

**Zero-Based Regulation
Prospective Analysis
Agency Guide**

The guide attempts to answer many of the questions that agencies may have when completing the Prospective Analysis form outlined in Executive Order 2020-01.

1. What is the specific legal authority for this proposed rule?

Per article III, section 29 of the state constitution, rules must be written to interpret, prescribe, implement, or enforce a statute. Therefore, rules must emanate from a statute and must be consistent with legislative intent. While it may require rulemaking, federal law is **not** the statutory basis for agency rulemaking. Federal law does not create state agencies. The authority must come from Idaho statutes that create the agency wishing to do rulemaking.

In answering this first question, please include a direct link to the statute that authorizes the rulemaking.

Also, please identify if the rule is “mandatory” or “discretionary” using the following definitions:

Term	Definition
Mandatory	A state statute explicitly requires the agency to make this particular rule section.
Discretionary	The rule falls under the general rulemaking authority of the agency.

For example, see Section [67-5309](#) (abstracted below):

67-5309. RULES OF THE DIVISION OF HUMAN RESOURCES AND THE PERSONNEL COMMISSION. The administrator of the division of human resources shall have the power and authority to adopt, amend, or rescind such rules as may be necessary for proper administration of this chapter. Such rules **shall** include:

(b) A rule describing the relevant labor markets and benchmark job classifications used in the administrator’s salary surveys.

If the Division of Human Resources promulgated a rule specific to describing the relevant labor markets as outlined in 67-5309(b), it would be considered “mandatory” because of the use of the word “shall.”

If, however, the Division of Human Resources promulgated a rule that was not included in the list under the word “shall,” it would be considered discretionary as the agency is leaning on the general rulemaking authority specified in this clause: “rules as may be necessary for proper administration of this chapter.”

2. Define the specific problem that the proposed rule is attempting to solve? Can the problem be addressed by non-regulatory measures?

Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new regulatory action) as well as assess the significance of that problem.

In answering this question, here are some general guidelines to follow:

a. Do:

- i. Explicitly and clearly define the problem that this specific rule is attempting to solve.
 1. Is there a market failure? An over-riding social need?

- ii. Present empirical evidence that the problem exists, that it is substantiated, and that it is widespread.

b. Don't:

- i. Simply note the general rulemaking authority in statute.
- ii. List an anecdote or two.
- iii. Make a vague allusion to the need to regulate the profession generally.

3. How have other jurisdictions approached the problem this proposed rule intends to address?

Start with an exploration of related federal and state laws. For other states, we are focused on those that surround Idaho, and have also included the two other least-regulated states for comparison: Alaska and South Dakota.

In reviewing other state laws, agencies are encouraged to contact their counterparts in the targeted states, leverage the assets of their national associations, or simply review the laws of the other states.

If any federal or state law is less stringent than Idaho, there is a rebuttable assumption that Idaho's more stringent restrictions are unnecessary and should at a minimum be adjusted to the law that is less stringent.

4. What evidence is there that the rule, as proposed, will solve the problem?

Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation. In other words, regulation requires evidence, not just assertions. In answering this question, here are some general guidelines to follow:

a. Do:

- i. Present empirical evidence that the rule has proven effective in other jurisdictions or in Idaho.
- ii. Present a clear theory of cause and effect between the rule and the desired outcome.

b. Don't:

- i. List an anecdote or two.
- ii. Offer overbroad characterizations such as "public health and safety."
- iii. Simply state that the rule was previously on the books and is merely being modified.

5. What is the anticipated impact of the proposed rule on various stakeholders? Include how you will involve stakeholders in the rulemaking process?

Please answer these questions in line with how they would be answered on the ARRF or the Notices that are published in the Idaho Administrative Bulletin.

6. What cumulative regulatory volume does this proposed rule add?

In calculating the net word count change, consider the net change of all the proposed additions minus the proposed deletions.

In calculating the net word restrictive word count change, consider the net change of all the proposed restriction additions minus the proposed restriction deletions. “Restrictive words” includes the following:

- Shall
- Must
- May Not
- Prohibited
- Required

7. Should this rule chapter remain as a rule chapter or be moved to statute as suggested in Section 67-5292, Idaho Code?

The Legislature has encouraged rule chapters to be integrated into statute where appropriate. It put forth three considerations that are listed in the table.

In calculating the cost of publishing the rule, take the number of pages of rules times \$56 per page. This is the annual cost. For comparison, there is no cost for publishing statutes.

For the frequency of substantive rule updates, do not count recent promulgations that primarily re-published the existing rule triggered by statutory sunsets or a failure of the legislature to approve the rule as necessary. Substantive rule updates are limited to where the actual requirements that the regulated population must follow are altered or changed.