

Appendix C:
Evaluative Criteria for Compliance:
Executive Order 12866

PROCEDURAL REQUIREMENTS..... 1
ANALYTIC REQUIREMENTS..... 17
DECISION MAKING REQUIREMENTS..... 21
JUDICIAL REVIEW 24

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) PROCEDURAL REQUIREMENTS		
QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
P1	Is the promulgating agency covered under Executive Order 12866?	<p>§3(b): “Agency,” unless otherwise indicated, means any authority of the United States that is an “agency” under 44 USC 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 USC 3502(10).</p> <p>44 USC 3502(1) [As used in this chapter--] the term “agency” means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include--</p> <p>(A) the General Accounting Office; (B) Federal Election Commission; (C) the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions; or (D) Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities.</p> <p>44 USC 3502(10)[1994]: The term “independent regulatory agency” means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission. [44 USC 3502(5) in 1994 supp. 2.]</p>

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) PROCEDURAL REQUIREMENTS			
QX#	EVALUATIVE CRITERIA		EXECUTIVE ORDER CITATION
P2	a	Did the agency seek the involvement of both those who are intended to benefit from and those expected to be burdened by the rule?	<p>§6(a)(1): <u>Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.</u></p> <p>§1(b)(9): <u>Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities.</u></p>
P2	b	Did the agency seek the views of appropriate State, local and tribal officials?	
P2	c	Did the agency afford the public a meaningful opportunity to comment on the proposed rule?	
P2	d	Did the agency explore consensual mechanisms such as negotiated rulemaking?	
P2	e	Did the agency draft its regulation to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty?	
			<p>§1(b)(12): <u>Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.</u></p>

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) PROCEDURAL REQUIREMENTS		
QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
P3	a	<p>Did the agency or OIRA determine that the rule is a “significant regulatory action” potentially subject to OIRA review?</p>
P3	b	<p>Did the Administrator of OIRA waive review?</p>

§6(a)(3)(A): [Rules] not designated as significant [by the agency] will not be subject to review under this section unless, within 10 working days of receipt of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

§3(e): “Regulatory action” means any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

§3(f): “Significant regulatory action” means any regulatory action that is likely to result in a rule that may:

- (1) Have an annual effect on the 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;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

**EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”)
PROCEDURAL REQUIREMENTS**

QX#	EVALUATIVE CRITERIA		EXECUTIVE ORDER CITATION
	For “significant regulatory actions,” did the agency submit to OIRA:		§6(a)(3)(B): <u>For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:</u>
P4	a	The text of the draft regulatory action, a reasonably detailed description of the need for the regulatory action, and an explanation of how the regulatory action will meet that need?	<p>(i) <u>The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and</u></p> <p>(ii) <u>An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President’s priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.</u></p>
P4	b	An assessment of the potential costs and benefits of the regulatory action?	
P4	c	An explanation of the manner in which the regulatory action is consistent with a statutory mandate?	
P4	d	An explanation of the manner in which the regulatory action promotes the President’s priorities?	
EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866			C-4

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) PROCEDURAL REQUIREMENTS		
QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
P4	e An explanation of the manner in which the regulatory action avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions?	

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) PROCEDURAL REQUIREMENTS				
QX#	EVALUATIVE CRITERIA		EXECUTIVE ORDER CITATION	
For “economically significant regulatory actions,” did the agency submit to OIRA:			§6(a)(3)(C): For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), <u>the agency shall also provide to OIRA the following additional information</u> developed as part of the agency’s decision-making process (unless prohibited by law): (i) <u>An assessment, including the underlying analysis, of benefits anticipated from the regulatory action</u> (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits; (ii) <u>An assessment, including the underlying analysis, of costs anticipated from the regulatory action</u> (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and (iii) <u>An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public</u> (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.	
P5	a	An assessment, including the underlying analysis, of benefits anticipated from the regulatory action?		
P5	b	An assessment, including the underlying analysis, of costs anticipated from the regulatory action?		
An assessment, including the underlying analysis, of the costs and benefits of potentially effective and reasonably feasible alternatives:				
P5	c	1		<ul style="list-style-type: none"> • identified by the agency?
P5	c	2		<ul style="list-style-type: none"> • identified by the public?

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 ("REGULATORY PLANNING AND REVIEW") PROCEDURAL REQUIREMENTS		
QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
P5	d An explanation why the selected regulatory action is preferable to identified potential alternatives?	

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) PROCEDURAL REQUIREMENTS				
QX#	EVALUATIVE CRITERIA		EXECUTIVE ORDER CITATION	
For instances where the agency did not submit these materials:			<p><u>§6(a)(3)(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rulemaking proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.</u></p>	
P6	a	<p>Does the regulation respond to an emergency?</p> <p>If yes:</p>		
P6	b	1		<p>Did the agency notify OIRA as soon as possible upon learning of such emergency?</p>
P6	b	2		<p>Did the agency comply with normal procedures to the extent practicable?</p>

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 ("REGULATORY PLANNING AND REVIEW") PROCEDURAL REQUIREMENTS					
QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION			
P6	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 5%; text-align: center;">c</td> <td>Was the agency obligated by law to act more quickly than normal review procedures allow? If yes:</td> </tr> </table>	c	Was the agency obligated by law to act more quickly than normal review procedures allow? If yes:		
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EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) PROCEDURAL REQUIREMENTS			
QX#	EVALUATIVE CRITERIA		EXECUTIVE ORDER CITATION
Public disclosure:			§6(a)(3)(E): After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall: <ul style="list-style-type: none"> (i) <u>Make available to the public the information set forth in subsections (a)(3)(B) and (C);</u> (ii) <u>Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and</u> (iii) <u>Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.</u>
P7	a	Did the agency make the information submitted to OIRA available to the public?	
P7	b	Did the agency identify for the public, in a complete, clear and simple manner, the substantive changes between the draft submitted to OIRA for review and the final action?	
P7	c	Did the agency identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA?	

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) PROCEDURAL REQUIREMENTS		
QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
P8	<p>Did OIRA return this rule to agency for further consideration?</p> <p>If yes:</p>	<p><u>§6b(2)(C): For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.</u></p>
P9	<p>a Did OIRA provide a written explanation for this return setting forth the provisions of Executive Order 12866 that form the basis for this return?</p>	
P9	<p>b Did the head of the agency provide in writing the basis for any objections to OIRA’s reasoning?</p>	

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

**EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”)
PROCEDURAL REQUIREMENTS**

QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
P10	Did OIRA document all substantive communications between OIRA personnel and persons not employed by the executive branch?	<p><u>§6(b)(4)(B): All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines:</u></p> <p>(i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);</p> <p>(ii) <u>OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and</u></p> <p>(iii) <u>OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.</u></p>

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) PROCEDURAL REQUIREMENTS			
QX#	EVALUATIVE CRITERIA		EXECUTIVE ORDER CITATION
Vice presidential and presidential consideration:			§7. Resolution of Conflicts. To the extent permitted by law, <u>disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.</u>
P11	a	Was vice presidential and presidential consideration requested?	
P11	b	When was consideration requested, and by whom?	
P11	c	During vice presidential and presidential review, were all communications with any person employed by the Federal government and the president's advisors or their staffs, or to the staff of the vice president, in writing?	§7: * * * <u>During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.</u>
P11	d	Were all such communications forwarded by the recipient to the promulgating agency (and any other affected agency) and included in each agency's public docket?	

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

**EXECUTIVE ORDER 12866 ("REGULATORY PLANNING AND REVIEW")
PROCEDURAL REQUIREMENTS**

QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
P11	<p>e Is there a complete public record of how such conflicts were resolved by the vice president or the president?</p>	<p>§7: * * *</p> <p><u>Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.</u></p> <p><u>At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.</u></p>

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CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) PROCEDURAL REQUIREMENTS			
QX#	EVALUATIVE CRITERIA		EXECUTIVE ORDER CITATION
Does OIRA’s public log contain:			<p>§6(b)(4)(C): <u>OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:</u></p> <p>(i) <u>The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;</u></p> <p>(ii) <u>A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and</u></p> <p>(iii) <u>The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.</u></p>
P12	a	The status of all regulatory actions?	
P12	b	Whether vice presidential and presidential consideration was requested, and if so, when and by whom?	
P12	c	The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications?	
P12	d	All documents exchanged between OIRA and the agency during the review by OIRA under this section?	<p>§6(b)(4)(D): <u>After the regulatory action has been published in the Federal Register or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.</u></p>

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 ("REGULATORY PLANNING AND REVIEW") PROCEDURAL REQUIREMENTS		
QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
P13	Is all information provided to the public by OIRA in plain, understandable language?	§6(b)(5): <u>All information provided to the public by OIRA shall be in plain, understandable language.</u>

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) ANALYTIC REQUIREMENTS			
QX#	EVALUATIVE CRITERIA		EXECUTIVE ORDER CITATION
A1	Did the agency identify the problem that it intends to address? If yes:		<u>§1(b)(1): 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 agency action) as well as assess the significance of that problem.</u>
A1	a	Did this problem include a failure of private markets or public institutions?	
A1	b	Did the agency assess the significance of this problem?	
A2	a	Did the agency examine whether existing regulations or other law created or contributed to the problem that the new regulatory action intends to correct?	<u>§1(b)(2): Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.</u>
A2	b	Did the agency examine whether existing regulations or other law should be modified to achieve the intended goal of regulation more effectively?	

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) ANALYTIC REQUIREMENTS		
QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
A3	Did the agency identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public?	<u>§1(b)(3): Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.</u>
A4	Did the agency consider the degree and nature of the risks posed by various substances or activities within its jurisdiction?	<u>§1(b)(4): In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.</u>

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) ANALYTIC REQUIREMENTS			
QX#	EVALUATIVE CRITERIA		EXECUTIVE ORDER CITATION
A5	<p>Did the agency determine that federal regulation was the best available method of achieving the regulatory objective?</p> <p>If yes:</p>		<p>§1(b)(5): <u>When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.</u></p>
A5	a	Did the agency design its regulation in the most cost-effective manner?	
A5	b	Did the agency consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts and equity?	
A6	a	Did the agency assess the costs of the intended regulation?	<p>§1(b)(6): <u>Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, ...</u></p>
A6	b	Did the agency assess the benefits of the intended regulation?	

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) ANALYTIC REQUIREMENTS		
QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
A7	<p>Did the agency identify and assess alternative forms of regulation?</p> <p>If yes:</p>	<p>§1(b)(8): <u>Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.</u></p>
A7	a	
A8	<p>Did the agency assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates?</p>	<p>§1(b)(9): Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. <u>Each agency shall 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.</u> In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.</p>

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) DECISION MAKING REQUIREMENTS		
QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
D1	Does the statute under which the agency is regulating require a regulatory approach other than maximizing net benefits? If no:	§1(a): [In] choosing among alternative regulatory approaches, <u>agencies should select those approaches that maximize net benefits</u> (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), <u>unless a statute requires another regulatory approach</u> .
D1	a Does the regulation maximize net benefits?	
D2	Did the agency provide a reasoned determination that the benefits of the regulation justify its costs?	§1(b)(6): <u>Each agency shall</u> assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, <u>propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs</u> .
D3	Did the agency design the regulation in the most cost-effective manner?	§1(b)(5): When <u>an agency</u> determines that a regulation is the best available method of achieving the regulatory objective, it <u>shall design its regulations in the most cost-effective manner to achieve the regulatory objective</u> . In doing so, <u>each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity</u> .
D4	Did the agency consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity?	

EVALUATIVE CRITERIA FOR COMPLIANCE: EXECUTIVE ORDER 12866

CENTER FOR THE STUDY OF AMERICAN BUSINESS PROJECT ON REGULATORY OVERSIGHT

EXECUTIVE ORDER 12866 (“REGULATORY PLANNING AND REVIEW”) DECISION MAKING REQUIREMENTS		
QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
D5	Did the agency base its decision on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation?	§1(b)(7): <u>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.</u>
D6	a	§1(b)(9): Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. <u>Each agency shall</u> 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 <u>minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives.</u> In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.
D6	b	
D7	Did the agency avoid promulgating a regulation that is inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies?	§1(b)(10): <u>Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.</u>

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D8	a	Did the agency tailor its regulation to impose the least burden on society?	§1(b)(11): <u>Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.</u>
D8	b	Did the agency tailor its regulation to impose the least burden on individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives?	
D8	c	Did the agency tailor its regulation to take into account the costs of cumulative regulations?	

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EXECUTIVE ORDER 12866 ("REGULATORY PLANNING AND REVIEW") JUDICIAL REVIEW		
QX#	EVALUATIVE CRITERIA	EXECUTIVE ORDER CITATION
	None	§10: Judicial Review. <u>Nothing in this Executive order shall affect any otherwise available judicial review of agency action.</u> This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

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