



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

October 13, 2020

MEMORANDUM¹

To: Members of the Committee on Regulation and Interested Persons

From: Todd Rubin, Attorney Advisor

Subject: Rules on Rulemakings

Executive Summary

The project under the Committee's consideration addresses whether and when agencies should adopt rules setting forth the procedures the agencies follow when engaging in informal rulemaking. These procedures can include internal approval requirements for proposed rules, minimum comment periods, requirements for ex ante and ex post review, and protocols for submitting sensitive information, among other subjects. The project does not seek to dictate the precise types of rulemaking procedures agencies should adopt, but it does explore the potential costs and benefits of a single rule or set of rules that sets forth an agency's informal rulemaking practices.

This memorandum frames the key issues for the Committee and, in its appendixes, identifies existing agency rules on rulemakings and reproduces several of them in full. It does not endorse any particular agency's rule.

The first section, *Explanations of Key Terms*, defines common terms used throughout this memorandum.

The second section, *Rules on Rulemakings Across Agencies*, describes the Administrative Conference's staff's methodology for uncovering and analyzing rules on rulemakings. It also highlights the most common issues associated with rules on rulemakings.

The third section, *Legal Considerations*, highlights the three most common legal issues implicated by agency rules on rulemakings: notice-and-comment requirements, an agency's obligation to adhere to a course of action to which it has committed, and publication requirements.

¹ I am grateful to everyone with whom I worked in preparing this memorandum, including the academic experts and government officials who participated in our March 2020 roundtable, and the following regulatory experts: Reeve Bull, Michael Livermore, Paul Noe, Sid Shapiro, Peter Strauss, Mark Thomson, Miriam Vincent, and Matt Wiener. I am especially grateful to Keith Holman, who assisted with the research underlying this memorandum.

The fourth section, *Policy Considerations*, discusses the key benefits of an agency’s adopting a rule on rulemaking, namely: promoting the rule of law and enhancing accountability, transparency, and efficiency.

The fifth section, *Considerations for the Committee*, highlights considerations for the Committee as it discusses a possible recommendation.

Finally, Appendix A offers excerpted examples of rules on rulemakings from a variety of agencies. Appendix B offers full-length rules on rulemakings from the U.S. Department of Transportation (DOT), the Federal Emergency Management Agency, and the U.S. Department of Housing and Urban Development. Appendix C offers a snapshot of DOT’s *Regulations* web page, which contains its rule on rulemaking as well as documents that explain its regulatory process.

I. Explanations of Key Terms

The following key terms are used here.

Rule: This memorandum uses the definition under the Administrative Procedure Act (APA), as codified at 5 U.S.C. § 551(4). It defines a “rule” as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” In addition to legislative rules (defined below), this definition of a “rule” includes both interpretive² rules and general statements of policy, which are often referred to collectively as “guidance documents.” As noted below, some people use the term “guidance document” more expansively to include not only policy statements and interpretive rules but also other agency documents that do not meet the APA definition of “rule.”

Legislative rule: Though the term “legislative rule” is not used in the APA, we define it, consistent with now-prevailing usage, as a rule that has the “force of law”³ or can “occasion legal consequences.”⁴ Legislative rules are therefore a subset of “rules” under the APA. Whether or not a legislative rule must go through notice and comment is a separate question that is addressed below.

A “rule on rulemaking” is a legislative rule that sets forth policies governing how agencies conduct rulemaking. As explained in greater detail below, rules on rulemakings can combine substantive elements and procedural elements.

The memorandum also refers to a broad universe of materials that agencies publish related to their rulemaking process that are not legislative rules. These include not only interpretive rules and policy statements—both rules under 5 U.S.C. § 551(4)—but also

² In accordance with standard parlance, this memorandum uses the term “interpretive” in place of the APA’s word “interpretative.”

³ *American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

⁴ *Center for Auto Safety v. NHTSA*, 452 F.3d 798, 806 (D.C. Cir. 2006).

documents that agencies publish to provide general background on the rulemaking process that may not qualify as APA rules at all and that, like interpretive rules and policy statements, do not impose any binding obligations on the agency. An example would be explanatory or background materials (sometimes known as, and collectively referred to below for shorthand as, “explainers”) about the agency’s rulemaking processes. These materials are not legislative rules because they do not have the “force of law” or “occasion legal consequences.” And again, they may not even be “rules” under the APA. Some commentators refer to these types of documents as “guidance documents,”⁵ but how they are characterized is immaterial to this memorandum.

II. “Rules on Rulemakings” Across Agencies

To determine how common rules on rulemakings are, we scanned every title of the electronic Code of Federal Regulations (eCFR), thereby covering every agency that has a rule on rulemaking within the CFR. We looked for subsection titles that were indicative of a rule that sets forth rulemaking procedures, such as “Rulemaking Requirements” or “Administrative Requirements.” Because the eCFR is very well indexed, we could easily identify the subsections that contain rules on rulemakings. We did not examine any *Federal Register* entries for agencies that were not published in the CFR, nor did we examine agency websites for potential rules on rulemakings, other than DOT’s, as will be discussed below. Because the *Federal Register* and agency websites are not systematically indexed, such a search would have been burdensome to conduct in a comprehensive manner.

Through our search of the eCFR, we identified 25 documents that appear to qualify as rules on rulemakings.⁶ Our analysis of their content revealed that they are heterogeneous. For example, they often combine “external-facing” provisions, which purport to bind the public, with “internal-facing” provisions, which purport to bind only the agency. They also often combine substantive and procedural provisions, as will be described in greater detail below.

The aspects of rulemaking most often addressed by these rules on rulemakings relate to:

- petitions for rulemaking
- internal initiation, review, or approval of rulemakings
- ex-ante regulatory analyses (e.g., benefit-cost analysis, regulatory flexibility analysis)
- negotiated rulemaking
- waivers of APA exemptions (e.g., waiver of exemption for rules related to grants, loans, contracts, and property)
- submission of sensitive information (e.g., trade secrets)
- minimum comment periods

⁵ See Cary Coglianese, Public Availability of Agency Guidance Documents 7–9 (May 15, 2019) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/consultant-report-public-availability-agency-guidance-documents>.

⁶ A mere scan of these documents cannot definitively establish whether or not the relevant agency considers each of them a binding rule that meets our definition of “rule on rulemaking.” As explained more thoroughly in section III, however, the fact that an agency publishes a rule in the CFR is generally some evidence that it intends to be bound thereby. See *American Mining Congress*, 995 F.2d at 1109, 1112.

- ex parte communications
- the effective or issued date of rules
- retrospective review

Appendix A gives examples of these procedures drawn from actual agency rules on rulemakings. Appendix B offers three examples of full-length rules on rulemakings. As discussed in the Executive Summary, these examples are offered merely to illustrate how these concepts apply in practice: this project does not endorse any particular agency’s rule on rulemaking.

III. Legal Considerations

Notice and Comment

Under the APA, agencies are generally required to publish a “general notice of proposed rulemaking . . . in the Federal Register.”⁷ They are then generally required to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments”⁸ This is often referred to as the “notice-and-comment process.” An important exception to the notice-and-comment requirement is for “rules of agency organization, procedure, or practice.”⁹ (Interpretive rules and policy statements are also exempt.) The APA thereby distinguishes between “substantive rules,” which must undergo notice and comment, and “procedural rules,” which need not undergo notice and comment. Although agencies need not put procedural rules through notice and comment, they are permitted to do so and indeed, frequently do. The Administrative Conference has recommended that agencies seek public input on proposed rules even in many instances in which they are not required to do so.¹⁰

Certain kinds of rules are clearly procedural. One kind of procedural rule is a rule that dictates how people must present their views to the agency.¹¹ For example, a rule that requires people to put their names and addresses on rulemaking petitions for the agency to consider them, or to write the word “sensitive” on a comment in order for the agency to protect it from disclosure, is clearly procedural and would not need to undergo notice and comment. On the other hand, rules are clearly substantive when they substantially affect the rights and interests of the public.¹² For example, a rule that requires the agency to use a particular value of a statistical life in a rulemaking is clearly substantive and would require notice and comment.

⁷ 5 U.S.C. § 553(b).

⁸ *Id.* § 553(c).

⁹ *Id.* § 553(b)(3)(A).

¹⁰ *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (Jul. 8, 1992).

¹¹ *See Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014).

¹² *See Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014).

These clear cases notwithstanding, the distinction between “substantive” and “procedural” rules is notoriously murky.¹³ Additionally, rules on rulemakings often combine substantive provisions with purely procedural provisions. If a rule on rulemaking has both, the part that is substantive must go through notice and comment. The part that is procedural need not.¹⁴ Therefore, agencies need to tread carefully if they decide not to use the notice-and-comment process to issue their rules on rulemakings.

Agency statements regarding the rulemaking process that are not legislative rules, such as explainers, are not required to undergo notice-and-comment procedures.¹⁵

Agencies’ Adherence to Their Own Pronouncements

Legislative rules are binding on agencies and the public. Agencies therefore must adhere to their legislative rules.¹⁶

It can be difficult to distinguish legislative rules from documents that are not legislative rules. This is a very complex determination that depends on a variety of factors. Among the factors courts consider are whether the agency has imposed or altered any rights or obligations,¹⁷ whether the agency has “genuinely [left] itself and its decisionmakers free to exercise discretion,”¹⁸ the agency’s “own characterization of its action,”¹⁹ “whether the action was published in the Federal Register or Code of Federal Regulations,”²⁰ and “whether the rule effectively amends a prior legislative rule.”²¹

¹³ See, e.g., *Pub. Citizen v. Dep’t of State*, 276 F.3d 264 (D.C. Cir. 2002) (finding a State Department rule that prohibited personnel from disclosing documents generated after the date of a Freedom of Information Act request to be “procedural,” explicitly refusing to consider whether the rule substantially impacted the public); *Chamber of Commerce v. DOL*, 174 F.3d 206, 211 (D.C. Cir. 1999) (holding that a DOL rule that required agency enforcement staff to inspect employers except those employers that adopted a comprehensive health program was substantive because it had a substantial impact on the public); *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (observing that the range of D.C. Circuit cases applying the procedural rules exemption “may appear idiosyncratic”).

¹⁴ We are not aware, though, of any instances in which an agency has made a rule divisible in this respect for purposes of notice and comment.

¹⁵ See 5 U.S.C. § 553(b)(3)(A) (exempting “interpretive rules” and “general statements of policy” from notice-and-comment requirements).

¹⁶ See, e.g., *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

¹⁷ *Center for Auto Safety*, 452 F.3d at 806 (asking whether action “impose[d] any rights and obligations” and whether the action “genuinely [left] the agency and its decisionmakers free to exercise discretion”).

¹⁸ *Id.*

¹⁹ See *Molycorp Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (stating that courts should consider “(1) the [a]gency’s own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency”).

²⁰ *Id.*

²¹ *American Mining Congress*, 995 F.2d at 1112 (framing the inquiry as including “(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule”).

A related issue concerns the circumstances under which agencies must adhere to statements made in documents that the agencies do not characterize as legislative rules, such as explainers.²² Courts have held agencies to the pronouncements in such documents if they speak in sufficiently mandatory language²³ or if the agency has applied the document in an inflexible fashion.²⁴ In some cases, courts may treat such provisions cast in sufficiently definitive language as constituting legislative rules. In other cases, courts may hold agencies to such provisions under a different theory. Either way, the result is the same, and the agency must abide by the language in the document. For this reason, when issuing documents other than legislative rules, such as explainers, agencies should be careful to avoid mandatory language.

The language an agency uses in any given document will affect whether or not a court will consider it to be bound thereby. Using words such as “must,” “shall,” or “will” increases the probability that a court will find a document binding on the agency.²⁵ By contrast, characterizing a document as an “FAQ” or “internal manual” decreases that probability.

It will not always be easy to predict how courts will treat specific language in an agency’s pronouncement about rulemaking. In this light, agencies should attempt to be as definitive as possible with respect to their intent either to be bound or to retain per se discretion to depart from specific procedures.

Publication of Rules on Rulemakings

The Freedom of Information Act (FOIA) requires “substantive rules of general applicability adopted as authorized by law” and “rules of procedure” to be published in the *Federal Register*.²⁶ FOIA also requires certain other documents, namely “statements of general policy” and “interpretations of general applicability formulated and adopted by the agency,” to be published in the *Federal Register*.²⁷

The Federal Register Act requires all rules that have “general applicability and legal effect” to be published in the CFR.²⁸ The CFR defines “general applicability and legal effect” as “any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations.”²⁹

As legislative rules, all rules on rulemakings must be published in the *Federal Register* and CFR. Other documents related to rulemakings need not be published in the CFR. Whether

²² See Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2006).

²³ See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (requiring agency to adhere to internal policy manual that used binding language).

²⁴ See, e.g., *Vietnam Veterans v. Secretary of the Navy*, 843 F.2d 528, 539 (D.C. Cir. 1988).

²⁵ See *Electronic Privacy Information Center v. U.S. Dep’t of Homeland Security*, 653 F.3d 1, 7 (D.C. Cir. 2011).

²⁶ 5 U.S.C. § 552(a)(1).

²⁷ *Id.*

²⁸ 44 U.S.C. § 1510(a).

²⁹ 1 C.F.R. § 1.1.

such other documents must be published in the *Federal Register* depends on whether they qualify as “interpretations of general applicability formulated and adopted by the agency” or “statements of general policy.”³⁰

IV. Policy Considerations

To identify the key policy considerations associated with rules on rulemakings, we spoke with regulatory experts. Our conversation with regulatory experts included a March 2020 roundtable, which consisted of government officials and academics. Officials from the following agencies participated in this roundtable: the Centers for Medicare and Medicaid Services; the Coast Guard; the Department of Commerce; the Department of Education; the Department of Justice; the Department of Labor; DOT; the Environmental Protection Agency; the Equal Employment Opportunity Commission; the Federal Communications Commission; the Federal Trade Commission; the Office of Management and Budget; and the Securities and Exchange Commission.

The agencies represented a wide cross section of the Executive Branch: four independent agencies and eight non-independent agencies. In addition, staff members from the House of Representatives, from both the majority and minority, participated.

We also conducted multiple interviews with academics after the roundtable. The roundtable and interviews allowed us to hear a diverse range of perspectives on policy considerations involving rules on rulemakings. The following themes emerged from these discussions.³¹

Rule of Law

The APA distinguishes between rules that have binding effect (i.e., legislative rules) and rules that do not (including general statements of policy and interpretive rules). Agencies should bear that distinction in mind when deciding how they will structure their rulemaking proceedings. Specifically, if an agency intends to adhere to a set of procedures in all future rulemakings (e.g., setting a minimum 60-day comment period), it should establish those procedures in a legislative rule. If, on the other hand, an agency does not wish to bind itself but instead simply wants to offer, say, a background description of the rulemaking process, it should very clearly distinguish any explainer providing such background from legislative rules that are intended to bind the agency. Clearly distinguishing between what is and is not binding advances important rule of law purposes by promoting fidelity to the APA’s structure and ensuring predictability for members of the public who participate in agency rulemakings.

³⁰ Documents other than legislative rules do not “prescrib[e] a penalty or course of conduct, confer[] a right, privilege, authority, or immunity, or impos[e] an obligation,” and therefore need not be published in the CFR. *See id.*

³¹ The law review literature on the benefits of agencies’ pre-committing to certain procedures reflects many of these same themes. *See, e.g.,* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017); Jennifer Nou, *Intra-Agency Coordination*, 129 HARVARD L. REV. 421 (2015); Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009).

Accountability

Rules on rulemakings promote accountability in two ways. First, by announcing binding policies to which agencies must adhere in future rulemakings, rules on rulemakings ensure that agencies follow a consistent set of procedures. Of course, as noted above, an agency may not always wish to bind itself to certain procedures, and the agency must therefore carefully consider what it wishes to include in any rule on rulemaking. But for those rulemaking procedures to which the agency wishes to pre-commit, a rule on rulemaking can promote public accountability.

Second, rules on rulemakings can also promote accountability by providing an established structure by which agency leadership approves all rulemakings or certain subclasses of rulemakings that the agency issues. For example, DOT's rule on rulemaking creates such a structure,³² as does the Coast Guard's.³³ This ensures internal accountability and provides an opportunity for the political leadership of the agency to review and sign off on rules in which such higher-level review is deemed appropriate. Of course, imposing an extensive internal review process can add to the time required to finalize a rule, and an agency must carefully consider the appropriate amount of internal review and the level at which sign-off is required for any given type of rulemaking.

Transparency

Rules on rulemakings dictate the practices the agency will follow in rulemakings, and it is important that the public has access to such documents. With respect to explainers, whether they should be made publicly available will depend on whether the materials include information of interest to the public. For example, agencies should make available to the public materials that include FAQs or background descriptions of the notice-and-comment process.³⁴ By contrast, materials that address matters solely of interest to agency officials (e.g., what font to use when writing a notice of proposed rulemaking) need not be made publicly available.

It is critical that, when an agency makes publicly available both rules on rulemakings and explainers, the agency distinguish between legislative rules and materials that are not legislative rules and are merely provided for background description.³⁵

³² See 49 C.F.R. § 5.13(b).

³³ See 33 C.F.R. § 1.05-10.

³⁴ This is consistent with Executive Order 13,891. This Executive Order, which applies to all agencies other than independent regulatory agencies, defines "guidance document" as "an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation." It requires agencies to establish a searchable, indexed database on their websites containing all of their guidance documents in effect. See Exec. Order No. 13,891, *Promoting the Rule of Law Through Improved Agency Guidance Documents*, 84 Fed. Reg. 55,235 (Oct. 15, 2019).

³⁵ See Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, ¶ 4 ("A policy statement should prominently state that it is not binding on members of the public and explain that a member of the public may take a lawful approach different from the one set forth in the policy statement or request that the agency take such a lawful approach.")

Members of the roundtable also highlighted the importance, as part of promoting transparency, of ensuring that relevant materials are not just available on agency websites, but that they are easily findable on these websites. DOT's website illustrates one approach to effectively publishing rulemaking materials in an easy-to-find way. DOT publishes its rule on rulemaking and its rulemaking documents that are not legislative rules in a single section of its website titled "Regulations." DOT also indexes these materials with headings and subheadings, allowing people to easily home in on particular procedures. Additionally, it clearly delineates between legislative rules and non-legislative rules, explaining that the latter do not have the force and effect of law. Appendix C offers a snapshot of DOT's indexing of its rule on rulemaking and its rulemaking documents that are not legislative rules.

Efficiency

Both agency staff and members of the public may benefit from having all rulemaking procedures cataloged in a comprehensive, easy-to-find rule on rulemaking. This is especially true of rules on rulemakings that are consolidated in a single document, though it can also be true of a series of rules on rulemakings so long as they are logically organized and maintained in a way that allows agency staff and the public to easily find the provisions of interest. The upfront time required to promulgate such a rule/set of rules can save time down the road by facilitating agency official access to relevant provisions and allowing agency officials to field public inquiries by pointing to a readily-available set of public documents (and ideally reducing the incidence of such inquiries by facilitating easy public access to such documents).

V. Issues for Committee to Consider in Formulating a Recommendation

Rather than providing recommendations, we are identifying some issues for the Committee members to consider in the first meeting. The Committee may, of course, have others. The first part highlights decisions the Committee will need to make in deciding what the recommendation should cover and what it should say. The second part highlights some principles that should apply to all rules on rulemakings.

Concepts for Committee Discussion

(1) What are the key considerations for agencies as they decide whether or not to issue one or more rules on rulemakings? And, if they decide to issue one or more such rules, what are the key considerations in deciding what goes into the rule(s)?

Potential benefits agencies should consider in deciding whether to issue such rules and what to include therein include promoting (1) public accountability and predictability by binding the agency to a set of procedures for all rules; (2) internal efficiency by ensuring that agency staff have clear directions on how to proceed when issuing rules; (3) internal accountability by providing an opportunity for high-level agency leadership, potentially including political appointees, to weigh in on certain types of rules; and (4) transparency by ensuring that the public can easily find an agency's rulemaking policies.

Potential costs include (1) binding the agency's hands in a way that reduces flexibility down the road, especially in situations that present unpredictable circumstances in which greater flexibility is needed and (2) slowing down the rulemaking process. To what extent can these costs be mitigated by drafting rules on rulemakings in a way that ensures needed flexibility? Are those costs less significant for rules on rulemakings promulgated under the APA's procedural rules exception, given that agencies may amend such rules without going through the notice-and-comment process?

(2) Are there benefits to consolidating all rulemaking procedures into a single rule, or are there instances in which it is preferable to issue a series of rules, with each addressing a different aspect of the rulemaking process?

(3) The recommendation likely should not attempt to dictate what provisions rules on rulemakings should contain, which is a determination that is best left to the discretion of individual agencies. But it could highlight a "menu of options" drawn from preexisting rules on rulemakings that agencies should *consider* in deciding what to include in any rule on rulemaking they issue. This menu of options includes:

- a. petitions for rulemaking
- b. internal initiation, review, or approval of rulemaking
- c. ex-ante regulatory analyses (e.g., benefit-cost analysis, regulatory flexibility analysis)
- d. negotiated rulemaking
- e. waivers of APA exemptions (e.g., waiver of exemption for rules related to grants, loans, contracts, and property)
- f. submission of sensitive information (e.g., trade secrets)
- g. minimum comment periods
- h. ex parte communications
- i. the effective or issued date of rules
- j. retrospective review

(4) How should agencies go about making rules on rulemakings public? Where should they place them on their websites to ensure that the public can easily access them? What sorts of search features should they enable in order to promote easy access to rules on rulemakings?

In speaking to this topic, the Committee should consider the approach taken in past recommendations of the Administrative Conference that addressed how agencies should make important documents publicly available. The relevant recommendations are Recommendation 2017-1 (*Adjudication Materials on Agency Websites*),³⁶ Recommendation 2018-5 (*Public Availability of Adjudication Rules*),³⁷ and Recommendation 2019-3 (*Public Availability of*

³⁶ Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039 (July 5, 2017).

³⁷ Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019).

Agency Guidance Documents).³⁸ Each of these recommendations encouraged agencies to ensure that relevant documents are easily accessible from the agency’s home page (using techniques like linked tabs or pull-down menus); to design their search engines to allow one to easily identify relevant documents; and to use techniques such as indexing, tagging, or sorting tables to ensure that relevant documents are easily findable.

(5) If the agency also issues explainers that are not legislative rules, how should the agency go about making those documents public, and how should the agency ensure that it clearly distinguishes such non-binding background materials from binding rules on rulemakings?

In making this recommendation, the Committee should be mindful of Recommendation 2019-3 (*Public Availability of Agency Guidance Documents*), which defined “guidance documents” very broadly to include not only the APA terms “interpretive rules” and “general statements of policy,” but also “other materials considered to be guidance documents under other, separate definitions adopted by government agencies.”³⁹ Explainers that do not qualify as legislative rules would fall under this Recommendation’s definition of “guidance documents.” The Recommendation encourages agencies to ensure that guidance documents are easily accessible from the agency’s home page (using techniques like linked tabs or pull-down menus); to design their search engines to allow one to easily identify relevant documents; to use techniques such as indexing, tagging, or sorting tables to ensure that relevant documents are easily findable; and to publish information about new or revised documents in the *Federal Register*. The Committee should consider structuring any recommendation such that it aligns with Recommendation 2019-3.

The Committee should also be aware that some explainers may qualify as either “interpretive rules” or “policy statements.” For such documents, the Committee should consider Recommendation 2019-1 (*Agency Guidance Through Interpretive Rules*) and Recommendation 2017-5 (*Agency Guidance Through Policy Statements*). The former urges agencies to structure their interpretive rules to make clear that they are not binding on the public, and the latter does the same with respect to policy statements, specifically encouraging agencies to actually label policy statements as non-binding on the public. The Committee should likewise consider Executive Order 13,891, which requires that agencies, other than independent regulatory agencies, make their interpretive rules and policy statements publicly available online and label such documents so that their non-binding nature is made clear. The principle embodied in Recommendation 2019-1, 2017-5, and Executive Order 13,891 seems to apply at least as strongly to those explainers that are not considered to be “interpretive rules” or “policy statements.”

Principles Agencies Should Always Follow When Issuing Rules on Rulemakings

(1) When agencies issue rules on rulemakings that combine both substantive and procedural provisions, they should ensure that the entire rule goes through notice and comment.

³⁸ Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019).

³⁹ *Id.*

(2) Agencies should avoid using binding language in rules on rulemakings if they do not wish to be bound by such provisions. Examples of binding language include “shall,” “must,” and “will.” And in no instance should an agency use such binding language in an explainer that is not intended to be a legislative rule.

Appendix A: Agency Rules on Rulemakings By Issue

This appendix presents examples of agency provisions that present good illustrations of each type of rule on rulemaking. This list is by no means comprehensive. We have just selected good illustrations from across the 25 policies we reviewed. For readability, all provisions are direct quotations, presented without quotations marks, unless otherwise stated, and quotations omit internal subdivisions.

1. Procedures Related to Petitions for Rulemaking

[Department of Housing and Urban Development \(24 C.F.R. § 10.20\)](#)

Any interested person may petition the Secretary for the issuance, amendment, or repeal of a rule. Each petition shall: Be submitted to the Rules Docket Clerk [omitted for brevity]; Set forth the text of substance of the rule or amendment proposed or specify the rule sought to be repealed; explain the interest of the petitioner in the action sought; and set forth all data and arguments available to the petitioner in support of the action sought.

No public procedures will be held directly on the petition before its disposition. If the Secretary finds that the petition contains adequate justification, a rulemaking proceeding will be initiated or a final rule will be issued as appropriate. If the Secretary finds that the petition does not contain adequate justification, the petition will be denied by letter or other notice, with a brief statement of the ground for denial. The Secretary may consider new evidence at any time; however, repetitious petitions for rulemaking will not be considered.

[Department of the Interior \(43 C.F.R. § 14.2\)](#)

Under the [APA], any person may petition for the issuance, amendment, or repeal of a rule. The petition will be addressed to the Secretary of the Interior, U.S. Department of the Interior, Washington, DC 20240. It will identify the rule requested to be repealed or provide the text of a proposed rule or amendment and include reasons in support of the petition. The petition will be given prompt consideration and the petitioner will be notified promptly of action taken. A petition for rulemaking may be published in the FEDERAL REGISTER if the official responsible for acting on the petition determines that public comment may aid in consideration of the petition.

[United States Coast Guard \(33 C.F.R. § 1.05-20\)](#)

Any member of the public may petition the Coast Guard to undertake a rulemaking action. There is no prescribed form for a petition for rulemaking, but the document should provide some supporting information as to why the petitioner believes the proposed rulemaking is necessary and the document

should clearly indicate that it is a petition for rulemaking. Petitions should be addressed to [omitted for brevity].

The petitioner will be notified of the Coast Guard's decision whether to initiate a rulemaking or not. If the Coast Guard decides not to pursue a rulemaking, the petitioner will be notified of the reasons why. If the Coast Guard decides to initiate rulemaking, it will follow the procedure outlined in this subpart. The Coast Guard may publish a notice acknowledging receipt of a petition for rulemaking in the FEDERAL REGISTER.

Any petition for rulemaking and any reply to the petition will be kept in a public docket open for inspection.

2. Procedures Related to Internal Initiation, Approval, or Review of Rules

[Department of Labor](#) (29 C.F.R. § 2.8)

Final agency decisions issued under the statutory authority of the U.S. Department of Labor may be issued by the Secretary of Labor, or by his or her designee under a written delegation of authority. The Administrative Review Board, an organizational entity within the Office of the Secretary, has been delegated authority to issue final agency decisions under the statutes, executive orders, and regulations according to, and except as provided in Secretary's Order 01-2020 (or any successor to that order).

[Department of Transportation](#) (49 C.F.R. Part 5)

Non quotation: DOT has an extensive set of procedures governing how rules are to be proposed and approved internally. For example: the head of a subcomponent prepares a "Regulatory Initiation Request" and submits it to the Office of the Secretary of Transportation (OST) for approval before the subcomponent may proceed with any rulemaking; OST reviews and clears all rules for the Department; and all rules must appear in the regulatory agenda at least six months before issuance. For further details on this process, please consult [the rule](#).

[United States Coast Guard](#) (33 C.F.R. § 1.05-10)

Most rules of local applicability are issued by District Commanders, Captains of the Port, and District Bridge Managers while rules of wider applicability are issued by senior Coast Guard officials at Coast Guard Headquarters. For both significant rulemaking (defined by Executive Order 12866, Regulatory Planning and Review) and non-significant rulemaking, other than those areas delegated to District Commanders, Captains of the Port, and District Bridge Managers the regulatory process begins when an office chief with program responsibilities identifies a possible need for a new regulation or for changes to an existing

regulation. The need may arise due to statutory changes, or be based on internal review or public input. Early public involvement is strongly encouraged.

After a tentative significant regulatory approach is developed, a significant regulatory project proposal is submitted to the Marine Safety and Security Council for approval. The proposal describes the scope of the proposed regulation, alternatives considered, and potential cost and benefits, including possible environmental impacts. All significant regulatory projects require Marine Safety and Security Council approval.

Significant rulemaking documents must also be approved by the Commandant of the Coast Guard.

If the project is approved, the necessary documents are drafted, including documents to be published in the FEDERAL REGISTER. These may include regulatory evaluations, environmental analyses, requests for comments, announcements of public meetings, notices of proposed rulemakings, and final rules.

3. Procedures Related to Ex-Ante Regulatory Analyses (e.g., benefit-cost analysis, regulatory flexibility analysis)

[Department of Housing and Urban Development](#) (24 C.F.R. § 10.7)

An Advance Notice of Proposed Rulemaking . . . briefly outlines: the proposed new program or program changes, and why they are needed; the major policy issues involved; [and] an estimate of the reporting or recordkeeping requirements, if any, that the rule would impose.

[United States Coast Guard](#) (33 C.F.R. § 1.05-20)

The [rulemaking] proposal describes the scope of the proposed regulation, alternatives considered, and potential cost and benefits, including possible environmental impacts.

4. Procedures Related to Negotiated Rulemaking

[Department of Transportation](#) (49 C.F.R. § 5.13)

DOT negotiated rulemakings are to be conducted in accordance with the Negotiated Rulemaking Act, 5 U.S.C. 561-571, and the Federal Advisory Committee Act, 5 U.S.C. App. 2, as applicable. Before initiating a negotiated rulemaking process, the OA or OST component should: assess whether using negotiated rulemaking procedures for the proposed rule in question is in the public interest, in accordance with 5 U.S.C. 563(a), and present these findings to

the RRTF; consult with the Office of Regulation on the appropriateness of negotiated rulemaking and the procedures therefor; and receive the approval of the RRTF for the use of negotiated rulemaking.

Unless otherwise approved by the General Counsel, all DOT negotiated rulemakings should involve the assistance of a convener and a facilitator, as provided in the Negotiated Rulemaking Act. A convener is a person who impartially assists the agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking. A facilitator is a person who impartially aids in the discussions and negotiations among members of a negotiated rulemaking committee to develop a proposed rule. The same person may serve as both convener and facilitator.

All charters, membership appointments, and FEDERAL REGISTER notices must be approved by the Secretary. Any operating procedures (e.g., bylaws) for negotiated rulemaking committees must be approved by OGC.

[United States Coast Guard](#) (33 C.F.R. § 1.05-60)

The Coast Guard may establish a negotiated rulemaking committee under the Negotiated Rulemaking Act of 1990 and the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) when it is in the public interest. Generally, the Coast Guard will consider negotiated rulemaking when: there is a need for a rule; there are a limited number of representatives for identifiable parties affected by the rule; there is a reasonable chance that balanced representation can be reached in the negotiated rulemaking committee and that the committee members will negotiate in good faith; there is a likelihood of a committee consensus in a fixed time period; the negotiated rulemaking process will not unreasonably delay the rule; the Coast Guard has resources to do negotiated rulemaking; and the Coast Guard can use the consensus of the committee in formulating the NPRM and final rule.

5. Statement regarding waiver of APA exemptions (e.g., waiver of exemption for rules related to grants, loans, contracts, and property)

[Federal Emergency Management Agency](#) (44 C.F.R. § 1.4)

It is the policy of FEMA to provide for public participation in rulemaking regarding its programs and functions, including matters that relate to public property, loans, grants, or benefits, or contracts, even though these matters are not subject to a requirement for notice and public comment rulemaking by law.

[Department of Housing and Urban Development](#) (24 C.F.R. § 10.1)

It is the policy of the Department of Housing and Urban Development to provide for public participation in rulemaking with respect to all HUD programs and functions, including matters that relate to public property, loans, grants, benefits, or contracts even though such matters would not otherwise be subject to rulemaking by law or Executive policy.

[Securities and Exchange Commission](#) (17 C.F.R. § 201.192)

Whenever the Commission proposes to issue, amend, or repeal any rule or regulation of general application other than an interpretive rule; general statement of policy; or rule of agency organization, procedure, or practice; or any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts, there shall first be published in the FEDERAL REGISTER a notice of the proposed action.

6. Procedures Related to Submission of Sensitive Information (e.g., trade secrets)

[Federal Aviation Administration](#) (14 C.F.R. § 11.35)

You should not submit sensitive security information to the rulemaking docket, unless you are invited to do so in our request for comments. If we ask for this information, we will tell you in the specific document how to submit this information, and we will provide a separate non-public docket for it. For all proposed rule changes involving civil aviation security, we review comments as we receive them, before they are placed in the docket. If we find that a comment contains sensitive security information, we remove that information before placing the comment in the general docket.

When we are aware of proprietary information filed with a comment, we do not place it in the docket. We hold it in a separate file to which the public does not have access, and place a note in the docket that we have received it. If we receive a request to examine or copy this information, we treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). We process such a request under the DOT procedures found in 49 CFR part 7.

7. Minimum Comment Periods

[Federal Emergency Management Agency](#) (44 C.F.R. § 1.4)

It is the policy of FEMA that its notices of proposed rulemaking are to afford the public at least sixty days for submission of comments unless the Administrator makes an exception and sets forth the reasons for the exception in the preamble to the notice of proposed rulemaking. This period shall also include any period of

review required by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1980.

[Department of Housing and Urban Development](#) (24 C.F.R. § 10.1)

It is the policy of the Department that its notices of proposed rulemaking are to afford the public not less than sixty days for submission of comments . . . Unless required by statute, notice and public procedure will be omitted if the Department determines in a particular case or class of cases that notice and public procedure are impracticable, unnecessary or contrary to the public interest.

[United States Coast Guard](#) (33 C.F.R. § 1.05-15)

Advance Notices of Proposed Rulemaking, Notices of Proposed Rulemaking, Supplemental Notices of Proposed Rulemaking, and Interim Rules will usually provide 90 days, or more if possible, after publication for submission of comments. This time period is intended to allow interested persons the opportunity to participate in the rulemaking process through the submission of written data and views.

8. Procedures Related to Ex Parte Communications

[Federal Emergency Management Agency](#) (44 C.F.R. § 1.6)

In rulemaking proceedings subject only to the procedural requirements of 5 U.S.C. 553: all oral communications from outside FEMA of significant information and argument respecting the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by FEMA or its offices and divisions or their personnel participating in the decision, should be summarized in writing and placed promptly in the Rules Docket File available for public inspection.

FEMA may conclude that restrictions on ex parte communications in particular rulemaking proceedings are necessitated by consideration of fairness or for other reasons.

[Department of Justice](#) (28 C.F.R. § 50.17)

In rulemaking proceedings subject only to the procedural requirements of 5 U.S.C. 553: a general prohibition applicable to all offices, boards, bureaus and divisions of the Department of Justice against the receipt of private, ex parte oral or written communications is undesirable, because it would deprive the Department of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated,

slow, and expensive, and, at the same time, perhaps not conducive to developing all relevant information.

All written communications from outside the Department addressed to the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by the Department, its offices, boards, and bureaus, and divisions or their personnel participating in the decision, should be placed promptly in a file available for public inspection. All oral communications from outside the Department of significant information or argument respecting the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by the Department, its offices, boards, bureaus, and divisions or their personnel participating in the decision, should be summarized in writing and placed promptly in a file available for public inspection.

The Department may properly withhold from the public files information exempt from disclosure under 5 U.S.C. 552.

The Department may conclude that restrictions on ex parte communications in particular rulemaking proceedings are necessitated by considerations of fairness or for other reasons.

9. Procedures Related to the Effective or Issued Date of Rules

[Federal Emergency Management Agency](#) (44 C.F.R. § 1.4)

A final substantive rule will be published not less than 30 days before its effective date unless it grants or recognizes an exemption or relieves a restriction or unless the rulemaking document states good cause for its taking effect less than 30 days after publication.

[Department of Housing and Urban Development](#) (24 C.F.R. § 10.1)

A final substantive rule will be published not less than 30 days before its effective date, unless it grants or recognizes an exemption or relieves a restriction or unless the rule itself states good cause for taking effect upon publication or less than 30 days thereafter.

[United States Coast Guard](#) (33 C.F.R. § 1.05)

A direct final rule will be published in the FEDERAL REGISTER with an effective date that is generally at least 90 days after the date of publication.

10. Procedures Related to Retrospective Review

[Federal Emergency Management Agency](#) (44 C.F.R. § 1.8)

As part of the semiannual agenda described in §1.7 of this part, FEMA will publish in the FEDERAL REGISTER and keep updated a plan for periodic review of existing rules at least within 10 years from date of publication of a rule as final. This includes those that have significant impact on a substantial number of small entities.

The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, including minimizing any significant economic impact of the rules upon a substantial number of small entities.

In reviewing rules FEMA shall consider the following factors: The continued need for the rule; the nature, type and number of complaints or comments received concerning the rule from the public; the complexity of the rule, including need for review of language for clarity; the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

Department of Transportation (49 C.F.R. § 5.13)

All departmental regulations are on a 10-year review cycle, except economically significant and high-impact rules, which are reviewed every 5 years in accordance with §5.17(f) of this subpart.

The OA or OST component that issued the regulation will review it for the following: continued cost justification: Whether the regulation requires adjustment due to changed market conditions or is no longer cost-effective or cost-justified in accordance with §5.5(h); regulatory flexibility: Whether the regulation has a significant economic impact on a substantial number of small entities and, thus, requires review under 5 U.S.C. 610 (section 610 of the Regulatory Flexibility Act); innovation: Whether there are new or emerging technologies, especially those that could achieve current levels of safety at the same or lower levels of cost or achieve higher levels of safety, use of which is precluded or limited by the regulation; general updates: Whether the regulation may require technical corrections, updates (e.g., updated versions of voluntary consensus standards), revisions, or repeal; plain language: Whether the regulation requires revisions for plain language; and other considerations as required by relevant executive orders and laws. The results of each OA's or OST component's review will be reported annually to the public.

Any member of the public may petition the Department to conduct a retrospective review of a regulation by filing a petition in accordance with the [appropriate procedures].

Appendix B: Full-Length Rules on Rulemakings

Text is current as of September 17, 2020

U.S. Department of Transportation

Title 49: Transportation

[PART 5— ADMINISTRATIVE RULEMAKING, GUIDANCE, AND ENFORCEMENT PROCEDURES](#)

Subpart B—Rulemaking Procedures

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§5.3 General.

(a) This subpart governs all DOT employees and contractors involved with all phases of rulemaking at DOT.

(b) Unless otherwise required by statute, this subpart applies to all DOT regulations, which shall include all rules of general applicability promulgated by any components of the Department that affect the rights or obligations of persons outside the Department, including substantive rules, rules of interpretation, and rules prescribing agency procedures and practice requirements applicable to outside parties.

(c) Except as provided in paragraph (d) of this section, this subpart applies to all regulatory actions intended to lead to the promulgation of a rule and any other generally applicable agency directives, circulars, or pronouncements concerning matters within the jurisdiction of an OA or component of OST that are intended to have the force or effect of law or that are required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556.

(d) This subpart does not apply to:

(1) Any rulemaking in which a notice of proposed rulemaking was issued before December 20, 2018, and which was still in progress on that date;

(2) Regulations issued with respect to a military or foreign affairs function of the United States;

(3) Rules addressed solely to internal agency management or personnel matters;

(4) Regulations related to Federal Government procurement; or

(5) Guidance documents, which are not intended to, and do not in fact, have the force or effect of law for parties outside of the Department, and which are governed by part 5, subpart C of this chapter.

§5.5 Regulatory policies.

The policies in paragraphs (a) through (j) of this section govern the development and issuance of regulations at DOT:

(a) There should be no more regulations than necessary. In considering whether to propose a new regulation, policy makers should consider whether the specific problem to be addressed requires agency action, whether existing rules (including standards incorporated by reference) have created or contributed to the problem and should be revised or eliminated, and whether any other reasonable alternatives exist that obviate the need for a new regulation.

(b) All regulations must be supported by statutory authority and consistent with the Constitution.

(c) Where they rest on scientific, technical, economic, or other specialized factual information, regulations should be supported by the best available evidence and data.

(d) Regulations should be written in plain English, should be straightforward, and should be clear.

(e) Regulations should be technologically neutral, and, to the extent feasible, they should specify performance objectives, rather than prescribing specific conduct that regulated entities must adopt.

(f) Regulations should be designed to minimize burdens and reduce barriers to market entry whenever possible, consistent with the effective promotion of safety. Where they impose burdens, regulations should be narrowly tailored to address identified market failures or specific statutory mandates.

(g) Unless required by law or compelling safety need, regulations should not be issued unless their benefits are expected to exceed their costs. For each new significant regulation issued, agencies must identify at least two existing regulatory burdens to be revoked.

(h) Once issued, regulations and other agency actions should be reviewed periodically and revised to ensure that they continue to meet the needs they were designed to address and remain cost-effective and cost-justified.

(i) Full public participation should be encouraged in rulemaking actions, primarily through written comment and engagement in public meetings. Public participation in the rulemaking process should be conducted and documented, as appropriate, to ensure that the public is given adequate knowledge of substantive information relied upon in the rulemaking process.

(j) The process for issuing a rule should be sensitive to the economic impact of the rule; thus, the promulgation of rules that are expected to impose greater economic costs should be accompanied by additional procedural protections and avenues for public participation.

§5.7 Responsibilities.

(a) The Secretary of Transportation supervises the overall planning, direction, and control of the Department's Regulatory Agenda; approves regulatory documents for issuance and submission to the Office of Management and Budget (OMB) under Executive Order (E.O.) 12866, "Regulatory Planning and Review" (Oct. 4, 1993); identifies an approximate regulatory budget for each fiscal year as required by E.O. 13771, "Reducing Regulation and Controlling Regulatory Costs" (Jan. 30, 2017); establishes the Department's Regulatory Reform Task Force (RRTF); and designates the members of the RRTF and the Department's Regulatory Reform Officer (RRO) in accordance with E.O. 13777, "Enforcing the Regulatory Reform Agenda" (Feb. 24, 2017).

(b) The Deputy Secretary of Transportation assists the Secretary in overseeing overall planning, direction, and control of the Department's Regulatory Agenda and approves the initiation of regulatory action, as defined in E.O. 12866, by the OAs and components of OST. Unless otherwise designated by the Secretary, the Deputy Secretary serves as the Chair of the Leadership Council of the RRTF and as the Department's RRO.

(c) The General Counsel of DOT is the chief legal officer of the Department with final authority on all questions of law for the Department, including the OAs and components of OST; serves on the Leadership Council of the RRTF; and serves as the Department's Regulatory Policy Officer pursuant to section 6(a)(2) of E.O. 12866.

(d) The RRO of DOT is delegated authority by the Secretary to oversee the implementation of the Department's regulatory reform initiatives and policies to ensure the effective implementation of regulatory reforms, consistent with E.O. 13777 and applicable law.

(e) DOT's noncareer Deputy General Counsel is a member of the RRTF and serves as the Chair of the RRTF Working Group.

(f) DOT's Assistant General Counsel for Regulation supervises the Office of Regulation within the Office of the General Counsel (OGC); oversees the process for DOT rulemakings; provides legal advice on compliance with APA and other administrative law requirements and executive orders, related OMB directives, and other procedures for rulemaking and guidance documents; circulates regulatory documents for departmental review and seeks concurrence from reviewing officials; submits regulatory documents to the Secretary for approval before issuance or submission to OMB; coordinates with the Office of Information and Regulatory Affairs (OIRA) within OMB on the designation and review of regulatory documents and the preparation of the Unified Agenda of Regulatory and Deregulatory Actions; publishes the monthly internet report on significant rulemakings; and serves as a member of the RRTF Working Group.

(g) Pursuant to delegations from the Secretary under part 1 of this title, OA Administrators and Secretarial officers exercise the Secretary's rulemaking authority under 49 U.S.C. 322(a), and they have responsibility for ensuring that the regulatory data included in the Regulatory Management System (RMS), or a successor data management system, for their OAs and OST components is accurate and is updated at least once a month.

(h) OA Chief Counsels supervise the legal staffs of the OAs; interpret and provide guidance on all statutes, regulations, executive orders, and other legal requirements governing the operation and authorities of their respective OAs; and review all rulemaking documents for legal sufficiency.

(i) Each OA or OST component responsible for rulemaking will have a Regulatory Quality Officer, designated by the Administrator or Secretarial office head, who will have responsibility for reviewing all rulemaking documents for plain language, technical soundness, and general quality.

§5.9 Regulatory Reform Task Force.

(a) *Purpose.* The Regulatory Reform Task Force (RRTF) evaluates proposed and existing regulations and makes recommendations to the Secretary regarding their promulgation, repeal, replacement, or modification, consistent with applicable law, E.O. 13777, E.O. 13771, and E.O. 12866.

(b) *Structure.* The RRTF comprises a Leadership Council and a Working Group.

(1) The Working Group coordinates with leadership in the Secretarial offices and OAs, reviews and develops recommendations for regulatory and deregulatory action, and presents recommendations to the Leadership Council.

(2) The Leadership Council reviews the Working Group's recommendations and advises the Secretary.

(c) *Membership.* (1) The Leadership Council comprises the following:

(i) The Regulatory Reform Officer (RRO), who serves as Chair;

(ii) The Department's Regulatory Policy Officer, designated under section 6(a)(2) of E.O. 12866;

(iii) A representative from the Office of the Under Secretary of Transportation for Policy;

(iv) At least three additional senior agency officials as determined by the Secretary.

(2) The Working Group comprises the following:

(i) At least one senior agency official from the Office of the General Counsel, including at a minimum the Assistant General Counsel for Regulation, as determined by the RRO;

(ii) At least one senior agency official from the Office of the Under Secretary of Transportation for Policy, as determined by the RRO;

(iii) Other senior agency officials from the Office of the Secretary, as determined by the RRO.

(d) *Functions and responsibilities.* In addition to the functions and responsibilities enumerated in E.O. 13777, the RRTF performs the following duties:

(1) Reviews each request for a new rulemaking action initiated by an OA or OST component; and

(2) Considers each regulation and regulatory policy question (which may include proposed guidance documents) referred to it and makes a recommendation to the Secretary for its disposition.

(e) *Support.* The Office of Regulation within OGC provides support to the RRTF.

(f) *Meetings.* The Leadership Council meets approximately monthly and will hold specially scheduled meetings when necessary to address particular regulatory matters. The Working Group meets approximately monthly with each OA and each component of OST with regulatory authority, and the Working Group may establish subcommittees, as appropriate, to focus on specific regulatory matters.

(g) *Agenda.* The Office of Regulation prepares an agenda for each meeting and distributes it to the members in advance of the meeting, together with any documents to be discussed at the meeting. The OA or OST component responsible for matters on the agenda will be invited to attend to respond to questions.

(h) *Minutes*. The Office of Regulation prepares summary minutes following each meeting and distributes them to the meeting's attendees.

§5.11 Initiating a rulemaking.

(a) Before an OA or component of OST may proceed to develop a regulation, the Administrator of the OA or the Secretarial officer who heads the OST component must consider the regulatory philosophy and principles of regulation identified in section 1 of E.O. 12866 and the policies set forth in §5.5 of this subpart. If the OA Administrator or OST component head determines that rulemaking is warranted consistent with those policies and principles, the Administrator or component head may prepare a Rulemaking Initiation Request.

(b) The Rulemaking Initiation Request should specifically state or describe:

(1) A proposed title for the rulemaking;

(2) The need for the regulation, including a description of the market failure or statutory mandate necessitating the rulemaking;

(3) The legal authority for the rulemaking;

(4) Whether the rulemaking is expected to be regulatory or deregulatory;

(5) Whether the rulemaking is expected to be significant or nonsignificant, as defined by E.O. 12866;

(6) Whether the final rule in question is expected to be an economically significant rule or high-impact rule, as defined in §5.17(a) of this subpart;

(7) A description of the economic impact associated with the rulemaking, including whether the rulemaking is likely to impose quantifiable costs or cost savings;

(8) The tentative target dates for completing each stage of the rulemaking; and

(9) Whether there is a statutory or judicial deadline, or some other urgency, associated with the rulemaking.

(c) The OA or OST component submits the Rulemaking Initiation Request to the Office of Regulation, together with any other documents that may assist in the RRTF's consideration of the request.

(d) The Office of Regulation includes the Rulemaking Initiation Request on the agenda for consideration at the OA's or OST component's next Working Group meeting.

(e) If the Working Group recommends the approval of the Rulemaking Initiation Request, then the Request is referred to the Leadership Council for consideration. In lieu of consideration at a Leadership Council meeting, the Working Group, at its discretion, may submit a memorandum to the RRO seeking approval of the Rulemaking Initiation Request.

(f) The OA or OST component may assign a Regulatory Information Number (RIN) to the rulemaking only upon the Leadership Council's (or RRO's) approval of the Rulemaking Initiation Request.

(g) The Secretary may initiate a rulemaking on his or her own motion. The process for initiating a rulemaking as described herein may be waived or modified for any rule with the approval of the RRO. Unless otherwise determined by the RRO, the Administrator of the Federal Aviation Administration (FAA) may promulgate an emergency rule under 49 U.S.C. 106(f)(3)(B)(ii) or 49 U.S.C. 46105(c), without first submitting a Rulemaking Initiation Request.

(h) Rulemaking Initiation Requests will be considered on a rolling basis; however, the Office of Regulation will establish deadlines for submission of Rulemaking Initiation Requests so that new rulemakings may be included in the Unified Agenda of Regulatory and Deregulatory Actions.

§5.13 General rulemaking procedures.

(a) *Definitions*—(1) *Significant rulemaking* means a regulatory action designated by OIRA under E.O. 12866 as likely to result in a rule that may:

(i) Have an annual effect on the U.S. economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

(2) *Nonsignificant rulemaking* means a regulatory action not designated significant by OIRA.

(b) *Departmental review process.* (1) OST review and clearance.

(i) Except as provided herein or as otherwise provided in writing by OGC, all departmental rulemakings are to be reviewed and cleared by the Office of the Secretary.

(ii) The FAA Administrator may promulgate emergency rules pursuant to 49 U.S.C. 106(f)(3)(B)(ii) and 49 U.S.C. 46105(c), without prior approval from OST; provided that, to the maximum extent practicable and consistent with law, the FAA Administrator will give OST advance notice of such emergency rules and will allow OST to review the rules in accordance with the provisions of this subpart at the earliest opportunity after they are promulgated.

(2) Leadership within the proposing OA or component of OST shall:

(i) Ensure that the OA's or OST component's Regulatory Quality Officer reviews all rulemaking documents for plain language, technical soundness, and general quality;

(ii) Ensure that the OA's Office of Chief Counsel (or for OST rules, the Office within OGC responsible for providing programmatic advice) reviews all rulemaking documents for legal support and legal sufficiency; and

(iii) Approve the submission of all rulemaking documents, including any accompanying analyses (*e.g.*, regulatory impact analysis), to the Office of Regulation through the Regulatory Management System (RMS), or a successor data management system, for OST review and clearance.

(3) To effectuate departmental review under this subpart, the following Secretarial offices ordinarily review and approve DOT rulemakings: The Office of the Under Secretary for Policy, the Office of Public Affairs, the Office of Budget and Programs and Chief Financial Officer, OGC, and the Office of Governmental Affairs. The Office of Regulation may also require review and clearance by other Secretarial offices and OAs depending on the nature of the particular rulemaking document.

(4) Reviewing offices should provide comments or otherwise concur on rulemaking documents within 7 calendar days, unless exceptional circumstances apply that require expedited review.

(5) The Office of Regulation provides a passback of comments to the proposing OA or OST component for resolution. Comments should be resolved and a revised draft submitted to the Office of Regulation by the OA or OST component within 14 calendar days.

(6) The Office of Regulation prepares a rulemaking package for the General Counsel to request the Secretary's approval for the rulemaking to be submitted to OMB for review (for significant rulemakings) or to the FEDERAL REGISTER for publication (for nonsignificant rulemakings). These rulemaking packages are submitted through the General Counsel to the Office of the Executive Secretariat.

(7) The Office of Regulation notifies the proposing OA or OST component when the Secretary approves or disapproves the submission of the rulemaking to OMB or to the FEDERAL REGISTER.

(8) The Office of Regulation is responsible for coordination with OIRA staff on the designation of all rulemaking documents, submission and clearance of all significant rulemaking documents, and all discussions or meetings with OMB concerning these documents. OAs and OST components should not schedule their own meetings with OIRA without Office of Regulation involvement. Each OA or OST component should coordinate with the Office of Regulation before holding any discussions with OIRA concerning regulatory policy or requests to modify regulatory documents.

(c) *Petitions for rulemaking, exemption, and retrospective review.* (1) Any person may petition an OA or OST component with rulemaking authority to:

(i) Issue, amend, or repeal a rule;

(ii) Issue an exemption, either permanently or temporarily, from any requirements of a rule;
or

(iii) Perform a retrospective review of an existing rule.

(2) When an OA or OST component receives a petition under this paragraph (c), the petition should be filed with the Docket Clerk in a timely manner. If a petition is filed directly with the Docket Clerk, the Docket Clerk will submit the petition in a timely manner to the OA or component of OST with regulatory responsibility over the matter described in the petition.

(3) The OA or component of OST should provide clear instructions on its website to members of the public regarding how to submit petitions, including, but not limited to, an email address or Web portal where petitions can be submitted, a mailing address where hard copy requests can be submitted, and an office responsible for coordinating such requests.

(4) Unless otherwise provided by statute or in OA regulations or procedures, the following procedures apply to the processing of petitions for rulemaking, exemption, or retrospective review:

(i) *Contents.* Each petition filed under this section must:

(A) Be submitted, either by paper submission or electronically, to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590;

(B) Describe the nature of the request and set forth the text or substance of the rule or specify the rule that the petitioner seeks to have issued, amended, exempted, repealed, or retrospectively reviewed, as the case may be;

(C) Explain the interest of the petitioner in the action requested, including, in the case of a petition for an exemption, the nature and extent of the relief sought and a description of the persons to be covered by the exemption;

(D) Contain any information and arguments available to the petitioner to support the action sought; and

(E) In the case of a petition for exemption, unless good cause is shown in that petition, be submitted at least 60 days before the proposed effective date of the exemption.

(ii) *Processing.* Each petition received under this paragraph (c) is referred to the head of the office responsible for the subject matter of that petition, the Office of Regulation, and the RRO. No public hearing, argument, or other proceeding must necessarily be held directly on a petition for its disposition under this section.

(iii) *Grants.* If the OA or component of OST with regulatory responsibility over the matter described in the petition determines that the petition contains adequate justification, it may request the initiation of a rulemaking action under §5.11 or grant the petition, as appropriate.

(iv) *Denials.* If the OA or component of OST determines that the petition is not justified, the OA or component of OST denies the petition in coordination with the Office of Regulation.

(v) *Notification.* Whenever the OA or OST component determines that a petition should be granted or denied, and after consultation with the Office of Regulation in the case of denial, the office concerned prepares a notice of that grant or denial for issuance to the petitioner, and issues it to the petitioner.

(d) *Review of existing regulations.* (1) All departmental regulations are on a 10-year review cycle, except economically significant and high-impact rules, which are reviewed every 5 years in accordance with §5.17(f) of this subpart.

(2) The OA or OST component that issued the regulation will review it for the following:

(i) *Continued cost justification:* Whether the regulation requires adjustment due to changed market conditions or is no longer cost-effective or cost-justified in accordance with §5.5(h);

(ii) *Regulatory flexibility:* Whether the regulation has a significant economic impact on a substantial number of small entities and, thus, requires review under 5 U.S.C. 610 (section 610 of the Regulatory Flexibility Act);

(iii) *Innovation:* Whether there are new or emerging technologies, especially those that could achieve current levels of safety at the same or lower levels of cost or achieve higher levels of safety, use of which is precluded or limited by the regulation.

(iv) *General updates:* Whether the regulation may require technical corrections, updates (e.g., updated versions of voluntary consensus standards), revisions, or repeal;

(v) *Plain language:* Whether the regulation requires revisions for plain language; and

(vi) Other considerations as required by relevant executive orders and laws.

(3) The results of each OA's or OST component's review will be reported annually to the public.

(4) Any member of the public may petition the Department to conduct a retrospective review of a regulation by filing a petition in accordance with the procedures contained in paragraph (c) of this section.

(e) *Supporting economic analysis.* (1) Rulemakings shall include, at a minimum:

(i) An assessment of the potential costs and benefits of the regulatory action (which may entail a regulatory impact analysis) or a reasoned determination that the expected impact is so minimal or the safety need so significant and urgent that a formal analysis of costs and benefits is not warranted; and

(ii) If the regulatory action is expected to impose costs, either a reasoned determination that the benefits outweigh the costs or, if the particular rulemaking is mandated by statute or compelling safety need notwithstanding a negative cost-benefit assessment, a detailed discussion of the rationale supporting the specific regulatory action proposed and an explanation of why a less costly alternative is not an option.

(2) To the extent practicable, economic assessments shall quantify the foreseeable annual economic costs and cost savings within the United States that would likely result from issuance of the proposed rule and shall be conducted in accordance with the requirements of sections 6(a)(2)(B) and 6(a)(2)(C) of E.O. 12866 and OMB Circular A-4, as specified by OIRA in consultation with the Office of Regulation. If the proposing OA or OST component has estimated that the proposed rule will likely impose economic costs on persons outside the United States, such costs should be reported separately.

(3) Deregulatory rulemakings (including nonsignificant rulemakings) shall be evaluated for quantifiable cost savings. If it is determined that quantification of cost savings is not possible or appropriate, then the proposing OA or OST component shall provide a detailed justification for the lack of quantification upon submission of the rulemaking to the Office of Regulation. Other nonsignificant rulemakings shall include, at a minimum, the economic cost-benefit analysis described in paragraph (e)(1) of this section.

(f) *Regulatory flexibility analysis.* All rulemakings subject to the requirements of 5 U.S.C. 603-604 (sections 603-604 of the Regulatory Flexibility Act), and any amendment thereto, shall include a detailed statement setting forth the required analysis regarding the potential impact of the rule on small business entities.

(g) *Advance notices of proposed rulemaking.* Whenever the OA or OST component responsible for a proposed rulemaking is required to publish an advance notice of proposed

rulemaking (ANPRM) in the FEDERAL REGISTER, or whenever the RRTF determines it appropriate to publish an ANPRM, the ANPRM shall:

(1) Include a written statement identifying, at a minimum:

(i) The nature and significance of the problem the OA or OST component may address with a rule;

(ii) The legal authority under which a rule may be proposed; and

(iii) Any preliminary information available to the OA or OST component that may support one or another potential approach to addressing the identified problem;

(2) Solicit written data, analysis, views, and recommendations from interested persons concerning the information and issues addressed in the ANPRM; and

(3) Provide for a reasonably sufficient period for public comment.

(h) *Notices of proposed rulemaking*—(1) *When required*. Before determining to propose a rule, and following completion of the ANPRM process under paragraph (g) of this section, if applicable, the responsible OA or OST component shall consult with the RRTF concerning the need for the potential rule. If the RRTF thereafter determines it appropriate to propose a rule, the proposing OA or OST component shall publish a notice of proposed rulemaking (NPRM) in the FEDERAL REGISTER, unless a controlling statute provides otherwise or unless the RRTF (in consultation with OIRA, as appropriate) determines that an NPRM is not necessary under established exceptions.

(2) *Contents*. The NPRM shall include, at a minimum:

(i) A statement of the time and place for submission of public comments and the time, place, and nature of related public rulemaking proceedings, if any;

(ii) Reference to the legal authority under which the rule is proposed;

(iii) The terms of the proposed rule;

(iv) A description of information known to the proposing OA or OST component on the subject and issues of the proposed rule, including but not limited to:

(A) A summary of material information known to the OA or OST component concerning the proposed rule and the considerations specified in §5.11(a) of this subpart;

(B) A summary of any preliminary risk assessment or regulatory impact analysis performed by the OA or OST component; and

(C) Information specifically identifying all material data, studies, models, available voluntary consensus standards and conformity assessment requirements, and other evidence or information considered or used by the OA or OST component in connection with its determination to propose the rule;

(v) A reasoned preliminary analysis of the need for the proposed rule based on the information described in the preamble to the NPRM, and an additional statement of whether a rule is required by statute;

(vi) A reasoned preliminary analysis indicating that the expected economic benefits of the proposed rule will meet the relevant statutory objectives and will outweigh the estimated costs of the proposed rule in accordance with any applicable statutory requirements;

(vii) If the rulemaking is significant, a summary discussion of:

(A) The alternatives to the proposed rule considered by the OA or OST component;

(B) The relative costs and benefits of those alternatives;

(C) Whether the alternatives would meet relevant statutory objectives; and

(D) Why the OA or OST component chose not to propose or pursue the alternatives;

(viii) A statement of whether existing rules have created or contributed to the problem the OA or OST component seeks to address with the proposed rule, and, if so, whether or not the OA or OST component proposes to amend or rescind any such rules and why; and

(ix) All other statements and analyses required by law, including, without limitation, the Regulatory Flexibility Act (5 U.S.C. 601-612) or any amendment thereto.

(3) *Information access and quality.* (i) To inform public comment when the NPRM is published, the proposing OA or OST component shall place in the docket for the proposed rule and make accessible to the public, including by electronic means, all material information relied upon by the OA or OST component in considering the proposed rule, unless public disclosure of the information is prohibited by law or the information would be exempt from disclosure under 5 U.S.C. 552(b). Material provided electronically should be made available in accordance with the requirements of 29 U.S.C. 794d (section 508 of the Rehabilitation Act of 1973, as amended).

(ii) If the proposed rule rests upon scientific, technical, or economic information, the proposing OA or OST component shall base the proposal on the best and most relevant scientific, technical, and economic information reasonably available to the Department and shall identify the sources and availability of such information in the NPRM.

(iii) A single copy of any relevant copyrighted material (including consensus standards and other relevant scientific or technical information) should be placed in the docket for public review if such material was relied on as a basis for the rulemaking.

(i) *Public comment.* (1) Following publication of an NPRM, the Department will provide interested persons a fair and sufficient opportunity to participate in the rulemaking through submission of written data, analysis, views, and recommendations.

(2) The Department, in coordination with OIRA for significant rulemakings, will ensure that the public is given an adequate period for comment, taking into account the scope and nature of the issues and considerations involved in the proposed regulatory action.

(3) Generally, absent special considerations, the comment period for nonsignificant DOT rules should be at least 30 days, and the comment period for significant DOT rules should be at least 45 days.

(4) Any person may petition the responsible OA or OST component for an extension of time to submit comments in response to a notice of proposed rulemaking. Petitions must be received no later than 3 days before the expiration of the time stated in the notice. The filing of the petition does not automatically extend the time for comments. The OA or OST component may grant the petition only if the petitioner shows a substantive interest in the proposed rule and good cause for the extension, or if the extension is otherwise in the public interest. If an extension is granted, it is granted as to all persons and published in the FEDERAL REGISTER.

(5) All timely comments are considered before final action is taken on a rulemaking proposal. Late-filed comments may be considered so far as possible without incurring additional expense or delay.

(j) *Exemptions from notice and comment.* (1) Except when prior notice and an opportunity for public comment are required by statute or determined by the Secretary to be advisable for policy or programmatic reasons, the responsible OA or OST component may, subject to the approval of the RRTF (in consultation with OIRA, as appropriate), publish certain final rules in the FEDERAL REGISTER without prior notice and comment. These may include:

(i) Rules of interpretation and rules addressing only DOT organization, procedure, or practice, provided such rules do not alter substantive obligations for parties outside the Department;

(ii) Rules for which notice and comment is unnecessary to inform the rulemaking, such as rules correcting de minimis technical or clerical errors or rules addressing other minor and insubstantial matters, provided the reasons to forgo public comment are explained in the preamble to the final rule; and

(iii) Rules that require finalization without delay, such as rules to address an urgent safety or national security need, and other rules for which it would be impracticable or contrary to public

policy to accommodate a period of public comment, provided the responsible OA or OST component makes findings that good cause exists to forgo public comment and explains those findings in the preamble to the final rule.

(2) Except when required by statute, issuing substantive DOT rules without completing notice and comment, including as interim final rules (IFRs) and direct final rules (DFRs), must be the exception. IFRs and DFRs are not favored. DFRs must follow the procedures in paragraph (l) of this section. In most cases where an OA or OST component has issued an IFR, the RRTF will expect the OA or OST component to proceed at the earliest opportunity to replace the IFR with a final rule.

(k) *Final rules.* The responsible OA or OST component shall adopt a final rule only after consultation with the RRTF. The final rule, which shall include the text of the rule as adopted along with a supporting preamble, shall be published in the FEDERAL REGISTER and shall satisfy the following requirements:

(1) The preamble to the final rule shall include:

(i) A concise, general statement of the rule's basis and purpose, including clear reference to the legal authority supporting the rule;

(ii) A reasoned, concluding determination by the adopting OA or OST component regarding each of the considerations required to be addressed in an NPRM under paragraphs (h)(2)(v) through (ix) of this section;

(iii) A response to each significant issue raised in the comments to the proposed rule;

(iv) If the final rule has changed in significant respects from the rule as proposed in the NPRM, an explanation of the changes and the reasons why the changes are needed or are more appropriate to advance the objectives identified in the rulemaking; and

(v) A reasoned, final determination that the information upon which the OA or OST component bases the rule complies with the Information Quality Act (section 515 of Pub. L. 106-554—Appendix C, 114 Stat. 2763A-153-54 (2001)), or any subsequent amendment thereto.

(2) If the rule rests on scientific, technical, economic, or other specialized factual information, the OA or OST component shall base the final rule on the best and most relevant evidence and data known to the Department and shall ensure that such information is clearly identified in the preamble to the final rule and is available to the public in the rulemaking record, subject to reasonable protections for information exempt from disclosure under 5 U.S.C. 552(b). If the OA or OST component intends to support the final rule with specialized factual information identified after the close of the comment period, the OA or OST component shall allow an additional opportunity for public comment on such information.

(3) All final rules issued by the Department:

(i) Shall be written in plain and understandable English;

(ii) Shall be based on a reasonable and well-founded interpretation of relevant statutory text and shall not depend upon a strained or unduly broad reading of statutory authority; and

(iii) Shall not be inconsistent or incompatible with, or unnecessarily duplicative of, other Federal regulations.

(4) Effective dates for final rules must adhere to the following:

(i) Unless required to address a safety emergency or otherwise required by law, approved by the RRTF (or RRO), or approved by the Director of OMB (as appropriate), no regulation may be issued by an OA or component of OST if it was not included on the most recent version or update of the published Unified Agenda.

(ii) No significant regulatory action may take effect until it has appeared in either the Unified Agenda or the monthly internet report of significant rulemakings for at least 6 months prior to its issuance, unless good cause exists for an earlier effective date or the action is otherwise approved by the RRTF (or RRO).

(iii) Absent good cause, major rules (as defined by the Congressional Review Act, 5 U.S.C. 801-808) cannot take effect until 60 days after publication in the FEDERAL REGISTER or submission to Congress, whichever is later. Nonmajor rules cannot take effect any sooner than submission to Congress.

(1) *Direct final rules.* (1) Rules that the OA or OST component determines to be noncontroversial and unlikely to result in adverse public comment may be published as direct final rules. These include noncontroversial rules that:

(i) Affect internal procedures of the Department, such as filing requirements and rules governing inspection and copying of documents,

(ii) Are nonsubstantive clarifications or corrections to existing rules,

(iii) Update existing forms,

(iv) Make minor changes in the substantive rules regarding statistics and reporting requirements,

(v) Make changes to the rules implementing the Privacy Act, or

(vi) Adopt technical standards set by outside organizations.

(2) The FEDERAL REGISTER document will state that any adverse comment must be received in writing by the OA or OST component within the specified time after the date of publication

and that, if no written adverse comment is received, the rule will become effective a specified number of days after the date of publication.

(3) If no written adverse comment is received by the OA or OST component within the original or extended comment period, the OA or OST component will publish a notice in the FEDERAL REGISTER indicating that no adverse comment was received and confirming that the rule will become effective on the date that was indicated in the direct final rule.

(4) If the OA or OST component receives any written adverse comment within the specified time of publication in the FEDERAL REGISTER, the OA or OST component may proceed as follows:

(i) Publish a document withdrawing the direct final rule in the rules and regulations section of the FEDERAL REGISTER and, if the OA or OST component decides a rulemaking is warranted, a proposed rule; or

(ii) Any other means permitted under the Administrative Procedure Act. (5) An “adverse” comment for the purpose of this subpart means any comment that the OA or OST component determines is critical of the rule, suggests that the rule should not be adopted or suggests a material change that should be made in the rule. A comment suggesting that the policy or requirements of the rule should or should not also be extended to other Departmental programs outside the scope of the rule is not adverse. A notice of intent to submit an adverse comment is not, in and of itself, an adverse comment.

(m) *Reports to Congress and GAO.* For each final rule adopted by DOT, the responsible OA or OST component shall submit the reports to Congress and the U.S. Government Accountability Office to comply with the procedures specified by 5 U.S.C. 801 (the Congressional Review Act), or any subsequent amendment thereto.

(n) *Negotiated rulemakings.* (1) DOT negotiated rulemakings are to be conducted in accordance with the Negotiated Rulemaking Act, 5 U.S.C. 561-571, and the Federal Advisory Committee Act, 5 U.S.C. App. 2, as applicable.

(2) Before initiating a negotiated rulemaking process, the OA or OST component should:

(i) Assess whether using negotiated rulemaking procedures for the proposed rule in question is in the public interest, in accordance with 5 U.S.C. 563(a), and present these findings to the RRTF;

(ii) Consult with the Office of Regulation on the appropriateness of negotiated rulemaking and the procedures therefor; and

(iii) Receive the approval of the RRTF for the use of negotiated rulemaking.

(3) Unless otherwise approved by the General Counsel, all DOT negotiated rulemakings should involve the assistance of a convener and a facilitator, as provided in the Negotiated Rulemaking Act. A convener is a person who impartially assists the agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking. A facilitator is a person who impartially aids in the discussions and negotiations among members of a negotiated rulemaking committee to develop a proposed rule. The same person may serve as both convener and facilitator.

(4) All charters, membership appointments, and FEDERAL REGISTER notices must be approved by the Secretary. Any operating procedures (*e.g.*, bylaws) for negotiated rulemaking committees must be approved by OGC.

§5.15 Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda).

(a) Fall editions of the Unified Agenda include the Regulatory Plan, which presents the Department's statement of regulatory priorities for the coming year. Fall editions also include the outcome and status of the Department's reviews of existing regulations, conducted in accordance with §5.13(d).

(b) The OAs and components of OST with rulemaking authority must:

(1) Carefully consider the principles contained in E.O. 13771, E.O. 13777, and E.O. 12866 in the preparation of all submissions for the Unified Agenda;

(2) Ensure that all data pertaining to the OA's or OST component's regulatory and deregulatory actions are accurately reflected in the Department's Unified Agenda submission; and

(3) Timely submit all data to the Office of Regulation in accordance with the deadlines and procedures communicated by that office.

§5.17 Special procedures for economically significant and high-impact rulemakings.

(a) *Definitions*—(1) *Economically significant rule* means a significant rule likely to impose:

(i) A total annual cost on the U.S. economy (without regard to estimated benefits) of \$100 million or more, or

(ii) A total net loss of at least 75,000 full-time jobs in the U.S. over the five years following the effective date of the rule (not counting any jobs relating to new regulatory compliance).

(2) *High-impact rule* means a significant rule likely to impose:

(i) A total annual cost on the U.S. economy (without regard to estimated benefits) of \$500 million or more, or

(ii) A total net loss of at least 250,000 full-time jobs in the U.S. over the five years following the effective date of the rule (not counting any jobs relating to new regulatory compliance).

(b) *ANPRM required.* Unless directed otherwise by the RRTF or otherwise required by law, in the case of a rulemaking for an economically significant rule or a high-impact rule, the proposing OA or OST component shall publish an ANPRM in the FEDERAL REGISTER.

(c) *Additional requirements for NPRM.* (1) In addition to the requirements set forth in §5.13, an NPRM for an economically significant rule or a high-impact rule shall include a discussion explaining an achievable objective for the rule and the metrics by which the OA or OST component will measure progress toward that objective.

(2) Absent unusual circumstances and unless approved by the RRTF (in consultation with OIRA, as appropriate), the comment period for an economically significant rule shall be at least 60 days and for a high-impact rule at least 90 days. If a rule is determined to be an economically significant rule or high-impact rule after the publication of the NPRM, the responsible OA or OST component shall publish a notice in the FEDERAL REGISTER that informs the public of the change in classification and discusses the achievable objective for the rule and the metrics by which the OA or OST component will measure progress toward that objective, and shall extend or reopen the comment period by not less than 30 days and allow further public comment as appropriate, including comment on the change in classification.

(d) *Procedures for formal hearings—(1) Petitions for hearings.* Following publication of an NPRM for an economically significant rule or a high-impact rule, and before the close of the comment period, any interested party may file in the rulemaking docket a petition asking the proposing OA or OST component to hold a formal hearing on the proposed rule in accordance with this subsection.

(2) *Mandatory hearing for high-impact rule.* In the case of a proposed high-impact rule, the responsible OA or OST component shall grant the petition for a formal hearing if the petition makes a plausible prima facie showing that:

(i) The proposed rule depends on conclusions concerning one or more specific scientific, technical, economic, or other complex factual issues that are genuinely in dispute or that may not satisfy the requirements of the Information Quality Act;

(ii) The ordinary public comment process is unlikely to provide the OA or OST component an adequate examination of the issues to permit a fully informed judgment on the dispute; and

(iii) The resolution of the disputed factual issues would likely have a material effect on the costs and benefits of the proposed rule or on whether the proposed rule would achieve the statutory purpose.

(3) *Authority to deny hearing for economically significant rule.* In the case of a proposed economically significant rule, the responsible OA or OST component may deny a petition for a formal hearing that includes the showing described in paragraph (d)(2) of this section but only if the OA or OST component reasonably determines that:

(i) The requested hearing would not advance the consideration of the proposed rule and the OA's or OST component's ability to make the rulemaking determinations required under this subpart; or

(ii) The hearing would unreasonably delay completion of the rulemaking in light of a compelling safety need or an express statutory mandate for prompt regulatory action.

(4) *Denial of petition.* If the OA or OST component denies a petition for a formal hearing under this subsection in whole or in part, the OA or OST component shall include a detailed explanation of the factual basis for the denial in the rulemaking record, including findings on each of the relevant factors identified in paragraph (d)(2) or (3) of this section. The denial of a good faith petition for a formal hearing under this section shall be disfavored.

(5) *Notice and scope of hearing.* If the OA or OST component grants a petition for a formal hearing under this section, the OA or OST component shall publish notification of the hearing in the FEDERAL REGISTER not less than 45 days before the date of the hearing. The document shall specify the proposed rule at issue and the specific factual issues to be considered in the hearing. The scope of the hearing shall be limited to the factual issues specified in the notice.

(6) *Hearing process.* (i) A formal hearing for purposes of this section shall be conducted using procedures borrowed from 5 U.S.C. 556 and 5 U.S.C. 557, or similar procedures as approved by the Secretary, and interested parties shall have a reasonable opportunity to participate in the hearing through the presentation of testimony and written submissions.

(ii) The OA or OST component shall arrange for an administrative judge or other neutral administrative hearing officer to preside over the hearing and shall provide a reasonable opportunity for cross-examination of witnesses at the hearing.

(iii) After the formal hearing and before the record of the hearing is closed, the presiding hearing officer shall render a report containing findings and conclusions addressing the disputed issues of fact identified in the hearing notice and specifically advising on the accuracy and sufficiency of the factual information in the record relating to those disputed issues on which the OA or OST component proposes to base the rule.

(iv) Interested parties who have participated in the hearing shall be given an opportunity to file statements of agreement or objection in response to the hearing officer's report, and the complete record of the proceeding shall be made part of the rulemaking record.

(7) *Actions following hearing.* (i) Following completion of the formal hearing process, the responsible OA or OST component shall consider the record of the hearing and, subject to the

approval of the RRTF (in consultation with OIRA, as appropriate), shall make a reasoned determination whether:

- (A) To terminate the rulemaking;
- (B) To proceed with the rulemaking as proposed; or
- (C) To modify the proposed rule.

(ii) If the decision is made to terminate the rulemaking, the OA or OST component shall publish a notice in the FEDERAL REGISTER announcing the decision and explaining the reasons therefor.

(iii) If the decision is made to finalize the proposed rule without material modifications, the OA or OST component shall explain the reasons for its decision and its responses to the hearing record in the preamble to the final rule, in accordance with paragraph (e) of this section.

(iv) If the decision is made to modify the proposed rule in material respects, the OA or OST component shall, subject to the approval of the RRTF (in consultation with OIRA, as appropriate), publish a new or supplemental NPRM in the FEDERAL REGISTER explaining the OA's or OST component's responses to and analysis of the hearing record, setting forth the modifications to the proposed rule, and providing an additional reasonable opportunity for public comment on the proposed modified rule.

(8) *Relationship to interagency process.* The formal hearing procedures under this subsection shall not impede or interfere with OIRA's interagency review process for the proposed rulemaking.

(e) *Additional requirements for final rules.* (1) In addition to the requirements set forth in §5.13(k), the preamble to a final economically significant rule or a final high-impact rule shall include:

(i) A discussion explaining the OA's or OST component's reasoned final determination that the rule as adopted is necessary to achieve the objective identified in the NPRM in light of the full administrative record and does not deviate from the metrics previously identified by the OA or OST component for measuring progress toward that objective; and

(ii) In accordance with paragraph (d)(7)(iii) of this section, the OA's or OST component's responses to and analysis of the record of any formal hearing held under paragraph (d) of this section.

(2) Absent exceptional circumstances and unless approved by the RRTF or Secretary (in consultation with OIRA, as appropriate), the OA or OST component shall adopt as a final economically significant rule or final high-impact rule the least costly regulatory alternative that achieves the relevant objectives.

(f) *Additional requirements for retrospective reviews.* For each economically significant rule or high-impact rule, the responsible OA or OST component shall publish a regulatory impact report in the FEDERAL REGISTER every 5 years after the effective date of the rule while the rule remains in effect. The regulatory impact report shall include, at a minimum:

(1) An assessment of the impacts, including any costs, of the rule on regulated entities;

(2) A determination about how the actual costs and benefits of the rule have varied from those anticipated at the time the rule was issued; and

(3) An assessment of the effectiveness and benefits of the rule in producing the regulatory objectives it was adopted to achieve.

(g) *Waiver and modification.* The procedures required by this section may be waived or modified as necessary with the approval of the RRO or the Secretary.

§5.19 Public contacts in informal rulemaking.

(a) *Agency contacts with the public during informal rulemakings conducted in accordance with 5 U.S.C. 553.* (1) DOT personnel may have meetings or other contacts with interested members of the public concerning an informal rulemaking under 5 U.S.C. 553 or similar procedures at any stage of the rulemaking process, provided the substance of material information submitted by the public that DOT relies on in proposing or finalizing the rule is adequately disclosed and described in the public rulemaking docket such that all interested parties have notice of the information and an opportunity to comment on its accuracy and relevance.

(2) After the issuance of the NPRM and pending completion of the final rule, DOT personnel should avoid giving persons outside the Executive Branch information regarding the rulemaking that is not available generally to the public.

(3) If DOT receives an unusually large number of requests for meetings with interested members of the public during the comment period for a proposed rule or after the close of the comment period, the issuing OA or component of OST should consider whether there is a need to extend or reopen the comment period, to allow for submission of a second round of “reply comments,” or to hold a public meeting on the proposed rule.

(4) If the issuing OA or OST component meets with interested persons on the rulemaking after the close of the comment period, it should be open to giving other interested persons a similar opportunity to meet.

(5) If DOT learns of significant new information, such as new studies or data, after the close of the comment period that the issuing OA or OST component wishes to rely upon in finalizing the rule, the OA or OST component should reopen the comment period to give the public an opportunity to comment on the new information. If the new information is likely to result in a

change to the rule that is not within the scope of the NPRM, the OA or OST component should consider issuing a Supplemental NPRM to ensure that the final rule represents a logical outgrowth of DOT's proposal.

(b) *Contacts during OIRA review.* (1) E.O. 12866 and E.O. 13563 lay out the procedures for review of significant regulations by OIRA, which include a process for members of the public to request meetings with OIRA regarding rules under OIRA review. Per E.O. 12866, OIRA invites the Department to attend these meetings. The Office of Regulation will forward these invitations to the appropriate regulatory contact in the OA or component of OST responsible for issuing the regulation.

(2) If the issuing OA or OST component wishes to attend the OIRA-sponsored meeting or if its participation is determined to be necessary by the Office of Regulation, the regulatory contact should identify to the Office of Regulation up to two individuals from the OA or OST component who will attend the meeting along with a representative from the Office of Regulation. Attendance at these meetings can be by phone or in person. These OIRA meetings are generally listening sessions for DOT.

(3) The attending DOT personnel should refrain from debating particular points regarding the rulemaking and should avoid disclosing the contents of a document or proposed regulatory action that has not yet been disclosed to the public, but may answer questions of fact regarding a public document.

(4) Following the OIRA meeting, the attendee(s) from the issuing OA or OST component will draft a summary report of the meeting and submit it to the Office of Regulation for review. After the report is reviewed and finalized in coordination with the Office of Regulation, the responsible OA or OST component will place the final report in the rulemaking docket.

§5.21 Policy updates and revisions.

This subpart shall be reviewed from time to time to reflect improvements in the rulemaking process or changes in Administration policy.

§5.23 Disclaimer.

This subpart is intended to improve the internal management of the Department. It is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, officers or employees, or any other person. In addition, this subpart shall not be construed to create any right to judicial review involving the compliance or noncompliance with this subpart by the Department, its OAs or OST components, its officers or employees, or any other person.

Federal Emergency Management Agency

Title 44: Emergency Management and Assistance

PART 1—RULEMAKING; POLICY AND PROCEDURES

Subpart A—General

Contents

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- §1.9 Regulatory impact analyses.

§1.1 Purpose.

(a) This part contains the basic policies and procedures of the Federal Emergency Management Agency (FEMA) for adoption of rules. These policies and procedures incorporate those provisions of section 4 of the Administrative Procedure Act (APA) (5 U.S.C. 553) which FEMA will follow. This part and internal FEMA Manuals implement Executive Order 12291.

(b) Rules which must be published are described in section 3(a) of the APA, 5 U.S.C. 552(a). FEMA implementation of paragraph (a) is contained in 44 CFR part 5, subpart B.

(c) This part contains policies and procedures for implementation of the Regulatory Flexibility Act which took effect January 1, 1981.

(d) A FEMA Manual No. 1140.1, “The Formulation, Drafting, Clearance, and Publication of FEDERAL REGISTER Documents” has been issued describing the internal procedures including policy level oversight of FEMA for:

- (1) Publishing the semiannual agenda of significant regulations under development and review;
- (2) Making initial determinations with respect to significance of proposed rulemaking;
- (3) Determining the need for regulatory analyses; and

(4) Reviewing existing regulations, including the reviews required by the Regulatory Flexibility Act.

(e) As the FEMA Manual deals with internal management it is not subject to the requirements either of 5 U.S.C. 552 or 553. Its provisions are not part of this rule and reference to it is informative only.

[46 FR 32584, June 24, 1981, as amended at 49 FR 33878, Aug. 27, 1984]

§1.2 Definitions.

(a) *Rule* or *regulation* means the whole or a part of any agency statement of general applicability and future effect designed to (1) implement, interpret, or prescribe law or policy, or (2) describe procedures or practice requirements. It includes any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term *rule* does not include a rule of particular applicability relating to rates, wages, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances. For purposes of this part the term *rule* does not include regulations issued with respect to a military or foreign affairs function of the United States.

(b) *Rulemaking* means the FEMA process for considering and formulating the issuance, amendment or repeal of a rule.

(c) *Administrator* means the Administrator, FEMA, or an official to whom the Administrator has expressly delegated authority to issue rules.

(d) *FEMA* means Federal Emergency Management Agency.

(e) *Major rule* means any regulation that is likely to result in:

(1) An annual effect on the economy of \$100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

[46 FR 32584, June 24, 1981, as amended at 49 FR 38118, Sept. 27, 1984]

§1.3 Scope.

(a) This part prescribes general rulemaking procedures for the issuance, amendment, or repeal of rules in which participation by interested persons is required by 5 U.S.C. 553 or other statutes, by Executive Order 12291, by FEMA policy, or by §1.4 of this part.

(b) Any delegation by the Administrator of authority to issue rules may not be further redelegated, unless expressly provided for in the delegation.

(c) This part does not apply to rules issued in accordance with the formal rulemaking provisions of the Administrative Procedure Act (5 U.S.C. 556, 557).

§1.4 Policy and procedures.

(a) In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, FEMA, to the extent permitted by law, shall adhere to the following requirements:

(1) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;

(2) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;

(3) Regulatory objectives shall be chosen to maximize the net benefits to society;

(4) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(5) FEMA shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular entities affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

(b) It is the policy of FEMA to provide for public participation in rulemaking regarding its programs and functions, including matters that relate to public property, loans, grants, or benefits, or contracts, even though these matters are not subject to a requirement for notice and public comment rulemaking by law.

(c) FEMA will publish notices of proposed rulemaking in the FEDERAL REGISTER and will give interested persons an opportunity to participate in the rulemaking through submission of written data, views, and arguments with or without opportunity for oral presentation.

(d) In order to give the public, including small entities and consumer groups, an early and meaningful opportunity to participate in the development of rules, for a number of regulations

the Administrator will employ additional methods of inviting public participation. These methods include, but are not limited to, publishing advance Notices of Proposed Rulemaking (ANPR), which can include a statement with respect to the impact of the proposed rule on small entities; holding open conferences; convening public forums or panels, sending notices of proposed regulations to publications likely to be read by those affected and soliciting comment from interested parties by such means as direct mail. An ANPR should be used to solicit public comment early in the rulemaking process for significant rules.

(e) It is the policy of FEMA that its notices of proposed rulemaking are to afford the public at least sixty days for submission of comments unless the Administrator makes an exception and sets forth the reasons for the exception in the preamble to the notice of proposed rulemaking. This period shall also include any period of review required by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1980.

(f) Unless required by statute or Executive Order, notice and public procedure may be omitted if the Administrator, for good cause, determines in a particular case or class of cases that notice and public procedure is impractical, unnecessary or contrary to the public interest and sets forth the reason for the determination in the rulemaking document or, for a class of cases, in a published rule or statement of policy. In a particular case, the reasons for the determination will be stated in the rulemaking document. Notice and public procedure may also be omitted with respect to statements of policy, interpretative rules, rules governing FEMA's organization or its own internal practices or procedures, or if a statute expressly authorizes omission.

(g) A final substantive rule will be published not less than 30 days before its effective date unless it grants or recognizes an exemption or relieves a restriction or unless the rulemaking document states good cause for its taking effect less than 30 days after publication. Statements of policy and interpretative rules will usually be made effective on the date of publication.

(h) This part shall not apply to any regulation that responds to an emergency situation, provided that, any such regulation shall be reported to the Director, Office of Management and Budget, as soon as is practicable. FEMA shall publish in the FEDERAL REGISTER a statement of the reasons why it is impracticable for the agency to follow the procedures of Executive Order 12866 with respect to such a rule, and the agency shall prepare and transmit, if needed, as soon as is practicable a Regulatory Impact Analysis of any such major rule.

[46 FR 32584, June 24, 1981, as amended at 49 FR 38119, Sept. 27, 1984; 50 FR 40004, Oct. 1, 1985]

§1.5 Rules docket.

(a) Documents which are public records and which are a part of a specific rulemaking procedure, including but not limited to, advance notices of proposed rulemaking, notices of proposed rulemaking, written comments addressed to the merits of a proposed rule, and comments received in response to notices, or withdrawals or terminations of proposed rulemaking, petitions for rulemaking, requests for oral argument in public participation cases,

requests for extension of time, grants or denials of petitions or requests, transcripts or minutes of informal hearings, final rules and general notices shall be maintained in the Office of Chief Counsel. All public rulemaking comments should refer to the docket number which appears in the heading of the rule and should be addressed to the Rule Docket Clerk, Federal Emergency Management Agency, Office of Chief Counsel.

(b) Documents which are a part of a specific rulemaking proceeding are public records. After a docket is established, any person may examine docketed material at any time during established hours of business and may obtain a copy of any docketed material upon payment of the prescribed fee. (See part 5 of this chapter.)

[46 FR 32584, June 24, 1981, as amended at 48 FR 44542, Sept. 29, 1983]

§1.6 Ex parte communications.

In rulemaking proceedings subject only to the procedural requirements of 5 U.S.C. 553:

(a) All oral communications from outside FEMA of significant information and argument respecting the merits of a proposed rule, received after notice of proposed informal rulemaking and in its course by FEMA or its offices and divisions or their personnel participating in the decision, should be summarized in writing and placed promptly in the Rules Docket File available for public inspection.

(b) FEMA may conclude that restrictions on ex parte communications in particular rulemaking proceedings are necessitated by consideration of fairness or for other reasons.

§1.7 Regulations agendas.

(a) The FEMA semi-annual agenda called for by Executive Order 12291 will be part of the Unified Agenda of Federal Regulations published in April and October of each year.

(b) In accordance with 5 U.S.C. 605, the regulatory flexibility agenda required by 5 U.S.C. 602 and the list of rules, if any, to be reviewed pursuant to 5 U.S.C. 610 shall be included in the FEMA semiannual agenda described in paragraph (a) of this section.

(c) The semiannual agenda shall, among other items, include:

(1) A summary of the nature of each major rule being considered, the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any major rule for which the agency has issued a notice of proposed rulemaking.

(2) The name and telephone number of a knowledgeable agency official for each item on the agenda; and

(3) A list of existing regulations to be reviewed under the terms of the Order and a brief discussion of each such regulation.

[46 FR 32584, June 24, 1981, as amended at 49 FR 33878, Aug. 27, 1984]

§1.8 Regulations review.

(a) As part of the semiannual agenda described in §1.7 of this part, FEMA will publish in the FEDERAL REGISTER and keep updated a plan for periodic review of existing rules at least within 10 years from date of publication of a rule as final. This includes those that have significant impact on a substantial number of small entities.

(b) The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, including minimizing any significant economic impact of the rules upon a substantial number of small entities.

(c) In reviewing rules FEMA shall consider the following factors:

(1) The continued need for the rule;

(2) The nature, type and number of complaints or comments received concerning the rule from the public;

(3) The complexity of the rule, including need for review of language for clarity;

(4) The extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

§1.9 Regulatory impact analyses.

(a) FEMA shall, in connection with any major rule, prepare and consider a Regulatory Impact Analysis. Such analysis may be combined with the Regulatory Flexibility Analysis described in §§1.12(f) and 1.16(c) of this part.

(b) FEMA shall initially determine whether a rule it intends to propose or to issue is a major rule and, if a major rule, shall prepare Regulatory Impact Analyses and transmit them, along with all notices of proposed rulemaking and all final rules, to the Director, Office of Management and Budget, as follows:

(1) If no notice of proposed rulemaking is to be published for a proposed major rule that is not an emergency rule, the agency shall prepare only a final Regulatory Impact Analysis, which

shall be transmitted, along with the proposed rule, to the Director, Office of Management and Budget, at least 60 days prior to the publication of the major rule as a final rule;

(2) With respect to all other major rules, FEMA shall prepare a preliminary Regulatory Impact Analysis, which shall be transmitted, along with a notice of proposed rulemaking, to the Director, Office of Management and Budget, at least 60 days prior to the publication of a notice of proposed rulemaking, and a final Regulatory Impact Analysis, which shall be transmitted along with the final rule at least 30 days prior to the publication of the major rule as a final rule;

(3) For all rules other than major rules, FEMA shall, unless an exemption has been granted, submit to the Director, Office of Management and Budget, at least 10 days prior to publication, every notice of proposed rulemaking and final rule.

(c) To permit each major rule to be analyzed in light of the requirements stated in section 2 of Executive Order 12291, each preliminary and final Regulatory Impact Analysis shall contain the following information:

(1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;

(2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;

(3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;

(4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and

(5) Unless covered by the description required under paragraph (c)(4) of this section, an explanation of any legal reasons why the rule cannot be based on the requirements set forth in section 2 of Executive Order 12291.

Department of Housing and Urban Development

Title 24: Housing and Urban Development

PART 10—RULEMAKING: POLICY AND PROCEDURES

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AUTHORITY: 42 U.S.C. 3535(d).

SOURCE: 44 FR 1606, Jan. 5, 1979, unless otherwise noted.

Subpart A—General

§10.1 Policy.

It is the policy of the Department of Housing and Urban Development to provide for public participation in rulemaking with respect to all HUD programs and functions, including matters that relate to public property, loans, grants, benefits, or contracts even though such matters would not otherwise be subject to rulemaking by law or Executive policy. The Department therefore publishes notices of proposed rulemaking in the FEDERAL REGISTER and gives interested persons an opportunity to participate in the rulemaking through submission of written data, views, and arguments with or without opportunity for oral presentation. It is the policy of the Department

that its notices of proposed rulemaking are to afford the public not less than sixty days for submission of comments. For some rules the Secretary will employ additional methods of inviting public participation. These methods include, but are not limited to, publishing Advance Notices of Proposed Rulemaking (ANPR), conducting public surveys, and convening public forums or panels. An ANPR will be used to solicit public comment early in the rulemaking process for significant rules unless the Secretary grants an exception based upon legitimate and pressing time constraints. Unless required by statute, notice and public procedure will be omitted if the Department determines in a particular case or class of cases that notice and public procedure are impracticable, unnecessary or contrary to the public interest. In a particular case, the reasons for the determination shall be stated in the rulemaking document. Notice and public procedure may also be omitted with respect to statements of policy, interpretative rules, rules governing the Department's organization or its own internal practices or procedures, or if a statute expressly so authorizes. A final substantive rule will be published not less than 30 days before its effective date, unless it grants or recognizes an exemption or relieves a restriction or unless the rule itself states good cause for taking effect upon publication or less than 30 days thereafter. Statements of policy and interpretative rules will usually be made effective on the date of publication.

[44 FR 1606, Jan. 5, 1979, as amended at 47 FR 56625, Dec. 20, 1982]

§10.2 Definitions.

(a) *Rule or Regulation* means all or part of any Departmental statement of general or particular applicability and future effect designed to: (1) Implement, interpret, or prescribe law or policy, or (2) describe the Department's organization, or its procedure or practice requirements. The term *regulation* is sometimes applied to a rule which has been published in the Code of Federal Regulations.

(b) *Rulemaking* means the Departmental process for considering and formulating the issuance, modification, or repeal of a rule.

(c) *Secretary* means the Secretary or the Under Secretary of Housing and Urban Development, or an official to whom the Secretary has expressly delegated authority to issue rules.

§10.3 Applicability.

(a) This part prescribes general rulemaking procedures for the issuance, amendment, or repeal of rules in which participation by interested persons is required by 5 U.S.C. or by Department policy.

(b) The authority to issue rules, delegated by the Secretary, may not be redelegated unless expressly permitted.

(c) This part is not applicable to a determination by HUD under 24 CFR part 966 (public housing) or 24 CFR part 950 (Indian housing) that the law of a jurisdiction requires that, prior to eviction, a tenant be given a hearing in court which provides the basic elements of due process (“due process determination”).

[44 FR 1606, Jan. 5, 1979, as amended at 61 FR 13273, Mar. 26, 1996]

§10.4 Rules docket.

(a) All documents relating to rulemaking procedures including but not limited to advance notices of proposed rulemaking, notices of proposed rulemaking, written comments received in response to notices, withdrawals or terminations of proposed rulemaking, petitions for rulemaking, requests for oral argument in public participation cases, requests for extension of time, grants or denials of petitions or requests, transcripts or minutes of informal hearings, final rules and general notices are maintained in the Rules Docket Room (Room 5218), Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410. All public rulemaking comments should refer to the docket number which appears in the heading of the rule and should be addressed to the Rules Docket Clerk, Room 5218, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410.

(b) Documents relating to rulemaking proceedings are public records. After a docket is established, any person may examine docketed material at any time during regular business hours, and may obtain a copy of any docketed material upon payment of the prescribed fee. (See part 15 of this title).

Subpart B—Procedures

§10.6 Initiation of rulemaking.

Rulemaking proceedings may be initiated on the Secretary's motion, or on the recommendation of a Federal, State, or local government or government agency, or on the petition of any interested person.

§10.7 Advance Notice of Proposed Rulemaking.

An Advance Notice of Proposed Rulemaking issued in accordance with §10.1 of this part is published in the FEDERAL REGISTER and briefly outlines:

- (a) The proposed new program or program changes, and why they are needed;
- (b) The major policy issues involved;

(c) A request for comments, both specific and general, as to the need for the proposed rule and the provisions that the rule might include;

(d) If appropriate, a list of questions about the proposal that will elicit detailed comments;

(e) If known, an estimate of the reporting or recordkeeping requirements, if any, that the rule would impose; and

(f) Where comments should be addressed and the time within which they must be submitted.

§10.8 Notice of proposed rulemaking.

Each notice of proposed rulemaking required by statute or by §10.1 is published in the FEDERAL REGISTER and includes:

(a) The substance or terms of the proposed rule or a description of the subject matter and issues involved;

(b) A statement of how and to what extent interested persons may participate in the proceeding;

(c) Where participation is limited to written comments, a statement of the time within which such comments must be submitted;

(d) A reference to the legal authority under which the proposal is issued; and

(e) In a proceeding which has provided Advance Notice of Proposed Rulemaking, an analysis of the principal issues and recommendations raised by the comments, and the manner in which they have been addressed in the proposed rulemaking.

§10.10 Participation by interested persons.

(a) Unless the notice otherwise provides, any interested person may participate in rulemaking proceedings by submitting written data, views or arguments within the comment time stated in the notice. In addition, the Secretary may permit the filing of comments in response to original comments.

(b) In appropriate cases, the Secretary may provide for oral presentation of views in additional proceedings described in §10.12.

§10.12 Additional rulemaking proceedings.

The Secretary may invite interested persons to present oral arguments, appear at informal hearings, or participate in any other procedure affording opportunity for oral presentation of views. The transcript or minutes of such meetings, as appropriate, will be kept and filed in the Rules Docket.

§10.14 Hearings.

(a) The provisions of 5 U.S.C. 556 and 557, which govern formal hearings in adjudicatory proceedings, do not apply to informal rule making proceedings described in this part. When opportunity is afforded for oral presentation, such informal *hearing* is a nonadversary, fact-finding proceeding. Any rule issued in a proceeding under this part in which a hearing is held is not based exclusively on the record of such hearing.

(b) When a hearing is provided, the Secretary will designate a representative to conduct the hearing, and if the presence of a legal officer is desirable, the General Counsel will designate a staff attorney to serve as the officer.

§10.16 Adoption of a final rule.

All timely comments are considered in taking final action on a proposed rule. Each preamble to a final rule will contain a short analysis and evaluation of the relevant significant issues set forth in the comments submitted, and a clear concise statement of the basis and purpose of the rule.

§10.18 Petitions for reconsideration.

Petitions for reconsideration of a final rule will not be considered. Such petitions, if filed, will be treated as petitions for rulemaking in accordance with §10.20.

§10.20 Petition for rulemaking.

(a) Any interested person may petition the Secretary for the issuance, amendment, or repeal of a rule. Each petition shall:

(1) Be submitted to the Rules Docket Clerk, Room 5218, Department of Housing and Urban Development, Washington, DC 20410;

(2) Set forth the text of substance of the rule or amendment proposed or specify the rule sought to be repealed;

(3) Explain the interest of the petitioner in the action sought; and

(4) Set forth all data and arguments available to the petitioner in support of the action sought.

(b) No public procedures will be held directly on the petition before its disposition. If the Secretary finds that the petition contains adequate justification, a rulemaking proceeding will be initiated or a final rule will be issued as appropriate. If the Secretary finds that the petition does not contain adequate justification, the petition will be denied by letter or other notice, with a brief

statement of the ground for denial. The Secretary may consider new evidence at any time; however, repetitious petitions for rulemaking will not be considered.

Appendix C

The *Regulations* page of DOT's website demonstrates the agency's approach to indexing its rule on rulemaking and its rulemaking documents that are not legislative rules.⁴⁰



⁴⁰ DEP'T. OF TRANSPORTATION., REGULATIONS, <https://www.transportation.gov/regulations> (last visited Sep. 30, 2020).