



Key Elements of the Rulemaking Process

Iowa Code Chapter 17A, the Iowa Administrative Procedure Act (IAPA)

The statute governing rulemaking by executive branch agencies, establishing the Administrative Rules Review Committee (ARRC), providing for judicial review of rulemaking and other agency action, and other matters. The IAPA establishes specific procedures which must be followed by agencies adopting rules. The IAPA is a procedural code, meaning the IAPA is concerned with how an agency creates its policy through rulemaking rather than the specific policy implemented. The rulemaking process is largely established by §§17A.4 and 17A.5.

Iowa Administrative Bulletin (IAB)-§§2B.5A, 17A.4(1), 17A.5

A biweekly publication containing all rulemaking proposed or adopted by executive branch agencies. The IAB also contains the schedule for rulemaking, other notices required by statute or approved by the ARRC that are not related to rules, and other matters.

Iowa Administrative Code (IAC)-§2B.5A

The IAC dates back to 1975 and contains rules adopted by over 100 agencies. It is updated on a biweekly basis when the IAB is published. The IAC is organized alphabetically by agency, with some agencies organized under larger parent agencies. Each agency is assigned its own space in the IAC under an agency identification number and arranges its own rules by chapter within that space. Each chapter is followed by history lines setting out each amendment that has been made to the chapter. Since 2008, each rule has such history lines as well.

Legislative Review: the Administrative Rules Review Committee-§§17A.4, 17A.8

During the rulemaking process, both proposed rulemaking and final adopted rulemaking can be reviewed by the ARRC. Most filings are reviewed. Generally, proposed rulemaking is reviewed by the ARRC after the notice of intended action is published in the IAB but before it is adopted, and adopted rulemaking is often reviewed after publication in the IAB but before it is effective. Review includes agency personnel explaining the rulemaking and answering questions by ARRC members and also members of the public commenting on the rulemaking and being questioned.

The ARRC may delay the effective date of an adopted rule for an additional 70 days or until the end of the next regular session of the General Assembly. The ARRC may object to a rule, which eliminates the presumption that the rule was legally valid in the event the rule is taken up in subsequent litigation relating to the subject of the objection. The ARRC has a variety of oversight powers for emergency rulemaking. The ARRC has additional, less commonly used powers as well.

The General Assembly as a whole has the constitutional authority to nullify any rule by joint action of both the Senate and the House and can affect rules in various ways through the passage of regular legislation as well.

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Scope of Rulemaking

The scope of each rulemaking document is set by the agency. Rulemaking can address entire rules or chapters of rules, or it can change individual words within a particular rule, or a combination thereof. A rulemaking document can add new rules, amend existing rules, or delete existing rules, or a combination thereof. Rulemaking is not restricted to one particular rule or issue, so a single rulemaking document can embrace a large number of related or even unrelated changes.

Notice of Intended Action-§17A.4(1)(a)

Notice must be published in the IAB at least 35 days before proposed rules are adopted in final form. The notice sets out the specific rule changes proposed by an agency. This notice is referred to as a “notice of intended action.”

Preamble: Synopsis of the Rulemaking Document-§17A.4(1)

Prior to the text of the rule language itself, a rulemaking document contains a preamble, which includes a summary of the subject matter and a citation to the specific statutory authority for the proposal. The summary should include at least a brief explanation of the principal reasons for the rulemaking and the effects of the rulemaking. The preamble also contains standard language as to the availability of a public hearing, the time and method for the submission of written comments, review by the ARRC, and other matters. An agency may also use the preamble as a mechanism to present more detailed information on the reasoning behind the proposal or to describe its history.

Public Comments and Opportunity for Oral Presentation (Public Hearing)-§17A.4(1)

The public must be allowed not less than a 20-day period to submit written comments on the notice to the agency. The method and deadlines for these submissions are set out in the notice.

The notice must also identify the mechanism for requesting an “opportunity for oral presentation,” informally known as a public hearing, if one is not already scheduled. This opportunity is only a right to express views and make arguments to a representative of the agency. The representative of the agency is not obligated to respond to the comments, only to receive them. Notice of the hearing must be published in the IAB at least 20 days in advance and is typically included in the notice of intended action. An agency may choose to schedule multiple public hearings on a notice.

Public participation in a public hearing is open to any “interested person,” meaning literally anybody. This phrase includes individuals, corporations, associations, or any other entity. A particular legal interest is not required; anybody is entitled to offer comment on a proposed rule without regard to the nature of their interest. Once a public hearing is scheduled, anyone is entitled to attend and speak. Participation is not limited to the persons or groups who make the initial request. Most agencies have adopted rules describing how they will conduct public hearings.

Unlike written submissions, a public hearing is not an automatic right. An agency can schedule a public hearing of its own volition, but only a limited number of persons can demand that a hearing be held if an agency does not initially choose to do so: the ARRC, 25 persons, a group representing 25 persons, a governmental subdivision, or an agency. When the agency does not schedule a hearing in the initial

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notice, a subsequent request delays the entire rulemaking process, as notice must still be given in the IAB at least 20 days in advance. For this reason, agencies should routinely schedule a public hearing as part of any rulemaking that might be controversial to avoid such a delay.

Agencies are required to “consider fully” all written and oral comments they receive, but such comments are not binding upon an agency in its decision making process.

Period for Adoption-§17A.4(1)

The 35-day period before a notice can be adopted is a minimum. Generally, adoption takes longer. Adopting in 35 days occurs only in rulemaking where every one of the procedural deadlines have been met on the earliest possible date. This notice period is limited. The agency has 180 days to either adopt the noticed language in final form or terminate the rulemaking. A notice which is not adopted within that period is void; the notice process must begin again if the agency still wants to pursue adoption. The 180-day period begins either on the date the notice was published in the IAB or the date of the last public hearing, whichever is later.

Substantive proposals require full and fair consideration before adoption by the agency. Since the first 20 of the minimum 35 days of the notice period are dedicated to public participation, this leaves only 15 days for consideration and analysis of that public comment, if the agency wishes to adopt as quickly as possible. More commonly the notice period runs 45-90 days, depending on the complexity of the public comment and the subject matter of the rulemaking.

Publication and Effective Date-§17A.5

Adopted rules can become effective no sooner than 35 days after they are published in the IAB. This 35-day period is a minimum. It allows the public time to come into compliance with the final rule language. When adopted rules are published in the IAB, the text of those rules is simultaneously incorporated into the IAC. This means that the text of adopted rules is incorporated into the IAC at least 35 days before it becomes effective. History lines following each rule and chapter in the IAC can be consulted to determine if the current text of a rule is in effect. Because the IAB is published on a biweekly basis, this means changes are incorporated into the IAC every two weeks.

Emergency Rulemaking-§§17A.4(3), 17A.5(2)

An agency can use various procedures to eliminate part or all of the regular rulemaking timeline before a rule becomes effective. In order to entirely eliminate the rulemaking timeline and put a rule into effect immediately, an agency either needs explicit statutory authorization or authorization from the ARRC by a majority vote (six members).

ARC Numbers-§§17A.4(1)(a), 17A.5(1)

Each rulemaking document, whether a notice or adoption, is assigned an ARC number for tracking purposes. The number is four digits followed by a number, such as ARC 5378C. Numbers are assigned by the Administrative Rules Coordinator upon acceptance of a rulemaking document for publication in the IAB. A notice is assigned a new ARC number upon submission for publication. Rulemaking documents are listed under their ARC numbers, sorted by agency, in the IAB.

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Limitation on Rulemaking Authority-§17A.23(3)

Agencies do not have any innate rulemaking authority, only that which is delegated to them by law or necessarily inferred. Agencies cannot expand upon that authority. Such delegations are construed narrowly. See §17A.23(3), *Iowa Power & Light Co. v. Iowa State Commerce Commission*, 410 N.W.2d 236, 240 (Iowa 1987), and various subsequent cases. Such delegations may be worded to grant an agency rulemaking authority over a very broad policy area or to require very specific rules on particular agency functions, or may fall somewhere between those two extremes. Rules cannot conflict with statutory provisions.

Agency Discretion to Adopt Rules-§§17A.2(11), 17A.3(1)

The IAPA, in conjunction with an agency's enabling statute (the statutory provisions establishing an agency's scope of authority on a particular subject), controls an agency's authority to adopt rules. Three statutory provisions will primarily govern whether an agency must adopt rules on a particular subject:

- The definition of “rule” under §17A.2(11) provides that “each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency” is a rule, and hence such statements must be implemented through the rulemaking process. There are 11 specific exclusions from the definition.
- §17A.3(1) expands upon the definition in §17A.2(11) by requiring agencies to adopt more detailed rules on their organization and practices. Agencies are required to adopt a detailed description of the organization of the agency, including the methods by which and location where the public may obtain information or make submissions or requests; rules of practice setting forth the nature and requirements of all formal and informal procedures available to the public, including a description of all forms and instructions that are to be used by the public in dealing with the agency; and, to the extent practicable, rules embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers.
- Any other statute can explicitly require an agency to adopt rules on a particular subject even if the IAPA does not.

Where none of these three provisions applies (meaning no statute addresses an agency's rulemaking authority on a particular subject), or if a statute authorizes, but does not require, an agency to adopt rules on a particular subject (generally by providing that an agency “may” adopt rules), the agency has discretion to either adopt rules on the subject or to make policy on a case-by-case basis.

Fiscal Impact Statement-§17A.4(4)

Any proposed or adopted rulemaking that necessitates additional annual expenditures of at least \$100,000 annually or combined expenditures of at least \$500,000 within five years by all affected persons, including the agency itself, must be accompanied by a fiscal impact statement from the agency outlining the expenditures. A summary of the statement is published in the preamble to the rulemaking in the IAB. The Fiscal Division of the Legislative Services Agency is required to analyze the statement and provide a summary of that analysis to the ARRC.

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Jobs Impact Statement-§17A.4B

An agency must include a jobs impact statement with each proposed or adopted rulemaking. The statement includes a determination as to whether the rulemaking would have a positive or negative impact on private sector jobs in Iowa and describes and quantifies the nature of that impact. The agency is required to take steps to minimize any adverse impact on jobs. A summary of the statement is published in the preamble to the rulemaking in the IAB.

Substantial Compliance, Statute of Limitations, Judicial Review-§§17A.4(5), 17A.19

A rule is void unless adopted in substantial compliance with the requirements of §17A.4. The term “substantial compliance” does not require strict adherence to the statute. In the event of a procedural defect, there are three criteria that measure substantial compliance:

- The extent to which injury resulted from the defect.
- The extent to which the defect could have deprived anyone of the opportunity to participate in the rulemaking process.
- The extent to which the defect was an isolated occurrence or part of an ongoing scheme to avoid the requirements of the rulemaking process.

All three of these factors are examined together. If the procedural defect did not significantly involve any of these criteria, then the rulemaking remains valid.

Unless the procedural validity of the rulemaking process is challenged within two years of the effective date, the rule will be presumed valid. This presumption applies only to possible procedural defects. The substance of a rule can be legally challenged at any time if a person is “aggrieved or adversely affected” by the rule, per §17A.19, which sets out procedures and criteria for judicial review of rules and other agency action.

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