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Guide to Making Federal Acts and Regulations

Part 3 - Making Regulations

Overview

This part provides an overview of the regulatory process and is intended to situate the process of making regulations within the broader context of making laws. Persons directly involved in the development and the processing of regulations should refer to the *Regulatory Policy* and the Process Guides at <http://www.pco-bcp.gc.ca/raoics-srdc/raoics-srdc/default.asp?Language=E&Page=Publications>.

In this part

- What are regulations?
- What is the legal framework for regulations?
- What is the policy framework for regulations?
- Summary of the regulatory process

Audience

All Government officials involved in the law-making process and other interested persons.

Key Messages

The *Statutory Instruments Act* and the *Regulatory Policy* govern the making of regulations.

The *Statutory Instruments Act* establishes a process designed to ensure that regulations are made on a legally secure foundation and are accessible through the *Canada Gazette*.

The *Regulatory Policy* establishes requirements for a Regulatory Impact Analysis as a means of ensuring that the Government's regulatory activity serves the public interest, particularly in the areas of health, safety, the quality of the environment and economic and social well-being.

Ensuring that the public's money is spent wisely is also in the public interest. The Regulatory Impact Analysis also involves weighing the benefits of alternatives to regulation, and of alternative regulations, against their cost, and focusing resources where they can do the most good.

To these ends, the federal government is committed to working in partnership with industry, labour, interest groups, professional organizations, other governments and interested individuals.

What are regulations?

Regulations are a form of law, often referred to as delegated or subordinate legislation. Like Acts, they have binding legal effect and usually state rules that apply generally, rather than to specific persons or situations.

However, regulations are not made by Parliament. Rather, they are made by persons or bodies to whom Parliament has delegated the authority to make them, such as the Governor in Council, a Minister or an administrative agency. Authority to make regulations must be expressly delegated by an Act. Acts that authorize the making of regulations are called enabling Acts.

An Act generally sets out the framework of a regulatory scheme and delegates the authority to develop the details and express them in regulations.

Most regulations are designated as such in the Act that authorize them to be made. However, Acts sometimes authorize the making of documents that have the same legislative effect, but which are called by another name, for example, "by-laws," "rules," "tariffs," "ordinances" or "orders." Usually, these documents are made in the same way as regulations and are subject to the same policy and legal constraints.

What is the legal framework for regulations?

A regulation-making authority does not have a free hand in making regulations. There are a number of legal constraints, including the Constitution and other generally applicable laws discussed in Chapter 1.2 "Legal Considerations". One of the most important of these for regulations is the *Statutory Instruments Act* (SI Act) and the *Statutory Instruments Regulations* (SI Regulations), which are made under it. They set out three basic legal requirements for making regulations:

legal examination,
registration,
publication in the *Canada Gazette*.

Enabling Acts provide an additional source of legal constraints. Regulations must stay within the scope of the authority that the enabling Act grants and must not conflict with it or restrict or extend the scope of its application.

What is the policy framework for regulations?

The *Regulatory Policy* of the Government of Canada provides the primary policy framework for making regulations. Its objective is to ensure that use of the government's regulatory powers results in the greatest net benefit to Canadian society. It states that regulatory authorities must ensure that:

1. Canadians are consulted, and that they have an opportunity to participate in developing or modifying regulations and regulatory programs.
2. They can demonstrate that a problem or risk exists, federal government intervention is justified and regulation is the best alternative.
3. The benefits outweigh the costs to Canadians, their governments and businesses. In particular, when managing risks on behalf of Canadians, regulatory authorities must ensure that the limited resources available to government are used where they do the most good.
4. Adverse impacts on the capacity of the economy to generate wealth and employment are minimized and no unnecessary regulatory burden is imposed. In particular, regulatory authorities must ensure that:

information and administrative requirements are limited to what is absolutely necessary and that they impose the least possible cost;
the special circumstances of small businesses are addressed; and
parties proposing equivalent means to conform with regulatory requirements are given positive consideration.

5. International and intergovernmental agreements are respected and full advantage is taken of opportunities

for coordination with other governments and agencies.

6. Systems are in place to manage regulatory resources effectively. In particular, regulatory authorities must ensure that:

the Regulatory Process Management Standards are followed; compliance and enforcement policies are articulated, as appropriate; and resources have been approved and are adequate to discharge enforcement responsibilities effectively and to ensure compliance where the regulation binds the government.

7. Other directives from Cabinet concerning policy and law making are followed such as:

*Cabinet Directive on Law-making,
1999 Cabinet Directive on the Environmental Assessment of Policy, Plan and Program
Proposals*

http://www.ceaa-acee.gc.ca/0012/0006/sea_e.htm,
Cost Recovery and Charging Policy http://www.tbs-sct.gc.ca/Pubs_pol/oepubs/TB_H/CRP_e.html.

The Special Committee of Council (a committee of the Cabinet) is responsible for the *Regulatory Policy*. The Regulatory Affairs Division of the Regulatory Affairs and Orders in Council Secretariat of the Privy Council Office supports the Special Committee in this responsibility by providing advice, developing guides, supporting capacity-building to help regulatory authorities comply with the policy, and monitoring the effectiveness of this policy.

Summary of the Regulatory Process

Most regulations and some other documents have to meet the requirements of a series of steps known as the regulatory process. This process is a combination of requirements that flow from the legal and policy frameworks. It includes the following steps:

development of a regulatory proposal by a department responsible for an enabling Act or an administrative agency or other body that has regulation-making authority (sponsoring department or agency),
central agency review (by Privy Council Office, Treasury Board Secretariat, Department of Justice);
pre-publication;
making or approval;
registration;
coming into force;
publication;
distribution;
parliamentary scrutiny.

Who is involved in the process?

The following are the main participants in the regulatory process:

the authority that "makes" or "approves" the regulation

usually the "Governor in Council," which is the Governor General acting on the advice of the Privy Council (this advisory role is usually exercised by the Special Committee of Council)

sometimes another Cabinet committee (such as the Treasury Board) or a particular Cabinet minister,
sometimes an administrative agency, such as the Canadian Radio-television and

Telecommunications Commission, or other body;

the Minister and the officials in the sponsoring department (in the case of Governor in Council or ministerial regulations) or the officials in the sponsoring agency (in the case of regulations made by an agency);
the Clerk of the Privy Council;
the Regulatory Affairs and Orders in Council Secretariat of the Privy Council Office;
the Deputy Minister of Justice;
the Regulations Section of the Department of Justice;
the Treasury Board Secretariat;
the Canada Gazette Directorate of the Department of Public Works and Government Services;
the Standing Joint Committee of the Senate and the House of Commons for the Scrutiny of Regulations.

What documents are subject to the regulatory process?

The regulatory process applies to most regulations, as defined in the *Statutory Instruments Act* (SI Act). Four types of documents are regulations:

documents described as "regulations" in an Act;
rules, orders and regulations governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act;
statutory instruments (as defined in the SI Act) made in the exercise of a legislative power conferred by or under an Act; and
statutory instruments (as defined in the SI Act) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act.

Some regulations are not subject to the regulatory process. They are wholly or partially exempted by their enabling Act or by the *Statutory Instruments Regulations*.

The Regulations Section of the Department of Justice provides advice on whether documents are regulations. Information on this question is also found in Part 2, section 2 of the *Federal Regulations Manual* (which is published by the Regulations Section).

The legal requirements of registration and publication (but not the policy requirements) also apply to a second group of documents. These include statutory instruments that fall outside the definition of "regulation" (for example, an order fixing the day on which an Act comes into force). Although there is no legal requirement for the examination of these documents, in practice the Regulations Section examines them as well.

Conception and development of regulations

Having the authority to make a regulation does not justify making it. The requirements of the *Regulatory Policy* must also be met. This includes demonstrating that a problem or risk exists, that the Government should intervene and that regulation is the best option. A regulation may not be the best tool or the only one to be used to achieve a policy objective.

Before deciding whether to regulate a particular field of activity, the sponsoring department or agency must assess all the possible solutions for achieving its objectives. If it concludes that a regulation should be pursued, it must initiate a process of planning, analysis and public consultation in accordance with the *Regulatory Policy*.

Early notice of proposed major regulations is given in departmental and agency annual *Reports on Plans and Priorities* submitted to Parliament. The extent to which a regulation has achieved its stated objective is subsequently reported to Parliament in the annual departmental *Performance Reports*.

The department or agency then drafts its regulatory proposal with the assistance of its legal advisers and, in some cases, the Regulations Section of the Department of Justice.

Regulatory Impact Analysis

An analysis of the expected impact of each regulatory initiative must be done. The results of this analysis are summarized in a Regulatory Impact Analysis Statement (RIAS). Each section of the RIAS implements one or more elements of the *Regulatory Policy*. The RIAS is, in effect, a public accounting of the need for each

regulation in terms of this policy.

The RIAS explains:

the elements of the regulatory proposal, including what problems or situations it addresses and what it is meant to achieve;
what alternatives to regulation have been considered;
what are the anticipated costs and benefits of the regulations;
what consultations have been carried out and what opportunities Canadians have had to be heard;
what is the response of the department or agency to the concerns voiced or suggestions made;
what mechanisms are built in to ensure compliance with the regulations once they are in force;
how the effectiveness of the regulations will be measured.

The RIAS serves the same purpose as a Memorandum to Cabinet, used by ministers to make informed decisions on the making of laws. The RIAS also becomes a public document that helps the Government to be accountable to Canadians and parliamentarians in the exercise of delegated authority for the making of laws.

Each of these audiences demands that the RIAS be prepared with close attention, ensuring that material submitted for consideration:

is written in simple, clear, complete and concise language that the general public can easily understand;
describes the problem or situation that it is intended to address; and
describes the potential impact of the proposal and the measures to be taken to minimize any adverse effects.

Detailed guidance to the preparation of a RIAS may be found in the *RIAS Writers' Guide* (http://www.pco-bcp.gc.ca/raoics-srdc/docs/publications/rias_e.pdf). This guide explains the objectives of the RIAS and some approaches that will result in an excellent finished product.

For regulations that have to be made or approved by the Governor in Council, a communications plan is required and, if needed, a supplementary note. The communications plan covers, among other things, the strategy to be used by the department or agency to bring the regulatory measures to the attention of the groups affected once they are made. As well, confidential information to support decision making should be placed in a supplementary note and be separate from the RIAS.

Central Agency Review

Clerk of the Privy Council and Deputy Minister of Justice

The roles of the Clerk of the Privy Council and the Deputy Minister of Justice are set out in the SI Act. They are supported in these roles by the Regulatory Affairs and Orders in Council Secretariat of the Privy Council Office and by the Regulations Section of the Department of Justice.

Regulatory Affairs and Orders in Council Secretariat

The Regulatory Affairs and Orders in Council Secretariat (RAOIC) is responsible for monitoring, coordinating and advising on regulatory and Orders in Council issues and policies, and their consistency with economic, social and federal-provincial policies. The RAOIC secretariat is divided into the Regulatory Affairs Division and the Orders in Council Division. The secretariat provides support to the Special Committee of Council (SCC) with respect to regulatory and Orders in Council matters.

The prime responsibilities of the Regulatory Affairs Division include:

the monitoring of regulatory proposals;
the provision of substantive support to SCC through analysis, briefing, and advice with respect to regulatory proposals; and
support for the implementation and development of the *Regulatory Policy*.

In more specific terms, it reviews each regulatory proposal from an overall policy perspective and may request additional information or analyses from the sponsoring department prior to the proposal being

submitted to the SCC for consideration.

The Orders in Council Division's main responsibilities include:

the management of the approval process for all Orders in Council, regulations, and other statutory instruments;
the provision of secretariat services to the SCC;
the provision of advice on the use of Orders in Council and/or Instruments of Advice;
the production and distribution of *Orders in Council*;
the registration and publication of regulations in Part II of the *Canada Gazette* (see <http://canadagazette.gc.ca/>); and
the maintenance of records of *approved Orders in Council*, the Consolidated Index of Statutory Instruments, and a number of Oath Books (see <http://www.pco-bcp.gc.ca/oic-ddc>).

Regulations Section

The tasks of the Deputy Minister under the SI Act are carried out by the Regulations Section, which examines all proposed regulations submitted by departments and agencies (except those exempted from examination), to ensure that:

they are authorized by the enabling statute;
they do not constitute an unusual or unexpected use of the authority under which they are to be made;
they do not trespass unduly on existing rights and freedoms and are not, in any case, inconsistent with the *Canadian Bill of Rights* or the *Canadian Charter of Rights and Freedoms*; and
their form and drafting are in accordance with established standards.

When it has finished its examination, the Regulations Section stamps the draft regulations. If the solution found for any legal problems in the file involves some legal risk, the Regulations Section writes to the department or agency explaining what the risk is. If serious legal issues remain unsettled, the Regulations Section reports its concerns to the Clerk of the Privy Council.

Regulations are not invalid just because they have been made without being examined by the Regulations Section. However, the Clerk can refuse to register them and the Governor in Council can, on the recommendation of the Minister of Justice, repeal all or part of any regulation that was made without having been examined.

Treasury Board Secretariat

The Treasury Board Secretariat examines draft regulations that, under their enabling statutes, require Treasury Board approval or recommendation. It also examines regulations that are liable to have significant financial implications, including those related to cost recovery programs.

Pre-publication

The purpose of pre-publication is to give those who are interested in a regulatory proposal an opportunity to determine the extent to which the proposal is in keeping with previous consultations.

A Cabinet Directive of 1986 requires draft regulations to be pre-published in Part I of the *Canada Gazette*, before they can be made. In some cases this requirement is imposed by the enabling Act. Part I of the *Canada Gazette* can be accessed at <http://canadagazette.gc.ca/partI-e.html>.

An exemption from pre-publication may be granted unless pre-publication is required by the enabling Act. For regulations made or approved by the Governor in Council, exemptions may be granted by the Special Committee of Council and are considered on a case by case basis. For more information on exemptions, see the *Federal Regulatory Process*. For regulations made by a Minister or agency, exemptions may be granted by the Minister or agency.

The pre-publication requirement does not apply to documents that are not regulations, unless the enabling Act says so.

Draft regulations must be approved before they are pre-published. If the regulations are made or approved by the Governor in Council, the approval is given by the Special Committee of Council. If they are made by a minister or agency, the approval is given by the minister or agency. The RIAS is published along with the

draft regulations.

When draft regulations are pre-published, interested persons are allowed a period of time to express their views. The period is usually 30 days in the case of regulations pre-published under the Cabinet policy. In other cases, the length of pre-publication may be specified in the enabling Act. The pre-publication period may also be determined by international agreements, such as the World Trade Organization agreements and the North American Free Trade Agreement. In general, it is both prudent and a requirement of the *Regulatory Policy* that regulations covered under international trade agreements be pre-published for a minimum of 75 days.

Making or Approval of Regulations

A regulation is "made" when it is officially established by the regulation-making authority. This is usually done through a separate document called an executive order. The regulation is attached to the order as an annex.

If the authority is the Governor in Council, the executive order is an "order in council" and the regulation is made when the Governor General indicates that the order in council is made. If the authority is a minister, the executive order is a "ministerial order" and the regulation is made when the minister signs the ministerial order. In the case of an agency or other body, the executive order is usually a resolution or other document, depending on its decision-making process.

In the case of regulations made by the Governor in Council, the sponsoring department must seek the approval of the responsible Cabinet committee, which is usually the Special Committee of Council. In preparing this submission, the department must augment its original RIAS documents with information relating to the comments received during the pre-publication period, any actions taken to address those comments and the rationale for the department's response.

Sometimes an enabling Act not only authorizes someone to "make" regulations, it also says that some other person or body must "approve" them. For example, the enabling provision may say "The Commission may, with the approval of the Governor in Council, make regulations ..." Approval is given through an executive order, such as an order in council or a ministerial order.

Registration

The SI Act requires regulations to be transmitted to the Clerk of the Privy Council within seven days after they are made so that they can be registered, unless the SI Regulations exempt them from this requirement because they are too numerous.

For regulations, the Clerk records the title of the regulation, the name of the regulation-making authority, the source of the power to make the regulation, the date of making and the date of registration, and assigns it a number, preceded by the designation "SOR." For other documents, the Clerk records much the same information and assigns each its own number, preceded by the designation "SI". In practice, the Clerk's responsibilities are fulfilled by the Orders in Council Division of the Regulatory Affairs and Orders in Council Secretariat.

Coming into force

Registration is a crucial step in the case of regulations because it determines when they take effect. Regulations that must be registered come into force on the day they are registered, unless the enabling statute or the regulations themselves specify another commencement date (see subsection 6(2) of the *Interpretation Act*). Other regulations and documents come into force on the day they are made, unless they specify another commencement date.

Commencement dates before the making of a regulation or other document can only be specified if there is authority to do so in the enabling Act. Such a commencement date makes a regulation or document retroactive and clear statutory authority is required for this.

Publication

The SI Act and SI Regulations provide for the publication of regulations in Part II of the *Canada Gazette* within 23 days after their registration. Some regulations are exempt from publication. They are listed in section 15 of the *SI Regulations*.

The *Canada Gazette* is published by the Queen's Printer, whose responsibilities in this regard are carried out by the Canada Gazette Directorate of the Department of Public Works and Government Services.

What if a regulation is not published even though it is supposed to be? Failure to publish it does not make it invalid, but it prevents conviction for an offence of contravening the regulation. The reason is the constitutional principle of the rule of law: the terms of the law must be knowable, not secret. If a regulation is not published, people cannot be presumed to have had any way of finding out what their rights and responsibilities were under it.

There is one exception. Someone who has contravened an unpublished regulation can be convicted if the regulation is exempt from publication or if it expressly provides that it applies according to its terms before it is published in the *Canada Gazette*. However, in such cases it must also be proved that reasonable steps had been taken to bring the gist of the regulation to the notice of those likely to be affected by it.

Distribution

All Orders in Council, including regulations, are made available to the public three working days after they have been approved by the Governor General. A list of all approved orders is available at <http://www.pco-bcp.gc.ca/oic-ddc>. In addition, electronic versions of regulations and other documents published in Part II of the *Canada Gazette* are available at <http://canadagazette.gc.ca/partII-e.html>.

Parliamentary Scrutiny

The Standing Joint Committee for the Scrutiny of Regulations monitors the exercise of regulatory power on behalf of Parliament. Its mandate, set out in section 19 of the SI Act, is to review regulations and other statutory instruments after they are made.

The Committee checks the instruments against the criteria that the Senate and the House of Commons have approved at the beginning of each session of Parliament. Some of these criteria are the same as those applied by the Regulations Section of the Department of Justice in its examination of proposed regulations.

When the Committee finds a problem with a statutory instrument, it tells the regulation-making authority and suggests solutions. If the Committee and the regulation-making authority are unable to agree on a solution, the Committee may make a report drawing the matter to the attention of both Houses of Parliament. If the instrument is made by the Governor in Council or a minister, the Committee is also authorized, under subsection 123(1) of the *Standing Orders of the House of Commons*, to make a report to the House of Commons proposing the disallowance of the instrument. A disallowance resolution, if not rejected, becomes an Order of the House enjoining the Governor in Council or minister to revoke the statutory instrument.

References

Regulatory Policy and the Policy and Process Guides of the Regulatory Affairs and Orders in Council Secretariat of the Privy Council Office <http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications>.

Federal Regulations Manual, Regulations Section of the Department of Justice.

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