

Analyses that Must Accompany any NPRM Proposing Major Changes to Public Charge

Under the laws and Executive Orders that govern the Federal regulatory process, DHS and OMB are required to prepare at least four major analyses to accompany the development and publication of any NPRM significantly changing the rules around public charge. These analyses, along with the laws or Executive Orders that require them, are outlined below.

(Note that the required analyses may change if the NPRM differs significantly from the draft that was leaked to the press in spring 2018.)

1. Detailed cost-benefit analysis of the proposal and feasible alternatives.

Executive Order (EO) 12866, “Regulatory Planning and Review” (issued on September 30, 1993 and returned to its original form on January 30, 2009 by Executive Order 13497) has specific requirements for “significant regulatory actions”, defined as those that may “have an annual effect on the economy of \$100 million or more” and/or “materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof.” Any NPRM that would discourage legal immigrants and their family members from seeking federal, state, or local benefits to which they are entitled would meet these criteria.

Therefore, the following requirements of EO 12866 would apply:

- Per Section 6(a)(C)(3) of the EO, the agency must submit to OMB a detailed assessment of the costs and benefits of its proposal.
- Per the same Section, the agency must submit “an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, ... and an explanation why the planned regulatory action is preferable to the identified potential alternatives.
- Per Section 1(A), all assessments of costs and benefits must “include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.”
- Per Section 6(a)(E), these assessments must be made available to the public.
- Per Section 1(b)(6), the agency agencies may “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”

2. Analysis of impact of proposal on small entities, and alternative regulatory options

For regulatory actions that will have a “significant economic impact on a substantial number of small entities,” the Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§601-612) requires federal agencies to assess the impact on “small entities.” As demonstrated by data submitted by the California Primary Care Association (CPCA) and the Asian-American Pacific Islander Health Care Organization (AAPCHO), the public charge NPRM is expected to have a significant impact on

revenues received and costs incurred by safety net health care providers, including but not limited to the more than 11,000 Health Centers located across the nation.

Thus, under the RFA requirements, an NPRM making significant changes to public charge must include an “initial regulatory flexibility analysis” (IRFA) which describes, among other things:

- the small entities to which the proposed rule will apply and, where feasible, an estimate of their number;
- significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

3. Analysis of impact on state and local governments

Both the Unfunded Mandates Reform Act (UMRA) of 1995 and Executive Order 12866 require agencies to prepare specific assessments for any NPRM that may increase total state, local, and/or tribal expenditures by \$100 million or more in any year. To the extent that the NPRM will discourage legal immigrants from seeking federal benefits, states and localities will be called on to help compensate, leading to increased costs that will easily exceed \$100 million for these governments. Thus, these requirements will be triggered.

The UMRA requires that the agency:

- prepare a written statement containing specific descriptions and estimates for the NPRM including qualitative and quantitative assessment of the anticipated costs and benefits of the mandate (Section 202);
- identify and consider a reasonable number of regulatory alternatives and select the least costly, most cost-effective, or least burdensome alternative (or explain why that alternative was not selected) (Section 205);
- develop a plan in which agencies provide notice of regulatory requirements to potentially affected small governments (Section 203); and
- develop an effective process to permit elected officers of state, local, and tribal governments (or their designees) to provide input in the development of regulatory proposals containing significant intergovernmental mandates (Section 204).

In addition, Section 1(b)(9) of Executive Order 12866 mandates that agencies must:

- “assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates” and
- “seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives”

4. Evaluation of effect on children's safety, and an explanation of why the proposed option is preferable

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks," 62 *Federal Register* 19885, April 23, 1997, requires that for any substantive rulemaking action that is likely to result in a safety risk that may disproportionately affect children, the agency must provide OMB with:

- (1) an evaluation of the environmental or safety effects on children and
- (2) an explanation of why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives.

This analysis must also be available to the public, either as part of the administrative record or through some other mechanism.