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CITY OF BALTIMORE

BRANDON M. SCOTT,  
Mayor



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May 1, 2023

The Honorable President and Members  
of the Baltimore City Council  
Attn: Natawna B. Austin, Executive Secretary  
Room 409, City Hall, 100 N. Holliday Street  
Baltimore, Maryland 21202

Re: City Council Bill 23-0354 - Administrative Procedure Act – Revisions

Dear President and City Council Members:

The Law Department reviewed City Council Bill 23-0354 for form and legal sufficiency. The bill clarifies the role of the City Administrator, the Department of Law, and the Department of Legislative Reference in reviewing proposed regulations prior to public notice and comment; revises provisions regarding the initial submission process for a proposed regulation; and revises provisions regarding agency noncompliance with the Administrative Procedure Act. The bill would take effect on the date of enactment.

Assisting agencies with the process for promulgating regulations falls largely on the Department of Legislative Reference (“DLR”) and the Law Department (“Law”) under the Administrative Procedure Act (“APA”), Baltimore City Code General Provisions Art., Title 4. Pursuant to a Charter amendment which took effect July 1, 2021, the City Administrator is now responsible for approving regulations proposed by City agencies. See Charter Art. VII, § 140(3).

Since the original enactment of the APA in 2020, DLR and Law have determined that the drafting process currently required by the APA results in inefficiencies in the promulgation of regulations. In addition, City Administrator approval of proposed regulations is a new requirement that was not previously addressed by the APA. Council Bill 23-0354 resulted from frequent discussions between DLR and Law and is designed to address these inefficiencies.

The greatest inefficiency in the promulgation of regulations results from the following current APA provision:

§ 4-205. Submission to Solicitor.

(a) Initial submission.

Before publishing notice of a proposed regulation, an agency shall submit the proposed regulation to the City Solicitor for approval as to the form described in this subtitle and legal sufficiency.

Under the APA, it is the province of Legislative Reference to choose the form of regulations. See General Provisions Art., § 4-202. Legislative Reference has chosen the format followed by the State for its regulations found in COMAR. As a result, regulations submitted to Law for review must adhere to the COMAR style guide. The current process requires that Law and the agency promulgating the regulations attempt to correctly format the proposed regulations using the COMAR style. Law works with the agency on formatting, ensuring that there is the requisite legal authority for the proposed regulations, and compliance with existing laws. Once regulations have been drafted, posted for public comment, adopted by the agency, and filed with DLR they become legally effective. Under the current APA process, it is at this point, after the regulation takes effect, that DLR corrects the formatting. See General Provisions Art., § 4-403.

The Department of Legislative Reference has familiarity and experience with the COMAR style of formatting. Neither Law nor the agencies have expertise in formatting regulations in the COMAR style.<sup>1</sup> As a result, when regulations are filed with DLR after adoption, they are subject to extensive editing in order to make the regulation conform to COMAR style. Because the regulations have already taken effect, the revisions must be reviewed by Law to ensure that any revisions are not substantive changes. Reversing the process so that formatting is done before any edits for content required by Law decreases duplicative editing of proposed regulations and the risk of a substantive change after the effective date of the regulations.

Based on several years' experience with this process, DLR and Law have determined that the process of promulgating regulations would be more effective and efficient if the agency proposing regulations submitted them simultaneously to DLR to draft the proposed regulations in COMAR style, and to Law for a brief review ensuring the agency has legal authority to write the regulations. After DLR and the agency draft the proposed regulations in the proper format, Law would review the regulations prior to their being published for public comment to confirm that the regulations conform to existing local, State and federal law. By reversing the process in this manner, additional editing of the regulations would be minimized after their adoption by an agency.

Another inefficiency in the promulgation of regulations arises from the process of posting notice of the proposed regulations for public comment. Currently, a proposed regulation must be published for public comment using the process and form of notice required by § 4-301 of the APA. This process requires the assistance of Baltimore City Information & Technology ("BCIT") and personnel from the Enoch Pratt Free Library system.

Currently, the APA requires that an agency post the notice:

- (i) in a conspicuous place on its website;
- (ii) in a public and conspicuous place at its agency offices;
- (iii) at each branch of the public library in the City;
- (iv) by providing a copy of the notice to each councilmember; and

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<sup>1</sup> This potential problem with the APA process was noted by Law in its bill report for the ordinance creating the APA. See Law Report on Council Bill 20-0557, pg. 3.

(v) by providing a copy of the notice to the Department of Legislative Reference.

What constitutes a conspicuous place on an agency website is open to interpretation and has been the subject of much debate. Similarly, what constitutes an agency office and a conspicuous place in an agency office are also open to interpretation. The current provisions of the APA provide little guidance on whether the various locations in which some agencies operate are to be considered an “agency office” for purposes of posting the notice of a proposed regulation.

In Council Bill 23-0354, the current APA notice and public comment process would be replaced by a monthly register that would be published by DLR. The monthly register would identify each proposed regulation and a notice of proposed action for each regulation. The process of posting public notice for a regulation would be more clearly delineated and streamlined.

For the reasons stated above, Law approves the amendments to the Administrative Procedure Act proposed by Council Bill 23-0354. However, the Law Department seeks the following amendments to the bill in order to further clarify the APA process:

1. Currently §§ 4-201 and 4-303 (now § 4-304) require proposed regulations to conform to “statutory” authority. At the State level a regulation is required to conform to its authorizing statute. At the City level, however, there are instances in which the Charter provides authority for drafting regulations. Law has recommended that the word “legal” be substituted for the word “statutory” in order to account for instances in which the Charter provides authority for regulations. Accordingly, the following amendments are recommended to Council Bill 23-0354:

§ 4-201. Citation of statutory authority.

A regulation is not effective unless it contains a citation of the [statutory] LEGAL authority for the regulation.

The title of § 4-201 should also be amended to “Citation of [statutory] LEGAL authority.”

On page 7, Line 4, delete “statutory” and substitute “legal, and Line 5, delete “statute” and substitute “law”.

2. Currently § 4-202 requires that regulations be written in plain English. In order to make this language more neutral the word “English” should be replaced with the word “language.” The following amendment is recommended:

§ 4-202. Form of proposed regulation.

Except as otherwise provided in § 4-203 of this subtitle, regulations shall be written in plain [English] LANGUAGE and shall conform to the style set forth in a style manual adopted by the Department of Legislative Reference.

3. Currently section § 4-205 requires that before a regulation can be published for public comment, it be submitted for approval as to form and legal sufficiency to the City Solicitor. Council Bill 23-0354 would amend the process required by this section so that, before an agency could publish a regulation for comment, the regulation would be submitted to Legislative Reference for confirmation that the regulation adheres to the required form and simultaneously to Law to confirm that there is legal authority for the agency to write the proposed regulations. Under the amendments proposed by this bill, after the regulation has been approved for format by DLR, it would be submitted for approval to the City Solicitor for a thorough review of the regulation for form and legal sufficiency, and to the City Administrator for approval. As discussed above, Law approves of this change in the process for promulgating regulations. The following clarifying amendments are recommended:

On page 3, Line 18, delete “content” and substitute “style”

Add a new provision to § 4-205(a) which states that upon receipt of a notice of regulation development, Legislative Reference will forward the notice to the Law Department for confirmation that legal authority exists for the agency to promulgate the proposed regulations.

4. Currently § 4-305 (now § 4-306) addresses the promulgation of emergency regulations. Council Bill 23-0354 amends § 4-305(b) regarding when an emergency regulation will take effect. The following clarifying amendment is recommended to the language of this section:

On page 9, Line 3, delete the second word “and”.

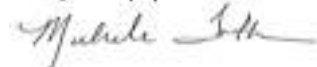
On page 9, Line 5, delete the period after the word “Reference” and add “for form and use of plain language;”.

Add the following two provisions:

- “(3) Signature by the agency; and
- (4) Filing with the Director.”

With the above amendments to the bill, the Law Department approves Council Bill 23-0354 for form and legal sufficiency.

Very truly yours,



Michele Toth  
Special Solicitor

cc: Ebony Thompson  
Stephen Salisbury

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