

Mark Shepard, Legislative Analyst
651-296-5051

Administrative Rulemaking

Administrative rulemaking is the process by which executive branch state agencies adopt rules that have the force of law. This information brief:

- ▶ describes the general policy underlying administrative rulemaking, and defines a rule;
- ▶ describes procedures used for adopting administrative rules in Minnesota; and
- ▶ describes methods of reviewing existing rules.

The legislature often delegates rulemaking powers to executive branch agencies.

Properly adopted agency rules have the force of law, so delegating rulemaking authority is delegating authority to make law. Agencies only have rulemaking authority to the extent that the legislature grants it. Courts invalidate agency rules that exceed or conflict with the legislative delegation of rulemaking authority.

Usually the legislature enacts the basic policy and permits or requires an agency to adopt rules to implement the details of this policy. The typical reasons for delegating rulemaking authority to agencies are that the legislature does not have the time or expertise to deal with all aspects of a topic.

Recently, the legislature often has tried to narrow the scope of rulemaking authority that it delegates to agencies. Some legislative committees have attempted to write more substantive standards into law, instead of leaving these to agency rulemaking. In other cases, committees have limited the subject matter on which agencies may adopt rules.

A “rule” is an agency statement of general applicability and future effect, made to implement a law.

In most cases an agency must follow Administrative Procedure Act (APA) rulemaking procedures when it issues a statement that comes within the definition of a “rule.” For example, when the legislature mandates new regulation of an occupation, the agency actions setting initial qualification standards and continuing education requirements must be established by rule if they are not specifically set forth in the enabling legislation. Courts invalidate agency attempts to set policy without following rulemaking procedures.

The Administrative Procedure Act establishes procedures that agencies must follow in adopting rules.

The rulemaking process, established in Minnesota Statutes, chapter 14, has three major components:

- ▶ procedures that must be followed before an agency formally proposes rules;
- ▶ procedures related to possible public hearings; and
- ▶ procedures related to review of proposed rules by an administrative law judge (ALJ).

Each of these three components is summarized in more detail below. These summaries do *not* include all of the detailed procedures that agencies must follow. For a more detailed summary of these procedures see “Rulemaking in Minnesota: A Guide” on the Office of the Revisor of Statutes website (www.revisor.leg.state.mn.us).

An agency must comply with the following requirements before formally proposing rules.

- ▶ **Rulemaking docket:** An agency must maintain a rulemaking docket. This docket must contain information on rules that the agency is thinking about proposing and on rules that are in the middle of the rulemaking process. [Minn. Stat. ' 14.366.](#)
- ▶ **Solicitation of comments:** An agency must solicit comments from the public on the subject matter of the possible rules before publishing a notice of proposed rules. [Minn. Stat. ' 14.101.](#)
- ▶ **Statement of need and reasonableness:** An agency must prepare a statement of the need for and reasonableness of the proposed rules. The statement must be available to the public. The statement must contain a summary of evidence and arguments that the agency intends to use to support the proposed rules. The statement must also:
 - (1) determine if there are less costly or less intrusive methods for achieving the purpose of the proposed rule;
 - (2) describe alternative methods for achieving the purposes of the proposed rule that were seriously considered, and give reasons why these alternatives were rejected; and
 - (3) assess the probable costs of complying with the proposed rule.

[Minn. Stat. ' ' 14.131 and 14.23.](#)

An agency must publish proposed rules and provide an opportunity for interested people to request a public hearing.

- ▶ **Notice:** An agency must publish notice of proposed rules in the State Register. It must mail this notice to people who have requested to be notified and must make other reasonable efforts to notify people who may be significantly affected by the proposed rules. [Minn. Stat. ' ' 14.14, subd. 1a, and 14.22.](#)
- ▶ **Public hearing:** An agency must conduct a public hearing on proposed rules if 25 or more people submit a written request for a hearing. About 25 percent of agency rules are adopted with a public hearing. [Minn. Stat. ' 14.25.](#)

If no public hearing is required, the agency presents its own evidence into the record and accepts material from the public.

If a public hearing is held, it is conducted by an independent ALJ. At the hearing the agency must make an affirmative presentation demonstrating the need for and reasonableness of the proposed rules. The public may testify and may question agency representatives. [Minn. Stat. ' 14.14.](#)

An independent ALJ must assess the agency's compliance with procedural and other legal requirements.

An ALJ from the Office of Administrative Hearings reviews all proposed rules, whether or not a public hearing was held. [Minn. Stat. ' ' 14.15](#) and [14.26.](#)

- ▶ **ALJ review:** If the ALJ determines that the agency has *not* met APA requirements, including demonstrating the need for and reasonableness of the proposed rules, the rules are submitted to the chief ALJ. If the chief supports the ALJ, the agency may not adopt the rule until the defects are corrected.
- ▶ **LCC comment:** If the chief ALJ determines that the agency has not established the need for or reasonableness of the rules, the rules are submitted to the Legislative Coordinating Commission (LCC) and to the House and Senate governmental operations committees for comment.

The legislature has created an expedited rulemaking process and exemptions from the APA rulemaking procedures.

Expedited Process

The APA contains an expedited process for adopting rules. This process may be used *only* when specifically authorized by law. Under the expedited process, an agency publishes notice of its proposed rule in the State Register and mails notice to those who have requested notice. The agency must then allow at least 30 days for comment. At the end of the comment period and after an ALJ approves the form and legality, the agency may adopt the rule. [Minn. Stat. ' 14.389.](#) There is a separate expedited process for repealing obsolete rules. [Minn. Stat. ' 14.3895.](#)

Specific Exemptions

The legislature sometimes enacts specific laws providing that agency policies that come within the definition of a "rule" may be adopted without complying with the APA. Under the general law governing new rulemaking exemptions:

- ▶ the Revisor of Statutes must approve form;

- ▶ the Office of Administrative Hearings must approve legality;
- ▶ a copy of the exempt rule must be published in the State Register; and
- ▶ the rule is effective only for two years.

The legislature has provided that even these requirements do not apply to certain types of exempt rules. [Minn. Stat. ' 14.386](#).

Good Cause Exemptions

In limited circumstances an agency may omit rulemaking procedures. This can be done only if the rulemaking procedures are unnecessary, impracticable, and contrary to the public interest, and if the rule:

- (1) addresses a serious and immediate threat to public health, safety, or welfare;
- (2) complies with a court order or federal law in a manner that does not allow for compliance with rulemaking procedures;
- (3) incorporates changes in law when no interpretation of law is required; or
- (4) makes changes that do not alter the meaning or effect of a rule.

Rules adopted under clauses (1) and (2) are effective only for two years. [Minn. Stat. ' 14.388](#).

Variances

Agencies may grant variances from rules. Some agencies have specific statutory variance authority and standards. The APA provides general authority and standards for granting variances for agencies whose variances are not governed by other law. [Minn. Stat. ' ' 14.055](#) and [14.056](#).

All three branches of state government have authority to review administrative rules.

Adopted rules are published by the Revisor of Statutes in Minnesota Rules. Rules also are available at the Minnesota Legislature's website at www.leg.state.mn.us by clicking on the link to Laws, Statutes, and Rules. A set of Minnesota Rules is comparable in size to a set of Minnesota Statutes.

Executive Review

- ▶ The governor may veto all or a severable portion of a proposed administrative rule at the end of the rulemaking process, before the rule takes effect. To veto a rule, the governor must submit notice of the veto to the State Register within 14 days of receiving a copy of the rule from the secretary of state. [Minn. Stat. ' 14.05, subd. 6.](#)
- ▶ An agency that adopts rules may repeal or amend them. A repeal or amendment of a rule is itself considered a “rule” and can be done only after following the usual APA rulemaking procedures.

Legislative Review

- ▶ The legislature can pass a bill repealing or amending a rule, or changing the permissible scope of the rule. If the legislature removes the statutory authority for rulemaking, rules adopted under that authority are automatically repealed. [Minn. Stat. ' 14.05, subd. 1.](#)
- ▶ The legislature has authorized the LCC (or a special subgroup created by the LCC) to investigate complaints about rules. The commission or the House or Senate governmental operations committees may also formally object to rules. An objection shifts the burden of proof to the agency to show that the rule is valid if it is challenged in court. [Minn. Stat. ' 3.842, subd. 4a.](#)
- ▶ The legislature has created a schedule under which it will review rules of cabinet-level agencies from the 2002 through the 2005 legislative sessions. [Minn. Stat. ' 14.3691.](#)
- ▶ The House and Senate standing committees with jurisdiction over the subject matter of a rule may vote to delay the effect of a proposed rule until the legislature adjourns the annual legislative session that begins after the vote of the committees. [Minn. Stat. ' 14.126.](#)

Judicial Review

An agency rule may be challenged in the court of appeals. The court must declare a rule invalid if it finds the rule:

- ▶ is unconstitutional;
- ▶ exceeds the statutory authority of the agency; or
- ▶ was adopted without complying with the APA requirements.

[Minn. Stat. ' 14.45.](#)

Courts have invalidated a number of rules, often on the ground that the rule exceeds statutory authority. A key issue in these cases is what the legislature intended when it granted rulemaking authority to the agency.

Local governments can petition an agency for amendment or repeal of a rule.

This authority applies to cities, counties, and sanitary districts. The authority expires July 31, 2006. An agency may use the expedited rulemaking process under section [14.389](#) to amend or repeal the rule as requested by the petition. If an agency does not take the action requested by a valid petition, an ALJ will hold a hearing on the continued need for and reasonableness of the rule. If the agency does not demonstrate the continued need for or reasonableness of the rule, a possible outcome is that the rule will no longer have the force of law. [Minn. Stat. ' 14.091](#).

Any person may petition an agency for adoption, amendment, or repeal of a rule.

An agency must respond to a petition within 60 days, giving reasons for its response. However, unlike a petition from a unit of local government, there is no public hearing process or other remedy if the agency decides not to take the action requested by the petition. [Minn. Stat. ' 14.09](#).

Any person may petition the Office of Administrative Hearings alleging that an agency is improperly enforcing a policy without going through rulemaking.

If the ALJ determines that the agency is enforcing or attempting to enforce a policy as though it were a duly adopted rule, the ALJ must direct the agency to cease enforcement of the unadopted rule that is the subject of the petition. It is not an unadopted rule when an agency enforces a law or rule by applying the law or rule to specific facts on a case-by-case basis. [Minn. Stat. ' 14.381](#).