

## **SPEAKER BIOS**

### **LESLIE LEWIS JOHNSON**

Ms. Johnson is Chief Counsel to the Independent Regulatory Review Commission and has been with the Commission since 2006. Prior to joining the Commission, she was a senior attorney with the Pennsylvania State System of Higher Education where for 14 years, she served as legal counsel to several public universities – Cheyney, East Stroudsburg, Kutztown and West Chester Universities of Pennsylvania. She was previously an associate practicing business and corporate law with the Harrisburg law firm of McNees Wallace & Nurick LLC. Ms. Johnson is a *summa cum laude* graduate of Spelman College with a degree in Economics. She earned her J.D from the University of Pennsylvania Law School.

### **AMY M. ELLIOTT**

Amy M. Elliott is the Chief Deputy Attorney General for the Legal Review Section with the Pennsylvania Office of Attorney General in Harrisburg, PA. Her duties involve the review, for form and legality, of all Commonwealth contracts, deeds, leases, bonds and regulations. She also assists with the research for and drafting of Official Opinions of the Office of Attorney General, the Plain English Statement for ballot questions, and responses to Right-to-Know Law requests. She joined the Office of Attorney General in 2003. Prior to working at the Office of Attorney General, Ms. Elliott served as an Assistant Counsel for the Pennsylvania Board of Probation and Parole.

Ms. Elliott received her law degree from the Dickinson School of Law in 1998, where she served as an Articles Editor for the Dickinson Journal of International Law and was a member of the Woolsack Honor Society. She received her B.A., *summa cum laude*, in Political Science from the College of Notre Dame of Maryland in 1995.

### **MARISA G. Z. LEHR**

Deputy General Counsel

Marisa G. Z. Lehr was appointed as Deputy General Counsel with the Governor's Office of General Counsel (OGC) in March 2015. In addition to her general responsibilities to the General Counsel, Marisa's practice focuses on regulatory and transactional matters on behalf of the Governor's Office and in conjunction with various executive and independent agencies. She is a member of the OGC Hiring Committee, the co-chair of the OGC Legislation and Regulations Practice Group, and the chair of the Pennsylvania Board of Commissioners on Uniform State Laws (the Pennsylvania Delegation of the Uniform Law Commission).

Marisa comes to OGC from the Pennsylvania Office of Attorney General (OAG), Civil Law Division, Litigation Section where she served as a Deputy Attorney General, providing legal representation to Commonwealth agencies, officials, and employees in a wide variety of litigation matters in both State and Federal court. During her time at OAG, Marisa also assisted Special Deputy Attorney General H. Geoffrey Moulton, Jr. in his review of and report on the handling of the Jerry Sandusky investigation by the Office of Attorney General, other law enforcement agencies, and child protective services. Prior to her employment with OAG, Marisa served as a judicial law clerk for the Honorable Thomas G. Saylor of the Supreme Court of Pennsylvania.

Marisa received her Bachelor of Science in Business Administration, summa cum laude, from Robert Morris University. During her time at Robert Morris, Marisa was a member of the University's Division-I field hockey team. Marisa received her Juris Doctor, summa cum laude, from Widener University School of Law, graduating as the valedictorian of her class. While at Widener, Marisa was a member of the Widener Law Journal, a Widener Scholar, and recipient of The Dean's Award.

### **DUANE M. SEARLE**

Duane M. Searle is Senior Counsel for the Legislative Reference Bureau of the Pennsylvania General Assembly. He has served as an attorney in the bureau for 22 years. His duties include drafting legislation on all subjects of law; preparing legal opinions requested by members of the General Assembly relating to constitutional law and statutory construction; and serving as director of the Pennsylvania Code and Bulletin.

Prior to his employment at the bureau, Mr. Searle was Deputy General Counsel with the Pennsylvania Treasury Department. As part of Treasury's legal office for six years, he was involved in audits of State agencies, litigation, human resource issues and implementation of the Pennsylvania Tuition Account Program, a 529 plan. In addition, he was frequently the State Treasurer's designee on the Public School Employees' Retirement Board, the State Employees' Retirement Board, the Pennsylvania Municipal Retirement Board and the Board of Finance and Revenue.

Mr. Searle's service to the Commonwealth of Pennsylvania was preceded by three years in the private practice of law where he represented clients in family law cases, real estate transactions, probate proceedings and civil rights defense litigation. He received his J.D. from the Dickinson School of Law in 1988 and graduated cum laude from Gettysburg College in 1985 with a B.A. in Psychology.

# AN OVERVIEW OF THE PENNSYLVANIA REGULATORY PROCESS FROM THE DECISIONMAKERS THEMSELVES

Tuesday, February 4, 2020

12:00 p.m. – 1:00 p.m.



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# AN OVERVIEW OF THE PENNSYLVANIA REGULATORY PROCESS FROM THE DECISIONMAKERS THEMSELVES

Panelists:

Leslie Johnson, Chief Counsel, Independent Regulatory Review Commission

Amy Elliott, Chief Deputy Attorney General, Legal Review Section

Marisa Lehr, Deputy General Counsel, Governor's Office of General Counsel

Duane Searle, Senior Counsel, Legislative Reference Bureau

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# AN OVERVIEW OF THE PENNSYLVANIA REGULATORY PROCESS FROM THE DECISIONMAKERS THEMSELVES

Agenda

- I. Introduction
- II. Historic Background of PA's Regulatory Process
- III. Roles and Practice Pointers
- IV. Current Trends
- V. Q&A

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# GOVERNING STATUTES

**Administrative Code (Section 612)**  
71 P.S. § 232.

**Commonwealth Attorneys Act**  
71 P.S. §§ 732.204(b) & 732.301(10).

**Commonwealth Documents Law**  
45 P.S. §§ 1102, 1201-1208 & 45 Pa.C.S. § 101, *et seq.*

**Regulatory Review Act**  
71 P.S. §§ 745.1 – 745.14.

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## HISTORICAL PERSPECTIVE: PRE-REGULATORY REVIEW ACT

- Very few controls on the promulgation of regulations.
- Concerns about agencies exceeding statutory authority and legislative intent.
- Minimal thought as to economic and social impact.
- Commonwealth Documents Law.
- Upon approval by the PA Department of Justice, regulation was published with a 30-day comment period.
- Not many public comments but a lot of complaints.

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## HISTORICAL PERSPECTIVE: SHAKEUPS

### 1980: **Commonwealth Attorneys Act**

- Provided for an elected Attorney General.
- Appointment of General Counsel.

### 1982: **Regulatory Review Act (RRA)**

- Created the Independent Regulatory Review Commission.
- Provided an open forum to review regulations based upon a set of criteria.
- Gave IRRC authority to bar publication of a regulation and allowed one chamber of the General Assembly to block a regulation without presentment to the Governor.

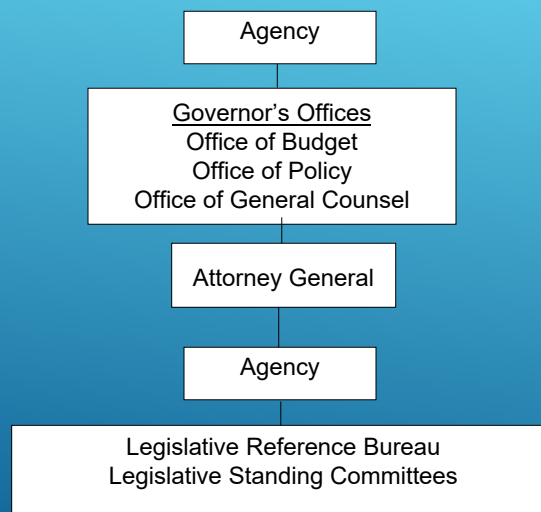
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## HISTORICAL PERSPECTIVE: LEGAL CHALLENGES & AMENDMENTS

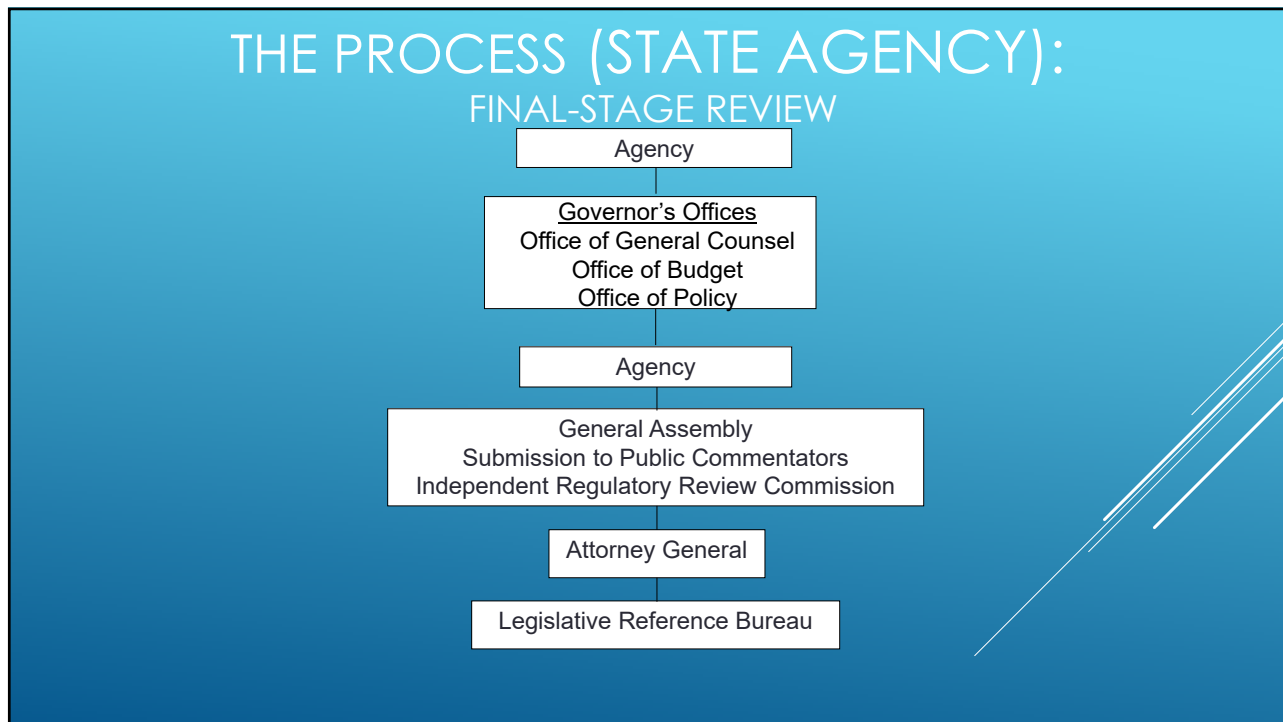
- DER v. Jubelirer, 130 Pa. Cmwlth. 124, 567 A.2d 741 (1989) challenged the constitutionality of the Act.
- The Act was amended in 1989 to remove the one-house veto, provide for the current 2-step review process and the concurrent resolution process.
- Concerned Citizens of Chestnut Hill Twp v. EQB, 158 Pa. Cmwlth. 248, 632 A.2d 1 (1993).
- Additional amendments provided for more time for review by IRRC and the committees, and included criteria to heighten consideration of the impact on small businesses and the use of data sources.

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## THE PROCESS (STATE AGENCY): REVIEWS PRIOR TO PUBLICATION



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## THE PROCESS (STATE AGENCY): REVIEWING OFFICE RESPONSIBILITIES & TIMELINES

EXTERNAL OFFICE	RESPONSIBILITY	REVIEW PERIOD
<b>Governor's Budget Office (GBO)</b>	Verify fiscal impact, verify that funds are available, develop and certify fiscal note.	None specified.
<b>Governor's Policy Office (GPO)</b>	Review and approve for compatibility with Governor's policy and related policies of other state agencies.	None specified.
<b>Governor's Office of General Counsel (OGC)</b>	Review and approve for form and legality.	None specified.
<b>Office of Attorney General (OAG)</b>	Review and approve for form, whether statutorily authorized or unconstitutional.	30 calendar days (statutory).

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## THE PROCESS (STATE AGENCY): REVIEWING OFFICE RESPONSIBILITIES & TIMELINES (CONT'D)

EXTERNAL OFFICE	RESPONSIBILITY	REVIEW PERIOD
<b>Legislative Reference Bureau (LRB)</b>	Review, edit for compliance with Pa. Code requirements and submit to printer for publication; <i>Style Manual.</i>	Regulation is published on a Saturday at least 10 calendar days following submission.
<b>Standing Committees of House and Senate</b>	Review and comments; approve, deem approve, disapprove or notify of intent to review.	Proposed – Until submission as final-form Final/Final-Omit – 24 hours before IRRC meeting.
<b>Independent Regulatory Review Commission (IRRC)</b>	Review and approve based on criteria specified in Section 5.2 of the Regulatory Review Act; <i>Process Manual.</i>	Proposed – 30 calendar days after close of public comment period. Final/Final Omit – Next scheduled meeting, no less than 30 days.

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## THE PROCESS: AGENCY PREPARATION

Executive Order 1996-1: Regulatory Review and Promulgation.

### Agency's Preparation:

- Discuss issues, ideas and alternatives with the regulated community, public and sponsors of enabling legislation.
- Establish a working group to develop a draft regulation (Advisory committees, Task force groups, Stakeholders).
- Discuss with designated standing committees.
- Hold public input hearings.
- Share drafts and ask for input, including language alternatives.

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## THE PROCESS: AGENCY PREPARATION

### Statutory Authority:

- Read entire statute applicable to the regulation to ensure that the agency is operating within its statutory authority and not drafting regulatory provisions that conflict with statute.

### Review recently codified regulations that are similar to agency's proposed regulation for guidance:

- Licensing regulations vs. fee regulations.
- IRRC's website is a great resource for finding examples of recent regulatory packages, which can be cross-referenced with regulation as published in the Pa. Bulletin and as codified in the Pa. Code.

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## THE PROCESS: AGENCY PREPARATION

### Preamble Annex, and Regulatory Analysis Form (RAF)

- Thorough Preamble that explains the Annex in plain English (\*Remember – RAF is not published in Pa. Bulletin).
- Ensure Annex is drafted and formatted in accordance with the Style Manual and IRRC Regulations (1 Pa. Code §§ 305.1a and 307.3a).
- RAF – Read each question and respond to all parts.
- Order of drafting: Annex → RAF → Preamble.

### Document Management/Control & Review

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## THE PROCESS: REVIEW BY THE OFFICE OF THE GOVERNOR

### Procedural:

- The regulatory package is submitted to OGC, GPO, and GBO *at the same time*.
- Before OGC can sign Face Sheet and send to OAG for review, must have approval from GPO and fiscal note from GBO.
- Once approvals are received, OGC forwards to OAG.
- When approved by OAG, OGC will contact Agency for pickup, and Agency may proceed with delivery to IRRC, Standing Committees, and LRB to start process under the Regulatory Review Act.

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## THE PROCESS: REVIEW BY THE OGC

### Legality & Statutory Authority

- Does agency have authority to promulgate the regulation? Cite specific authority.
- Does the regulation operate within, and not conflict with, the applicable statute underlying the regulation?

### Constitutional (under both State and Federal)

### Other Laws

- Does the regulation comport with other relevant Federal and State statutes?
- Does the regulation comport with Federal and State case law?

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## THE PROCESS: OGC – FORM AND LEGALITY REVIEW

Regulatory Review Act and Commonwealth Documents Law: Has the agency complied with the requirements of these laws?

- Has the agency thoroughly completed a RAF with the applicable information (71 P.S. § 745.5(a))?
- Has the agency attached copies of forms or reports that will be required for implementation of the regulation (71 P.S. § 745.5(a)(5))?
- Has the agency published the regulation in the Pa. Bulletin for at least a 30-day public comment period (71 P.S. § 745.5(b); 45 P.S. § 1201)?
- At the final stage, has the agency responded to each comment (public, IRRC, and Standing Committees)(71 P.S. § 745.5a)?

### Form

- Overall compliance with Pennsylvania Code & Bulletin Style Manual (5<sup>th</sup> ed., 2014)
- Proper formatting of text in Proposed and Final Annex (1 Pa. Code §§ 305.1a & 307.3a).
- Consistency of information between documents (Preamble, Annex, and RAF).

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## THE PROCESS: REVIEW BY THE OAG

### Scope of Review at Both Proposed and Final Stages: Form and Legality

- Constitutionality under both federal and state constitutions;
- Statutory authority of the agency promulgating the regulation;
- Consistency of the regulation with the governing statute;
- Proper form as to structure and language of regulation;
- Compliance with the required procedures for regulatory review and promulgation; and
- Compatibility and consistency with other statutes and governing case law.

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## THE PROCESS: REVIEW BY THE OAG

### Final Review

If the OAG has not approved or objected to a regulation within 30 days after submission, the regulation shall be deemed approved.

If the OAG determines that a regulation is in the improper form, not statutorily authorized or unconstitutional, the OAG must notify the agency, OGC and the General Assembly of the reasons for the determination.

After a final-form regulation has been approved by the IRRC and the legislative committees, an agency may not make changes to the regulation, *except at the direction of the Office of Attorney General.*

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## REGULATORY REVIEW ACT: 2 STAGE REVIEW PROCESS

### Proposed:

- Delivery to the Legislative Reference Bureau, standing committees and IRRC.
- Published in the *PA Bulletin*.
- Minimum 30-day public comment period.
- IRRC comment.

### Final:

- Delivery to IRRC and committees within 2 years from the close of the public comment period.
- IRRC public meeting.
- Final review by Office of Attorney General.
- Publication in the *PA Code & Bulletin*.

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## IRRC CRITERIA FOR REVIEW

71 P.S. § 745.5B

- Whether agency has statutory authority to implement regulation.
- Whether the regulation is consistent with the legislative intent.
- Economic & fiscal impact on the public and private sector.
- Protection of the public health, safety & welfare.
- Clarity, feasibility, need & reasonableness of the regulation.

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## IRRC CRITERIA FOR REVIEW (CONT'D)

71 P.S. § 745.5B

- Whether regulation is a policy decision requiring legislative review.
- Comments, objections or recommendations of a committee.
- Compliance with the RRA & IRRC regulations.
- Whether the regulation is supported by acceptable data.
- Whether a less costly or less intrusive alternative method of achieving the goal of the regulation has been considered for regulations impacting small business.

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## PRACTICE TIPS

- Clearly articulate your statutory authority.
- Be wary of “drift” in the regulatory text.
- The regulation should be understandable by those not in the regulated community.

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## PRACTICE TIPS PROPOSED STAGE

- Read enabling statutes to ensure consistency with statutory authority and legislative intent.
- Read all laws, executive orders and IRRC's manual relating to the regulatory review process. [http://www.irc.state.pa.us/documents/agency\\_toolbox.cfm](http://www.irc.state.pa.us/documents/agency_toolbox.cfm).
- Use Pennsylvania Code & Bulletin *Style Manual*: <http://www.pacodeandbulletin.gov/> and <http://www.irc.state.pa.us/>
- Use recent chapter in *Pennsylvania Code* as a formatting reference for the Annex and review IRRC regulations for formatting rules (see 1 Pa. Code §305.1a).
- Carefully complete Regulatory Analysis Form (RAF) (71 P.S. §745.5(a); 1 Pa. Code §305.1(b)(1)).
- Use Preamble to as a marketing tool to fully explain regulation and any changes made to existing language (see 1 Pa Code § 301.1(a) & 305.1(b)(4)).

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## PRACTICE TIPS: FINAL STAGE

### RAF

- Make revisions in response to comments.
- Review and revise dates.
- Review and revise cost data and any other analyses.

### Preamble

- It should adequately explain the regulatory text in the Annex.
- Describe any revisions made from proposed to final and the reasons.
- May include response to comments received.

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## PRACTICE TIPS: FINAL STAGE

### Annex

- Use official version of the regulation published in the *PA Bulletin* as the basis for the final-form package.
- Format text pursuant to 1 Pa. Code § 307.3a.
- Changes must be accurately reflected in Preamble.

### Comments

- Review all comments.
- Organize comments by pertinent section or issue.
- Identify and explain revisions made to regulation in response to comments.
- Explain reasons for not revising regulation in response to comments.
- Responses may be included in Preamble or in a separate document.

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# Current Trends

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# Q & A

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