



LEGISLATIVE SERVICES AGENCY

Promulgation through the Indiana Register & Indiana Administrative Code

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Legislative Services Agency (“LSA”)



The Publisher

- IC 4-22-2-3: The publisher refers to Legislative Council or the Legislative Services Agency operating under the direction of the Council
- Responsible for publishing the Indiana Administrative Code and the Indiana Register



The Indiana Register

- IC 4-22-8-2: The Indiana Register is a serial publication
- Contains:
 - Every rule
 - Other agency statements such as a rule recall, rule withdrawal, or non-rule policy document
 - Other matters required by statute to be published in the Register



The Indiana Register – Weekly Publications

- Publisher's Receipts for Filed Documents
 - Publisher's Receipts for Filed Documents are posted within three (3) business days of the delivery of a Final Rule, Provisional Rule, Interim Rule, Agency Correction (AC), or Readopted Final Rule for filing with the Publisher on an "as filed" basis daily at 5:00 p.m. (IC 4-22-2-39(c))
- Other Documents
 - All other documents are published on the Indiana Register website on Wednesdays at 3:00 p.m.



The Indiana Register – Types of Documents

AC = Agency Correction

AF = Publisher's Receipt for Filed Document

AO = Attorney General's Opinions

AR = IC 4-22-2-19 and IC 4-22-2-25 Notices

AT = Request for Additional Time (Governor)

BF = IDEM Final Readoption

BN = IDEM Notice of Readoption

BP = IDEM Proposed Readoption

CH = Change in Notice of Public Hearing

DA = Disapproval by Attorney General

DG = Disapproval by Governor

EI = Economic Impact Statement

EO = Executive Orders from the Governor

ER = Provisional Rule

FC = Continuation of Notice of First Public Comment

FD = IDEM Findings and Determinations

FN = Notice of First Public Comment Period

FR = Final Rule

GP = Governor's Proclamations

IN = Public Comment Period for Interim Rules

IF = Interim Final Rules

LN = Legislative Notice of Rule Readoption

NI = Notice of Intent to Adopt a Rule

NR = Nonrule Policy Document

OA = Objection to Errata (Attorney General)

OG = Objection to Errata (Governor)

ON = Other Notice

PC = Publisher's Correction

PH = Notice of Public Hearing

PR = Proposed Rule

RA = Regulatory Analyses

RC = Notice of Recall

RF = Readopted Final Rule

RN = Notice of Public Comment Period for Rule Readoption

RP = Readopt Proposed Rule

SC = Continuation of Notice of Second Public Comment Period

SN = Notice of Second Public Comment Period

WD = Notice of Withdrawal



The Indiana Register – Document Control Number and Document Identification Number

- Assigned by the Publisher
- Document Identification Number: unique number assigned to each submitted document:
 - After July 1, 2006, each document that has been posted on the Indiana Register website is assigned a unique document identification number (DIN). A sample DIN is: 20151223-IR-410150039FRA
- Document Control Number: unique identifier that links each related document in a rulemaking:
 - The number is in the format "LSA Document #07-209" with the first 2 digits referencing the year of filing and the digits after the hyphen referencing the rulemaking action in order of filing in that year.
 - The LSA Document number must be included in any subsequent action related to the same rulemaking action.



The Indiana Administrative Code

- IC 4-22-8-5: Codification of the general and permanent rules of the agencies
- Updated continuously



The Indiana Administrative Code – History Line

- History lines describe the history of each current rule including all transfers and repeals

357 IAC 1-5-2 Posting

Authority: IC 15-16-4-50; IC 15-16-5-44

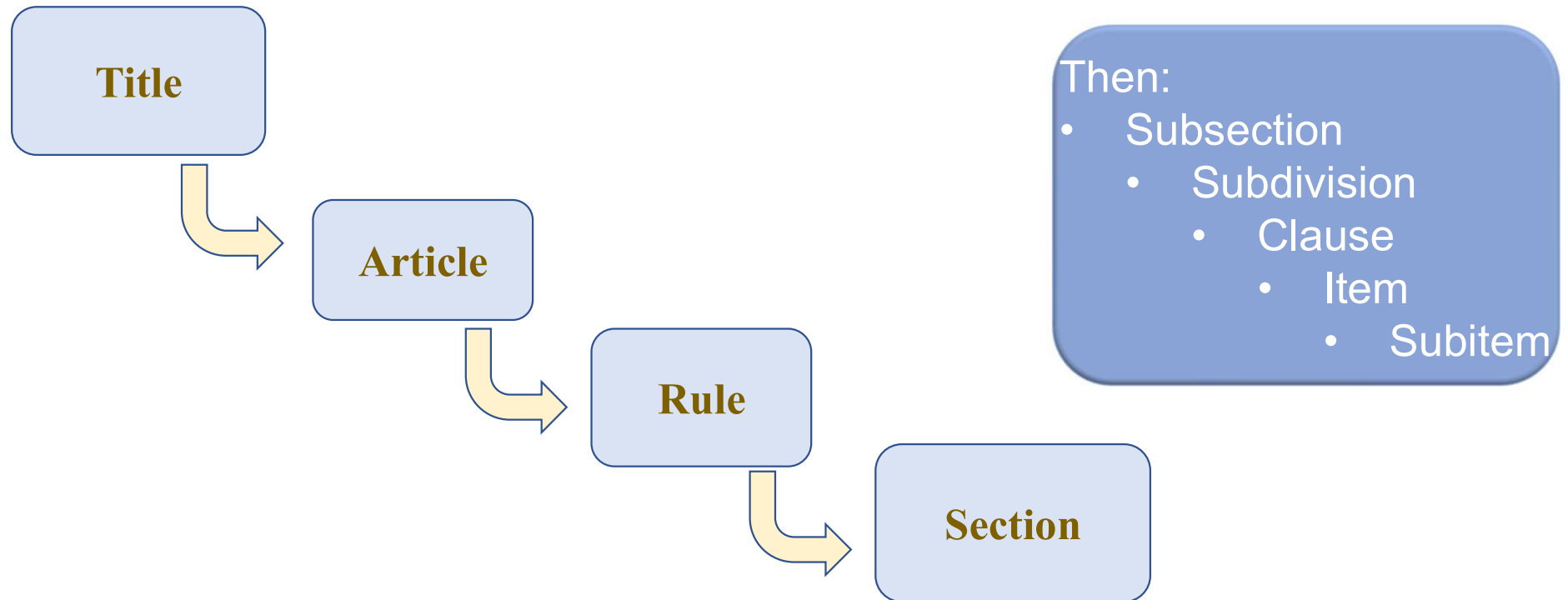
Affected: IC 15-16-4; IC 15-16-5

Sec. 2. (a) At the time of each commercial for hire pesticide application identified...[text deleted for example]

(Indiana Pesticide Review Board; 357 IAC 1-5-2; filed Apr 20, 1990, 4:35 p.m.: 13 IR 1702; errata, 13 IR 1861; filed Jun 9, 2000, 9:58 a.m.: 23 IR 2706; readopted filed Oct 29, 2001, 4:41 p.m.: 25 IR 936; readopted filed Sep 20, 2007, 1:47 p.m.: 20071010-IR-357070485RFA; readopted filed Dec 2, 2013, 4:00 p.m.: 20140101-IR-357130491RFA; readopted filed Dec 1, 2017, 9:25 a.m.: 20171227-IR-357170359RFA)



The Indiana Administrative Code - Organization





LEGISLATIVE SERVICES AGENCY

The Indiana Administrative Code- Organization

Sec. 8. (a) All surface water quality criteria in this section, except those provided in subsection (b)(1), are not applicable when the stream flows are less than the applicable stream design flow for the particular criterion as determined under 327 IAC 5-2-11.4.

(b) The following are minimum surface water quality conditions:

(1) All surface waters within the Great Lakes system, including waters within a mixing zone, must be free from substances, materials, floating debris, oil, or scum attributable to municipal, industrial, agricultural, and other land use practices, or other discharges that do any of the following:

(A) Settle to form putrescent or otherwise objectionable deposits.

(B) Occur in amounts sufficient to be unsightly or deleterious.

(C) Produce:

(i) color;

(ii) visible oil sheen;

(iii) odor; or

(iv) other conditions;

to an extent that creates a nuisance.



LEGISLATIVE SERVICES AGENCY

The Indiana Register and Indiana Administrative Code - Publication

- Published electronically (IC 4-22-8-2 and IC 4-22-8-5)

The screenshot displays the website for the Indiana General Assembly, 2024 Session. The header includes the text "Indiana General Assembly 2024 Session" and a navigation menu with items: Home, Information, Session, Committees, Legislation, Laws, and Publications. The Publications menu is open, showing a search bar and a list of links: Administrative Rules Drafting Manual, Administrative Code, Indiana Register, List of Agencies with Emergency Rulemaking Authority, and Table of Session Statutory Changes to Rules. Below the navigation, the main content area says "Welcome to the Indiana General Assembly 123rd General Assembly" and features buttons for "Democrats" and "Republicans". A banner image of the legislative chamber is visible at the bottom.



Drafting for Rules - Formatting

IC 4-22-2-20

Sec. 20. (a) Whenever an agency submits a rule to the publisher, the attorney general, or the governor under this chapter, the agency shall submit the rule in the form of a written document that:

- (1) is clear, concise, and easy to interpret and to apply; and
- (2) uses the format, numbering system, standards, and techniques established under section 42 of this chapter.

(b) After June 30, 2006, all documents submitted to the publisher under this chapter must be submitted electronically in the format specified by the publisher.



Drafting for Rules

IC 4-22-2-42

Sec. 42. The publisher, with the assistance of the code revision commission, shall establish a format, a numbering system, standards, and techniques for agencies to use whenever they draft and prepare rules under this chapter.



Drafting for Rules

IC 4-22-2-19.5

Sec. 19.5. (a) To the extent possible, a rule adopted under this article or IC 13-14-9 shall comply with the following:

(1) Minimize the expenses to:

(A) regulated entities that are required to comply with the rule;

(B) persons who pay taxes or pay fees for government services affected by the rule; and

(C) consumers of products and services of regulated entities affected by the rule.

(2) Achieve the regulatory goal in the least restrictive manner.

(3) Avoid duplicating standards found in state or federal laws.

(4) Be written for ease of comprehension.

(5) Have practicable enforcement.

(b) Subsection (a) does not apply to a rule that must be adopted in a certain form to comply with federal law.



Drafting for Rules - Conformity

- Nonconforming documents may be rejected by the Publisher for failure to use required format, numbering system, standards, and techniques

IC 4-22-2-23	IC 4-22-2-37.1
IC 4-22-2-24	IC 4-22-2-37.2
IC 4-22-2-31	IC 4-22-2-38
IC 4-22-2-32	IC 4-22-2.6-5
IC 4-22-2-33	IC 4-22-2.6-7
IC 4-22-2-35	



Drafting Manual and User's Guide

- Drafting Manual:
 - Prepared under the direction of the Indiana Code Revision Commission
 - Approved by the Legislative Council
 - Drafting standards for rule documents and administrative code
 - (<http://iac.iga.in.gov/iac//IACDrftMan.pdf>)
- User's Guide:
 - Helpful hints about drafting
 - Examples of rule documents
 - Templates
 - (<http://iac.iga.in.gov/iac//faqs.pdf>)



Code and Noncode Provisions

- Code:
 - Permanent
 - Organized by 4 level citation number and included in the Indiana Administrative Code
- Noncode:
 - Temporary and not included in the Indiana Administrative Code
 - May contain a specific termination date that is within 2 years after the date of adoption of the rule (e.g., Provisional Rule; Interim Final Rule)
 - May terminate by implication when their purpose is fulfilled or ceases to exist (e.g. repealer, effective date, and expiration date provisions)
 - May supplement, supersede, or suspend current administrative code or temporarily add new provisions



Code and NonCode Provisions

Code:

SECTION 1. 852 IAC 1-1.1-3 IS AMENDED TO READ AS FOLLOWS:

123 IAC 1-1.1-3 **Application**

Authority: IC 1-24-1-1

Affected: IC 1-24-1-3

Sec. 3. The definitions in this chapter apply throughout this ~~article.~~ **title.**

Noncode:

- SECTION 1. **(a) This SECTION is supplemental to 856 IAC 2-2.**
(b) [text]
- SECTION 1. **(a) This SECTION supersedes 856 IAC 2-2-2.**
- SECTION 3. 71 IAC 8-2-1 IS SUSPENDED.



Drafting Standards

- Use short, simple sentences
- Use as the subject of each sentence the person or entity to whom a power, right, or privilege is granted or upon whom a duty, obligation, or prohibition is imposed
- Use present tense
- Use the indicative mood
- Use active voice



Drafting Standards

- Organize provisions
 - General provisions before specific provisions
 - Chronological order for provisions that describe a procedure
 - For a rule document that adds a new article or rule:
 - Applicability
 - Definitions
 - Creation of an entity
 - Administrative and procedural provisions
 - Substance
 - Prohibitions and penalties
- Consistency



Drafting Standards

- Definitions
 - Avoid:
 - Writing substantive or applicability provisions into definitions
 - Use of a word in a sense foreign to a dictionary meaning
 - Developing and using an artificial concept
 - Use "includes" not "including, but not limited to"
 - "Includes" is used in a non-exhaustive definition. Use of "including, but not limited to" is redundant.



Drafting Standards – Lead in Lines

- To add a new section:
SECTION 1. 70 IAC 2-1-5 IS ADDED TO READ AS FOLLOWS:
70 IAC 2-1-5 **General Provisions**

Authority: IC 1-1-2-3
Affected: IC 4-2-3-7

[Rule Text]
- To amend a section:
SECTION 1. 345 1-3-26.5 IS AMENDED TO READ AS FOLLOWS:

345 IAC 1-3-26.5 Moving equines into Indiana
Authority: IC 15-17-3-21
Affected: IC 15-17-3-13

[Rule Text]
- To Repeal a section:
SECTION 2. 310 IAC 13 IS REPEALED.



Templates

- <https://www.in.gov/omb/rule-approval-process/lsa-templates/>
- Purpose Of Notice
 - Contains a narrative paragraph explaining the purpose of the notice
 - A brief description of the major provisions adding, amending, or repealing language within the rule.
 - Each description of the change in a rule begins with "adds", "amends", "repeals", or "makes" and the subject matter affected



Templates

- Authority:
 - Citation of each Indiana statute that expressly delegates rulemaking power to the agency to issue a rule on the subject matter of the accompanying rule.
 - If the General Assembly has not expressly delegated authority to issue a rule, give the citation of each statute that grants rulemaking power to the agency by implication.
- Citations Affected:
 - Citation of each Indiana statute that:
 - Is cited in the rule text
 - Directly relates to the subject matter
 - Is a savings clause or other provision that affects the validity



LEGISLATIVE SERVICES AGENCY

Publication of Certain NonRule Policy Documents in *Indiana Register* (IC 4-22-7-7)

- Attorney General's Opinions
- Executive Orders
- Official explanatory opinions of the State Board of Accounts based on an official opinion of the Attorney General
- Any other statement:
 - (A) that:
 - (i) interprets, supplements, or implements a statute or rule;
 - (ii) has not been adopted in compliance with IC 4-22-2;
 - (iii) is not intended by its issuing agency to have the effect of law; and
 - (iv) may be used in conducting the agency's external affairs; or
 - (B) that specifies a policy that an agency relies upon to:
 - (i) enforce a statute or rule;
 - (ii) conduct an audit or investigation to determine compliance with a statute or rule; or
 - (iii) impose a sanction for violation of a statute or rule.
- IC 4-22-7-7 includes information bulletins, revenue rulings (including, subject to IC 6-8.1-3-3.5, a letter of findings), and other guidelines of an agency.



Rule Effectiveness

- Final Rules accepted for filing under IC 4-22-2-35 – the latest of the following:
 - The effective date of the statute delegating authority to the agency to adopt the rule.
 - 30 days after the date and time the rule is accepted for filing by the publisher.
 - The effective date stated by the agency in the rule.
 - The date of compliance with every requirement established by law as a prerequisite to the adoption or effectiveness of the rule.
- Provisional Rules under IC 4-22-2-37.1 – the latest of the following:
 - The effective date of the statute delegating authority to the agency to adopt the provisional rule.
 - The date and time the provisional rule is accepted for filing by the publisher.
 - The effective date stated by the agency in the provisional rule.
 - The date of compliance with every requirement established by law as a prerequisite to the adoption or effectiveness of the provisional rule.
 - The statutory effective date for a provisional rule set forth in law.



Rule Effectiveness

- Interim Rules accepted under IC 4-22-2-37.2 – the latest of the following:
 - The effective date of the statute delegating authority to the agency to adopt the interim rule.
 - The date and time the interim rule is accepted for filing by the publisher.
 - The effective date stated by the agency in the interim rule.
 - The date of compliance with every requirement established by law as a prerequisite to the adoption or effectiveness of the interim rule.
 - The statutory effective date for an interim rule set forth in law.
- Exceptions for certain interim rules in IC 4-22-2.3
- Agency Corrections under IC 4-22-2-38 – the latest of the following:
 - The date that the rule being corrected by an agency correction becomes effective
 - 45 days after the rule is accepted for filing by the publisher.



Rule Effectiveness

- Readopted Final Rules accepted under IC 4-22-2.6-8 – the latest of the following:
 - 30 days after the date and time the rule is accepted for filing by the publisher.
 - The effective date stated by the agency in the rule.
 - The date of compliance with every requirement established by law as a prerequisite to the adoption or effectiveness of the rule.



Where and How Do You Submit

Submissions to the publisher:

- All documents, except final rules, should be submitted electronically :
 - by email register@iga.in.gov; or
 - Confirm in advance a walk-in submission.
- Final Rule documents must be burned to CD and submitted in the Final Rule Binder to the OAG. Once the Final Rule is approved by the Governor's office, the office will submit the binder to the publisher.



Rulemaking Tips and Tricks

Websites in a Publication

The Register does not currently link to other websites. Please avoid long websites or placing hyperlinks in documents.

Contact the Register if you choose to provide webcast information for Microsoft Teams.



Word Document and Markup from the Register

- The Register will email the agency a markup PDF and Word document after a document with rule text is published.
- The markup will have edits made to the document for publishing shown in red, and questions or suggestions are shown in green.
- The Word document is identical to what is posted on the Register.
- The Word document, with any changes made after publishing, is to be used when presenting the rule for adoption.
- The adopted version must be burned to a CD to be placed in the Final Rule binder.



Watch your Deadlines

Deadlines for rules expiring in 2026:

1. Legislative Notices are due before January 1, 2025.
2. Notice of Public Comment Period for Rule Readoptions are due before September 3, 2025.
3. Readopted Final Rules are due before December 2, 2025.

Rulemaking under IC 4-22:

1. Requires at least one 30 day comment period and a public hearing to be held 30 days after the proposed rule is published.
2. Rules must be approved by the governor within one year of the Notice of First Public Comment Period being published.



Rule Drafting Manual

The Administrative Drafting Manual has been updated on the Register website.

Common Issues:

1. Word documents with redline edits, comments, or track changes on.
2. Not using the latest version of the administrative code.
3. All the text in an IAC cite that is being amended not shown in the document.
4. Including the following in a rule document:
 - IAC Article and Rule headings if the headings are not being amended.
 - Text of current cites that are not being amended.
 - Text of a cite to be repealed.
5. Stricken text following bold text – stricken text must appear before bold text.
6. Striking or adding in bold when IAC cite headings are changed: these can be amended without showing the stricken and bold text.
7. Not including in the Final Rule binder, a statement of whether or not changes were made to the rule after publication or not.



LEGISLATIVE SERVICES AGENCY

Resources

Register website

<http://iac.iga.in.gov/iac/irtoc.htm>

OMB website

<https://www.in.gov/omb/rule-approval-process/>

Templates on OMB website

<https://www.in.gov/omb/rule-approval-process/lsa-templates/>

Administrative Rule Drafting Manual

<http://iac.iga.in.gov/iac//IACDrftMan.pdf>

User's Guide with Supplemental Manual

<http://iac.iga.in.gov/iac//faqs.pdf>

Email the Register Staff at Register@iga.in.gov



OFFICE OF THE INDIANA ATTORNEY GENERAL **TODD ROKITA**

An Overview of the Rulemaking Process

Donald "Ned" Hannah
Deputy Attorney General, Advisory

Z. Claire Dyer
Deputy Attorney General, Advisory



OFFICE OF THE INDIANA ATTORNEY GENERAL **TODD ROKITA**

Welcome

Since taking office in 2021, Attorney General Rokita has taken strong actions to protect liberty and the rule of law. Employing nearly 400 staff members, the Office of the Indiana Attorney General serves with a servant's heart to ensure Hoosiers' voices are heard and protected.

Our Services to Hoosiers

- As attorney for the State of Indiana, we represent state agencies and officeholders. With nearly **20,000 active cases** at any given time, our office defends laws passed by the legislature and challenges federal overreach harmful to Hoosiers.
- We protect consumers from illicit business practices, cybersecurity threats, data privacy violations and ID theft. We have obtained **nearly \$1 billion in settlements** for Hoosiers — including hundreds of thousands from annoying and illegal robocallers.
- We **return over \$1 million** in Unclaimed Property to Hoosiers every week - achieving a **record \$76.8 million returned** in fiscal year 2023.
- Since taking office, **we have recovered \$85.5 million** from entities allegedly engaged in Medicaid fraud.
- We handle more than **1,000 criminal and civil appeals** each year — successfully upholding the convictions of child abusers, murderers and rapists.





Rulemaking: In General

“The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.’ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974)). The same principle is true here at the state level...”

Natural Resources Defense Council v. Poet Biorefining-North Manchester, LLC, 15 N.E.3d 555, 563 (Ind. 2014)



Office of the Attorney General Advisory Division

- The Attorney General is the legal advisor to all agencies in the drafting and preparation of rules (IC 4-22-2-22)
- Agencies are encouraged to seek advice and assistance from the Advisory Division when promulgating rules



General Requirements

- Indiana Code 4-22-2, 4-22-2.1, 4-22-2.3, 4-22-2.6
- Some agencies may have additional statutory requirements for rulemaking; consult your authorizing statutes
- See, e.g., IDEM boards have a separate rulemaking process governed by IC 13-14



What is a Rule?

"Rule" means the whole or any part of an agency statement of general applicability that:

(1) has or is designed to have the effect of law; and

(2) implements, interprets, or prescribes:

(A) law or policy; or

(B) the organization, procedure, or practice requirements of an agency.

IC 4-22-2-3(b)



Rule or Policy?

A formal rulemaking is not required for “a resolution or directive of any agency that relates solely to internal policy, internal agency organization, or internal procedure and does not have the effect of law.”

IC 4-22-2-13(c)(1)



Rule or Agency Action?

The rulemaking statute does not apply to an “agency action” – an adjudication resulting in an order that applies only to particular parties.

Hamilton Se. Utilities, Inc. v. Indiana Util. Regulatory Comm’n, 135 N.E. 3d 902, 913 (Ind. Ct. App. 2019).



Indiana Administrative Code and Indiana Register

- Final and/or regular rules become part of the Indiana Administrative Code (IAC)
- Online at <http://iac.iga.in.gov/iac/>
- Documents related to pending rulemaking actions, provisional rules, and interim rules are in the Indiana Register: <http://iac.iga.in.gov/iac/irtoc.htm>



Important Resource

- Important resources to remember are the Administrative Rules Drafting Manual and IR Database Guide available at:
<http://iac.iga.in.gov/iac/IACDrftMan.pdf> and
<http://iac.iga.in.gov/iac//faqs.pdf>



Regulatory Analysis IC 4-22-2-22.7

- Regulatory Analysis to be completed and submitted to the Office of Management and Budget (OMB) and State Budget Agency (SBA)
 - Template available under step 2 at: <https://www.in.gov/omb/rule-approval-process/administrative-rulemaking-rulemaking-process-overview/>
 - To be published on the Indiana Register
- Agency must receive authorization from OMB and SBA to commence the public comment periods.



Regulatory Analysis IC 4-22-2-22.7 (Con't.)

- The regulatory analysis must include findings and any supporting data, studies, or analyses prepared for a rule that demonstrate compliance with the following:
 - Comply with standards of IC 4-22-2-19.5 including, minimizing expenses to regulated entities, persons, or consumers, in the least restrictive manner with practicable enforcement.
 - If applicable, complies with the requirements for fees, fines, and civil penalties in IC 4-22-2-19.6.
 - The annual economic impact on small businesses statement required under IC 4-22-2.1-5.
 - Any requirement under any other law to conduct an analysis of the cost, benefits, economic impact, or fiscal impact of a rule, if applicable.



Regulatory Analysis IC 4-22-2-22.7 (Con't.)

- The regulatory analysis must include a statement justifying any requirement or cost that is:
 - imposed on a regulated entity under the rule; and
 - not expressly required by:
 - the statute authorizing the agency to adopt the rule; or
 - any other state or federal law.



Regulatory Analysis IC 4-22-2-22.7 (Con't.)

- Budget Committee Review
 - If the proposed rule adds or amends language to increase or expand application of a fee, fine, or civil penalty the agency must obtain budget committee review of the proposed rule before it can be approved by OMB and SBA. SBA will assist an agency covered by this requirement to seek budget committee review.
 - Template available under step 3 at: <https://www.in.gov/omb/rule-approval-process/administrative-rulemaking-rulemaking-process-overview/>



60-Day Deadline to Begin Rulemaking

- Rulemaking must begin within 60 days of effective date of statute authorizing rule (IC 4-22-2-19)
- If rulemaking will not begin within 60 days, notify Legislative Services Agency (LSA)
 - Notice should state reason why rulemaking failed to begin within the 60 days
- LSA notice can be submitted after the 60 day deadline, at any point in the process
- See page 28 of the Administrative Rules Drafting Manual for additional information.



Exceptions to 60-Day Deadline

- Rule required to receive or maintain delegation, primacy, or approval for state implementation or operation of a program established under federal law



First Notice of Public Comment Period IC 4-22-2-23

- Must be submitted by the agency to the Indiana Register **at least thirty (30) days before the public hearing.**
 - Date, time, and place at which the hearing will be convened, including information for how to attend the public hearing remotely (Public Hearing Notice).
 - Full text of Proposed Rule.
 - Documents incorporated by reference, if applicable

(Continued on next slide...)



First Notice of Public Comment Period IC 4-22-2-23 Con't.

- Latest version of the regulatory analysis submitted to SBA and OMB.
- Authorization of SBA and OMB for the commencement of the public comment periods.
- If the proposed rule adds or amends language to increase or expand application of a fee, fine, or civil penalty or a schedule of fees, fines, or civil penalties, the agenda of the budget committee meeting at which the rule was scheduled for review.



First Notice of Public Comment Period IC 4-22-2-23

- The actual notice of the first public comment period includes:
 - A general description of the subject matter of the proposed rule.
 - Appropriate overview of intent and scope of the rule.
 - Statutory authority for the rule.
 - Latest version of the regulatory analysis submitted to SBA and OMB excluding any appendices containing any data, studies, or analyses references. Must include where, when, and how a person may inspect any data, studies, or analyses used referenced in the regulatory analysis.

(Continued on next slide...)



First Notice of Public Comment Period IC 4-22-2-23

- The actual notice of the first public comment period includes:
 - Where, when, and how a person may inspect any documents incorporated in by reference in the proposed rule (IC 4-22-2-21).
 - Where, when, and how a person may submit written comments on the proposed rule, including the name, address, phone number, and email address of the small business regulatory coordinator (IC 4-22-2-28.1).
 - An indication that, if the agency does not receive any substantive comments during the public comment period or public hearing, the agency may adopt a rule that is the same as or does not substantially differ from the text of the proposed rule published under this section.



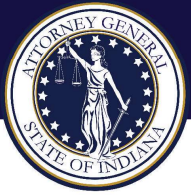
Authorization to Proceed from LSA

- After submitting the Notice of First Public Comment Period and Hearing Notice, the agency should receive an Authorization to Proceed from LSA



Rulemaking Docket IC 4-22-2-22.5

- Must be in place from publication of Notice of First Public Comment Period until effective date of rule
- Must be kept current and can be updated
- Agency can use IOT application or its own
- To ensure compliance with statute, call it “Rulemaking docket” or “Pending rules”



Rulemaking Docket IC 4-22-2-22.5 Con't.

- Must include:
 - Subject matter of the proposed rule
 - Notices or links to IR notices
 - How comments may be made and inspected
 - Time within which comments may be made, including deadline
 - The date, time, and place where a public hearing will be held
 - A description of relevant scientific and technical findings related to the proposed rule, if applicable
 - A reasonable estimate of the timetable for action, updated periodically as circumstances change.



Second Public Comment Period IC 4-22-2-24

- If an agency receives substantive comments during the first public comment period or the public hearing, or the rule establishes a requirement or limitation that is more stringent than an applicable federal requirement or limitation, the agency must conduct a second public comment period.
- The agency must comply with all of the publication requirements **at least thirty (30) days before the second public hearing was convened.**



Second Public Comment Period IC 4-22-2-24 Con't.

- To publish a notice of the second public comment period, the agency must submit the following to the Indiana Register:
 - Full text of the proposed rule.
 - The Notice of the Second Public Comment Period



Second Public Comment Period IC 4-22-2-24 Con't.

- The notice of the second public comment period includes:
 - Date, time, and place at which the hearing will be convened, including information for how to attend the public hearing remotely (Public Hearing Notice).
 - A general description of the subject matter of the rule.
 - Summary of the written comments received by the agency during the first public comment period and a summary of the response of the agency to the written comments.
 - Either a statement indicating that no changes in the regulatory analysis have been made from the first public comment period or the latest version of the regulatory analysis excluding any appendices containing data, studies, or analyses.
 - Where, when, and how a person may inspect the regulatory analysis and the data, studies, or analyses referenced in the analysis.



Second Public Comment Period IC 4-22-2-24 Con't.

- Explanation of any differences between the text of the proposed rule published in the notice of first public comment period and the text of the proposed rule.
- Where, when, and how a person may inspect any documents incorporated in by reference in the proposed rule (IC 4-22-2-21).
- Where, when, and how a person may submit written comments on the proposed rule.
 - Name, address, phone number, and email address of the small business regulatory coordinator (IC 4-22-2-28.1)
- An indication that the notice is for the second of two (2) thirty (30) day comment periods and that the agency may adopt the rule following the second comment period if the proposed rule is the same or does not substantially differ from the text of the published proposed rule.



Second Public Comment Period IC 4-22-2-24 Con't.

- When the public comment period will conclude (at least 30 days after the notice is published).
- Indication that, if the agency does not receive any substantive comments during the 30-day public comment period or public hearing, the agency may adopt a rule that is the same as or does not substantially differ from the text of the published proposed rule.
- Authorization to proceed from the publisher.



Public Hearing IC 4-22-2-26

- May be conducted “in any informal manner that allows for an orderly presentation of comments and avoids undue repetition.”
- “The agency shall afford any person attending the public hearing an adequate opportunity to comment on the agency’s proposed rule through the presentation of oral and written facts or arguments.”



Public Hearing IC 4-22-2-26

- Occurs on place on date and at time and place stated in the notice and include an option for remote attendance.
- May recess and reconvene on a different date or at a different time or place by announcing change at original hearing before the recess.
- Record the announcement in the agency's record of the public hearing.
- Subject to Open Door requirements in IC 5-14-1.5.



Public Hearing and Remote Webcast Hearing IC 4-22-2-26 and IC 4-22-2-17

- Documentation confirms the public hearing occurred on the date and time and place stated in the notice of public hearing and record of any comments received.
 - Record of hearing may consist of minutes, transcript, or summary.
- Public hearing(s) occur at least thirty (30) days after the Notice of Public Comment Period and Notice of Second Public Comment Period, if applicable.
- Include an option for remote attendance that allows the public to comment remotely.
- Webcast(s) are archived as public records on the state website.
- Executive Order 24-02



Summary of Public Comments and Agency Responses IC 4-22-2-27 and IC 4-22-2-27.5

- The authorized authority adopting the rule will consider the comments submitted during the public comment period(s) and public hearing(s).
- Summary of comments received by the agency during each public comment period and public hearing and a summary of the response of the agency to the comments must be submitted to the attorney general, the governor, and the publisher.



Economic Impact Statement and Small Ombudsman Review IC 4-22-2-28, IC 4-22-2.1-5 and IC 4-22-2.1-6

- If an agency intends to adopt a rule that will impose requirements or costs on small businesses, the agency shall prepare a statement describing the annual economic impact of the rule on small businesses once the rule is implemented.
- Proposed Rule and Economic Impact statement must be sent to the Small Business Ombudsman for their review.
- Receive approval or comments from the Small Business Ombudsman.



Economic Impact Statement and Small Ombudsman Review IC 4-22-2-28, IC 4-22-2.1-5 and IC 4-22-2.1-6

- Small Business Ombudsman's comments made available for public inspection and copying at the agency's office, electronically by IOT, and distributed at public hearing.
- Agency must respond in writing to Ombudsman's comments or suggestions.



Incorporation by Reference IC 4-22-2-21

- Incorporation by reference makes an outside document part of the rule.
- Document must be fully and exactly described in the rule.
- The incorporated document is “frozen;” updates do not become part of the rule.
- Incorporated document must be filed with LSA (hard copy or electronic) unless previously filed with another rule.



Incorporation by Reference IC 4-22-2-21

- Texts and documents outside the rule that may be incorporated by reference:
 - Federal or state statute, rule or regulation
 - Code, manual or standard adopted by U.S., state, or nationally recognized organization or association
 - Certain Indiana DLGF manuals and information



The 249th Day IC 4-22-2-25

- Agency has one year from the date of publication of Notice of First Public Comment Period to obtain Governor's approval (or deemed approval)
- If one-year deadline will not be met, the agency must submit a notice to LSA before the 250th day after the Notice of First Public Comment Period is published.



The 249th Day IC 4-22-2-25 Con't.

- LSA notice includes reasons for delay and expected date of approval and the expected date the rule will be approved or deemed approved by the Governor
- If rule is not approved (or deemed approved) by the Governor within one year, or by expected date in LSA notice, rule is dead and new rulemaking must be started.



Final Rule Adoption IC 4-22-2-29

- Final rule adoption, unlike other steps in the process, can't be delegated. The rule must be adopted by the individual or group of individuals (board, commission, etc.) with the statutory authority to adopt rules (IC 4-22-2-15)
- If adopted by a board, commission or other group, adoption must take place in a public meeting



Final Rule Adoption IC 4-22-2-29

- Final rule need not be identical to proposed rule, but if it substantially differs, it must be a *logical outgrowth* of the proposed rule based on public comments or comments received from the Small Business Ombudsman
- Agency may consolidate two or more proposed rules as one final rule, or adopt parts of proposed rule in two or more separate final adoption actions



Final Rule Disc

- Rule binder must include a disc of the Final Rule in Word format to be published by LSA
 - Must be titled “Final Rule”
 - Disc must be labeled “Final Rule”
 - Must contain final version of the rule
 - No further revisions



Attorney General Review IC 4-22-2-31 and IC 4-22-2-32

- All rules must comply with statutory steps for submission and are reviewed for form and legality within 45 days



Attorney General Review

Submission packet to OAG

- Final rule on CD (in Word, not PDF)
- Signature page
- Supporting documentation
- All materials incorporated by reference



Attorney General Review

Supporting Documentation

- Copies of all Indiana Register Documents
- Rulemaking docket
- Regulatory analysis and related documents
- Hearing notices
- Public hearing comments
- Agency's response to comments
- Documents related to adoption (meeting minutes, transcript, etc.)
- Summary of changes from proposed to final rule



Attorney General Review

- Agency may include additional documents and explanations to facilitate review.
- An index and tabbed dividers labeling the appropriate rulemaking step is preferred.
- An explanation clarifying any unusual circumstances should be included when appropriate.



Attorney General Review

- Possible actions for OAG review
 - Approve
 - Take no action for 45 days (“deemed approved”)
 - Disapprove
 - Return to agency without disapproval
 - Agency may recall or withdraw rule
 - Recall: changes can be made to bring rule into compliance (IC 4-22-2-40)
 - Withdraw: rule is dead (IC 4-22-2-41)



Attorney General Review

Grounds for disapproval

- Adopted without statutory authority
- Adopted without complying with rulemaking statutes
- Changes from proposed rule to final rule do not comply with IC 4-22-2-29(c)
 - Changes must be logical outgrowth of written comments received during the public comment periods, public hearings, or from Small Business Ombudsman.
- Violates another law



Attorney General Review

- OAG does not evaluate the policy or technicalities of a rule, except to determine that the rule is within the agency's statutory authority and does not violate another law.



Attorney General Review IC 4-22-2-20

- Form of rule
 - is clear, concise, and easy to interpret and to apply
 - uses the format, numbering system, standards, and techniques established by LSA under IC 4-22-2-42



Attorney General Review

- If the rule does not comply with form requirements, OAG may disapprove the rule, or return it to agency without disapproval
- If returned to agency, rule can be corrected without readoption (IC 4-22-2-32(e))



Attorney General Review

- A rulemaking action that does not comply with IC 4-22-2 does not have the effect of law (IC 4-22-2-44)
- OAG requires supporting documentation to determine compliance with IC 4-22-2 and IC 4-22-2.1 (IC 4-22-2-31)



Approval by Governor IC 4-22-2-33 and IC 4-22-2-34

- As a courtesy, the OAG submits the rule to the Governor's Office, on agency's behalf, after OAG approval
- Governor may approve or disapprove a rule with or without cause
- 15 days to take action
- Governor can request an additional 15 days



Submission to Publisher IC 4-22-2-35 and IC 4-22-2-36

- After Governor's approval, rule is submitted to publisher for filing
- LSA accepts it for filing and publishes a receipt in the Indiana Register
- Rule takes effect the *later* of:
 - 30 days after it is accepted for filing; or
 - the effective date stated in the rule



Recall of Rule IC 4-22-2-40

- A rule may be recalled by the agency at any time before it is accepted for filing
- A recall “un-adopts” a rule and voids any approval given after the rule was adopted
- Agency may re-adopt an identical or revised rule
- A notice of recall is published in the Indiana Register
 - See page 24 of the Administrative Rules Drafting Manual for more information.



Withdrawal of Rule IC 4-22-2-41

- The agency may withdraw the rule at any time before it is accepted for publication.
- Withdrawal terminates the rulemaking action.
- A notice of withdrawal is published in the Indiana Register
 - See page 24 of the Administrative Rules Drafting Manual for more information.



Expiration and Re-Adoption IC 4-22-2.6

- Rules expire January 1 of 5th year after effective date unless readopted.
- Re-Adoption of Rules
 - Submit initial notice of re-adoption to Indiana Register (*see also* IC 4-22-2.6-3)
 - Review rule, reexamine previous cost benefit, economic impact, fiscal impact, and regulatory burden statements → prepare written findings
 - Publish Notice of Proposed Re-Adoption
 - Public Comment Period(s)
 - Re-Adoption of Rule



Other Rulemaking Actions IC 4-22-2-38

- Agency correction
 - Non-substantive rule change to correct typographical or other errors or to update certain outdated citations or references
 - Submit to Indiana Register for filing



Provisional Rulemaking IC 4-22-2-37.1

- Agency must have provisional rulemaking authority in statute
 - Must have Governor's Approval
 - Submit text of proposed provisional rule, statement justifying need, and any additional information required by the Governor
 - Publish Proposed Provisional Rule with LSA
 - Rule distributed to Legislative Council
 - Adopt Provisional Rule and submit Provisional Rule and Signature Page to LSA
- Expires after 180 days
- Governor and Attorney General may object to a Provisional Rule



Interim Rulemaking IC 4-22-2-37.2

- Agency must have interim rulemaking authority in statute
 - Must have Governor's Approval
 - Submit text of proposed interim rule, statement justifying need, and any additional information required by the Governor
 - Publish Notice of Interim Rule with LSA
 - LSA Authorization to Proceed
 - Notice of Public Comment Period (30 days)
 - Agency response to comments
 - Adopt identical rule or revised version based on logical outgrowth from written comments received
 - Expires after 425 days
 - Governor and Attorney General may object to an Interim Rule



Office of the Attorney General - Advisory Division

- The Attorney General is the legal advisor to all agencies in the drafting and preparation of rules (IC 4-22-2-22).
- The Advisory Division of the OAG is primarily tasked with assisting agencies with rule drafting questions.
 - The Advisory Division is comprised of 10 attorneys and 2 assistants.
 - Each attorney reviews rules as they are submitted on a rotating basis.



Office of the Attorney General - Advisory Division

- Agencies may request pre-review of proposed rules and related documents
 - Highly encouraged where there are form or legality questions.
- Pre-review can facilitate final rule review **but does not guarantee approval**, because procedural problems may occur during the promulgation process.



Office of the Attorney General- Advisory Division

- **Agencies are encouraged to seek advice and assistance from the Advisory Division when promulgating rules**
- William Anthony: william.anthony@atg.in.gov
- Donald “Ned” Hannah: donald.hannah@atg.in.gov
- Z. Claire Dyer: claire.dyer@atg.in.gov
- Aaliyah McGowan (Paralegal): aaliyah.mcgowan@atg.in.gov
- Celeste Croft (Executive Assistant): celeste.croft@atg.in.gov



OFFICE OF MANAGEMENT AND BUDGET

Administrative Rulemaking Seminar: OMB and SBA Review



February 7, 2024

Patrick Price

Special Counsel, Office of Management and Budget
General Counsel, State Budget Agency

Chad Ranney

Deputy Director & General Counsel, Office of Management and Budget



Roadmap of Presentation

I. OMB & SBA Review

- Overview
- Review In Practice
- Provisional and Interim Rule Review
- Tips for Smooth OMB Review

II. General Rulemaking Requirements

- What is a Rule
- Role of Rules
- Examples
- Why it Matters

III. Cost-Benefit Analysis

- Overview
- Answer the “Why”
- How to Prepare Analyses
- Examples from Cost-Benefit Analyses

V. Helpful Resources

VI. Questions





OFFICE OF MANAGEMENT AND BUDGET

Overview of OMB and SBA Review

Background

- OMB and SBA review provided in statute, IC 4-3-22-13 and IC 4-22-2-22.8
- Agencies must use standard template for regulatory analysis
- Financial Management Circular #5.1 (7/14/2023) describes the OMB and SBA review process

Purposes

- Coordination between agency, SBA, OMB, and Governor's Office
- Evaluate whether burdens imposed by regulations are justified; IC 4-3-22-1
- Cost-benefit, fiscal, and regulatory analyses





Scope of OMB and SBA Review

FMC #5.1 OMB and SBA Review Process

- Applies to ALL regular rulemakings under IC 4-22-2-23
- Does NOT APPLY to provisional rules
 - Covered by Financial Management Circular #5.3
- Does NOT APPLY to interim rules
 - Covered by Financial Management Circular #5.4
- Does NOT APPLY to re-adoptions of expiring rules
 - Agency prepares readoption analysis instead





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OMB and SBA Review Process

STEP 1: Agency submits review request

- Proposed rule, regulatory analysis, and all supporting materials required by FMC #5.1
- Send to sbarules@gov.in.gov

STEP 2: OMB reviews request for completeness and assigns tracking #

- OMB will send response acknowledging review request
- Agency should reference tracking number in correspondence (e.g., OMB #2024-001)
- Incomplete requests will be held until all supporting documentation provided

STEP 3: OMB circulates review request

- OMB will send proposed rule and supporting materials to SBA and Governor's Office





OFFICE OF MANAGEMENT AND BUDGET

OMB and SBA Review Process

STEP 4: OMB, SBA, Governor's Office review rule

- Allows agency to address any questions/concerns about proposed rule
- Work with agency on rule language, regulatory analysis

STEP 5: Budget Committee review (if necessary)

- If rule includes new or increased fees, fines, or civil penalties, it must be reviewed by Budget Committee

STEP 6: OMB transmits approval letter

- Single approval letter signed by OMB and SBA
- Approval letter only issued AFTER approval by OMB, SBA, and Governor's Office and Budget Committee review, if necessary.
- Approval letter will be emailed to submitter for agency





Contents of Review Request

1. Requirements for submission described in FMC #5.1
2. Copy of the proposed rule in Word format
3. Redline of changes made from existing regulation
4. Regulatory Analysis, as described in FMC #5.2
5. Family impact statement (if necessary), as described in EO #13-05
6. Agency staff member contact info





OMB and SBA Review In Practice

OMB Review

- Collaborative process between OMB, Governor's Office, and Agency
- Focus on rule language and cost-benefit analysis
- Process is deliberative and exempt from APRA (PAC opinion 17-FC-270)

SBA Review

- Focus on fiscal impact analysis

Governor's Office Review

- Focus on policy rationale for proposed rule





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OMB and SBA Review of Subsequent Revisions

OMB and SBA Review of Revisions

- If rule changes after OMB and SBA approval, agency must resubmit for review
- Agency must submit:
 - Revised rule language
 - Revised regulatory analysis
 - Discussion of any changes in the rule or regulatory analysis
 - Explanation of rationale for any changes
- Reapproval is required before the agency may continue with the rulemaking process





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Provisional Rule Overview

Provisional Rulemaking (IC 4-22-2-37.1)

- For temporary situations posing imminent and substantial harm
- Must get written authorization from Governor to proceed
- Circulated to the legislature then effective (DNR and IDEM 10-day delay)
- Fees, fines, or civil penalties must be submitted to Budget Committee
- Email SBArules@sba.in.gov to request approval
- Financial Management Circular #5.3 (7/14/2023) describes the review process and information required





Provisional Rule Overview

Provisional Rulemaking review in practice

- OMB does initial review of rule language and qualification for provisional rulemaking
- OMB works with agency on rule language and justification
- OMB sends recommendation to Governor's Office
- Governor's Office signs approval letter
- OMB sends PDF and Word version of approval letter to agency submitter
- Agency provides PDF and Word versions of approval letter to Indiana Register





OFFICE OF MANAGEMENT AND BUDGET

Interim Rule Overview

Interim Rulemaking (IC 4-22-2-37.2)

- For changes required by new or updated statutes, federal regulations, or professional codes
- Placeholder that gives agency time to do formal rulemaking
- Must get written authorization from Governor to proceed
- Publish Notice of Interim Rulemaking and 30-day comment period (no public hearing)
- Fees, fines, or civil penalties must be submitted to Budget Committee
- Email SBArules@sba.in.gov to request approval
- Financial Management Circular #5.4 (7/14/2023) describes the review process and information required





Interim Rule Overview

Interim Rulemaking review in practice

- OMB does initial review of rule language and qualification for interim rulemaking
- OMB works with agency on rule language and justification
- OMB sends recommendation to Governor's Office
- Governor's Office signs approval letter
- OMB sends PDF and Word version of approval letter to agency submitter
- Agency provides PDF and Word versions of approval letter to Indiana Register





Budget Committee Review

Budget Committee Review

- Required for any proposed rule that adds or amends language to increase or expand application of a fee, fine, or civil penalty
- Templates for Budget Committee report available on OMB website:
 - <https://www.in.gov/omb/rule-approval-process/rulemaking-resources/>
- Work with SBA budget analyst for agency to request to be added to Budget Committee agenda after initial approval by OMB





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Tips for Smooth OMB Review

- Be prepared to talk to us about the rule
 - Have everyone in the discussion at the same time – lawyers *and* subject matter experts
- Don't bite off too much
 - Rule only moves as fast as the slowest portion
 - Can break off higher priority portions to move through first
- Don't reinvent the wheel
 - Modifying existing administrative code tends to be easier than a repeal and replace
- Consider hiring outside resources for big rules





Tips for Smooth Review

- Identify what is new
 - **Redlines** (changes from existing requirements)
- Follow rule drafting manual guidelines
- Check legal authority for each provision
- Feedback from interested parties
- Avoid duplication of statutory or CFR language (consider manuals)
- Include requirements from forms or policy
- Consider talking to OMB before drafting





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What is a Rule – Statute

Indiana Code establishes what must be included in regulation

IC 4–22–2–3(b)

“Rule” means the whole or any part of an agency statement of general applicability that:

- (1) Has or is designed to have the effect of law; and
- (2) Implements, interprets, or prescribes:
 - (A) Law or policy; or
 - (B) The organization, procedure, or practice requirements of an agency.





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What is a Rule – Case Law

Courts have adhered closely to the statutory definition

Rules have Four Elements

- *Villegas v. Silverman*, 832 N.E.2d 598 (Ind. Ct. App. 2005)
- An administrative rule is:
 - (1) “an agency statement of general applicability to a class;”
 - (2) that is “applied prospectively to the class;”
 - (3) that is “applied as though it has the effect of law,” and
 - (4) that “affect[s] the substantive rights of the class.”

“Effect of Law” means Mandatory

- *Ward v. Carter*, 90 N.E.3d 660 (Ind. 2018)
- “an agency regulation carries the effect of law when it prescribes binding standards of conduct for persons subject to agency authority.”
- “[I]f an agency rule acts as a coercive mechanism or wields coercive power over people, it carries the effect of law.”





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What is a Rule – Examples

In General

- Requirements that must be met need to be in statute or regulation
- Basis for denying application or permit must be in statute or rule
- Basis for violation or enforcement action must be in statute or rule

Examples

- Information required to be submitted in an application
- Documents *required* to prove identification
- Required equipment
- Required training standards
- Fees, Fines, and Civil Penalties
 - Specific dollar amount
 - Formula - must explain how the fee is calculated





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Why Isn't Policy Enough?

Because statute requires certain process for adoption

- Agency power to make rules flows from General Assembly
 - Agencies can only make rules where authorized by statute
- General Assembly requires rules to be adopted using certain process
 - Administrative Rules and Procedures Act (IC 4-22-2)
 - Requires due process (sort of)
 - *Villegas v. Silverman*, 832 N.E.2d 598 (Ind. Ct. App. 2005)
 - “These requirements dictate, among other things, public input into any proposed rule changes. The duty of the BMV to issue licenses in a manner that it deems prudent does not supercede the mandate to allow the public to participate in the rule-making process.”





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Why Isn't Policy Enough?

Courts will not enforce rules without procedural steps

- Agency policies without rulemaking steps do not carry the effect of law
 - “We hold that the new identification requirements are a rule, and because they were not promulgated in accordance with the ARPA, they are void and without effect.” *Villegas*, 832 N.E.2d at 610
 - “IDEM may only regulate by a new rule if the proper rulemaking procedures have been followed.” *Indiana-Kentucky Elec. Corp. v. Comm'r, Indiana Dep't of Env't Mgmt.*, 820 N.E.2d 771, 780 (Ind. Ct. App. 2005)
- Examples of rule “alternatives” rejected by courts:
 - **Written policy:** *Villegas*, (required documents for driver’s license)
 - **Oral policy:** *Indiana-Kentucky Elec. Corp.*, (location of environmental monitoring equipment)
 - **Contract:** *Am. Trucking Associations, Inc. v. City of Los Angeles, Cal.*, 569 U.S. 641 (2013) (imposing “distinctive governmental” authority through contract)





The Role of Rules – Statutes vs. Rules

- Statutes set general program requirements
- Regulations fill in details
- Regulations can expand on or explain statutory requirements and definitions
- Rules should not duplicate statute, IC 4-22-2-19.5(a)(3)
 - If your rule repeats statute, must update rule each time statute is updated
 - Means more rules and more confusion





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The Role of Rules – Rules vs. Policies/Manuals

- Rules *impose* requirements
- Rules are legally enforceable
- Policies and Manuals *explain* requirements
- Manuals can combine requirements from statute and regulation and explain in regular language for regulated parties
 - Examples, [BMV Driver's Manual](#), [DNR Hunting Manual](#)
- Policies and Manuals are not legally enforceable





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Statute, Rule, or Policy/Manual

	Statute	Rule	Policy	Manual
Purpose	Set legal authority and basic requirements	Expand on basic requirements	Explain / clarify specific requirements	Synthesize and explain all requirements
Legally Enforceable	Yes	Yes	No	No
Requirements for Adoption	Set by Indiana Constitution	Set by Indiana statute	Set by internal agency policy	Set by internal agency policy
Language style	LSA bill drafting manual	LSA rule drafting manual	Typically, legal memo style	Common language
Comprehensive	Maybe, agency rules can supplement	No, does not include statutes	Usually focused on one issue	Yes, one-stop summary for public





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Example 1 – BMV

Statute

- IC 9-24-16.5-1 The bureau shall issue a photo exempt identification card to an individual who meets the following conditions ... (2) Is an **Indiana resident**.

Regulation

- 140 IAC 7-1.1-3(b) An applicant must show proof of the following ... (4) Being an Indiana resident and of the applicant's **residence address, which may not be a post office box**, by submitting **two (2) documents showing proof of being an Indiana resident and two (2) documents showing the applicant's residence address**. Qualifying documents include the following ...

BMV Driver's Manual

- You must be a legal resident of Indiana to obtain an Indiana credential. Evidence of Indiana residency includes:
 - Maintaining a residential address in Indiana and not claiming residency in another state
 - Being a registered voter in Indiana
 - Having a dependent who is enrolled in an elementary or secondary school located in Indiana





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Example 2 – DNR

Statute

- IC 14-22-11: Establishes basic requirements for hunting licenses.

DNR Regulation

- 312 IAC 9-12-2(a): **In addition to the requirements for obtaining a hunting license under IC 14-22-11**, an individual born after December 31, 1986, must have successfully completed a course in hunter education by the department or the department's agent under IC 14-22-35-1 and this rule.

DNR Hunting Manual

- Hunter education: Anyone born after Dec. 31, 1986 must successfully complete a DNR-offered hunter education class to purchase an Indiana hunting license.





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Attorney Fees

- Modified in HEA 1623 effective July 1, 2023
- Basis for agency action must be found in statute or valid rule
- Agency may be liable for enforcing requirements only found in non-rule policies, manuals, handbooks, interpretative guidance, etc.
- Applies to proceedings under AOPA (IC 4-21.5-3-27.5)
- Applies to judicial review of agency actions (IC 34-52-2-1.5)





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Cost-Benefit Analysis – Overview

WHAT

Document the net impact of a new rule

GOAL

Justify new regulation by demonstrating that benefits exceed costs.

FOCUS

Minimizing negative impacts and maximizing benefits of new rule.





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Cost-Benefit Analysis – Statutory Requirements

- Minimize the expenses to regulated entities that are required to comply with the rule. IC 4-22-2-19.5
- Include justification of any requirement or cost that is imposed on a regulated entity under the rule. IC 4-22-2-22.7
- Include the total estimated economic impact. IC 4-22-2-28
- Describe any assumptions made and any data used. IC 4-22-2-22.7





Cost-Benefit Analysis – Steps

Step 1: Identify each new requirement in proposed rule

Step 2: Identify impacted parties

Step 3: Identify benefits for each new requirement

Step 4: Identify the costs for each new requirement

Step 5: Aggregate the total benefits and costs for each requirement and the entire rule

Step 6: Explore mitigation options

Step 7: Seek input from affected on proposed rules





Identify All New Requirements

Step 1: Identify everything in the proposed regulation that is changing from current requirements

- Must identify all changes from existing regulation
 - Biggest reason for delays in OMB review
 - **Redlines** or another way to track changes
 - Lists or tables can be very helpful
- Identify any current requirements
 - Statute, other regulations, federal regulations, court orders, compacts, etc.
 - Can include in list, table, or annotations
 - Excluded from cost-benefit analysis of the rule





Who Is Impacted By Changes?

Step 2: Identify impacted parties

- Serves as the multiplier for costs / benefits
 - Consider impact on all persons affected by the rule (not just regulated persons)
 - Can exclude parties already in compliance from cost-benefit analysis
- Can determine from variety of sources
 - Agency records
 - Estimates
 - Calculations
 - Surveys
 - Research





Impacted Parties – Example

How to Identify Number of Impacted Parties

Sometimes you know

- **PLA:** There are 60,993 beauty culture professionals, 8,217 beauty culture salons, 99 beauty culture schools, and 498 tanning facilities holding active licenses in the State of Indiana.

Sometimes you can calculate

- **Egg Board:** Total number of small businesses in Indiana who would be potentially impacted by the requirement for using new packaging materials is estimated to be 170 producer packers. This number was determined by the total of 540 small egg businesses minus 355 registered farm market retailers who would be exempt under the proposed rule. We then removed the 15 small wholesalers who are not packing their own eggs and would not have a direct cost associated with purchasing new packaging materials.





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Impacted Parties – Example

How to Identify Number of Impacted Parties

Sometimes you can estimate

- **IDHS:** It is estimated that this proposed rule will affect somewhere around 14,068 homes per year. This is the number of homes believed to be constructed each year in Indiana, based off building permit data obtained from the United States Census Bureau.
- **Health:** Of the 54 Indiana counties responding to a survey, 50 local health departments reported that in 2020 there were a total of 4954 septic permits issued, or an average of 99.1 per local health department, and in 2021, 49 local health departments reported that there were a total of 4885 septic permits issued, representing an average of 99.5 permits per county. These were the years that the impact of COVID was most significant, and the number of permits issued may not be representative of past or future years. If this average of 99.5 permits were extended to all 92 counties in Indiana, that would give an approximate number of 9154 residential septic permits issued each year.





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Benefits: Answer the “Why”

Step 3: Identify benefits for each change

- What is the benefit → it's the reason you are doing the rule
 - Benefits are positive externalities of the rule
- Who gets the benefits → usually someone other than the group regulated
 - Benefit is usually the value in solving the problem
- How to calculate benefits → same way you calculate costs, BUT ...
 - Often benefits are less certain
 - Can be more intangible and less concrete than costs
 - Usually require assumptions and estimates
 - Look to research studies (e.g., value of human life, quality adjusted life years)





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Benefits: Source of Motivation

How did this problem come to your attention?

- Inspection records
- Enforcement proceedings
- Implementation experience
- Consumer complaints
- Lawsuits
- Consent decrees
- Federal requirements
- Research studies
- Experience of other states or jurisdictions





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Benefits: Motivation Examples

- **Health:** Individuals with a confirmed elevated blood lead level of 5 $\mu\text{g/dL}$ and above can expect increased healthcare costs and a loss in lifetime earnings.
- **Egg Board:** According to a CDC report, there were 8 cases of Salmonella in Indiana that were attributed to back yard poultry flocks.
- **IURC:** NiSource, the parent company of Columbia Gas of Massachusetts, said restoration and payment of claims related to the Merrimack Valley gas disaster could cost greater than \$1 billion for that one incident. Even one smaller incident with fatalities can easily exceed tens of millions of dollars.
- **IDEM:** Persons impacted by military deployment unable to provide the necessary documentation or retake the examination within a specified amount of time.
- **Insurance:** The proposed rule is based upon Model #787 and must be adopted in each state in order for that state to maintain its accreditation with the NAIC. States failing to maintain NAIC accreditation will subject domestic insurers to financial examinations from each of the other NAIC-accredited jurisdictions.





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Costs: Answer What It Takes

Step 4: Identify costs associated with each change

- What is the cost → it's the burden of complying with the rule
 - Costs are negative externalities of the rule
- Who bears the costs → the parties regulated by the rule (and potential others who are indirectly affected)
 - Anyone who must change their behavior to interact with the regulated party
- How to calculate costs → same way you calculate benefits, BUT ...
 - Often costs are more certain and ascertainable
 - Can be more tangible and concrete than benefits
 - May require assumptions and estimates, but scope of impact should be mostly evident from rule
 - Look to surveys of regulated parties (e.g., what would it take to comply)
 - Exclude impacts and costs of existing compliance





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Existing Compliance – Example

Existing Compliance Reduces Cost Imposed by Regulation

Using Enforcement Records

- **State Chemist:** There are currently approximately 300 regulated and potentially impacted government entities in Indiana. These government entities are broken down roughly as 75% (225) local, 23% (69) state, and 2% (6) federal. Based on routine government facility inspections by OISC, it is estimated that at least 80% of these government entities already have application recordkeeping systems in place.
- **IDHS:** IDHS employs EMS District Managers who are responsible for 2-3 IDHS districts and would handle EMS organizations in roughly 20 Indiana counties. The District Manager interacts frequently with the EMS providers in their districts and also will do organization visits or official audits. All new ambulances are inspected, so every time a new ambulance is put into service the District Manager will be on site. This is how they interact and discover the equipment and resources that are being used.





Existing Compliance – Example

Using Surveys

- **DOC:** A fiscal impact toolkit was developed to measure a detention facility's current level of compliance with the new standards, and if noncompliant, the extent of any fiscal impact to achieve compliance. All nineteen (19) juvenile detention facilities were provided the fiscal impact toolkit; of those, twelve (12) of the detention facilities completed the toolkit. A potential fiscal impact was reported for a total of nine (9) standards.

Using Surveys plus internet research

- **BMV:** BMV has conducted a survey of all licensed driver education schools to determine how many vehicles this amendment would impact. Of the 80 schools that responded, five vehicles total were reported to not already have this safety feature in place. Assuming a replacement cost of \$13.99 for the mirror (determined via internet research), the anticipated cost to all licensed entities is approximately \$70.





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Add It All Up

Step 5: Tally costs and benefits for each new requirement and aggregate for the entire rule

- For each new requirement, sum the benefits and costs
 - Multiply average costs / benefits by number of impacted parties
 - Exclude parties already in compliance from cost-benefit analysis
- Evaluate the net benefit for each requirement separately
 - Benefits from one requirement cannot offset costs of another
- Aggregate the calculation for each requirement to determine the total net benefit of rule
- Consider using a table





Tallying Costs – Example

Number of impacted parties x Cost imposed – Existing compliance

- **PLA:** Dry needling courses are typically three days and include 27 to 29 hours of instruction. The estimated cost for a Physical Therapist to take two courses is \$1,300 to \$2,000, not including travel or lodging. Based on a survey that was sent to over 40 leaders of hospital physical therapy departments and physical therapy private practices across the state, approximately **239 licensed Physical Therapist have already completed 1 dry needling course** and approximately 76 license Physical Therapist have completed 2 or more dry needling courses. **The estimated cost for a Physical Therapist who has already taken one course would be \$600 to \$1,000**, not including travel or lodging, and Physical Therapists who have already completed 2 or more dry needling courses may not require any additional training. **The total estimated cost for existing Physical Therapists who have taken at least one dry needling course to meet the new standard is \$239,000.**





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Weighing Costs and Benefits – Example 1

Quantify the overall benefits of the regulation

- **Health:** Individuals with a confirmed elevated blood lead level of 5 $\mu\text{g}/\text{dL}$ and above can expect increased healthcare costs and a loss in lifetime earnings. A Columbia Law School review of one cohort of 1- and 2-year-olds in Texas in 2014 estimated that the per child societal costs of children with blood lead levels more than 5 $\mu\text{g}/\text{dL}$ was \$10,813. **This includes costs associated with immediate medical intervention, lead related ADHD, parental time-off work, special education costs, and lost earning potential.** It does not include pain and suffering, future-related adult medical expenses, or criminal justice costs. In Indiana, using the same conservative assumed per-child savings, **Hoosiers would see avoided costs of \$20.9M in for those children above 5 $\mu\text{g}/\text{dL}$ in year one.**





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Weighing Costs and Benefits - Example 1

Quantify the overall costs of the regulation

- **Health:** The Indiana Department of Health expects the reduction in the EBLL threshold to cost \$6,599,894 in year one and \$10,225,222 in year two. Costs will grow in years 3-5 with the additional children tested under universal screening, but will taper down in years 6-10 as the state moves to a targeted screening strategy. In total, this rule change, coupled with the new universal screening legislation, **will cost \$119,421,978 over a ten-year period.**





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Weighing Costs and Benefits – Example 2

Quantify the Overall Benefits of the Regulation

Egg Board:

Consumer safety

- The majority of our 170 businesses who may reuse egg cartons are from small back yard flocks of 250 birds or less. According to a report from the Centers for Disease Control, there were **8 cases of Salmonella in Indiana that were attributed to back yard poultry flocks**. Nationally, 2017 saw the largest increase in the incidence of Salmonella in humans as a result of live poultry.

Product traceability

- When egg cartons are reused there is an increased probability that the trace back information required on every egg carton can be incorrect or conflicting when multiple sets of information are present.
- In the event of a food borne illness contributed to egg consumption occurs, the **accurate and rapid trace back to the origin is vital**. Using only new cartons at retail will alleviate the potential to trace back to multiple origins and save significant resources.





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Weighing Costs and Benefits – Example 2

Quantify the Overall Costs of the Regulation

Egg Board:

- As of March 31, 2018, we have 139 registrants in this classification.
- Each of these registrants is required to report the volume of eggs they distribute. This information indicates that, on average, this group of producer retailers is distributing approximately 145,000 dozen eggs per year.
- Assumptions for calculating annual impact:
 - All eggs are marketed in 1 dozen egg cartons
 - New egg carton cost was calculated from an average of 3 on-line suppliers
 - Egg cartons are foam material, purchased in 100 carton packages
- The average price per carton = \$.42.
- The 145,000 dozen distributed by small businesses with a carton cost of \$.42 would result in a total annual economic impact of \$60,900 in increased cost, if all eggs were currently being marketed in used cartons. **Average annual per business cost is calculated to be \$438.13. Range** from (\$0 - \$2500 (all eggs retailed from a 250-bird flock)).





Example Summarizing Net Benefits

Tables Can Be Helpful to Summarize

Requirement	Impacted Parties	Average Benefit	Average Cost	Percent existing compliance	Total Benefit	Total Cost	Net Benefit	Comments
Requirement 1	1,000	\$400	\$50	46%	\$184,000	\$23,000	\$161,000	Existing compliance estimated from industry survey
Requirement 2	1,000	\$200	\$150	25%	\$150,000	\$112,500	\$37,500	Going to consider mitigation options to reduce costs
Requirement 3	1,000	\$10	\$2	99%	\$100	\$20	\$80	National standard has been in place since 2020 and enforcement records indicate almost complete voluntary compliance already





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Attempt to Reduce Costs

Step 6: Explore mitigation options to reduce costs

- Even when regulation has net benefit, always explore ways to reduce costs
- Common techniques include:
 - Grandfathering
 - Delayed enforcement
 - Exceptions
 - Safe Harbors
 - Making it easier to comply
 - Transition assistance
- OMB happy to assist with brainstorming mitigation options





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Minimizing Costs – Example 1

Commonly used techniques to minimize costs imposed

Grandfathering

- **Health:** “(i) This rule does not require existing onsite sewage systems to comply with updates made to this rule subsequent to the system’s installation, except to the extent necessary to fix a malfunction or failure.”

Safe Harbor

- **DNR:** (i) A person who possesses or sells a boreal chorus frog that was lawfully acquired by the person does not violate this section if the person does each of the following:
 - (1) Lists the number of boreal chorus frogs in possession on a departmental form by October 1, 2021.
 - (2) Identifies the frog with an individually unique elastomer or another method of permanent marking approved by the director.
 - (3) Manages the frog in a manner that is likely to ensure the safety of the public and the health of the frog.





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Minimizing Costs – Example 2

Delayed Enforcement

- **DNR:** “Effective October 1, 2021, “snare lock” means a device that creates and maintains a snare loop and prevents the loop after closure upon an animal from reopening to a diameter that allows the animal to escape. (regulation filed November 2020)
- **DNR:** a person must not:
 - (1) sell, offer or grow for sale, gift, barter, exchange, or distribute a species;
 - (2) transport or transfer a species; or
 - (3) introduce a species.

Subdivisions (1) and (2) are effective one (1) year after the effective date of this section.





Minimizing Costs – Example 3

Making it Easier for Regulated Parties to Comply

- **DNR:** (b) In order to be effective, a zone established under this rule must be identified by **coordinates or** on-site by buoys placed under 312 IAC 5-4.

Changed to:

- (b) In order to be effective, a zone established under this rule must be identified with **signage at the coordinates or** on-site by buoys placed under 312 IAC 5-4.

Consider human behavior

- Try to harness human behavior and work with it, not against it
- Cass Sunstein and Richard Thaler's [Nudge](#)





Minimizing Costs – Example 4

Helping Regulated Parties with Transition

- **DNR** will notify trappers and hunters of rule changes through news releases sent out electronically, updates on the website, and updated information in the Hunting & Trapping Guide that is printed and distributed each year.
- **BOAH** sends out emails to interested stakeholders so they are aware of upcoming rulemaking matters before the board. The BOAH posts the board agenda in a prominent location on the website so the rule information can be found on this page in addition to the rulemaking docket. The BOAH also sends out an issues newsletter to stakeholders on a quarterly basis.





Getting a Second Opinion

Step 7: Seek input from affected parties

- Many benefits to seeking input from affected parties *before* OMB review
 - We will ask 😊
 - Validates the work you have done
 - Regulated parties can identify factors you may have missed
 - Buy-in from regulated parties makes review easier
 - Avoids surprises
 - Avoids legislative response





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Input of Regulated Parties – Example 1

Obtaining input of regulated parties can be very helpful

- **DHS:** Any amendments to this code were done in a public meeting, following the submission of a code change proposal that was posted on the Commission's website for public comment before being voted on by the subcommittee. The subcommittee contained members of the fire service industry, building inspection industry, architects, engineers, and builders. The subcommittee would discuss, and hear comments on, all proposals before voting on whether to adopt the code change proposal. This method of adoption was to ensure that the policy decisions were taking into account all sides of the issue (i.e. safety, cost, feasibility, etc.).
- **Gaming:** IGC has conducted three stakeholder meetings, on May 29, 2019, June 17, 2019, and on August 1, 2019, during which time regulations were discussed. In addition, on July 2, 2019, the IGC posted a draft emergency rule to its website, www.in.gov/IGC, and allowed any interested party to provide comment on the proposed regulations through August 1, 2019. Our final emergency rule was adopted by our Commission at our August 28, 2019 business meeting and submitted to LSA for posting and was placed on IGC's website.





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Input of Regulated Parties – Example 2

IURC: Staff sought feedback from stakeholders in Indiana by soliciting comments on draft proposed rules during two different comment periods. The Commission sought feedback from the pipeline operators in Indiana, the Indiana Energy Association (a trade group of Indiana's electric and gas investor-owned utilities), the Indiana Office of Utility Consumer Counselor, the Indiana Underground Plant Protection Service, Inc. (generally known as Indiana 811) and legal counsel for major Indiana operators. In addition, the Commission solicited comments from all excavators in the Commission's database, which includes contact information for excavators that have been involved in an excavation damage case or have otherwise interacted with the Commission over the last 10 years. This solicitation was sent to more than 10,000 entities throughout Indiana. The Commission staff made modifications to its draft rule based on received comments. The Commission staff then solicited comments on the revised version, and received additional comments from three entities. The Commission staff met with the Indiana 811 board of directors, and made additional revisions based on the meeting and the second round of comments. The Commission understands that the stakeholders have no remaining objections to these rule amendments.





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Input of Regulated Parties – Example 3

- **State Chemist:** The State Chemist / Pesticide Review Board had a series of discussions with industry and government organizations to discuss the proposed changes, implementation plan, and timelines. These included discussions with Agricultural Council of Indiana (ACI), Indiana Farm Bureau (IFB), Indiana Professional Lawn and Landscape Association (IPLLA), Indiana Nursery Association (INA), Indiana Pest Management Association (IPMA), National Railroad Contractors Association (NRCA), Indiana Vector Management Association (IVMA), Purdue University Cooperative Extension Service (CES), Purdue Pesticide Programs (PPP), Indiana Department of Environmental Management (IDEM), and Indiana State Department of Health (ISDH).





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Helpful Resources

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[OMB Website](#)

- Overview of OMB/SBA processes
- Links to key documents
- Links to rulemaking resources

[Freakonomics - All You Need is Nudge](#)

