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STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

In the Matter of the Proposed Amendments to the Attorney General Rule and Adoption of the "Dual Notice" Sample Form.

STATEMENT OF NEED AND REASONABLENESS

Introduction

The Office of the Attorney General reviews administrative rules adopted without a public hearing or adopted through the emergency rulemaking procedure for legality and form to the extent form relates to legality pursuant to the Administrative Procedure Act, Minn. Stat. ch. 14 ("APA"). Minn. Stat. §§ 14.26and 14.32 (1992). Since January 1971, the Attorney General has had rules governing this rule review ("Attorney General Rules"), now located in Minn. Rules ch. 2010 (1991). The Attorney General Rules, last amended in 1988, now require further amendment. As required by Minn. Stat. § 14.22, this Statement of Need and Reasonableness justifies the need for and reasonableness of the proposed amendments.

There are several reasons for the proposed amendments. First, there have been numerous amendments to the APA since the rules were last amended in 1988, requiring another update of the rules. Further, certain errors are repeatedly made by State agencies, requiring clarification of the rules to attempt to avoid these errors. In addition, the 1992 Minnesota Legislature ordered the Attorney General, after consultation with the Office of Administrative Hearings, to adopt rules prescribing the form and content of the dual notice authorized by Minn. Stat. § 14.22, subd. 2. 1992 Laws of Minnesota, ch. 494, sec. 9. Finally, legislation was proposed in 1992, but not passed, suggesting that the notices of intent to adopt rules be in clearer, everyday language. While the legislation did not pass, its objectives were incorporated into the sample notices of intent found in the Attorney General Rules.

Statutory Authority

The statutory authority for the adoption of the "dual notice" is 1992 Minn. Laws, ch. 494, sec. 9. The authority to amend the existing Attorney General Rules is Minn. Stat. § 14.06. The Legislature has acknowledged that the Attorney General has rulemaking authority in Minn. Stat. §§ 14.365(8) and 1992 Minn. Laws, ch. 494, sec. 9.

Section by Section Justification

General

There is a need to amend the Attorney General Rule so that it corresponds with recent legislative changes to the APA, to clarify the rule to avoid repeated errors by state agencies, and to attempt to provide as complete, clear notices of rulemaking in common, layperson language to encourage participation in the administrative rulemaking process.

The amendments proposed are reasonable in attempting to achieve these objectives and to clarify the process for state agencies and the public. The proposed amendments attempt to strike a balance between requiring a complete rulemaking record and clearer notices, yet not unnecessarily increase the paperwork or burdens on State agencies working through the rulemaking process.

Scattered throughout the proposed amendments are re-numbering of rule parts and subparts, corrections to cross-references, and grammatical or syntex corrections. When certain rule parts or items have been added or reorganized in the rule, it is necessary to re-number the remaining parts and to correct the cross references so that they are correct. None of these changes, nor the grammatical corrections, have any impact on the substance nor administration of the rule on the public or agencies.

2010.0300 Documents Necessary for Review of a Rule Adopted Without a Public Hearing.

2010.0300 E

Part 2010.0300 E is not actually a new rule, but rather a revised version of current part 2010.0300 F moved earlier on the chronological checklist of documents. The objective of rule 2010.0300 is to be essentially a chronological checklist of documents required to be part of the rulemaking record submitted to the Attorney General. Listing the documents in the order that they must be prepared during the agency's rulemaking proceeding greatly assists the agency in working through this complicated process. To this end, the Statement of Need and Reasonableness was moved earlier on the list. Minn. Stat. § 14.23 was amended in 1990 to now require agencies to prepare the Statement of Need and Reasonableness "before the section 14.22 notice." Therefore, there is a need to move the required Statement before the notice of intent to remind state agencies that they must prepare or begin to prepare, the statement before the notice. It is reasonable to assist the agencies as much as possible.

The Statement of Need and Reasonableness has always been required to be submitted as part of the rulemaking record; it is necessary that it be submitted to assure that one was prepared and that the Attorney General may review the justification for the proposed rule in reviewing the legality of the rule. Since the statement must be prepared by the agency, it is reasonable that it be part of the rulemaking record.

The first sentence of 2010.0300 E was rearranged to clarify the language. The final phrase "complying with part 2010.0700" now appears after "the statement of need and reasonableness" to clarify that it is the statement, not the proposed rule which must comply with part 2010.0700. The second sentence was added to remind state agencies of the statutory timeline requirement of Minn. Stat. § 14.23 that the Statement must be prepared prior to the date of the notice of proposed adoption of rules. It is necessary to add this reminder because agencies have not realized that that Statement must be prepared before the notice of intent and it is reasonable to add this timeline reminder in the listing of the required document.

2010.0300 F

The APA was amended in 1990 to require agencies to send a copy of their Statement of Need and Reasonableness to the Legislative Commission to Review Administrative Rules (LCRAR) when it becomes available to the public. Minn. Stat. § 14.23 (1990). Since the Attorney General must determine if the agency has complied with this procedural requirement, it is necessary that the agency submit proof of its compliance. Requiring either a copy of the dated correspondence to the LCRAR or an affidavit of mailing the Statement to the LCRAR is a reasonable solution of this need as it gives agencies a choice to prepare whatever document is most convenient for them.

2010.0300 G

The requirement that the Notice of Intent as mailed be signed has been deleted from this "preamble" provision and moved to subpart 17. In the past, many agencies have forgotten to have these notices signed, perhaps because the requirement is not separately itemized in this rule part. It is therefore necessary to emphasize this requirement, and separate itemization is a reasonable solution to prevent agencies from easily overlooking this requirement.

Rule part 2010.0300 G has also been amended to require that the mailed notice of intent to adopt rules be sent 33 days prior to the end of the comment period. Minnesota Statutes § 14.22 requires that persons be given 30 days to comment. If the notice is mailed the same day the notice appears in the State Register, persons receiving the mailed notice will not have a full 30 day period in which to comment due to the delay in receiving the mail. There is therefore a need to assure equal opportunity for all persons to comment on the rule.

In many statutory, legal or administrative proceedings, three days are added to the prescribed period if a notice is mailed. For example, Minnesota Rules of Civil Procedure 6.05 provides:

> Whenever a party has the right or is required to act within a prescribed period after the service of a notice or other paper upon the party, or whenever such service is required to be made a prescribed period before a specified event, and the notice or paper is served by mail, three days shall be added to the prescribed period.

This addition of three days is commonly known as the "three-day mailing rule." As it would be administratively inefficient to attempt to use actual date of receipt of the mailed notice to compute the 30 day comment period for those persons receiving mailed notice, it is reasonable to adopt the widely adopted and utilized "three-day mailing rule" and require that the mailed notice be sent at least three days before 30 day comment period begins to run, or 33 days before the end of the comment period.

2010.0300 G(1) and (2)

The requirement to cite the specific statutory authority to adopt the rule is proposed to be deleted from subpart (1) and moved to a separately listed item in subpart (2). As discussed in length in the justification for the sample form of the notice of intent in

proposed rule 2010.9916, the sample form has been extensively revised. Since the sample form has been extensively revised, it is necessary to assure that the substantive requirements correspond with the new proposed form. Only one change, however, is necessary. The present rule could be read to require the citation to the statutory authority and the reference to the APA in one sentence. Since the proposed sample form separates these two sentences, it is necessary revise the substantive rule and reasonable to separate the recitations into two different subparts.

2010.0300 G(3)

This subpart is proposed to be amended to include the new statutory requirement that the end date of the comment period must appear in the notice of intent and to include information on how to calculate the end date. The 1992 Legislature amended the APA to require all notices of intent to include the date on which the 30-day comment period ends. Minn. Stat. § 14.22, subd. 1 (1992 Minn. Laws, ch. 494, sec. 5). It is therefore necessary to include this new requirement in the listing of statements required in the content of the notice.

In addition, past experience has shown that there have been many errors in the calculation of the ending deadline of the "30 day" comment period. Far too often the agency mis-counted, resulting in many "29 day" comment periods. Therefore, there is a compelling need to clarify how one counts the days. The proposed calculation language is taken from Minn. Stat. § 645.15. It is reasonable to utilize the widely adopted method of counting the days and crucial that all agencies understand how to do so.

Further, the proposed rule advises agencies that the 30 day period begins to run after the latest notice, whether mailed or published. To count otherwise, that is, to begin the count from the earlier notice, would mean that recipients of the latter notice would not get a full 30 day comment period. Finally, numerous problems arise with Monday holidays (where the publication date is Tuesday, not Monday). The proposed amendment reminds agencies of this extension so that they remember to count from Tuesday, rather than Monday. It is reasonable to attempt to assist agencies as much as possible to avoid these repeated errors.

2010.0300 G(7)

Subpart G(7) has been amended to require a person requesting a hearing to provide his or her name and address. Minn. Stat. § 14.22(5) requires that the requester for a hearing shall state his or her name and address. Since the current rule is incorrect in stating that the requester "should" include the name and address, it is necessary to correct the rule. Moreover, several persons have suggested, in response to the draft of the amendments distributed in 1991, that other language also be made mandatory, for example, to require commentators to identify the portion of the rule addressed. Minn. Stat. § 14.22(2) requires, however, that the comment "should" identify the portion addressed. The Attorney General rule cannot be inconsistent with the statute.

2010.0300 G(10)

Subpart G(10) has been amended to require agencies to give notice that any person may request a copy of the Attorney General decision. Advising the public that they may receive a copy of the decision provides for a more complete notice and allows persons to better participate in the rulemaking process. Adding this clause in the notice will not be burdensome to the agency, therefore it is a reasonable addition to the notice. In fact, for the past seven years, the sample forms have advised persons that they may request such a copy, therefore, if agencies have been following the sample forms in the past, this is not a change.

2010.0300 G(17)

Subpart G(17) is not actually a new requirement, but rather is the signature requirement moved from the "preamble" part to this separately itemized listing. It is necessary to move this requirement to avoid it being consistently overlooked. It is necessary that these notices be signed to assure acquiescence of the rulemaking by the authorized person.

2010.0300 F

Subpart F is proposed to be deleted and moved to 2010.0300 E to be earlier in the chronological checklist so that it is prepared before the notice of intent is mailed and published.

2010.0300 H

Subpart H requires submission of evidence that the agency complied with Minn. Stat. § 16A.128, subd. 2(a). Minn. Stat. § 16A.128, subd. 2(a) requires an agency adopting rules that establish or adjust fees to send a copy of the Notice and the rules to the chairs of the house appropriations and senate finance committees. The Attorney General is required to determine whether an agency has met all statutory requirements in adopting its rule. Thus, there is a need to provide a means whereby the Attorney General can make such a determination with respect to section 16A.128. The proposed amendment provides a reasonable solution to this need by providing the agency with alternative methods for showing compliance, allowing the agency to select whichever method is most convenient. This subpart also cross-references a proposed sample affidavit should the agency wish to use the sample.

2010.0300 I

Subpart I requires an agency to provide copies of any correspondence required under Minn. Stat. § 14.12. Minn. Stat. § 14.12 requires an agency to report to the Legislative Commission to Review Administrative Rules (LCRAR), other appropriate committees of the legislature, and the governor of its failure to publish a notice 180 days after the effective date of the law requiring the rule to be promulgated. In reviewing the legality of the rule adoption, it is necessary for the Attorney General to determine if this requirement was met, should the agency miss the deadline. The easiest, most accurate, and therefore reasonable method of demonstrating compliance is submitting a copy of the sent

correspondence. Listing this procedural requirement also reminds state agencies of this statutory timeline.

2010.0300 J

This subpart repeats the requirement that the notice must be mailed at least 33 days before the end of the comment period. Because the three-day mailing rule is now expressly incorporated in the Attorney General Rule, it is reasonable to remind the person at the time he or she is preparing the affidavit of mailing of this requirement. As discussed in the justification for subpart G(3), it is necessary to assure that those receiving the notice by mail have 30 days to comment, and it is reasonable to adopt the widely utilized three-day mailing rule.

For ease and clarity, the requirements regarding the affidavit in this rule part were separated and individually numbered. Considering the procedural complexity of rulemaking, there is always a continuing need to clarify rules where possible in ways that assist compliance. It is reasonable to number the requirements to increase compliance with each. Finally, the reminder that separate affidavits may be necessary under certain circumstances has been deleted and moved to sample form Rule 2010.9920, where it is more relevant and topical than in this regulatory section.

2010.0300 K

This subpart was amended by adding the sentence that the publication date must be at least 30 days before the end of the 30 day comment period. Past experience with procedural rulemaking errors has shown the necessity of reiterating procedural requirements to assure compliance. Thus, reiteration that the 30 day comment period requires publication 30 days in advance of the deadline is reasonable as a means of reminding the agency of the statutory requirement and assuring that the agency double checks the deadline date with the publication date.

2010.0300 L

Subpart L is proposed to be amended to require three copies of the adopted rule rather than four. It is proposed that the Attorney General no longer retain the submitted agency rulemaking record, but rather return the entire record to the agency. There are several reasons for this change. First, Minnesota Statutes § 14.365 now requires the agency to retain the official rulemaking record. Furthermore, the Attorney General's Office has neither the space nor the funds to pay for duplicate storage of these records. It is unnecessary for the Attorney General to retain duplicate rulemaking records. It should be noted that the Office of Administrative Hearings returns the rulemaking record upon completion of its review, confirming the reasonableness of this change. Currently, the four copies of the adopted rule are distributed as follows: one is retained by the Secretary of State, one is for the Revisor of Statutes, the third is for the agency and the fourth copy is for the Attorney General. Since the Attorney General is no longer retaining the rulemaking record, there is no longer the need for the fourth copy of the adopted rule. The proposed amendment incorporates this change.

2010.0300 N(3)

It is proposed that the Findings of Fact no longer require a statement that a copy of the notice and the proposed rule was sent to the chairs of the house appropriations and finance committees. Actual proof of this notice is now required by part 2010.0300 H. Duplication is unnecessary. Instead, just a general statement of compliance with all notice and procedural requirements is necessary. Questions have been raised as to why certain procedural requirements are listed, but not others. Rather than listing various individual requirements, it is reasonable to require only the essential statements necessary for complete Findings and Order adopting the rule.

2010.0300 N(5)

This subpart is amended to require the agency to affirmatively state the number of written comments and requests for notice of submission of the rule to the attorney general that were received. Currently, only an affirmative statement that no requests for a hearing, no comments, or no requests for notice of submission of the rule to the attorney general was required. See rule 2010.0300 K(7). Requiring the statement only when there were no comments or requests caused confusion. Moreover, sometimes agencies forgot to forward comments as required. Requiring an affirmation statement of the number of comments received is reasonable, because it forces the agency to be certain it is forwarding all comments as part of the record. Requiring the agency to count the number of letters received is not burdensome for the agency and greatly eases review of the record.

2010.0300 N(7)

The amendments in subpart N(5) above requiring the agency to specify the number of written comment letters and the number of requests for notice of submission to the Attorney General make subpart seven's language duplicative. Since an agency is now required to indicate the number of comment letters received and the number of requests for notice of submission, it is unnecessary to indicate the reverse, that they received no such requests or comments.

2010.0300 N(8)

Requiring the Findings to be signed is not a new requirement, but rather is moved from a non-numbered paragraph to a separate itemized requirement to avoid being overlooked. It is crucial that the Findings be signed and dated in order to assure that person authorized to adopt the rule acquiesced in the adoption and to assure that the adoption did not occur before the end of the comment period.

2010.0300 O

Subpart O has been amended to require submission to the Attorney General of withdrawals of requests for a hearing. Although the current rule requires all submissions from the public to be a part of the rulemaking record, some agencies have argued that they did not need to submit written withdrawals of requests for hearing to the Attorney General. Thus, there is a need to clarify that submissions include withdrawals. The Attorney General must review the validity of the rulemaking process, including ascertaining whether there are more than 25 requests for a hearing outstanding. It is therefore necessary for the

Attorney General to review the withdrawals to ascertain and confirm the validity of the withdrawals. The agency has all the requests in its file, so there is a de minimus burden to forward them with the record.

2010.0300 Q

This subpart was merely re-organized. Some agencies prepared the notice of submission to the Attorney General even when no one requested such notice. Therefore, clarification was needed and it is reasonable to accomplish this by placing the condition and statute which triggers this requirement ("if any persons requested to be informed of the rule submission") first.

2010.0300 Q(3) and (5)

These two subparts have been amended to require the notice to include the review and comment periods timelines. Persons requesting notice of submission of the rule need to know how long the review period is and how much time they have to comment. It is reasonable to place the burden on the agency with the expertise and ready access to the statutes and rules to figure out these time periods. Further, specifying the deadlines in the notice assures that everyone is notified of the same deadline dates. Finally, because there have been so many misunderstandings as to how to calculate time period, it is again necessary to explain how to count the days. The language proposed is quoted from Minn. Stat. § 645.15, a widely used and adopted method of how to count the days of a time period.

2010.0300 R

This subpart is clarified to explain the circumstances when this affidavit is necessary because some agencies submit this document although no requests for submission were received. It is reasonable to express the condition which triggers this requirement at the outset of the rule part for clarification.

2010.0400 Documents Necessary for Review of Emergency Rule

Rule Part 2010.0400 contains the list of documents necessary for review of an emergency rule. The justifications for the amendments to this rule are much the same for those in the corresponding section for the permanent rules. Therefore, while the following contains a brief justification for each change, there is a cross-reference to the more in-depth discussion of the rationale for each change in the corresponding permanent rule section.

2010.0400 E

The signature requirement for notices of intent for emergency rules has been deleted from this "preamble" section and moved to subpart 2010.0400 E(12) as a separately required item to avoid being continuously overlooked as discussed in the section justifying part 2010.0300 G.

The Attorney General proposes to expressly incorporate the "three day mailing rule" for mailing the notices of intent to adopt emergency rule. As discussed in the section justifying part 2010.0300 G, it is necessary to assure that those receiving the notice by mail

receive a full 25 day comment period and it is reasonable to adopt the widely and uniformly used "three day mailing rule" and add three days to the 25 day comment period for those notices sent by mail.

2010.0400 E(1) and (2)

The requirement that the notice of intent recite the specific statutory authority has been deleted from subitem (1) and moved to subitem (2). The proposed sample form for the notice of intent to adopt emergency rules in part 2010.9951 has been extensively revised. It is therefore necessary to assure that the substantive part of the rule corresponds with the sample notice. As discussed in the rationale for part 2010.0300 G(1) and (2), the only change necessary is to separate these two recitations into two different parts to avoid the argument that these recitations must be in the same sentence in the notice.

2010.0400 E(3)

Subpart (3) has been amended to include the new statutory requirement that the end date of the comment period must appear in the notice and contains an explanation of how to count the days. As discussed in the justification for part 2010.0300 G(3), it is necessary to update the rule for new statutory requirements and to explain how to count the days to avoid the repeated errors and misunderstandings.

2010.0400 E(12)

Subpart E(12) is not actually a new requirement, but rather is the signature requirement moved from the "preamble" part to a separately itemized listing to attempt to avoid the problem of this requirement being overlooked.

2010.0400 F

Subpart F requires submission of evidence that the agency complied with Minn. Stat. § 16A.128, subd. 2a, which requires agencies, if they are adopting rules that establishes or adjust fees, to send a copy of the notice to certain legislative officials. As discussed in the rationale for rule 2010.0300 H, it is necessary to assure that the agency complied with this requirement and the rule is reasonable in providing the agency alternatives for submitting documentation of compliance.

2010.0400 G

This subpart was amended to repeat the requirement that the notice of intent must be mailed at least 28 days before the end of the comment period. Since incorporating the three-day rule is new, it is necessary to remind the mailer to be sure to mail the notice three days before the comment period begins to run and reasonable to place this reminder with the affidavit of mailing.

2010.0400 H

This part was amended to include the reminder that the publication date must be at least 25 days before the end of the comment period. As discussed in the rationale for rule 2010.0300 K, to assure that those who receive the notice by publication receive a full

25 day opportunity to comment on the rule, it is necessary to remind the agency to check the deadline date with the publication date.

2010.0400 I

Subpart I was amended to require submission of three copies of the adopted rule rather than four. As discussed in the rationale rule 2010.0300 L, since the Attorney General will no longer retain the rulemaking record, an extra copy of the rule for the Attorney General is no longer necessary. Therefore, it is reasonable to require one less copy of the rule.

2010.0400 K(2)

Subpart K(2) requires the Findings of Fact to include a general statement that all other notice and procedural requirements have been complied with. In the past, questions were raised as to why the Findings recite compliance with certain procedural requirements, but not others. Rather than repeating individual requirements which are to be established in other ways, it is reasonable to simply require a general statement of compliance for the sake of brevity and ease.

2010.0400 J(4) (old) and 2010.0400 K(4)

Subpart K(4) requires agencies to affirmatively provide the number of comments and requests for notice of submission to the Attorney General for review. The current rule 2010.0400 J(4), which has been deleted, requires agencies to cite only whether no comments or notice of submission requests were received. As discussed in corresponding part 2010.0300 N(5), the proposed rule assures that the lack of any comments or requests in the rulemaking record results from none being received, rather than from the agency forgetting to include them in the record. Requiring the agency to count how many comments and requests were received confirms the completeness of the record.

2010.0400 K(6)

The amendment to subpart K(6) adds the requirement that the Findings must include a statement that the authority for the use of emergency rulemaking procedures has not expired. One of the legal issues in reviewing emergency rules is to assure that the emergency rule was adopted within the timelines of Minn. Stat. § 14.29. Thus, there was a need to assure compliance. Adding this statement to the Findings is a reasonable method of assuring that the agency is aware of this timeline, and is confirming its view in writing that it has met the statutory deadline.

2010.0400 K(8)

Subpart K(8) requiring the Findings to be signed is not a new requirement, but rather moves the signature to be a separately designated requirement. As discussed in detail in the corresponding part 2010.0300 N(8), because some Findings have been unsigned, it is necessary to separately designate the signature as an individual requirement to avoid it from being overlooked. It is necessary that the Findings be signed to assure acquiescence of the adoption by the person authorized to adopt the rule.

2010.0400 N

This subpart is simply re-organized to clarify at the outset that the Notice of Submission need be prepared only when a person requests notice of submission of the emergency rule to the Attorney General.

2010.0400 N(3) and (5)

These two subparts add the number of days for comment and review and explain how to calculate the length of the comment period into the Notice of Submission to the Attorney General. The notice is of little value in failing to tell recipients how much time they have to comment. Therefore, as discussed in length in the justification for part 2010.0300 Q(3), the rule proposes that the agency calculate the timelines and so place those dates of the deadlines in the notices because the agency has better resources to make this calculation than members of the public.

2010.0400 O

Subpart O adds the clarification that only if the agency sent out a notice under 2010.0400 N, does it need to prepare this affidavit because agencies have been preparing this affidavit even when no notice was sent.

2010.0500, subpart 1

Subpart 1 amends the address where to submit the rule for review. The division that reviews rules, the Public Finance Division of the Attorney General's Office, moved two years ago to the new address, and it is necessary to update the rule to the new address. Generally, it is advisable that rules do not to contain street addresses as the addresses periodically change. However, it is crucial that the right division and address be cited in the Attorney General rule to avoid disputes and misunderstanding as to when to trigger the clock for the rule review timeline. Otherwise, persons could argue that submission to another division in the Attorney General's Office, submission to the agency attorney, or receipt by main office will trigger the rule review time period.

2010.0500, subpart 2

This subpart was amended require three, rather than four, copies of the rule because the Attorney General will no longer retain a copy of the rulemaking record, thus an extra copy of the rule is unnecessary.

2010.0700 A

Rule 2010.0700 A is proposed to be amended by requiring the agency to explain why small business considerations are not applicable, should that be the case. Review of rules includes examining whether the agency must comply with the small business notice requirement of Minn. Stat. § 14.115. When the record is silent on small business considerations, it is unknown whether, in fact, the statute is inapplicable or whether the agency forgot to consider the impact. Since the agency must examine whether the small business considerations statute is applicable anyway, articulating its basis in writing is not burdensome or unreasonable.

2010.0700 B

Subpart B requires a statement of the basis for the nonapplicability of Minn. Stat. § 14.11 requiring an estimate of costs to local public bodies. Section 14.11 is another procedural requirement the Attorney General must assure compliance, and rather than being silent on this point, it is necessary for the agency to explain, should it be the case, how the statute is not applicable. Since the agency must make this determination anyway, it is not an unreasonable burden for the agency to explain its determination in writing.

2010.0700 D

Subpart D requires the Statement of Need and Reasonableness be signed by the appropriate person. All important legal and administrative documents should be signed by the appropriate person. The Statement of Need and Reasonableness is a crucial document in the rulemaking process. There should be confirmation of acquiescence by the person authorized to adopt the rule of the Statement of Need and Reasonableness. Additionally, now that the statement must be prepared before the date of the section 14.22 notice, Minn. Stat. § 14.23, the signature and date of signature in the Statement must be provided to assure and confirm compliance with this deadline. While an additional burden is placed on the agency to secure yet one more signature on another rulemaking document, acquiescence and confirmation of compliance with the deadline overrides the burden.

2010.1000 A

Part 2010.1000 A is a recitation of the definition of a rule from Minn. Stat. § 14.02, subd. 4. That statute was amended in 1990, and it is necessary to also amend the corresponding rule so that it reads verbatim from the statutory definition.

2010.1000 H

Rule 2010.1000 contains a list of the various legal issues involved in the review of rules. The purpose of the list is to advise the public and state agencies what issues are considered in the review of rules.

Whether or not a rule is "reasonable" has always been a legal issue in reviewing rules, see Juster Bros. v. Christgau, 214 Minn. 108, 118, 7 N.W.2d 501, 507 (1943), Broen Memorial Home v. Minnesota Dept. of Human Services, 364 N.W. 436, 440 (Minn. Ct. App. 1985). Thus, separately designating "reasonableness" as a standard will not add another legal issue. However, there has long been concern regarding the standard of determining the reasonableness of the rule on its face. Recently, the Minnesota Supreme Court specified the standard for review of reasonableness of rules on their face in Mammenga v. Dept. of Human Services, 442 N.W.2d 786, 789 (Minn. 1989). This proposed section simply repeats the legal standard cited in the Mammenga decision. It is reasonable to cite the legal standard to be used in considering the reasonableness of a rule on its face so that the public and state agencies know what standard applies.

2010.1000 K

"Unreasonableness" was deleted from this part because it is moved to part 2010.1000 H as a separately designated legal issue. Also, the current rule is misleading in only referring to emergency rules, when "reasonableness" has always been a legal issue in review of all rules. "Illegal" was added to this section as another "catch-all" term along with "constitutional issues" as reasons for rejection of the rule. The Attorney General has the authority to review rules as to their legality, and adding this term to this part merely repeats that authority.

2010.1100, 2010.1200, 2010.1300, and 2010.1400, subp. 2

These four rule parts were amended to provide that the Attorney General's Office will return the rulemaking record to the agency upon completion of its review, and because it will no longer retain the record, one less copy of the adopted rule is necessary. Since the agency is now required to keep the official rulemaking record, Minn. Stat. § 14.365, and since the Attorney General's Office neither has the space nor the funds to pay for storage space for agency rules, it is proposed that the Attorney General will no longer retain the rulemaking record. While there will be a loss of readily available rule records for review, the change is necessary and is reasonable, for the Office of Administrative Hearings also returns the record upon competition of its review. Finally, it is reasonable to remind state agencies of their statutory obligation to retain the official rulemaking record.

2010.9913

Sample forms help agencies comply with rulemaking procedural requirements. Changes in the law since these Attorney General Rules were amended require changes in the sample form to assure compliance. Minn. Stat. § 14.23 now requires state agencies to submit a copy of the Statement of Need and Reasonableness to the Legislative Commission to Review Administrative Rules (LCRAR) when it becomes available to the public. The rulemaking record must show that this procedural requirement was satisfied, and one way is by affidavit. Proposed 2010.9913 is the recommended format of such an affidavit.

If the proposed rules establish or adjust fees, the agency must send certain documents to certain legislative officials pursuant to Minn. Stat. § 16A.128, subd. 2a. Again, the rulemaking record must contain proof of this compliance, and proposed 2010.9913 contains a proposed sample affidavit the agencies may use to confirm that they complied with this statutory requirement.

In an effort to reduce paper work and documents, these two affidavits were combined into one sample form. However, to avoid confusion and misunderstanding of the appropriate use of this combined form, detailed notes and explanations on the applicability and use of this sample form were necessary. The amended introductory language is a reasonable solution to explain the use of the form.

2010.9916

The Sample Notice of Intent to Adopt a Rule without a Public Hearing has been totally re-written in layperson language and placed in this part. In 1992, legislation was proposed to require Notices of Intent to be "written in a clear and coherent manner using

words with common and everyday meanings and be appropriately divided and captioned by its various sections." While the legislation did not pass, the suggestions have been incorporated into the proposed recommended forms for Notices of Intent. The recommended forms are now directed to the reader, organized more coherently, and separately divided and captioned by paragraph headings. The overriding objective in the revision is to make the notice more useful and helpful to the public.

Substantively, essentially no change occurred in the notice from the current form with the exception of requiring the actual calendar date of the end of the 30 day comment period, now required by statute. Thus, if the agency uses the old (current) form with the addition of the ending date of the comment period, the agency will still be in compliance with the substantive section of the Attorney General Rule.

2010.9920

Part 2010.9920 contains an revised sample affidavit of mailing the notice. Sometimes there has been confusion when the person who can attest to the accuracy of the mailing list is not the same person who mailed the notices to those on the mailing list. Therefore, the note at the beginning of the recommended form explaining that under these circumstances, separate affidavits must be submitted, is a reasonable way to cure the confusion.

The three-day mailing rule has been incorporated into the substantive section of the Attorney General rule and it is necessary to remind agencies that they must take the three day mailing rule into consideration when mailing the notice.

The current affidavit form states that the notice must be "attached." Attaching the notice to the affidavit means a duplicate copy of the notice is part of the record. For administrative efficiency and conservation, this requirement has been deleted. However, it is proposed that the affiant affirmatively state what was mailed. In reviewing the Notice of Intent, the attorneys must check whether the rule was mailed, or if not, whether the Notice contains an adequate summary of the rule. Therefore, it is necessary for the affiant to affirmatively state whether or not the rule was mailed. While making such a statement, it is reasonable for an agency to state what else was mailed to the persons on the mailing list (such as the Statement of Need and Reasonableness). Stating what was mailed is not burdensome to the agency and would greatly ease the review of the record.

2010.9930

The recommended form for the Findings is proposed to be re-organized in a format more similar to regular administrative agency Findings with separately numbered paragraphs and with the standard conclusions appropriately summarizing the rulemaking proceeding. Further, as discussed in the substantive part of the rule, certain procedural recitations were deleted in favor of a general statement of compliance to avoid unnecessary duplication. Finally, it is necessary for the agency to affirmatively state how many comments and submissions were received to assure the correct number are in the submitted record.

2010.9940

Part 2010.9940 contains the revised Notice of Submission of the rulemaking record to the Attorney General. Minn. Stat. § 14.26 requires that the Notice must be given to those who requested such notice on the same day that the record is submitted. The rulemaking record cannot be submitted to the Attorney General until all procedural requirements have been met, thus technically, this notice must be given before the record can be submitted to the Attorney General. Therefore, rather than being in the past tense, the notice should state that the rule will be submitted to the Attorney General, presumably later on that same day.

The current notice provides the agency the option of either explaining where the supporting documents may be obtained or attaching the documents to the notice. Since the Findings are also available and will likely be of great interest to the recipients of this notice, the sample notice reminds the agency that it may choose to mail the Findings along with the rule.

The current sample form simply states that the public has eight calendar days to submit comments. Should someone want to comment, that person must go through the trouble of figuring out and counting the eight calendar days. Since confusion and error often arises in counting the days, it is reasonable to require the agency to compute and notice the comment deadline. While it imposes an additional burden on the agency, a more complete and undisputed timeline for the public outweighs the additional burden.

The address where to submit the comments has been changed, therefore it is necessary to revise the form to reflect the correct address. Finally, with the widespread use of fax machines, it is reasonableness to propose that agencies consider including their fax machine number on these notices.

2010.9945

The only amendment to this form was to delete the requirement that the Notice be "attached" to the Affidavit. Attaching the Notice to the affidavit means a duplicate copy of the Notice must be submitted in the record. In an effort to reduce paperwork, attaching an extra copy of the Notice was deleted.

2010.9946

1992 Minn. Laws, ch. 494, sec. 9 ordered the Attorney General, after consultation with the Office of Administrative Hearings, to adopt rules prescribing the form and content of the notice authorized by Minn. Stat. § 14.22, subd. 2. That notice is a combination of the Notice of Intent to Adopt a Rule Without a Public Hearing and a Notice of Hearing should 25 requests for a hearing be received, commonly referred to as the "Dual Notice." Part 2010.9946 contains the form and content of the "dual notice" containing all the statutory and regulatory requirements of both the Office of Administrative Hearings and the Office of the Attorney General. The Office of Administrative Hearings was consulted in the drafting of this form and their suggestions incorporated into the proposed dual notice. Attachment A. In addition, another Notice of Solicitation for comments on the draft dual notice was published in the State Register, two written comments were received, and many of the suggestions incorporated into the proposed dual notice form.

As with the revised Notices of Intent, the dual notice was written in layperson language, divided and captioned by various sections and directed to the reader as suggested by proposed legislation.

2010.9951

As discussed in the justification for part 2010.9916, the Notices of Intent were extensively revised in layperson language, reorganized, and captioned by paragraph headings. Generally, there are no substantive changes with the exception of adding the calendar date of the end of the comment period, which is now required by statute.

2010.9955

As discussed in the justification for part 2010.9930, the sample findings forms were revised to a more standard format for agency findings, certain specific recitations were deleted in favor of general statements of compliance, affirmative statements were set forth regarding the ending date of the comment period and the number of comments received to assure that the agency's calculations are consistent with the Attorney General's count.

2010.9960

As discussed in the justification for part 2010.9940, the tense in this notice was changed to reflect that this notice must be given before the agency can submit the rule to the Attorney General, changed to remind the agency that they may also provide a copy of the findings along with this notice, changed to place the burden on the agency to calculate the end of the eight day comment period and to so advise the public, and to provide the correct address for submission fo comments. All of these amendments are reasonable in providing a more useful and complete notice to the public.

2010.9915 and 2010.9950

2010.9915 and 2010.9950 are repealed because these notices have been extensively re-written in layperson language, reorganized with paragraph headings and additional information added to provide for more complete and useful notices of rulemaking to the public. The new sample forms are now contained in parts 2010.9916 and 2010.9951. It is therefore necessary to repeal the old sample forms to avoid duplication.

Small Business Considerations

Minnesota Statutes § 14.115 requires agencies, when proposing new rules or amending existing rules which may affect small businesses, to consider certain methods for reducing the impact of the rule and to provide certain notices to small businesses. By and large, the impact of these amendments in this rulemaking proceeding are on state agencies, not small businesses. However, small businesses which participate in the State administrative rulemaking process may be impacted by the rule amendments which make minimal procedural changes in the rulemaking process. Also, small businesses may be impacted by the significant amendments to the various notices, particularly the Notices of Intent and the Dual Notice. Although the impact of the amendment on small businesses is minimal and indirect, the Attorney General nevertheless considered all of the methods for

reducing the impact on small businesses as listed in Minn. Stat. § 14.115, subd. 2. The listed methods for reducing the impact on small businesses, however, are either not applicable to the proposed amendments or feasible. Nevertheless, the Attorney General's main objective in this rulemaking proceeding is to provide the most informative and useful notices to the public, including small businesses, in order to encourage public participation in the Administrative rulemaking process.

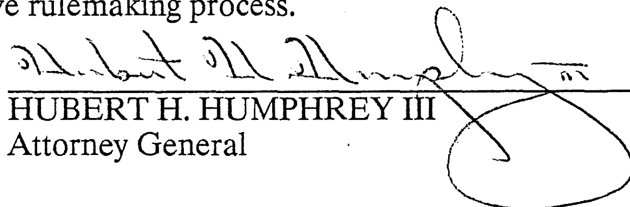
Other Statutory Requirements

Minn. Stat. § 14.11, subd. 1 is inapplicable as the proposed rule will not require expenditures of more than $100,000 by local public bodies. Minn. Stat. § 14.11, subd. 2 is inapplicable as the proposed rule will not have any impact on agriculture land. Minn. Stat. § 16A.128, subd. 1 is inapplicable because the proposed rule does not set any fee.

Conclusion

Based on the foregoing, the amendments to the Attorney General Rule and the proposed dual notice are needed to assist state agencies in the promulgation of their rules in compliance with the Minnesota Administrative Procedure Act, Minn. Stat. ch. 14, and are reasonable because they clarify the requirements and achieve these objectives. Furthermore, the proposed "dual notice" and extensive revisions to the notices of intent attempt to provide complete, informative and useful notices for the public to encourage participation in the State Administrative rulemaking process.

Dated: 10-13-92



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