**HEA 1623 (2023) Implementation Frequently Asked Questions**

# What are the important rulemaking dates for CY 2023 and 2024?

* + July 1, 2023 – HEA 1623 becomes effective.
  + August 1, 2023 – deadline to email Governor’s Office for inclusion on list of emergency rules that expire October 1, 2024.
  + September 1, 2023—deadline for Governor to provide list of emergency rules to the Indiana Register.
  + September 1, 2023 – deadline for readoption notices for rules that expire January 1, 2024.
  + October 1, 2023 – indefinite emergency rules expire, unless on list provided by Governor to Indiana Register.
  + December 31, 2023 – deadline for IDEM, DNR, Gaming, HRC to go before Budget Committee for fees, fines, and civil penalties not currently in rule.
  + December 31, 2023 – deadline for IDEM, DNR, Gaming, HRC to withdraw or cease to enforce fees, fines, or civil penalties not reviewed by Budget Committee.
  + January 1, 2024 – deadline for initial readoption notice to legislators for rules that expire January 1, 2025.
  + January 1, 2024 – deadline for agency to post on its website a schedule of fines and penalties.
  + June 30, 2024 – deadline for all agencies other than IDEM, DNR, Gaming, and HRC to go before Budget Committee for fees, fines, and civil penalties not currently in rule.
  + June 30, 2024 – deadline for all agencies other than IDEM, DNR, Gaming, HRC to withdraw or cease to enforce fees, fines, or civil penalties not reviewed by Budget Committee.
  + September 2, 2024 – deadline for readoption notices for rules that expire January 1, 2025.
  + October 1, 2024 – expiration of emergency rules on list provided by Governor to the Indiana Register.
  + December 31, 2024 – deadline for IDEM, DNR, Gaming, HRC to have fees, fines, civil penalties in rule.
  + June 30, 2025 – deadline for all agencies other than IDEM, DNR, Gaming, HRC to have fees, fines, civil penalties in rule.

# Did HEA 1623 change when attorney’s fees are required to be paid?

* + IC 4-21.5-3-27.5 was amended to provide for mandatory attorney’s fees during an ALJ review under AOPA if:
    1. The agency action was based on something that should have been in rule but wasn’t, as provided in IC 4-22-2-44, such as a policy or manual (an invalid rule), or
    2. The agency failed to demonstrate that it acted within its legal authority.
  + IC 34-52-2-1.5 was amended to provide for mandatory attorney’s fees in a judicial review under same two circumstances.
  + These new provisions only apply to agency actions commenced after June 30, 2023.

# Is there guidance for what needs to be in rule? [Updated 7/14/2023]

* + Yes. OMB has prepared a memo summarizing current law regarding what needs to be contained in rule that is posted to the [OMB rulemaking website](https://www.in.gov/omb/files/What-is-a-rule-5-30-2023.docx). Note, IC 4–22–2–13(a) already requires an agency to have a regulation in place to enforce binding standards of conduct for persons subject to agency authority.  HB 1263 doesn’t change this standard; it just grants attorney fees when an agency tries to implement a requirement and it hasn’t done formal rulemaking.
  + OMB has also prepared a memo summarizing case law regarding determining when an agency is acting as a market participant rather than a regulator that is posted to the [OMB rulemaking website](https://www.in.gov/omb/files/Agency-fees-market-participant-vs-regulator-7-14-2023.docx).

# Is the moratorium still in place? [Updated 7/14/2023]

* + Because HEA 1623 incorporates the substance of Executive Order 13-03 (the regulatory moratorium / OMB review) and Executive Order 2-89 (SBA review), these two executive orders are now redundant and have been repealed by [Executive Order 23-04](https://www.in.gov/gov/files/Executive-Order-23-04.pdf).
  + Family Impact statements are required by Executive Order 13-05, which will remain in place after HEA 1623. HEA 1623 incorporates the substance of Executive Order 13-03 (the regulatory moratorium / OMB review) and Executive Order 2-89 (SBA review), so only those two executive orders are now redundant and will be rescinded.

# Will HEA 1623 make rulemaking take longer?

* + For most rules, the formal rulemaking process should be shorter and easier to comply with after HEA 1623. Rules that add or increase fees, fines, or civil penalties must go before Budget Committee after HEA 1623 and so may take longer.

# What changed for formal rulemaking? [Updated 7/14/2023]

* + HEA 1623 made several changes to the formal rulemaking process, including:
    1. There is no longer a requirement for publishing a Notice of Intent.
    2. There is no longer a requirement for publishing a notice in the newspaper.
    3. There is no longer a requirement for agencies to provide rule language to the Legislative Council.
    4. OMB and SBA review is now required in statute (rather than executive order). IC 4-22-2-22.8.
    5. A proposed rule that adds or amends language to increase or expand application of a fee, fine, or civil penalty must be reviewed by Budget Committee before it can approved by OMB and SBA. IC 4-22-22.8(c).
    6. Agencies must notify OMB and SBA if the proposed rule is revised after OMB and SBA approval and obtain a new approval. IC 4-22-2-22.8(e).
    7. The regulatory analysis, which includes the OMB cost-benefit analysis and SBA fiscal-impact analysis, is now published along with the proposed rule text. IC 4-22-2-23(b).
       1. The template for the Regulatory Analysis is provided [here](https://www.in.gov/omb/files/Regulatory-Analysis-Template-6-1-2023.docx).
    8. The public comment period is now 30 days (rather than 21). IC 4-22-2-23(c), IC 4-22-2-24(d).
       1. The LSA template for the first notice is provided [here](https://www.in.gov/omb/files/1st-notice-of-public-comment-period.doc).
    9. The public hearing(s) must include a remote option and be recorded. IC 4-22-2-17.
       1. The LSA template for the public hearing is provided [here](https://www.in.gov/omb/files/Notice-of-Public-Hearing.doc).
    10. A second public comment period and hearing is required if:
        1. an agency received substantive comments during first public comment period or hearing, or
        2. the rule establishes a requirement or limitation that is more stringent than an applicable federal requirement or limitation. IC 4-22-2-24(a).
    11. The notice for the second public comment period and hearing must include a summary of comments received and the agency’s response. IC 4-22-2-24(c)(3).
        1. The LSA template for the second notice is provided [here](https://www.in.gov/omb/files/2nd-notice-of-public-comment-period.doc).
        2. The LSA template for the public hearing is provided [here](https://www.in.gov/omb/files/Notice-of-Public-Hearing.doc).
    12. An agency must provide to the Governor, Attorney General, and Indiana Register a summary of the comments received during the public comment period(s) and hearing(s) as well as the agency’s response. IC 4-22-2-27.5.
        1. The LSA template for the final rule is provided [here](https://www.in.gov/omb/files/Final-Rule.docx).

# What steps were eliminated from the rulemaking process?

* + HEA 1623 eliminated several steps from the rulemaking process that should make things easier for agencies, including:
    1. OMB and SBA review were consolidated into one step rather than at different times.
    2. Agencies no longer need to send a copy of the rule to legislative council.
    3. Agencies no longer need to post a notice in a newspaper.
    4. The Notice of Intent was eliminated.

# What steps were added to the rulemaking process?

* + HEA 1623 modified several steps during the rulemaking process, including:
    1. Rules that add or increase fees, fines, or civil penalties need to be reviewed by Budget Committee.
    2. If rule language is revised after OMB and SBA review, an agency needs to resubmit the rule to OMB and SBA for approval.
    3. The public comment period is extended from 21 to 30 days.
    4. The public hearing(s) must include a remote option and be recorded.
    5. A second public comment period and hearing is required if:
       1. an agency receives substantive comments during the first public comment period or the public hearing; or
       2. the rule establishes a requirement or limitation that is more stringent than an applicable federal requirement or limitation.
    6. The notice for the second public comment period and hearing must include a summary of comments received and the agency’s response.
    7. An agency must provide to the Governor, Attorney General, and Indiana Register a summary of the comments received during the public comment period(s) and hearing(s) as well as the agency’s response.

# When is a second public comment period and hearing required?

* + A second public comment period and hearing is required if:
    1. an agency receives substantive comments during the first public comment period or the public hearing; or
    2. the rule establishes a requirement or limitation that is more stringent than an applicable federal requirement or limitation.

# What are considered “substantive comments”?

* + Agencies should keep in mind the intent of HEA 1623 (public input and transparency) and be reasonable in how they evaluate comments. For example, a person who attends a public hearing to learn more about the proposed rule but does not offer any comments, would not be considered a substantive comment. However, a comment that addresses the subject matter of a rulemaking and/or indicates that more time is needed to review or comment on the rulemaking should be considered substantive. If an agency receives a comment and is not sure whether it is substantive, the agency should probably reach out to the Office of the Attorney General’s advisory section for guidance because that office will be the one determining whether the agency followed all required rulemaking steps.

# What is the regulatory analysis required under IC 4-22-2-22.8 and how is it different than what agencies currently prepare?

* + The intent of HEA 1623 was to codify the existing OMB and SBA review processes, so the regulatory analysis required under IC 4-22-2-22.8 largely covers the same things agencies currently prepare, such as the OMB cost-benefit analysis or SBA fiscal-impact analysis. In addition, it includes the new analysis required for fees, fines, and civil penalties.

# Will there be a template for the regulatory analysis?

* + Yes, OMB has worked with LSA to develop a template for the regulatory analysis which is available [here](https://www.in.gov/omb/files/Regulatory-Analysis-Template-6-1-2023-2.docx).

# What changed in terms of the OMB review? [Updated 7/14/2023]

* + The intent of HEA 1623 was to codify the existing OMB review process and HEA 1623 should not change the standards for what needs to be contained in the OMB cost-benefit analysis (unless fees, fines, or civil penalties are involved). For example, the regulatory analysis required in IC 4-22-2-22.8 should incorporate what was previously required under [FMC 5.1](https://www.in.gov/sba/files/FMC-5.1-OMB-Review-of-Agency-Rulemaking-January-1,-2022.pdf) as part of the existing OMB review under EO 13-03.
  + HEA 1623 did add a requirement in IC 4-22-2-22.8(e) that agencies notify OMB if the proposed rule is revised after OMB approval and obtain a new approval.

# What changed in terms of the SBA review? [Updated 7/14/2023]

* + The intent of HEA 1623 was to codify the existing SBA review process and HEA 1623 should not change the standards for what needs to be contained in the SBA fiscal-impact analysis (unless fees, fines, or civil penalties are involved). For example, the regulatory analysis required in IC 4-22-2-22.8 should incorporate what was previously required under [FMC 5.2](https://www.in.gov/sba/files/FMC-5.2-SBA-Review-of-Agency-Rulemaking-January-1,-2022.pdf) as part of the existing SBA review under EO 89-02.
  + HEA 1623 did add a requirement in IC 4-22-2-22.8(e) that agencies notify SBA if the proposed rule is revised after SBA review and obtain a new approval.

# What is required for fees, fines and civil penalties?

* + Pursuant to IC 4-22-2-19.6(b), for each fee, fine, or civil penalty imposed by an agency that is not set as a specific amount in statute, a rule must describe the circumstances for which the agency will assess the fee, fine, or civil penalty and set forth the amount of the fee, fine, or civil penalty as:
    1. a specific dollar amount,
    2. a formula by which a specific dollar amount can be reasonably calculated, or
    3. as a range of potential dollar amounts, stating the factors that the agency will utilize to set a specific dollar amount in an individual case.
  + These new requirements do not prohibit an agency entering into a settlement agreement as part of an agency action which sets an agreed amount for the fine or civil penalty to be paid. IC 4-22-2-196.6(b).
  + No part of a proposed rule, including a provisional or interim rule, that adds or amends language to increase or expand application of a fee, fine, or civil penalty may be approved before submitting the proposed rule to the Budget Committee for review.
  + To readopt a rule that contains a fee, fine, or civil penalty, an agency must review the rule to consider its continued need and whether it will meet IC 4-22-2-19.5 and the requirements for frees, fines, and civil penalties in IC 4-22-2-19.6.
  + Beginning January 1, 2024, an agency must post on its website a schedule of fines and civil penalties. IC 4-22-2-2-19.6(f).

# Do you have any examples of how an agency that put a schedule of civil penalties in rule?

* + The State Chemist has a very detailed schedule laying out its civil penalties contained in 355 IAC 9-3-1. The schedule lays out the legal citation, general description of the offense, amount of penalty by violation number, and whether the amount is calculated per incident or per day.

# Do you have any examples of how an agency established factors for setting amounts of civil penalties?

* + IDEM has a detailed non-rule policy regarding the factors it utilizes to determine the specific amount of a civil penalty, which is accessible [here](https://www.in.gov/idem/oe/nrp/civil.html#:~:text=IDEM%20imposes%20civil%20penalties%20for,statutes%2C%20rules%2C%20or%20permits). The policy outlines the factors IDEM will utilize and how those factors influence the amount of the final civil penalty.

# Do agencies have time to get regulations into compliance with the standards for fees, fines, and civil penalties?

* + Yes, IC 4-22-2-19.6(e) includes a safe harbor for agencies to get their regulations into compliance with the new standards. Most agencies have until June 30, 2024, to go before Budget Committee to have their fees, fines, and civil penalties reviewed and June 30, 2025, to have formal rules in place without any liability. DNR, IDEM, Gaming, Horse Racing have until December 31, 2023, to go before Budget Committee to have their fees, fines, and civil penalties reviewed and June 30, 2025, to have formal rules in place without any liability.

# What happens if an agency is unable to get Budget Committee review by the deadline in the safe harbor provision?

* + If an agency is unable to obtain Budget Committee review within the deadline in the safe harbor provision (IC 4-22-2-19.6(e)) for existing fees, fines, and civil penalties that do not meet the new standards, the agency must withdraw or otherwise cease to enforce or apply the fee, fine, or civil penalty; otherwise, the agency can be liable for the non-compliant amount of the fee, fine, or civil penalty as well as attorney’s fees.

# When will agencies be able to obtain Budget Committee review during 2023? [Updated 7/14/2023]

* Yes. During 2023, there will be Budget Committee meetings in August (Madison), September (West Lafayette), October (Evansville), and December (Indianapolis) where agencies can seek to have fees, fines, and civil penalties reviewed. The schedule for 2024 has not been set yet; however, Budget Committee typically meets less frequently in non-budget years. Agencies that anticipate needing to go before Budget Committee to review fees, fines, or civil penalties should reach out to their budget analyst as soon as possible to let them know (ideally before September 1, 2023) for calendaring purposes. A survey is being prepared that will help determine the number of agencies that need to seek Budget Committee review.
* Budget analysts will usually send out a call for agenda items 1 to 1.5 months prior to the meeting date and will help work with agencies to prepare at that time.

# Will there be guidance for what is required for Budget Committee review? [Updated 7/14/2023]

* Yes. OMB and SBA will actively work with agencies to help prepare for Budget Committee presentations. Although the review for fees, fines, and civil penalties is new, the Budget Committee review process is not. This review will follow the same established pattern followed for other review items. A written report is provided in advance to the committee members that contains the substance of information they want for review. There is an opportunity to work through issues before the meeting. Then, during the meeting itself, the agency does a short (5-minutes or so) overview of the information contained in the report.
* The standard process is that a rough draft of the report should be made available to SBA at least two and a half weeks in advance of the meeting, so that SBA can work with the agency to refine the report. The final report will be circulated to legislative members in advance of the meeting.
  1. The template for the Budget Committee report for new fees, fines, and civil penalties is available [here](https://www.in.gov/omb/files/Budget-Committee-Template-New.docx).
  2. The template for the Budget Committee report for increased fees, fines, and civil penalties is available [here](https://www.in.gov/omb/files/Budget-Committee-Template-Increased.docx).
  3. The template for the Budget Committee report for safe harbor fees, fines, and civil penalties is available [here](https://www.in.gov/omb/files/Budget-Committee-Template-Safe-Harbor.docx).
* There will be a Budget Committee meeting on August 4 during which two agencies will present under the new process (one for fees and one for penalties). This will serve as a trial run to help iron out the details for how this review will work. Agencies curious about the process are encouraged to watch the meeting. Livestream and archived Budget Committee meetings are available [here](https://www.in.gov/sba/budget-committee/).

# Did HEA 1623 change standards for employee evaluations?

* + Yes, IC 4-12-2-4 provides “An agency may not consider the number or amount of fines or civil penalties imposed on regulated entities by an employee in the evaluation or compensation of the employee.”

# Is there a standard platform that agencies should use for the remote option for public hearings? [Updated 7/14/2023]

* + Not yet. IOT is currently evaluating options for the statewide webcasting and recording requirements under HEA 1167; however, that solution has an effective date of July 1, 2025. Once that solution is in place, public hearings for rulemaking can be handled under the same system. In the meantime, agencies can use whatever platform, such as Microsoft Teams, that they currently use for remote hearings.
  + IOT can provide technical assistance to agencies regarding how to handle remote hearings, including how to control who is able to orally comment, who can see written comments, etc.

# Where and how will webcast recordings of public hearings be made available to the public?

* + For now, agencies should post the recordings on their rulemaking docket website.

# If an agency changes its proposed rule after approval by OMB and SBA, does it have to get approval from OMB and SBA again?

* + Yes, an agency must resubmit the proposed rule for approval if it is revised after SBA and OMB approval. IC 4-22-2-22.8(e). To do so, the agency must submit a revised regulatory analysis along with a discussion of the impact the revisions have on the regulatory analysis previously reviewed by OMB and SBA.
  + After obtaining new notice of determination, the agency must submit to the Indiana Register the new notice of determination, the revised proposal rule, and revised regulatory analysis.

# If an agency changes its proposed rule after review by Budget Committee, does it have to get reviewed by Budget Committee again?

* + If the changes to the proposed rule involve the establishment or amount of a fee, fine, or civil penalty, then the rule must be resubmitted for Budget Committee review. *See* IC 4-22-2-22.8(c) and (e). However, if the changes do not increase or expand application of a fee, fine, or civil penalty, the rule does not have to be reviewed by Budget Committee again (however, the rule would still need to be resubmitted to OMB and SBA, *see* FAQ #25).

# If an agency has started a formal rulemaking before July 1, 2023, which process should it follow?

* + If a rulemaking has commenced with the publishing of a Notice of Intent or a notice under IC 13-14-9 before July 1, 2023, it follows the existing statutory requirements.

# If an agency has a proposed rulemaking pending with OMB for approval on July 1, 2023, which process should it follow?

* + A rulemaking that is pending with OMB on July 1, 2023, should follow the new process under HEA 1623 once it is approved by OMB.

# What changed for rule readoptions? [Updated 7/14/2023]

* + A rule now expires on January 1 of the 5th year after the year in which the rule takes effect (rather than the 7th year). IC 4-22-2.6 (a).
  + Because of the elimination of exemptions in IC 4-22-2.5 (for example for DOR, IDEM, DLGF, IBTR), there are no longer any rules which do not expire (“forever” rules).
  + Under IC 4-22-2.6-4(b), the agency shall reexamine the previous cost benefit, economic impact, fiscal impact, and regulatory analysis prepared for the rule under IC 4-3-22-13, IC 4-3-27-12, IC 4-22-2-22.7, IC 4-22-2-22.8, IC 4-22-2-28, or IC 4-22-2.1-5.
  + The timing for readoption notices has changed pursuant to IC 4-22-2.6-5 (*see* list of deadlines under FAQ #30).
  + Pursuant to IC 4-22-2.6-5, the Notice of Readoption must include a general description of the subject matter of all rules proposed to be readopted, listing of rules that are proposed to be readopted, written public comment period of thirty days, instructions on how to submit a written comment, and any other information required by the publisher.
    1. The LSA template for the notice is provided [here](https://www.in.gov/omb/files/Legislative-Notice.docx).
  + Along with the Notice of Readoption, the agency must publish a written findings regarding its determination of the continued need for the rule, including any updates the regulatory analysis. The template for the readoption analysis is provided [here](https://www.in.gov/omb/files/Readoption-Review-Template-1.docx).
    1. Note: the requirement for an agency to do an updated regulatory analysis was already required under existing IC 4-22-2-3.1(b), but it wasn’t published.
  + IC 4-22-2.6-6 provides that an agency shall prepare responses to all comments received during the public comment period. Following the consideration of the comments, the agency may do the following:
    1. Conduct 1 or more additional comment periods IC 4-22-2.6-6(1).
    2. Readopt 1 or more rules within the scope of notice of proposed readoption without change IC 4-22-2.6-6(2).
       1. The LSA template for the readopted final rule is provided [here](https://www.in.gov/omb/files/Readopted-Final-Rule.docx).
    3. Repeal 1 or more rules within the scope of the notice of proposed readoption if the need for the rule no longer exists IC 4-22-2.6-6(3).
  + IC 4-22-2.6-10 provides that if a rule is not readopted and the Governor finds that the failure to readopt the rule causes an emergency to exist, the Governor may, by executive order issued **before** the rule's expiration date, postpone the expiration date of the rule up to one (1) year.

# What are the new deadlines in the rule readoption process?

* + IC 4-22-2.6-1 contains the following schedule for rule readoptions based on when the latest version of a rule became effective:
  + Latest version in calendar year 2017, the rule expires on January 1, 2024:
    1. Readoption notice due on or before September 1, 2023
    2. Readopted rule filing due on or before December 1, 2023
  + Latest version in calendar year 2018, the rule expires on January 1, 2025:
    1. Initial notice of readoption to legislators due on or before January 1, 2024
    2. Readoption notice due on or before September 2, 2024
    3. Readopted rule filing due on or before December 1, 2024
  + Latest version in calendar year 2019, the rule expires on January 1, 2026:
    1. Initial notice of readoption to legislators due on or before January 1, 2025
    2. Readoption notice due on or before September 1, 2025
    3. Readopted rule filing due on or before December 1, 2025
  + Latest version in calendar year 2020, the rule expires on January 1, 2027:
    1. Initial notice of readoption to legislators due on or before January 1, 2026
    2. Readoption notice due on or before September 1, 2026
    3. Readopted rule filing due on or before December 1, 2026
  + Latest version in calendar year 2021, the rule expires on January 1, 2026:
    1. Initial notice of readoption to legislators due on or before January 1, 2025
    2. Readoption notice due on or before September 1, 2025
    3. Readopted rule filing due on or before December 1, 2025
  + Latest version in calendar year 2022, the rule expires on January 1, 2027:
    1. Initial notice of readoption to legislators due on or before January 1, 2026
    2. Readoption notice due on or before September 1, 2026
    3. Readopted rule filing due on or before December 1, 2026
  + Latest version in calendar year 2023, the rule expires on January 1, 2028:
    1. Initial notice of readoption to legislators due on or before January 1, 2027
    2. Readoption notice due on or before September 1, 2027
    3. Readopted rule filing due on or before December 1, 2027
  + NOTE: there are two years of rules that need to be readopted during 2026 and 2027 and rules that were adopted in 2021 expire before rules adopted in 2020. These were intentional decisions by the drafters. HEA 1623 changes the length of time that a regulation is effective from seven years to five. To accomplish this, the legislature had to combine the current seven-year schedule of readoptions into five years, which doubles up two years.

# What are the readoption deadlines for rules that previously did not expire?

* + For rules that previously did not expire under IC 4-22-2.5 (before its repeal), if the latest version of the rule became effective after January 1, 2017, follow the schedule for readoptions for other rules described in FAQ #25 above.
  + If the latest version of a rule that did not expire under IC 4-22-2.5 (before its repeal) became effective before January 1, 2017, and:
  + (1) the rule was adopted by an agency established under IC 13, the rule expires not later than January 1, 2025:
    1. Initial notice of readoption to legislators due on or before January 1, 2024
    2. Readoption notice due on or before September 2, 2024
    3. Readopted rule filing due on or before December 1, 2024
  + (2) the rule was adopted by an agency established under IC 16, the rule expires not later than January 1, 2026:
    1. Initial notice of readoption to legislators due on or before January 1, 2025
    2. Readoption notice due on or before September 1, 2025
    3. Readopted rule filing due on or before December 1, 2025
  + (3) the rule was adopted by an agency not described in (1) or (2), the rule expires not later than January 1, 2027.
    1. Initial notice of readoption to legislators due on or before January 1, 2026
    2. Readoption notice due on or before September 1, 2026
    3. Readopted rule filing due on or before December 1, 2026

# What happens if someone objects to readoption of a rule?

* + IC 4-22-2.6-6(b) provides that someone may submit a written request to have a particular rule considered separately and the agency will have to readopt the rule through the regular formal rulemaking process. We have heard from several agencies concerned that this would be a major burden if one disgruntled person objects. We agree this could be problematic in theory; however, this provision is already contained in existing law, IC 4-22-2.5-4, and has not been intentionally used in anyone’s recollection that we’re aware of.

# What happens if an agency misses the deadlines for readoption and a critical rule is going to expire?

* + IC 4-22-2.6-10 provides that if a rule is not readopted and the Governor finds that the failure to readopt the rule causes an emergency to exist, the Governor may, by executive order issued **before** the rule's expiration date, postpone the expiration date of the rule up to one (1) year.

# Is there a template for the readoption analysis?

* + Yes, OMB has worked with LSA to develop a template for the readoption analysis which is available [here](https://www.in.gov/omb/files/Readoption-Review-Template-1.docx).

# What changed for emergency rules?

* + Everything. The existing process and authority for emergency rules under is abolished and replaced with two new categories of rules: provisional rules under IC 4-22-2-37.1 and interim rules under IC 4-22-2-37.2, which are discussed below.

# Do we need to get authority granted for provisional or interim rules when our statutes change / in agency bill / etc.?

* + No. One of the goals of HEA 1623 was to consolidate the authority for provisional and interim rulemaking in one place, so every agency is granted authority to utilize these rulemaking processes if the agency has rulemaking authority and the standards in IC 4-22-2-37.1 or 37.2 are met. No additional statutory authority is required.

# What happens to existing authority for emergency rulemaking contained in the Indiana Code?

* + Any additional authority in statute outside IC 4-22 to adopt rules through emergency rulemaking in IC 4-22-2-37.1 is void (including if it was added in a separate bill during the 2023 session). The code revision commission has been directed to prepare a bill to remove this language.

# What happens to existing emergency rules with a defined expiration date?

* + Existing emergency rules with a defined expiration date expire on the defined date.

# What happens to existing emergency rules without a definite expiration date?

* + IC 4-22-2.3-1 provides an expiration date of October 1, 2023, for existing emergency rules that were adopted and allowed to remain in effect indefinitely, unless they are included on a list submitted by the Governor to the Indiana Register, in which case they are allowed to remain in effect until October 1, 2024.

# How does an agency add a rule to the list provided by the Governor to the Indiana Register?

* + If you think your agency has a rule that needs to be included on this list, we need to hear from you by **August 1, 2023**, with the following information:
    1. The emergency rule that needs to remain in effect, including LSA document number;
    2. The reason the emergency rule needs to remain in effect until October 1, 2024; and
    3. Your agency’s plan, including timeline, to replace the emergency rule before October 1, 2024.
  + Please email this information to [pprice@gov.in.gov](mailto:pprice@gov.in.gov)

# What happens to existing emergency rules that were readopted or otherwise incorporated into Indiana Administrative Code?

* + Under IC 4-22-2.3-1(b), the text of an emergency rule adopted under IC 4-22-2-37.1 (as effective before July 1, 2023) or IC 4-22-2-37 (before its repeal) which:
    1. is incorporated into a provision of the Indiana Administrative Code that before July 1, 2023,
    2. was amended under the procedures in IC 4-22-2-23 through IC 4-22-2-36 or IC 13-14-9, or;
    3. was readopted as part of a provision of the Indiana Administrative Code that was readopted under IC 4-22-2.5 (before its repeal) or IC 13-14-9.5 (before its repeal)
    4. continues in effect to the extent that the text remains part of the provision of the Indiana Administrative Code into which the emergency rule text was incorporated.

# What are the procedures for provisional rules? [Updated 7/14/2023]

* + Under IC 4-22-2-37.1(b), an agency may utilize the provisional rulemaking procedures if (1) it has rulemaking authority and (2) the Governor find a provisional rule is necessary to avoid:
    1. imminent and substantial peril to public health, safety, or welfare;
    2. loss of federal funds;
    3. imminent and material deficit;
    4. imminent and substantial violation of state or federal law; or
    5. injury to people or public utility under IC 8-1-2-113, and imminent and substantial peril to wildlife or domestic animals.
  + To obtain a determination from the Governor, the agency must submit the draft of the provisional rule, a statement justifying the rule, and any additional information the Governor may request. IC 4-22-2-37(b). A notice of determination from the Governor must include findings explaining the basis for the determination and is published in the Indiana Register.
  + Any proposed rules that would expand or increase fees, fines and civil penalties must first be submitted to the Budget Committee for review before it can be approved by the Governor. IC 4-22-2-37(b).
  + After approval by the Governor, the agency must obtain a document control number from the Indiana Register by submitting:
    1. The full text of the proposed rule,
       1. The LSA template for a provisional rule is provided [here](https://www.in.gov/omb/files/Provisional-Rule.docx).
    2. A statement justifying the need for provisional rulemaking,
    3. The approval of the Governor, and
       1. The LSA template for the Governor’s approval submission is provided [here](https://www.in.gov/omb/files/Governor-Approval.docx).
    4. Copies of any incorporated materials.

The Indiana Register will provide copies of proposed provisional rule to legislators and legislative committees designated by the Legislative Council. After distribution to the legislature, the Indiana Register can assign a document control number. IC 4-22-2-37(c).

* + After the provisional rule has been circulated to the legislature, an agency may adopt the provision rule. DNR and IDEM must wait ten business days after the circulation to the legislature before they may adopt a provisional rule. IC 4-22-2-37(c).
    1. The LSA template for adoption of a provisional rule is provided [here](https://www.in.gov/omb/files/ProvisionalSigPage.pdf).
  + After the document control number has been assigned and the provisional rule is adopted, the agency must submit the text of the provisional rule, a signature page indicating compliance with all procedures required by law, the Budget Committee agenda (if required), and a copy of any incorporated matters to the Indiana Register. IC 4-22-2-37(e).
  + After it has been accepted for filing, the provisional rule can become effective.

# When does a provisional rule become effective?

* + In most circumstances, a provisional rule becomes effective when adopted version of the provisional rule is accepted for filing by the Indiana Register.
* Under IC 4-22-2-37.1(g), a provisional rule takes effect on the latest of the following:
  + 1. The effective date of delegating authority to the agency to adopt the provisional rule;
    2. The date and time the provisional rule is accepted for filing by the Indiana Register;
    3. The effective date of compliance with every requirement by law that is a prerequisite to the provisional rule becoming effective; or
    4. The statutory effective date set forth by law.

# How long can a provisional rule stay in effect?

* + Under IC 4-22-2-37.1(h), a provisional rule and all amendments by another provisional rule expire not later than one hundred eighty (180) days after the initial provisional rule is accepted for filing by the Indiana Register.
  + The Governor may terminate the provisional rule before the end of one hundred eighty (180) days If the Governor determines that the circumstance that is the basis for using the provisional rule procedures ceases to exist. IC 4-22-2-37.1(h).
  + Before a provisional rule expires, the Governor by executive order may authorize the extension of the provisional rule under the interim procedures in IC 4-22-2-37.2 if the Governor determines that the circumstance justifying the provisional rule continues to exist. A rule adopted under this procedure expires not later than one (1) year after the date on which the rule is published in the Indiana Register. IC 4-22-2.3-2.

# After a provisional rule expires, can an agency do another provision rule on the same subject?

* + No. Except as provided IC 4-22-2.3, the subject of the provisional rule, including all amendments, may not be subsequently extended by a provisional or interim rule. IC 4-22-2-37.1(h).

# Can the Governor or Attorney General invalidate a provisional rule? [Updated 7/14/2023]

* + The attorney general or Governor may file an objection to a provisional rule with the Indiana Register no later than 45 days after the date the rule is accepted for filing. Once filed, the objection invalidates the provisional rule. IC 4-22-2-37.1(i).
  + The Attorney General may only object to a provisional rule if it was adopted without statutory authority or without complying with the requirements in IC 4-22-2-37.1. IC 4-22-2-37.1(i) and (j). This is akin to the form and legality review that the Attorney General’s Office typically performs. The Attorney General must provide written findings that explain the basis for the invalidation and provide it to the agency.

# How does an agency get Governor approval for provisional rulemaking? [Updated 7/14/2023]

* + Requests for approval should be submitted via [SBARules@sba.IN.gov](mailto:SBARules@sba.IN.gov) and include a copy of the provisional rule and the information required by [Financial Management Circular 5.3 Review of Provisional Rulemaking](https://www.in.gov/sba/files/FMC-5.3-Review-of-Provisional-Rulemaking-July-14-2023.pdf).
  + NOTE: To ensure proper routing of your request, please indicate in the subject line of your email that this is for PROVISIONAL rulemaking.

# Will there be guidance for what is required for Governor approval of provisional rules? [Updated 7/14/2023]

* + Yes, the requesting agency should review [Financial Management Circular 5.3 Review of Provisional Rulemaking](https://www.in.gov/sba/files/FMC-5.3-Review-of-Provisional-Rulemaking-July-14-2023.pdf)for guidance regarding the information required for review.

# What are the procedures for interim rules? [Updated 7/14/2023]

* + Under IC 4-22-2-37.2 (b), an agency may only adopt an interim rule (1) on a subject for which they have rulemaking authority and (2) if the Governor finds the agency has demonstrated that use of the interim rule is necessary for:
    1. A new state or federal program, federal regulation, federal grant or loan agreement, a building, an equipment, a firefighting, a safety, or a professional code adopted by a nationally recognized organization;
    2. A change in state or federal law, federal regulation, federal grant or loan agreement, a building, an equipment, a firefighting, a safety, or a professional code adopted by a nationally recognized organization; or
    3. a category under IC 4-22-2.3.
  + To obtain a determination from Governor, the agency must submit the draft of the provisional rule, a statement justifying the rule, and any additional information the Governor may request. A notice of determination from the Governor must include findings explaining the basis for the determination and is published in the Indiana Register. IC 4-22-2-37.2(c).
  + Any proposed rules that would expand or increase fees, fines and civil penalties must first be submitted to the Budget Committee for review before it can be approved by the Governor. IC 4-22-2-37.2(c).
  + In order to receive an authorization to proceed from under IC 4-22-2-37.2(d), an agency must submit the following to the Indiana Register:
    1. The full text of the proposed rule,
    2. The approval of the Governor,
       1. The LSA template for the Governor’s approval submission is provided [here](https://www.in.gov/omb/files/Governor-Approval.docx).
    3. The Budget Committee agenda (if required), and
    4. Copies of any incorporated materials.
  + Once it has obtained authorization to proceed, an agency can publish a Notice of Interim Rulemaking under IC 4-22-2-37.2(e), which must include:
    1. A description of the subject matter;
    2. The full text of the proposed rule;
    3. A statement justifying any requirement or cost imposed on a regulated entity and not expressly required by state or federal law;
    4. Information how the public can inspect any material relied on for the justification of requirements as well as any incorporated materials; and
    5. Information regarding the public comment period.
       1. The LSA template for the notice is provided [here](https://www.in.gov/omb/files/Interim-Notice.doc).
  + After the Notice of Interim Rulemaking is published, there is a thirty (30) day public comment period, and an agency must prepare written responses to any comments received. IC 4-22-2-37.2(e) and (f).
  + An agency may not adopt an interim rule that substantially differs from the version of the proposed interim rule published in the Indiana Register unless it is a logical outgrowth of any proposed interim rule as supported by any written comments submitted during the public comment period.
    1. The LSA template for the interim final rule is provided [here](https://www.in.gov/omb/files/Interim-Final-Rule.doc).
    2. The LSA template for adoption of an interim rule is provided [here](https://www.in.gov/omb/files/InterimSigPage.pdf).
  + After the public comment period and the interim rule is adopted, the agency must submit to the Indiana Register:
    1. the text of the final interim rule,
    2. a summary of all comments received and the agency’s response,
    3. a signature page indicating compliance with all procedures required by law, and
    4. a copy of any incorporated matters to the Indiana Register. IC 4-22-2-37(e).
  + After it has been accepted for filing, the interim rule can become effective.
  + The new procedures apply to interim rules accepted for filing by the Indiana Register after June 30, 2023, regardless of whether there was official action to adopt the rule before July 1, 2023. IC 4-22-2-37.2 (a)(2).

# Is there a requirement for a notice and comment period for interim rulemaking?

* + Yes. There is a required thirty (30) day public comment period after the Notice of Interim Rulemaking is published. IC 4-22-2-37.2 (e).

# Is there a requirement for a public hearing for interim rulemaking?

* + No. There is no public hearing required for interim rulemaking.

# How long can an interim rule stay in effect?

* + Except as provided under IC 4-22-2.3, an interim rule and all provisional or interim rules adopted on the same subject expire no later than 425 days after the initial interim rule is accepted for filing. IC 4-22-2-37.2(k).

# After the interim rule expires, can an agency propose another interim rule on the same subject?

* + Except as provided in IC 4-22-2.3, no. *See* IC 4-22-2-37.2(k).

# When do interim rules expire?

* + Except as provided in IC 4-22-2.3, interim rules expire no later than 425 days after the initial interim rule is accepted for filing by the Indiana Register. IC 4-22-2-37.2(k).

# Can the Governor or Attorney General invalidate an interim rule? [Updated 7/14/2023]

* + The Attorney General or Governor may file an objection to an interim rule with the Indiana Register no later than 45 days after the date the interim rule is accepted for filing. Once filed, the objection invalidates the interim rule. IC 4-22-2-37.2(l).
  + The Attorney General may only object to an interim rule if it was adopted without statutory authority or without complying with the requirements in IC 4-22-2-37.2. IC 4-22-2-37.2(l) and (m). The Attorney General must provide written findings that explain the basis for the invalidation and provide it to the agency.

# What will the process for Governor approval for interim rules look like? [Updated 7/14/2023]

* + Requests for approval should be submitted via [SBARules@sba.IN.gov](mailto:SBARules@sba.IN.gov) and include a copy of the interim rule and the information required by [Financial Management Circular 5.4 Review of Interim Rulemaking](https://www.in.gov/sba/files/FMC-5.4-Review-of-Interim-Rulemaking-July-14-2023.pdf).
  + NOTE: To ensure proper routing of your request, please indicate in the subject line of your email that this is for INTERIM rulemaking.

# Will there be guidance for what is required for Governor approval of interim rules? [Updated 7/14/2023]

* + Yes, the requesting agency should review [Financial Management Circular 5.4 Review of Interim Rulemaking](https://www.in.gov/sba/files/FMC-5.4-Review-of-Interim-Rulemaking-July-14-2023.pdf)for guidance regarding the information required for review.

# What happens if an agency has a unique circumstance not covered above?

* + If you have a unique situation not covered above, please reach out to your Operations Director and OMB (at [SBArules@sba.in.gov](mailto:SBArules@sba.in.gov)) for help to work out a solution.

**FAQ added 7/14/2023**

# Does the AG have an obligation to explain why a rule was invalidated? [Added 7/14/2023]

* + Yes, the Attorney General must provide written findings that explain the basis for the invalidation and provide it to the agency.

# What does it mean for Budget Committee to review a rule? [Added 7/14/2023]

* + The Budget Committee only reviews proposed fees, fines, and civil penalties, it does not approve or deny them. To qualify as being reviewed, an item must be included on the official agenda, which is adopted by a vote of the Committee.

# Does an agency have to wait until the 5 years are up or can it readopt rules earlier than five years? [Added 7/14/2023]

* + There is no prohibition on readopting a rule earlier than its expiration date. Some agencies are exploring this option to spread out the volume of rules that need to be readopted rather than having them concentrated in a single year. Also, because of the nature of the readoption analysis, agencies may want to readopt all rules on the same subject matter in the same year because it is easier to do the same readoption analysis for all the rules at the same time.

# What documents need to be reviewed by Budget Committee? Does this include rule language? [Added 7/14/2023]

* A written report is provided in advance to the committee members that contains the information they want for review. This report is focused on financial information and does not include the rule language itself.
* The standard process is that a rough draft of the report should be made available to SBA at least two and a half weeks in advance of the meeting, so that SBA can work with the agency to refine the report. The final report will be circulated to legislative members in advance of the meeting.
  1. The template for the Budget Committee report for new fees, fines, and civil penalties is available [here](https://www.in.gov/omb/files/Budget-Committee-Template-New.docx).
  2. The template for the Budget Committee report for increased fees, fines, and civil penalties is available [here](https://www.in.gov/omb/files/Budget-Committee-Template-Increased.docx).
  3. The template for the Budget Committee report for safe harbor fees, fines, and civil penalties is available [here](https://www.in.gov/omb/files/Budget-Committee-Template-Safe-Harbor.docx).

# Are family impact statements still required? [Added 7/14/2023]

* + Yes, family Impact statements are required by Executive Order 13-05, which will remain in place after HEA 1623.

# How are rules currently in the adoption process going to be handled? [Added 7/14/2023]

* + If a rulemaking has commenced with the publishing of a Notice of Intent or a notice under IC 14-14-9 before July 1, 2023, it follows the existing statutory requirements.
  + A rulemaking that is pending with OMB on July 1, 2023, should follow the new process under HEA 1623 once it is approved by OMB.

# Can you provide clarification on sunset/readoption deadlines? [Added 7/14/2023]

* + The deadlines for readoption are provided in FAQs 30 and 31. FAQ 30 includes the new deadlines for regular rules that expire. FAQ 31 includes the new deadlines for regular rules that previously never expired.

# What does the initial readoption notice to legislators entail? [Added 7/14/2023]

* + The legislative notice is a very simple document that includes the agency name, statutory authority, subject matter, and a list of rules to be readopted. The LSA template for this notice is provided [here](https://www.in.gov/omb/files/Legislative-Notice.docx).

# Does that October 1, 2023, expiration date apply to language from an emergency rule that was readopted before the October deadline? [Added 7/14/2023]

* + No, language from an emergency rule that was readopted into the Indiana Administrative Code is not subject to the October 1, 2023, expiration date.
  + IC 4-22-2.3-1(b) provides that the October 1, 2023, expiration date does not apply to language from an emergency rule that was either:

(1) incorporated into a provision of the Indiana Administrative Code before July 1, 2023, under the regular rulemaking procedures in IC 4-22-2-23 through IC 4-22-2-36 or IC 13-14-9 (as applicable); or

(2) readopted as part of a provision of the Indiana Administrative Code that was readopted under IC 4-22-2.5 (before its repeal) or IC 13-14-9.5 (before its repeal).

# Our statutes provide that the agency may assess a penalty with a stated amount not to exceed along with factors that the agency should consider when assessing penalties, do we still need to have rules on top of that? [Added 7/14/2023]

* + Yes. IC 4-22-2-19.6(b) applies to all situations where a fee, fine, or penalty is not set in a specific amount by statute, which would include when statute sets a not-to-exceed amount. When an agency is given authority to assess a penalty not-to-exceed, it would still need a rule specifying the range of potential dollar amounts that might be assessed as well as the factors that the agency will utilize to set a specific dollar amount in an individual case. Those factors need to be set forth with sufficient certainty that a review of an agency action under IC 4-21.5 or comparable process can evaluate whether the amount was reasonable.

# Do contracts with standard fee language need to have those fees put into rule? [Added 7/14/2023]

* + This is probably a better handled on a case-by-case basis. The case law looks at whether the character of what was being imposed was something that would traditionally be handled through contract or whether it was really regulatory in nature. This is a fact-specific analysis and there is not guidance from Indiana courts on it yet.
  + OMB has also prepared a memo summarizing case law regarding determining when an agency is acting as a market participant rather than a regulator that is posted to the [OMB rulemaking website](https://www.in.gov/omb/files/Agency-Fees-market-participant-vs.-regulator-7-14-2023.docx).

# Is there guidance for distinguishing between regulatory fees and market participation by an agency? [Added 7/14/2023]

* + Yes. A frequent question that has come up is whether an amount an agency charges qualifies as a rule that needs to be spelled out in regulation or whether it falls outside the definition of a rule because the agency is acting in another capacity, such as a market participant. This question, unfortunately, has not yet been addressed by Indiana courts. OMB has prepared a [memo](https://www.in.gov/omb/files/Agency-fees-market-participant-vs-regulator-7-14-2023.docx) with guidance based on what other courts have found in various circumstances that hopefully will provide insight into how Indiana courts might approach the question. Agencies are advised to review this summary, the referenced case law, and other research to make their best determination based on the particular circumstances of the fee at issue.

# If the amount of a fee is set in statute, does it also need to be in rule? [Added 7/14/2023]

* + No, IC 4-22-2-19.6(b) only applies in a situation where a fee, fine, or penalty is *not* set in a specific amount by statute.

# If the amount of a penalty is set in statute, does it need to be listed on the website? [Added 7/14/2023]

* + Yes, IC 4-22-2-19.6(f) broadly applies to fines and penalties and is not limited to just amounts set in rule. In addition, the intent of this provision was to promote transparency for regulated parties regarding the potential penalties for violations, so the language should be read in that light.

# Do the new attorney’s fee provisions only apply to cases under AOPA (IC 4-21.5)? [Added 7/14/2023]

* + The primary attorney’s fee provision is in IC 4-21.5-3-27.5, which applies to “a proceeding under this chapter concerning an agency action.” The companion provision for judicial review is IC 34-52-2-1.5 and applies to “a proceeding under IC 4-21.5-5 to judicially review a final order made by a state agency.” Both provisions refer to proceedings under AOPA. If your agency has an administrative review process outside AOPA, you are encouraged to review the statutes and case law to evaluate whether the AOPA standards are nonetheless applicable.

# What does a “prevailing party” mean in terms of attorney’s fees? [Added 7/14/2023]

* + Prevailing party is a well-defined term in federal case law to determine when attorney’s fees should be awarded, for example it is used in § 1983 civil rights cases. By adding this term to Indiana’s attorney’s fees provision, the intention was to mirror the federal standards.