ON REFORM
AND EFFICIENCY

CORE

REFORMING MINNESOTA'S ADMINISTRATIVE RULEMAKING SYSTEM

DETAILED REPORT

MARCH 1993

Pursuant to 1991 Laws, Chapter 345
Art. 1, Sec. 17, Subd. 9

THE CORE VISION OF STATE GOVERNMENT

The Commission on Reform and Efficiency envisions a Minnesota state government that is mission driven, oriented toward quality outcomes, efficient, responsive to clients, and respectful of all stakeholders. These goals are defined below.

Mission driven

State government will have clearly defined purposes and internal organizational structures that support the achievement of those aims.

Oriented toward quality outcomes

State government will provide quality services. It will focus its human, technical, and financial resources on producing measurable results. Success will be measured by actual outcomes rather than processes performed or dollars spent.

Efficient

State government will be cost-conscious. It will be organized so that outcomes are achieved with the least amount of input. Structures will be flexible and responsive to changes in the social, economic, and technological environments. There will be minimal duplication of services and adequate communication between units. Competition will be fostered. Appropriate delivery mechanisms will be used.

Responsive to clients

State government services will be designed with the customer in mind. Services will be accessible, located conveniently, and provided in a timely manner, and customers will clearly understand legal requirements. Employees will be rewarded for being responsive and respectful. Bureaucratic approvals and forms will be minimized.

Respectful of stakeholders

State government will be sensitive to the needs of all stakeholders in providing services. It will recognize the importance of respecting and cultivating employees. It will foster cooperative relationships with local units of government, and nonprofit and business sectors. It will provide services in the spirit of assisting individual clients and serving the broader public interest.

— Feb. 27, 1992

CORE

STATE OF MINNESOTA
COMMISSION ON REFORM AND EFFICIENCY

203 Administration Building, 50 Sherburne Ave., St. Paul MN 55155
(612) 297-1090 Fax (612) 297-1117

March 31, 1993

The Honorable Arne Carlson
Governor
130 State Capitol
St. Paul, Minnesota 55155

The Honorable Ember Reichgott
Minnesota Senate
Legislative Commission on Planning and Fiscal Policy
306 State Capitol
St. Paul, Minnesota 55155

Dear Governor Carlson and Senator Reichgott:

Pursuant to Laws of Minnesota 1991, Chapter 345, Article 1, Section 17, Subdivision 9, the Commission on Reform and Efficiency was directed to recommend long-term actions for improving government efficiency and effectiveness.

This is one of a series of reports being issued in response to our charge and provides detailed findings and recommendations regarding the administrative rules system. We are pleased to report that the commission has identified numerous opportunities for significant reform. The problem analysis and recommendations contained in this and our subsequent reports represent the best thinking of our diverse and bipartisan group. You will see that we have taken our charge seriously and have not shied away from controversy. We respectfully request your continued support for the much-needed government reform detailed in the commission's reports and recommendations.

Sincerely,

Arend J. Sandbulte
Commission Chair

Connie Weinman
Chair
Working Committee

Dana B. Badgerow
Commissioner of
Administration

AJS/CW/DBB

c: Agency Heads
Legislators

REFORMING MINNESOTA'S ADMINISTRATIVE RULEMAKING SYSTEM

DETAILED REPORT

BY THE MINNESOTA COMMISSION ON REFORM AND EFFICIENCY

MARCH 1993

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EXECUTIVE SUMMARY

Rulemaking in Minnesota is controlled by the Administrative Procedure Act. If a state agency wishes to enforce a standard or regulate an activity, it must follow processes outlined in the act to adopt a rule. In essence, the act opens up the rulemaking system — creating opportunities for public involvement and instituting due process checks on state agencies.

The Administrative Procedure Act (APA) does not ensure the adoption of "good" rules, any more than the legislative process ensures the establishment of "good" laws. The quality of a rule depends on those involved in making it. The APA attempts to secure the involvement of the people affected by the rule.

Most of the problems associated with rulemaking do not involve the requirements set out in the APA. Rather, they relate to how the process is used, who uses it, when it is used, and how it is directed by the legislative and executive branches. The Commission on Reform and Efficiency (CORE) has identified five major problems with rulemaking:

- The number of rules is burdensome to state agencies and their stakeholders.
- Rules often set policy, rather than implement legislative initiatives.
- Rules tend to be unreasonably prescriptive.
- Accountability for adopted rules is diffuse.
- Legislative oversight of adopted and proposed rules is fragmented.

In the past decade, most efforts to address rulemaking concerns have been piecemeal. The CORE Rulemaking Project had a larger scope, so the commission's recommendations are not limited to refining the APA. CORE's rulemaking recommendations do not necessarily shorten the process. Problems of quality, quantity, and prescriptiveness are not solved by making rules faster. Instead, the recommendations focus on using state resources more efficiently, securing meaningful public involvement, and weighing rule costs and benefits seriously. If these proposals are adopted, agencies will receive clearer, better defined mandates from the legislature, some matters will be exempted from the rulemaking process, and the roles of the legislature and the governor will be clearly delineated.

In sum, Minnesota has a sound rulemaking system to build upon. However, a number of significant issues have remained unresolved for too long. These concerns must be addressed to strengthen not only the rulemaking process but also the public's trust in state government.

INTRODUCTION

Administrative rulemaking was chosen for study in February 1992 by the Commission on Reform and Efficiency, a 22-member group of citizens appointed by Gov. Arne Carlson and the Minnesota Legislature. CORE also studied seven other areas for long-range reform: executive branch organization, the budgeting process, human resources management, organization of environmental services, delivery of human services, aid to local governments, and electronic data interchange.

The selection of rulemaking was precipitated by the dissatisfaction of a number of CORE members, legislators, regulated parties, and state managers with the use of rules and rulemaking. Specifically, they were concerned that the number of rules is growing; the rules are overly prescriptive; accountability for rulemaking is diffuse and oversight is weak; and rules sometimes set policy, rather than implement legislative initiatives.

Throughout this project, CORE strived to:

- Analyze both the strengths and weaknesses of the current rulemaking process.
- Involve as many stakeholders and perspectives as possible.
- Consider all options presented.
- Focus on long-term reform in its recommendations on rulemaking.

In conducting its study, CORE used as a foundation its overall vision of a state government that is mission-driven, oriented toward quality outcomes, efficient, responsive to clients, and respectful of all stakeholders.

Project scope

CORE's Administrative Rules Project focused on the formal and informal processes of rulemaking. Statutory requirements were examined, along with legislative activity before an agency engages in rulemaking and agency activity beyond the statutory requirements. Contested case hearings and enforcement issues were not studied. An outline of the project's research questions is presented in Appendix A.

This report summarizes CORE's findings, conclusions, and recommendations on the rulemaking process. It is supplemented by CORE's human services and environmental

reports, which outline specific applications of the process and of rules in those areas.[1]

Project methodology

In April 1992, CORE asked all state agencies for suggestions to improve the rulemaking process (see Appendix B). Special emphasis, in the form of extensive interviews and focus group discussions, was placed on the 14 state agencies that are most active in rulemaking: the departments of Human Services, Health, Agriculture, Labor and Industry, Commerce, Natural Resources, Revenue, Education, Administration, Public Safety, Public Service, Transportation, and Corrections, and the Pollution Control Agency. About 70 persons participated in these interviews and focus groups. Appendix C contains an outline used for these focus group discussions.

CORE also met with current and past legislators, legislative staff, academicians, historians, and staff from the Office of the Attorney General, the Office of the Revisor of Statutes, the Legislative Commission to Review Administrative Rules, and the Office of Administrative Hearings.

Comments also were solicited through a survey (see Appendix D) and focus group interviews of regulated parties that are on the rulemaking mailing lists of the departments of Health, Human Services, Agriculture, and Natural Resources, and the Pollution Control Agency. These agencies were chosen because of CORE's interest in the environmental and human services areas. Eighty-six persons responded to the survey, and 27 attended a focus group meeting. In addition, 22 county associations were invited to attend a special focus group meeting on county concerns.

From this diverse group of stakeholders, a project advisory group of 42 persons was asked to aid in the development of CORE's findings, conclusions, and recommendations.

Interviews and focus group data were supplemented by reviews of the literature, other states' and federal rulemaking practices, and the Model State Administrative Procedure Act developed by the National Conference of Commissioners on State Laws.

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[1]See Commission on Reform and Efficiency, *Minnesota's Human Services Delivery System* (St. Paul: CORE, March 1993) and CORE, *Reforming Minnesota's Environmental Services Systems* (St. Paul: CORE, March 1993).

BACKGROUND

Administrative rules are laws adopted and enforced by state agencies. They bind both agencies and the public and serve to ensure equal treatment for all affected parties. Authority for rulemaking is delegated to state agencies by the legislature with the concurrence of the governor. These delegations may be broad in scope or very program-specific.

The definition of *rule* is found in M.S. 14.02, Subd. 4:

> "Rule" means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.

This is a very broad definition. Some agencies have interpreted it literally, maintaining that almost all documents must go through rulemaking. Other agencies routinely prepare such documents as bulletins, manuals, and interpretive guidelines without using the rulemaking process. Still others seek to avoid rulemaking altogether by having the legislature adopt their measures.

Purpose of rulemaking

Significantly different perspectives exist on the purpose of rulemaking. Rulemaking is seen variously as a way:

- The legislature can make general policy and forward detailed technical issues to agencies;
- Program advocates and affected interest groups can influence agency standards and services;
- Parties can advance their interests in lawmaking, in addition to the legislative process;
- The legislature can pass on tough policy questions to state agencies for resolution;
- Laws can be made without identifying costs or required investments to regulated parties, the general public, or consumers;
- Agency professionals can advance the latest standards suggested by their professions; and
- Competition between service providers can be limited by requiring costly standards only a few can meet.

Issues covered in rules

Rules deal with a variety of matters and have a profound effect on the operation of state agencies. Basically, rules clarify and put into operation the terms of laws passed by the legislature, but they can be quite explicit, specifying a number of standards or required procedures. For example, they may dictate how a service is to be delivered, what the provider roles should be, what equipment and facilities are necessary, eligibility criteria, reporting methods, inspection schedules, fee levels, and penalties for noncompliance.

Administrative rules are laws. They can:

- Compel actions of various parties in the delivery of a service, including other state agencies, local units of government, and service providers.
- Set specific standards or requirements for regulated parties and detail processes to follow when receiving public funds.
- Structure agency activities through the standardization of programs and the ordering of relationship with parties outside the agency to protect the agency from legal challenges.
- Incorporate federal regulations, exceeding federal standards in some cases, thus allowing agencies to comply with mandates and qualify for federal funds.

The environmental, health, and human services areas are heavily controlled by rules adopted by a variety of agencies.

The Pollution Control Agency and the departments of Health, Agriculture, and Natural Resources adopt rules that regulate such things as ground water; air quality; the disposal of solid and hazardous wastes; the storage and application of pesticides; the installation and testing of wells; the operations of laboratories, hospitals, restaurants, and food stores; and the use of lakes and shore lands. Such methods as licensing operators, issuing permits, and conducting inspections are used to control these activities and are set out in rules.

Department of Human Services (DHS) rules tend to be extremely detailed, affecting a number of service providers — including providers of long-term care, physicians and health care professionals, day care and foster care providers, and adoption agencies. For the most part, all those active in the delivery of a human service are controlled by rules, whether they are county, for-profit, or nonprofit providers. DHS rules usually are very specific, identifying the people eligible to receive a service, the level of service they can obtain, who will provide the service, when the service will be available, and the price the state will pay.

Volume of rulemaking

There are nearly as many administrative rules as laws adopted by the legislature and the governor — and the number of rules continues to grow each year. The greatest growth has occurred in the areas of human services, health, environmental protection, occupational and professional licensing, contractor regulation, insurance regulation, and elementary and secondary education.

Over the past 10 years, rulemaking activity has fluctuated, as Table 1 illustrates.

Table 1. Rulemaking Activity

Fiscal Year	Number of Rules Proposed	Number of Rules Adopted*
1981	103	116
1982	126	111
1983	110	100
1984	113	116
1985	186	154
1986	171	144
1987	129	117
1988	192	136
1989	170	140
1990	183	131
1991	179	176
Average:	151	131

*Rules may take more than one year to become adopted.

Lobbying on rules

Like laws adopted by the legislature, rules are the focus of substantial lobbying efforts. The 1992 report of the Ethical Practices Board noted that lobbying disbursements for "administrative purposes," including rulemaking, permitting, and rate setting, totaled $1,693,655 from July 1991 through June 1992. This compared with a legislative lobbying total of $3,965,449 for the same period.

History of rulemaking

The legislature has created a vast array of administrative agencies to conduct the business of state government and deal with the state's problems. Because it is not in session full-time and does not have the expertise of professionals in the field, the legislature often must delegate its authority to agencies to help solve these problems. Agencies, in turn, take this legislative mandate and develop or expand it into programs that are delineated in administrative rules.

The Administrative Procedure Act (APA) is the legislature's way of overseeing agency implementation of administrative rulemaking authority. Besides setting out provisions for rulemaking, it is intended to provide oversight of powers and duties delegated to administrative agencies, increase public accountability of administrative agencies, ensure a uniform minimum procedure, increase public access to government information, encourage public participation in the formulation of administrative rules, and spell out the process for contesting cases and appealing for judicial review (M.S. 14.001).

The roots of the APA go back to 1941, when the legislature passed a law that allowed the commissioner or head of any agency to prescribe rules and regulations for the conduct of the agency unless expressly forbidden by law. The only uniform statutory comment in the rule promulgation process was that any rules affecting persons other than the agency needed to be filed with the secretary of state (M.S. 1941 Sec. 15.06(5)).

The first APA, as such, was enacted in 1945 (Minnesota Statutes, Chapters 452, 590). It required agencies wanting to promulgate rules or regulations to hold a public hearing after giving 30 days' notice to interested persons who registered with the secretary of state. The agency submitted the rules to the attorney general, who approved or disapproved them based on a review of form and legality; if approved, the rules became effective 30 days after they were filed with the secretary of state.

The 1945 act was substantially amended in 1957. This became the first comprehensive Administrative Procedure Act, which included a requirement that rules and regulations be based on a showing of need.

Between 1957 and 1974, the APA was amended several times to, among other things, add some agencies that had historically been exempt from rulemaking and excluding others. In 1974, the *State Register* was established with the requirement that all notices of intended rulemaking action, hearing notices, and approved rules be published in it. Before the creation of this publication, agencies had to notify persons who had registered with the secretary of state to specifically receive notices of rules hearings.

The 1974 legislature also created the Legislative Commission to Review Administrative Rules (LCRAR) and gave it the authority to review agency rules and to suspend rules if appropriate. If a rule is suspended, it is to remain in that status until the next regular

legislative session where a bill to permanently repeal it is required; if a bill to repeal is not passed, the suspended rule becomes effective again.

The 1975 legislature passed the most significant amendments to the APA of any session. These amendments had two major impacts:

- The definition of *rule* was expanded to include "every agency statement of general applicability and future effect." This was intended to encompass all agency guidelines and policy statements and to restrict agencies from promulgating rule-like statements without the benefit of public input.

- The Office of Hearing Examiners (now the Office of Administrative Hearings) was created and charged with conducting all administrative hearings pursuant to the APA and creating procedural rules for rulemaking and contested case hearings. In addition, all rulemaking required a public hearing conducted by this office. All funding for this office was to be from a direct charge to the agency for which a hearing was conducted. These amendments made it clear that the legislature intended to protect the interests of the public and at the same time place additional constraints on state agency rulemaking.

The next significant amendments were made in 1980, when a provision was added for noncontroversial rulemaking. Before then, all rulemaking required a public hearing conducted by the Office of Administrative Hearings (OAH), which meant 70 to 90 rule hearings per year. The amendment allowed adoption of rules without a public hearing, unless seven or more persons objected and requested a hearing. If no objections were received, the proposed rule was approved by the attorney general. This condition remains largely unchanged, except that the number of persons required to trigger a hearing has been increased to 25.

Another significant change made by the 1980 legislature was the inclusion of the revisor of statutes, with substantive responsibilities, in the rulemaking process. The intent of this change was to encourage the use of standardized language so rules would be clearer and more uniform and to provide agencies with drafting help. The revisor also was given final authority over the form rules take before they are published.

The 1982 legislature added a requirement on agencies that they prepare a note of fiscal impact when a proposed rule would affect agricultural lands. It also expanded from 90 to 180 days the agencies' authority for "temporary" (now known as "emergency") rulemaking authority, with an additional 180 days allowed for an extension.

The 1983 legislature enacted changes that require an agency to prepare a note of fiscal impact when a proposed rule will affect small businesses and to review its rules every five years, considering during this review how it can reduce the impact of the rules on

small business. The LCRAR was required to monitor the implementation of this section. This legislature also created the Minnesota Court of Appeals, which reviews contested case decisions.

In 1985, the legislature specified that emergency rulemaking authority must be used within six months, or it is lost. It also mandated that an agency must prepare a note of fiscal impact if a rule would result in increased, mandated costs to local governments.

Relatively few amendments were made to the APA between 1986 and 1992. The 1992 legislature added a provision to allow for "harmless error," under which an agency does not have to reinitiate the rulemaking process if a procedural error in the process is determined by the OAH or the attorney general to be harmless to the public.

A detailed chronology of changes to the Administrative Procedure Act is presented in Appendix E.

Players and their roles

Agencies

For purposes of this report, the term *agency* refers to state departments having legislative authority to adopt rules. Not all state agencies have this authority. Some agencies are led by commissioners appointed by the governor. Others are directed by boards composed of gubernatorial appointees. Depending on statutory authority, rules may be adopted by a commissioner or a board.

Office of the Revisor of Statutes

The revisor's office assists agencies with drafting rule language. To ensure consistency and clarity, all formal published rule language must be approved by the revisor. The revisor also compiles and publishes all rules.

Office of the Attorney General

This office is involved in two ways. A special assistant attorney general is assigned as legal counsel to each state agency and as such may assist in rulemaking. The level of involvement between the agency and its special assistant attorney general varies; some of the larger agencies have a full-time special assistant assigned to them.

A separate section of the attorney general's office, the Public Finance Division, reviews and approves all proposed rules that do not go to public hearings. The attorney general also promulgates administrative rules for agency rules that do not have a hearing and

checks that agencies follow them. Agencies reimburse the attorney general for all services rendered.

Office of Administrative Hearings

All rule hearings are conducted by the OAH. Administrative law judges preside over these hearings and issue reports on the proposed rules.

Legislative Commission to Review Administrative Rules

The LCRAR provides legislative oversight of rulemaking. It has the authority to review and/or suspend agency rules and conduct its own public hearings any time before a proposed rule is adopted.

State Register

This is the official publication for all rule notices and proposed rule language.

Affected parties

Many parties are affected by agency rules, including providers of services, consumers, local governments, and the general public.

Current process

Initial agency actions

Once agencies have been granted authority to propose rules, they typically begin by staffing the project. They also assess controversy levels to determine the correct course to pursue. At this point, if agencies wish to consult with affected parties, they publish in the *State Register* a notice of intent to solicit outside opinion.

Many agencies establish advisory task forces at the beginning of the rulemaking process. These groups are used to provide information and feedback on proposed rule language. Meetings or negotiations with affected parties may last for hours or extend over days, months, or even years. While not required by the APA, this procedure has proved to be effective in narrowing issues of controversy and building acceptance for proposed rules.

While agencies are meeting with affected parties, they are also drafting statements of need and reasonableness for their proposed rules. These documents outline the need for a rule, the impacts associated with it, and the reasonableness of the direction the agency intends to take.

Adopting rules with a public hearing

The process for adopting rules with a hearing is used when 25 or more people request a public hearing or when an agency anticipates controversy and schedules a hearing. The process involves the following steps:

- A notice of intent to solicit outside opinion is published one week after the *State Register*'s publication deadline, giving interested parties the opportunity to submit information and opinions.

- A statement of need and reasonableness is prepared and made available to the public.

- Rule language is submitted to the revisor of statutes for approval, which takes an average of one week.

- A description of activities to date is filed with the OAH, assignment of an administrative law judge (ALJ) is requested, a hearing is scheduled, and the notice of hearing is approved by the assigned ALJ. An ALJ is assigned within 10 days of the chief administrative law judge's receipt of the request; a hearing is scheduled within 10 days of receipt of the necessary documents.

- The notice of hearing and the proposed rule language are published in the *State Register* two weeks after its publication deadline, and other persons registered with the agency are notified. The notice must be published and mailed at least 30 days before the scheduled hearing date.

  The APA requires that an agency publish a notice of intent to adopt a proposed rule — with or without a public hearing — within 180 days after the effective date of a law requiring the rule. If the deadline is not met, the agency must report its failure to do so to the LCRAR, appropriate committees of the House and Senate, and the governor. There are no penalties for failing to comply with this requirement.

- Agency staff testifies at the hearing to establish the need for and the reasonableness of the proposed rule. The hearing record remains open five to 20 days as determined by the administrative law judge. There is no statutory deadline for completing the hearing; it usually takes one day.

- The ALJ completes a report on the proposed adoption of the rule, which may be reviewed by the chief administrative law judge. The report is completed within 30 days of the close of the hearing record.

- If the ALJ concludes that the rule has no defects, it is adopted by the agency and submitted to the revisor of statutes for approval. There is no statutory deadline for this submission. Review and approval by the revisor take an average of three days. The

rule is then filed with the secretary of state.

- The revisor of statutes prepares in an average of two days a formal notice of adoption, which the agency submits to the *State Register* to be published two weeks after its publication deadline.

- The rule becomes effective five working days after the notice of adoption is published, unless a later date is required by law or specified in rule.

Hearing procedures for rules adopted with a public hearing

The APA includes details on hearing procedures. These procedures are further specified in OAH rules. The hearing is conducted by the ALJ, who ensures that all persons at the hearing are treated fairly and impartially. The judge may also participate in the hearing by asking questions of agency staff or others.

After the hearing, the record remains open for five to 20 days, as determined by the ALJ. The public and the agency may submit additional information into the record during this time. The record may remain open longer in extenuating circumstances. After the hearing record is closed, the agency and other interested parties have five days in which to respond to any new information submitted during the hearing or open record period. During these five days, the agency may indicate that it is willing to incorporate changes to the proposed rule based on comments received.

The ALJ must write a report within 30 days from the close of the hearing record; this report must be available to all persons upon request for at least five working days before the agency takes any action on the rule. Several options are available to the ALJ in writing the final report. The judge can conclude that:

- the rule has been modified in such a way that it is substantially different from that which was proposed and published; in this case, the agency cannot adopt the rule until it fixes the defects, or it can withdraw the rule;

- the rule has no defects or it has minor defects that the agency can correct, thus the agency may proceed to adopt; or

- there are defects in the rule concerning the need and reasonableness. The ALJ may recommend ways to correct the defects. If the agency does not choose to correct the defects as recommended by the chief administrative law judge, the agency must take the rule to the LCRAR for its review and comment within 30 days. The agency does not have to wait longer than 30 days for action, and the LCRAR's opinion is not binding on the agency. The agency may proceed to adopt a rule with or without the blessing of the LCRAR.

Adopting rules without a public hearing

If a proposed rule is considered noncontroversial — that is, the agency believes that fewer than 25 people will request a public hearing on it — the following steps are taken to adopt a rule:

- A notice of intent to solicit outside opinion is published one week after the *State Register* publication deadline, giving interested parties the opportunity to submit information and opinions.

- A statement of need and reasonableness is prepared and made available to the public.

- Rule language is submitted to the revisor of statutes for approval, which takes an average of one week.

- The notice of intent to adopt a rule without a public hearing and the proposed rule language are published in the *State Register* two weeks after its publication deadline, and other persons registered with the agency are notified. Again, the agency must publish its notice of intent to adopt a proposed rule within 180 days of the effective date of the law requiring the rule.

- The agency waits for at least 30 days, during which time the public may formally request a hearing. If 25 or more written requests for a hearing are received, the agency must publish a notice of intent to adopt rules with a public hearing.

  When an agency does not know if a proposed rule will generate a hearing, it has the option of publishing a "dual notice" that indicates that the agency will hold a hearing at a certain time and place only if the notice elicits requests for a hearing from at least 25 people. The notice continues that if at least 25 people do not request a hearing, the hearing is cancelled. This practice of dual notice was first tried by agencies during the 1980s and has now become incorporated in the APA (M.S. 14.22, Subd. 2.)

- If fewer than 25 people request a hearing, the proposed rule is submitted to the revisor of statutes for final approval. No statutory deadline exists for this submission, and review and approval take an average of three days.

- The rule is adopted by the agency and submitted to the attorney general for approval. The attorney general must either approve or disapprove the rule within 14 days of the submission.

- After the attorney general approves the rule, it is filed with the secretary of state.

- The revisor of statutes prepares a formal notice of adoption, which takes an average of two days, and the agency submits it to the *State Register* to be published two weeks after its publication deadline.

- The rule is effective five working days after the notice of adoption is published, unless a later date is required by law or specified in rule.

If a public hearing is not needed, rules may be completed in about three months, assuming that no outside comments needing further clarification are received.

Adopting emergency rules

The legislature occasionally may grant an agency authority to adopt rules under emergency powers; for example, to implement a new program quickly or to qualify for federal funds. Emergency rules have a life of 180 days and may be extended an additional 180 days at the discretion of the agency.

Under emergency rule authority, agencies use an abbreviated notice and comment process with the following steps:

- A notice of intent to solicit outside opinion is published one week after the *State Register*'s publication deadline, giving interested parties the opportunity to submit information and opinions.

- Rule language is submitted to the revisor of statutes for approval, which takes about one week.

- The notice of intent to adopt emergency rules is published in the *State Register* one week after the publication deadline, and other persons registered with the agency are notified.

- The agency waits at least 25 days after publication and notice to interested persons.

- Final modifications are approved by the revisor of statutes in about three days. There is no statutory deadline for action by the revisor.

- The rule is adopted by the agency and submitted to the Attorney General's Office for approval; approval or disapproval must be made within 10 working days after submission.

- After the attorney general approves the rule, it is filed with the secretary of state.

- The revisor of statutes prepares a formal notice of adoption, which takes about two days, and the agency submits it to the *State Register* to be published one week after the publication deadline.

- The rule is effective five working days after their approval by the attorney general. It must be published as soon as practicable.

Agencies seldom seek emergency rulemaking authority because they must adopt permanent rules to replace emergency rules within one year. To have permanent rules in place within that time, agencies must begin developing them at the same time they are promulgating emergency rules. Consequently, they would have to go through two separate rule developments nearly simultaneously.

Little emergency rulemaking is done, in part because the legislature is reluctant to grant this authority. If a bill granting this authority reaches the floor, House and Senate rules dictate that the bill must be referred to the governmental operations committees for further discussion. This effectively encourages discussion of the need for emergency rulemaking.

Some agencies would be inclined to seek emergency rulemaking authority if emergency rules would remain in effect for a longer period of time, thus allowing testing of new programs or approaches. Agencies in general said the current limit is too short for any significant examination to occur.

Emergency rulemaking was undertaken five times in the 1989-90 year, seven in 1990-91, and 12 in 1991-92. There was one extension of an emergency rule listed in the *State Register* between 1989 and 1992, made by the Department of Administration.

Time spent on review

Compared with the federal rulemaking process and the Model State Administrative Procedure Act, on which many states base their procedures, Minnesota's set of checks is complex and comprehensive. The federal system is a strict "notice and comment" process that lacks the public forum of a rules hearing before an administrative law judge. No other states use an office of administrative hearings similar to Minnesota's. A few states have a similar office but with different functions.

The time dedicated to the review of proposed rules by neutral parties, such as the Office of the Attorney General and the OAH, varies, but in general, it is up to 20 days for emergency rules, 24 days for rules adopted without a public hearing, and 41 days for rules adopted with a public hearing. Although this may seem lengthy, it should be considered in relation to the months or even years many agencies spend developing the proposed rules.

Other factors, such as the complexity of a rule, the increased workload of the revisor's office during the legislative session, the Department of Finance check on certain fee rules, and review by agency rulemaking advisory committees, may add to the time it takes to promulgate rules.

Like laws, rules can be challenged after they are adopted by appealing through the state court system or seeking statutory changes that would supersede agency rules.

Exemptions in APA

A significant number of agencies and programs are exempted from the rulemaking provisions of the Administrative Procedure Act. The APA does not apply to the legislative and judicial branches, the Department of Military Affairs, the tax court, the University of Minnesota, the Comprehensive Health Association, or the use of emergency powers by state officials.

Also exempted are internal management issues of an agency, placement and supervision of inmates in a supervised release term, the management of institutions and inmates under the control of the commissioner of corrections, weight limitations on use of highways by the Department of Transportation, opinions of the attorney general, provisions of the state education management information system, and occupational safety and health standards administered by the Department of Labor and Industry.

Agencies may also seek exemptions from rulemaking on a case-by-case basis. Like grants of emergency rulemaking authority, these exemptions are referred to the legislature's governmental operations committees for approval.

FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

The biggest problem associated with rulemaking is the scope of authority for policymaking that the legislature grants to agencies. This and other rulemaking issues are outlined in this section, along with CORE's recommendations for resolving them. While there are no simple fixes to the problems associated with rulemaking, changes can be made to use state resources more efficiently, secure meaningful public involvement in the process, and seriously weigh rule costs and benefits.

Delegation of rulemaking authority to agencies

The legislature often must make tough policy and political decisions; many are left to the end of a session and made quickly to meet deadlines. When this occurs, intentionally or not, agencies may receive fairly broad authorizations to make policy decisions the legislature did not want to or could not make.

Transferring policymaking to an agency shifts policy choices to an organization designed to administer the law, not make it. Political discussions are moved out of the legislature and into the rulemaking process.

The lack of firm direction from the legislature or governor often results in agency rules that are prescriptive and based on inputs, rather than expected outcomes. A familiar analogy is that rules tend to include in excruciating detail how a plane should be built but not necessarily that it must also fly.

Legislature's responsibilities in rulemaking delegations

Finding No. 1. The number of rules promulgated by agencies continues to grow, their volume now approximating that of the laws passed by the legislature.

In 1985, Minnesota's rules were contained in eight volumes; today, there are 12. Several factors have prompted this increase, including the growing number of federal regulations that have an impact on state agencies, the broad definition of what must be done through rulemaking in Minnesota, new state programs, and a steady flow of authorizations for rulemaking by the legislature. In addition, many obsolete rules have not been removed.

Finding No. 2. The legislature, which is responsible for making policy and setting direction for the state and its programs, sometimes delegates its lawmaking powers to executive branch agencies. This delegation of power is often broad, vague, or lacking in specific direction.

The legal authority to make rules flows from a variety of sources. While rules sometimes clearly rest on one grant of authority, more often they have many such bases. This leads to questions of legislative intent in delegations of lawmaking authority.

Legal authority most often comes from three sources. First, broad authority may be found in the enabling laws that created the agency or assigned responsibilities. This authority is frequently conferred as a power granted to a commissioner or a board. For example:

- The commissioner of Health, under M.S. 144.07, may make all reasonable rules necessary to carry into effect the provisions of that section and M.S. 144.06 and 144.09 and may amend, alter, or repeal such rules.

- The Pollution Control Agency (PCA), under M.S. 116.07, Subd. 4, may adopt, amend, and rescind rules and standards having the force of law for the prevention, abatement, or control of air pollution; the collection, transportation, storage, processing, and disposal of solid waste; the prevention, abatement, or control of water, air, and land pollution and noise pollution; and the management, identification, labeling, classification, storage, collection, treatment, transportation, processing, and disposal of hazardous waste and the location of hazardous waste facilities.

Second, authority is often granted to incorporate or translate federal rules into Minnesota rules to avoid federal enforcement or to obtain federal funds. Many state environmental and human services rules are driven by federal requirements.

This authority is frequently used by the PCA, which is the designated enforcement agency of federal Environmental Protection Agency rules. Under federal law, a state may choose to enforce federal rules, rather than have a federal agency enforce them, but only if the state adopts rules with equal or higher standards. Minnesota often takes this option. Consequently, a significant amount of PCA rulemaking activity focuses on translating federal rules into state rules.

The Department of Human Services also expends significant rulemaking efforts in adopting and translating federal rules into state rules for programs that are federally funded, such as Aid to Families with Dependent Children and medical assistance. When the state decided it wanted these federal programs and funds, it agreed to adopt the rules that direct them.

Federal regulations often set minimum standards that the state must adopt to acquire enforcement responsibilities and/or receive federal funds. These minimums are often augmented and tailored to fit Minnesota. Where an agency is granted broad rulemaking power, issues arise regarding who should decide if federal regulations should be augmented — the legislature or the agency.

Third, specific authority may be granted by the legislature when it authorizes or requires rules to be adopted to implement a statute and/or program.

Broad or vague authorizations

Finding No. 3. The legislature sometimes delegates substantial policymaking responsibilities to state agencies. When it authorizes or requires an agency to make rules for undefined areas or circumstances, it saddles the agency with conflicts inherent in developing policies, diffuses accountability for rulemaking, and lengthens the rulemaking process.

The delegation of broad or vague lawmaking powers to executive branch agencies often results in confusion. The ambiguity of rules developed in an attempt to resolve policy issues the legislature was unable to settle slows the rulemaking process. Several agencies reported that reaching agreement and clarifying policy disputes take a great deal of rulemaking time.

Advocates of programs and regulated parties find themselves spending more and more time in advisory task force meetings called by agencies proposing rules. If legislative policy and direction are precise and a detailed framework for rulemaking is provided, the number of issues in controversy will be limited, and discussion can focus on the reasonableness of a rule, not its need.

The transfer of policymaking to an administrative agency shifts policy choices to an organization designed to administer the law, not make it. As a result, political discussions and contending forces move out of the legislative arena and into the rulemaking process.

An agency may spend months or even years trying to negotiate differences and find resolutions. Legislators may think the agency is "dragging its feet" or refusing to make rules. On the other hand, if an agency moves to promulgate rules too quickly, it may be accused of exceeding its authority, acting arbitrarily, or making rules without sufficient consultation with affected parties.

Finding No. 4. There are some areas of lawmaking in which it is clearly best for the legislature to delegate rulemaking to agencies, given their technical, procedural, and enforcement expertise.

The legislature's knowledge and agency expertise justify some delegations of lawmaking power, but overall, no obvious rationale defines which activities should be directed by rules and which by statutory law. A great deal depends on the legislature's disposition. In some areas, such as taxation, the legislature actively develops most, if not all, subtle nuances of policy, leaving little for the Department of Revenue to do in rulemaking. In other areas, such as human services, the legislature delegates its lawmaking authority more often.

Some areas may require considerable precision in lawmaking to effect a desired behavior. For example, the understanding of scientific measures, chemicals, or specific techniques necessary to achieve desired standards goes beyond the general knowledge of the legislature and is best left to agencies with technical expertise. In addition, technical characteristics are likely to change as technology develops and thus should not be included in statutes.

Stakeholders feel that in this and similar situations, the legislature's role should be enunciating policies, stating policy objectives, and defining the time in which rulemaking activity should occur. An agency with technical expertise could then determine the necessary operating standards to meet the legislature's stated policy objectives and goals.

Finding No. 5. The legislature, in its policy committees or general discussion of a bill, typically pays minimal attention to provisions dealing with the delegation of rulemaking and the parameters within which it expects rules to be made. While legislative authorizations in recent years have become more specific, past broad delegations of rulemaking seldom are reviewed. The legislature, however, does scrutinize provisions that seek to exempt a program from rulemaking and authorizations for emergency rules.

Rulemaking provisions in bills appear very early in the legislative process, usually when a bill is drafted. While these provisions are sometimes initiated by a few legislators, most result from the work and suggestions of agencies and advocacy groups.

Legislative policy committees tend to focus on the content issues of a bill, its purpose, and how the proposed law will achieve that goal. Legislators and legislative staff noted that provisions relating to the parameters outlined for rules are seldom discussed.

The Legislative Committee to Review Administrative Rules oversees rules and the rulemaking process. However, it does not examine provisions of bills relating to rulemaking during the legislative session.

Oversight of rule provisions by the House and Senate is limited to situations where the governmental operations committees remove bills from the floor to examine specific provisions that seek exemptions from rulemaking or requests for emergency rulemaking authority.

Finding No. 6. The legislature is not aware of the specific costs of preparing and adopting the rules it authorizes or requires.

The costs of rulemaking are difficult to ascertain. The legislature is usually without this information when determining the need for rules and rarely allocates funds to pay directly for requested or desired rulemaking. Similarly, the costs of updating existing rules are also unknown.

Conclusions

- Continued growth in the number of rules has contributed to a general perception of overregulation.
- The legislature is the most appropriate body for making policy and for articulating program expectations.
- In the past, the legislature has not narrowly limited its delegation of lawmaking powers to state agencies. This has left agencies having to make rules without sufficient direction and saddled them with conflicts inherent in policy development.
- It is desirable in some cases for the legislature to delegate rulemaking to agencies, given agency technical, procedural, and enforcement expertise. In other areas where policy must be established, such as whether to exceed federal regulatory standards, the legislature is best able to make these decisions.
- Many rules adopted in Minnesota are driven by federal regulations and mandates that usually provide minimum standards, giving the state the opportunity to exceed them. The granting of broad rulemaking authority to an agency gives rise to the question of whether decisions to raise standards should be made by the agency or the legislature.
- The legislature lacks cost information when considering bills authorizing rulemaking.

Recommendations

1. The legislature should limit and focus future delegations of rulemaking powers.

The legislature should require agencies to prepare rule notes for bill provisions authorizing or requiring rules that may significantly affect the delivery of a service or result in significant burdens on agencies or others.

Like fiscal notes used to identify costs to the state budget, these rule notes should explain why a delegation of rulemaking is needed, whether alternatives to rulemaking are available, whom the possible rule would affect, what estimated costs may be imposed on those to be regulated, and whether the possible rule would be controversial or difficult to adopt.

Impacts

- Fewer rulemaking provisions would be authorized by the legislature.

- Policymaking would be limited to the legislature.
- Time lines for rulemaking would be shortened when clear directions are provided.

2. The legislature should review and limit past delegations of rulemaking powers.

The LCRAR, with the cooperation of the revisor of statutes and the House and Senate Research staffs, should prepare a report for the 1994 legislature describing the frequency with which broad grants of authority are used to adopt rules and examining their use in defining policy and procedural direction.

This report should review all delegations of rulemaking to state agencies and include an assessment of need for broad grants of authority, as well as recommendations for adopting more limited and specific delegations. It should then be referred to the House and Senate governmental operations committees, which may wish to prepare bills revising and limiting existing rulemaking authorities to agencies based on the report's findings.

Impacts

- Policymaking would be brought back to the legislature.
- The legislature would be informed of the extent of agency rulemaking activity.
- The number of future rules initiated by agencies would be reduced.

3. Legislative leaders should require serious scrutiny of bills before delegating rulemaking authority.

Legislative leaders should ask the chairs of policy committees to pay greater attention to the rules provisions of bills by encouraging committee inquiry into these provisions with agencies and bill proponents.

Committee inquiries should focus on the purposes of proposed rules, whom the rules would affect, whether alternatives to rulemaking are available, the costs associated with promulgation, and the costs imposed on regulated parties. The results of these discussions should be included in the record of the committee and incorporated as needed in the rulemaking provisions of a bill.

The House and Senate should direct bills containing significant rule authorizations to their

respective governmental operations committees to ensure uniform scrutiny of rules provisions. These committees currently review provisions of bills that exempt an agency from rulemaking or authorize the use of emergency rulemaking. This recommendation would expand the review authority of these committees to include bills that delegate significant rulemaking.

Impacts

- The legislature would become more familiar with rules and rulemaking activities.
- Policymaking would be brought back to the legislature.
- The legislature would be informed of the extent of agency rulemaking activity.

4. The legislature, in establishing rulemaking mandates, should indicate what it expects will be achieved, should direct the agency to specify outcomes in the rule, and should state a deadline for the agency to have rules in place.

The legislature should include in legislation what it intends to achieve with a specific rulemaking mandate to an agency and by when it expects the agency to have rules in place, as well as direct the agency to specify expected outcomes in the rule. With outcome-based rules, providers and other regulated parties have the option of developing processes that meet the goals.

Impacts

- Affected parties would understand desired results.
- Alternative approaches for achieving policy goals would be encouraged.
- Enforcement techniques and compliance would be enhanced.

5. Where rules will have major cost impacts on large numbers of affected parties, the legislature should require agencies to carry out structured cost-benefit analyses.

Mandates to perform cost-benefit analyses by agencies should be funded to ensure action. The governor as well could require agencies to conduct these formal analyses after legislative rulemaking authority has been granted.

Impacts

- Agencies and the legislature would be better able to weigh the costs of a rule against its benefits.
- Agencies would be required to analyze the cost impacts of their rules on the public.
- Fewer rules imposing unreasonable costs on affected parties would be promulgated.

Agency resources required for rulemaking

Finding No. 7. Agencies generally must allocate staff time and funds from their regular budgets for rulemaking. Rulemaking is not a separate spending activity, and the legislature does not allocate funds specifically for it. As agencies experience tighter budget constraints, they must either allocate funds from other activities, reduce spending for rulemaking, or limit the amount of time spent on rulemaking.

Some small agencies do not anticipate the possibility of rulemaking and its associated costs. While these agencies may have staff able to prepare a rule, they may lack sufficient funds for hearing services or legal assistance. Recently, the Ethical Practices Board proposed a rule on lobbyist disclosure. When the rules were challenged by a successful petition for a hearing, the agency found it lacked the funds necessary to pay for a hearing and subsequently dropped the proposal.

Rulemaking is not a separate funding activity for most agencies. Instead, it is paid for from various program and support staff budgets or from legal, public hearing, or publication contract expenses. The ever-increasing amount of rulemaking required by the legislature, particularly in a time of limited resources and tighter budgets, has become a serious concern of agencies.

Some across-the-board budget cuts in recent years have led to reductions in personnel assigned to rulemaking. In the Department of Human Services, for example, the number of rule writers has declined from 12 to five in the past 10 years.

Agency responses to reduced budgets can affect rulemaking in many ways. They may spend less staff time and resources on rulemaking, hold less frequent meetings of advisory committees, or spread out the time for promulgating a rule. They may also save money by not assigning staff to review and update existing rules or do so less regularly.

Rules impose a variety of other costs on an agency, including the costs of enforcing rules and collecting and processing required information. While these costs appear to be a factor in determining the content of some rules, they are not routinely calculated or known when rules are proposed.

Measuring the costs and benefits of rulemaking is a growing concern. Some argue that many costs imposed on the regulated party make only marginal contributions to the quality of a service or improvement of a condition and that they may equal or outweigh the value of benefits.

In other cases, rules appear to be designed to correct a particular condition or activity viewed as potentially damaging or dangerous. They are used as a way of limiting potential liability. Cost-benefit analysis, however, is not always used in the rulemaking process, making it difficult to determine whether rules add value or whether there are better ways to manage risk.

Conclusion

- The desirability of establishing small agencies with rulemaking powers is questionable when they lack the capability and resources to do the work efficiently and effectively.

Recommendation

> **6. The legislature should carefully examine the desirability of giving small agencies rulemaking powers if it does not fund them to perform all their functions, including rulemaking.**

Rulemaking requires agencies to expend significant resources. Some of these agencies have such resources, but not all do. If an agency is required to promulgate rules, it must also be given the resources to make them. The reorganization of state agencies advocated by CORE would allow the consolidation of resources that are now spread out among small agencies.

Impacts

- Agencies would be better able to fulfill their mandated responsibilities.
- Less rulemaking would be necessary.
- The legislature would have more control over rulemaking.

Accountability for rules

Accountability for laws made through rulemaking is diffuse and difficult to fix, compared with accountability for laws made by the legislature and governor. Statutory laws are the

result of deliberations and agreements made by the legislature and agreed to by the governor. Rules are a result of delegations of authority from the legislature agreed to by the governor and adopted by unelected agency commissioners or independent boards.

Accountability is most diffused when authority for rulemaking is held by independent boards. The terms of the members of these boards frequently overlap the term of the governor who appoints them, and these boards may function as mini-legislatures with significant discretion under broad authority granted by the legislature.

Governors in Minnesota have not been involved in the rulemaking activities of the executive branch, although the practices of other states and the Model State APA suggest a range of roles is possible.

Governor's accountability for rulemaking

Finding No. 8. Accountability for laws made by rulemaking is very diffuse and difficult to fix, compared to accountability for laws made by the legislature and the governor.

Statutory laws are made by elected public officials who are held accountable by the electorate for their decisions. If voters disagree with the laws made by elected public officials, they can vote against the officials in the next election.

Rules are distinguished from statutory law because they result from delegations of lawmaking authority by the legislature agreed to by the governor. Rules are not adopted or specifically approved by elected public officials. Instead, they are adopted by appointed commissioners or boards to which this power is delegated. Legislators and the governor, therefore, are only indirectly accountable for rules.

Finding No. 9. The executive branch is responsible for preparing and adopting rules. However, the governor, who is elected statewide, is not directly accountable for the adoption of rules by departments of the executive branch. The governor has some indirect authority over rulemaking through the appointment of agency commissioners, but no formal responsibility for monitoring the rulemaking performance of agencies or for approving or disapproving rules.

The legislature may delegate lawmaking power to executive branch agencies through a commissioner or board. It is through this commissioner or board that the governor, as the appointing agent of the individuals, may exercise indirect authority over rulemaking.

The governor's staff reports that they are aware of some proposed rules, particularly controversial ones. However, the governor is not directly accountable to the electorate for rules, or policy decisions made in their promulgation. The governor does not need to take action for a rule to be adopted or for it to become effective. The governor also lacks the authority to veto a rule and prevent it from becoming a law.

Accountability concerns are heightened when matters of substance and policy, rather than procedure, are in question in rulemaking. The APA details many steps to ensure due process, public awareness, opportunities to comment, consistency between rules and statutory laws, and confirmation of the legal authority to adopt rules. These procedural steps involve the agencies, the revisor of statutes, the attorney general, and the OAH. When a disagreement arises over policy, however, the APA fixes responsibility with unelected commissioners or boards.

Sometimes a policy question may be sent to the LCRAR if an ALJ finds the statement of need and reasonableness for a proposed rule to be defective. The burden then is on legislators to determine whether the proposed rule is consistent with the desired policy direction.

The legislature has the power to monitor the rulemaking system and the rules produced through it. It may exert influence on a proposed rule through hearings called by the LCRAR or any other legislative committee. In this way, legislators can ask questions at any point before a rule is adopted by an agency.

Because the powers of the legislative and executive branches are separated, questions arise on how accountable for rules the legislature can be to the electorate. Rules are not presented to the legislature for a recorded vote before they are adopted. If this were done, legislators would be held accountable for their decisions in the same way they are held accountable for statutory law. The separation of powers also makes the suspension or veto of proposed rules by legislative committees questionable. The legislature may supersede an existing or proposed rule with a statutory law, which requires a recorded vote, action by the entire membership of both houses, and presentation to the governor.

Finding No. 10. The legislature most often grants authority to adopt rules to agency commissioners, who are appointed by the governor. While the legislature may hold commissioners partially responsible for the rules they adopt, commissioners are not accountable to the electorate. Their responsibility for the adoption of rules is often shared with others in the rulemaking process and is only one of many duties they have.

Accountability for rules is diffused when decisions about the adoption of rules are made by unelected persons such as commissioners, even though they are appointed by the governor and confirmed by the Senate. The legislature may attempt to hold a commissioner accountable for adopted rules, but this is not a part of the approval process. Instead, focus is placed on the rulemaking process, the openness of the agency to public comment, and the steps the agency took.

Finding No. 11. Although Minnesota governors have not been significantly involved in rulemaking, governors in other states play key roles.

The Model State Administrative Procedure Act (MSAPA), on which many states have based their APAs, authorizes a governor to have the power, to the extent that the adopting agency would have the power, to rescind or suspend all or a severable portion of any rule, of any agency, at any time, and for any reason that is not unconstitutional. "Severable portion" is specified because it is not intended that the governor be able to rescind or suspend particular words of a rule in a way that would substantially change the rule's meaning; rather, only those parts that are divisible or independent in language and content for the rest of the rule. If all parts of a rule are not severable, the governor must either approve or disapprove the whole rule.

This rule authorizes the governor to rescind or suspend a rule only after it has been adopted, under the theory that the governor should have the power to exercise a negative political check on rules adopted by agencies in the same way the veto is used as a negative political check on laws adopted by the legislature. The MSAPA requires the governor to follow the same formal rulemaking procedures the agency must use, because the recision or suspension is rulemaking and has the force of law. The MSAPA also gives the governor the power to terminate any pending rulemaking proceeding, by issuing an executive order accompanied by a statement of reasons.

Appendix F expands on this discussion of the governor's role in rulemaking by looking at Iowa, which follows these MSAPA guidelines.

Conclusion

- The legislature and governor should be accountable to the electorate for all laws, whether adopted as statutes or rules.

Recommendation

7. The governor should have the opportunity to review and comment on all rules just before their adoption by commissioners.

The governor may wish to establish guidelines on the types of rules that will be reviewed and the time frame and criteria of the review. The governor, for example, could review rules that exceed federal standards. The governor should also determine how this review would be initiated and communicated to state agencies; this could be done by executive order or by seeking legislative authority. If the governor did not review and comment within 30 days, the commissioner could proceed to adopt the rule.

Impacts

- Clear accountability would be established.

- Rulemaking activity in the executive branch would be coordinated.
- Through set standards, the governor could directly address such issues as rule prescriptiveness and the specifying of outcomes.

Seeking clarification of legislative rulemaking mandates

Finding No. 12. Agencies often have questions on the intent and direction of legislative rulemaking delegations.

A few agencies have historically minimized the problem of policymaking in rulemaking by quickly moving issues back to the legislature. They draft bills outlining their ideas and seek legislative action on them. They have good relationships with their policy committees and other key legislators and considerable success in obtaining legislative consideration of their recommendations.

Some agencies also reported that, due to the length of time it takes to adopt rules, they are more frequently requesting the legislature to adopt both policies and rules relating to their administration, thus eliminating the need to promulgate rules.

Other agencies, however, reported that they seldom seek policy clarification because they perceive a lack of legislative receptivity.

Conclusion

- A mechanism is needed through which agencies can move policy issues contained in rulemaking back to the legislature for clarification and policy direction.

Recommendation

> **8. The governor should be instrumental in seeking clarification of delegations of authority from the legislature when policy direction is needed.**

When agencies find that policy disputes are substantially affecting their ability to develop and adopt authorized rules, the governor should ask the legislature at the beginning of the session to take action to provide clearer or more complete policy direction. This request should be directed to the speaker of the House and the majority leader of the Senate and could be accompanied by a bill containing proposed language to clarify or resolve the issue.

Impacts

- Clear accountability would be established.
- Policy would be set and clarified by the legislature.
- Rulemaking activity in the executive branch would be coordinated.

Accountability and independent boards

Finding No. 13. When authority to adopt rules is granted to independent boards, accountability is very diffuse and difficult to assign. The membership terms of these boards frequently overlap the governor's term, and these boards may function as mini-legislatures, with broad authority and ability to determine the extent of the rules they propose and adopt. Further, their hearings may appear to duplicate those before administrative law judges.

Several boards are granted the authority to adopt rules, including the Pollution Control Agency Board, Public Utilities Commission, and State Board of Education. Numerous smaller boards also hold this power. Typically, members of these boards are distanced from political accountability because they are appointed for fixed terms that often overlap the governor's term. Sometimes these boards are given rulemaking powers even when a commissioner appointed by the governor exists, as with the Pollution Control Agency.

These citizen boards often have many responsibilities in addition to adopting rules, such as issuing permits, conducting semi-judicial hearings relating to rate setting, settling disputes, and adopting plans and agency programs. At times, permits may be issued or rates set without rules.

Rulemaking by citizen boards also introduces an element of confusion and possible duplication with the hearings conducted by the Office of Administrative Hearings. A board may choose to hold a public hearing at any time — before it proposes a rule, to collect opinions and seek direction, or after. Such a hearing does not replace the rulemaking hearing before an administrative law judge. As a result, several hearings may be held on what appears to be the same issue. The board may also hold additional hearings after it receives a report from the ALJ.

Conclusion

- Accountability is very diffuse and difficult to assign when authority to adopt rules is held by independent boards.

Recommendation

The legislature, as it reviews the scope of authority granted to agencies to adopt rules, should also examine the need for and desirability of granting rulemaking authority to independent boards. Only in compelling situations should a board, rather than a commis-

9. The legislature should limit rulemaking authority to governor-appointed commissioners.

sioner, be empowered to adopt rules. For boards that the legislature decides should retain rulemaking authority, the governor should be granted final authority on controversial rules adopted with a public hearing. The rule would become effective if the governor does not take action within 30 days after adoption by the board.

Impacts

- Accountability would rest in an elected official.
- Policy setting would be focused.

Oversight of rulemaking

The legislature is responsible for seeing that its delegations of rulemaking authority to agencies are carried out appropriately. The legislature is legitimately concerned with how the rulemaking process operates, its openness to the public, and the time and costs involved. Questions exist, however, regarding the effectiveness of this oversight. For example, the current oversight mechanism, the LCRAR, does not communicate with the various legislative committees that generate large quantities of rulemaking authorities. This oversight mechanism should provide a "reality check" that rules accurately interpret the intent of legislative mandates.

Legislative oversight of rulemaking

Finding No. 14. The legislature is accountable for the delegation of rulemaking powers. It is responsible for overseeing its authorizations of rulemaking power through to a determination of whether the rules fit within legislative policy parameters and intent. Serious questions exist about how effectively the legislature organizes itself to perform these functions. Every state except Delaware has some formal legislative oversight committee specified in its APA, although the form it takes varies.

To effectively oversee its authorizations of rulemaking, the legislature requires considerable information on how the system is working and techniques for scrutinizing proposed rules for their consistency with policy parameters and legislative intent.

The Legislative Commission to Review Administrative Rules collects a great deal of

information. However, it analyzes only pieces of the rulemaking system. For example, it follows whether an agency has begun or completed rules required by laws from recent sessions. It also examines procedural errors that are deemed to be harmless (errors that do not deprive any person from participating in the process) and the work of agencies developing expedited rulemaking. The LCRAR does not attempt to track all rulemaking completed by agencies — actions related to federal rules, updates to existing rules, and rules initiated by an agency without legislative direction are not tracked — nor does it track provisions of bills calling for rulemaking as they proceed through the legislature.

The current process of legislative oversight does not have a link with the various committees that generate large quantities of rulemaking authorities. The House and Senate governmental operations committees, for example, are the ones most interested in rulemaking. They are responsible for identifying bills that attempt to exempt an agency from rulemaking, and they scrutinize requests for emergency rulemaking. The legislature's various policy committees, which are most able to judge whether proposed or adopted rules are consistent with legislative policy directions, seldom evaluate proposed rules.

The LCRAR collects and analyzes some information and may hold hearings on rules of concern to individual legislators. In doing so, it may exert considerable influence on the agency and the shape of the final rule. In addition, it may suspend a proposed rule until the entire legislature has an opportunity to supersede it during the next session. It has seldom used this power, however.

Other states have similar oversight committees. The Model State APA creates a single-purpose joint legislative committee, the Administrative Rules Review Committee (ARRC), to review rulemaking. The committee is composed of six legislators, three from each house and each having a two-year term.

The ARRC reviews possible, proposed, and adopted rules. It is not required to review all rules, so it can focus on complex and controversial regulations. The committee can veto a rule only by statute, referring it to the appropriate policy committee of the legislature and putting it through the legislative process.

Appendix G examines legislative oversight structures in Wisconsin and Iowa. Appendix H compares legislative oversight structures across the United States.

Conclusions

- Legislative oversight of rules and rulemaking is fragmented and incomplete.

- Gaps exist in the present structure for legislative oversight. Policy committees are often not involved in reviewing rules resulting from past committee actions, and the Legislative Commission to Review Administrative Rules tracks only parts of the rulemaking process.

Recommendations

10. The legislature should examine its current mechanism for rules oversight and either strengthen it or replace it with a new organization.

Strengthened oversight should be accomplished by more directly linking the membership of the LCRAR to the chairs of legislative policy committees and the House and Senate governmental operations committees. For example, its membership may include governmental operations committee members — perhaps the chairs, initially — and the chairs or vice-chairs of policy committees that authorize considerable amounts of rulemaking.

It is important that rulemaking discussions that occur in the governmental operations and policy committees during the session be followed up with discussions by the LCRAR. If strengthening the LCRAR is not desirable, a new joint governmental operations committee, composed of equal membership from the House and Senate, should be created to replace it.

11. The Legislative Commission to Review Administrative Rules or a new joint governmental operations committee should annually evaluate the scope, volume, and clarity of rulemaking authorizations.

The commission or its replacement should also assess the number of rulemaking responsibilities the legislature delegates to the executive branch and evaluate procedural actions that are exempt from the rulemaking process. This assessment should provide information on the quality and quantity of rulemaking authorizations to policy committees that delegate such authority.

12. The Legislative Commission to Review Administrative Rules or a new joint governmental operations committee should coordinate activity to ensure that policy committees have information about adopted rules — particularly those adopted following a public hearing — and the provisions of the legislation under which they were adopted.

If specific rules are not consistent with legislative expectations, policy committees should conduct hearings early in the session and initiate bills clarifying their expectations.

In accordance with existing law, the LCRAR or a new joint governmental operations committee would also conduct public meetings on proposed rules when requested by legislators or citizens. Members of associated policy committees should be invited to attend and participate. If major concerns exist, the commission or joint committee could choose to suspend the rule and refer it to the legislature for action at its next session.

Impacts

- Legislative oversight would be strengthened.
- The legislature would be better able to weigh the costs of rulemaking against expected outcomes.
- The legislature would be able to check whether requirements in authorizations are being met by agencies.

Administrative Procedure Act

The law that guides agency rulemaking, the Minnesota Administrative Procedure Act, seems to work fairly well. It provides a long but fair process of checks and balances that prevents, or at least makes very difficult, the development of capricious or arbitrary rules. The law includes several provisions to involve the public in rulemaking and to have neutral third parties approve rules. For example, the APA requires agencies to notify the public of their intent to adopt rules, publish the proposed rule language, and hold a hearing if at least 25 persons request that a hearing be held in front of an administrative law judge.

Agencies commonly form advisory task forces to assist in developing rules. Although this step is not required by the APA, agencies use it to help reduce the level of controversy on a specific issue and to obtain the views of the parties that would be affected by the proposed rule. Depending on the complexity of the issues, this informal negotiation through a task force may occur in one meeting or over several years. Usually, agencies will formally propose as a rule the results of the negotiation. Once the language is proposed and published in the *State Register*, the agency is fairly committed to its language and not likely to be open to changes.

Since the informal negotiation process is not part of the APA, nor should it be, CORE recommends a stronger requirement on the agency to inform the public of its intention to form an advisory task force and to allow more members of the public an opportunity to participate.

The APA also includes a provision called "substantial change" that ensures that an agency can adopt a rule only as it has been published in the *State Register* as a proposed rule and

the public has been notified. If during the rulemaking process the agency changes its language substantially, as determined by the Office of Administrative Hearings or the attorney general, the agency must publish the new language, notifying the public of their opportunity to comment. This requirement was found to deter agencies from incorporating changes to a proposed rule, even if the changes would improve it.

Public information and participation in rulemaking

Finding No. 15. The APA specifies many opportunities for public response, including notification from the agency, participation in public hearings, and comments to the agency, administrative law judge, and attorney general, at different stages of the process. In practice, however, the notices do not provide enough information for the public to respond, and only special interests seem to be involved.

The public may comment at any time generally and specifically whenever notices are published in the *State Register.* A minimum of three public notices is required: notice to solicit outside opinion, notice of intent to adopt a rule with or without a hearing, and notice of adoption of a rule.

The notice to solicit outside opinion is a general notice indicating that the agency is proceeding to develop rules. It does not contain proposed rule language or information other than the name of the rule to which the public can react. Interviews with agencies found that they rarely, if ever, receive responses to this notice.

The notice receiving the most comment is the notice of intent to adopt a rule, which must include proposed language and information regarding a possible hearing. The amount of comment this notice generates varies with the complexity of the proposed rule.

The notice of adoption of a rule does not solicit comment from the public; it merely announces that a rule has gone through the required procedures and that it becomes effective five days after it appears in the *State Register.*

After a rule is adopted, the public may still affect the rule by lodging a complaint with the LCRAR. The LCRAR may study the issue and can suspend the rule until the next legislative session.

Conclusions

- Public information and participation are vital elements of the process that need to be strengthened.

- The first published request for information from the public, the notice to solicit outside opinion, does not serve a useful function as currently designed. Responses, if any are received by an agency, seldom provide information about the issues to be considered in the proposed rule.

Recommendation

> **13. An agency should be required to publish a notice summarizing questions to be considered in the proposed rule, whether an agency intends to form an advisory task force, and a list of persons or associations the agency intends to invite to serve on an advisory task force.**

This notice should also include a proposed timetable outlining when the agency intends to form the advisory task force, complete its negotiations, and adopt the proposed rule. If the agency does not plan to form an advisory task force, it should explain how outside opinion will be solicited.

Impacts

- The public would be provided with information to which it could respond.
- More interested parties would be involved early in the process.
- The likelihood of the rule needing "substantial change" later in the process would be reduced.

Feedback from the public

Finding No. 16. The Administrative Procedure Act allows the requests from 25 persons to trigger a public hearing on a proposed rule — even if the proposing agency did not believe the rule was controversial and published its notice of intent to adopt a rule without a public hearing. These requests, however, do not always include the petitioners' names, addresses, telephone numbers, and reasons for objecting.

When an agency is forced to hold a public hearing, it does not necessarily know why the 25 or more persons requested the hearing or which specific provision they oppose. The agency may try to discuss concerns with individuals, but petitioners often fail to indicate how they can be reached. These problems may prolong the process by precluding the resolution of some disagreements or misconceptions before a hearing. Agencies' staff say that petitioners do not always appear to testify at the hearing.

Staff also noted that special interest groups or the general public may request a hearing to keep abreast of an agency's general activities, because they believe the public hearing opens any and all agency rules to discussion, or to express their dissatisfaction with legislative policy.

A sampling of agencies showed that several hearings have been triggered by the 25-person provision (as opposed to the agency determining at the onset that the process will include a hearing). The Pollution Control Agency, for example, had 10 proposed rules go to public hearings between July 1989 and July 1992. Seven of these hearings were held because 25 persons requested them, two of them attended by no one, and three were held because of an agency or legislative decision to include a hearing. The Department of Human Services had 10 proposed rules go to hearing during that same period. Four of these were triggered by the 25-person request; one was attended by at least 25 persons, and the other three had fewer than 25 persons attending or the report of the presiding administrative law judge does not include the number in attendance.

Conclusion

- Requests for public hearings are not useful to state agencies when petitioners fail to include their names, addresses, telephone numbers, and reasons for objection.

Recommendation

> **14. The Administrative Procedure Act should be amended to require those who petition for a public hearing to specify their objections and to include their names, addresses, and telephone numbers.**

Petitions lacking this information should not be considered valid. The additional information allows the agency to better prepare for the hearing.

Impacts

- Agencies would be better prepared for hearings.
- Petitioners could be engaged in a meaningful dialogue.
- Some hearings might be avoided, shortening the process and reducing costs.

Estimating the impacts of rules

Finding No. 17. Rules impose a sizable economic burden on agencies that enforce the rules, on providers of services, and on those who are regulated. Attempts are made to estimate these impacts on local governments, small businesses, and agricultural lands.

Statutory laws may imply additional investments and operating costs to those who provide services or those who are regulated. The exact costs, however, often become known only

after a rule is adopted. The standards that must be met, the levels of service required, the types of equipment that must be used, the quantity of equipment necessary, the degree of training or certification required by employees, and the number of reports to be issued all affect the expenditures of a business and the cost of a service.

Those who are regulated occasionally express concerns about the costs of complying with proposed rules, and this is often the only way these costs become known or a factor in decision making. Agencies do not estimate these costs unless they are required to do so, such as when a rule affects federal funding or the state budget.

Some costs imposed on local governments and small businesses are considered in rulemaking. The statement of need and reasonableness must contain an impact statement on local governments when proposed rules would impose costs exceeding $100,000. Small business statements must also be included. A considerable difference of opinion exists, however, over how adequate and accurate these estimates are. They often are based on figures provided by a handful of providers or regulated parties. Some also question whether the correct types of costs are considered.

Local government impacts

Many counties and cities have expressed concerns about costs imposed by rules — in effect, unfunded mandates. In regard to environmental regulation and some health and human services mandates, local governments feel that the state should provide the funds necessary to comply with its rules and laws, rather than compel them to raise taxes. Local governments think this is particularly unfair when they are not involved in the creation of a rule. Others note that local impact statements often assume rule compliance will add only a marginal cost to service delivery. Complying with rules, too, is perceived by local governments as an unfunded mandate.

Small business impacts

Small business owners do not get involved in rulemaking for several reasons, according to staff of the Minnesota Small Business Assistance Office:

- Rulemaking is very complicated.
- It is not worth the small business owner's time.
- They rely on trade associations or, if they are large enough, lawyers and lobbyists to be involved in the rulemaking process.

Because of these factors and lack of small business participation in the rulemaking process, agencies tend to be basically unaware of a rule's effect on small business unless it is glaringly obvious. This lack of knowledge is reflected in agency statements of need and reasonableness, which typically cite little or no impact expected on small businesses.

Missing from the materials submitted with the statement of need and reasonableness are impact statements relating to other affected parties. Many external stakeholders noted that their costs in complying with rules are not considered when rules are being promulgated. Although it is unrealistic to assume that every proposed rule will outline impacts to every possible party, stakeholders expressed a desire to have rule impact statements be more meaningful and comprehensive — particularly for large, encompassing rules.

Conclusions

- Requirements to report financial impacts on affected parties in rule statements of need and reasonableness are not clearly defined in the Administrative Procedure Act but should be.

- The costs that would be imposed on affected parties and their ability to pay them should be known before a rule is adopted. If agencies assessed impacts more completely, problems of enforcement and compliance could be better anticipated and addressed.

- The rulemaking process lacks a cost focus in terms of costs both to the state and to affected parties.

Recommendation

15. The legislature should clarify the criteria for statements on the impact of rules affecting agricultural land, small businesses, or local governments.

The legislature might indicate, for example, whether local government impacts should include administrative costs, what should be included as "additional costs," what efforts should be made to collect estimates from affected local governments, and how estimates should be reconciled with state agencies' data. Agency comments now focus solely on whether the impacts were considered.

Impacts

- Agencies and the legislature would be better able to weigh the costs of a rule with its benefits.

- Agencies would be required to analyze the cost impacts of their rules on affected parties.

- Fewer rules imposing unreasonable costs on affected parties would be promulgated.

'Substantial change'

Finding No. 18. The issue of "substantial change" affects many agency decisions by significantly inhibiting the incorporation of materials late in the rulemaking process.

The "substantial change" provision of the APA serves as a check on state agencies by ensuring that affected parties have a chance to comment on a rule in its final form before it is adopted by an agency. As a result, this due process concept requires publication and opportunity for comment not only when a rule is proposed but also whenever it is substantially changed.

If a rule is substantially changed and is no longer represented by its statement of need and reasonableness in the judgment of the Office of Administrative Hearings or the attorney general, it cannot be adopted without being published in its revised form and moved through the formal rulemaking process, which may mean another hearing.

Agencies say this limits their ability to incorporate ideas presented after proposed rules are published or at public hearings. They maintain that it is virtually impossible to incorporate useful suggestions or to negotiate because they are bound by their statement of need and reasonableness and the language of the published proposed rule. At the same time, the definition of *substantial* is unclear and subject to negotiation due to latitude in interpretation by ALJs and the attorney general's office. In general, concerns about time, costs, and the possibility of another hearing deter agencies from incorporating ideas from others late in the rulemaking process.

Some argue that agencies are overly cautious and that many changes could be made at the time of public hearings. External stakeholders noted that agencies use substantial change as an excuse to maintain their initial proposals. In either case, substantial change was a concern expressed by many — whether it be a perception or a reality.

Conclusion

- Uncertainty surrounding "substantial change" has led agencies to be overly cautious and disinclined to incorporate comments suggested late in the rulemaking process, even when the changes may improve the rule. This makes it even more important to gather information and have meaningful dialogue early in the process before the rule is formally proposed.

Recommendation

16. The legislature should provide the chief administrative law judge and the attorney general with another process for incorporating substantial changes introduced after the proposed rule is published.

This process should consist of publishing the language changes made after a hearing (or allowing a hearing if one has not already been held), allowing a period for comments, and then proceeding to final action. This process would eliminate the possibility of a second hearing on the substantially different rule language but would notify the affected interests and permit them to comment to the ALJ or the attorney general. The public could still request action by the LCRAR or the governor as part of the governor's review and comment proposed in Recommendation 7. In addition, the agency commissioner or executive branch secretary[2] should either adopt the findings of the ALJ or explain why the agency rejects them.

Impacts

- Agencies would have an incentive to incorporate improvements to the proposed language that are suggested late in the rulemaking process.

- The elimination of a second hearing late in the process would save agency resources.

Documenting alternatives considered

Finding No. 19. The agency's statement of need and reasonableness explains the need for a rule and documents that the direction chosen by the agency to formulate a rule is reasonable. The statement does not have to include alternatives that the agency seriously considered.

The authorizing legislation should provide the agency with the need for the rule; the agency's role should be to fill in the detail to implement the legislative mandate and provide a reasonable manner for doing so. Part of this effort should include discussing alternative courses that were considered.

Conclusion

- The agency should inform the public of alternatives it may have considered.

[2]Executive branch secretaries have been proposed as part of CORE's executive reorganization recommendations.

Recommendation

> **17. In their statement of need and reasonableness, agencies should be required to list the alternatives they considered before deciding to propose a rule.**

This would provide more information to the public and serve as a check on the agency.

Impacts

- The public is aware of the agency's considerations.
- The requirement serves as a further check on the need for rules.

Agency initiatives

CORE found that most agencies have negotiating processes to develop new rules in conjunction with affected parties. These tend to work fairly well in narrowing the points of contention and in minimizing the possibility of a rule hearing. Narrowly focused special interests, however, seem to be the only parties involved in these negotiations.

In addition to establishing new rules, agencies must keep constituencies informed of their activities. This presents a Catch-22 situation, however, because the encompassing nature of the definition of a rule requires that agency interpretations, guidelines, or bulletins be created through the same process as rules. This could stifle an agency's willingness to keep its public well informed.

Agencies also have few incentives, nor is much direction given to them, to keep their rules up to date. As a consequence, many rules become obsolete and are not enforced, but agencies and the public remain legally bound to them until they are repealed.

The recommendations in this section are directed at state agencies and could be implemented by agencies themselves, with no change to the APA.

Keeping rules current

Finding No. 20. Agencies have no incentives to keep their rules updated. Repeals must go through the rulemaking process, which is costly and time-consuming.

Some agencies must adopt federal regulations as state rules in order to comply with certain mandates, such as Environmental Protection Agency requirements, or to receive federal funds, such as for health and human services. The PCA and the Department of

Human Services must go through formal rulemaking to adopt these federal requirements and establish need and reasonableness even if they are not proposing to augment the standards.

Options to keep rules updated

The revisor of statutes can prepare and submit an annual technical bill to make nonsubstantive corrections in administrative rules. This enables agencies to avoid having to go through formal rulemaking to make a nonsubstantive change in a rule. Granted this authority in 1992, the revisor is expected to take a conservative approach to determining what is nonsubstantive. Examples of the use of this power include:

- The legislature passes a law that is contrary to an agency's rule. The new law implicitly, rather than expressly, overrides the rule and does not take it off the books. Through its annual bill, the revisor would be able to propose repealing the rule since it no longer has any affect.

- The legislature has authorized an agency to promulgate a rule allowing retailers to sell lottery tickets if they have not been convicted of a "gambling-related offense." In promulgating the rule, the agency left out the phrase "gambling-related." Instead of the agency having to go through formal rulemaking to change the rule to include this phrase, the revisor can submit the change in the annual bill.

Conclusions

- Few incentives exist to keep rules up to date. As a result, a growing number become obsolete and unenforceable.

- Repealing existing rules through the revisor's bill is more efficient than using the rulemaking process and might help to focus legislative attention on the growing number of rules.

Recommendation

18. Agencies should review existing rules and repeal those that are obsolete.

Agencies should review and repeal existing rules that are obsolete and no longer enforced. The review could be initiated by the governor, legislature, or agency or by public suggestion. Agencies should clarify or correct rules through the revisor's technical bill, their annual housekeeping bill, or the procedure for making noncontroversial rules.

Impacts

- Agencies could easily keep rules current.
- State resources would be saved.

Fee rules and rulemaking requirements

Finding No. 21. The state's Administrative Procedures Act states that fees not fixed by law must be fixed by rule.

Department of Finance staff review rules concerning fees and verify the figures used to calculate fees; the commissioner gives final approval of fee rule statements of need and reasonableness. Agencies must also submit copies of their notices and proposed rules to the chairs of the House Appropriations and Senate Finance committees.

The finance commissioner may also exempt agencies from rulemaking when fees are based on actual direct costs of a service, are one-time fees, produce insignificant revenues, are billed within or between state agencies, are exempt from commissioner approval, or are related to admission to or use of facilities operated by the Iron Range Resources and Rehabilitation Board. This exemption authority is used infrequently.

Conclusion

- Existing statutes allow the exemption of some fee rules from the rulemaking process, but such exemptions are seldom sought.

Recommendation

> **19. Agencies should seek exemptions from the rulemaking process for specific fee rules.**

The commissioner of finance should, at an agency's request, exempt fee rules from rulemaking when such rules are restricted to reimbursement of service costs. Other categories of fee rules already identified in law should also be exempted from Administrative Procedure Act provisions upon petition. Authority for granting exemptions is already implied in the department's statutes. If the authority is not clear, the commissioner should seek clarification from the legislature.

Impacts

- State resources would be saved.
- The need for some rulemaking would be reduced.

Interpretive guidelines

Finding No. 22. Rules are often unclear and difficult to understand. Agencies often need to explain rules by producing guidelines, bulletins, or other interpretive materials.

Several factors contribute to problems in rule clarity, including the use of legal language and technical jargon, cross-relationships with other rules and statutes, and rule organization. Many stakeholders noted that the applicability of rules to general rather than specific situations also makes rules less distinct.

When a rule is written for general circumstances, providers, regulated parties, and other affected persons question its applicability. They need to find out if the rule applies to them, how it applies, or what they need to do. To find answers, they must contact agencies. These calls produce answers, or "interpretations."

Many stakeholders are concerned with the consistency of these answers, both within the department and across state government, as well as with the uniformity of comprehension and application by inspectors and those who are regulated.

Some agencies respond by producing volumes of interpretations that explain their rules. The Department of Human Services, for example, routinely produces bulletins as well as program operator manuals that are sent to county officers, service providers, and regulated parties almost weekly.

Most agencies, however, do not do this; instead, clarifications and explanations are conveyed orally as needed, or they are not provided at all.

Finding No. 23. Formal agency rule interpretations and guidelines must be created using the administrative rulemaking process.

Most agencies do not produce formal rule interpretations because they must be established using the Administrative Procedure Act — the same process used to create the rules being explained.

The definition of *rule* and thus what must go through the rulemaking process is very broad. It includes "every agency statement of general applicability and future effect." This definition raises serious concerns about an agency's authority to publish informational documents that could keep the public better informed.

Despite this encompassing definition, some agencies, such as the Department of Human Services, publish numerous bulletins and manuals without using the process outlined in the APA.

Recently, the legislature gave the Department of Revenue authority to establish revenue notices by publishing them in the *State Register* — avoiding the numerous procedures and checks required for rulemaking in the APA. These notices explain Revenue rules and serve, for all intents and purposes, as interpretive guidelines. They are not legally binding on the public, but they do bind the agency. Representatives from many agencies stated they would like similar authority so they could inform their affected publics more efficiently and effectively.

The fact that rules interpretations must be adopted through rulemaking is a disincentive for agencies to provide sufficient information to affected parties.

Conclusion

- Creating interpretive documents through the administrative rulemaking process hinders agency educational efforts.

Recommendation

20. Rule interpretations or other educational documents should be exempted from Administrative Procedure Act rulemaking requirements.

Each agency should make a case to the legislature why its interpretive materials should be exempted from rulemaking. Procedures similar to those used for the establishment of Department of Revenue notices should be used as a model.

Impacts

- Agency education initiatives would be supported and affected parties better informed.
- State resources would be saved.
- The need for some rulemaking would be reduced.

Prescriptiveness of rules

Finding No. 24. Rules tend to be prescriptive and often specify input measures, rather than expected outcomes or desired results.

Some rules are so extensive that they substantially direct all the activities of all service delivery participants. As a technique for commanding and controlling parties, this is an expensive way to achieve a policy objective. It also fails to recognize the varying capabilities of local governments and providers to comply with rules.

Department of Human Services rules, for example, contain numerous conditions, often referred to as inputs, that become minimum requirements for providers of services. These rules also provide detailed directions to counties and specify many occupational requirements for county welfare department employees.

Finding No. 25. The legislature recently recognized some aspects of the inflexibility of the rulemaking process when it lengthened the State Board of Education's rule waiver period.

The 1991 legislature extended to three years the period of time in which the State Board of Education can waive its rules. Waivers can be issued if a school district or school can demonstrate that its own methods of achieving educational objectives would work better than those specified by the board.

Conclusion

- Greater use of rule variances and waivers could provide affected parties with flexible compliance options.

Recommendation

> **21. Agencies should make better use of rule variances or waivers to facilitate the use of outcome measures.**

Agencies should develop processes that specify when a rule can be waived. Frequent waivers may indicate that a rule needs revision.

Impacts

- Affected parties would understand desired results.
- The use of alternative approaches for achieving policy goals would be encouraged.
- Enforcement techniques and compliance would be improved.

Agency negotiations of proposed rules

Finding No. 26. Parties invited by the agency to the negotiating table have the greatest opportunity to influence rulemaking. By the time a proposed rule is published for comment by the general public, the agency may have been influenced heavily by those who were invited early and those who have the resources to stay at the negotiating table.

Stakeholders expressed concerns about whether agencies know all their constituents and whether all the necessary or proper parties are invited to the negotiations over proposed rules.

The proposing agency determines whom it will ask to serve on an advisory task force and what agency staff and resources will be assigned to the rulemaking effort. It is fairly easy to contact special interest groups and bring them to the negotiating table. Notices in the *State Register* or in professional publications tend to reach these parties. Reaching the general public is more difficult. Notices in the *State Register* are not usually read by the general public.

Another concern is that strong special interest groups are the only ones with the resources to remain at the negotiating table until a conclusion is reached, leaving out the general public and smaller interest groups.

Finding No. 27. For a variety of reasons, including a lack of resources, agency culture, and the time rulemaking takes, many agencies fail to adequately inform the public affected by their rules.

Just as an agency's culture influences the frequency of rulemaking activity and the agency's predisposition to negotiation, it also affects the degree to which the agency will inform the public affected by its rules. Some agencies have few procedures for informing affected parties, while others have elaborate structures.

When major rules are adopted, agencies have made efforts to inform and educate the affected parties through such efforts as publishing explanatory articles in trade journals and newsletters, sending information to interested persons, and holding informational meetings throughout the state. These efforts, however, take time and money, and the effective date for a rule may be postponed until an agency judges it can complete these activities. Funds to do such things may be difficult to obtain.

Finding No. 28. It is difficult to reach and engage the general public.

Members of the general public often lack the time, expertise, and resources to become involved in rulemaking and may not know that their interests may be affected.

Broadening participation in rulemaking and soliciting comments early in the process increase opportunities for the general public's involvement and lessen the need for hearings. They reduce the possibility of substantial change, because agencies can hear ideas and incorporate them early in the process.

Conclusions

- Advisory task forces are most useful early in the rulemaking process and when they represent a variety of interests.

- Agencies have a great deal of discretion and flexibility in informing the public of their rulemaking activities.

Recommendation

> **22. To better notify the general public of rulemaking activity, agencies should provide more useful information about proposed rules throughout the state.**

Agencies could notify the general public about a proposed rule by sending out news releases to local media that summarize information about what the rule would do, who would be affected by it, and what kinds of changes the rule would require. These releases could also include the schedules of advisory task force meetings at which citizens could present their ideas. Agencies could also solicit suggestions about which existing rules should be changed or repealed through notices in trade publications and the general press. Finally, agencies should more actively invite members of the public to add their names to agencies' mailing lists.

Impacts

- More interested parties would be involved early in the process.
- The likelihood of problems with substantial change later in the process would be reduced.
- A greater variety of issues would be identified and addressed early in the process.

Development of cost impact statements

Finding No. 29. The economic impact of rules on agencies that enforce them, providers of services, and those who are regulated by them can be significant. However, impacts on all affected parties, other than those specified in the APA, are rarely calculated or factored into considerations of alternative levels of service or standards.

The legislature has provided few guidelines for what should be included in the impact statements required for the three areas specified in the APA and none for affected parties not specified in the act.

Conclusion

- Agencies do not always adequately calculate estimated rule compliance costs for the public and private sectors, and they are not required to assess the impact on all affected parties.

Recommendation

> **23. Agencies should circulate proposed rule language before it is published and ask affected parties to develop impact assessments based on this draft.**

In addition to seeking parties' assessments, agencies should develop their own estimates of costs imposed on affected parties. Both assessments should then be included in the rule's statement of need and reasonableness.

Checks on agency rulemaking

Finding No. 30. The attorney general establishes many requirements for agencies to follow when adopting rules without a hearing.

The attorney general's rules for approving noncontroversial agency rules require several documents from the agency. The agency's legal counsel, for example, must sign a declaration stating that a rule and its record have been reviewed and that legal requirements have been followed. This declaration is further reviewed by the Public Finance Section of the Office of the Attorney General, which checks procedures followed by the agency and approves rules proposed without hearings. The attorney general also requires affidavits concerning the accuracy of agency mailing lists and mailings. (See Appendix I for the attorney general's checklist to approve noncontroversial rules and Appendix J for the Office of Administrative Hearings checklist to approve controversial rules.)

Conclusions

- Some of the requirements of the attorney general may be unnecessary.

Recommendation

> **24. The Attorney General's Office should simplify approval of rules adopted without a hearing.**

The Office of the Attorney General should examine and reduce its requirements for approving noncontroversial rules. It should continue to require that an agency demonstrate that it attempted to involve the public, but it should abbreviate the number of documents agencies must produce.

Impacts

- State resources would be saved.
- Both agency and Office of the Attorney General staff would have less work.
- Adoption time lines would be shortened, while critical checks would be preserved.

Notice-publishing process

Finding No. 31. Publishing rule notices that include rule language entails a two-week delay.

The current practice of publishing rule notices involves sending the rule language from the revisor of statutes to the printer through telecommunications technology while the rule notice is typeset and sent to the *State Register* for proofreading. This creates the two-week delay.

Conclusion

- The rule notice could also be transmitted electronically, thus shortening the process.

Recommendation

> **25. The *State Register* publishers should reduce the time it needs to proofread, edit, and prepare for publication each of the three rule notices required by the Administrative Procedure Act — the notice to solicit outside opinion, the notice of intent to adopt a rule, and the notice of adoption.**

The two-week publication delay for notices that include rule language could be reduced through using available technology.

Impacts

- The usual three months for adopting rules without a public hearing could be reduced by two weeks.

Controversial rule negotiations

Finding No. 32. Completing productive negotiations over proposed rules can take a substantial amount of time.

As stated earlier, the negotiation process is neither required nor specified in the APA. It may take only a few meetings or may last for years, and nothing guarantees consensus will be reached. Some rules have been in the development stage for several years.

When issues are very controversial, the use of advisory task forces may lengthen by months or years the time it takes to adopt rules. The process may stagnate when consensus is difficult to reach. In these cases, some agencies have successfully used neutral third parties, such as arbitrators or ALJs, to facilitate closure of the process.

Conclusions

- Productive negotiations take time. When issues are controversial, agencies may have trouble bringing the negotiating process to an end.

Recommendation

> **26. Agencies should use neutral third parties in some highly controversial rules negotiations.**

As the experience of some agencies has shown, using neutral third parties can help bring to a close negotiations over controversial rules.

Impacts

- Rule adoption time would be shortened.
- Resources would be saved — the cost of an arbitrator is less than the cost of a drawn-out process.
- Discussions could be more substantive and candid.

Organizing rulemaking resources

Finding No. 33. Agency resources to conduct rulemaking are limited.

Some agencies report that it can cost as much as $300,000 to promulgate a major set of rules. Costs vary, depending on the intensity of the effort, the length of time involved,

the complexity of the issue, and the level of controversy.

A number of costs are associated with rulemaking, including program and rule-writing staff time, legal advice, publication in the *State Register*, the use of ALJs, and representation for affected groups.

Agency program staff do the necessary research before a rule is drafted. This includes researching federal rules, developing programs, conducting technical studies regarding methods for regulation, identifying needed and desired information, collecting data from those who provide services and those who are regulated, developing enforcement techniques, and determining agency enforcement capabilities.

In most cases, the largest rulemaking cost to an agency is program staff time spent working on rules development with advisory task forces, communicating with people in other divisions of the agency and other agencies, and in contact with others in both the public and private sectors. Program staff write and review the statement of need and reasonableness, perform any required impact studies, and assist in the drafting of a rule.

Larger agencies have rule-writing staff to assist program staff in taking rules through the process. They help draft rule language and the statement of need and reasonableness, arrange for various publications, and route proposed rules through the revisor and the attorney general. They also may assist with advisory task forces and with subsequent efforts to interpret rules.

A few large agencies that conduct a lot of rulemaking estimated that all staff assigned to rulemaking (program, rule writing, and supervisory) could total up to 10 percent of their salary budget.

Finding No. 34. Rulemaking resources in some large agencies are poorly organized. Rulemaking expertise in one division may not be shared with others in the same agency.

Some large agencies organize rulemaking around the divisions that are most active in promulgation. The expertise of these divisions, however, is often not available to other divisions that may make rules less frequently.

Some large agencies, such as the Pollution Control Agency, organize nearly all of their rulemaking by division. While this focuses attention on divisional expertise, it may have an adverse impact on regulated parties who are affected by many of the department's activities. It also raises questions regarding the consistency of approaches and attitudes toward rulemaking within the agency.

Conclusions

- Rulemaking resources in some large agencies are not organized to consider the needs of all regulated parties.

Recommendation

> **27. Agencies should organize their rulemaking resources for maximum benefit.**

Each agency should organize its rulemaking expertise to benefit all of its divisions. Internal rulemaking experts should be known throughout the agency and should be the initial contacts for divisions that do not normally make rules. Reorganization of state agencies under secretaries may allow further consolidation of these resources. For example, the secretary of health and human services may wish to have one rulemaking function for that grouping of agencies.

Impacts

- Agencies would be better able to fulfill their mandated responsibilities.
- Less time would be spent on rulemaking when staff resources are identified.
- The use of experienced staff could reduce the time needed to educate other staff in rulemaking.

IMPLEMENTATION

The CORE recommendations for change would significantly reshape rulemaking in Minnesota and affect a number of the stakeholders in the process. The legislature, governor, and state agencies would be primarily responsible for implementing the rulemaking reforms.

Implementing the rulemaking recommendations would require changes in three areas: (1) statutory laws, (2) House and Senate rules, and (3) agency practices.

Statutory changes

The law covering the Legislative Commission to Review Administrative Rules (Minnesota Statutes, Chapter 3) should be amended to provide for the LCRAR's membership to include the chairs or vice-chairs of the House and Senate governmental operations committees and the chairs of at least three policy committees from each house and to require that the commission's biennial report contain an evaluation of the volume, scope, and clarity of legislative rulemaking authorizations.

The Minnesota Administrative Procedure Act (Minnesota Statutes, Chapter 14) would need to be changed in regard to the formal rulemaking process. Specifically, it should be amended to require:

- The addition of a "notice and comment" period if substantial change is found by the administrative law judge and the subsequent approval by an ALJ;
- An annual list of all agencies' rules, to be submitted to the LCRAR along with a plan for repealing unnecessary rules and updating others;
- Modifications to the notice to solicit outside opinion to provide more usable information to the public;
- Inclusion in the statement of need and reasonableness of the alternatives the agency considered to the proposed rule and information on anticipated cost impacts on affected parties;
- Review and comment by the governor on noncontroversial rules and approval of controversial rules of boards; and
- Inclusion by those requesting a hearing of objections to the proposed rule.

The law dealing with fiscal notes in rulemaking (M.S. 3.98) should be amended to also require "rule notes" on bills that include delegations of rulemaking authority; this requirement would be similar to the one for fiscal notes. The rule note should include why the delegation is necessary, whom the rule would effect, the estimated costs to affected parties, and an estimate of how difficult the rule would be to adopt.

Finally, the requirements of the study the LCRAR should undertake in cooperation with the revisor of statutes and the House and Senate Research offices should be specified in statute. The study should consider the use of broad vs. narrow grants of rulemaking authority, how extensively broad grants of authority are used and the need for them, and the need for granting rulemaking authority to boards; it should also recommend changes to limit the scope of agency rulemaking authority and redefine or eliminate the APA fiscal impact requirements.

House and Senate rule changes

To improve legislative oversight of rulemaking, Senate Rule 35 and House Rule 5.10 should be amended to require that all bills include a clear and focused mandate, a date by which agency must adopt rules, a statement of what is expected to be achieved by each rule, and special considerations regarding rulemaking, if there are any.

These rules should also be changed to provide that the governmental operations committees may return to policy committees any bills that do not contain these elements.

Agency changes

Many CORE recommendations can be implemented immediately by agencies, without statutory or rule changes. These include:

- Regularly reviewing existing rules and repealing obsolete ones.
- Seeking exemptions from the rulemaking process for certain fee rules.
- Requesting that the legislature exempt interpretive materials from rulemaking.
- Making better use of rule variances or waivers.
- Improving notification to the general public about proposed rules.
- Circulating proposed rule language to develop impact assessments before it is published.

- Using neutral third parties in some highly controversial rule negotiations.
- Better organizing agency rulemaking resources.

Cost impacts

When implemented, CORE's recommendations would result in some short-range savings, although these would be moderated by increased efforts to review and update or repeal existing rules. Long-term savings would be realized if the legislature and the governor aggressively moved to reduce the delegations of rulemaking and provide detailed, results-oriented parameters when rulemaking is required.

Short-term savings

Rulemaking costs would be eliminated for:

- Minor rule repeals, which would be done through the revisor's technical bill, instead of by rulemaking.
- Certain fee rules, which would be exempt from rulemaking; this could affect half of all fee rules now adopted annually through rulemaking.
- Interpretative materials that could be published without going through rulemaking.

Long-range savings

The most significant cost savings generated by these recommendations would occur over a number of years as legislative and agency attitudes and practices changed. These changes would:

- Create delegations of rulemaking authority that are less policy-laden. Better defined legislative mandates would eliminate the need for some rulemaking.
- Limit and shorten the deliberations on rules to matters relating mostly to implementation of the law and administration of a service, instead of policymaking. The resulting decrease in controversy should lead to advisory task forces being able to conclude their work more quickly.
- Reduce the volume of rulemaking as alternatives, such as contracts or manuals, are used to implement programs and to instruct rather than command affected parties.
- Provide much more extensive cost information that would better enable the legislature

to decide whether to delegate the rulemaking authority or to make the law itself. In some cases, it may choose to adopt most of the possible rule as a statute, thereby eliminating the need for or greatly limiting the scope of the rule. Rules with a limited scope take less time to promulgate than those with a broad scope.

- Allow the governor to watch over and exert more influence on the rulemaking process. This could further reduce the requests for delegations of rulemaking and spur the movement of requests for rulemaking back to the Legislature when these delegations involve significant policy issues. The governor could foster the adoption of rules that focus more on expected outcomes of a program or that set standards in line with federal requirements. Until the study of past delegations of authority (to be done by the LCRAR and others) is completed, the governor may wish to restrict agencies from adopting rules that exceed federal standards.

- Result in the legislature reviewing all agency authority to promulgate rules and agencies making rules only when they are based on specific delegations of authority. The legislature would be encouraged to carefully determine when the delegation of rulemaking is necessary and to set defined policy parameters for the proposed rulemaking. From these continuous efforts, the legislature would regain control over the amount and type of rulemaking done by state agencies.

CONCLUSION

The problems with rulemaking have no simple fixes. Amending the Administrative Procedure Act would have little effect if the way the legislature delegates rulemaking authority to agencies does not also change. Accountability for executive branch rulemaking would be best increased by the governor assuming a greater role in the process, and everyone affected by rules needs a greater opportunity to participate in their making.

CORE's recommendations would not necessarily shorten the process of making rules, but quality, quantity, and prescriptiveness are problems not solved by making rules faster. To respond to these issues, CORE offers constructive ideas for reform that should bring about a wiser use of state resources, more meaningful public involvement, and the serious consideration of rule costs and benefits.

BIBLIOGRAPHY

George Beck. "State Agency Rulemaking in Minnesota: Expediting the Process and Reducing the Cost." *Hamline Journal of Public Law 4* (Spring 1983).

———. "The Role of the Administrative Law Judge in the Rulemaking Process." *Hamline Journal of Public Law and Policy 7* (1) (Spring 1986).

James R. Bowers. *Regulating the Regulators: An Introduction to the Legislative Oversight of Administrative Rulemaking*. New York: Praeger, 1990.

Keon S. Chi. "Pennsylvania's Integrated Legislative Executive Regulatory Review System." In *Innovations*. Lexington, Ky.: Council of State Governments, July 1987.

Neil Hamilton. "Legislative Oversight of Agency Rulemaking: Recommendations for Minnesota." *Hamline Journal of Public Law and Policy 7* (1) (Spring 1986).

——— and J. David Prince. "Legislative Oversight of Administrative Agencies in Minnesota." *William Mitchell Law Review 12* (2) (1986).

Phillip J. Harter. "Practice and Perspective: Regulatory Negotiation." *ADR Reports* (18 February 1988 and 3 March 1988).

Duane Harves. "The Minnesota APA and the Office of Administrative Hearing." *Hamline Journal of Public Law and Policy 7* (1) (Spring 1986).

———. *The State of Minnesota, Office of Administrative Hearings, 1975-1985, A Report on the First Decade*. Minneapolis: Minnesota Office of Administrative Hearings, 1986.

Maryanne Hruby. "Rulemaking and the Legislative Commission to Review Administrative Rules." *Hamline Journal of Public Law and Policy 7* (1) (Spring 1986).

Lyn Kathlene and John A. Martin. "Enhancing Citizen Participation: Panel Designs, Perspectives, and Policy Formation." *Journal of Policy Analysis and Management 10* (1).

Connie Levi. "Minnesota Regulatory Reform Project: An Overview." *Hamline Journal of Public Law and Policy 7* (1) (Spring 1986).

Harold L. Levinson. "Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives." *William and Mary Law Review 1* (79) (1982).

William V. Luneburg. "Federal Rulemaking at a Crossroads." *Administrative Law News 17* (2) (Spring 1992).

Paul M. Marinac. *Rulemaking in Minnesota: A Guide*. St. Paul: Office of the Revisor of Statutes, November 1991.

R. Shep Melnick. "Administrative Law and Bureaucratic Reality." *Administrative Law Review 44* (2) (Spring 1992).

Minnesota Ethical Practices Board. *Lobbying Disbursement Summary, July 1991 to June 1992*. St. Paul: Ethical Practices Board, September 1992.

Minnesota House of Representatives, Research Department. *State Agency Rulemaking Activity, July 1985-1987*. St. Paul: House of Representatives, October 1987.

James R. Nobles. "The Minnesota APA and the Legislature." *Hamline Journal of Public Law and Policy 7* (1) (Spring 1986).

"Problems with Minnesota Rulemaking," seminar, presentations by Mike Tripple, Win Borden, Mike Miles, and Steve Mihalchick; responses by Bill Brooks, Duane Harves, Becky Comstock, and Randy Young. *Hamline Journal of Public Law 5* (1) (Spring 1984).

Bernard Schwartz. "Administrative Law Cases During 1991." *Administrative Law Review 44* (3) (Summer 1992).

Mark Shepard. "Overview of the Minnesota Administrative Procedures Act." *Hamline Journal of Public Law and Policy 7* (1) (Spring 1986).

U.S. Environmental Protection Agency, Office of Policy, Planning and Evaluation. *Regulatory Negotiation Project*. Washington, D.C.: U.S. Government Printing Office, several documents, September 1989, January 1991, and February 1991.

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CORE
STATE OF MINNESOTA
COMMISSION ON REFORM AND EFFICIENCY

203 Administration Building, 50 Sherburne Ave., St. Paul MN 55155
(612) 297-1090 Fax (612) 297-1117

CORE Administrative Rules Project Outline

This CORE project focuses on Minnesota's system of rulemaking, its impact on programs, agencies and customers, costs associated with rulemaking, citizen participation in rules adoption, and the legislature's role in the process. The examination will address questions in five general areas:

I. Description of Rulemaking in Minnesota

- What was the intention of its legislative authors?
- What conditions existed that called for this process?
- What has happened in recent years?
- Which agencies use rulemaking?
- What are the kinds of matters on which rules are made?
- What are the roles of various parties in this process?
- What are the cost components associated with rulemaking?
- What costs do rules and rulemaking impose on service delivery and stakeholders?
- What informal steps exist in the process in addition to formal procedures outlined in the APA?

II. Origin and Purpose of Rules

- Where do rules originate?
- Why are rules made?
- How often are rules eliminated?

III. Citizen Participation in Rulemaking

- Who requests to be informed about proposed rules?
- Who petitions for hearings?
- Who attends hearings?

IV. Role of the Legislature

- Who is responsible for adopted rules?
- What is the role of the Legislature in the final approval or adoption of rules?

V. Rulemaking Alternatives

- What is the rulemaking process of the Federal Government?
- What are the practices in other states?
- Are there alternatives to rulemaking?

STATE OF MINNESOTA
Department of Administration

200 Administration Building
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Saint Paul, Minnesota 55155
(612) 296-3862

May 14, 1992

APPENDIX B

Dear Agency Head:

As part of its ongoing long-term reform work, the Commission on Reform and Efficiency (CORE) is examining administrative rulemaking in Minnesota. This CORE project focuses on Minnesota's rulemaking system, its impact on programs, agencies and customers, costs associated with rulemaking, citizen participation in rules adoption, and the Legislature's role in the process. This project is one of seven selected by the commission for study in 1992.

Since rulemaking activity differs from agency to agency, CORE staff are interested in gathering information from a broad base of operations. To that end, I am inviting you to participate in their process. If you have thoughts, comments, or ideas regarding administrative rulemaking, please send them to:

The Commission on Reform and Efficiency
c/o Clarence Shallbetter
309 Administration Building
50 Sherburne Avenue
St. Paul, Minnesota 55155

Staff are particularly interested in the formal and informal practices of agencies, strengths and weaknesses of the current approach, recommendations for its improvement, and challenges to enhancing the system. The project outline accompanying this memo may serve as a further framework for your ideas.

So that your information can be incorporated into their analysis, staff ask that they receive materials before June 30, 1992.

Let me thank you ahead of time for your help with this project. I think you'll agree that it's an examination that is long overdue. Your help will enable CORE to formulate meaningful recommendations that will enhance the process — benefiting not only our employees, but our customers as well.

Sincerely,

Dana B. Badgerow
Commissioner

jr/DBB

CORE STATE OF MINNESOTA
COMMISSION ON REFORM AND EFFICIENCY

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Administrative Rules Project
Focus Group Outline

CORE's focus group with your organization will cover a variety of issues associated with administrative rulemaking in Minnesota. The following outline may help in preparing for the meeting and organizing your thoughts. All ideas are welcome. We're interested in hearing your insights on how the process can be improved and made more efficient for all stakeholders involved.

I. From your perspective, what does the administrative rulemaking process look like? What are its components? Who is involved? How do they interrelate?

   A. What drives rulemaking? Where do rules originate?

   B. What informal steps exist in addition to the formal process outlined in the Administrative Procedures Act?

   C. What roles do citizens play in the process? Where is the general public involved?

   D. Who is accountable for rules that have been adopted? Who is responsible for the overall process?

II. What advantages does the present system offer? What are its strengths?

III. What are the weaknesses of the present system? What makes rulemaking difficult for you?

IV. What are your recommendations for change? What can be done that is viable and most beneficial?

V. What are the challenges associated with your recommendations? What are the challenges associated with enhancing the overall process?

APPENDIX D

CORE

STATE OF MINNESOTA
COMMISSION ON REFORM AND EFFICIENCY

203 Administration Building, 50 Sherburne Ave., St. Paul MN 55155
(612) 297-1090 Fax (612) 297-1117

August 28, 1992

Subject: Minnesota's Rulemaking Process

Dear Sir or Madam:

The Commission on Reform and Efficiency (CORE) is examining administrative rulemaking in Minnesota as part of its comprehensive review of state government. This CORE project will include an assessment of the current rulemaking system (as defined by the Administrative Procedures Act, Minnesota Law Chapter 14) and its impact on programs, agencies and customers, an analysis of citizen participation in the process, and a review of the Legislature's role in rule promulgation. This project represents one of seven areas selected by the Commission for study in 1992.

The rulemaking process involves a diverse set of stakeholders. CORE staff have already interviewed managers from a variety of state agencies, a number of key legislators, and representatives from the Attorney General's Office, the Revisor's Office and the Office of Administrative Hearings.

To gain a better understanding of external stakeholder concerns, we have developed the enclosed survey and have scheduled a series of focus group meetings for individuals who, like yourself, are on the rulemaking mailing lists of five major state agencies: Human Services, Health, Agriculture, Natural Resources, and the Pollution Control Agency. These agencies were selected because of their frequent rulemaking activity and their relationship to other CORE projects.

I invite you to become involved in this project by completing the enclosed survey and/or attending one of our focus group meetings. We are very interested in learning about your experiences with Minnesota's rulemaking process, your assessment of its strengths and weaknesses, and your recommendations for change.

So that your ideas can be included in our analysis, I ask that you return your survey by September 30, 1992. If you would like to participate in a focus group, please register with Carolyn Guderian at (612) 296-9176 by September 9, 1992. Space is limited to 15 persons per group. Focus groups will be held in St. Paul near the State Capitol and are scheduled for three dates in September:

Monday, September 14, 9:00 - 11:30 a.m.
Wednesday, September 16, 2:00 - 4:30 p.m.
Friday, September 18, 9:00-11:30 a.m.

The Office of the Legislative Auditor is also examining Minnesota's rulemaking process. CORE has invited staff from that office to participate in September's focus groups. Aggregate survey results will also be shared. This will facilitate the development of two reports that complement, rather than duplicate, one another.

On behalf of CORE, I would like to thank you for your help. The development of meaningful recommendations will require input from a variety of sources. I hope you are able to share your insights with us.

Sincerely,

Jeff Rathermel
CORE Administrative Rules Project

CORE STATE OF MINNESOTA
COMMISSION ON REFORM AND EFFICIENCY

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SURVEY OF PARTICIPANTS IN THE RULEMAKING PROCESS

Although you may not be familiar with all aspects of Minnesota's rulemaking system (the Administrative Procedures Act, Minnesota Law Chapter 14), please complete this survey based on any past experiences you may have had with the process. Your insights are important to this study.

Sources of information will be kept confidential.

Surveys Mailed = 363 Surveys Returned = 86 Number Responding Presented in ( )

1. With which state agency are you most involved? Please check only one:

- ☐ Department of Natural Resources (8)
- ☐ Pollution Control Agency (28)
- ☐ Department of Health (13)
- ☐ Department of Human Services (28)
- ☐ Department of Agriculture (4)

- ☐ Other: (5)

2. How do you become informed about a state agency's rulemaking activity? Please check all that apply:

- ☐ I am in regular contact with the state agency (45)
- ☐ I review the State Register for announcements (36)
- ☐ The agency contacts me (55)
- ☐ I am informed through professional networks/newsletters (50)
- ☐ I ask to serve on agency rules advisory committees (29)
- ☐ I am (or have been) asked to be on agency advisory committees (40)
- ☐ I attend public hearings on rules before an Administrative Law Judge (41)
- ☐ I submit comments to the agency or Administrative Law Judge (50)

- ☐ Other: (8)

3. When do you become involved in state agency rulemaking? Please check all that apply:

- ☐ During discussion of issues that may lead to a new rule, or a rule change (53)
- ☐ Before any notice is published by the agency in the State Register (40)
- ☐ After the agency solicits outside opinion in the State Register (49)
- ☐ After the agency publishes notice of intent to adopt a rule in the State Register (59)
- ☐ During public hearings in front of Administrative Law Judges (38)
- ☐ After public hearings in front of Administrative Law Judges (26)

- ☐ Other: (9)

4. What advantages or opportunities does rulemaking offer you, or those you represent?

Responses are included in the findings and conclusions of this report.

5. What disadvantages or problems have you experienced with the process?

Responses are included in the findings and conclusions of this report.

6. How would you characterize opportunities for public participation in the rulemaking process?

- ☐ There are <u>not enough</u> opportunities for public participation (30)
- ☐ There are <u>adequate</u> opportunities for public participation (45)
- ☐ There are <u>too many</u> opportunities for public participation (1)

Comments: _____

_____

7. Do you feel you are able to affect the rulemaking process?

- ☐ Yes (60)
- ☐ No (24)

Comments: _____

_____

8. If you could modify the way rulemaking is done in Minnesota, what would you change?

Responses are included in the findings and conclusions of this report.

9. What are the challenges to implementing your recommendations in question 8?

Responses are included in the findings and conclusions of this report.

10. Your name: _____

11. Name of affiliated organization: _____

12. Who does your organization represent? Please check <u>all that apply</u>:

- ☐ Service providers (33)
- ☐ Regulated parties (41)
- ☐ Consumers or clients (43)
- ☐ The general public (28)
- ☐ Licensed parties (26)
- ☐ Governmental unit(s) (23)
- ☐ Special interest(s) (7)

- ☐ Other: (7)

13. Do you have other comments regarding Minnesota's rulemaking system? If so, please use the space below for your ideas:

Responses are included in the findings and conclusions of this report.

Thank you for your participation.

Please return this survey in the enclosed stamped envelope by September 30, 1992.

If you would like to provide your comments in person and discuss your views more fully in a group meeting, please call Carolyn Guderian at (612) 296-9176 to register for one of our rulemaking focus groups. Please register by September 9, 1992. Focus group meetings will be limited to 15 persons and will be conducted on September 14, from 9:00 to 11:30 a.m., September 16, from 2:00 to 4:30 p.m., and September 18, from 9:00 to 11:30 a.m. All meetings will take place in St. Paul at the State Capitol or the Centennial Office Building. Room assignments will be made after participants have registered.

Chronology of Minnesota's Administrative Procedure Act

The following summary chronicles the major events in the development of Minnesota's Administrative Procedure Act (APA). For a detailed discussion of all amendments through 1985, see *The State of Minnesota, Office of Administrative Hearings, 1975-1985, A Report on the First Decade,* by Duane Harves, chief administrative law judge.

1941 The commissioner or head of any agency was allowed to prescribe rules and regulations for the conduct of the agency unless expressly forbidden by law. Any rules affecting persons other than the agency had to be filed with the secretary of state. This law is considered the predecessor of the APA.

1945 Agencies were required to hold a public hearing after first giving 30 days' notice to interested persons who registered with the secretary of state; agencies had to submit the rules to the attorney general with reasons for the rule; the attorney general approved or disapproved the rules based on form and legality; approved rules became effective 30 days after they were filed with the secretary of state.

1957 The first comprehensive APA was created. It added the requirement that rules be based on a show of need. Agencies conducted their own hearings.

1974 The Legislative Commission to Review Administrative Rules (LCRAR) was created and given the authority to review and suspend agency rules. Suspended rules remained that way until the next regular legislative session, when a bill permanently repealing the rules would need to be passed by both the House and Senate and signed by the governor, or the suspended rules would become effective again. (This remains generally unchanged.)

The *State Register* was created to publish all notices of intended action, hearing notices, and approved rules.

1975 The Office of Administrative Hearings (OAH) was created, along with procedures for conducting hearings. All rules were to have a hearing conducted by this office before adoption.

The definition of *rule* was expanded to reduce the amount of discretion of state agencies: a rule includes "every agency statement of general applicability and future effect." This change was driven by perceived violations of the rulemaking provisions of the APA; agency guidelines or policy statements had been issued without any public participation.

Agencies now had to make an affirmative presentation of the need for and reasonableness of proposed rules.

1977 *State Register* publishing requirements were amended to specify that the Department of Administration provide one free copy to each county library (or county-designated library) and one copy of the manual of agency rules. This increased the cost of rulemaking.

The date on which a rule became effective was changed from 20 to five days after it appeared in the *State Register.*

1980 A notice and comment procedure was added for noncontroversial rules. Before this, all rules required a hearing conducted by the OAH. This change provided that if seven or more persons objected, the agency had to hold a hearing. Noncontroversial rules were approved by the attorney general.

The revisor of statutes was added to the rulemaking process and given substantive responsibilities. The revisor must approve the form of rules language before publication.

Deadlines were imposed on agencies: a proposed rule must be published within six months of the enactment of the authorizing legislation, or agencies must report to the legislature for failing to do so; agencies also must adopt the rule within six months of the administrative law judge's report following a hearing or report to the legislature for failing to do so.

1982 A requirement was added to consider the impact on agricultural lands when proposing rules.

1983 Consideration of the impact on small business was added; the LCRAR can review.

The Court of Appeals was created.

1984 A requirement was added that authority granted for emergency rulemaking must be used within six months, or it is lost.

The number of persons required to force an agency to go to hearing was raised from seven to 25. The new number was taken from the Model State Administrative Procedure Act, which was formulated in 1981.

1985 A requirement was added that agencies prepare fiscal notes for rules that would result in increased, mandated costs to local agencies.

The revisor of statutes was directed to assess the agency the costs of drafting and reviewing rules; the attorney general was directed to assess agencies the costs of the required review of rules and all other services provided to them.

1989 The LCRAR was given authority to periodically review exemptions to the rulemaking provisions of the APA.

1990 Agencies proposing rules to establish fees were required to send a copy of the proposed rules to the chairs of the House Appropriations and the Senate Finance committees.

Agencies were required to send the statement of need and reasonableness to the LCRAR.

1992 Provision for "harmless error" was added, which allows the attorney general or the administrative law judge to disregard any error or defect in the rulemaking proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule, based on two criteria: (1) that the failure did not deprive any person or entity of the opportunity to participate in the rulemaking; and (2) that the agency has corrected the error or failure so that it did not deprive any person or entity the opportunity to participate.

The Role of the Governor in Iowa's Administrative Rulemaking Process

Iowa's procedure for gubernatorial suspension or recision of administrative rules is similar to that set out in the Model State Administrative Procedure Act (MSAPA). The agencies work closely with the administrative rules coordinator (ARC), who is appointed by the governor to provide legal counsel and monitor the administrative rules process for the governor. Iowa's law differs from the MSAPA in that its governor does not have to go through formal procedures to rescind a rule but must act within 70 days of the rule's adoption.

The first step in the process of promulgating an administrative rule in Iowa is for the agency to send the proposed rule to the ARC. The ARC then reviews the rule for proper procedure and substance (whether the rule is in compliance with the procedural requirements of the Iowa APA and the substance of the rule is within the statutory grant of power to the agency or whether the rule is arbitrary and capricious.)

The ARC then forwards the notice of the rule to the code editor for publication. At this time, the ARC may also informally recommend changes to the agency to fix any problems.

After the rule is formally adopted, a copy of it is sent to the governor, who has 70 days in which to rescind it. The governor must issue the recision in a form similar to a legislative veto, describing the action and stating why it is being taken. After the 70 days, the governor cannot rescind an adopted rule. A governor has rescinded a rule only once since this office was given this power. The ARC attributes this to very good working relationships between the governor's office and agencies at the early stages of the rulemaking process, not to an inefficiency in the process.

The governor also has the same objection power held by the Legislative Review Committee and the attorney general. If the governor objects to all or some portion of a proposed or adopted rule because it is deemed to be unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency, the governor may notify the agency in writing of the objection. This objection shifts the burden of proof to the agency to show that the rule is not unreasonable, arbitrary, capricious, or beyond the authority of the agency in any future court proceeding challenging the rule.

Legislative Oversight in Iowa and Wisconsin

Iowa's legislative review

Iowa's legislative Administrative Rules Review Committee (ARRC) is composed of five legislators from each house. It meets once a month for a day to a day and a half and has at its disposal the full staff of the administrative code editor.

Every rule may be looked at by the ARRC at one of two times:

1. When the rule appears as a notice of intended action in the Iowa *Administrative Bulletin.*

2. When it is presented in final form for publication in the *Bulletin.*

The staff of the ARRC reviews all proposed and final form rules to determine if the committee should review them. About 95 percent of all rules are reviewed by the ARRC. Only the purely inconsequential procedural rules (for example, a change of address) are not reviewed.

At the ARRC meeting, the agency that promulgated a rule explains the rule to the committee. ARRC meetings are open to the public, and any interested person may appear and present testimony. Although the ARRC does not have the power to veto a rule, it does have four courses of action:

1. It can accept the rule, or it can object. If it objects because it believes the rule is unreasonable, arbitrary, capricious, or poor public policy, the burden of proof in any future court challenge is shifted to the agency to prove otherwise.

2. It can demand an economic impact statement from the agency. This statement will include who will be affected by the rule, what this effect will be and when it will occur, and how much it will cost to implement the rule. Only two members are needed to call for an economic impact statement.

3. It can enact a 70-day delay to the rule going into effect. The ARRC typically does this if the rule is controversial. This allows for negotiations between the agency and the affected parties and for further study. This action requires a two-thirds vote by the committee.

4. It can enact a delay until the next session of the legislature. Rules delayed in this manner are referred through the speakers of the House and Senate to the appropriate standing committees. To disapprove a rule, the standing committees must have a joint resolution passed by the joint assembly, in which case the agency must withdraw the proposed rule. If the joint resolution fails, the rule takes effect.

Wisconsin's legislative review

The first step in Wisconsin's rule promulgation process is the agency's submission of a proposed rule to the Legislative Council Rules Clearinghouse (LCRC) for review. The LCRC reviews each proposed rule mostly for procedural defects, such as in form, style, technical adequacy, clarity, and the use of plain language. The LCRC also looks at whether there is statutory authority for the proposed rule. LCRC staff have 20 days to review the proposed rule after which it returns the rule to the agency with a written critique.

After the LCRC review, the agency is, in most cases, required to hold a public hearing on the proposed rule. The exemptions to this requirement include interpretive rules, emergency rules, or rules for which no interested parties have been identified.

Legislative review starts after this hearing, when the agency sends the final draft of the rule to the presiding officers of each house, who then refer the rule to the appropriate standing committees.

The standing committees then generally have 30 days in which to review the proposed rule. They may extend this period if they want to meet with the agency. The agency cannot promulgate the rule during this period. These committees meet year around but not regularly. The chairperson decides whether to hold a hearing and will do so if enough members of the committee want one; hearings usually are not held. Some of these committees take an active role in the review, while others are passive and rubber-stamp everything.

If neither the House nor the Senate committee takes action, the agency may complete the promulgation of the proposed rule. If either committee, by majority vote of a quorum of the committee, recommends modifying the rule and the agency agrees, the review period is extended. No limit exists on the number of times this period of recommendation and modification can recur.

If either committee objects to a proposed rule, the rule must be referred to the Joint Committee for Review of Administrative Rules (JCRAR). The JCRAR has 30 days to take one of three actions:

1. It may not concur with the committee objection, in which case the rule is promulgated;

2. It may seek rule modifications with the agency in the same way the committees may; or

3. It may object to the rule and concur with the reviewing committee.

Very few rules are objected to by the standing committees, and still fewer are objected to by the JCRAR. Of the 213 proposed rules to go through the LCRC in 1985, only eight were objected to by the standing committees, and the JCRAR did not concur with any of these objections. From 1986 to 1989, standing committees objected to one, five, four, and six rules, respectively. The JCRAR concurred with two of these objections, both in 1989.

If the JCRAR objects to the rule, it must introduce within 30 days a bill in each house to prevent the promulgation of the rule. If both bills are defeated or are not enacted in any other manner, the agency may promulgate the proposed rule. If either bill is enacted, the agency may not promulgate the proposed rule unless a subsequent law specifically authorizes its promulgation. The JCRAR works with the standing committees as somewhat of a referee to resolve disputes between them and the agencies. The JCRAR rarely has to introduce a bill to prevent the promulgation of a rule.

The JCRAR also has the statutory authority to suspend rules that have been promulgated and are being enforced. The JCRAR first must receive testimony on the suspension at a public hearing. If the JCRAR suspends a rule, it must introduce within 30 days a bill in each house to repeal the suspended rule. If both bills are defeated or are not enacted in any other manner, the rule remains in effect, and the JCRAR may not suspend it again. If either bill is enacted, the rule is repealed and may not be promulgated again by the agency, unless a subsequent law specifically authorizes such action.

JCRAR hearings on the possible suspension of a rule are rare — one or two a session — and are precipitated by public, interest group, or legislator complaint.

Legislative Oversight Structures in Other States

All states except Delaware have an administrative procedure act.

Forty-one states have some legislative committee system for reviewing rules included in their APAs. The nine states without formal systems for legislative review are: Arizona, California, Delaware, Hawaii, Mississippi, Nebraska, New Jersey, New Mexico, and Rhode Island.

In nine states, legislative committees have only advisory powers — recommending legislation to suspend, repeal, or nullify a rule: Arkansas, Florida, Maryland, New York, Oregon, Texas, Utah*, Virginia, and Washington.

Legislative committees may suspend a rule in nine states: Alabama, Connecticut, Illinois, Iowa, Minnesota, Missouri, Ohio, South Dakota, and Wisconsin.

In three states, legislative committees may shift the burden of proof to an agency in future court challenge of a rule: New Hampshire, North Dakota, and Vermont.

Legislative committees may introduce legislation or initiate resolutions to veto a rule in 20 states: Alaska, Colorado*, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Montana, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee*, West Virginia, and Wyoming.

In all states, legislatures may enact legislation to veto a rule; however, legislatures in 15 states have the power through their APA to veto a rule by resolution. In only three states are legislatures explicitly allowed to do so by their constitution through an amendment (†). States in which the legislature may veto a rule through a resolution include: Alabama, Connecticut†, Georgia, Idaho, Illinois, Iowa†, Kansas, Louisiana, Massachusetts, Michigan†, Nevada, Ohio, Oklahoma, Pennsylvania, and South Carolina.

Information for this appendix was obtained from *Legislative Review of Administrative Rules and Regulations, 1990* by the National Conference of State Legislatures.

*These states have a rules sunset system in which rules expire each year unless extended by the general assembly.

Office of the Attorney General
Rule Review Checklist

File No. _____
DATE RECEIVED _____
REVIEW DATE _____
DUE DATE _____
(DIS)APPROVED _____
WITHDRAWN _____

Docket No. _____
ADOPTED W/O HEARING _____
EMERGENCY RULE _____
TO REVISOR ON _____
REVISOR (DIS)APPROVED _____
FILED W/SEC. OF STATE _____
RETURNED TO AGENCY _____

_____ Rule as adopted (4 copies)
_____ Notice to Solicit Outside Information/Opinion (if applicable)

_____ Date published in *State Register*
_____ Comments

_____ Petition for Adoption of a Rule
_____ Board's Authorizing Resolution

_____ Date adopted

_____ Proposed Rule

_____ Revisor's Certificate

_____ Notice of Intent to Adopt Rule

_____ Statutory Authority
_____ Small Business Statement
_____ Expenditure of public money statement
_____ Signature

_____ Statement of Need and Reasonableness (if applicable)

_____ Small Business Statement
_____ Fees — § 16A.128

_____ Affidavit of Mailing Notice of Intent to Adopt Rule

_____ Dated 30/25 days before adoption
_____ Notice attached indicates it is attached
_____ Copy of rule or summary attached

_____ Publication in *State Register*

_____ Dated 30/25 days before adoption

_____ 180-day deadline from:

_____ Effective date of law requiring rule (14.12) (both rules) amendments don't apply
_____ Effective date of statutory authority (§ 14.29) (emergency rules)

_____ Resolution Adopting

_____ Date adopted

_____ Findings of Fact, Conclusions & Order Adopting

_____ Date

_____ Written Requests, Submissions or Comments
_____ Declaration of Attorney

_____ Name of SAAG representing agency

_____ Notice of Submission to Attorney General (if applicable)
_____ Affidavit of Mailing Notice to Attorney General (if applicable)

OFFICE OF ADMINISTRATIVE HEARINGS
RULE FILING CHECKLISTS

APPENDIX J

Initial Filing - 1400.0300	Date	Comments
____A. Copy of Rules (Revisor apprd)	_____	
____B. Order for Hearing	_____	
____1. time, date, place		
____2. statement that NoH will be given to all persons who have registered		
____3. NoH will be published in State Register		
____4. signature of authorized person (if Board, document of authority attached)		
____C. Notice of Hearing	_____	
____1. time, date, place		
____2. statement of opportunity for all interested persons to participate		
____3. description of subjects and issues with notice of availability (alternatively a copy of the proposed rules attached to the NoH)		
____4. statutory authority to adopt rules cited		
____5. statement of how to present views and that the proposed rules may be changed		
____6. lobbyist registration statement (w/address and phone of Ethical Prc. Bd.)		
____7. 5 to 20 + 5 comment period statement		
____8. required Notice on report availability		
____9. SONAR at OAH		
____10. expediture of public money by local public bodies*		if required
____11. small business*		if required
____12. agricultural land*		if required
____13. Cite to APA + rules		
____14. ALJ name + address		
____D. Duration and Attendence	_____	
____E. SONAR	_____	
____F. Affidavit of Discret. Notice	_____	
____G. Notice to Finance re: Fees*	_____	if required

SONAR Contents - 1400.0500	Comments

A. Summary of Evidence and Argument

1. citations to statutes or case law
2. citations to manuals or treatises
3. list of witnesses
4. summary of testimony

B. (if applicable) Statements
1. compliance with M.S. § 14.115
2. compliance with M.S. § 14.11, subd. 2 and M.S. § 17.80 to 17.84
3. compliance with M.S. § 15.43, subd. 1 and M.S. § 116.07, subd. 6
4. compliance with M.S. § 144A.29, subd. 4

C. (if modifying a fee) Approval from the Commissioner of Finance

D. Any other requirements of law or rule

Prehearing Filing - 1400.0600	Filed?	Date	Comments
A. Notice of Hearing (as mailed)	_____	_____	
B. Certification that the mailing list is accurate and complete	_____	_____	
C. Affidavit of mailing to list	_____	_____	
D. Affidavit of additional notice	_____	_____	
E. Rule Petition (if any)	_____	_____	
F. Copy of State Register Solicitation of comments together with copies of any comments received	_____	_____	
G. Names of Agency Personnel and any other witnesses to testify at the rule hearing	_____	_____	
H. Copy of State Register publication of the proposed rules and notice of hearing	_____	_____	

Prehearing Filing - Chapter 14	Filed?	Date	Comments
A. Statment of SONAR filed with LCRAR	_____	_____	
B. (if modifying a fee) M.S. § 16A.128, subd. 2a notice to Committees	_____	_____	
C. mailing of NoH to commentators	_____	_____	

OFFICE OF ADMINISTRATIVE HEARINGS

RULE FILING CHECKLISTS

INITIAL FILING - Minn.. Rule 1400.0300	YES	NO	DATE FILED	COMMENTS
A. Order for Hearing:				
1. Specify time, date, place				
2. Statement of Notice to those registered and publication				
3. Signed by person authorized, and, if a Board, accompanied by document of authority				
B. Copy of Rules				
C. Notice of Hearing:				
1. Time, date, place				
2. Statement that all interested parties will have opportunity to participate . .				
3. Description of subjects and issues				
a. If copy not attached, then clearly indicate nature and extent				
b. Statement of availability and how to obtain one free copy				
4. Authority to adopt				
5. How may present views and notice that rules may be modified as a result of hearing				
6. Ethical practices statement, include law and address for questions				
7. 5-20+3 day notice re: record				
8. Notice re: report availability				
9. Statement of Need availability and content				
10. Expenditure by local public body notice 14.11, subd. 1				
11. Cite to APA and our rules				
12. Questions to administrative law judge				
13. Name and address of administrative law judge				
14. Small business statement if required . .				
15. Agricultural land statement if required .				
D. Statement of Duration and attendance expected				
E. Statement of Need and Reasonableness				
F. Statement of Additional Notice				

PREHEARING FILING - Minn. Rule 1400.0600	YES	NO	DATE FILED	COMMENTS
A. Notice of Hearing as mailed				
B. Certification that list is accurate and complete				
C. Affidavit of Mailing to list				
D. Additional Notice Affidavit				
E. Rule Petition, if any				
F. Comments received following request with copy of request for comments				
G. Names of Agency personnel or others solicited by it to appear				
H. Copy of State Register in which Notice and Rules were published or photocopy . .				

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