



RHODE ISLAND ADMINISTRATIVE PROCEDURES ACT REGULATORY MANUAL

A guide for Rhode Island executive agencies

About this Manual

This manual provides guidance on the updated Rhode Island Administrative Procedures Act. Its focus is on the process for creating state regulations. It does not address adjudicative actions. The manual provides citations to Rhode Island General Laws for reference. Final legal determinations should always be made by each agency's legal counsel. This document, as well as related documents, can be found at www.omb.ri.gov/reform.

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Overview of Rhode Island Administrative Rulemaking

The Rhode Island Administrative Procedures Act (APA, RIGL §42-35-1, et seq.) governs agency rulemaking, including how state agencies propose and promulgate regulations. Every state rulemaking entity, unless exempt under statute¹, is subject to the APA.

The purposes of the APA include:

- keeping the public informed of agency rulemaking activities,
- providing the opportunity for public participation in the development of regulations,
- establishing uniform standards for the conduct of formal rulemaking, and
- improving the quality of state regulations.

Following the procedures in the APA promotes public participation and transparency. Moreover, if proper APA procedures are not followed, regulations may not be legally enforceable. Understanding the APA process and related timelines will help prevent unintended consequences and delays.

Rulemaking Procedures

Regular Rulemaking

State agencies must use a prescribed process for creating regulations. Agencies must designate a rules coordinator (RIGL §42-35-2.1) who is responsible for managing the rulemaking process. Most rulemaking will fall under “regular rulemaking,” which under the APA requires public notice and comment. The steps of the rulemaking process include:

Step One: Regulatory Preparation and Analysis

Step Two: Advance Notice of Proposed Rulemaking (optional step)

Step Three: Notice of Proposed Rulemaking and Public Comment Period

Step Four: Finalizing Regulations and Filing with the Office of the Secretary of State

Note: Certain types of rulemaking do not fall under “regular rulemaking.” These include emergency rulemaking and direct final rules (more information on pg. 5). These types of rulemaking can only be pursued in the specific circumstances, as determined by agency legal counsel and leadership.

Step One: Regulatory Preparation and Analysis

The regulatory process starts with the preparation of a preliminary version of the regulation. Agencies should strive to create regulations that are clear, predictable, and reliable. Please see the Office of Regulatory Reform’s (ORR) *Best Practices for Writing Clear Regulations* for additional guidance on regulatory drafting.

Critical to the development of sound regulatory policy is a detailed and systematic appraisal of potential regulatory impacts. State law requires several types of regulatory analysis during the rulemaking process. These required analyses are outlined in the table on the following page. Agencies must submit regulatory proposals and analysis to the ORR for approval. Please refer to ORR’s *Regulatory Review Submission Guidance*, as well as ORR’s *Analyzing the Costs and Benefits of Regulation* for additional information.

¹ The legislature and judiciary are exempt per RIGL §42-35-1(1).

Table 1: Specific Analyses Required for Rulemaking

Overall Regulatory Benefits & Costs	<p>Agency Regulatory Analysis (RIGL §42-35-2.9) & New Rule Review (Executive Order 15-07)</p> <p>The APA requires that agencies:</p> <ul style="list-style-type: none"> • conduct a benefit and cost analysis on regulatory options and determine the best option, and • consider alternative regulatory approaches and determine the best approach.
Impact on Small Business	<p>Economic Impact Statement (RIGL §42-35.1-3)</p> <p>The Small Business Regulatory Fairness in Administrative Procedures Act (SBRFA) requires that agencies:</p> <ul style="list-style-type: none"> • state the effect of regulatory action on small businesses, • identify and estimate the number of small business subject to a proposed regulation, • calculate small business regulatory compliance costs, and • describe any less intrusive or less costly alternatives. <p>Regulatory Flexibility Analysis (RIGL §42-35.1-4)</p> <p>In addition, SBRFA requires that agencies consider:</p> <ul style="list-style-type: none"> • less stringent compliance or reporting requirements for small businesses, • less stringent schedules or deadlines for small businesses, • consolidating compliance or reporting requirements for small businesses, • establishing performance standards to replace design or operational standards, and • the exemption of small businesses from any or all regulatory requirements.
Impact on State and Local Budgets	<p>Fiscal Note (RIGL §22-12-1.1)</p> <p>Title 22 requires that agencies, in cooperation with the State Budget Officer (or the Department of Revenue for municipalities), prepare a fiscal note on the financial effects that regulatory proposals will have on the state or its municipalities.</p>

Step Two: Advance Notice of Proposed Rulemaking (RIGL §42-35-2.5)

Before the formal rulemaking process begins, state agencies can, if they so choose, solicit the public for comments and recommendations by posting an Advance Notice of Proposed Rulemaking. This period allows agencies the opportunity to gather information from the public. This process may be facilitated through the creation of public committees or workshops. Public meetings under this section require a 15-day notice and are otherwise subject to the RI Open Meetings Act (RIGL §42-46). Note that the Advance Notice of Proposed Rulemaking process does not prohibit an agency from obtaining information and opinions from members of the public by any other method.

Step Three: Notice of Proposed Rulemaking and Public Comment Period (RIGL §42-35-2.7 to 2.8)

State agencies must notify the public of all regulatory changes before they happen. They must also allow the public an opportunity to comment on these changes. The Notice of Proposed Rulemaking and Public Comment Period serve this purpose.

The Notice of Proposed Rulemaking must include:

- a short explanation of the purpose of the proposed rule²,
- a citation to the specific legal authority behind the rule,
- the text of the proposed rule, including clearly marked additions, deletions or other amendments,
- the regulatory analysis, as well as how full information on the analysis may be obtained,

² The Concise Explanatory Statement required by RIGL §42-35-2.6 provides the ideal text for the short explanation required under the Notice of Proposed Rulemaking.

- where, when, and how a person may comment on the proposed rule and request a hearing (including public comment period dates),
- the date of the filing of Notice of Proposed Rulemaking, and
- citations to each supporting scientific or statistical study, report, or analysis.

After the Notice of Proposed Rulemaking, agencies must specify a Public Comment Period of at least 30 days during which the public may submit information and comments. While a Public Hearing during this period is not required, an agency may choose to hold a hearing or the public may request a hearing.³ The hearing must be held between the period of 10 days after the notice and 5 days before the end of the public comment period. If a hearing is held, be sure to include the date, time, and location in the notice. Ensure that your hearing location is accessible to individuals with disabilities.

Step Four: Finalizing Regulations and Filing with Office of the Secretary of State

During the regulatory finalization state, state agencies must consider all submissions received during the Public Comment Period. Agencies may incorporate or reject comments and must note the reasons for their actions. If changes to a regulation are substantial, an agency may decide to extend the Public Comment Period or restart the rulemaking process. After the regulations are finalized they are submitted, with any comments, to the Office of Regulatory Reform for one final post-comment review (EO 15-07).

After ORR approval, each agency may then file their final regulations with the Office of the Secretary of State. Please see *Guidelines for the Use of the Secretary of State's Rules and Regulations Database Submission Tool* for additional information on State filing procedures.

³ Opportunity for a public hearing must be granted if a request is received by 25 persons, a governmental agency, or by an association having not less than 25 members.

Emergency Rulemaking (RIGL §42-35-2.10)

State agencies may take prompt regulatory action in instances of imminent peril to the public or loss of federal funding.

Key Points:

- The agency head and Governor, or Governor's designee, must sign the emergency rule for it to become effective.
- Emergency regulations can be effective immediately or upon a later date. They remain in effect for 120 days, and are renewable only once for 60 days. After which, the rule expires.
- Emergency regulations can occur without public comment, or with an abbreviated comment period.
- Agencies must use the regular rulemaking process to permanently adopt an emergency regulation.
- Emergency regulations are not required to go through public comment and therefore should only be used as necessary. To become a permanent rule the agency must follow the regular rulemaking process.

Direct Final Rules (RIGL §42-35-2.11)

State agencies may accelerate the rulemaking process for rules which are expected to be noncontroversial.

Key Points:

- Direct Final Rules still require the Concise Explanatory Statement and the Notice of Proposed Rulemaking.
- Direct Final Rules must still be made available to the public for 30 days. If no public objection is received the rule becomes final.
- State agencies must use the full regular rulemaking process should a public objection be received within the 30 day period.

Publishing and Recordkeeping

Agencies are required to maintain and publish key information that is generated during the regulatory process. These records must be made available to the public or available by request, and many of these records must now be published and maintained on each agency's website.

Publication Requirements

Regulatory Publications

Unless exempt from disclosure under law, each agency must publish the following documents and records:

- Each notice of a proposed rulemaking,
- Each rule filed under the APA,
- Each summary of regulatory analysis required for regulatory submissions,
- Each issued declaratory order,
- The index of declaratory orders,
- Each guidance document,
- The index of currently effective guidance documents, and
- Each issued final order in a contested case.

These documents must be made available for public inspection, and available via regular or electronic mail by request. Additionally, all of these documents must be published on the agency's website by December 31, 2018.

Agencies must also file the following documents and records with the Secretary of State's Office:

- Notice of a proposed rulemaking,
- A summary of the regulatory analysis required for each proposed rule,
- Each final rule,
- An index of currently effective guidance documents, and
- Any other notice or matter than an agency is required to publish under the APA.

Rulemaking Agenda

Each agency must maintain the rulemaking agenda required by the APA and publish it on the agency website. This rulemaking agenda lists each pending rulemaking proceeding, and must contain:

- The subject matter of the proposed rule,
- Notices related to the proposed rule,
- How comments on the proposed rule can be submitted,
- The time within which comments may be inspected,
- Requests for a public hearing and any appropriate information concerning the hearing, and
- The timetable for action on the proposed rule.

The agency must also submit a copy of each current and updated rulemaking agenda to the Secretary of State, who will also publish it on the Secretary of State's website.

Non-regulatory Publications

General Information for Public

Agencies must publish general information about its organization. This information includes descriptions of:

- Agency organization and method of operations,
- The method the public can take to obtain information and make requests,
- All procedures, including descriptions of all forms and instructions used by agency,
- Processes where an application is appropriate--such as for a license, available benefits, or other matters (this information must be available on the agency website, unless the process is prescribed by law),
- Rules for the conduct of public hearings

Agencies must also maintain and publish a separate, current, and dated index and compilation of all final rules that have been filed with the secretary of state. Agencies must update the index and compilation at least monthly, and file the index, compilation, and all changes with the secretary of state. These materials should be available for public inspection, and available for copying at the principal office of the agency.

All of the above information must be published on the agency's website by December 31, 2018.

Annual Reports to GA

Agencies are required to electronically submit their annual reports to the general assembly. This electronic copy will be posted on the general assembly website in lieu of a printed copy; agencies must also produce a printed copy, if requested.

Recordkeeping

Rulemaking Record

Agencies must maintain a rulemaking record for each proposed rule, which must be readily available for public inspection in the principal office of the agency. Beginning on January 1, 2019, the agency must publish this rulemaking record on its agency website upon commencement of the public comment period; it may be removed from the agency website upon the effective date of the rule.

Each rulemaking record must contain:

- A copy of all publications in the state register relating to the rule and the rule's proceedings;
- A copy of any part of the rulemaking docket containing entries relating to the rule and rule's proceedings,
- A copy of all factual material, studies, and reports that agency staff submitted as part of formulating the proposed or final rule,
- Any notice of proposed rulemaking,
- Any official transcript of oral presentations made in the rule's proceedings; if not transcribed, any audio recording or verbatim transcription of the presentations and any summarizing memorandum prepared by the presiding agency official,
- A copy of any comments received by the agency in response to the notice of proposed rulemaking,
- A copy of the rule and explanatory statement filed with the Secretary of State
- Any petition for agency action on the rule.

Agencies must also submit the rulemaking record to the secretary of state, who will make it available on the secretary of state's website. The agency or the secretary of state may determine that all or part of the rulemaking record cannot be practically or appropriately displayed on the website. In these instances, the agency or secretary of state shall note that the record or part is not displayed, describe the part, and provide a reason for its exclusion.

Internal agency documents—such as preliminary drafts, notes, recommendations, and intra-agency memoranda in which opinions are expressed or policies formulated or recommended—are exempt for inclusion in the rulemaking record. However, a specific document is not exempt from inclusion in the rulemaking record when it is publicly cited by an agency in connection with its decision. Unless otherwise exempt from disclosure by law, inter-agency memoranda related to regulatory enforcement will be published as part of the agency rulemaking record.

Upon judicial review, the file required by this section constitutes the official agency rulemaking record for that rule. Unless otherwise required by law, the official agency rulemaking record does not need to be the exclusive basis for agency action on that rule.

Related Procedures

[Guidance Documents \(RIGL §42-35-2.12\)](#)

A Guidance Document allows agencies to inform the public on their interpretation of or policy on a regulatory issue. These documents do not have the force of law, as such they do not create or confer any rights and do not bind the public. However, Guidance Documents can provide binding instructions to agency staff members. All active Guidance Documents must be indexed and made available to the public on the Secretary of State's website.

[Five-Year Refiling Process \(RIGL §42-35-4.1 to 4.2\)](#)

State agencies must file an electronic list of all active rules with the Secretary of State every five years. The next Five-Year Refile is in January 2017. Agencies must use the Regular Rulemaking Process to remove any regulations that it decides not to refile.

Direct Connection to Secretary of State's Website

The Secretary of State's office is currently revising several technical aspects of its online regulation database that will assist agencies with maintaining a current, well-organized collection of the required regulatory information on agency websites. More robust RSS feeds and other Application Programming Interfaces (APIs) will allow agencies to display a customized view of information, fed directly from the Secretary of State's regulatory database. More information on these technical improvements is forthcoming.