

The Regulatory Process in Puerto Rico

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Principles of the Regulatory Process in Puerto Rico

Part I: Delegation of Regulatory Power

Part II: Categories of Regulations

Part III: Challenge to Regulations

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Part I: Delegation of Regulatory Power

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Sources of Law Related to the Delegation of Regulatory Power

- **Constitution of Puerto Rico (Article III, Section 16):** Grants the Legislative Assembly the authority to create, consolidate, or reorganize executive departments and define their functions. Consequently, the Legislative Assembly has delegated various powers to administrative agencies within the Executive Branch, either through the agency's organic law or special legislation.
- **Organic Laws:** Fundamental legislation that establishes the creation of local government entities and provide the framework for their governance.
- **Special Laws:** Legislation that addresses specific issues or circumstances rather than applying generally across an entire public entity. In these cases, regulation is authorized on specific matters associated with the special law, which may not necessarily have been contemplated within the regular powers delegated to the public entity under its organic law.

Local Sources of Law Related to the Regulatory Process

- **Act No. 38-2017, known as the ‘Uniform Administrative Procedure Act of the Government of Puerto Rico’ (LPAU):**
 - This general law uniformly regulates processes before the agencies of the Government of Puerto Rico, including the informal resolution of administrative **disputes** and the approval of regulations with legislative effect.
 - It remains very similar to the original version of the LPAU approved in 1988, which, in turn, used the federal Administrative Procedure Act (**APA**) as a model.
 - Requires agencies to review their approved regulations every five years.
- **Regulation for the Filing and Publication of Regulations in the Department of State, Regulation No. 5281 of August 3, 1995:**
 - **Approved** by the Department of State, it supplements the **procedural** requirements set forth in the LPAU regarding the filing and publication of regulations by government agencies.

Federal Sources of Law Related to the Regulatory Process

- **Public Law 114-187**, approved on **June 30, 2016**, known as the **‘Puerto Rico Oversight, Management, and Economic Stability Act’** (PROMESA):
 - Establishes the Financial **Oversight** and Management Board for Puerto Rico (FOMB) and **grants it** the authority to review rules, regulations, and executive orders to ensure they align with the approved Fiscal Plan.
- **FOMB Policy: Review of Rules, Regulations and Orders** (Revised on October 18, 2019):
 - Requires that any regulation be submitted in English to the FOMB before issuance. The submitting agency must also explain how the regulation complies with the **applicable** Certified Fiscal Plan.
 - For any regulation submitted to the FOMB, the FOMB will respond within five business days of receipt. The response will either approve, reject, or request further information. If the FOMB does not respond within five business days, the agency may proceed to issue the regulation.
 - A regulation that is not submitted to the FOMB for approval cannot take effect even if it has completed the entire regulation adoption process **stipulated** in the LPAU.

Part II:

Categories of Regulations



Categories of Regulations

I. Non-Legislative Regulations

II. Legislative Regulations

III. Joint Regulations

IV. Emergency Regulations

I. Non-Legislative Regulations

- Are aimed to clarify or **standardize** internal procedures or to establish administrative discretion.
- They do not **directly** nor significantly impact the rights of individuals not involved in the operations of the administrative agency that promulgates it.
- Common Example: **Personnel** Regulations.

Types of Non-Legislative Regulations

1. Internal regulations
2. Guidance documents
3. Price orders and similar decrees

‘Internal Regulations’

- Rules pertaining to the internal administration of the agency or internal communications between agencies that do not affect the rights or procedures available to the general public.
- These are regulations that do not directly nor substantially affect the rights of individuals outside the operation of the administrative agency, or apply to the **employees**, officials, or agents of that agency.

‘Guidance Document’

- A 'Guidance Document' is a physical or **electronic** document of general applicability developed by an agency that expresses the agency's interpretation of a law or regulation, the agency's public policy, or how and when the agency will exercise its discretionary power.
- It lacks legal force and does not create rights or obligations for citizens.
- It is typically aimed to promote consistency in determinations and procedures.
- Under no circumstances can a ‘Guidance Document’ replace a rule or regulation, nor can it substitute for the process of **approving**, amending, or repealing regulations.

- A guidance document may be used by an agency in an **adjudicative** process, but it is not binding on the agency. If an agency intends to act differently in an **adjudication** from a position expressed in a guidance document, it must provide a reasonable explanation for the deviation.
- Each agency **shall maintain** a physical and public record of all its guidance documents. The agency shall also publish each of these on its website in a permanent, **continuous**, free, and easily accessible manner. The Secretary shall coordinate the implementation of these provisions.
- The agency shall have thirty (30) days from the approval of the guidance document to publish it.

‘Price Orders and Similar Decrees’

- They are used solely to determine one or more regulatory **parameters** based on a previously approved regulation that outlines the rules for their issuance.
- Includes price orders issued by the Puerto Rico Department of Consumer Affairs, as well as other similar **decrees**.

II. Legislative Regulations

- Establish rights, impose obligations, and enforce a framework of conduct with the force of law.
- Affect the rights and obligations of parties or individuals.
- Are approved to provide **substantive** or detailed content, or in some other way supplement the law.
- Must comply with the Uniform Administrative Procedure Act (LPAU) to be valid.

Requirements for adopting, amending, suspending, and repealing Legislative Regulations

A. Compliance with LPAU.

1. Notice of Proposal.
2. Citizen participation through written comments and/or public hearings.
3. Content Requirement
4. Filing of the regulation with the Department of State.
5. Publication of the regulation.
6. Effective date of regulations.
7. Preservation and access to the official record.

B. Compliance with Regulation 5281.

1. Content Requirements
2. Supplementary Flyer

1. Notice of Proposal

Requirements for notice of proposal (applies to the adoption, amendment, suspension, or repeal of a legislative regulation):

1. The notice of proposal must be published in both Spanish and English in at least one widely circulated newspaper in Puerto Rico, as well as on the Internet.
2. It must include an executive summary or explanation of the purposes of the proposed regulation.
3. **It must cite** the legal source authorizing such regulation.
4. It must inform the form, the place, the days, and the hours during which written comments or comments via email may be submitted.
 - **Upon** receiving comments via email, the agency will acknowledge receipt of such comments by email within two (2) business days of receipt.
5. **It must inform** individuals of their option to submit a **written** request for an oral hearing on the proposed action, along with the grounds that the requester considers necessary to justify granting such **oral** hearing.

6. It must include the physical and web address where the full text of the proposed regulation will be accessible to the public, along with the copy of the published notice of proposal.
7. In addition to all of the above, if the proposed regulation affects a specific community of residents, the agency shall:
 - Publish the same notice in a regional newspaper distributed in the area where the community is located, and schedule an announcement on a local broadcast radio station with the largest audience or closest proximity to the affected community at least twice (2) between the hours of 7:00 AM and 7:00 PM.
 - The radio announcement must specify the date of the newspaper publication and include all details and information that were provided in that notice of proposal.

2. Citizen Participation

- **Written comments (Section 2.2 of LPAU):**

The agency must allow the public, including individuals, businesses, and other agencies, at least thirty (30) days from the notice of proposal publication date to submit written comments. Responding to these comments is at the agency's discretion, as the LPAU does not require them to address each one. The agency also has full discretion to incorporate, reject, or modify any recommendations or comments received from the public.

This approach differs from the federal Administrative Procedure Act (APA) process, which requires federal agencies proposing regulations to respond to all comments through a process called “notice-and-comment rulemaking”.

- **Public Hearings (Section 2.3 of LPAU):**

Agencies may, at their discretion or as required by their organic law or other legislation, convene public hearings. These hearings may be recorded or transcribed. The presiding official must compile a report summarizing the oral comments made during the hearing for the agency's review.

3. Content Requirements

Every regulation adopted or amended by an agency must include the following:

1. Citation of the legal provision authorizing the adoption or amendment of the regulation, or any part thereof.
2. A brief and concise explanation of its purposes and the reasons for its adoption or amendment, including an executive summary that clearly and precisely lays out the justification and cost-benefit analysis of the proposed regulation.
3. A reference to any regulation being amended, repealed, or suspended through its adoption.
4. Date of approval.
5. Effective date.

4. Filing with the Department of State

- 1. Filing of the regulation:** Any regulation approved by an agency of the Government of Puerto Rico must be submitted to the Department of State in Spanish along with its English translation, in both the original document and three (3) copies.
- 2. Record of Filing:** The Secretary of State shall record the date and time of the presentation on all copies of the regulations filed with the Department of State, and maintain a permanent file of these regulations for public inspection.
- 3. Regulation Correction:** The Secretary shall examine every regulation submitted to his office to determine if it complies with the LPAU and the regulation approved by the Department of State related to the filing of regulations with the Department of State (Regulation 5281).

4. **Approval by the Secretary of State:** If the proposed regulation is found to comply with LPAU and Regulation 5281, the Secretary will **annotate** approval on each copy of the regulation, thereby meeting the legal requirement for the regulation to be **duly** filed. Conversely, if it is determined that a regulation does not comply with these provisions, the Secretary may then:
- a) Return it to the originating agency with a list of objections, so that the agency can correct and draft it in accordance with the law, and indicate whether the corrections constitute an amendment to another regulation.
 - b) Make any changes or corrections needed for the regulation to be approved.

In either case, the regulation will not be considered filed until the originating agency has made the indicated changes, and the Secretary has approved the new text, or the agency has granted its approval of the amendments made by the Secretary.

5. Publication

- Once approved, the Secretary of State will publish a summary of the filed regulation, its number, the date it takes effect, and the name of the approving agency. This information must be published in two widely circulated newspapers within twenty-five (25) days of the regulation being filed with the Department of State.
- Additionally, every regulation submitted to and approved by the Secretary becomes part of the publication called '*Reglamentos del Gobierno de Puerto Rico*' (Regulations of the Government of Puerto Rico) which includes all regulations approved by local agencies, along with any amendments made to those regulations.

6. Effective Date of Regulations

As a general rule, once approved by the Secretary of State, regulations will take effect thirty (30) days after being filed with the Department of State, unless:

1. Otherwise provided by the law under which the regulation was adopted, in which case it will take effect on the date prescribed by that law;
2. The agency specifies a later effective date within the regulation itself; or
3. If it is an emergency regulation.

7. Preservation and Access to Official Record

Section 2.6 of LPAU establishes that all agencies adopting a regulation must maintain an official record available for public inspection. This record should contain all information related to the proposed regulation, as well as the adopted or amended regulation. The record must be available for public **scrutiny** both before the regulation is approved and after the regulation process is finalized. The record must include the following:

- a) Copies of all publications related to the regulation or procedure;
- b) Any petition, **request**, memorandum, or written comment submitted to the agency, and any written materials considered by the agency in relation to the adoption of the regulation and the procedure followed;
- c) Any report prepared by the **presiding** officer of a public hearing summarizing the content of the presentations;
- d) A copy of any regulatory analysis prepared in the regulation adoption procedure;
- e) A copy of the regulation and an explanation thereof; and
- f) All requests for exceptions, amendments, repeal, or suspension of the regulation.

B. Compliance with Regulation No. 5281

- The Regulation 5281, issued by the Department of State, supplements the requirements established under LPAU regarding the filing and publication of regulations at the Department of State, among other things related to that procedure.
- It establishes the technical specifications for all regulations, such as paper size, font, page margins, among other details.
- It sets content requirements in addition to those mandated by LPAU.
- It mandates the inclusion of a supplementary flyer with the regulation submission to the Department of State.

1. Content Requirements

In addition to the content requirements established under the LPAU, Regulation 5281 requires all proposed regulations or amendments to include the following information:

1. Name of the agency adopting it;
2. Title of the regulation;
3. Index;
4. Reference to specific provisions of law that the regulation implements, supplements, or interprets, if applicable; and
5. Handwritten signature of the approving authority, with their name and title.

2. Supplementary Flyer Requirement

Every regulation filed with the Department of State has to include a 'Supplementary Flyer' that must contain the following:

1. Regulation title;
2. Date of approval;
3. Name and title of the person or persons who approved it;
4. Date when the notice of proposal was published in the newspaper;
5. Effective date;
6. Date when the regulation was filed with the Department of State;
7. Regulation number;
8. Agency that approved it;
9. Reference to the legal authority for promulgating the regulation;
10. Reference to any regulation amended, repealed, or suspended by the adoption of this regulation; and
11. Certification by the agency official who approved the regulation regarding its correctness, and that it was approved in accordance with the provisions of the LPAU.

Additionally, the Supplementary Flyer must include a copy of the proposal notice that was published in the newspaper.

III. Joint Regulations

- Two or more agencies may jointly approve regulations under the laws they respectively **administer**, in cases where it is deemed beneficial for public service.
- The heads of the respective agencies will jointly designate the **examining** officer or examining panel responsible for the regulatory procedure, which will submit a single report **addressed** to all concerned agency heads.
- The remaining processes for joint regulations are carried out in accordance with the procedures established for legislative regulations.

IV. Emergency Regulations

- The provisions concerning the issuance of legislative regulations under the LPAU (Sections 2.1, 2.2, 2.3, and 2.8) may be waived if the Governor of Puerto Rico certifies that, due to an emergency or other compelling circumstances, public interests require immediate implementation of a specific regulation or amendment to existing regulations.
- In all such cases, the regulation or amendment, along with the Governor's certification, must be filed by the Secretary of State.
- The Secretary of State, and not the agency, is in charge of filing the regulation or amendment under the emergency exception. Once it has been filed, the agency must adhere to the provisions of the LPAU related to notice of proposal and public participation, and subsequently must also comply with the requirements rendered under the LPAU related to the filing of legislative regulations with the Department of State.

Part III: Challenge to Regulations

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Challenge to Non-Legislative Regulations

- To determine whether a rule or regulation is legislative or non-legislative, the Court uses the '**substantial impact test**'. This test essentially states that if the regulation modifies substantive rights or creates obligations, it constitutes a legislative regulation.
- A non-legislative regulation can be challenged against the agency during its application as part of the administrative process. Additionally, it can be contested through a declaratory judgment before the Court of First Instance (District Court).

Challenge to Legislative Regulations

On its face: Anyone can challenge the validity of a regulation ‘on its face’ for non-compliance with the regulatory provisions outlined in the LPAU by filing a petition in the Court of Appeals within thirty (30) days from the effective date of such rule or regulation. These provisions relate to four specific aspects: (1) notice of proposal, (2) public participation, (3) filing with the Department of State, and (4) content requirements. Any other challenge to a regulation would have to specifically pertain to “its application”.

On its application: A challenge to a regulation based on the Constitution of Puerto Rico or any other grounds under current law may be filed with the Court of First Instance (District Court) at any time. In these cases, the challenger must adhere to the doctrine of **justiciability**, demonstrating that the matter is legally **adjudicable**.

Jurisdiction over challenges to legislative regulations will be in the judicial region where the domicile of the person challenging the regulation resides.

Challenge to Emergency Regulations

- Can be challenged by any person for non-compliance with the requirements of the LPAU for adopting emergency regulations. In these cases, the term to challenge it extends till the legislative regulation is adopted.

Part IV: Common Errors in the Regulatory Process

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Common Errors

- Approval of legislative regulations as if they were non-legislative regulations, or amending legislative regulations through non-legislative regulations.
- Approval of a regulation that exceeds the agency's authority or scope.
- Failing to meet the requirements regarding proposal notice or requirements related to filing with the Department of State.
- Failure to include required content, including cost-benefit analysis and executive summary.

EXAMPLES

Case: Pro-Security Committee ARRAQ and ARESPA v. Planning Board,
(Civil Case No. KLRA-2021-00044)

Subject: Joint Regulations of the Land Use Plan

Basis for invalidating the regulation: The regulation did not include the executive summary and cost-benefit analysis required by the LPAU.

Court Analysis: This omission constituted a substantial non-compliance with the LPAU that nullified the proposed Joint Regulation.

EXAMPLES

Case: R&B Power, Inc. v. General Services Administration Bidding Board, 2024 TSPR 24

Subject: Circular letter imposing penalties and requirements as if it were a legislative regulation.

Basis for invalidating the regulation: An administrative agency cannot enforce a provision contained in a circular letter that has the effect of a legislative rule, unless it is adopted through the rulemaking procedure rendered by the LPAU. In this case, the agency required individuals to comply with the rule set forth in the circular letter, substantially impacting their rights.

Court Analysis: The agency treated the Circular Letter as enforceable law, despite it being a non-legislative rule. This action ignored the requirement that all legislative rules must follow the LPAU's formal rulemaking process. Administrative agencies are compelled to adopt legislative rules in accordance with LPAU procedures, regardless of their legal regulatory authority. The legal framework explicitly prohibits silently including such rules in guidance documents or other non-legislative formats to circumvent formal adoption procedures.

EXAMPLES

Case: Toa Baja Municipality v. Puerto Rico Department of Natural and Environmental Resources, 185 DPR 684 (2012)

Subject: Amendment to legislative regulation.

Basis for invalidating the regulation: The amendment didn't comply with the regulatory procedure established by the LPAU, as it was adopted under the standards for non-legislative regulations.

Court Analysis: The Puerto Rico Department of Natural and Environmental Resources' designation of new protected species and their habitat under an existing regulation significantly impacts public legal rights. Therefore, this **quasi-legislative** action is considered an amendment to a legislative regulation and must adhere to the LPAU's regulatory process. The agency's failure to submit this amendment to the Department of State made it unenforceable.

EXAMPLES

Case: Sierra Club v. Planning Board, 203 D.P.R. 596 (2019)

Subject: Repeal of a previously approved legislative regulation.

Basis for invalidating the regulation: Everyone is entitled to challenge the repeal of a previously approved legislative regulation with the Court of Appeals if the agency did not adhere to the procedure established under the LPAU for repealing regulations.

Court Analysis: The LPAU expressly establishes the nullity of any regulation approved in "substantial" non-compliance with its provisions. In this case, the Planning Board did not fulfill any of the requirements for repealing a previously approved regulation, as it did not notify the public of its intention to revoke the regulation nor provide any opportunity for public participation, in violation of the requirements set forth under Sections 2.2 and 2.3 of the LPAU.

EXAMPLES

Case: Association of Shipowners of Puerto Rico, Inc. v. Puerto Rico Pilotage Commission, Civil Case No. KLRA-2019-00642 (2020).

Subject: Publication requirements that must be fulfilled by the Department of State after a regulation has been filed and approved by the Secretary of State.

Basis for invalidating the regulation: Nullification due to the Department of State failure to comply with the publication requirements set forth in the LPAU.

Court Analysis: The Department of State's publication of a filed regulation in the newspaper was incomplete because it lacked the content required by Section 2.8 of the LPAU. This content should include a summary of the regulation, its number, effective date, and the name of the approving agency. Additionally, it was published in only one newspaper instead of two. Therefore, the regulation is nullified because it did not meet the publication requirements stipulated by law.

Note: Although the Court did not make a determination on how to proceed with this regulation after it was nullified, we believe that in this case, the Department of State's incomplete publication would only necessitate the agency to refile the regulation with the Department of State, rather than restart the entire approval process rendered under the LPAU.

EXAMPLES

Case: Grupo HIMA v. Department of Health, 181 DPR 72 (2011)

Subject: Compliance with requirements to issue an emergency regulation.

Basis for invalidating the regulation: Nullity due to failure to comply with the requirements to approve an emergency regulation by not explaining the circumstances that justified the approval of such a regulation.

Court Analysis: It was concluded that the Department of Health failed to meet the necessary standards for approving an emergency regulation because the emergency certification provided was overly brief and did not explain specific reasons for using the emergency procedure to approve the Regulation. By not clarifying why the emergency procedure was chosen, the Department of Health should have followed the standard approval process for regulations outlined in the LPAU.

Questions

Questions?