

Regulatory Analysis Form

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INDEPENDENT REGULATORY
REVIEW COMMISSION

(1) Agency

Pennsylvania Board of Pardons

(2) I.D. Number (Governor's Office Use)

056-003

IRRC Number: 2525

(3) Short Title

37 Pa. Code, CH. 81, § 81.282 (Representation of Applicant)

(4) PA Code Cite

37 Pa. Code § 81.282

(5) Agency Contacts & Telephone Numbers

Primary Contact: John L. Heaton, Esq. (717) 787-8125
Secretary, Board of Pardons

Secondary Contact: Alison Taylor (717) 772-4262
Deputy General Counsel

(6) Type of Rulemaking (check one)

- Proposed Rulemaking
 Final Order Adopting Regulation
 Final Order, Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

- No
 Yes: By the Attorney General
 Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

The purpose of the amendment is to make clear that persons who, by reason of mental incompetence or other mental disability, are unable to apply for clemency on their own or to designate an individual to act on their behalf may nevertheless make application with the Board for clemency. This amendment will also make clear that applicants may be represented by a public defender or other court-appointed attorney. This amendment will protect a mentally incompetent person's constitutional right to due process of law and his or her rights under the Americans with Disabilities Act.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

71 P.S. § 299 – Authorizes the Board to “adopt rules and regulations governing its actions and no hearings or recommendations shall be contrary thereto.”

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(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

The United States Supreme Court in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), determined that state clemency processes may require some minimal due process protections, including an opportunity to be heard or to present a case in support of a position. Mentally incompetent persons who are prevented from stating their case for clemency before the Board or to even designate a representative to act on their behalf, because of mental incapacity, could argue they are denied due process. In addition, if such mental incapacity is deemed a disability under the Americans with Disabilities Act (ADA), being denied access to a state's clemency process because of such incapacity arguably violates the ADA.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The regulation as amended will enable mentally incompetent persons, who are unable to apply for clemency on their own or designate another person to act on their behalf, to file a clemency application with the Board. The regulation as amended will protect such mentally incompetent persons' constitutional rights to due process of law and their rights under the Americans with Disabilities Act.

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

None.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

The amendment will enable mentally incompetent persons to seek clemency through a court-appointed representative.

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(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

There will be no adverse effects to the adoption of this amendment to 37 Pa. Code § 81.282.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

No groups or persons will be required to comply with the proposed amended regulation. The regulation is being amended to make clear that mentally incompetent persons are not prevented from making application for clemency.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

The proposed amendment was drafted in conjunction with the Office of Attorney General.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

No costs and/or savings are anticipated due to the adoption of this amendment to 37 Pa. Code § 81.282.

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(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

No costs and/or savings are anticipated due to the adoption of this amendment to 37 Pa. Code § 81.282.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

No costs and/or savings are anticipated due to the adoption of this amendment to 37 Pa. Code § 81.282.

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(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Savings	0	0	0	0	0	0
COSTS:	0	0	0	0	0	0
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Costs	0	0	0	0	0	0
REVENUE LOSSES:	0	0	0	0	0	0
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Revenue Losses	0	0	0	0	0	0

(20a) Explain how the cost estimates listed above were derived.

No costs and/or savings are anticipated due to the adoption of this amendment to 37 Pa. Code § 81.282.

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(20b) Provide the past three year expenditure history for programs affected by the regulation.

N/A

Program	FY -3	FY -2	FY -1	Current FY

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

N/A

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

None. However, the Board believed a Court could determine that the current regulation violated a mentally incompetent person's due process right to seek clemency and discriminated against such a person under the Americans with Disabilities Act. Recently, an inmate sentenced to death raised such challenges to the current regulation, and that litigation is pending in the Luzerne County Court of Common Pleas following remand by the Pennsylvania Supreme Court. This amendment should insulate the Board from future legal challenges on these grounds.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

None. The Board determined that amending 37 Pa. Code § 81.282 in this way was the most effective legal course to take.

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(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

No.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

It is similar to clemency regulations in other states regarding the application process for mentally incompetent persons. This amended regulation will not put Pennsylvania at a competitive disadvantage with other states.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

No.

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(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

No. Applications from mentally incompetent persons pursuant to this amended regulation will be processed and evaluated according to already existing regulations.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

No special provisions of this type were developed.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

This amendment will become effective upon publication in the *Pennsylvania Bulletin*.

(31) Provide the schedule for continual review of the regulation.

This amendment will be reviewed at least annually.

CDL-1

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FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

INDEPENDENT REGULATORY
REVIEW COMMISSION

(Pursuant to Commonwealth Documents Law)

DO NOT WRITE IN THIS SPACE

#2525

Copy below is hereby approved as to
form and legality. Attorney General

Copy below is hereby certified to be a true and correct
copy of a document issued, prescribed or promulgated by:

Copy below is approved as
to form and legality.
Executive or Independent
Agencies.

BY: _____
(DEPUTY ATTORNEY GENERAL)

PENNSYLVANIA BOARD OF PARDONS

(AGENCY)

[Signature]
BY: _____
DAVID J. DEURIES

DOCUMENT/FISCAL NOTE NO. 056-003

DATE OF APPROVAL _____

DATE OF ADOPTION _____

FEB 02 2006

DATE OF APPROVAL _____

BY: *[Signature]*

EXECUTIVE

Deputy General Counsel
(~~Chief Counsel~~
~~Independent Agency~~)

(Strike inapplicable title)

TITLE: *Secretary*
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

[] Check if applicable
Copy not approved.
Objections attached.

[] Check if applicable.
No Attorney General approval
or objection within 30 days
after submission.

FINAL RULEMAKING/PROPOSED OMITTED
COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA BOARD OF PARDONS

37 PA. CODE, CH. 81
§ 81.282
REPRESENTATION OF APPLICANT

PREAMBLE

THE PENNSYLVANIA BOARD OF PARDONS 37 PA CODE CHAPTER 81: BOARD OF PARDONS

The Pennsylvania Board of Pardons adopts a proposal to amend 37 Pa. Code § 81.282, concerning "Representation of Applicant," of the Board's regulations. The proposed amended section is set forth in Annex A. The Board is publishing this amended section as a final regulation with notice of proposed rulemaking omitted.

AUTHORITY

This amendment is promulgated in response to the requirements of the Act of June 1, 1995 (P.L. 1017, No. 15) (Spec. Sess. No. 1) (Act 1995-215).

PURPOSE AND LEGAL REQUIREMENTS

The purpose of the amendment is to make clear that persons who, by reason of mental incompetence or other mental disability, are unable to apply for clemency on their own or to designate an individual to act on their behalf may nevertheless make application with the Board for clemency. This amendment will also make clear that applicants may be represented by a public defender or other court-appointed attorney. This amendment will protect a mentally incompetent person's constitutional right to due process of law and his or her rights under the Americans with Disabilities Act.

REGULATORY REVIEW

Under § 5.1 9(c) of the Regulatory Review Act (Act) (71 P.S. § 745.5a(c)), the Board submitted a copy of the regulation with proposed rulemaking omitted on _____ to the Independent Regulatory Review Commission (IRRC), the Senate and House Judiciary Committees. On the same date, the regulation was submitted to the Office of Attorney General for review and approval pursuant to the Commonwealth Attorneys Act.

In accordance with § 5.1 (j.1) and (j.2) of the Act, this regulation was (deemed) approved by the Committees on _____. The IRRC met on _____ and approved the regulation.

AFFECTED PARTIES

The amendment will affect mentally incompetent persons, as well as other persons authorized by law to act on behalf of the mentally incompetent person and to appear before the Board on behalf of the incompetent person.

EFFECTIVE DATE

This amendment will become effective upon publication in the *Pennsylvania Bulletin*.

CONTACT PERSON

For further information regarding this amendment, contact John L. Heaton, Esq., Secretary of the Pennsylvania Board of Pardons, 333 Market Street, 15th Floor, Harrisburg, PA, 17126-0333, (717) 787-8125.

Findings

(1) Public notice of the Board's intention to amend its regulations as adopted by this order, under the procedures specified in §§ 201 and 202 of the Commonwealth Documents Law (CDL) has been omitted under the authority contained in § 204 ((1)(iii) of the CDL (45 P.S. § 1204(1)(iii)), because the Board has found that the rulemaking relates to agency practice and procedure.

(2) The amendment of the regulations of the Board in this manner provided in this order is necessary and appropriate for administering the Constitution of Pennsylvania. Pa. Const. art. IV, § 9.

Order

The Board of Pardons, acting under Article IV, § 9 of the Pennsylvania Constitution, orders that:

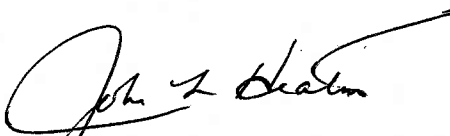
(a) The regulations of the Board, 37 Pa. Code Chapter 81, are amended by amending § 81.282 (relating to "Representation of Applicant") to read as set forth in Annex A.

(b) The Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

(c) The Board shall certify this order and the attached Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall become effective immediately upon publication in the *Pennsylvania Bulletin*.

By the Pennsylvania Board of Pardons:



Secretary

Annex A

TITLE 37. LAW

PART III. AGENCIES AND OFFICES

Subpart A. BOARD OF PARDONS

CHAPTER 81. BOARD OF PARDONS

REPRESENTATION

§ 81.282. Representation of applicant.

The applicant may be represented by [privately retained] legal counsel or another person designated by the applicant. The applicant may also be represented by a legal guardian, next friend or other person authorized by law to act on behalf of the applicant. If confined, the applicant may request representation from the Department of Corrections.

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 56-003
 SUBJECT: Representation of Applicant
 AGENCY: PENNSYLVANIA BOARD OF PARDONS

#2525

TYPE OF REGULATION

- Proposed Regulation
- Final Regulation
- X Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

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 REVIEW COMMISSION

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
2/9	<i>Chestine Crowe / O'Brien</i>	HOUSE COMMITTEE ON JUDICIARY
2/9	<i>Mari Santono / Caltagirone</i>	
2/9	<i>Peggy Thasler / Sen. Greenleaf</i>	SENATE COMMITTEE ON JUDICIARY
2/9	<i>M. Mummert</i>	
2/9/06	<i>Steph J. Hoff</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
2-9-06	<i>Mary Mummert</i>	ATTORNEY GENERAL (for Final Omitted only)
		LEGISLATIVE REFERENCE BUREAU (for Proposed only)