

2019

THE REGULATORY REVIEW
PROCESS IN PENNSYLVANIA



PREFACE

The General Assembly passed the Regulatory Review Act (RRA) in 1982. The RRA established the Independent Regulatory Review Commission (IRRC) to provide uniform oversight of the rulemaking process in Pennsylvania and to act as a consensus builder among Commonwealth agencies, legislative standing committees, and interested parties. IRRC is charged with reviewing all regulations that Commonwealth agencies propose for promulgation, except those of the Pennsylvania Game Commission and the Pennsylvania Fish and Boat Commission.

IRRC accomplishes the goals of the RRA typically through a two-stage review process. First, IRRC reviews an agency's proposed regulation and any accompanying comments from the public and the General Assembly, and issues formal comments when necessary. Second, IRRC reviews and takes action on the final version of the regulation before it is published as a final rule.

There are five IRRC Commissioners, each of whom is appointed by a different appointing authority. The appointing authorities are the Governor, the President Pro Tempore of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives, and the Minority Leader of the House of Representatives. A Commissioner may not be a Commonwealth employee or hold an elected or appointed position in state government.

IRRC also acts as a clearinghouse for complaints, comments, and other input from the General Assembly and the public regarding proposed and final regulations, as well as existing regulations. It further assists agencies and the public by conducting seminars and workshops.

This manual is devoted to a discussion of the RRA, related laws, and how IRRC and others involved in the review process conduct their business. Sections I and III provide both an overview and a detailed analysis of the regulatory review process. Section II explains statements of policy and the very limited circumstances under which they may fall under review. Section IV offers opportunities for agencies to build consensus with regulated communities. Section V describes aspects of the review process that are used less frequently than those described in the previous sections. Sections VI and VII include information on IRRC's Annual Report and website, respectively. The Appendices provide additional explanatory material on information contained in this manual.

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I. AN OVERVIEW OF THE RULEMAKING PROCESS

A. GENERALLY

Pursuant to their respective enabling statutes, Commonwealth agencies have the authority, discretion and, to the extent necessary, the responsibility to promulgate regulations. Depending upon the circumstances, an agency may have to:

1. Create, amend, or repeal a regulation to implement legislation;
2. Ensure that existing regulations do not conflict with a recently enacted or amended federal or state regulation or statute;
3. Comply with a decision of a state or federal court; or
4. Clarify an existing regulation.

The catalyst for change may be internal or external. However, an agency has the discretion to update an existing regulation in order to improve the way it operates consistent with its enabling legislation.

Entities included in the regulatory review process are the promulgating agency, IRRC, legislative standing committees (Committee), the Office of General Counsel (General Counsel), the Office of the Budget, the Office of Attorney General (Attorney General), the Legislative Reference Bureau (LRB), the Joint Committee on Documents (JCD), and members of the public, the regulated community, and their representatives.

Pennsylvania has four statutes that govern the regulatory review process. They are the following:

- **Commonwealth Documents Law (CDL)** (*45 P.S. §§ 1102 – 1208*), which outlines the procedural steps in the preparation of a regulation;
- **The Administrative Code of 1929 (Administrative Code)** (*71 P.S. § 232*), which requires the Office of the Budget to prepare a fiscal note for regulations;
- **Commonwealth Attorneys Act** (*71 P.S. §§ 732-101 – 732-506*), which provides for legal review and approval by the General Counsel and the Attorney General; and
- **Regulatory Review Act (RRA)** (*71 P.S. §§ 745.1 – 745.15*), which provides for oversight and review by IRRC and the General Assembly.

Additionally, IRRC promulgated regulations to provide further instructions for complying with the RRA, which are found at *1 Pa. Code Chapters 301 – 315*. Regulations pertaining to the functions of the JCD and the LRB are found at *1 Pa. Code Chapters 1 – 17*.

An agency under the Governor’s jurisdiction should also review any executive order or other administrative circular in effect at the time it plans to proceed with the regulatory review process.

Most of this manual is dedicated to explaining the typical **two-stage review process** of the RRA. The two stages include a time for review and comment on proposed regulations, and a period for review and action on final regulations. Both stages are addressed in detail in Section III of this manual. A chart outlining the basic process can be found in Appendix A of this manual.

B. APPLICABLE LAWS

1. CDL – *Framework & LRB*

The CDL, enacted in 1968, establishes the basic structure for the rulemaking process. It lists the steps through which a proposed regulation must proceed before it may be adopted. *See 45 P.S. §§ 1102 – 1208.*

The CDL also created the *Pennsylvania Code* and the *Pennsylvania Bulletin*, publications of the LRB’s Pennsylvania Code and Bulletin Office. The weekly *Pennsylvania Bulletin* includes proposed and final rulemakings, agency notices, Governor’s proclamations and executive orders, and actions by the General Assembly and the Unified Judicial System. The *Pennsylvania Code* is the Commonwealth’s official publication for final rules and regulations. Pennsylvania Code and Bulletin Office editors and staff compile and edit documents, and verify that all legal requirements for publication are met. They work closely with agency personnel during the publication process. The Pennsylvania Code and Bulletin Office also developed a *Style Manual* to provide guidance to agencies drafting regulations. The *Style Manual* is available on IRRC’s website at www.irrc.state.pa.us/resources/docs/PA_Code_and_Bulletin_Style_Manual.pdf.

The CDL requires an agency to publish notice of its intention to promulgate, repeal, or amend a regulation. This notice, which is published in the *Pennsylvania Bulletin*, must include:

- The text of the proposed regulation, indicating any changes in the language of the existing regulation;
- The agency’s statutory authority to propose the regulation;
- A brief explanation of the proposed regulation or any amendments;
- A request for comments with a deadline for submittal of comments; and
- Any other statement required by law.

45 P.S. § 1201.

Before taking any action on a regulation, the agency must review and consider written comments submitted. *45 P.S. § 1202.*

2. Administrative Code – *Fiscal Notes*

The Administrative Code directs the Office of the Budget to prepare a fiscal note for regulatory actions of administrative departments, boards, commissions, or authorities that receive money from the State Treasury. The fiscal note must state the costs of the proposed action for programs of the Commonwealth or local governments. It must be published in the *Pennsylvania Bulletin* at the same time as the proposal and contain the following information:

- The fund or appropriation source providing the expenditures for the proposal;
- The probable cost of implementing the proposal in its first fiscal year, and a projected cost estimate for each of the next five fiscal years;
- The fiscal history of the program expenditures;
- The probable loss of revenue for the fiscal year of its implementation, and the projected loss of revenue for each of the next five fiscal years; and
- The recommendation, if any, of the Secretary of the Budget.

71 P.S. § 232. There is no statutory deadline for the Office of the Budget review.

3. Commonwealth Attorneys Act – *Legal Review*

The Commonwealth Attorneys Act provides for the review of a regulation as to form and legality. *71 P.S. §§ 732-204(b), 732-301(10).* Before publication in the *Pennsylvania Bulletin*, a regulation must pass legal muster by being in proper form, statutorily authorized, and constitutional. *See 1 Pa. Code § 13.16.* The General Counsel and the Attorney General both perform this function, but do so independently of each other. They both review regulations first as proposed, and then again in final form.

Proposed and final-form regulations must be prepared by either an executive or independent agency. They are initially reviewed for form and legality by the agency's legal office. Independent agencies submit their regulations directly to the Attorney General. Executive agencies must have the General Counsel's approval before submitting their regulations to the Attorney General.

a. General Counsel

The General Counsel is responsible for advising the Governor and providing legal services to executive agencies – *i.e.*, all agencies that fall under the jurisdiction of the Governor. Therefore, the General Counsel may question every aspect of an executive agency's proposed or final-form regulation, either as a matter of policy or as a matter of law. The General Counsel reviews a regulation to determine if:

- It is clearly drafted;
- The preamble satisfactorily explains the purpose of, need for, and statutory basis of the regulation; and

- The Regulatory Analysis Form (RAF), as described in Appendix C of this manual, is completed correctly.

There are no statutory time restrictions for the General Counsel’s review. However, the General Counsel may establish its own limit as a matter of policy.

b. Attorney General

The Attorney General is an independent agency that, among other things, reviews all regulations from both executive and independent agencies at two separate points in the process. (The CDL and the RRA also provide for Attorney General review.) In addition to **constitutionality** and **statutory authority**, the Attorney General’s review includes:

- Consistency with governing statute, and other statutes and case law;
- Proper form and structure; and
- Compliance with the regulatory review process.

The Attorney General initially reviews proposed regulations before the regulatory review process begins under the RRA. This review must be completed within 30 days after submission by the agency.

During this 30-day period, the Attorney General must convey any legal concerns related to the regulation to the General Counsel or the independent agency counsel. If legal issues are raised, the time for Attorney General review is put on hold or “tolled.” During this hiatus, the agency is expected to cooperate with the Attorney General to reach a consensus or resolution. Independent agencies usually respond directly to the Attorney General. Executive agencies generally work through the General Counsel in preparing a response.

If the Attorney General takes no action within 30 days, the regulation is deemed to be approved. Upon approval, the regulation can proceed through the regulatory review process.

At the final-form stage, the sequence of review is reversed. The Attorney General’s review takes place following final action by IRRC and the Committees. This is because only the Attorney General may direct an agency to make changes to a final-form regulation approved by IRRC and the Committees under the RRA. *71 P.S. § 745.8(b). See also 71 P.S. § 732-204(b).*

If the issues raised by the Attorney General during this review period are not resolved, the Attorney General may disapprove the regulation. Upon disapproval, the Attorney General must notify the General Counsel or independent agency, the Secretary of the Senate, and the Chief Clerk of the House of Representatives of the reasons for the disapproval. A disapproved regulation may be published with or without revisions. However, if the agency chooses to publish the regulation without revisions, it must also publish the Attorney General’s objections. The Attorney General may appeal the agency’s decision to Commonwealth Court and may request a stay to prevent the implementation of the regulation. *71 P.S. § 732-204(b).*

If the Attorney General approves the regulation, it can be published in the *Pennsylvania Bulletin*. The regulation becomes effective on the date of publication or on a later date specified by the agency in the order adopting the regulation.

4. RRA – *Formal Review Process*

The RRA was enacted in 1982 to address concerns by the legislature regarding the promulgation of regulations. *71 P.S. §§ 745.1 – 745.15*. The intent of the RRA is summarized as follows:

- Establish a method for ongoing and effective legislative review and oversight to foster executive branch accountability;
- Provide for primary review by a commission with sufficient authority, expertise, independence, and time to perform that function;
- Provide ultimate review of regulations by the General Assembly;
- Assist the Governor, Attorney General, and General Assembly in their supervisory and oversight functions; and
- Encourage the resolution of objections to a regulation and the reaching of a consensus among the agency, the Committees, interested parties, and IRRC.

71 P.S. § 745.2(a). The RRA was reenacted in 1989, establishing the current two-step oversight process, and has been amended several times over the years.

The RRA applies to every department, departmental administrative board or commission, independent board or commission, agency, or other authority of this Commonwealth, except the Senate, the House of Representatives, the Pennsylvania Fish and Boat Commission, the Pennsylvania Game Commission, or any court, political subdivision, or municipal or local authority. (*See the definition of “agency” at 71 P.S. § 745.3.*)

The RRA provides for a two-stage process for most regulations, which is described in greater detail in Section III of this manual. At the outset, **the top two criteria used to evaluate every regulation are statutory authority and legislative intent**. Once IRRC makes a finding that a regulation satisfies these two criteria, it must apply the remaining eight criteria to determine if a regulation is “in the public interest.” *71 P.S. § 745.5b*. The review criteria can be found in Section III.A.4 and Appendix B of this manual.

The promulgating agency has broad discretion to determine the scope of a regulation and when to introduce a regulation into the process. However, once a regulation has been submitted to IRRC under the RRA, it is subject to the specific timelines described in this manual. **Only the RRA guides the legislative oversight process for regulations**. Although the other previously described statutes affect the process, the RRA actually controls the timeline for review and promulgation of a regulation.

II. STATEMENTS OF POLICY

Statements of policy (SOP), unlike regulations, provide guidance by which agency personnel carry or will carry out their duties authorized by state law. They can contain instructions based on the agency's interpretation of statutory or regulatory requirements which can be applied on a case-by-case basis, and give the agency the discretion to deviate from their terms.¹ *See also 45 P.S. § 1102(13)*. An SOP does not expand upon the plain meaning of a statute or regulation and is not binding upon third parties. The agency issuing the SOP cannot apply or rely upon it as law because it is merely a policy document. In determining whether an agency has attempted to establish a binding norm, a court must consider: the plain language of the SOP; the manner in which the agency implements it; and whether the SOP restricts the agency's discretion in its implementation.²

An SOP is not required to proceed through the regulatory review process. However, merely referring to a document as an SOP does not necessarily make it so. If IRRC finds that an agency is enforcing an SOP and is, in effect, making compliance mandatory, then it may present the matter to the JCD for further review.

A. JOINT COMMITTEE ON DOCUMENTS

The JCD is an administrative board within the Department of General Services. It oversees and directs the functions of the LRB and publication of the *Pennsylvania Code* and *Pennsylvania Bulletin*. Members of the JCD include the Attorney General, the Director of the LRB, the Director of the Pennsylvania Code and Bulletin Office, the General Counsel, the President Pro Tempore of the Senate, the Minority Leader of the Senate, the Speaker of the House, the Minority Leader of the House, the Secretary of the Department of General Services (or their designees), and two public members appointed by the Governor. Under the RRA, the JCD also reviews IRRC's regulations and serves as the arbiter as to whether an SOP or other agency document should be promulgated as a regulation.

If IRRC or a Committee finds that an SOP or agency document should be promulgated as a regulation, IRRC or the Committee may present the matter to the JCD for review. If the JCD determines that the SOP or other document is being used improperly, it may order the agency either to promulgate it as a regulation within 180 days or stop using it altogether in the business of the agency. *71 P.S. § 745.7a*.

¹ *Borough of Bedford v. Dept. of Environmental Protection*, 972 A.2d 53 (Pa. Cmwlth 2009).

² *Northwestern Youth Services, Inc., et al. v. Dept. of Public Welfare*, 1 A.3d 988 (Pa. Cmwlth 2010), *citing* *Cash America Net of Nevada LLC v. Commonwealth*, 978 A.2d 1028 (Pa. Cmwlth. 2009). *See also* *Dept. of Environmental Res. v. Rushton Mining Co.*, 591 A.2d 1168, 1173 (Pa. Cmwlth 1991) (one must look to the extent to which the pronouncement leaves the agency free to exercise discretion to follow or not follow the announced policy in an individual case).

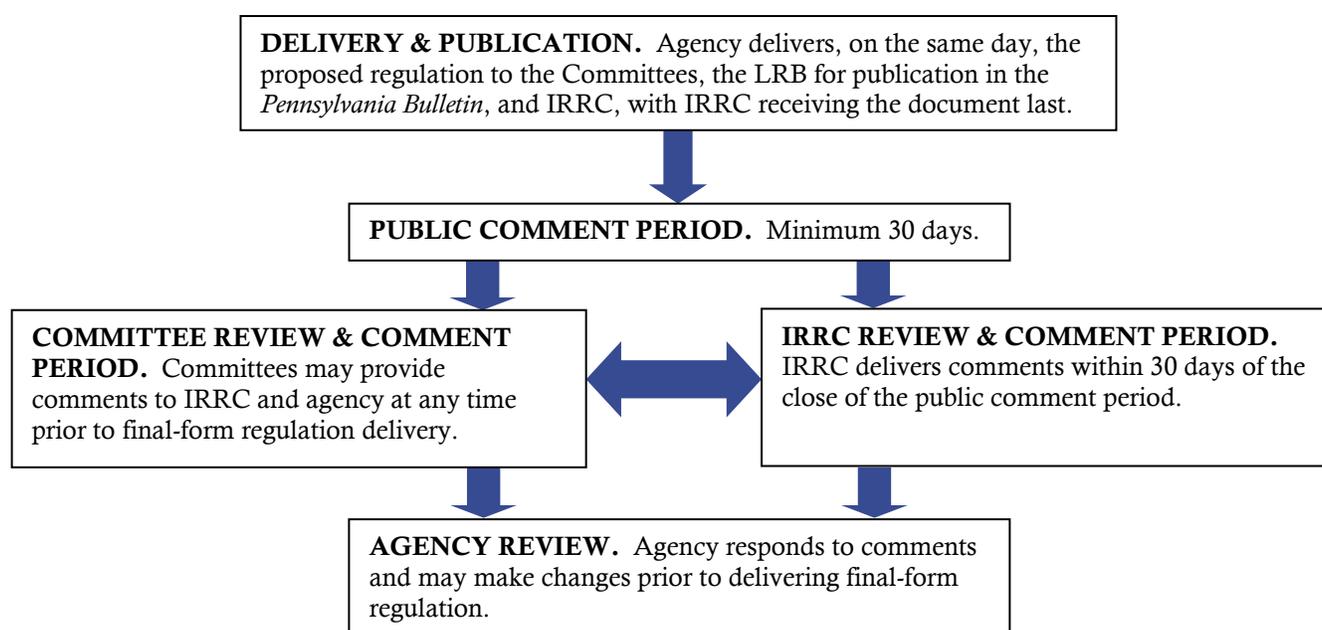
B. LITIGATION

The more widely used method of challenging an SOP is a petition for review filed in Commonwealth Court. Petitioners generally contend that the document in question is invalid or unenforceable because it was not promulgated as a regulation pursuant to the CDL and/or the RRA.

III. THE REGULATORY REVIEW PROCESS

IRRC reviews regulations through a two-stage process. First, IRRC reviews an agency’s proposed regulation and any accompanying comments from the public, members of the General Assembly, and the Committees. It may also issue comments on the regulation based on the criteria set forth in the RRA. Second, after a final-form regulation is submitted by the agency, IRRC reviews and takes action on the final version before it is published as a final rule. A chart outlining this basic process can be found in Appendix A of this manual, and a more detailed explanation follows in this section. Additionally, checklists for delivering proposed and final-form regulations are located in Appendices D and E of this manual, respectively, and on IRRC’s website at www.irrc.state.pa.us/documents/agency_toolbox.cfm.

A. PROPOSED STAGE



1. Delivery and Publication of the Proposed Regulation

Review of proposed regulations under the RRA begins after the Attorney General’s approval. The agency delivers its proposed regulation to the Committees, the LRB, and IRRC **on the same day, with IRRC receiving the document last.** *71 P.S. § 745.5(a); 1 Pa. Code § 305.1.* A completed RAF and preamble, which summarizes the regulation and outlines its purposes, must accompany the regulation. Also required is a face sheet (indicating agency and legal approval) and a transmittal sheet (signed by IRRC, the LRB, and designated majority and minority Committee Chairs). *1 Pa. Code § 305.1(b).*

The LRB publishes the preamble and regulation in the *Pennsylvania Bulletin*. The preamble also contains the deadline for submittal of comments by the public, and should include a detailed explanation of the purpose for the regulation. A copy of the regulation, as delivered to IRRC, the Committees, and the LRB is also available on IRRC’s website at www.irrc.state.pa.us.

The RAF is not published in the *Pennsylvania Bulletin* but it is posted on IRRC's website with the proposed regulation. It is also available for inspection and copying at either the agency or IRRC. The information to be provided in the RAF can be found in Appendix C of this manual.

The LRB has editorial privileges and, prior to publication, may revise the text of proposed regulations pursuant to *45 Pa.C.S. § 723*. Revisions may include editing regulations for grammar, style, and consistency; reformatting; renumbering; and correcting legal citations. **The proposed regulation published in the *Pennsylvania Bulletin* is the official version of the document and should be used as the source document when developing the final-form regulation.**

After the end of a legislative session, or *sine die* adjournment, an agency may deliver a proposed regulation and related materials to IRRC and the LRB. However, the agency may **not** deliver the proposed regulation to the Committees until after the start of the next legislative session. The earliest that the regulation may be delivered to the Committees is the fourth Monday in January of the next year or after both Committees have been designated, whichever is later. The latest that the regulation may be delivered to the Committees is the second Monday after the Committee designations have been published in the *Pennsylvania Bulletin*. **Regulations published as proposed that are not delivered to the Committees within this timeframe are deemed to have been withdrawn.** If the agency wants to promulgate the regulation, it must deliver a new proposed regulation to IRRC, the Committees, and the LRB. (*For a more detailed explanation regarding delivery of proposed regulations during the sine die period, refer to 71 P.S. § 745.5(f) and 1 Pa. Code § 311a.1.*)

FAQ #1

How long does it take for the proposed regulation to be published in the *Pennsylvania Bulletin*? ANSWER: The average time is between seven to ten days from receipt of the regulation by the LRB.

2. Public Comment Period

Anyone may submit comments to the agency during the public comment period set forth in the preamble. **Public comment periods must be at least 30 days.** *71 P.S. § 745.5(b)*. However, they may be shorter if exigent circumstances exist, or longer if the agency so chooses or when required by law.

Depending upon the circumstances, an agency may extend or reopen the public comment period by delivering notice to IRRC and the Committees, and by publishing a notice in the *Pennsylvania Bulletin*. *1 Pa. Code § 305.3(b)*. If the public comment period is reopened, then IRRC's time for review and the two-year deadline for delivering the final-form regulation will be extended accordingly. *1 Pa. Code § 305.3(c)*.

The RRA requires the agency to forward copies of all comments it receives to the Committees and IRRC within five business days of receipt. *71 P.S. § 745.5(c); 1 Pa. Code § 305.2(b)*. If a comment indicates that a copy was sent to IRRC and the agency verifies delivery, the agency is not required to deliver another copy. *1 Pa. Code § 305.2(a)(1)*. Within five business days of receipt, the agency must also notify all commentators of the procedure for requesting additional information on the final-form regulation. *71 P.S. § 745.5a(a); 1 Pa. Code § 305.2(d)*.

After the end of a legislative session, or *sine die* adjournment, an agency may deliver comments to IRRC as provided above, but it may not deliver them to the Committees until after the start of the next legislative session as explained in Section III.A.1 of this manual. (*For a more detailed explanation regarding delivery of comments during the sine die period, refer to 1 Pa. Code §§ 311a.2, 311a.3.*)

**PRACTICE
TIP #1**

Any person or entity affected by regulations should review proposed regulations and carefully consider the need to submit comments. Concerned citizens and experts in related fields may also want to submit comments supporting proposed regulations or offering suggestions for improvement. Written comments may contain useful information that agency staff can use to refine regulations to implement better and more efficient methods for attaining their policy objectives.

**PRACTICE
TIP #2**

Persons interested in a regulation are encouraged to file comments with IRRC, the Committees, and the agency.

During its review, IRRC conducts independent outreach to notify groups and individuals who might be impacted by a proposed regulation. If IRRC receives comments that have not also been submitted to the agency, it will forward copies to the agency. Comments can be sent to IRRC by mail to 333 Market Street, 14th Floor, Harrisburg, PA 17101, by fax to (717) 783-2664 or by e-mail to irrc@irrc.state.pa.us. **All comments received are made part of IRRC's public regulation file, and are retained for at least four years following final promulgation of the regulation. *71 P.S. § 745.5a(k)*. These comments are also scanned and placed on IRRC's website in the exact manner in which they are received by the agency or IRRC; they are not edited in any way by IRRC.** (*Agencies may wish to advise commentators to consider this when deciding whether to include any personal information as part of their comments.*) The files are available for public review at IRRC's office during normal working hours and on IRRC's website at www.irrc.state.pa.us.

**PRACTICE
TIP #3**

Final-form regulations are not published prior to their approval. Therefore, if commentators want notification of the final-form regulation and related information, they should inform the agency either before the close of the public comment period or in accordance with any instructions provided by the agency.

3. Standing Committee Review

Both the House of Representatives and the Senate form standing committees of their members to oversee specific subject and policy matters and agencies. One of the functions of a standing committee includes the review of regulations. (Committee assignments and schedules can be found on the General Assembly's website at www.legis.state.pa.us.)

Committees may submit comments, recommendations, and objections to the agency and IRRC at any time prior to the agency's delivery of the final-form regulation. They have broad discretion in how they conduct their review – comments, recommendations, and objections may refer to any of the criteria established by Section 5.2 of the RRA (which are listed in detail in the following subsection and in Appendix B of this manual) or they may raise concerns outside of those criteria. Unlike IRRC, the Committees do not forfeit their ability to disapprove a final-form regulation by failing to comment on the proposed regulation.

4. IRRC Review

IRRC's formal review timeline begins at the close of the public comment period. IRRC must submit its comments, recommendations, and objections within 30 days of the close of the public comment period. *71 P.S. § 745.5(g)*. Using the official version of the regulation as published in the *Pennsylvania Bulletin*, IRRC's comments, recommendations, and objections are based on the criteria contained in Section 5.2 of the RRA. *71 P.S. § 745.5(g); 1 Pa. Code § 305.3(e)*. (See *Appendix B of this manual*.)

IRRC must first and foremost determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intent of the General Assembly. To determine whether a regulation meets the statutory authority and legislative intent criteria, IRRC may examine:

- Language used in the authorizing statute;
- Comments of the Committees and members of the General Assembly;
- Comments in the *Legislative Journal*;
- Pertinent legal precedents; and
- Attorney General opinions.

IRRC must also consider the following criteria to determine if the regulation is in the public interest:

- Economic or fiscal impacts;
- Protection of the public health, safety, and welfare, and effect on this Commonwealth's natural resources;
- Clarity, feasibility, and reasonableness;
- Policy decision of such a substantial nature that it requires legislative review;
- Whether the regulation is supported by acceptable data;
- Whether a less costly or less intrusive alternative method of achieving the goal of the regulation has been considered for a regulation impacting small business;
- Comments, objections, or recommendations of a Committee; and
- Compliance with the RRA and IRRC's regulations.

When considering whether the regulation satisfies these criteria, IRRC analyzes comments from the Senate, House of Representatives, and public; conducts independent research and outreach to the public and affected parties; and discusses issues with the agency and Committees.

If the public comment period is extended or reopened by the agency, IRRC may have 30 days after the close of the extended or reopened comment period to deliver comments to the agency and the Committees. In such a case, IRRC's new comments will either supplement or replace its original comments. If IRRC does not deliver comments within 30 days after the close of the new public comment period, then the original IRRC comments will remain the official version. *1 Pa. Code § 305.3(b), (c)*.

FAQ #2

If there are extenuating circumstances that may require more extensive review, may IRRC take more time to review the regulation and submit comments? ANSWER: No. IRRC must convey all of its recommendations, objections, concerns, or questions regarding any provision in a proposed regulation within 30 days of the close of the public comment period.

FAQ #3

Does IRRC deem regulations approved? ANSWER: Yes. If IRRC does not comment on a portion of the proposed regulation by the deadline, that portion is unchanged when the regulation is submitted in its final form, and a Committee has not raised any concerns, IRRC shall be deemed to have approved that portion of the regulation.

Following its review, IRRC will deliver its comments to the agency, Committees, and the LRB for publication in the *Pennsylvania Bulletin*. These comments are also posted on IRRC's website at www.irc.state.pa.us.

5. Agency Response

The RRA requires the agency to consider and respond to every comment it has received on the proposed regulation from the public, Committees, and IRRC as it prepares the final-form regulation.³ *71 P.S. § 745.5a(a)*. This response is included in the preamble to the final-form regulation or attached as a separate document often referred to as a comment and response document.

As a result of input received during the proposed stage or on its own initiative, the agency may modify the text of the final-form regulation. Modifications may not enlarge the scope of the proposed regulation. *45 P.S. § 1202*. However, Pennsylvania’s courts have interpreted the phrase “enlarge the scope” very broadly. Generally, the courts have found that the scope has not been enlarged as long as the final-form regulation deals with the same subject matter as the proposed regulation. This is true even if the methodologies and requirements set forth in the regulation have been significantly revised from proposed to final form. The agency must also submit a written response to all comments received during the public comment period, and all comments received from IRRC and the Committees.

**PRACTICE
TIP #4**

Submitting comments during the public comment period ensures that the agency will respond to those comments. It also gives IRRC an opportunity to review them before it issues comments, which are due within 30 days of the close of the public comment period.

B. FINAL STAGE

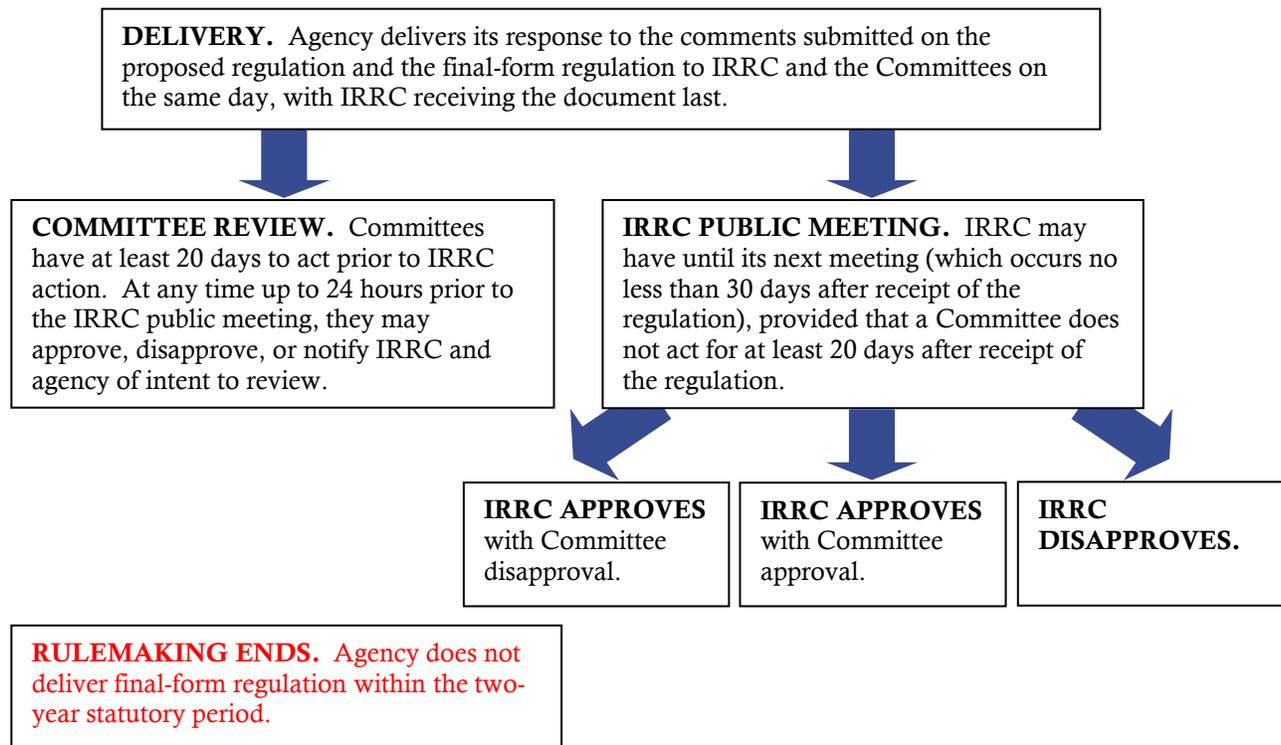
The final stage begins when a final-form or final-omitted regulation is delivered to the Committees and IRRC **on the same day, with IRRC receiving the document last**. For almost all regulations, this stage ends with review and approval at a single meeting of IRRC. After a final review and approval by the Attorney General, the agency may publish the regulation in the *Pennsylvania Bulletin*. Once a regulation has been approved and published, it has the full force and effect of law. Following publication, the regulation is codified in the *Pennsylvania Code*.

A final-form regulation is the final version of a regulation that was first published in the *Pennsylvania Bulletin* as a proposed regulation, with the opportunity for comment from the public, IRRC, and the Committees. **Preparing a final-form regulation may take an agency anywhere from a few days or weeks to the statutory maximum of two years from the close of the public comment period**. The time required depends upon the agency. During this period, the agency may meet with the Committees, interested parties, and IRRC to discuss concerns raised during the proposed

³ The CDL also requires the agency to review and consider any comments submitted pursuant to the public notice requirements. *45 P.S. § 1202*.

stage. When preparing the final-form regulation, the agency should use as its source document the proposed regulation as published in the *Pennsylvania Bulletin* to incorporate any editorial changes that have been made by the LRB. *1 Pa. Code § 307.3a(a)*.

In contrast, a final-omitted regulation is neither published as a proposed regulation nor offered for public comment; it enters the process at the final rulemaking stage. Section V.A of this manual discusses the specific circumstances under which final-omitted regulations may be promulgated.



(Sections III.B.6 – 8 of this manual explain the process after the IRRC public meeting.)

1. Delivery of the Final-Form or Final-Omitted Regulation

The agency delivers the final-form regulation and its response to all comments received to the Committees and IRRC **on the same day, with IRRC receiving the document last**. The agency must also provide to the Committees and IRRC the names and addresses of commentators who requested notice of the final-form regulation. *71 P.S. § 745.5a(b); 1 Pa. Code § 307.2*. An agency delivers a final-omitted regulation to the Attorney General, the Committees, and IRRC **on the same day, with IRRC receiving the document last**. *71 P.S. § 745.5a(c); 1 Pa. Code § 307.3*. *(For a more detailed explanation regarding delivery of final regulations either immediately before or during the sine die period, refer to 71 P.S. § 745.5a(f) and 1 Pa. Code Chapter 311a.)*

The agency's notice to commentators must include a copy of the final-form regulation or a summary of the changes made to the proposed regulation. The agency must send the notice and required information to the commentators on the date of delivery to the Committees and IRRC. *71 P.S. § 745.5a(b)*. **If an agency does not deliver a final-form regulation within two years from the close of the public comment period, the regulation is deemed to be withdrawn and the rulemaking ends.**

After the end of a legislative session, or *sine die* adjournment, an agency may not deliver a final-form regulation and related materials to IRRC or the Committees until after the start of the next legislative session. If delivery is made before *sine die* and the Committees' review period is not completed (as further explained in Section III.B.2 of this manual), then the agency must redeliver the regulation to IRRC and the Committees by the fourth Monday in January of the next year or after both Committees have been designated, whichever is later. The latest that the regulation may be delivered to the Committees is the second Monday after the Committee designations have been published in the *Pennsylvania Bulletin*. Additionally, if the two-year period expires during *sine die*, then the agency must resubmit the final-form regulation no later than the second Monday after the designations have been published in the *Pennsylvania Bulletin*. **If the agency misses the deadline for delivery after the two-year period has expired, then the final-form regulation is deemed to be withdrawn and the agency must resubmit a proposed regulation if it wishes to proceed with promulgation.** (For a more detailed explanation regarding delivery of final-form regulations during the *sine die* period, refer to *71 P.S. § 745.5a(j.1)* and *1 Pa. Code §§ 311a.4, 311a.5*.)

2. Time Period for Review by Committees and IRRC

A final-form or final-omitted regulation must be delivered to the Committees and IRRC **on the same day, with IRRC receiving the document last.** *71 P.S. § 745.5a(a), (c)*. Following delivery, IRRC cannot act for at least 20 days so that the Committees have an opportunity to review the regulation. IRRC may have until its next scheduled meeting (which occurs no less than 30 days after delivery of the regulation) to approve or disapprove the regulation. IRRC is deemed to have approved a regulation when it has not filed comments on the proposed regulation, the agency has not made any changes to the regulation from proposed to final form, and a Committee has raised no concerns. *71 P.S. § 745.5(g)*.

Committees can take action on a final-form or final-omitted regulation at any time up to 24 hours before IRRC's public meeting. A Committee can approve, disapprove, or notify the agency and IRRC of its intent to review the regulation. If a Committee takes no action prior to IRRC's public meeting, the Committee is deemed to have approved the regulation. If a Committee disapproves or notifies IRRC and the agency of its intent to review the regulation, the Committee will have 14 days after it receives IRRC's order to take action. *71 P.S. § 745.5a(j.2)*. Even if IRRC approves the regulation, a Committee is still guaranteed this additional time to review the regulation. If the Committee does not act during its 14-day review period, the regulation is deemed to be approved and the agency may proceed with the promulgation of the regulation.

3. 48-Hour Blackout Period

The RRA provides for a blackout period before IRRC's public meeting. Unsolicited public comments relating to the substance of a regulation on IRRC's current public meeting agenda will be embargoed during the final 48 hours prior to the start of the meeting. The public comments will be provided to the Commissioners at the public meeting. The blackout period does not apply to communication between IRRC and agency staff, members of the General Assembly, and legislative staff. *71 P.S. § 745.5a(j); 1 Pa. Code § 303.2.* IRRC may also request and receive information from outside sources during the blackout period.

IRRC is required to keep the agency and Committees apprised of any communications that it receives during the blackout period. IRRC must transmit comments received during this period to the agency and Committees upon receipt.

FAQ #4

What is the best manner to provide written comments to IRRC on a final regulation? ANSWER: IRRC accepts written comments on final regulations by first class mail, fax, or e-mail. IRRC's mailing address is 333 Market Street, 14th Floor, Harrisburg, PA 17101. The fax number is (717) 783-2664. The e-mail address is irrc@irrc.state.pa.us. Contact IRRC's office (or visit IRRC's website at www.irrc.state.pa.us) to learn the date of the public meeting when the regulation will be considered. All comments should be received at least 48 hours prior to the public meeting (with copies sent to the agency and the Committees) otherwise they are subject to the blackout period restrictions.

FAQ #5

If I fail to submit a written comment prior to the blackout period, may I still provide a comment on a final regulation? ANSWER: Yes. The comment will be embargoed and provided to the Commissioners at the public meeting.

4. Agency Option to Withdraw Before IRRC Action

After delivery, an agency may withdraw a final-form or final-omitted regulation at any time before IRRC's public meeting. *71 P.S. § 745.5a(a); 1 Pa. Code §§ 301.7, 307.4(1).* In this case, the agency must notify the Committees and IRRC that it is withdrawing the final regulation and IRRC must stop its review and not take any action on the regulation. *1 Pa. Code § 301.7(a).* The agency may redeliver the final regulation at a later date to the Committees and IRRC, as long as it is done within the remainder of the two-year period. (There is no time limit for final-omitted regulations.) Upon redelivery, the final review process starts anew. The agency must also resend the appropriate notice to commentators who requested it on final-form regulations. **If the agency does not deliver a final-form regulation within two years from the close of the public comment period, the rulemaking is deemed to be withdrawn.**

5. IRRC Public Meetings

IRRC has until its next scheduled meeting, which occurs no fewer than 30 days after receipt of a final-form or final-omitted regulation, for its review. *71 P.S. § 745.5a(e)*. Generally, IRRC holds public meetings once or twice a month and typically on a Thursday. These meetings are structured but informal and may be rescheduled at IRRC's discretion. However, IRRC is required to give ten days notice of meetings to the Committees and agencies whose regulations are scheduled for action. *71 P.S. § 745.4(h); 1 Pa. Code § 303.1(b)*. The public meeting schedule and agenda are posted on IRRC's website at www.irrc.state.pa.us.

At the start of the public meeting, any embargoed material is distributed to the Commissioners. During the meeting, IRRC reviews each regulation on its agenda. The Chair invites the promulgating agency to make remarks and respond to questions. Legislators or their staff and interested members of the public are also invited to make comments. (See IRRC's website for meeting guidelines at www.irrc.state.pa.us/meetings/#Guidelines.) During the discourse, the Commissioners may ask questions or voice concerns. This discussion enables the Commissioners to resolve any unanswered questions concerning the agency's intent or the regulation's impact on the regulated community.

Finally, the Commissioners determine whether a regulation is in the public interest according to the criteria contained in Section 5.2 of the RRA and vote to approve or disapprove the regulation in its entirety. *71 P.S. § 745.5b*. The RRA limits the scope of IRRC's review of a final-form or final-omitted regulation, and such review can relate only to the following areas:

- Comments, recommendations, or objections raised by IRRC to the proposed version of the regulation;
- Amendments, additions, revisions, or deletions to the proposed version; or
- Recommendations, comments, or objections conveyed by a Committee to the agency or IRRC.

If IRRC takes no action or if there is a tie vote, the regulation is deemed to be approved.

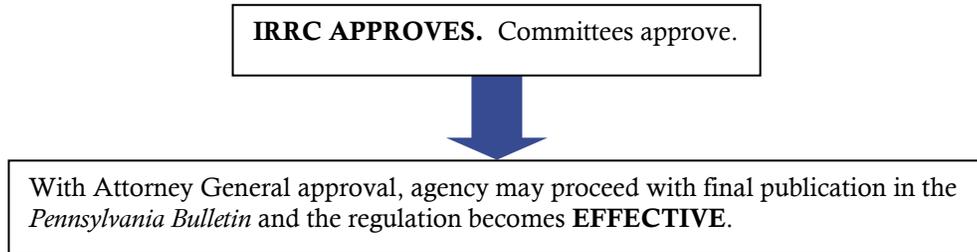
When an order is issued by IRRC, it is delivered to the agency, the Committees, and the LRB, and is posted on IRRC's website at www.irrc.state.pa.us.

The actions of the Commissioners are not adjudicatory or judicial by nature and they do not resolve any legal claim that a person may raise. Their review functions are considered "quasi-legislative" or "quasi-administrative." Further, a decision to approve or disapprove a regulation cannot be appealed.⁴

⁴ See *71 P.S. § 745.2(d)*; Concerned Citizens of Chestnuthill Township v. Environmental Quality Bd., 632 A.2d 1 (1993), *app. den.*, 642 A.2d 204 (1992).

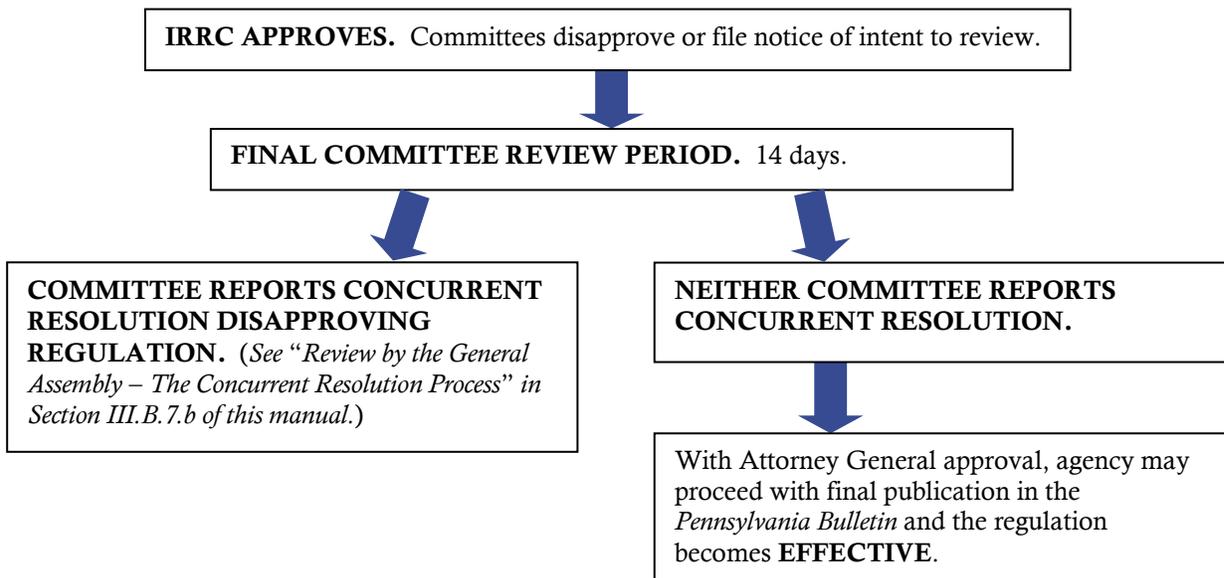
a. IRRC Approval with Committee Approval

IRRC and Committee approval of the regulation concludes the review process under the RRA. The agency may then submit the regulation to the Attorney General for final review. Upon the Attorney General's approval for form and legality, the agency may submit the regulation to the LRB for publication in the *Pennsylvania Bulletin*. The regulation becomes effective on the date of publication or on a later date specified by the agency in its order adopting the regulation.



b. IRRC Approval with Committee Disapproval or Notice of Intent to Review

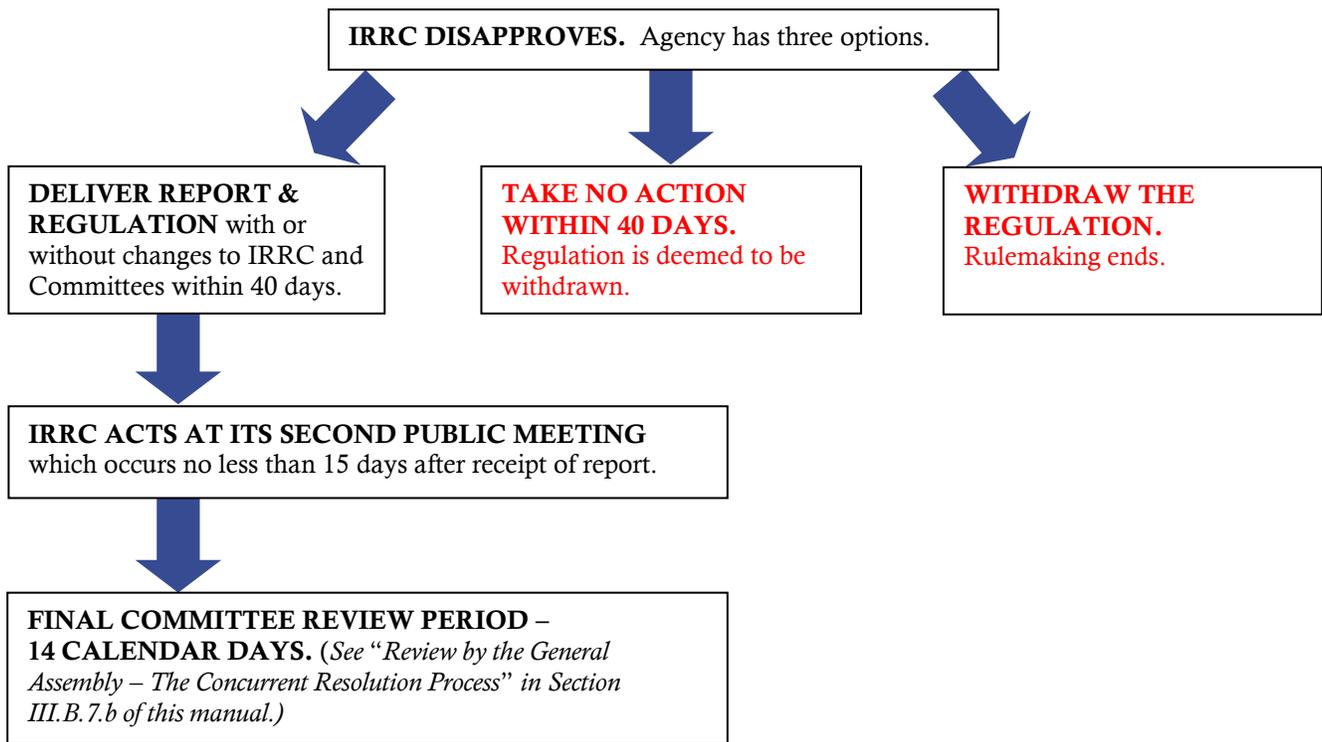
If IRRC approves the regulation and either one or both of the Committees disapproves the regulation or notifies IRRC and the agency of its intent to review the regulation, the agency may not promulgate the regulation for 14 days after the Committees receive IRRC's order. 71 P.S. § 745.5a(j.2). During the 14-day review period, the Committee(s) that took action may report a concurrent resolution disapproving the regulation. 71 P.S. § 745.7(d). If a concurrent resolution is not reported within 14 days, the agency can deliver the regulation to the Attorney General for review. Upon the Attorney General's approval for form and legality, the agency may submit the regulation to the LRB for publication in the *Pennsylvania Bulletin*. The regulation becomes effective on the date of publication or on a later date specified by the agency in its order adopting the regulation.



c. IRRC Disapproval

If IRRC disapproves a regulation, it issues an order specifying which criteria have not been satisfied. The order is delivered to the Committees, the agency, and the LRB. IRRC also advises commentators who requested notice related to the final-form regulation of IRRC’s vote to disapprove. *71 P.S. § 745.6(a); 1 Pa. Code § 311.1.*

An IRRC disapproval temporarily bars the agency from promulgating the regulation pending subsequent review. The subsequent review provides the opportunity for further explanation or amendment of the regulation by the agency relating to IRRC’s disapproval order or, at the agency’s option, withdrawal of the regulation. (See “*Agency Options after IRRC Disapproval*” in Section III.B.6 of this manual.)



6. Agency Options after IRRC Disapproval

a. Resubmit with or Without Revisions

The agency may resubmit the regulation with or without modifications. In either case, the agency must submit on the same day a report to the Committees and IRRC within 40 days of receipt of the disapproval order. The report must contain the original or revised final-form regulation and IRRC’s disapproval order. If the regulation is submitted without revisions, the report must respond to the concerns raised in the order. *71 P.S. § 745.7(b); 1 Pa. Code §§ 311.2(a)(1), 311.3.* If the regulation is revised, then the report must contain a detailed explanation of how the revisions respond to IRRC’s concerns. *71 P.S. § 745.7(c); 1 Pa. Code §§ 311.2(a)(2), 311.4.*

IRRC acts at its public meeting, which occurs no less than 15 days after receipt of the resubmitted regulation. *71 P.S. § 745.7(c.1); 1 Pa. Code § 311.5.* A regulation can be approved, deemed to be approved, or disapproved by IRRC. IRRC must notify the Committees of the final disposition of the regulation. The regulation is then subject to Committee review for 14 days. *71 P.S. § 745.7(d).*

b. Withdraw the Regulation

An agency may withdraw a disapproved regulation. *71 P.S. § 745.7(a)(3); 1 Pa. Code § 311.2(a)(3).* **A voluntary withdrawal concludes the review process.**

c. Take No Action – Regulation is Deemed to be Withdrawn

An agency can opt to take no action. If the agency does not deliver a report to the Committees and IRRC within 40 days of the agency’s receipt of the disapproval order, the regulation is deemed to be withdrawn. *1 Pa. Code § 311.2(b).* **A deemed withdrawal concludes the review process.**

7. Committee Actions

a. Additional Review Period for Committees

An additional review period for either Committee can be triggered by one of three events:

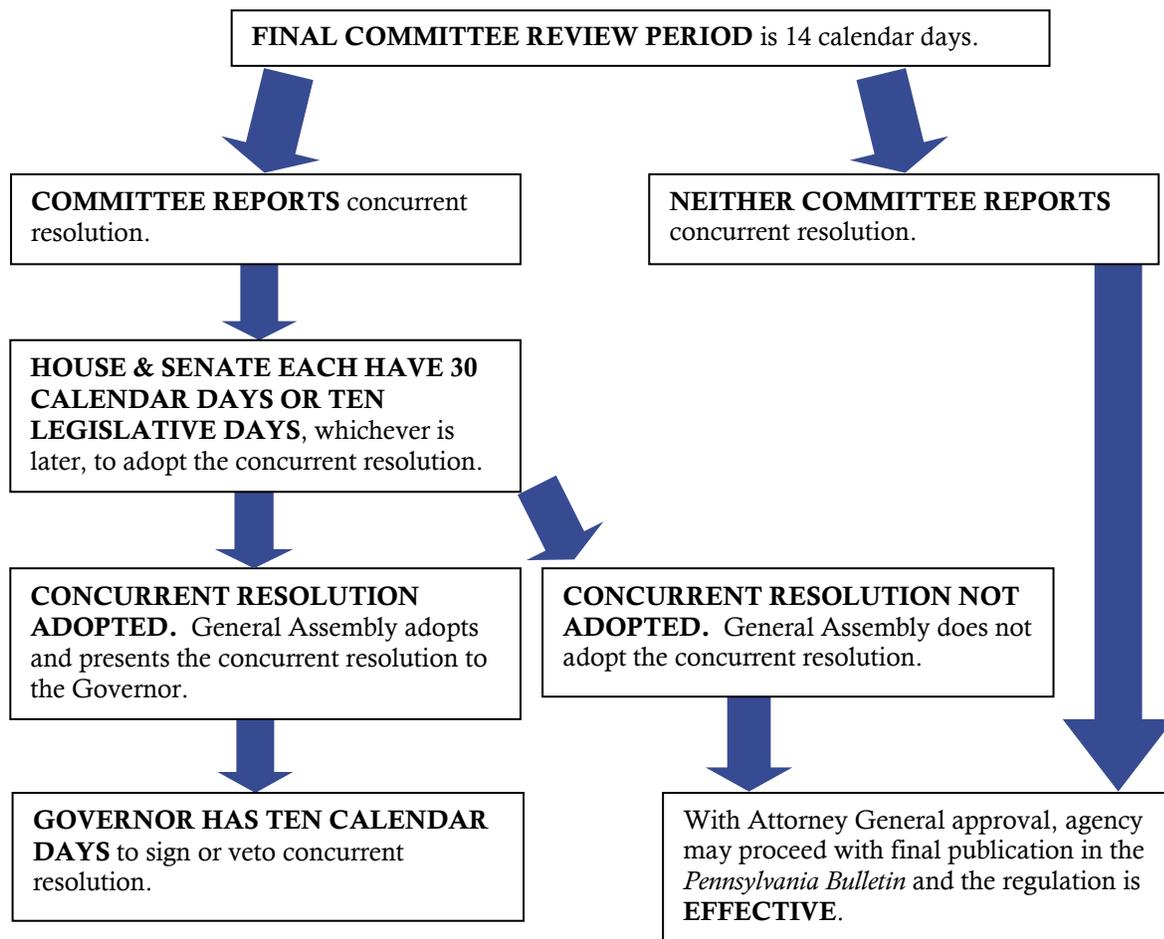
- A Committee notifies IRRC of its intent to review the regulation at any time up to 24 hours before IRRC’s first public meeting (*71 P.S. § 745.5a(j.2)*);
- A Committee disapproves a regulation (*71 P.S. § 745.5a(j.2)*); or
- IRRC disapproves a regulation at its public meeting. The agency resubmits the regulation, with or without revisions, to the Committees and IRRC. After IRRC acts on the regulation a second time, IRRC notifies the Committees of its action (*71 P.S. § 745.7(c.1), (d)*).

If a Committee takes either the first or second action, then that Committee has 14 calendar days to report a concurrent resolution. In the third scenario, both Committees have 14 calendar days to report a concurrent resolution. *71 P.S. § 745.5a(j.2).* The 14-calendar day period begins the day after IRRC delivers its order to the appropriate Committees. **If either Committee does not report out a concurrent resolution within 14 calendar days, the agency may proceed with final promulgation.** *71 P.S. § 745.5a(j.2); 1 Pa. Code § 311.5(d), (e).* However, if a Committee reports a concurrent resolution disapproving the regulation, promulgation is suspended until the legislative review process described in the next section is completed.

b. Review by the General Assembly – The Concurrent Resolution Process

The concurrent resolution process begins when either Committee reports out a concurrent resolution disapproving the regulation. From the date on which the concurrent resolution is reported, the Senate and the House of Representatives each have 30 calendar days or ten legislative days, whichever is longer, to adopt it. *71 P.S. § 745.7(d)*.

Both chambers must adopt the concurrent resolution by majority vote to continue the bar on the promulgation of the regulation. If both chambers adopt the concurrent resolution, it is presented to the Governor for consideration. If one chamber does not adopt the concurrent resolution within the time period described in the above paragraph, the General Assembly is deemed to have approved the regulation. *71 P.S. § 745.7(d); Art. III, Section 9 of the Pa. Constitution*.



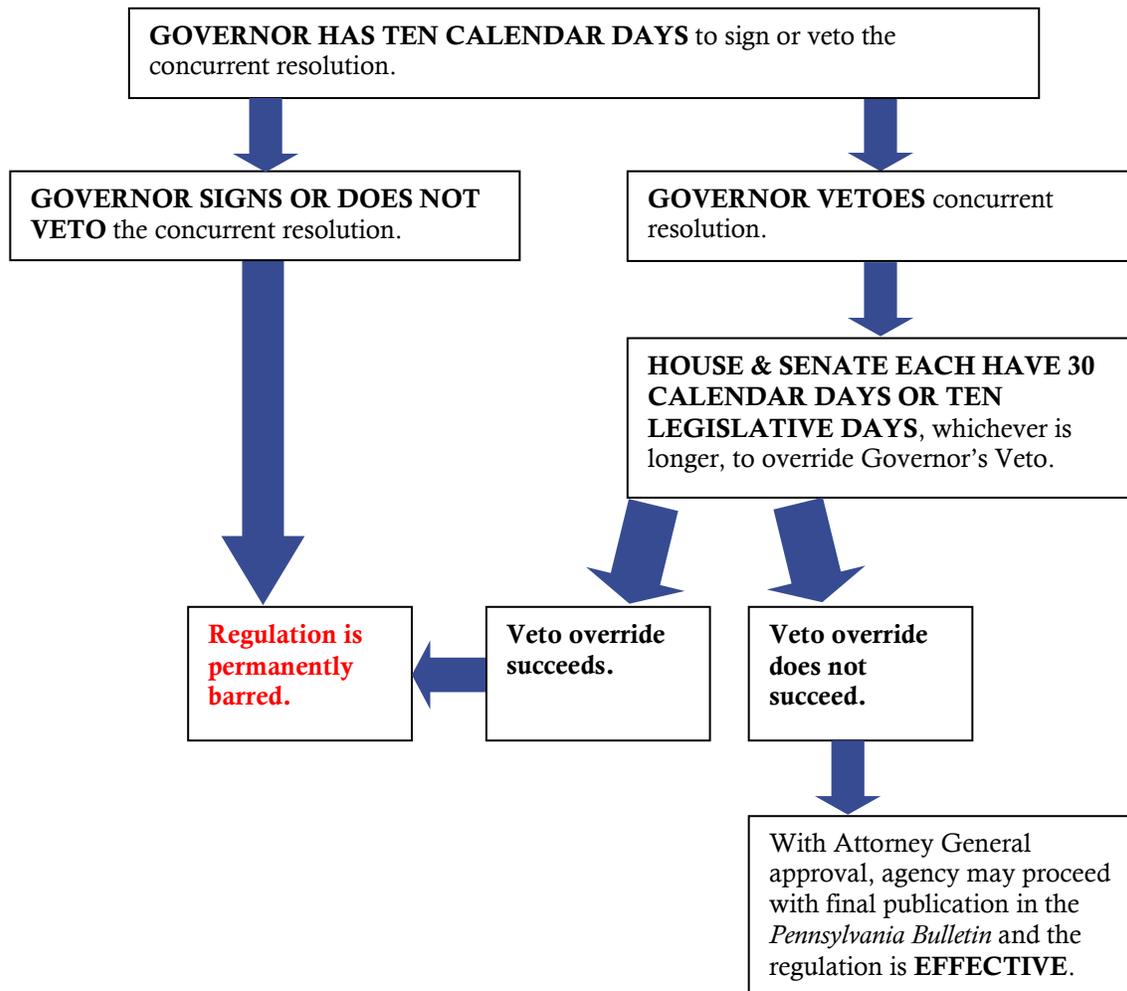
8. Governor's Action on Concurrent Resolution

The Governor has ten calendar days to act on the concurrent resolution. If the Governor signs the concurrent resolution, or if the Governor does not veto the concurrent resolution within ten calendar days, **the concurrent resolution is approved and the regulation is permanently barred.**

If the Governor vetoes the concurrent resolution, the Senate and the House of Representatives may override the veto. A veto override requires a two-thirds majority vote in each chamber, and must be passed within 30 calendar or ten legislative days, whichever is longer. **A successful veto override will permanently bar the regulation.** However, if either chamber takes no action, or does not override the Governor's veto, the General Assembly is deemed to have approved the regulation. *See 71 P.S. § 745.7(d); Art. III, Section 9, Pa. Constitution.*

The agency may proceed with promulgation if either of the following events occurs:

- The Senate or the House of Representatives does not adopt the concurrent resolution by majority vote; or
- The Governor vetoes the concurrent resolution and both the Senate and House of Representatives do not override the Governor's veto by a two-thirds majority vote.



IV. OPPORTUNITIES FOR BUILDING CONSENSUS

A. PROPOSED STAGE

Prior to its publication in the *Pennsylvania Bulletin*, agencies sometimes provide a draft of a regulation to citizen advisory panels or other interest groups. Some agencies are required by statute to take this step, while others do so voluntarily. Typically, the agency will invite interested parties and stakeholder groups to review and comment on the proposal before it is published. The agency may also schedule public hearings or information sessions to explain the regulation and promote dialogue. Agencies may also publish an advance notice of proposed rulemaking to provide information on an upcoming regulation. (See Section V.E of this manual.)

B. FINAL STAGE

On a small number of regulations, additional work may be necessary before the final stage is complete and the regulations are approved. Fortunately, the RRA offers a degree of flexibility for the agency, Committees, and IRRC to consider and make changes necessary to achieve consensus. The basic rule in the RRA is that a final-form or final-omitted regulation cannot be amended after its delivery to the Committees and IRRC. However, there are two exceptions to this rule: toll the time for review or withdraw the regulation altogether.

1. Tolling the Time for Review

The intent of tolling is to allow an agency to make changes – typically to correct minor inconsistencies or errors – to a final regulation before IRRC takes action on it. Tolling is essentially a “time-out” in the review process. The agency’s option to toll the time for review is limited.

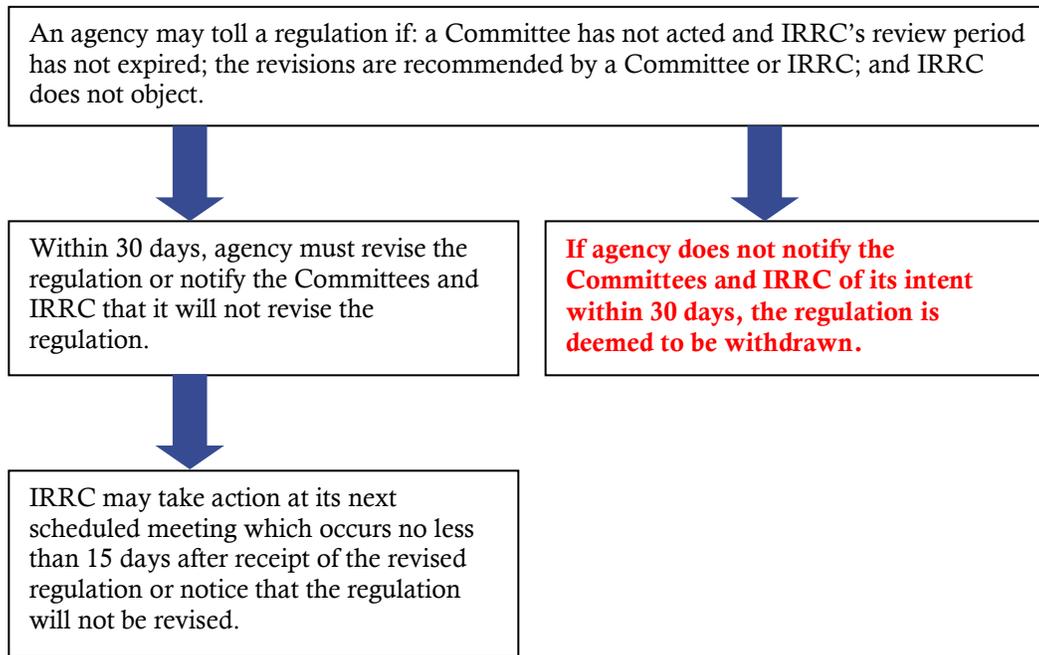
First, the opportunity to toll the review period exists only until either one of the Committees acts or IRRC’s review period expires, whichever occurs first. *71 P.S. § 745.5a(g)(1)*. This ensures that both the Committees and IRRC act on the exact same version of the regulation.

Second, tolling allows the agency to consider revisions recommended by a Committee or IRRC. *71 P.S. § 745.5a(g)(1); 1 Pa. Code § 307.5(a)*.

Third, tolling is only permitted if IRRC does not object. *71 P.S. § 745.5a(g)(1); 1 Pa. Code § 307.5(c)*. If IRRC objects, review of the regulation continues and tolling cannot occur.

Last, the final review period may be tolled only once. *71 P.S. § 745.5a(g)(4); 1 Pa. Code § 307.5(h)*. Within 30 days from the beginning of the tolling period, the agency must deliver to IRRC and the Committees the revised regulation or a statement that it will not make revisions to the regulation. *71 P.S. § 745.5a(g)(2)*. **If the agency does not meet the 30-day deadline, it is deemed to have withdrawn the regulation.**

Upon receipt of the revised regulation or notice that the regulation will not be revised, IRRC and Committee review resumes. IRRC may take action at its next scheduled meeting, which occurs no fewer than 15 days after delivery of the revised regulation or notice that the regulation will not be revised.



2. Withdrawal of a Regulation

A second option available to an agency is to voluntarily withdraw the regulation. The reason for a withdrawal of a regulation is at the discretion of the agency. An agency may notify the Committees and IRRC that it is withdrawing a regulation at any time before IRRC's public meeting. The withdrawal may also serve the same purpose as a tolling and provide the agency with another opportunity to consider revisions to a regulation. However, unlike tolling, a withdrawal effectively removes a regulation from the final review state unless, and until, it is redelivered.

If the agency opts to withdraw a final-omitted regulation, it may submit that regulation again as a final-omitted at any time. Final-form regulations may also be withdrawn and submitted again at a later date. However, **final-form regulations must be resubmitted within two years of the close of the public comment period**, and the agency must again provide each commentator who requested notice with a copy of the final-form regulation or a summary of the changes made.

V. ADDITIONAL STEPS WITHIN AND OUTSIDE THE REVIEW PROCESS

This section focuses on less common circumstances that arise either during or outside of the regulatory review process. Some of these circumstances are initiated by the agencies (*e.g.*, final-omitted and emergency certified regulations) where others may arise at the prompting of IRRC (*e.g.*, review of published documents or subpoenas).

A. FINAL-OMITTED REGULATIONS

A final-omitted regulation is a regulation promulgated by an agency without prior publication of a notice of proposed rulemaking in the *Pennsylvania Bulletin*. There is no formal opportunity for public, Committee, and IRRC comments. Under the RRA, the procedure for review of final-omitted regulations and the criteria used is exactly the same as it is for final-form regulations. *See 71 P.S. §§ 745.5a, 745.6.*

The CDL establishes three very limited circumstances under which an agency is permitted to promulgate a final-omitted regulation. These occur when:

1. Comments from the public are not appropriate, necessary, or beneficial. Regulations in this category generally relate to: military affairs; agency management organization or personnel; agency procedure or practice; Commonwealth property, loans, grants, benefits, or contracts; or the interpretation of a self-executing statute.
2. All persons subject to the regulation are named or given personal notice. Examples of regulations in this category are those setting fees for licensing examinations. For these fees, licensure applicants are individually notified of the amount of the fee.
3. Notice is impracticable, unnecessary, or contrary to the public interest. Regulations which have a significant and an immediate fiscal impact and regulations which respond to emergencies fall under the categories of “impracticable” and “contrary to the public interest.” Prior notice is generally found “unnecessary” when the agency is rescinding regulations for which the enabling statute has been repealed or amended.

45 P.S. § 1204.

**PRACTICE
TIP #5**

If an agency has a question about the appropriateness of submitting a final-omitted regulation, it should contact the Attorney General and/or the General Counsel for guidance.

**PRACTICE
TIP #6**

Although a final-omitted regulation has no formal public comment period, there is nothing prohibiting anyone from commenting on the regulation to the agency, IRRC, and the Committees.

Eliminating the proposed stage saves approximately 60 days of formal review. Review periods under the Commonwealth Attorneys Act and the RRA are also shortened to conserve time. The regulation is submitted to the Attorney General, Committees, and IRRC **on the same day, with IRRC receiving the document last.** This saves an additional 30 days because the Attorney General's review occurs concurrently with IRRC's and the Committees' review.

B. EMERGENCY CERTIFIED REGULATIONS

The RRA allows an agency to immediately implement a final-form or final-omitted regulation when the Governor or Attorney General certifies that it is necessary to respond to an emergency. An emergency certified regulation takes effect upon publication in the *Pennsylvania Bulletin*, or on the date specified in the agency's adoption order. Although IRRC and the Committees review the regulation in the same manner as they review all other final-form and final-omitted regulations, **the regulation takes effect prior to the completion of the review process.** If it is disapproved by IRRC or a Committee, it remains effective for 120 days or until finally disapproved under the concurrent resolution process, whichever occurs later. If the regulation is approved, it is permanently effective. *71 P.S. § 745.6(d); 1 Pa. Code § 313.2.*

The conditions under which the Governor or the Attorney General may certify a regulation as an emergency are limited. The Attorney General may certify that a regulation is necessary to satisfy the order of a state or federal court, or to implement the provisions of a federal statute or regulation. The Governor may certify that a regulation is required to: avoid an emergency which may threaten the public health, safety, or welfare; cause a budget deficit; or create the need for supplemental or deficiency appropriations of at least \$1,000,000. *71 P.S. § 745.6(d); 1 Pa. Code § 313.1.*

C. TEMPORARY REGULATIONS

The General Assembly occasionally determines it necessary to permit agencies to promulgate temporary regulations to quickly implement programs or certain mandates outside of the RRA. This mechanism is set forth by statute, is for a fixed period of time, and does not need to immediately comply with the regulatory review process. If the agency does not advance the temporary regulations through the regulatory review process within the time set by the General Assembly, those regulatory mandates will expire.

D. EXISTING REGULATIONS

IRRC may review any existing regulation that has been in effect for at least three years. This review may be undertaken either at IRRC's own initiative or at the request of any person or member of the General Assembly. If a Committee requests the review, IRRC must assign it high priority. *71 P.S. § 745.8a; 1 Pa. Code § 315.1(a).*

IRRC performs an advisory role in the review of an existing regulation. If IRRC finds that the regulation is contrary to the public interest because it does not satisfy the regulatory review criteria outlined in Section 5.2 of the RRA, it may recommend changes to the agency. IRRC may also recommend statutory amendments to the Governor and General Assembly. *71 P.S. § 745.8a; 1 Pa. Code § 315.1(a), (f).*

E. ADVANCE NOTICE OF PROPOSED RULEMAKING

An advance notice of proposed rulemaking is a mechanism used by some agencies to provide notice of a new proposed regulation. **An advance notice of proposed rulemaking is not part of the formal rulemaking process under the RRA, and does not have to be delivered to IRRC and the Committees.** However, public commentary is welcomed.

F. ADVANCE NOTICE OF FINAL RULEMAKING

Similar to an advance notice of proposed rulemaking, an advance notice of final rulemaking is used by some agencies to provide notice of intended changes from the proposed version of a regulation to the final version. However, it is occasionally done when, based on feedback received at the proposed stage or other factors, the agency has made substantial changes to the final regulation. When publishing an advance notice of final rulemaking in the *Pennsylvania Bulletin*, agencies generally explain the purpose of the changes and may request additional public input. **An advance notice of final rulemaking is not a part of the formal rulemaking process under the RRA and does not change the timeline for review.**

G. PUBLISHED AND UNPUBLISHED DOCUMENTS

In limited circumstances, IRRC may review published and unpublished documents to determine whether they should be promulgated as regulations. Such documents include SOPs (*see Section II of this manual*), guidelines, bulletins, and other types of directives. This type of review often arises as a result of a complaint or query from a third party that an agency is making compliance with a non-regulatory document mandatory. If IRRC finds that the agency is enforcing such directives as regulations, it may present the matter to the JCD. *71 P.S. § 745.7a; 1 Pa. Code § 315.2.*

The JCD will decide if the document at issue is regulatory in nature. If it concludes that it is, the JCD may order the agency either to promulgate the document as a regulation within 180 days or stop using it.

H. SUBPOENA POWER

IRRC may issue subpoenas to require the production of documents or the attendance of persons, if necessary to perform its functions. Either the Chair or Executive Director may sign subpoenas, which may be served in any manner authorized under Pennsylvania law. If attendance or production of documents is not forthcoming, IRRC may apply to the Commonwealth Court for enforcement of its subpoena. *71 P.S. § 745.10.*

VI. ANNUAL REPORT

By April 1 of each year, IRRC must file an annual report with the General Assembly and the Governor. *71 P.S. § 745.11(b).* The annual report provides information about IRRC and its staff, and lists all of the proposed and final regulations reviewed during the preceding calendar year. The annual report is also available on IRRC's website at www.irrc.state.pa.us.

VII. IRRC WEBSITE (www.irrc.state.pa.us)

The IRRC website provides direct access to all regulations, comments, and related public documents submitted during the regulatory review process. It also provides detailed information about IRRC, public meetings, and the review process, and allows users to download and print manuals, templates, and other written materials. The website also includes IRRC's Right to Know policy, which explains how to request public records.

The website contains a searchable database for users to readily locate current regulatory information and data on regulations that have previously gone through the review process. A subscription feature is included to provide interested parties with the ability to receive e-mail notifications on new regulations, comments, and other materials delivered to IRRC, as well as IRRC meeting agendas.

All comments received are included in IRRC's public regulation file, and are retained for at least four years following final promulgation of the regulation. *71 P.S. § 745.5a(k).* They are also scanned to the website, which helps makes these comments accessible to the public, members of the General Assembly, and other agencies. Agencies are also encouraged to notify commentators that these comments are placed on IRRC's website in the exact manner in which they are received by the agency or IRRC; they are neither modified nor redacted in any way by IRRC.

Questions about the website can be directed to irrc@irrc.state.pa.us or by calling (717) 783-5417.

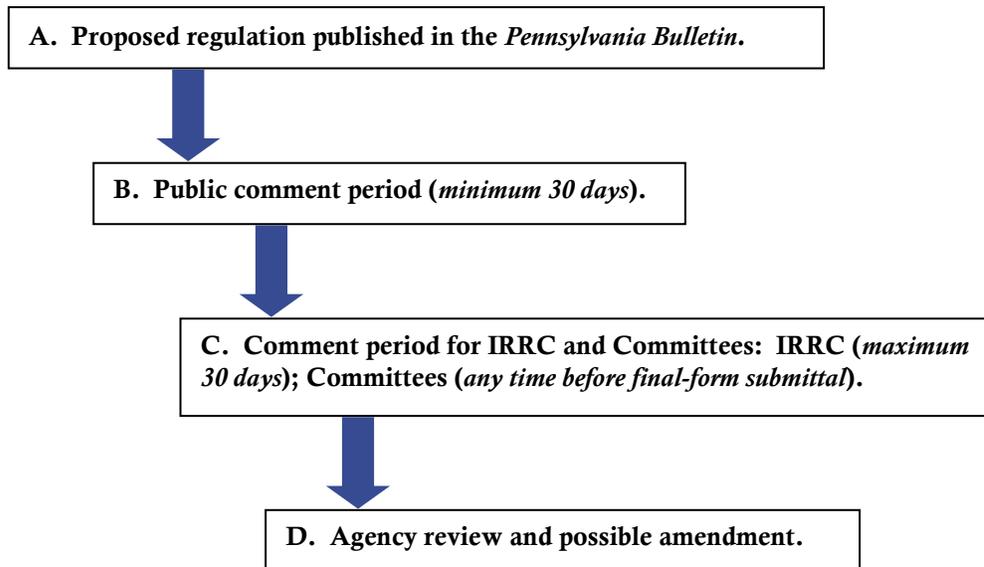
APPENDICES

APPENDIX A

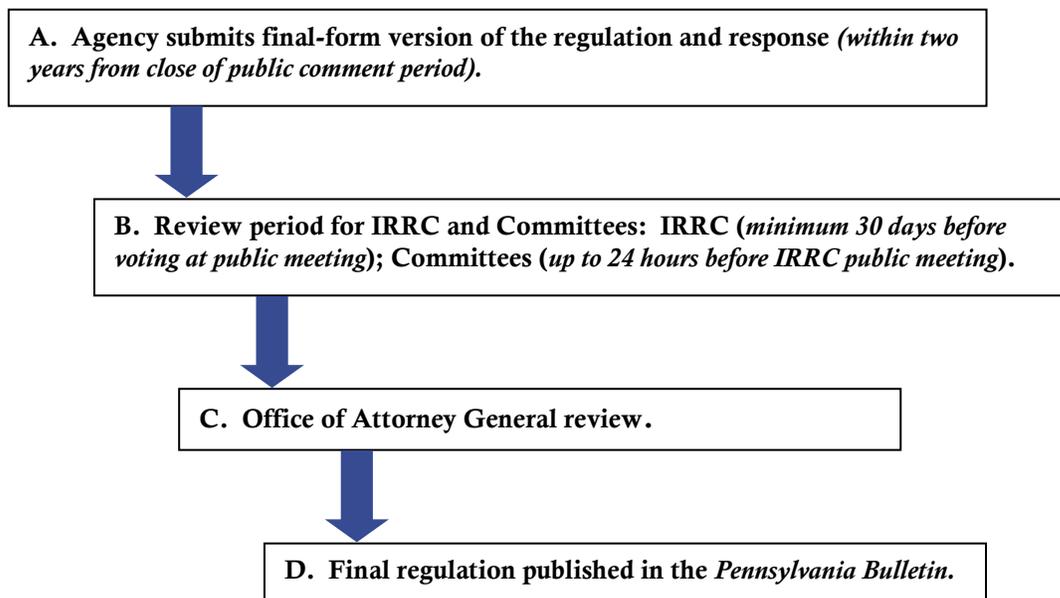
TWO-STAGE REGULATORY REVIEW PROCESS

(Summary)

1. PROPOSED REGULATION STAGE: After approval for form and legality by the Attorney General, the agency publishes a proposed regulation in the *Pennsylvania Bulletin* for public review and comment. IRRC and the Committees may also submit comments.



2. FINAL-FORM REGULATION STAGE: The agency submits a regulation and response to comments to the Committees and IRRC for review before publication as a final rule. Commentators also have opportunity to review the final version.



APPENDIX B

REGULATORY REVIEW ACT CRITERIA (71 P.S. § 745.5b)

- **Whether the agency has the statutory authority to promulgate the regulation.**
- **Whether the regulation is consistent with the intent of the General Assembly.**
- **Whether the regulation is in the public interest. To determine whether the regulation satisfies these criteria, IRRC also considers:**

1. Economic or fiscal impacts of the regulation, which include the following:

- i. Direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector.
- ii. Adverse effects on prices of goods and services, productivity or competition.
- iii. The nature of required reports, forms or other paperwork and the estimated cost of their preparation by individuals, businesses and organizations in the public and private sectors.
- iv. The nature and estimated cost of legal, consulting or accounting services which the public or private sector may incur.
- v. The legality, desirability and feasibility of exempting or setting lesser standards of compliance for individuals or small businesses.

2. The protection of the public health, safety, and welfare and the effect on this Commonwealth's natural resources.

3. The clarity, feasibility, and reasonableness of the regulation to be determined by considering the following:

- i. Possible conflict with or duplication of statutes or existing regulations.
- ii. Clarity and lack of ambiguity.
- iii. Need for the regulation.
- iv. Reasonableness of requirements, implementation procedures, and timetables for compliance by the public and private sectors.

4. **Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.**
5. **Comments, objections, or recommendations of a Committee.**
6. **Compliance with the provisions of the RRA or the regulations of IRRC in promulgating the regulation.**
7. **Whether the regulation is supported by acceptable data.**
8. **Whether a less costly or less intrusive alternative method of achieving the goal of the regulation has been considered for regulations impacting small business.**

APPENDIX C

REGULATORY ANALYSIS FORM CONTENTS

1. The title of the regulation, the name of the agency, the type of rulemaking, and the names, telephone numbers, and e-mail addresses of agency officials responsible for responding to questions and receiving comments.
2. A concise, nontechnical explanation of the regulation.
3. The statutory authority for the regulation.
4. A citation to any federal or state statute or court order, federal regulation, or the decision of a federal or state court mandating the regulation.
5. An explanation of why the regulation is needed, the compelling public interest that justifies the regulation, and who will benefit from the regulation.
6. A listing of provisions that are more stringent than federal standards and the compelling Pennsylvania interest that demands stronger regulation.
7. A description of how the regulation compares to regulations in other states and whether the regulation will put Pennsylvania at a competitive disadvantage.
8. An explanation and reference to any other regulations of the promulgating agency or other state agencies that the regulation may affect.
9. A description of the input solicited during the development of the regulation.
10. An identification of the types of persons, businesses, small businesses, and organizations who will need to comply with the regulation and who will benefit or be adversely affected.
11. Estimates of the direct and indirect costs and savings to the regulated community, the Commonwealth, and its political subdivisions.
12. An explanation of how the benefits of the regulation outweigh any cost and adverse effects.

13. A description of required legal, accounting, or consulting procedures; additional reporting, recordkeeping, or other paperwork, including copies of forms; and measures taken to minimize these requirements.
14. A description of special provisions developed to meet the needs of affected persons, including minorities, elderly, small businesses, and farmers.
15. A description of alternatives which have been considered and rejected, and a statement that the regulation is the least burdensome alternative.
16. If data is the basis for the regulation, a description of the data, and an explanation of how the data was obtained and how it meets the acceptability standard for empirical, replicable, and testable data that is supported by documentation, statistics, reports, studies, or research.
17. The schedule for review, promulgation, and implementation of the regulation, including public meetings or hearings.
18. A description of the plan developed for evaluating the continuing effectiveness of the regulation after its implementation.

(RAF template can be found at www.irrc.state.pa.us/documents/agency_toolbox.cfm.)

APPENDIX D

SAMPLE REGULATORY PACKAGE (PROPOSED STAGE)

1. A proposed regulatory package includes:

- Regulatory Analysis Form: transmittal document that includes a summary of the regulation, statutory authority, budget, and policy
www.irrc.state.pa.us/resources/docs/RAF.doc
- Face Sheet: for filing documents with the LRB; signed by the agency head, the Office of Attorney General, and the Office of General Counsel or the chief counsel of an independent agency
www.irrc.state.pa.us/resources/docs/Face_Sheet.doc
- Transmittal Sheet: signed by IRRC, the LRB, and the Committees
www.irrc.state.pa.us/resources/docs/TransmittalSheet_Regs_Sub_RRA.pdf
- Preamble: summary and explanation of the regulation
- Annex A: text of the proposed regulation, with proper formatting if it is an amendment to an existing regulation

2. A checklist for delivery and submission of a proposed regulatory package can be found on IRRC's website at www.irrc.state.pa.us/resources/docs/Checklist_Proposed_Regs.pdf.

APPENDIX E

SAMPLE REGULATORY PACKAGE (*FINAL STAGE*)

1. A final-form regulatory package includes:

- Regulatory Analysis Form: revised transmittal document that includes a summary of the regulation, statutory authority, budget, and policy
www.irrc.state.pa.us/resources/docs/RAF.doc
- Face Sheet: for filing documents with the LRB; signed by the agency head and the Office of General Counsel or the chief counsel of an independent agency
www.irrc.state.pa.us/resources/docs/Face_Sheet.doc
- Transmittal Sheet: signed by the Office of Attorney General (for final-omitted only) and IRRC, the LRB, and the Committees
www.irrc.state.pa.us/resources/docs/TransmittalSheet_Regs_Sub_RRA.pdf
- The agency's response to all comments received
- A list of names and addresses of commentators who requested additional information on the final-form regulation, or written statement that no commentator requested information
- Preamble: summary and explanation of the regulation
- Annex A: text of the proposed regulation, with proper formatting to show any changes from the proposed regulation

2. A checklist for delivery and submission of a final-form regulatory package can be found on IRRC's website at www.irrc.state.pa.us/resources/docs/CheckList_Final_Regs.pdf.

APPENDIX F GLOSSARY

| | |
|----------------------------|---|
| Acceptable Data | Empirical, replicable, and testable data as evidenced in supporting documentation, statistics, reports, studies, or research. (71 P.S. § 745.3) |
| Agency | Any department, departmental administrative board or commission, independent board or commission, agency, or other authority of this Commonwealth now existing or hereafter created, but shall not include the Senate or the House of Representatives, the Pennsylvania Fish and Boat Commission, the Pennsylvania Game Commission, or any court, political subdivision, municipal, or local authority. (71 P.S. § 745.3) |
| Commission | Independent Regulatory Review Commission or IRRC. |
| Commission Comments | Objections, recommendations, statements, or questions relating to a proposed regulation issued by the Commission in accordance with Section 5(g) of the RRA (71 P.S. § 745.5(g)). |
| Commission Order | A public document containing the Commission's findings and reasons for approval or disapproval of a final-form or final-omitted regulation, which is not subject to appeal. |
| Commissioners | The members of IRRC appointed by the Governor, the President Pro Tempore of the Senate, the Minority Leader of the Senate, the Speaker of the House of Representatives, and the Minority Leader of the House of Representatives. |
| Committee | A standing committee of the Senate or the House of Representatives designated by the President Pro Tempore of the Senate for the Senate or by the Speaker of the House of Representatives for the House. Designation shall prescribe the jurisdiction of each standing committee over the various state agencies for purposes of the RRA. The designation shall be transmitted to the LRB for publication in the <i>Pennsylvania Bulletin</i> . (71 P.S. § 745.3) |

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| Committee Action | One of the following: (1) Approval or disapproval of a regulation, or notice that the Committee intends to review the regulation pursuant to Section 5.1(j.2) of the RRA (71 P.S. § 745.5a(j.2)); or (2) Reporting of a concurrent resolution under Section 7(d) of the RRA (71 P.S. § 745.7(d)). |
| Concurrent Resolution | A legislative measure initiated by a Committee, which must be approved by the House and Senate, to bar final promulgation of a regulation. |
| Deemed Approved by the Commission | The approval of a regulation or an agency report by the Commission by operation of law when the Commission has not approved or disapproved the regulation or agency report submitted in accordance with either Section 5.1(e) or 7(c.1) the RRA (71 P.S. §§ 745.5a(e), 745.7(c.1)). |
| Embargoed Materials | Unsolicited documents pertaining to a regulation on the agenda for the Commission’s public meeting delivered during the blackout period by any party other than the agency or members of the General Assembly and their staffs. |
| Emergency Certified Regulation | A regulation certified by the Attorney General or the Governor pursuant to Section 6(d) the RRA (71 P.S. § 745.6(d)) as necessary for compliance with a court order or statutory mandate, or to respond to an emergency. |
| Executive Agency | An agency under the jurisdiction of the Governor. |
| Existing Regulation | An enforceable regulation contained in the <i>Pennsylvania Code</i> . |
| Final-Form Regulation | A regulation previously published as a proposed regulation pursuant to the act of July 31, 1968 (P.L. 769, No. 240), referred to as the Commonwealth Documents Law, which an agency submits to the Commission and the Committees following the close of the public comment period. (71 P.S. § 745.3) |

Final-Omitted Regulation

A regulation which an agency submits to the Attorney General, the Commission, and the Committees for which the agency has omitted notice of proposed rulemaking pursuant to Section 204 of the act of July 31, 1968 (P.L. 769, No. 240), referred to as the Commonwealth Documents Law. (71 P.S. § 745.3)

Independent Agency

An agency that does not fall under the Governor’s jurisdiction, such as the Pennsylvania Public Utility Commission, Treasury Department, and Pennsylvania Labor Relations Board.

IRRC

Independent Regulatory Review Commission

JCD

Joint Committee on Documents

LRB

Legislative Reference Bureau

Pennsylvania Bulletin

The official gazette of the Commonwealth of Pennsylvania which is published every Saturday by the LRB and is available online at www.pabulletin.com.

Pennsylvania Code

The official codification of Pennsylvania’s administrative rules and regulations which is published monthly by the LRB and is available online at www.pacode.com.

Preamble

Part of the proposed and final regulatory package that includes the purpose and explanation for the regulation, effective date, statutory authority, a description of any amendments, fiscal impact, public comment period, and agency contact person. It contains some of the same information as that in the Regulatory Analysis Form. (*See 1 Pa. Code § 301.1* for a more comprehensive definition.)

Proposed Regulation

A document intended for promulgation as a regulation which an agency submits to the Attorney General, the Commission, and the Committees and for which the agency gives notice of proposed rulemaking and holds a public comment period pursuant to the act of July 31, 1968 (P.L. 769, No. 240), referred to as the Commonwealth Documents Law. (71 P.S. § 745.3)

Public Comment Period

The period following the publication of a proposed regulation in the *Pennsylvania Bulletin* during which the public may submit recommendations or objections to the agency.

Public Meeting

The public session at which the Commission staff briefs the Commissioners on the regulations scheduled for action and the Commission takes formal action on regulations.

Regulation

Any rule or regulation, or order in the nature of a rule or regulation, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or amending, revising, or otherwise altering the terms and provisions of an existing regulation, or prescribing a practice or procedure before such agency. (71 P.S. § 745.3)

Regulatory Analysis Form (RAF)

A document containing information about a regulation, including the agency’s statutory authority, title of the regulation, a description of the regulation, a cost/benefit analysis, an impact analysis, and the timeframe for the adoption of the regulation.

Regulatory Review Criteria

The requirements contained in Section 5.2(a) and (b) of the RRA (71 P.S. § 745.5b(a), (b)) that a regulation must satisfy in order for the Commission to determine that the regulation is in the public interest.

Sine Die

The final adjournment of the Senate and the House of Representatives by November 30 of even numbered years.

Small Business

In accordance with the size standards described in the U.S. Small Business Administration’s Small Business Size Regulations under 13 CFR Ch. 1, Part 121 . . . or its successor regulations. (71 P.S. § 745.3)

Statement of Policy

Guidance to regulated entities as to the factors an agency will consider in deciding matters over which it has jurisdiction, but does not constitute a binding norm.

48-Hour Blackout Period

The 48-hour period immediately preceding the call to order of the Commission’s public meeting that applies to embargoed material.



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This manual is also available on our website at www.irrc.state.pa.us.

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