**Why are five-year-review reports required?**

* Five-year-review reports, if properly prepared, can allow an agency to:
	+ “[D]etermine whether any rule should be amended or repealed” A.R.S. § 41-1056(A);
	+ Discover potential issues with rules before problems arise;
	+ Assemble and preserve institutional knowledge; and
	+ Prevent its rules from expiring under A.R.S. § 41-1056(J).

**Which rules need to be reviewed?**

* Every five years, each agency is required to review “**all of its rules, including rules made pursuant to an exemption from this chapter or any part of this chapter**” within that five year period. A.R.S. § 41-1056(A).

**What needs to be contained in the report?**

* Under A.R.S. § 41-1056 (A)(1) – (11) and R1-6-301, each five-year-review report shall contain [items in bold are new/changed as of August 2, 2012**]**:
* Cover letter
	1. Meet the requirements under R1-6-301(C).
	2. **Certification in the cover letter that the agency is in compliance with A.R.S. § 41-1091**, which requires agencies to file substantive policy statements, annually publish a directory of such statements, and outlines other related requirements. The person preparing the report should consult with the agency director or designee (i.e., the person who signs the cover letter for the report) for questions regarding the agency’s compliance with this requirement.
* The report shall contain a concise analysis of the following for each rule:
	1. Effectiveness in achieving objectives **(including data supporting conclusions);**
	2. Written criticisms of the rule received in last five years **including any written analyses submitted to the agency questioning whether the rule is based on valid scientific or reliable principles or methods**;
	3. Authorization of the rule by existing statutes;
	4. Whether the rule is consistent with statutes/other rules;
	5. Clarity/conciseness/understandability of the rule;
	6. Estimated economic, small business and consumer impact of the rule as compared to the [EIS] prepared on the last making of the rule;
	7. Analysis submitted to the agency by another person regarding the rule’s impact on this state’s business competitiveness as compared to the competitiveness of businesses in other states;
	8. Whether the agency completed the previous five-year-review report process;
	9. A determination that the probable benefits of the rule outweigh **within this state** the probable costs of the rule, and the rule imposes the least burden and costs to persons regulated by the rule, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective;
	10. **A determination that the rule is not more stringent than a corresponding federal law unless there is statutory authority to exceed the requirements of federal law**; and
	11. **For rules adopted after July 29, 2010 that require the issuance of a regulatory permit, license or agency authorization, whether the rule complies with section 41-1037 [General permits; issuance of traditional permit].**
* Assessing the wisdom of the rules is no longer required as part of the five-year-review report.
* Under A.R.S. § 41-1056(B), an agency may also include the text of a proposed expedited rule as part of the report.

**How much detail is required for a “concise analysis” under A.R.S. § 41-1056 and R1-6-301?**

***Effectiveness in Achieving Objectives***

* An objective is “something that one’s efforts or actions are **intended to attain or accomplish**,” aka purpose, goal, or target. *Dictionary.com (emphasis added).*
* Thus, adequately addressing the true “objective” of the rule is the first vital step in analyzing whether the rule has been effective in achieving its intended goal.
* As for concisely analyzing the objective of the rule, this should cover why the rule was adopted rather than simply what the rule does.
	+ For example, a five-year-review report that states the objective of a rule is to “list the definitions related to…” would be insufficient, not only for stating the objective, but also for analyzing whether the rule is achieving its intended purpose. A better objective statement would say something like “this rule was adopted to prevent \_\_\_\_\_\_\_\_ by \_\_\_\_\_\_\_.”
	+ An example of a well-crafted objective statement for R4-21-101 is “To define terms used in the rules to make the rules understandable to the reader, achieve clarity in the rules without needless repetition, and afford consistent interpretation.”
	+ By contrast, many agencies have traditionally listed an objective statement for a definition section as “To list definitions applicable to Article 10,” which provides merely “what the rule does” rather than the “why the rule does what it does.”
* A.R.S. § 41-1056(A)(2) also requires “a summary of any available data supporting the conclusions reached.” (i.e., data supporting the conclusion that the rules are effective in achieving their objective).

***Written Criticisms***

* A summary of the comments themselves as well as the agency’s response should be included.
* This not only assists the agency in analyzing its rules for potential changes, but also provides an opportunity for an agency to formally preserve stakeholder comments and its response so it may be considered and/or incorporated for future rulemaking.
* This category also allows for submission to the agency questioning whether the rule is based on valid scientific or reliable principles or methods.
	+ Unless such analyses are submitted to the agency, this does not need to be addressed in the report other than to say that no such analysis was submitted.

***Authorization by Existing Statutes***

* Although language may vary, general authority typically looks like: “make rules and regulations for the organization and proper and efficient operation of the department…” A.R.S. § 36-104 (3).
* Specific authority, on the other hand, should look something like: “the director shall promulgate such rules and regulations as are required by state law or federal law or regulation to protect confidential information.” A.R.S. § 36-107.

***Consistency w/ Statutes and Rules***

* Should take statutory/rulemaking changes into consideration and explain how any inconsistencies are being addressed (future rulemaking) and enforced by the agency (i.e., that the agency is enforcing any inconsistencies in rule according to statute).
	+ Inconsistencies may include terms that are not uniformly used throughout the rules, citation errors, or be of a more substantive nature.

***Clarity, Conciseness, and Understandability***

* This analysis should consider the phrasing and location of sentences and subsections, along with general readability.
* This does not mean that an average reader needs to completely understand the subject matter of the rules, but the rules merely should not obstruct the reader in understanding what the rules say.
* The agency should indicate whether it believes the rules are clear, concise, and understandable or suggest how it plans to amend the rules to make them such.

***EIS***

* There are two variations of this requirement, which varies depending upon the agency’s individual circumstances, as outlined in R1-6-301(A)(8):
	+ A comparison of the current economic, small business, and consumer impact of the rule with the economic, small business, and consumer impact statement prepared on the last making of the rule or,
	+ If no economic, small business, and consumer impact statement was prepared on the last making of the rule, an assessment of the actual economic, small business, and consumer impact of the rule.
* Basically, an agency must compare the current economic impact with the estimated economic impact contained in the last making of the rule –OR—if an EIS was not prepared on the last making of the rule, the actual economic impact of the rule.

***Business Competitiveness Analysis***

* Theoretically, an agency would need to consider the rule’s impact on business competitiveness in this state compared with the impact on businesses in other states.
* This analysis is limited to consideration of materials submitted to the agency by another person.
	+ At this time, no such analysis has ever been submitted to an agency.

***Previous Five-Year-Review Report***

* R1-6-301(A)(10) requires an agency to include the anticipated month and year in which it plans to complete certain enumerated actions regarding its rules if the agency makes such a determination.
	+ This item attempts to keep tabs on that action and notify Council when and how the action was complete or why the proposed course of action from the previous five-year-review report was not completed.
* If no action was proposed in the last five-year-review report for a particular rule, a simple statement to that effect should be included for that rule.
* GRRC staff can provide electronic copies of most five-year-review reports dating back to October 2002 if needed.

***Costs vs. Benefits***

* “A determination that the rule imposes the least burden and costs to persons regulated by the rule, including paperwork and other compliance costs necessary to achieve the underlying regulatory objective.” R1-6-301(A)(11).
* Under this analysis, an agency should either:
	+ Indicate the reason the rules reviewed impose the least burden and costs to regulated persons, or
	+ State something to the effect of “The agency believes that once the changes indicated in this report are made, the rules will impose the least burden and costs to persons regulated by the rule.”
* Arguably, any changes that need to be made to the rule automatically disqualify it from being “least” burdensome and costly (at least until the changes are made).

***Stringency Compared with Federal Law***

* As a longtime component of the rulemaking analysis, the five-year-review report now offers agencies a first look into stringency compared to federal law.
	+ This is important, because under Arizona law, a state law is not allowed to be more stringent than federal law unless a there is statutory authority to exceed the requirements of federal law. A.R.S. § 41-1056(A)(12).
* This analysis should address:
	1. Whether federal law applies, including a statement explaining why federal law does or does not apply (i.e., there may not be corresponding federal law – OR – it may not apply to these rules for a number of other reasons), and
	2. Why the agency believes the rules are either less stringent than corresponding federal law or a citation to the statutory authority authorizing the rules to be more stringent.

***Compliance with A.R.S. § 41-1037***

* This is limited to those rules:
	+ **Adopted after July 29, 2010**, and
	+ **Requiring issuance of a regulatory permit, license, or agency authorization**.
* Analysis under this section should analyze applicable rules to ensure that it either issues general permits under A.R.S. § 41-1001(10) or falls within an exception under A.R.S. § 41-1037(A).

**What format does the report need to be in?**

* Although there is no precise formula or template for how an agency structures its five-year-review report, certain elements must be contained under R1-6-301(A).
	+ An agency may choose the precise format by which it presents its five-year-review report as long as each rule under review is analyzed completely.
* One common mishap in formatting, however, relates to an agency’s use of a summarizing table for identical information. Tables are not allowed, as stated in R1-6-301(B).
	+ Tables have allowed agencies to forgo analysis by summarily stating something to the effect that “The rules are effective in achieving their stated objectives” followed by a table of checkmarks showing which rules this statement applies to, without additional explanation (i.e., conclusory language rather than an analysis).
	+ In this instance, for example, an agency should tell why it believes the rules meet their stated objectives, including any data used to back up its conclusions (e.g., If a rule’s object was to decrease complaints against licensees, data could include the number of complaints before and after adoption of the rule being analyzed.).
* **R1-6-301(B)** states that “[i]f the analysis for a category is identical for all of the rules in a report, the agency shall specify that the analysis within that category applies to all of the rules in the report.”
* Most categories of analysis under R1-6-301(A) may be analyzed together; however, certain categories, such as objective, likely need to be analyzed separately because each rule should have at least a slightly different objective (if not, an agency may want to consider consolidating those rules).
* **R1-6-301** requires an agency to provide a copy of the rules being reviewed and attach a cover letter signed by agency head containing:
	1. Person to contact for information regarding the report;
	2. Any rule not renewed with the intention that it expire;
	3. Any rule not reviewed because the Council rescheduled review under A.R.S. § 41-1056(H); and
	4. Certification that the agency is in compliance with A.R.S. § 41-1091.

**What roles do Council and Council staff play in the five-year-review report process?**

* **A.R.S. § 41-1056(L)** states that “Not less than ninety days before the due date of a report, the council shall send a written notice to the head of the agency whose report is due. The notice shall list the rules to be reviewed and the date the report is due.”
	+ A list of agencies and their respective report due dates can be found on the GRRC website, which indicates the month and year by which the report shall be filed with GRRC staff.
* **R1-6-301(E)** states that the “Council staff shall review the report for compliance with the requirements of A.R.S. § 41-1056 and…[1 A.A.C. 6]…and may ask questions or suggest changes to the agency.”
* Once any necessary changes are made, the agency shall then submit a final electronic and hard copy of the entire report.
* An agency is allowed to obtain an extension of 120 days by filing a written notice of extension with the Council before the due date of the report.
	+ If an agency desires an extension of more than 120 days but less than 181 days, it must, under R1-6-303, send a written request to the Chair at least 40 days prior to the due date of the report.
* **A.R.S. § 41-1056(J)(1)** requires the Council to “[c]ause a notice to be published in the next register that states the rules have expired and are no longer enforceable” if an agency fails to submit a timely report.

**How should I prepare for writing a five-year-review report?**

* Consult the five-year-review report schedule on the [GRRC website](http://www.grrc.az.gov/forms-and-reports/5-year-review.asp).
* Review the last five-year-review report.
* Talk with your supervisor/colleagues about any comments/analyses/data applicable to the rules.
* Review the last Economic, Small Business, and Consumer Impact Statement for the rules.
* If in doubt, contact Council staff to address questions or concerns.
* If you have difficulty locating an old report, EIS, or rulemaking, please contact GRRC Staff.

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**RELEVANT CHANGES MADE IN AUGUST 2012 by HB 2744**

**41-1056. Review by agency**

**A. At least once every five years, each agency shall review all of its rules, INCLUDING RULES MADE PURSUANT TO AN EXEMPTION FROM THIS CHAPTER OR ANY PART OF THIS CHAPTER, to determine whether any rule should be amended or repealed. The agency shall prepare and obtain council approval of a written report summarizing its findings, its supporting reasons and any proposed course of action. THE REPORT SHALL CONTAIN A CERTIFICATION THAT THE AGENCY IS IN COMPLIANCE WITH SECTION 41-1091. For each rule, the report shall include a concise analysis of all of the following:**

**1. The rule's effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached.**

**2. Written criticisms of the rule received during the previous five years, INCLUDING ANY WRITTEN ANALYSES SUBMITTED TO THE AGENCY QUESTIONING WHETHER THE RULE IS BASED ON VALID SCIENTIFIC OR RELIABLE PRINCIPLES OR METHODS.**

**3. Authorization of the rule by existing statutes.**

**4. Whether the rule is consistent with STATUTES OR other rules made by the agency, AND current agency enforcement policy and current agency views regarding the wisdom of the rule.**

**5. The clarity, conciseness and understandability of the rule.**

**6. The estimated economic, small business and consumer impact of the rules as compared to the economic, small business and consumer impact statement prepared on the last making of the rules.**

**7. Any analysis submitted to the agency by another person that compares REGARDING the rule's impact on this state's business competitiveness to the impact on AS COMPARED TO THE COMPETITIVENESS OF businesses in other states.**

**8. If applicable, that the agency completed the previous five-year review process.**

**9. A determination that the PROBABLE BENEFITS OF THE RULE OUTWEIGH WITHIN THIS STATE THE PROBABLE COSTS OF THE RULE, AND THE rule imposes the least burden and costs to persons regulated by the rule, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective.**

**10. A DETERMINATION THAT THE RULE IS NOT MORE STRINGENT THAN A CORRESPONDING FEDERAL LAW UNLESS THERE IS STATUTORY AUTHORITY TO EXCEED THE REQUIREMENTS OF THAT FEDERAL LAW.**

**11. FOR RULES ADOPTED AFTER JULY 29, 2010 THAT REQUIRE THE ISSUANCE OF A REGULATORY PERMIT, LICENSE OR AGENCY AUTHORIZATION, WHETHER THE RULE COMPLIES WITH SECTION 41-1037.**

**B. AN AGENCY MAY ALSO INCLUDE AS PART OF THE REPORT THE TEXT OF A PROPOSED EXPEDITED RULE PURSUANT TO SECTION 41-1027.**