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RULEMAKING GUIDE

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I. Introduction and Overview of State Government Rulemaking

This guide reviews the rulemaking process and related matters from a legal perspective.[1] Unless otherwise indicated, references in this Legislative Guide to the Iowa Code are to the 2021 Iowa Code.[2] References to the Iowa Administrative Code (IAC) are current through December 2, 2020. References to Administrative Rules Coordinator (ARC) numbers refer to four-digit numbers followed by a letter that are assigned to a rulemaking document by the ARC pursuant to Iowa Code sections 17A.4(1)(a) and 17A.5(1).

Iowa state government consists of over 100 rulemaking entities with a variety of titles such as departments, divisions, boards, and commissions.[3] As of December 2, 2020, the IAC contained 25,517 total rules adopted by those entities. In 2019, 61 such agencies submitted 637 rule filings for publication (rule filings generally contain multiple rule changes). As the rulemaking process generally involves two rule filings, that amounts to approximately 300 rulemaking processes for 2019. Twenty-one of these 61 agencies submitted only one or two filings. Thirteen agencies submitted 19 rule filings using the "emergency" rulemaking procedures of the rulemaking process. In 2019, emergency rulemaking filings accounted for 3 percent of the total filings.

Rulemaking activity for the last 10 years is as follows:

Iowa Rulemaking Filings — Calendar Years 2010 — 2019

YEAR	AGENCIES	FILINGS		YEAR	AGENCIES	FILINGS
2019	61	637		2014	52	536
2018	58	652		2013	50	684
2017	54	617		2012	60	562
2016	58	502		2011	61	607
2015	48	516		2010	58	861

II. A Sketch of the Iowa Administrative Procedure Act (IAPA)

A. Overview of Iowa Code Chapter 17A

Iowa Code chapter 17A, cited as the Iowa Administrative Procedure Act (IAPA), has a variety of procedures and requirements that impact how a state agency creates policy, including procedures and requirements for rulemaking, contested case proceedings, and other agency action, as well as procedures and requirements for judicial review thereof.

1 For information on the drafting of administrative rules, see www.legis.iowa.gov/law/administrativeRules/ruleWriterInfo.
2 Note that 2020 Iowa Acts, ch. 1090 (HF 2389), included a variety of technical updates relating to the rulemaking process. See www.legis.iowa.gov/legislation/BillBook?ga=88&ba=hf2389.
3 A list of such entities is published in each issue of the Iowa Administrative Bulletin (IAB). See www.legis.iowa.gov/docs/publications/ACOD/767414.pdf.

B. Background of the Rulemaking Process

The current Iowa rulemaking process went into effect in 1975,[4] and is based on the 1946 federal Administrative Procedure Act and the 1961 Revised Model State Administrative Procedure Act.[5] The IAPA was carefully crafted during 1973 and 1974 by a special subcommittee of the General Assembly.[6] The IAPA replaced a prior, less comprehensive statute governing the rulemaking process.[7] Arthur Bonfield, a professor at the University of Iowa College of Law, served as special counsel to the subcommittee. Professor Bonfield's subsequent law review article remains the first and best resource for information concerning Iowa's rulemaking process.[8]

The rulemaking process serves four basic functions:

- It requires agencies to publish a notice detailing their intention to adopt a new rule or revise an existing one.
- It provides an opportunity for the public to offer comments and criticisms on that proposal.
- It provides a limited opportunity for both the Governor and the General Assembly to exercise oversight over the rulemaking process.
- It provides a publication process to widely distribute and codify final rules.

These functions are carried out in a uniform, predictable manner across executive branch agencies.[9] This process does not give the public veto power over agency rulemaking; agencies have the authority to use their expertise to implement the type of rule they think most effective. To be lawful, a rule must be within the statutory authority of the agency and must be adopted using the required rulemaking process. Although the rulemaking process does not dictate what policy an agency will implement, it does ensure that agency decision making is subject to public scrutiny and that agencies give full and fair consideration to public comments.

The IAPA is a procedural code. The rulemaking process does not control the substance of state agency rulemaking; each agency's individual enabling legislation and other controlling law dictate the substance of the rules. The rulemaking process relates to how an agency creates its policy, not what that policy will ultimately be when the process is complete. The rulemaking portions of the IAPA are primarily set out in Iowa Code sections 17A.4 through 17A.8. Iowa Code section 17A.19 sets out a process for seeking judicial review of virtually all agency actions, including rulemaking. Iowa Code section 17A.19 also details the grounds that courts may use to overturn an agency rule.

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4 1974 Iowa Acts, ch. 1090 (HF 1200).

5 Arthur E. Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process, 60 Iowa L. Rev. 731, 746-47 (1975) [hereinafter The Iowa Administrative Procedure Act].

6 Uniform State Administrative Procedures Act Subcommittee of the Standing Committee on State Government.

7 The significantly less detailed predecessor to the IAPA, also codified as Iowa Code chapter 17A, was originally enacted in 1951. 1951 Iowa Acts, ch. 51 (HF 606). Under that enactment, the predecessor to the IAC, the Iowa Departmental Rules (IDR), was published from 1952-1975.

8 Bonfield, The Iowa Administrative Procedure Act.

9 See Appendix A for a brief outline of the rulemaking process.

C. Requirements for the Rulemaking Process: Broadly Construed and Difficult to Supersede

The requirements for the rulemaking process are to be construed broadly to effectuate the purposes of the IAPA.[10] This means that exemptions or exclusions from the rulemaking process are to be construed narrowly.[11] Iowa Code section 17A.23(1) specifically provides that any statute attempting to lessen or eliminate the requirements of the IAPA must refer specifically to the IAPA to make explicitly clear that a provision of the IAPA is being affected; otherwise the action will not be effective. Iowa Code section 17A.1(2) contains similar language. The effect of this unusual language is that in the event of a conflict between the IAPA and any other state statute, the IAPA will nearly always prevail.[12]

D. Agency Policymaking: General Policy and Individual Decision Making

State agencies create policy in a variety of ways; however, most fall into two basic categories. General policymaking applies to broad groups or classes, while the second category, case-by-case policymaking, applies to a specific individual or entity based on a specific fact situation.

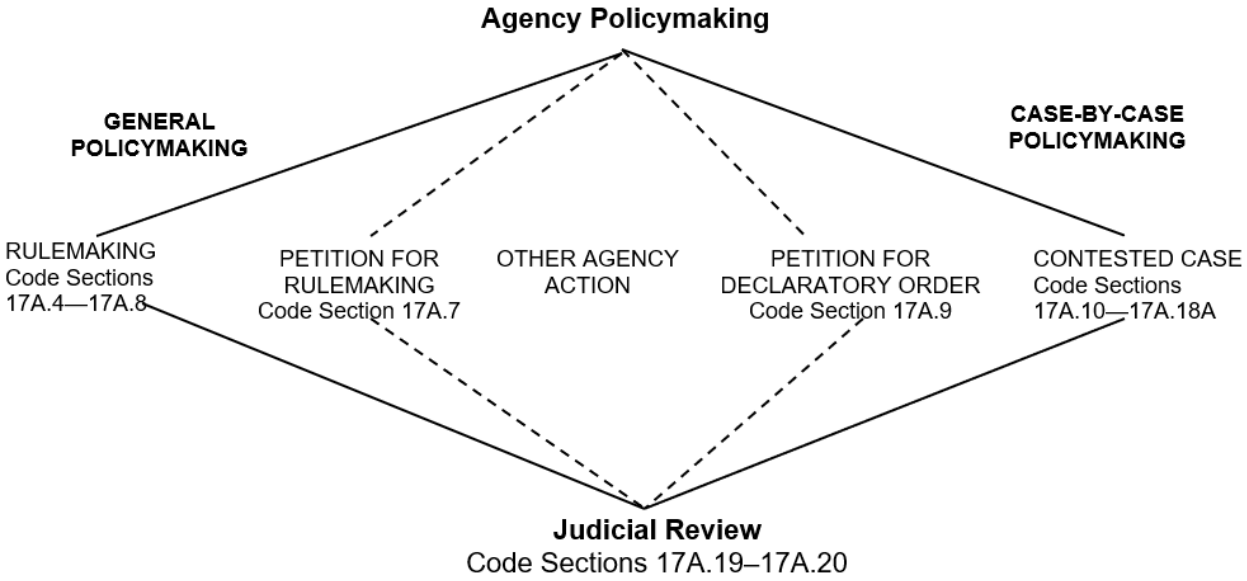
The primary example of general policymaking is the administrative rule, which is governed by a process set out in Iowa Code sections 17A.4 through 17A.8. A rule has the same force and effect as a statute,[13] and hence is analogous to a statute enacted by the General Assembly in many respects.[14] The rulemaking process is to a great extent a political process, providing a forum for the stakeholders in agency decision making to voice either their support or opposition to an agency proposal. See Part V, Section A for a detailed discussion of the definition of a rule.

The primary example of case-by-case policymaking is the contested case proceeding. In many respects, a contested case proceeding is analogous to a judicial proceeding, where an evidentiary hearing is utilized to determine individual rights, duties, and responsibilities based on a specific fact situation. Unlike a rulemaking decision, the agency decision in a contested case must be supported by evidence contained in the record made before the agency. A decision in a contested case binds only those persons who were actual parties to that decision. However, that decision may serve as a precedent that can be applied in future decisions involving the same or a very similar fact situation.

Between these two extremes, the IAPA provides procedures for petitions for rulemaking,[15] declaratory orders,[16] requests for waiver,[17] and a myriad of agency

[10] See Iowa Code §§17A.1(3), 17A.23(2).
[11] Schmitt v. Iowa Dep't of Social Services, 263 N.W.2d 739, 745 (Iowa 1978) (citing Iowa Code §17A.23).
[12] See Hollinrake v. Monroe Cty., 433 N.W.2d 696, 698 (Iowa 1988). By contrast, other statutory provisions that purport to supersede all other conflicting statutes do not include such language requiring specific citation in order to prevail, see e.g., Iowa Code §§88.21, 441.55.
[13] City of Des Moines v. Iowa Dep't of Transp., 911 N.W.2d 431, 440 (Iowa 2018).
[14] Judicial principles for the construction and interpretation of statutes also generally apply to the construction and interpretation of rules. See Messina v. Iowa Dep't of Job Service, 341 N.W.2d 52, 56 (Iowa 1983).
[15] Iowa Code §17A.7(1).
[16] Iowa Code §17A.9.
[17] Iowa Code §17A.9A.

activities collectively referred to as "other agency action."[18] Rulemaking, contested case decisions, and all other forms of agency action can be challenged using the procedures for judicial review established in Iowa Code section 17A.19.[19] This spectrum of agency action can be summarized using the following diagram:



E. Agency Policymaking: Rulemaking vs. Case-by-Case

Except as provided in the definition of "rule" in Iowa Code section 17A.2(11) and Iowa Code section 17A.3(1)(c), the rulemaking process does not mandate that an agency develop its policy through rulemaking. An agency's own enabling statute determines whether rules are required. As a general rule, absent a statutory mandate for rulemaking, an agency can create its policy either through rulemaking or on a case-by-case basis based on individual facts and circumstances.[20] The rulemaking process does not set the scope of agency rulemaking responsibilities for policymaking. The substantive rulemaking obligations of an agency are set out in the enabling statute.

Iowa Code section 17A.3(1)(c) imposes a special rulemaking requirement that is both substantive and substantial. It states:

> As soon as feasible and to the extent practicable, adopt rules, in addition to those otherwise required by this chapter, embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers.

[18] All the possible forms of other agency action are difficult to define here. The Iowa Supreme Court has stated that other agency action is a residual category that does not amount to rulemaking or a contested case. If a statute or the United States or Iowa Constitutions do not require a hearing, or if the required hearing does not rise to the level of an evidentiary hearing, the agency action is considered other agency action. In terms of due process, other agency action entitles parties to an informal hearing at most. See Pettit v. Iowa Dep't of Corrections, 891 N.W.2d 189, 196 (Iowa 2017).

[19] Iowa Code section 17A.19(1) provides in part: "A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter."

[20] See Young Plumbing and Heating Co. v. Iowa Nat. Res. Council, 276 N.W.2d 377, 382 (Iowa 1979); Ford v. Iowa Dep't of Human Services, 500 N.W.2d 26, 30 (Iowa 1993).

The meaning and impact of this provision has been fully detailed by Professor Bonfield.[21] It does not eliminate case-by-case decision making — it simply requires that a structure be set out in rule to guide and channel that decision making. It would be impossible to craft a rule so detailed and complete that individual interpretations were unnecessary. Moreover, in some situations the program or statutory scheme may require extensive and individualized decision making that precludes detailed and broadly applicable rulemaking.[22]

Generally, an agency should strongly consider developing policy through rulemaking as the process offers numerous advantages both to the public and the agency. The primary advantage for the agency is that rulemaking provides a process to create a cogent, fully developed program, while simultaneously allowing the public an opportunity to participate in the development of that program.[23]

F. Overview of the Contested Case Process

Frequently, Iowa statutes require that a particular decision be preceded by an opportunity for an evidentiary hearing known as a contested case hearing.[24] A full explanation of the contested case process would require an entire textbook.[25] The contested case process set out in Iowa Code sections 17A.10 through 17A.18A resembles, in simplified form, the procedural protections that are provided in judicial proceedings. A contested case proceeding can also be mandated by the due process clause of the Iowa Constitution or the United States Constitution.[26] Not every agency action creates a right to a contested case.[27] Generally, an opportunity for a contested case hearing must be provided when the agency action deprives a person of a property interest (e.g., revocation of a license). A contested case hearing is similar to a judicial hearing, except that it is held before an administrative agency, not a court. The IAPA creates a trial-type process that uses a presiding officer instead of a judge. The presiding officer can be an administrative law judge or the agency itself (e.g., a director, board, or commission). Administrative law judges are often provided by the Department of Inspections and Appeals rather than employed by the agency itself. The contested case hearing does not involve the use of a jury.

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[21] Arthur E. Bonfield, Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to the Iowa State Bar Association and Iowa State Government, at 15-22 (1998) [hereinafter Amendments to Iowa Administrative Procedure Act]. Professor Bonfield writes: "[A]gencies must make a real and substantial effort to provide, by *rule*, procedural protections that are adequate, under the particular circumstances, to protect persons affected by agency action against improper exercises of agency power. It also requires agencies to make a real and substantial effort to elaborate, by *rule*, the substantive standards used in the application of the laws they administer in order to provide fair notice of their contents and some assurance that they will be consistently applied." Id. at 18 (emphasis in original).

[22] For example, the rules of the Workers' Compensation Division of the Department of Workforce Development are largely procedural with few substantive policy provisions. 876 IAC 1-12. The vast majority of policymaking by the division is done through the contested case process. See decisions.iowaworkforce.org/Pages/default.aspx.

[23] In his writings, Professor Bonfield offers a variety of detailed reasons why the rulemaking process is a superior means of policymaking. Arthur E. Bonfield, State Administrative Policy Formulation and the Choice of Lawmaking Methodology, 42 Admin. L. Rev. 21 (1990).

[24] The IAPA defines a contested case as "a proceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." Iowa Code §17A.2(5).

[25] See Arthur E. Bonfield, The Definition of Formal Agency Adjudication under the Iowa Administrative Procedure Act, 63 Iowa L. Rev. 285 (1977).

[26] "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. xiv, §1; see also Iowa Const. art. I, §9.

[27] Pettit, 891 N.W.2d at 196.

The contested case hearing provides many of the due-process-of-law protections found in judicial hearings. The most important of these is the right to a decision based solely on the testimony and evidence introduced into the record made during the evidentiary hearing. In virtually any other type of agency decision making, such as rulemaking or waivers, the agency can base its decision on information gained from whatever source it chooses. In a contested case, however, the basis for that decision must be found within the record.[28]

G. Overview of Judicial Review — Process — Iowa Code Section 17A.19

Virtually any agency action that impacts individual rights, duties, or responsibilities can be appealed through the judicial system. This includes rulemaking, contested case decisions, petitions for waiver, or any other agency action. The judicial review process is detailed in Iowa Code section 17A.19. The court's broad range of remedies includes affirming the agency action or remanding it back to the agency for further proceedings. There are 14 grounds for overturning an action by an agency; those grounds are detailed in Iowa Code section 17A.19(10).[29] The court may overturn the agency's decision if it violates one of those specific grounds and a party's substantial rights have been prejudiced.[30] A person must be "aggrieved or adversely affected" by agency action in order to seek judicial review under the IAPA.[31]

A person must exhaust all adequate administrative remedies prior to seeking judicial review.[32] This will generally require completing an agency's particular administrative appeal process prior to seeking judicial review. Once all required administrative proceedings have been completed, the action taken by the agency is considered "final agency action," and judicial review can be sought.[33] Judicial review of agency action that is not final can be sought if all adequate administrative remedies have been exhausted and awaiting judicial review of final agency action would not provide an adequate remedy,[34] such as instances where irreparable injury would result from following the full administrative process.[35] Because no adequate administrative remedies exist for procedural defects in the rulemaking process, no exhaustion of administrative remedies is required prior to seeking judicial review on that ground.[36]

During judicial review of a contested case decision, the court cannot, in most situations, hear further evidence concerning issues of fact if the determination was entrusted to the agency.[37] The court is thus bound by the agency record from the contested case proceeding. The court is bound by the agency's findings of fact "if supported by substantial evidence in the record as a whole," but the court is not bound

[28] Iowa Code §17A.12(8).
[29] See Bonfield, Amendments to Iowa Administrative Procedure Act, at 59-73 for a discussion of significant amendments to these grounds enacted in 1998.
[30] Meyer v. IBP, Inc., 710 N.W.2d 213, 218 (Iowa 2006) (citing Iowa Code §17A.19(10)).
[31] Iowa Code §17A.19(1).
[32] Iowa Code §17A.19(1).
[33] Iowa Code §17A.19(1). See also Dunn v. City Dev. Bd. of Iowa, 623 N.W.2d 820, 825 (Iowa 2001): "In determining if agency action is final the question is 'whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.'" (citations omitted).
[34] Iowa Code §17A.19(1).
[35] Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751, 765 (Iowa 2019).
[36] Lundy v. Iowa Dep't of Human Services, 376 N.W.2d 893, 896–97 (Iowa 1985).
[37] Iowa Code §17A.19(7).

by the agency's interpretation of the law and may substitute its own interpretation for that of the agency.[38]

Note that judicial review under the IAPA may not be the vehicle for a judicial remedy for every possible action taken by an agency.[39]

H. Recordkeeping Requirements in the IAPA — Iowa Code Section 17A.3

Iowa Code section 17A.3 can be viewed as a simplified open records law specifically for state rules and policy. This provision is more specific than the general Iowa open records law contained in Iowa Code chapter 22. Iowa Code section 17A.3 requires agencies to develop rules detailing their practice, procedure, and organization, and requires that certain types of information be retained and indexed for ready public access. Iowa Code section 17A.3(1) requires rulemaking to completely describe agency operations and procedures and requires that all agency policy be maintained and indexed according to name and subject.

The required rulemaking provisions in Iowa Code section 17A.3(1), paragraphs "a" and "b," require that every agency establish rules of organization and operation, essentially a flow chart detailing agency organization, operation, and chain of command. The required rules also include rules of practice and procedure along with a description of all forms made available to the public. Note that an all-inclusive set of practice and procedure rules is not required.[40] A description of all forms used by the agency does not require that the actual text be placed in rule — a general description is adequate.

Iowa Code section 17A.3(1), paragraphs "d" and "e," require the maintenance and indexing of all forms of agency law to facilitate easy public inspection. These two provisions require the indexing and availability of all agency policy and all agency decisions affecting individuals — if there is an agency policy that could affect the public, it must be readily available and easily found. An exemption is provided for certain confidential information.

Iowa Code section 17A.3(2) provides that any "agency rule or other statement of law or policy, or interpretation, order, decision, or opinion" that may be established cannot be used by the agency against a person or party if it is not indexed and publicly available, unless the person or party has actual timely knowledge thereof. The purpose of this language is to prohibit undisclosed but authoritative interpretations of law or policy by an agency that are equivalent to secret rulemaking.[41]

Therefore, agency policies affecting the public or a portion thereof that the agency does not adopt through the rulemaking process, that do not fall under one of the exceptions to the definition of "rule" under Iowa Code section 17A.2(11), and that are not decided on a case-by-case basis should at minimum be made publicly available and indexed as provided in Iowa Code section 17A.3 or any action taken based on such policies could be

[38] Meyer, 710 N.W.2d at 218–19. See also Iowa Code section 17A.19(11) regarding the degree of deference a court will give to the views of an agency based on whether the matter at issue has been vested in the discretion of the agency.

[39] See Chiavetta v. Iowa Bd. of Nursing, 595 N.W.2d 799, 803 (Iowa 1999), providing that certain civil rights claims must be brought under Iowa Code chapter 216 rather than the IAPA.

[40] See, e.g., Anstey v. Iowa State Commerce Comm'n, 292 N.W.2d 380, 387 (Iowa 1980) (holding that the commission's failure to adopt certain rules relating to the use of forms did not amount to a rulemaking omission so substantial as to void the proceedings).

[41] See Anderson v. Iowa Dep't of Human Services, 368 N.W.2d 104, 108 (Iowa 1985).

invalidated by a court.[42] This requirement does not apply to the mere application of law to fact in a particular situation.[43]

III. Limitations on Rulemaking Authority

A. Scope of Agency Authority

The fundamental principle concerning the scope of agency rulemaking for decades has been that a rule cannot exceed an agency's statutory authority.[44] The Iowa Supreme Court has stated that an administrative agency does not have any independent lawmaking power. An agency has only that authority which is either expressly or by necessary implication delegated to that agency by statute.[45] This principle is also codified in Iowa Code section 17A.23(3).[46] In 2013, that provision was amended to state that statutory grants of rulemaking shall be construed narrowly unless otherwise provided by statute. That amendment further limited agency rulemaking authority.[47] An agency cannot use rulemaking to expand its statutory authority.[48] Furthermore, a broad, general grant of rulemaking authority to an agency is not a blanket grant of rulemaking authority for all matters within the agency's subject area. A court will examine an agency's specific authority to adopt each rule at issue, and reliance on a broad, general grant of rulemaking authority will likely not be sufficient.[49]

While a person alleging that agency action such as rulemaking is invalid ultimately bears the legal burden of proof,[50] a court will not defer to the view of an agency in determining whether the agency has sufficient authority to adopt a rule unless the agency has been clearly vested with authority to interpret the relevant statute.[51] When rules adopted by an administrative agency exceed the agency's statutory authority, the rules will be found void and invalid.[52]

The IAPA provides a variety of other grounds on which agency action, including rulemaking, can be invalidated. Such grounds include a rule being unconstitutional or derived from an unconstitutional statute, being made through an improper decision making process, or otherwise being unreasonable, arbitrary, capricious, or an abuse of discretion.[53]

B. Authority to Adopt a Rule: Express Language or Necessary Implication

As described in this Part III, Section A, an agency has only that authority which is either expressly or by necessary implication delegated to that agency. An express delegation

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[42] Id.

[43] See Young Plumbing and Heating Co., 276 N.W.2d at 383; Doe v. Iowa State Bd. of Physical Therapy and Occupational Therapy Examiners, 320 N.W.2d 557, 561 (Iowa 1982).

[44] See, e.g., Bruce Motor Freight, Inc. v. Lauterbach, 247 Iowa 956, 971, 77 N.W.2d 613, 616 (Iowa 1956); Wallace v. Iowa State Bd. of Edu., 770 N.W.2d 344, 348 (Iowa 2009); City of Des Moines, 911 N.W.2d at 440–41.

[45] Wallace, 770 N.W.2nd at 348.

[46] "An agency shall have only that authority or discretion delegated or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency."

[47] 2013 Iowa Acts, ch. 114, §5. Further limitations were enacted by 2018 Iowa Acts, chapter 1040, §1 (codified at Iowa Code §17A.23(4)).

[48] Iowa Code §17A.23(3). City of Des Moines, 911 N.W.2d at 441.

[49] See Wallace, 770 N.W.2d at 348; City of Des Moines, 911 N.W.2d at 441–46.

[50] City of Des Moines, 911 N.W.2d at 439. See Iowa Code §17A.19(8)(a).

[51] City of Des Moines, 911 N.W.2d at 439. See Iowa Code §§17A.19(10)(m), 17A.19(11)(a).

[52] Wallace, 770 N.W.2d at 348. See Iowa Code §17A.19(10)(b).

[53] Iowa Code §17A.19(10). The Iowa Supreme Court has also, at times, stated that, in addition to complying with statutory limitations, a rule must be "reasonable." See Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n, 243 N.W.2d 610, 616 (Iowa 1976); Wallace, 770 N.W.2d at 348. Whether that remains a separate, significant criterion is unclear.

of rulemaking authority is obvious — the agency's enabling statute specifically authorizes or mandates rulemaking.[54] Even express delegations contain some limitations. A general delegation of rulemaking authority does not grant unlimited power to an administrative agency to regulate matters within the agency's expertise.[55] If the statute merely authorizes rulemaking (language such as "may adopt") but does not mandate it, the agency remains free to create its policy either by rule or on a case-by-case basis.[56]

The authority to adopt a rule is not an obligation to adopt a rule. The following excerpt from Iowa Code section 89A.3 provides a good example:

1. The safety board may adopt rules governing maintenance, construction, alteration, and installation of conveyances, and the inspection and testing of new and existing installations as necessary to provide for the public safety, and to protect the public welfare.
2. The safety board shall adopt, amend, or repeal rules pursuant to Iowa Code chapter 17A as it deems necessary for the administration of this chapter, which shall include but not be limited to rules providing for:
    a. Classifications of types of conveyances.
    b. Maintenance, inspection, testing, and operation of the various classes of conveyances.
    c. Construction of new conveyances.
    d. Alteration of existing conveyances.
    e. Minimum safety requirements for all existing conveyances.
    f. Control or prevention of access to conveyances or dormant conveyances.
    g. The reporting of accidents and injuries arising from the use of conveyances.
    h. The adoption of procedures for the issuance of variances.
    i. The amount of fees charged and collected for inspection, permits, and commissions. Fees shall be set at an amount sufficient to cover costs as determined from consideration of the reasonable time required to conduct an inspection, reasonable hourly wages paid to inspectors, and reasonable transportation and similar expenses. The safety board shall also be authorized to consider setting reduced fees for nonprofit associations and nonprofit corporations, as described in Iowa Code chapters 501B and 504.
    j. Submission of information such as plans, drawings, and measurements concerning new installations and alterations.

The language in Iowa Code section 89A.3(1) is permissive. Accordingly, the agency is not required to establish a general policy on the subjects specified in that subsection. The language in Iowa Code section 89A.3(2) is a mandate; the statute enumerates 10 specific areas where the agency must adopt rules.

[54] Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004) described an agency's authority, included in legislation, to adopt rules.
[55] Litterer v. Judge, 644 N.W. 2d 357, 363-64 (Iowa 2002).
[56] See Young Plumbing and Heating Co., 276 N.W.2d at 382.

The scope of a delegation can be drastically affected depending on whether rulemaking authority is granted generally to implement an entire chapter of the Iowa Code or is limited to a specific section or sections of a statute. An agency has only the authority delegated to it and cannot expand that delegation beyond the language of the statute.[57] Note that authority to adopt a rule can come from sources other than a state statute. For example, a decision by the Iowa Supreme Court interpreting the meaning of a statute could serve as authority for a rule that reflects that decision. A federal statute or regulation could serve as authority for a rule implementing the statute or regulation.

Rulemaking by "necessary implication" is less apparent than a specific delegation of authority but it still is an important source of rulemaking authority. An implied delegation of rulemaking authority occurs when an agency is empowered to make a decision or take action that affects individual rights, duties, or responsibilities, or even to simply administer a statutory mandate. For example, the power to adjudicate or to conduct a contested case implies the power to adopt procedural rules for the conduct of those contested cases. It is legislative intent as provided in the statutory language that determines whether agency decision making must be accomplished through rulemaking or on a case-by-case basis.[58] Agencies should be cautious about presuming authority for rulemaking by necessary implication, as the threshold for such authority has often proven to be difficult to meet.[59]

C. Agency Authority to Interpret Statutes Through Rulemaking

The nature of the legislative delegation to an agency is critical to determine the scope of review on judicial review of an agency's interpretation of a statute. A simple grant of rulemaking authority does not give an agency authority to interpret all statutory language. If an agency has been clearly vested with interpretive authority, the court will generally defer to the agency's interpretation, and grant relief only if the agency's interpretation is "irrational, illogical, or wholly unjustifiable."[60] If an agency has not been clearly vested with discretion to interpret the statute, the court is free to substitute its own judgment for that of the agency.[61]

The Iowa Supreme Court's 2010 decision in *Renda v. Iowa Civil Rights Commission* clarified the Court's approach to such questions. Interpretation of a statute has been clearly vested in the agency's discretion where the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved indicate that the General Assembly intended, or would have intended had it considered the question, to delegate to the agency interpretive power with the binding force of law over implementation of the provision in question.[62] While prior case law regularly found that agencies had

[57] See Iowa Code §17A.23. ("An agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency."); Smith-Porter v. Iowa Dept. of Human Services, 590 N.W.2d 541, 544–45 (Iowa 1999).

[58] See, e.g., Iowa Power and Light Co. v. Iowa State Commerce Comm'n, 410 N.W.2d 236 (Iowa 1987). In *Iowa Power and Light Co.*, the Iowa Commerce Commission (ICC), now the Iowa Utilities Board, was empowered to set rates for the purchase, by regulated utilities companies, of electricity generated by small windmills and low-head dams. The statute set out four criteria to be considered in setting the rates. The ICC set a single, statewide rate by rule. The Iowa Supreme Court voided this rule, stating: "[N]owhere in the disputed statutory scheme is the commission empowered to adopt a uniform statewide rate...The statutes instead demand that the commission consider the unique individual circumstances surrounding each utility and resolve the rates disputes by contested case proceedings." Id. at 241.

[59] See City of Des Moines, 911 N.W.2d at 441–49.

[60] Iowa Code §17A.19(10)(m).

[61] Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d 8, 10 (Iowa 2010), see Iowa Code §17A.19(10)(c).

[62] Renda, 784 N.W.2d at 11, citing Bonfield, Amendments to Iowa Administrative Procedure Act, at 63.

been implicitly vested with the authority to interpret particular statutory terms,[63] the Court's decisions since *Renda* have seldom found such implicit vesting to have occurred.[64] This trend in the case law suggests that agencies are unlikely to be found to have authority to interpret a statute, through rulemaking or otherwise, absent a statute that explicitly vests the agency with such authority.

The Court has stated that it will avoid determinations of whether an agency has "the authority to interpret an entire statutory scheme" and "broad articulations of an agency's authority, or lack of authority."[65] The Court will instead consider "the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes."[66] This is in contrast to the higher degree of deference to federal agency interpretations accorded by federal law under the *Chevron* doctrine.[67] The Court will consider a number of factors when determining whether an agency has been clearly vested with the authority to interpret a particular piece of statutory language. The simplest instances will be those where an agency has been explicitly vested with the authority to interpret statutes.[68] In other instances, the Court will determine whether an agency has been implicitly vested with such authority by considering whether the statutory provision at issue is a substantive term within the special expertise of the agency (suggesting an agency may have interpretive authority), is found in a statute other than the statute the agency has been tasked with enforcing (suggesting an agency likely does not have interpretive authority), or is a term that has an independent legal definition that is not uniquely within the subject matter expertise of the agency (suggesting an agency likely does not have interpretive authority).[69]

D. Delegation of Authority by Legislative Branch

When determining the scope of an agency's rulemaking authority, one must also examine the statutory language to determine whether the delegation itself is lawful. As recently as 1997, the Iowa Supreme Court struck down legislative delegations of authority that were excessive.[70] A delegation must contain "a clear delineation of legislative policy and substantive standards to guide the agency in its implementation of that policy."[71] However, precise substantive guidelines or standards are not required in the legislation if adequate procedural safeguards are provided. Such procedural safeguards must advance the legislative purpose and must preclude arbitrary, capricious, or illegal conduct by the

[63] See Renda, 784 N.W.2D at 12-13 for a discussion of the case law prior to the *Renda* decision.

[64] See, e.g., Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 519 (Iowa 2012); Iowa Dental Ass'n v. Iowa Ins. Div., 831 N.W.2d 138, 145 (Iowa 2013); City of Des Moines, 911 N.W.2d at 439. But the standards for implicit vesting of interpretive authority can be met, see Evercom Sys., Inc. v. Iowa Utilities Bd., 805 N.W.2d 758, 763 (Iowa 2011); Christensen v. Iowa Dep't of Revenue, 944 N.W.2d 895, 903-04 (Iowa 2020). For a general discussion of the case law in this area, see Melissa H. Weresh & Aaron W. Ahrendsen, Rectifying Renda: Amending the Iowa Administrative Procedure Act to Remove the Legal Fiction of Legislative Delegation of Interpretive Authority, 63 Drake L. Rev. 591, 619-25 (2015).

[65] Renda, 784 N.W.2d at 13-14.

[66] Id. at 14.

[67] Chevron v. Nat. Res. Defense Council, 467 U.S. 837 (1984). See also Bonfield, Amendments to Iowa Administrative Procedure Act, at 63 for a comparison between Iowa's statutory approach and the *Chevron* doctrine.

[68] See, e.g., Iowa Code §§16.1A(4), 147.76. See Bonfield, Amendments to Iowa Administrative Procedure Act, 10-12 for a discussion of explicitly or expressly vesting interpretive authority versus clearly vesting such authority.

[69] Renda, 784 N.W.2d at 14.

[70] In re D.C.V. and R.P., 569 N.W.2d 489 (Iowa 1997). In this case, the Court held that a statute delegating to juvenile courts and the Department of Human Services the power to formulate regional group foster care plans was an unlawful delegation of legislative authority where the statute provided no procedure and safeguards to protect against arbitrary decisions to institute group foster care placement of juveniles. See also In re C.S., 516 N.W.2d 851 (Iowa 1994).

[71] In re C.S., 516 N.W.2d. at 859 (citation omitted).

agency.[72] The IAPA provides a set of procedural safeguards that both channels agency discretion and provides a mechanism for judicial review. A statute that sets out general substantive guidelines or standards and requires compliance with the IAPA will likely pass judicial scrutiny.[73]

IV. Definition of Agency — Iowa Code Section 17A.2

Iowa Code section 17A.2(1) defines an "agency" as "each board, commission, department, officer, or other administrative office or unit of the state. Agency does not mean the General Assembly, the judicial branch or any of its components, the Office of Consumer Advocate, the Governor, or a political subdivision of the state or its offices and units." Note how this definition is both inclusive and exclusive because it applies to any administrative unit, regardless of its name or its location within an umbrella agency, while at the same time containing a number of exclusions.

A. Administrative Office or Unit

The definition essentially encompasses any government entity that has the authority to affect the rights, duties, or responsibilities of persons through rulemaking, adjudication, or informal action. This definition does not include purely advisory groups.

B. State Government Purview

The "of the State" clause in the agency definition clearly excludes any unit of local government such as cities, counties, or school boards. The rulemaking process applies only to state agencies.

C. Agency Exclusions and Requirements

The term "agency" does not include the General Assembly, the judicial branch or any of its components, the Office of Consumer Advocate, the Governor, or a political subdivision of the state or its offices and units. The judicial branch has a complete exemption that includes any administrative agencies within that branch of government. The General Assembly and the Office of the Governor have less encompassing exemptions which do not specifically exempt agencies housed within those two bodies. Of the over 100 rulemaking entities in the executive branch of government, only the Office of Consumer Advocate is exempted from the IAPA.

The quorum requirement for agency action is also a significant part of this definition. For agencies headed by multimember bodies, Iowa Code section 17A.2(1) states "[u]nless provided otherwise by statute, no less than two-thirds of the members eligible to vote of a multimember agency constitute a quorum authorized to act in the name of the agency."[74]

The words "no less" in the quorum requirement mean that if two-thirds results in a fraction of a member, such fraction is to be rounded up to the nearest whole number, not merely rounded off. For example, in a five-member board, two-thirds translates into 3.33 members; this is rounded up to four members, not down to three. The Administrative Rules Review Committee (ARRC) has adopted its own policy concerning quorums. The ARRC has in the past insisted that any action taken by a board or commission be based

[72] In re D.C.V. and R.P., 569 N.W.2d at 497.

[73] See Elliot v. Iowa Dep't. of Transp., Motor Vehicle Div., 377 N.W.2d 250, 253 (Iowa Ct. App. 1985); State v. Giovanazzi, 674 N.W.2d 682 (Iowa Ct. App. 2003). These cases discuss the significance of the procedural safeguards provided in the IAPA for purposes of analysis of delegation of legislative authority.

[74] Statutes generally establish a quorum as a majority of the members of the board or commission.

on a majority vote of the entire board or commission. The ARRC may object or take other action on any rule that allows board or commission action based on a majority of those present and voting.[75] The rationale behind this requirement is that policies that have the force and effect of law should be considered and approved by a full majority of the body. The problem is that an actual minority could establish policy if several of the members simply abstained from voting. The ARRC requirement ensures that an actual majority of a board or commission adopts a policy.

V. Definition of Administrative Rules

A. General Definition — Iowa Code Section 17A.2

Under Iowa Code section 17A.2(11), the definition of "rule" has two components: a broad definition followed by a series of narrow exemptions. This definition makes it impossible to avoid the rulemaking process by calling an agency statement by some other name; if a statement meets the three criteria contained in the definition, it is a rule and must be adopted through the process outlined in Iowa Code sections 17A.4 and 17A.5.

Iowa Code section 17A.2(11) states in part:

> "Rule" means 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. . . . The term includes the amendment or repeal of an existing rule . . . . [76]

Within the definition itself are three distinct components that establish the broadest possible application.

The word "statement" is a generic word. Accordingly, if a statement falls within the statutory definition, the rulemaking requirements must be followed, regardless of how that statement is titled or styled.

The phrase "general applicability" refers to statements that apply to groups or classes as opposed to statements which apply only to named individuals based on their specific fact situation. Statements that apply to specific individuals are handled through contested cases, declaratory rulings, or other agency actions. The phrase "general applicability" does not necessarily mean applicable to everybody or to society as a whole. It means only that the statement applies to some identifiable group or segment of society, even if that group in fact has only one member.[77]

The phrase "implements, interprets, or prescribes law or policy" covers any action relating to the creation or interpretation of a policy. It does not matter whether the agency is establishing a policy with the force and effect of law or simply interpreting what the law

[75] "1.4(2) Quorum requirements and related matters. Iowa Code section 17A.2 specifically establishes a quorum requirement, for boards and commissions, of not less than two-thirds of the entire membership, unless otherwise provided by statute. In addition to this requirement, the Committee insists that any action taken by a board or commission be based on a majority vote of the entire board or commission. The Committee will object or take other action on any rule that allows board or commission action based on a majority of those present and voting." Administrative Rules Review Committee Rules of Procedure 1.4(2) (Iowa ARRC 2019).

[76] The definition in Iowa Code §17A.2(11) is based on the rule definition provision of the federal Administrative Procedure Act, 5 U.S.C. §551(4) (2018).

[77] Bonfield, The Iowa Administrative Procedure Act, at 828-29. See, e.g., Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973). In *Anaconda*, the Tenth Circuit upheld federal emission restrictions set out in regulation and applicable in a single Montana county, even though there was only a single source for those emissions.

might mean. This provision differs significantly from the federal Administrative Procedure Act, which excludes so-called interpretive rules from the process.[78]

If an agency establishes policy that is the equivalent of a rule, as defined in Iowa Code section 17A.2(11), but that policy is not established through the rulemaking process under the IAPA, action taken based on that policy could be invalidated by a court.[79]

In certain narrow situations, even an executive order of the Governor could be subject to the rulemaking requirements. "Executive order" is not defined in the Iowa Code. Traditionally, an executive order is a formal document used by the Governor to establish policy internal to the executive branch. Some gubernatorial powers, such as rules rescission under Iowa Code section 17A.4(7), must be exercised by executive order. As a gubernatorial function, such orders are exempt from the rulemaking process. However, Iowa Code section 17A.2(11) specifically provides that an executive order or other gubernatorial directive is subject to rulemaking if it creates an agency, establishes a program, or transfers a program between agencies established by statute or rule. To the extent such orders only affect entities with advisory authority, as is typically the case, rather than binding policymaking power, Iowa Code section 17A.2(11) would not apply.

B. Exclusions from the Rulemaking Process — Iowa Code Section 17A.2

Twelve specific, narrow exclusions for certain agency statements are set out in Iowa Code section 17A.2(11), paragraphs "a" through "l." These exclusions should be interpreted narrowly. Iowa Code section 17A.23 specifically states that the IAPA is to be "construed broadly to effectuate its purposes." These purposes, set out in Iowa Code section 17A.1(3), that apply to the rulemaking process can be summarized as: legislative oversight of agency actions; increased public accountability by agencies; increased public access to government information; and increased public participation in government decision making. These purposes are most effectively met by a broad interpretation of the term "rule" to maximize the number of agency statements that must go through the process. Consequently, the exclusions should be interpreted narrowly to ensure that the maximum number of agency statements go through the process.

Note that other statutes may define a particular policy as a rule, thus making the rulemaking process applicable, even though the policy may otherwise qualify under one of the Iowa Code section 17A.2(11) exclusions. Iowa Code section 17A.1(2) states in part that ". . . nothing in this chapter is meant to abrogate in whole or in part any statute prescribing procedural duties for an agency which are greater than or in addition to those provided here." As a practical matter, this commonly means that when a statute requires or authorizes an agency to make "rules," Iowa Code section 17A.1(2) requires that the rulemaking process be followed, even if that rule might otherwise be excluded from the rulemaking process.[80]

Although Iowa Code section 17A.2(11) contains 12 specific exemptions, they are best presented by grouping them into several categories.

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[78] 5 U.S.C. §553 (2018).

[79] See Anderson, 368 N.W.2d at 108. Making the policy publicly available and indexing it under Iowa Code section 17A.3(1)(d) or (e) may be another option.

[80] See, e.g., Iowa Code §8A.413 (requiring the Department of Administrative Services to adopt rules concerning state human resource management). The provisions of Iowa Code section 8A.413 might otherwise be exempt from rulemaking under Iowa Code section 17A.2(11)(c) as an interagency or intra-agency manual.

The exclusions in paragraphs “a” and “c” apply to certain internal management statements and interagency communications or directives. In essence, these provisions exempt personnel, general management, and housekeeping matters that are of little relevance to the public. These exclusions are specifically limited to statements that do not substantially affect the legal rights of the public.

The exclusions in paragraphs “b,” “d,” “e,” “j,” and “l” are statements that do not meet the exact definition of a rule and that are not subject to rulemaking requirements. To eliminate any uncertainty, these functions were given specific exemptions.

Paragraph “b” exempts declaratory orders. Declaratory orders are established in Iowa Code section 17A.9 as a mechanism to obtain binding advice from an agency, based on a specific set of facts. Since a declaratory order is tied to a specific fact situation, it may serve as precedent for further decisions, but it has no immediate general applicability. Declaratory orders are not statements of general applicability and are therefore not administrative rules. Paragraph “b” also exempts “an interpretation issued by an agency with respect to a specific set of facts and intended to apply only to that specific set of facts.” This language refers to nonbinding, informal legal advice by an agency, as opposed to the binding, formal process of issuing a declaratory order.[81]

Paragraph “d” exempts decisions in contested cases. The underlying principle for the exemption is similar to that for declaratory orders. It should be emphasized, however, that the precedent set in contested case decisions is a major source of state policymaking. Agencies should consider adopting rules to codify precedent when it occurs often enough or otherwise becomes so well developed that it has broad and frequent application.

Paragraph “e” excludes opinions of the Attorney General. Paragraph “l” excludes advisory opinions of the Iowa Ethics and Campaign Disclosure Board. While such opinions carry some legal weight, they are not legally binding. Such opinions may also consist more of an application of law to a fact pattern, rather than statements of general applicability.

Paragraph “j” excludes a decision by an agency not to exercise a discretionary power. This is limited to situations where the agency declines to act in a particular fact situation, not where policymaking of a general nature is involved.[82]

Paragraph “f” excludes government policies that need to be secret to maintain effective administration of the law. To claim coverage under this provision, the agency must show that: (1) publication would allow law violators to escape detection; (2) publication would encourage disregard for the law; or (3) publication would give unfair advantage to persons in an adverse position to the state.

Paragraph “g” excludes from rulemaking the prices charged for goods or services. The exemption applies when the state is, in effect, acting as a merchant, selling a good or a service, such as sales conducted by Iowa Prison Industries. License fees, application fees, or other fees are explicitly carved out from this exclusion, and must be adopted by rule.

Paragraphs “h” and “i” exclude statements relating to the maintenance, care, and public use of a state building or property.

[81] Bonfield, The Iowa Administrative Procedure Act, at 811.
[82] Id. at 838.

Paragraph "k" excludes statements relating only to inmates of a penal institution, students enrolled in a state school, or patients in a state hospital, when those statements are issued by that agency. Note the exclusion applies to statements relating only to those named groups. If the statement affects family, visitors, or other members of the public, the exclusion does not apply.[83]

VI. Notice of Rulemaking — Iowa Code Section 17A.4

A. Uniform Rules for Agency Procedure

The uniform rules on agency procedure[84] (uniform rules) were drafted in 1985 by a task force headed by Professor Bonfield. The rules were also amended by the Iowa Attorney General's office effective July 1, 1999, in response to legislative revisions to Iowa Code chapter 17A. The uniform rules cover petitions for rulemaking, declaratory orders, agency procedures for rulemaking, fair information practices under Iowa Code section 22.11, and contested cases. The rules are in the form of example language that agencies may utilize, rather than uniform requirements imposed on all agencies without deviation. Because the uniform rules have not been updated in many years, the language, particularly relating to agency procedures for rulemaking, is somewhat outdated. Agencies adopting this language for the first time or amending previously adopted language should consider updating it.[85]

B. Regulatory Principles Governing Rulemaking — Executive Order No. 9

In 1999, Governor Vilsack established Executive Order No. 9,[86] which contains a series of general principles establishing a philosophical framework for agencies to use when engaging in policymaking through the rulemaking process. That order also requires all administrative agencies to appoint an agency rulemaking coordinator as the contact point for the agency's rulemaking activities. The principles established in the order are as follows:

- To the extent permitted by statute, and wherever applicable, each agency shall only issue rules that are authorized by state law and that aid in interpreting the law or serve an important public need. In deciding whether and how to regulate, each agency shall assess all costs and benefits of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, each agency shall select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages) and that are most equitable in their result.
- Each agency shall identify and assess the significance of the specific problem any contemplated regulation intends to address.

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[83] Airhart v. Iowa Dep't of Social Services, 248 N.W.2d 84, 85 (Iowa 1976). In this case, the court held that an individual on parole was not an "inmate" within the meaning of Iowa Code section 17A.2.

[84] The current text of these rules is available at www.legis.iowa.gov/DOCS/Rules/Current/UniformRules.pdf. The uniform rules were printed at the beginning of the first volume of the IAC before printing of the IAC was discontinued.

[85] The Board of Pharmacy has made the most comprehensive effort to update the uniform rule language on agency procedures for rulemaking. It would be a good starting point for any agency seeking to update this language. The chapter can be found at 657 IAC 28.

[86] Exec. Order No. 9 (Sept. 14, 1999), *available at* www.legis.iowa.gov/docs/publications/EO/966173.pdf.

- To the extent that it is reasonable and practicable, each agency shall examine whether existing rules (or laws) have created or contributed to the problem that a new rule is intended to correct, and whether those rules (or laws) should be modified to achieve the intended goal of regulating more effectively.
- Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior or providing information upon which choices can be made by the public.
- Each agency shall, in setting its regulatory priorities, consider the varying degrees and natures of the risks posed by the different substances or activities within its jurisdiction.
- Each agency shall design its rules in the most cost-effective manner to achieve the desired regulatory objective. In doing so, each agency shall consider incentives, innovation, consistency, predictability, enforcement, and compliance costs (to government, regulated entities, and the public), flexibility, and equity.
- Each agency shall assess both the costs and the benefits of contemplated rules and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a rule only upon a reasoned determination that the benefits of the intended rule justify its costs and that the rule is the best available method of achieving the desired regulatory objective, consistent with the other principles contained in this order.
- To the extent that it is reasonable and practicable, each agency shall base its decisions on scientific, technical, economic, and other information concerning the need for, and consequences of, the intended rule.
- Each agency shall identify and assess alternative forms of regulation and shall, to the extent that it is reasonable and practicable, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.
- To the extent that it is reasonable and practicable, each agency shall seek the views of appropriate local officials or their representatives before imposing regulatory requirements that might specifically or uniquely affect those governmental entities. Each agency shall assess the effects of its contemplated rule on local governments, including the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize their rulemaking actions with related local regulatory and other governmental functions.
- Each agency shall avoid rules that are inconsistent, incompatible, or duplicative with its own rules or those other state agencies.
- Each agency shall narrowly tailor its rules to impose the least possible burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

- Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

C. Rulemaking Docket

Both the uniform rules and Executive Order No. 9 require agencies to maintain a rulemaking docket. The docket is generally maintained by each agency on its Internet site. The docketing requirement requires agencies to list each "anticipated" rulemaking proceeding. A rulemaking proceeding is considered "anticipated" from the time a draft of proposed rules is distributed for internal discussion within the agency.

The docket must also contain detailed items of information concerning pending rulemaking. Those items include:

- The subject matter of the proposed rule.
- A citation to all published notices relating to the proceeding.
- Where written submissions on the proposed rule may be inspected.
- The time during which written submissions may be made.
- The names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made.
- Whether a written request for the issuance of a regulatory analysis pursuant to Iowa Code section 17A.4A, or a concise statement of reasons pursuant to Iowa Code section 17A.4(2), has been filed, whether such an analysis or statement or a fiscal impact statement pursuant to Iowa Code section 17A.4(4) or 25B.6 has been issued, and where any such written request, analysis, or statement may be inspected.
- The current status of the proposed rule and any agency determinations with respect thereto.
- Any known timetable for agency decisions or other action in the proceeding.
- The date of the rule's adoption.
- The date of the rule's filing, indexing, and publication.
- The date on which the rule will become effective.
- Where the rulemaking record may be inspected.

D. Commencement of Rulemaking — Filing and Publication in Iowa Administrative Bulletin — Iowa Code Section 17A.4(1)

The rulemaking process begins when the agency drafts and approves a notice of intended action and electronically files it with the ARC[87] for publication in the IAB, an Internet publication containing all newly noticed and adopted rules.[88] The IAB is similar to the Federal Register, containing both notices of intended actions and the text of all rules adopted in final form. It may also contain various other notices required by statute or

[87] Rulemaking documents are filed through the electronic Rule Management System (RMS) maintained by the Legislative Services Agency (LSA).

[88] Individual bulletins are available at www.legis.iowa.gov/law/administrativeRules/bulletinSupplementListings. See also Appendix B.

approved by the ARRC. Publication in the IAB is legally sufficient to support a rulemaking, but it is only a minimum notice. Agencies are free to use more extensive notice if they choose and, in some cases, statutory provisions can require more extensive notice.

All notices of intended action are subject to preclearance by the ARC prior to assignment of an ARC number and publication in the IAB.

E. Notice of Intended Action

A notice of intended action must be published in the IAB not less than 35 days before the proposal can be adopted in final form. The notice must contain either the "terms or substance" of the proposal or set out a description of the matters involved.[89]

The scope of the notice is set by the agency. A notice can address one or more rules or portions of rules. A notice can add new rules, amend existing rules, delete existing rules, or a combination thereof. A notice is not restricted to one particular rule or issue, so a single rulemaking can embrace a large number of related or even unrelated changes.

While the actual text of the rule is not necessarily required to be published in the IAB, the notice must contain enough information for the average person to understand the nature and scope of the proposal. The main reason why the text of a rule might not actually be published with the notice is that the text may already be readily available as part of a national standard, published federal regulation, or other document adopted by reference in a rule. See discussion of adoptions by reference in this Part VI, Section S.

F. Preamble — Explanation of Rulemaking and Related Matters

The preamble of the notice appears prior to the text of the rule changes and contains a synopsis of the subject and a citation to the specific statutory authority for the proposal. The preamble is not part of the rule itself and will not appear in the IAC. The notice must include a brief explanation of the principal reasons for the rulemaking.[90] The failure to include all of the principle reasons supporting a rule adoption in the explanation may mean only those reasons contained in the explanation can later be introduced in court to justify the rule in the event of any litigation.[91] Additionally, failure to clearly inform the public of the effects of the rulemaking in the preamble may be grounds for invalidating the rulemaking.[92] The preamble must include a brief explanation of the principal reasons for its failure to provide in that rule for the waiver of the rule in specified situations if no such waiver provision is included in the rule.[93] 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. At times preambles can be pages long, with the agency using it as a mechanism to present its reasoning behind the proposal at length or to detail its history.

G. Fiscal Impact Statement — Iowa Code Section 17A.4(4)

Iowa Code section 17A.4(4) requires that an agency prepare a fiscal impact statement for all proposed or adopted rules with an annual expenditure of $100,000 or an expenditure of $500,000 within five years, which includes expenditures by "all

[89] Iowa Code §17A.4(1)(a).
[90] Iowa Code §17A.4(2).
[91] See Bonfield, Amendments to Iowa Administrative Procedure Act, at 26-27.
[92] Iowa Fed'n of Labor, AFL-CIO v. Iowa Dep't of Job Service, 427 N.W.2d 443, 449-50 (Iowa 1988).
[93] Iowa Code §17A.4(2). Iowa Code section 17A.9A, establishing uniform procedures for agency waiver of rules, was enacted subsequent to the enactment of this language.

affected persons, including the agency itself." The LSA analyzes the statement and provides a summary to the ARRC. Fiscal impact analysis provides a general overview of the financial costs, both to the agency and to those persons subject to the rule. The analysis generally does not include intangible considerations, such as the value of time lost. To the extent practicable, expenditures are expressed in dollar amounts. In those cases where the agency cannot establish a dollar figure, a range of costs or a general discussion of the impact are acceptable. A summary of the statement is published as part of the preamble to a rule filing. The LSA has developed a form for the fiscal impact statement. The form must be completed for every rule filing, even if it merely indicates that the dollar thresholds have not been met.

H. Fiscal Impact Statement for Local Government — Iowa Code Section 25B.6

This statutory provision relating to the fiscal impact of rules on local governments is not part of Iowa Code chapter 17A, but as a practical matter it is part of the rulemaking process. Iowa Code section 25B.6 begins with a general prohibition against rules which mandate expenditures by political subdivisions or their contracting entities which are not required or authorized by statute. It then requires a proposed administrative rule, which increases annual expenditures more than $100,000 by all affected political subdivisions, to be accompanied by a fiscal impact statement outlining the costs. The statement must be submitted to the ARC for publication in the IAB along with the notice of intended action.

I. Jobs Impact Statement — Iowa Code Section 17A.4B

Iowa Code section 17A.4B requires that an agency prepare a jobs impact statement for all proposed rules and submit it to the ARC along with the rule filing. A summary of the statement is published as part of the preamble to a rule filing. If necessary, the statement is updated when the proposed rules are adopted. Agencies must accept comments and information from stakeholders prior to final preparation of the statement.

The statement must identify and describe the cost that the agency anticipates state agencies, local governments, the public, and the regulated entities will incur due to implementing and complying with a rule; determine whether a rule would have a positive or negative impact on private sector jobs and employment opportunities in Iowa; describe and quantify the nature of the impact a rule will have on private sector jobs and employment opportunities including the categories of jobs and employment opportunities that are affected by the rule and the number of jobs or potential job opportunities and the regions of the state affected by the rule; and identify, where possible, the additional costs to employers per employee due to implementing and complying with a rule. The ARC has developed a form for the statement.

When agencies do determine that a rule is likely to have an impact on jobs, they generally do not include a precise number of jobs estimated to be impacted. Instead, agencies will usually describe whether the impact will be positive or negative and how significant the impact is estimated to be and explain the rationale for those determinations.

Iowa Code section 17A.4B also directs agencies to take steps to minimize the adverse impact on jobs and the development of new employment opportunities due to implementation of a rule.

J. Written Comments and Opportunity for Oral Presentation

The public must be allowed not less than 20 days to submit written comments to the agency regarding a proposed rule, and the method and deadlines for these submissions must be set out in the initial notice. The notice must also identify the mechanism for requesting an "opportunity for oral presentation," which is colloquially referred to as a public hearing.[94] Public participation is open to "all interested persons." The phrase encompasses any person or entity: individuals, corporations, or associations. 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.[95]

The "opportunity for oral presentation" is established in Iowa Code section 17A.4(1)(b). This phrase was specifically chosen to ensure there was no confusion with a due process, judicial-type hearing. The oral presentation was originally conceived as an alternative to written comments, designed for those persons who could not effectively make written presentations.[96] This "opportunity" is nothing more than the right to express views and make arguments. It does not include the myriad of due process rights that are expected in a trial-type hearing, such as the right to cross-examine other witnesses, the right to a decision based solely on the evidence introduced into the record, or the right to an unbiased decision maker.[97] In short, this "opportunity for oral presentation" is simply a public hearing on a proposed rule. Legally, it provides the public with the right to deliver oral comments before a representative of the agency and places an obligation on the agency to give those comments full and fair consideration. Twenty days' notice of the hearing must be given by publishing the notice in the IAB. Unlike written submissions, a public hearing is not an automatic right. Only a limited number of persons or entities can demand that a hearing be held: the ARRC; a petition signed by 25 persons; a group representing 25 persons; a government agency; or the Governor. The availability is limited because a hearing can be expensive and time consuming for the agency. This process eliminates the ability for any single individual to disrupt the process. When the agency does not schedule a hearing in the initial notice, a subsequent request delays the entire rulemaking process for over 40 days as an amended notice for the hearing is published in the IAB.[98] Notice must be published for 20 days, plus a minimum 19-day editorial period to get the notice published in the IAB. For this reason, agencies routinely schedule a hearing as part of any rulemaking that might be controversial.

Public hearings are generally held in the Des Moines area, although they can be held anywhere in the state.[99] An agency may schedule multiple public hearings on a single notice, although a single hearing is much more common. Scheduling multiple hearings may be useful when input is sought from a variety of geographic regions in the state or when a significant amount of public comments are anticipated. Agencies also occasionally

[94] Iowa Code §17A.4(1)(b).
[95] Bonfield, The Iowa Administrative Procedure Act, at 852.
[96] Id. at 853.
[97] Id.
[98] Id. at 854.
[99] The Iowa Supreme Court once invalidated an agency rule providing that all public hearings would be held in Des Moines, as the travel requirements involved would be too onerous to meet the requirements of Iowa Code §17A.4(1)(b). See Schmitt, 263 N.W.2d at 746. Agencies have generally held public hearings in Des Moines since that time without issue.

establish multiple remote locations for participation in a single hearing. Each hearing time, date, and location must be noticed in the IAB.[100]

K. Conducting an Opportunity for Oral Presentation

Once an oral presentation is scheduled, whether in the agency's discretion or by request, participation is not limited to the persons or groups who made the initial request. "Interested persons" are entitled to attend and make a presentation. As described above, this phrase means any person or entity, with no legal interest required.[101] A transcript of verbatim testimony is not required at the oral presentation;[102] notes or an audio recording are sufficient. There is no statutory requirement that the agency provide a presiding officer that actually interacts with the public; however, the uniform rules call for the agency's presiding officer to be familiar with the substance of the proposed rule, to preside at the hearing, and to prepare a synopsis summarizing the contents of the presentations made at the hearing. An agency is free to set reasonable standards for the conduct of an oral presentation such as the length of the presentation and a duration that each person is permitted to speak.[103] Most agencies have adopted detailed rules describing how public hearings will be conducted.

L. Agency Consideration of Comments

Iowa Code section 17A.4(1)(b) requires that the agency "consider fully all written and oral submissions." Agency policymakers are not required to be present at the meeting, nor are the final agency decision makers required to review the tapes, minutes, or submissions of the rulemaking proceeding.[104] However, the agency decision maker must be fully and adequately informed as to the content of the public comment; this can be accomplished through an adequately prepared staff synopsis of the public comments.[105] However, the language of Iowa Code section 17A.4(1)(b) does not require that an agency actually respond to each argument raised against a proposed rule;[106] such arguments and other comments need only be considered.

An agency is required to give public comment "full and fair" consideration.[107] However, the agency remains free to use other available materials and information and its expertise to adopt whatever rule it determines is appropriate.[108] Such a determination need not be based on the comments received, as long as the comments are considered.

M. Rulemaking Record

Iowa law does not require rulemaking on the record; the decision to adopt a rule does not need to be supported by testimony or other evidence in a record. An agency is free to obtain information from any source it wishes and its ultimate decision need not be based on, or supported by, materials or comments submitted by the public.[109] While

[100] Bonfield, The Iowa Administrative Procedure Act, at 851: "If the notice would apprise the average person of information sufficient to enable such persons to ascertain the precise nature and scope of the proceedings and the precise means by which they can participate, the notice should be deemed sufficient."
[101] Id. at 852.
[102] Id. at 854.
[103] Id. See also Schmitt, 263 N.W.2d at 747.
[104] Schmitt, 263 N.W.2d at 746.
[105] Id. See also Bonfield, The Iowa Administrative Procedure Act, at 855.
[106] See Iowa Citizen/Labor Energy Coal., Inc. v. Iowa State Commerce Comm'n, 335 N.W.2d 178, 181 (Iowa 1983). By contrast, a concise statement issued under Iowa Code §17A.4(2) does require that an agency address such arguments.
[107] Id. at 182.
[108] Bonfield, The Iowa Administrative Procedure Act, at 853.
[109] Id. See also Iowa Farm Bureau Fed'n v. Environmental Protection Comm'n, 850 N.W.2d 403, 418-19 (Iowa 2014).

rulemaking on the record is not required as the legal basis to formulate rules, maintenance of such a record is generally still required for the purpose of allowing public inspection. The uniform rules provide a framework for the creation of a rulemaking record although language adopted from the uniform rules will vary by agency. The rulemaking record is a collection of written and oral comments and other materials generated as part of the rulemaking. Under the uniform rule language, the record must be maintained for at least five years and must consist of the following:

- Copies of all publications in the IAB with respect to the rule or the proceeding upon which the rule is based and any file-stamped copies of agency submissions to the ARRC concerning that rule or the proceeding upon which it is based.
- Copies of any portions of the agency's public rulemaking docket containing entries relating to the rule or the proceeding upon which the rule is based.
- All written petitions, requests, and submissions received by the agency, and all other written materials of a factual nature as distinguished from opinion that are relevant to the merits of the rule and that were created or compiled by the agency and considered by the agency head, in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based, except to the extent the agency is authorized by law to keep them confidential; provided, however, that when any such materials are deleted because they are authorized by law to be kept confidential, the agency shall identify in the record the particular materials deleted and state the reasons for that deletion.
- Any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, the stenographic record or electronic recording of those presentations, and any memorandum prepared by a presiding officer summarizing the contents of those presentations.
- A copy of any regulatory analysis pursuant to Iowa Code section 17A.4A or fiscal impact statement pursuant to Iowa Code section 17A.4(4) or 25B.6 prepared for the proceeding upon which the rule is based.
- A copy of the rule and any concise statement of reasons issued pursuant to Iowa Code section 17A.4(2) prepared for that rule.
- All petitions for amendment or repeal or suspension of the rule.
- A copy of any objection to the issuance of that rule without public notice and participation that was filed pursuant to Iowa Code section 17A.4(2) by the ARRC, the Governor, or the Attorney General.
- A copy of any objection to the rule filed by the ARRC, the Governor, or the Attorney General, pursuant to Iowa Code section 17A.4(4), and any agency response to that objection.
- A copy of any significant written criticism of the rule, including a summary of any petitions for waiver of the rule.
- A copy of any executive order concerning the rule.

N. Concise Statement: A Record Based on the Agency's Decision — Iowa Code Section 17A.4(2)

In a rulemaking proceeding, the public is not entitled to a decision based on the evidence in the record, but the public can demand that the agency create a record for its decision. Any "interested person" may request that the agency prepare "a concise statement of the principal reasons for and against the rule it adopted, incorporating therein the reasons for overruling considerations urged against the rule."[110] The phrase "interested person" is interpreted broadly to mean any person or entity, with no legal interest required.[111]

This provision requires a synopsis of the most important arguments for and against the proposal. An analysis of every detail is not required; however, all of the principal reasons for the final adoption of the rule must be included in the statement. Additionally, the agency must set out all of its reasons for adopting the rule over public objections. The request for a concise statement forces the agency to review and analyze all the oral comments and other written material submitted during the rulemaking process as well as the agency's expertise and any other material or information relied upon by the agency in formulating the rule.[112] The failure to include all of the reasons supporting a rule adoption in the statement may mean only those reasons contained in the statement can later be introduced in court to justify the rule in the event of any litigation.[113] A concise statement may also be cited by a court as evidence of an agency's decision-making process in formulating a rule.[114]

The request for a concise statement may be made at any time during the rulemaking process up to 30 days after the final adoption. The statement must be issued within 35 days of receipt of the request. Failure to timely issue a concise statement may constitute grounds for invalidating the rulemaking.[115] A concise statement is not required to be published in the IAB.

O. Period for Adoption — Iowa Code Section 17A.4(1)(b)

The notice period of the rulemaking process is limited. The agency has 180 days to either adopt the proposal in final form or terminate the rulemaking. The notice period begins either on the date the notice was published in the IAB or the date of the last oral presentation, whichever is later. The 35-day publication period for a notice of intended action is a minimum. A rule proposed by a notice of intended action can be adopted no sooner than 35 days after publication of the notice. Generally, adoption of a proposal takes longer; that precise timing occurs only in noncontroversial rulemaking proceedings where each deadline has been promptly met. Substantive proposals often require more lengthy consideration before adoption by the agency. The first 20 of the 35 days of the process are dedicated to public participation; this leaves only 15 days for consideration and analysis of that public comment. Commonly, the notice period runs 45 to 90 days, depending on the

[110] Iowa Code §17A.4(2).
[111] Bonfield, The Iowa Administrative Procedure Act, at 852. Note that at the time of Professor Bonfield's writing, the statutory language he describes concerning issuance of concise statements was codified at Iowa Code section 17A.4(1)(b).
[112] Id. at 857.
[113] In the event of litigation concerning an agency's rulemaking process, "[t]he concise statement of the reasons for and against a rule and the reasons why the agency has overruled the considerations urged against the regulation may properly be deemed binding on the agency by virtue of this statutory provision. That is, the reasons contained in such a statement become the exclusive basis upon which the agency may subsequently defend the legality of the rule in subsequent judicial review proceedings." Id. at 856-57.
[114] See Iowa Medical Soc'y v. Iowa Bd. of Nursing, 831 N.W.2d 826, 833-36, 843 (Iowa 2013).
[115] Iowa Bankers Ass'n v. Iowa Credit Union Dep't, 335 N.W.2d 439, 447-48 (Iowa 1983).

complexity of the public comment. A rule proposed by a notice of intended action that is not adopted within the maximum period of 180 days expires, and the rulemaking process must begin again with publication of a new notice in the IAB.

P. Termination of Notice

An agency is not as a general matter obligated by the IAPA to adopt all or any portion of a notice of intended action. Professor Bonfield described the role of an agency considering the written and oral comments on a notice of intended action as "determining the precise shape of a rule and whether to adopt it."[116] Publication of a notice does not establish any binding legal expectation that the notice must be adopted, even if a statute may require rulemaking on the subject at issue to eventually be carried out by the agency. An agency that decides not to adopt a portion of a notice may simply omit that portion when adopting the notice. An agency that decides not to adopt any of the noticed language has two options. The agency may allow the 180-day period provided in Iowa Code section 17A.4(1)(b) to elapse, at which point the notice automatically expires. The agency may instead file a notice of termination for publication in the IAB. A notice of termination briefly informs the public that a previous notice of intended action has been terminated and provides the agency's rationale for the termination.[117] The publication of the notice of termination ends the rulemaking process. Notices of termination receive their own ARC number and are subject to review by the ARRC. The IAPA does not preclude further rulemaking by an agency if a prior notice of intended action on the same subject, even one containing the same language, was terminated, whether by operation of Iowa Code section 17A.4(1)(b) or by publication of a notice of termination.

Q. Amended Notice

While the rulemaking process generally only involves the publication of a single notice of intended action by an agency, an agency can have multiple notices published prior to the adoption of rules. A notice published after the initial notice of intended action is referred to as an "amended notice." The publication of an amended notice starts a new 180-day period before the rulemaking expires pursuant to Iowa Code section 17A.4(1)(b). The new 180-day period is calculated based on the date of publication and any public hearings held for the amended notice. Procedurally, an amended notice is treated the same as an initial notice of intended action.

Amended notices are generally done for one of two reasons, or both. First, an agency may determine that the scope of the changes it wishes to make to the language published in the initial notice is different enough from what was originally published, or the changes are otherwise extensive enough, for additional notice to the public to be necessary or advisable. See Part VII, Section B for a discussion of how significantly noticed language can be changed without requiring further notice. The agency can then file an amended notice containing the language of the desired changes to give notice to the public and seek feedback prior to adopting the changes.[118]

Second, an agency may need or desire to schedule one or more public hearings on the originally noticed language. Because all public hearings must be noticed in the IAB at least 20 days in advance, if an agency schedules a public hearing on noticed

[116] Bonfield, The Iowa Administrative Procedure Act, at 855.
[117] See, e.g., IAB Vol. XLI, No. 25 (6/5/19) p. 3080, ARC 4469C; IAB Vol. XLII, No. 1 (7/3/19) p. 36, ARC 4533C.
[118] See, e.g., IAB Vol. XLI, No. 13 (12/19/18) p. 1385, ARC 4172C.

language after the notice of intended action has been published, an additional notice must be published that includes information on the public hearing. This form of amended notice will only include information on the public hearing and will refer back to the previous notice for the public to see the rule changes that have been proposed.[119]

An amended notice can also include both options: proposing changes to the language published in the original notice and scheduling a public hearing on the proposed changes.[120]

R. Timeliness Requirement for Implementing Statutes by Rule — Iowa Code Section 17A.4(9)

The ARRC in recent years has expressed concern that agencies have not always carried out rulemaking to implement newly enacted statutes in a timely manner. In response to that concern, Iowa Code section 17A.4(9) was enacted in 2016. This subsection requires that agencies carry out one of two actions if a provision of a newly enacted bill, or another statute that governs or is directly related to a provision of the bill, expressly requires rulemaking by the agency.

Within 180 days of the effective date of the provision, the agency must either submit a notice of intended action to the ARC and ACE to commence the rulemaking process[121] or submit written notification to the ARRC that the agency has not commenced rulemaking. The notification must include the provision for which rulemaking is required, the subject matter of the provision, an explanation of the delay in the submission of a notice, and an estimated timeline for submission of a notice.

This requirement only applies to rulemaking required by bills, not discretionary rulemaking. The requirement applies to bills enacted starting with the 2016 Legislative Session.

S. Adoption by Reference and Dates Certain — Iowa Code Sections 2B.5A(3) and 17A.6(2)

The IAC does not contain the actual text of every administrative rule. A large amount of rulemaking implements verbatim federal statutes or regulations, various types of national codes, such as building or electrical codes, or other material. In these cases, the material is drafted and published through other sources outside of state government. Often, such as in the areas of building or engineering codes, the material is used by a highly specialized and limited readership. In these cases, drafting the actual language into Iowa rules would be impracticable and of limited utility. Instead, the solution is to adopt a rule that references the specific material by a citation. Iowa Code section 17A.6(2) specifically requires that an agency which adopts material by reference must provide an electronic copy to the ACE for publication on the General Assembly's Internet site, or if an electronic copy is not available, deliver a copy of the publication containing the standards to the ACE for deposit in the State Law Library where it is available for public inspection and reference.

[119] See, e.g., IAB Vol. XLII, No. 1 (7/3/19) p. 11, ARC 4534C.
[120] See, e.g., IAB Vol. XLII, No. 1 (7/3/19) p. 39, ARC 4535C.
[121] The notice only needs to be submitted electronically for publication within the 180-day period. It does not need to actually be published in the IAB within the 180-day period. See Iowa Code §17A.4(9)(a)(1).

If the material adopted by reference is proprietary or contains proprietary information, an agency may instead establish alternative procedures providing for public access to an electronic or printed copy of a publication containing the material.[122]

All adoptions by reference should be limited to a reference in the text to a "date certain." This may be the date the material is published, the date it was made effective, or any other date that ties the material to a specified point in time. The effect is that the adoption by reference does not include any amendments to the adopted material occurring after the date certain unless the rule is adopted again with a revised date.

There are three reasons for this "date certain" limitation. The first reason is practical: to ensure that the reader obtains the correct version of the adopted material. Without that date, the reader has no guarantee that the version they have obtained is correct. The agency also has no guarantee that the material adopted by reference might not be later revised in such a way that the agency might find problematic. The second reason is political: the ARRC has in the past been concerned with this issue and has demanded the use of a specific date to ensure that every reader knows which version of the standard or manual is in effect.[123] The last reason is constitutional: as a legal principle, adopting a national standard or manual without a date certain is arguably unconstitutional. The doctrine is that the power to make an Iowa law may not be delegated to a "foreign" jurisdiction. An administrative rule is for all intents and purposes a law, just as is a statute enacted by the General Assembly. Thus, rules are subject to the same constitutional constraints. When an agency adopts a standard or a manual tied to a date certain it is in essence adopting existing material into Iowa law — it literally becomes an Iowa law at that point because an Iowa lawmaking authority has adopted that text. When a specified date certain is not used, the agency is not only adopting existing material into Iowa law, it is allowing that "foreign" jurisdiction to determine what Iowa law will be in the future. Such an approach arguably constitutes an unconstitutional delegation of lawmaking authority.[124]

T. Requirement for Substantial Compliance — Iowa Code Section 17A.4(5)

A rule is void unless adopted in "substantial compliance" with the mandates of the rulemaking process. The phrase "substantial compliance" does not require perfect adherence to every procedural detail. Generally speaking, while the phrase is intended to be construed narrowly against an agency, a rule will not be invalidated due to mere harmless error by an agency.[125] However, when analyzing questions of substantial compliance, a court will consider not only harm suffered by the parties to the suit, but also

[122] Iowa Code §17A.6(3).

[123] "1.4(3) Adoption of materials by reference. If a rule adopts an Iowa statute or Iowa administrative rule by reference, that adoption includes all subsequent amendments to that statute or rule. Any other material adopted by reference cannot include subsequent amendments and the citation must include a date certain identifying either the effective date or publication date of the material." Administrative Rules Review Committee Rules of Procedure: 1.4(3) (Iowa ARRC 2019).

[124] 1982 Op. Iowa Att'y Gen. 439 (6/17/82), *available at* govt.westlaw.com/iaag/Document/I966d57e1127a11dba76edcd428e38b66. Incorporation of extrinsic material by reference without a date certain has been held unconstitutional in other states, but case law primarily centers around such incorporations in statutes. See, e.g., City of Oklahoma City v. State ex rel. Oklahoma Dep't of Labor, 918 P.2d 26, 29-30, (1995) (as corrected Oct. 13, 1995), Protz v. Workers' Compensation Appeal Bd. (Derry Area School District), 161 A.3d 827, 838–839 (2017). The question has not been considered by an Iowa court.

[125] See Bonfield, The Iowa Administrative Procedure Act, at 873-74.

"harm to persons not parties, and the interest in strict compliance with the IAPA.[126] This broad analysis of possible violations of the rulemaking process furthers the purposes of the IAPA of "increasing public accountability of agencies, fostering public participation in rule-making, and assuring agency adherence to a uniform minimum procedure."[127] Such purposes are to be construed broadly.[128] Professor Bonfield set out three basic criteria that measure substantial compliance:

- The extent to which injury resulted from the procedural defect.
- The extent to which the defect could have deprived anyone of the opportunity to participate in the 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.[129]

All three of these criteria are examined together, and if the defect did not significantly involve any of these criteria, then the rulemaking remains valid. The Iowa Supreme Court has stated that these criteria are "probative" in analysis of substantial compliance.[130]

U. Statute of Limitations — Iowa Code Section 17A.4(5)

Unless the validity of a rulemaking process is challenged within two years of the effective date of the rule, the rulemaking will be presumed valid. The assumption is that a rule should not be forever clouded by a procedural defect which is unrelated to the substance of the rule.[131] This presumption of validity means that a rule cannot be challenged on procedural grounds once two years have passed since the completion of the rulemaking; any defect not challenged within that period is deemed cured. Note this presumption applies only to possible procedural defects. The substance of a rule can be challenged at any time a person is "aggrieved or adversely affected" by the rule.[132]

VII. Adoption and Effective Date of Rules — Iowa Code Section 17A.5

A. Overview

The notice and public participation requirements constitute only the first half of the rulemaking process. A proposed rule is not effective until three things occur:

- The rule proposed by a notice of intended action is adopted in final form.
- The adopted rule is filed with the ARC.
- The adopted rule is again published in the IAB for 35 days before it becomes effective and is also indexed and codified in the IAC.

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[126] Iowa Bankers Ass'n, 335 N.W.2d at 447. See also Bonfield, The Iowa Administrative Procedure Act, at 874: "Only if it is completely clear that an agency's inadvertent failure to technically comply with some minor detail of a rulemaking requirement is harmless in every possible respect as to all members of the public is a court justified in finding 'substantial compliance.'" The intent of the General Assembly to strike a fair balance between the purposes of the IAPA and "the need for efficient, economical and effective government administration" may also be relevant to such analysis. Iowa Code §17A.1(4). Note that the issue of harm for purposes of analysis of substantial compliance is a different question than whether a party can show a sufficient interest to establish standing to sue. See Iowa Bankers Ass'n, 335 N.W.2d at 442-45.

[127] Iowa Bankers Ass'n, 335 N.W.2d at 447, citing Iowa Code §17A.1(2), now codified at §17A.1(3).

[128] Iowa Bankers Ass'n, 335 N.W.2d at 447, citing Iowa Code §17A.23.

[129] See Arthur E. Bonfield, State Administrative Rulemaking, at 362 (Little, Brown & Co., 1986) (providing a detailed analysis of the concept of "substantial compliance").

[130] Iowa Bankers Ass'n, 335 N.W.2d at 447.

[131] Bonfield, The Iowa Administrative Procedure Act, at 875.

[132] Id. See also Iowa Code §17A.19.

Not less than 35 days after the publication of the notice of intended action, the agency may adopt the proposed rule in final form. Adoption can occur on the 35th day. During the notice period, the agency collects and reviews the public comments offered on the proposal and may consider other material and information as well as the agency's own expertise.[133] At the conclusion of the notice period, the agency decision maker makes whatever changes may be necessary or desirable and formally adopts the final rule. An adopted rule must include a preamble similar to a notice of intended action. The preamble for an adopted rule also includes a summary of public comments received, changes made to the noticed language, the date of adoption, and the effective date.

B. Changing the Text From Notice to Adoption

A noteworthy issue in the rulemaking process is the extent to which the text of a rule proposed by a notice of intended action can be changed prior to the final adoption of the rule without invalidating the notice. The question is whether the noticed language has been changed to such a degree upon adoption that the public arguably did not receive sufficient notice of what the final language might be. An agency may make changes to the text of a noticed rule based on the comments received during the rulemaking process or for any other reason. Under Iowa law, even substantial changes can be made to a rule proposed by a notice of intended action as long as those changes are within the scope of the original notice and a logical outgrowth of the comment received on the proposal.[134] Professor Bonfield has developed a three-part test to functionally determine whether changes to a proposed rule are so extensive that they exceed the scope of the original notice.[135] When that occurs, the entire rule must again be placed under notice. The factors considered in this test are:

- The extent to which all persons affected by an adopted rule should have understood that the published proposed rule would have affected their interests.
- The extent to which the subject matter of the adopted rule or issues determined by that rule are different from the subject matter or issues involved in the published proposed rule.
- The extent to which the effects of the adopted rule differ from the effects of the published proposed rule had it been adopted instead.

Failure to give adequate notice to the public under Iowa Code section 17A.4(1)(a) would likely be grounds for invalidating the rulemaking.[136] An agency that determines desired changes to the noticed language may not pass this test could file an amended notice that includes the desired changes for publication in the IAB prior to adopting them.

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[133] Bonfield, The Iowa Administrative Procedure Act, at 853.

[134] Iowa Citizen/Labor Energy Coal., 335 N.W.2d at 180-81 (stating that the adequacy of notice is to be decided on a functional basis and that a notice must be sufficiently informative to assure interested persons an opportunity to participate intelligently in the rulemaking process). As to the extent of permissible modification, the court stated: "[The notice requirements are] not to be a straightjacket for agencies. . . . The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed. . . . Even substantial changes in the original plan may be made so long as they are in character with the original scheme and a logical outgrowth of the notice and comment already given." Id. at 181 (citation and quotation omitted).

[135] Bonfield, State Administrative Rulemaking, at 235.

[136] See Iowa Code section 17A.4(5) requiring substantial compliance with the requirements of Iowa Code section 17A.4.

C. Details of Adoption: Procedure and Effect

The structure of an agency, as established by statute, determines who has the authority to adopt rules in final form on the agency's behalf. In some agencies, a single individual such as a director has the sole authority to adopt rules. In other agencies, a multimember body such as a board or commission has the authority to adopt rules. Such multimember bodies must adopt rules by a majority vote at a public meeting. Adoption of rules is sometimes subject to prior review or approval by another agency official or body before the adopting authority can act.[137]

Adoption is, in effect, a relinquishment by the agency of any further right to make changes to the rules. The agency declares that the terms and substance of the rules are now fixed. At that point, for the agency, the rulemaking process is finished once the adopted rules are filed — if any additional changes are needed, a new rulemaking process must begin.

D. Publication and Effective Date

A rule can be made effective no sooner than 35 days after the rule is adopted in final form, electronically filed with the ARC,[138] and published in the IAB.[139] At the same time an adopted rule is published in the IAB, the text is indexed and incorporated into the IAC. Agencies may specify a later effective date, so long as that date is set out in the filing. Agencies sometimes prefer to set the first day of the following month, or even the first day of the following year, as the effective date.

In calculating the precise moment a rule becomes effective, a published rule goes into effect on the 35th day (e.g., 34 days plus one minute). Each issue of the IAB contains a chart, the schedule for rulemaking, which calculates every step of the rulemaking process, including the earliest effective date for each rulemaking period. The schedule for rulemaking is updated each year.[140]

This 35-day period is critical to ensure that the public is able to actually find and read the rules that they must obey. This period is not an additional opportunity for comment. In essence, it is a grace period allowing a new rule to be published, distributed, and reviewed by the general public before it goes into effect. The delay provides affected individuals with an opportunity to bring their affairs into compliance with the new requirements. The delay also allows time for the commencement of litigation to prevent enforcement of the rule, once the final text of the rule has been determined, before such enforcement begins. The publication process may be the most important part of the rulemaking process, because it is the only provision that is arguably constitutionally required. The Fourteenth Amendment to the United States Constitution provides that no person may be deprived of life, liberty, or property without due process of law. A fundamental part of due process is the right to notice. Relative to administrative rules, this means that a right exists to have a published copy available before the rule is enforced against a particular individual.

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[137] See, e.g., Iowa Code §§123.10 (rules of the Alcoholic Beverages Division adopted by the administrator of the division subject to approval by the Alcoholic Beverages Commission), 691.6(3) (rules adopted by the State Medical Examiner subject to approval of the Director of Public Health).

[138] Rulemaking documents are filed through the Rules Management System (RMS), an electronic filing system maintained by the LSA.

[139] Iowa Code §17A.5(2).

[140] The 2021 schedule for rulemaking is available at: www.legis.iowa.gov/docs/publications/ACOD/1150990.pdf.

VIII. Emergency Rulemaking Process — Iowa Code Sections 17A.4(3) and 17A.5(2)(b)

A. Overview

Regular rulemaking generally takes a minimum of 108 days (including editorial periods); however, frequently the rulemaking process lasts six months or longer. Such delay can complicate an agency's ability to swiftly react to emergency situations. Iowa Code chapter 17A has two procedures which can be used individually or jointly to shorten or even eliminate delays caused by the regular timeline for the rulemaking process. These two procedures have been colloquially referred to as the "emergency" rulemaking process, but that phrase does not appear in the IAPA and is somewhat misleading as these procedures are not limited to emergency situations.

The emergency rulemaking process is a combination of Iowa Code section 17A.4(3), relating to the publication of a notice of intended action, and Iowa Code section 17A.5(2)(b), relating to effective dates. As there are two different parts to the rulemaking process, there are also two procedures to be followed in shortening the process.

When these two procedures are combined, the result is that a rule is adopted without prior notice and becomes effective prior to publication in the IAB. Such rules are often made effective immediately. Such rules can still be viewed by the public on the General Assembly's Internet site prior to publication.[141]

Oversight of the emergency rulemaking process is described in Part XIII, Section B.

B. Adopting Rules Without Notice — Iowa Code Section 17A.4(3)

Under Iowa Code section 17A.4(3), an agency can adopt a rule immediately without going through the notice period of the rulemaking process (known as filing without notice). Agency discretion to file rules without notice was eliminated by 2013 Iowa Acts, chapter 114. Since that enactment, an agency must meet one of two conditions to eliminate the notice requirements. First, this procedure can be used if "the statute so provides."[142] This means that a statute explicitly authorizes emergency rulemaking by the agency on the subject in question.[143] Authorization to use this procedure cannot be inferred.[144] A statute does not need to include specific findings to authorize this procedure. Second, this procedure can be used if the ARRC authorizes it by a majority vote at its regular monthly meeting or a special meeting. The ARRC can only authorize this procedure if the ARRC finds under Iowa Code section 17A.4(3) that notice and public participation in the rulemaking process would be "unnecessary, impracticable, or contrary to the public interest . . . ." This means that the requesting agency must provide the ARRC with specific reasons which justify that finding. Agencies seeking such authorization are generally required to provide the ARRC with a draft of the proposed emergency rules to review prior to the meeting.

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[141] See www.legis.iowa.gov/law/administrativeRules/emergencyDocs.
[142] Iowa Code §17A.4(3)(a).
[143] See, e.g., 2019 Iowa Acts, ch. 65, §8; 2019 Iowa Acts, ch 89, §29.
[144] See Iowa Code §17A.1(2) ("This chapter is meant to apply to all rulemaking … not specifically excluded from this chapter or some portion thereof by its express terms or by the express terms of another chapter."); Iowa Code §17A.23(1) ("If any other statute … diminishes a requirement imposed upon an agency by this chapter, this chapter shall take precedence unless the other statute expressly provides that it shall take precedence over all or some specified portion of this cited chapter."); Iowa Code §17A.23(2) ("… this chapter shall be construed to apply to all covered agency proceedings and all agency action not expressly exempted by this chapter or by another statute specifically referring to this chapter by citation.")

Professor Bonfield offered guidance on the meaning of these criteria.[145] The term "unnecessary" means useless or needless. Rulemaking is unnecessary when the rule is strictly ministerial or routine, such as changing an address; in such cases notice and public participation would be a waste of time and effort. The term "impracticable" is defined as infeasible, unwise, or imprudent. Rulemaking is impracticable when notice and public participation would automatically prevent the agency from functioning. An example would be newly enacted legislation calling for a specific effective date, and the legislation must be supplemented through rulemaking. In this situation the "impracticable" exemption might apply, as any delay in rulemaking would result in a delay in the implementation of the statute. The term "contrary to the public interest" is a catch-all phrase that requires a balancing test. The agency must weigh the value of notice and public participation against the value of quick implementation of the rule. These criteria are to be construed narrowly.[146]

C. Making Rules Effective Prior to Publication — Iowa Code Section 17A.5(2)(b)(1)

Ordinarily, a rule cannot be effective prior to 35 days after its filing with the ARC and publication in the IAB. Under Iowa Code section 17A.5(2)(b)(1), a rule can be made effective on the date of filing and acceptance by the ARC or any subsequent date, as specified by the agency in the filing (known as filing emergency after notice). An agency can file emergency after notice on its own accord without authorization from the ARRC. An agency must meet one of three criteria to do so. An agency must make specific findings regarding at least one of the criteria, which must be included in the preamble to the rulemaking.[147]

Under Iowa Code section 17A.5(2)(b)(1)(a), this procedure can be used if "a statute so provides." This means that a statute explicitly authorizes emergency rulemaking by the agency on the subject in question.[148] Authorization to use this procedure cannot be inferred.[149]

Iowa Code section 17A.5(2)(b)(1)(b) provides that this procedure can be used if the rule "confers a benefit or removes a restriction on the public or some segment thereof." The theory of this exemption is that there would be no opposition to the swift implementation of rules that have only positive effects on persons affected.[150]

Iowa Code section 17A.5(2)(b)(1)(c) also provides that this procedure can be used if the rule is necessary because of an "imminent peril to the public health, safety or welfare." In its application, this criterion requires the peril to be identifiable, specific, and immediate.[151]

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[145] Bonfield, The Iowa Administrative Procedure Act, at 861-70.
[146] Id. at 861.
[147] Iowa Code §17A.5(2)(b)(2).
[148] See, e.g., 2019 Iowa Acts, ch. 65, §8; 2019 Iowa Acts, ch 89, §29.
[149] See Iowa Code §17A.1(2) ("This chapter is meant to apply to all rulemaking … not specifically excluded from this chapter or some portion thereof by its express terms or by the express terms of another chapter."); Iowa Code §17A.23(1) ("If any other statute … diminishes a requirement imposed upon an agency by this chapter, this chapter shall take precedence unless the other statute expressly provides that it shall take precedence over all or some specified portion of this cited chapter."); Iowa Code §17A.23(2) ("… this chapter shall be construed to apply to all covered agency proceedings and all agency action not expressly exempted by this chapter or by another statute specifically referring to this chapter by citation.").
[150] Bonfield, The Iowa Administrative Procedure Act, at 885.
[151] Id. at 887-88.

The exemptions in Iowa Code section 17A.5(2)(b)(1) are narrower and more clearly defined than the grounds to eliminate notice and public participation.[152] The exemptions are also to be construed narrowly.[153] Unlike notice and public participation, the publication of law or regulation prior to its enforcement is arguably a constitutionally protected right. For that reason, the exemptions making rules effective prior to publication are more restrictive.

While agency actions are normally accorded a presumption of validity by a reviewing court,[154] Iowa Code section 17A.5(2)(b)(2) provides that the burden of proof is on the agency to prove that it satisfied at least one of these criteria. This provision, however, does not apply to the substantive validity of the rule; it applies only to its procedural validity.

There are special notice requirements for rules filed emergency after notice. When a rule is filed emergency after notice, Iowa Code section 17A.5(2)(b)(2) requires that the agency make "reasonable efforts" to inform all persons who may be affected by that rule. What is "reasonable" will vary with the circumstances.[155] If only a few persons are affected, then actual, individual notices may be required. If a rule has a more general impact, use of appropriate mass media will be adequate. This essentially means "constructive" notice — a reasonable person should have known that the rule existed. The key issue is the type of notice that will be most effective; cost will be a secondary consideration. The more significant the consequences of failure by a person to comply with a rule filed emergency after notice might be, the greater the burden on an agency to ensure that such persons had notice. The failure to provide some type of notice likely makes the rule voidable, at least as to those persons who did not have actual knowledge of its existence.

D. "Double-Barreled" Rulemaking

This rulemaking method was devised as a way to mitigate the negative effects of an emergency rule filing. Under this process, when an agency files an emergency rule it also files the same rule as a notice of intended action that will follow the regular rulemaking process, thus providing for public participation and possible subsequent revision based on public comments received. Both filings are published in the same IAB with different ARC numbers. The rule proposed by the notice may ultimately be adopted with changes to the noticed language, with the adopted language replacing the language adopted in the earlier emergency filing. This process is colloquially known as "double-barreled" rulemaking, but that term is not used in the IAPA. It allows for a rule to be implemented quickly while still eventually allowing for notice and public participation. The General Assembly and the ARRC have expressed a strong preference for emergency rulemaking to be double-barreled.

E. Other Alternatives to Regular Rulemaking

Emergency rulemaking is not the only statutory process by which the regular rulemaking process can potentially be bypassed.

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[152] See id. at 886-87.
[153] See id.
[154] Iowa Code §17A.19(8)(a).
[155] Professor Bonfield offers guidance on the meaning of reasonable efforts, see Bonfield, The Iowa Administrative Procedure Act, at 889-90.

A rule promulgated by a state agency during a declared disaster emergency pursuant to Iowa Code chapter 29C is exempt from being adopted under the IAPA.[156] Rules adopted under the IAPA can be suspended by the Governor by proclamation during a declared disaster emergency if such rules would prevent, hinder, or delay necessary action in coping with the emergency.[157]

The Attorney General can suspend a provision of the IAPA, whether relating to rulemaking or otherwise, on a limited basis if necessary to avoid the denial of federal funds or to otherwise avoid inconsistency with the requirements of federal law.[158]

IX. Waiver of Administrative Rules — Iowa Code Section 17A.9A

Any person may petition an agency for a waiver from the requirements of a rule. The decision to grant or deny this petition is within the sole discretion of the agency. Agencies must establish procedures by rule regarding applying for, evaluating, and granting waivers. The statute pertains only to waivers of rules, not to any other waivers an agency may have the authority to grant.

An agency may issue a waiver only if all of the following apply:

- The agency has jurisdiction over the rule.
- The waiver is consistent with any applicable statute, constitutional provision, or other law.
- Granting the request would not waive any requirement created or duty imposed by statute.

Additionally, the burden of persuasion rests with the person who petitions the agency. The agency may choose to grant the petition if it finds, based on clear and convincing evidence, all of the following:

- The application of the rule would pose an undue hardship on the person for whom the waiver is requested.
- The waiver from the requirements of a rule in the specific case would not prejudice the substantial legal rights of any person.
- The provisions of a rule subject to a petition for a waiver are not specifically mandated by statute or another provision of law.
- Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver is requested.

Like any other agency action, any waiver could serve as precedent concerning future agency actions. To ensure that waivers do not have broad application, the statute requires that the agency evaluate these petitions based on the “unique, individual circumstances” set out in the petition and that any waiver be drafted to provide the narrowest exception possible to the provisions of the rule. The agency may place any condition on a waiver

[156] Iowa Code §29C.19.
[157] Iowa Code §29C.6(6). See, e.g., Proclamation of Disaster Emergency 2020-35, issued March 19, 2020, §1 et seq., *available at* www.homelandsecurity.iowa.gov/documents/disasters/Proclamations/2020/PROC_2020_35_COVID-19_March19.pdf.
[158] Iowa Code §17A.21.

that the agency finds desirable to protect the public health, safety, and welfare. An agency cannot grant a waiver of its own accord. A waiver can only be granted upon petition.[159]

A waiver is not permanent unless the petitioner can show that a temporary waiver would be impracticable. If a temporary waiver is granted, there is no automatic right to renewal. At the sole discretion of the agency, a waiver may be renewed if the agency finds all of the factors listed above remain valid.

A grant or denial of a waiver petition must be indexed, filed, and available for public inspection as provided in Iowa Code section 17A.3. All waivers must be submitted electronically to the LSA within 60 days of being granted or denied.[160] The submission must identify the rules for which a waiver has been granted or denied, the number of times a waiver was granted or denied for each rule, a citation to the statutory provisions implemented by the rules, and a general summary of the reasons justifying the agency's action on the waiver request. To the extent practicable, the agency must also include information detailing the extent to which the granting of a waiver has established a precedent for additional waivers and the extent to which the granting of a waiver has affected the general applicability of the rule itself. Information on waivers submitted to the LSA is posted on the General Assembly's Internet site.[161]

Iowa Code section 17A.9A used the phrase "waiver or variance" instead of "waiver" until the Iowa Code section was amended by 2020 Iowa Acts, House File 2389. The previous language did not distinguish between waivers and variances. Many rules still include outdated references to variances.

X. Petition for Rulemaking — Iowa Code Section 17A.7(1)

A. Overview

Iowa Code section 17A.7(1) creates a formal application process that allows any interested person to request that an agency adopt, amend, or repeal a rule. The phrase "interested person" is used elsewhere in the IAPA and is interpreted broadly.[162] Therefore, anyone can make the request; there is no requirement that the petitioner have a real and direct interest or show that some legal right exists. This process is not intended as a means to challenge a rule perceived to be unlawful, and hence there is no requirement that an individual use this process prior to seeking other judicial remedies.[163] This process is only intended for seeking changes regarding lawful rules. While an agency cannot be compelled to change its rule, the receiving agency is required to respond to the petition within 60 days. This process functions as a means to encourage reconsideration of existing administrative rules. Rules do not always achieve the intended results and even formerly efficient policies can become obsolete or outdated. The petition process allows individuals to demand that the agency reexamine its rule and respond to criticisms and suggestions concerning its future. The process can also be used to encourage an agency to adopt a new rule that may be necessary or desirable, whether due to changes in legal, practical, or other circumstances. The petition process provides individuals with

[159] AT&T Communications of the Midwest, Inc. v. Iowa Utilities Bd., 687 N.W.2d 554, 559-60 (Iowa 2004).
[160] The 60-day deadline was enacted by 2020 Iowa Acts, ch. 1090 (HF 2389), §10.
[161] www.legis.iowa.gov/law/administrativeRules/additionalInfo/waiverVariances.
[162] See Iowa Code §17A.4(1)(b); Bonfield, The Iowa Administrative Procedure Act, at 852, explaining that the phrase means "quite literally anyone" because "all citizens have an 'interest' in the making of sound law."
[163] Lundy, 376 N.W.2d at 896.

the ability to bring these issues to the attention of the agency and encourage an agency to thoughtfully review its rules, or lack thereof, in a particular area.

B. Format and Agency Consideration of Petitions

The uniform rules on agency procedure, which have been adopted in some form by most agencies, suggest a format for the petition process. The petition must identify the petitioner, both by name and address. The petition must also include the actual text of the proposed change and the arguments and evidence that support the request for the change.

The petitioner should state the petitioner's interest in the matter at issue even though a real and direct interest is not required. An agency is not required to actually make the requested rule changes. For this reason, it is advisable to demonstrate that the petitioner has a reason for making the request, a reason that justifies the effort requested from the agency.

Within 60 days of the request, the agency must either commence rulemaking or deny the petition stating its reasons for the denial. The agency is not required by statute to hold a formal hearing on a petition, but the uniform rules call for the opportunity for an informal meeting to discuss or clarify the issues.

An agency is not obligated to commence rulemaking or complete rulemaking based on a petition. If an agency declines to grant a petition, it is unlikely a court will reverse that decision on judicial review. The purpose of the petition is only to induce agencies to engage in a reasoned reconsideration of the existing state of the rule. The petition process requires only that the agency give "fair consideration" to the request.[164] Furthermore, an agency is permitted to "rely on reasons other than the actual merits of the request" when determining whether to grant a petition.[165] A petition is thus not an effective way to force an agency to take action that it prefers in its discretion not to carry out, so long as that discretion is not abused.[166]

Agencies must submit petitions they receive and the disposition of the petitions to the ARRC.[167]

XI. Petition for a Declaratory Order — Iowa Code Section 17A.9

A petition for a declaratory order under Iowa Code section 17A.9 is a formal request to an agency asking it how it will apply a statute, rule, or other policy based on the specific set of facts contained in the petition.[168] This allows an individual to seek a reliable legal determination from an agency regarding a particular situation. While a petition for rulemaking is an attempt to change agency policy, a petition for a declaratory order is an attempt to determine what the current policy actually is. When the process is completed,

[164] Litterer, 644 N.W.2d at 361.

[165] Id. While the Court in *Litterer* found the agency lacked the statutory authority to carry out the rulemaking petitioned for, other reasons such as unresolved public policy debate concerning the matters raised in the petition or a preference to engage in case-by-case decision making rather than rulemaking are permissible reasons to decline a petition. See Cmty Action Research Grp. v. Iowa State Commerce Comm'n, 275 N.W.2d 217, 220 (Iowa 1979); Bernau v. Iowa Dep't of Transp., 580 N.W.2d 757, 766 (Iowa 1998).

[166] See Litterer, 644 N.W.2d at 362 for a discussion of how courts will evaluate agency discretion regarding petitions.

[167] Iowa Code §17A.7(1), as amended by 2020 Iowa Acts, ch. 1090 (HF 2389), §7. Prior to the enactment of House File 2389, the ARRC established an expectation that agencies submit petitions they receive to the committee. This requirement was also included in the uniform rule language on petitions for rulemaking and in the rules of many agencies.

[168] Bonfield, Amendments to Iowa Administrative Procedure Act, at 36-40 for a discussion of significant amendments to Iowa Code section 17A.9 enacted in 1998.

the order binds the agency as well as the petitioner on those issues set out in the petition.[169] An agency cannot issue a declaratory order that would substantially prejudice the rights of a person who would be necessarily affected by the order and who does not consent in writing to the issuance of the order. Agency decisions regarding petitions for declaratory orders are agency action subject to judicial review.

By limiting such petitions to a specific factual situation, the statute allows an agency the flexibility to make a legal determination without engaging in more systemic policymaking that might involve broader, more complex policy considerations and might also require the rulemaking process. This statutory process provides a way for the public to seek and receive meaningful legal advice from an agency that is actually binding. Ordinarily, legal advice given by an agency cannot be held against the agency if it later reverses itself.[170]

The uniform rules, which have been adopted in some form by most agencies, provide for the form, contents, and filing of petitions for declaratory orders, the procedural rights of persons in relation to the petitions, and the disposition of the petitions. Each agency's rules describe the classes of circumstances in which the agency will not issue a declaratory order. An agency must state its reasons for declining to issue a declaratory order in writing. There are a variety of reasons for which an agency might determine that a declaratory order cannot be issued. Examples include:

- A lack of legal authority. The issue presented in the petition must deal with a statute, rule, or other provision of law that is within the agency's authority.
- Unlawful activity. There is no reason for an agency to advise people how close they can come to violating the law.
- Unclear facts. Unless the petitioner knows all of the pertinent facts that surround the question, an answer would be useless.
- Uncertainty. The agency may be uncertain how the law should be applied.
- Overly broad impact. The ideal declaratory order applies to a very narrow fact situation. As the facts and issues become broader, the possibility of unintended and undesirable consequences increases.

XII. Publication of Administrative Rules

A. Overview

The publication of administrative rules is a significant undertaking. The process not only requires the prompt publication of newly implemented rules, but also the elimination of rescinded rules; all of this is done on a two-week cycle. A key issue with any official code publication is timeliness. For example, the Iowa Code contains Iowa's statutory law. A new Iowa Code is published every year after the conclusion of the regular legislative session. The timeliness issue is even more severe with administrative rulemaking, which occurs continuously. New nonemergency rules are published biweekly year-round in the IAB.

[169] Iowa Code §17A.9(7). See Bonfield, Amendments to Iowa Administrative Procedure Act, at 39.
[170] See ABC Disposal Sys., Inc. v. Dep't of Nat. Res., 681 N.W.2d 596, 606-07 (Iowa 2004).

B. Publication Process — Iowa Code Sections 2B.5A, 17A.4(1), 17A.5(1), and 17A.6(1)

Iowa Code sections 2B.5A, 17A.4(1), 17A.5(1), and 17A.6(1) ensure that newly noticed and adopted rules are promptly published and distributed on a statewide basis. The publication process begins when the rulemaking document is electronically submitted by the agency to the ARC. Paper filing of rulemaking documents was discontinued in 2006. Rulemaking documents are currently filed using RMS, an electronic filing system developed by the LSA in coordination with the Governor's office. Agencies are able to draft rulemaking documents through RMS and submit them to the Governor's office. The ARC then assigns an ARC number to each document. That number is used to trace and index that particular document during the rulemaking process. Most rulemaking procedures have two distinct ARC numbers; one for the initial notice and a second for the final adoption. These numbers are not used to identify a rule in the text of the rule itself in the IAC, although they can be used to trace the history of a rule as shown in this Part XII, Section E. Once the ARC number has been assigned, rulemaking documents are submitted to the LSA for editing, processing, and publication in the IAB under the supervision of the Administrative Code Editor (ACE). Editing and processing of rulemaking documents contained in an issue of the IAB are carried out for a 19-day period prior to the publication date of that issue.

When adopted rules are published in the IAB every two weeks, the text of those rules is simultaneously incorporated into the IAC. Because adopted rules generally become effective 35 days after publication in the IAB as provided in Iowa Code section 17A.5, this means that the text of adopted rules is incorporated into the IAC 35 days before it becomes effective. To determine if the current text of a rule in the IAC has become effective, the history of the rule, as described in this Part XII, Section E, should be consulted.

While the LSA no longer produces paper copies of the IAC, each individual chapter of rules in the IAC that is modified every two weeks is republished in the electronic IAC Supplement.[171] The IAC Supplement is published simultaneously with the IAB and can be used to update any paper copies of the IAC maintained outside of the LSA by removing the prior chapter and inserting the newly published chapter in the IAC Supplement. The IAC Supplement also contains any editorial revisions to rules carried out by the ACE pursuant to Iowa Code section 2B.13(2).

C. Organization of the IAC

The Iowa Code has a single author — the Iowa General Assembly, which convenes for only a specific period each year. The IAC has over 100 authors because each agency drafts and adopts its own rules. Moreover, rulemaking is a continuous process throughout the year. For this reason, the publication of administrative rules is not organized by subject matter like the Iowa Code; instead, it is arranged by agency. Rules adopted by a particular agency are then organized by subject matter into chapters.

1. Agency Identification Number

Each agency is assigned its own space in the IAC and each agency arranges its own rules within that space. The ACE assigns each agency an identification number;

[171] Prior to July 2008, only specific individual pages of the IAC that were modified were published in the IAC Supplement.

that number is used when citing a rule as a means of identifying the agency.[172] Large "umbrella" agencies are generally numbered in increments of 20, starting with 21. The numbers between those increments identify the divisions or other subunits within those agencies as well as smaller independent agencies that have been established.

2. Agency Rules Analysis

At the beginning of each agency included in the IAC, a numerical list is provided that sets out the citation and a brief description of each chapter and rule of that agency. For a small agency, this can be the fastest way to find a particular rule. This analysis lists only the chapters and rules and does not contain any of the subunits that may be part of each rule.

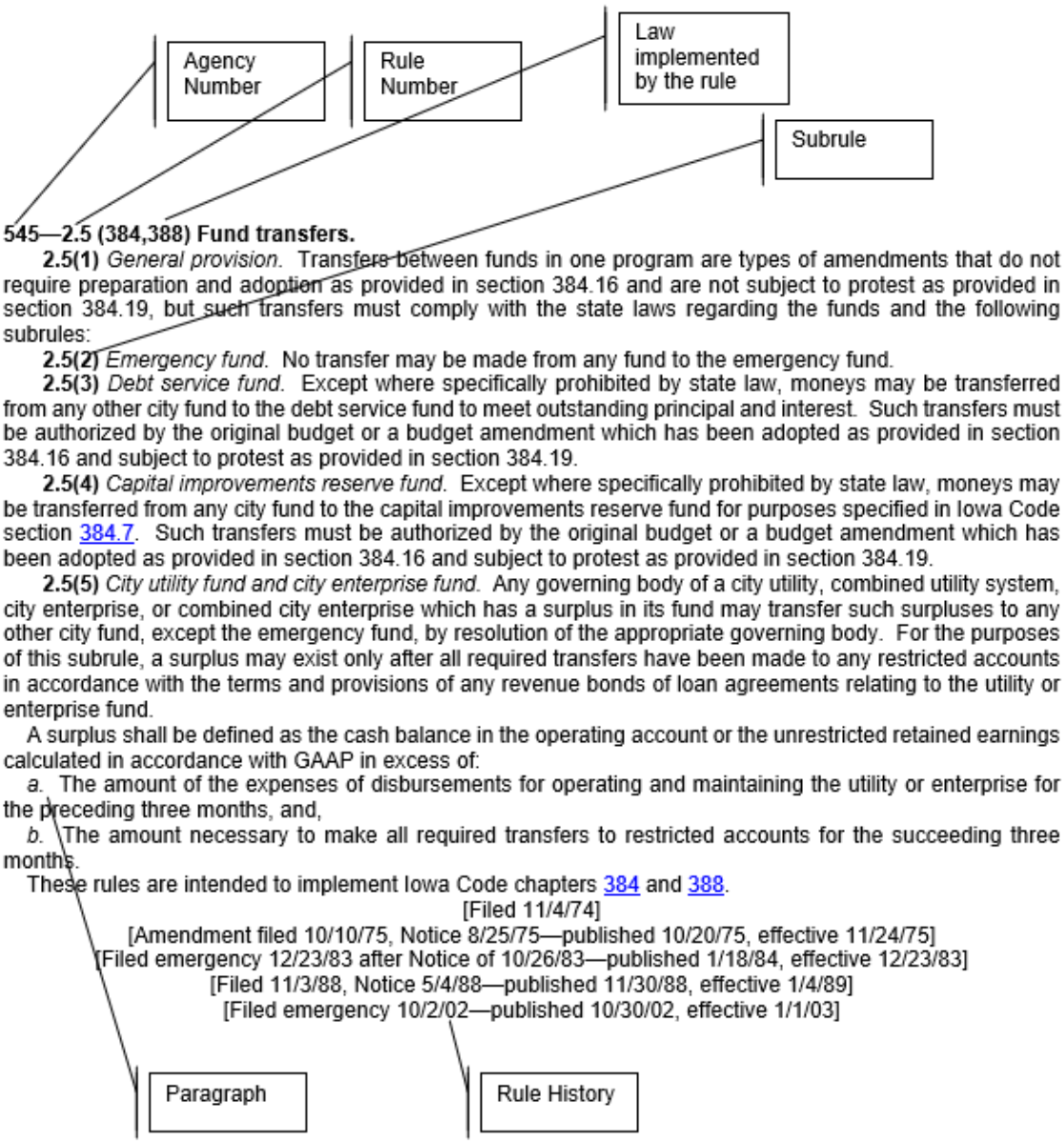
3. Citation and Structure of Administrative Rules

Although rules are organized into chapters and sometimes divisions within chapters, the individual rules are the building blocks of the IAC. The citations for both the IAC and the IAB are established pursuant to Iowa Code section 2B.17(5), which provides that the IAC is cited as (agency identification number) IAC (chapter, rule, subrule, lettered paragraph, or numbered subparagraph);[173] and the IAB is cited as IAB (volume), (issue number), (publication date), (page number), (ARC number).[174] The framework of a typical rule is set out in the example below:

[172] For example, the agenda identification number for the Department of Human Services is 441. This number is used for all of the department's rules. Not all rulemaking entities have their own independent agency identification numbers. For example, the Terrace Hill Commission is listed under the Department of Administrative Services, 11 IAC 114 and 116, and numerous licensing boards are listed under the Professional Licensure Division, agency identification number 645.

[173] For example, 441 IAC 79.1(1) means Department of Human Services, Iowa Administrative Code Chapter 79, the first rule in that chapter, the first subrule of that rule.

[174] For example, IAB Vol. XLI, No. 15 (1/16/19) p. 1731, ARC 4243C means the rule filing designated as ARC 4243C, published on January 16, 2019, in volume XLI, issue number 15 of the Iowa Administrative Bulletin at page 1731.



D. Locating Administrative Rules

As shown in Appendix B, the General Assembly's Internet site for all matters relating to administrative rules can be found here:

www.legis.iowa.gov/law/administrativeRules

The IAC, including archives, can be found here:[175]

www.legis.iowa.gov/law/administrativeRules/agencies

The publication of paper copies of the IAB and supplements to the IAC have been discontinued for many years. The electronic publications of the IAB and IAC Supplement, including archives, can be found here:[176]

www.legis.iowa.gov/law/administrativeRules/bulletinSupplementListings

A searchable and sortable database of all rulemaking dating back to 2008, called the rules tracker, can be found here:

www.legis.iowa.gov/law/administrativeRules/tracker

E. Tracing the History of an Administrative Rule

An individual's rights, duties, and responsibilities at a particular point in time are fixed by an administrative rule as that rule existed at that particular point in time, which is not necessarily the same rule that is currently effective. Consequently, it can be important to identify the rule text in effect on a particular date. The best example is litigation.[177] The law that applies in a particular case is the law that was in effect at the time the events occurred which led to the litigation.

At the end of each chapter of rules within the IAC, a complete rulemaking history is provided for that chapter. The history dates back to the IDR for particularly old rules. The chapter history does not identify which particular rule was changed during each rulemaking, only information about the rulemaking documents that amended the chapter on each date the chapter was amended.[178] The rulemaking documents themselves must be consulted to determine if a particular rule was affected. Each line of bracketed text provides the history of each particular rulemaking process that amended the chapter, showing the date of filing, the date of publication of the notice of intended action, the date of publication of the adopted rules, and the effective date.[179] The last line of this text is the most recent change. An example of recent chapter history for Department of Human Services chapter 79 is as follows:

[Filed ARC 4973C (Notice ARC 4675C, IAB 9/25/19), IAB 3/11/20, effective 4/15/20]

[Filed ARC 4974C (Notice ARC 4819C, IAB 12/18/19), IAB 3/11/20, effective 4/15/20]

[Filed ARC 4975C (Notice ARC 4818C, IAB 12/18/19), IAB 3/11/20, effective 4/15/20]

Starting in July 2008, a less detailed history is provided after each individual rule, although each amendment to the rule is not listed on a separate line. Rules not amended

[175] Each agency's rules can be accessed by individual chapter or rule or by a single PDF or RTF file containing all of the agency's rules. Beginning in 1998, new, complete, electronic versions of chapters were generated each time a chapter was amended. To determine how a particular chapter or rule looked at a particular point in time prior to 1998, the chapter or rule must be manually assembled by compiling prior updates to the chapter or rule printed in the IAC Supplement, using the history of the chapter as described in Part XII, Section E, to determine which supplements are relevant. The LSA can assist the public in carrying out such research.

[176] The IAB has only been published since 1978. From 1975 through 1978, the content published in the IAB was published as part of the IAC Supplement. Prior to the enactment of the IAPA in 1975, there was no analog to the IAB. From 1952 through 1975, the IDR was published every two years, with supplements published every six months. IDR material is available at www.legis.iowa.gov/law/administrativeRules/departmentalRules.

[177] The Iowa ACE can authenticate rulemaking documents for purposes of litigation. See Iowa Code §2B.18(2).

[178] ARC numbers were not included in the history prior to July 2008. Only publication and effective dates of rulemaking amending a chapter were included.

[179] Actions by the ARRC that affected an effective date are footnoted on the bracketed history lines. The text of a footnote is included after the history lines at the end of a chapter.

since July 2008 will not have rule histories. An example of recent rule history for Department of Human Services rule 441 IAC 79.1 is as follows:

> … ARC 4067C, IAB 10/10/18, effective 11/14/18; ARC 4065C, IAB 10/10/18, effective 12/1/18; ARC 4066C, IAB 10/10/18, effective 12/1/18; ARC 4068C, IAB 10/10/18, effective 12/1/18; …

A rule can potentially change multiple times per year; therefore, finding the text of a rule as it existed at an earlier time, or carrying out other historical rules research, can be a difficult task, particularly for rules that are older or have been frequently amended. As agencies have been reorganized over the years, rules are sometimes transferred from one chapter to another or from one agency to another. The LSA can assist the public in carrying out such research. While nearly all historical rulemaking documents are now available electronically, the LSA generally maintains paper copies as well. The ACE is a useful point of contact for the LSA regarding questions on rules research.

XIII. Oversight of the Administrative Rulemaking Process

A. Oversight Entities

The oversight process for rulemaking is not a single process and is not codified in a single statutory provision.[180] Moreover, review of administrative rules is not limited to a single entity; various independent entities are responsible for review of rules. Judicial review of administrative rules is also a form of oversight, and is discussed in Part II, Section G, and Part III.

1. General Assembly

The General Assembly has a number of legislative actions it can take relating to administrative rules during a legislative session. The Iowa Supreme Court has stated that inaction on a rule by the General Assembly over a number of years can be considered tacit approval of the rule.[181]

The General Assembly can nullify any administrative rule, regardless of how long that rule might have been in effect.[182] This process is similar to the enactment of legislation except it does not need gubernatorial approval. Any rule can be nullified if a constitutional majority of the members of the Senate and House of Representatives approve.

Rules are occasionally also rescinded in the text of a regular bill that also addresses other matters. This functions similar to a nullification, except that the rescission is effectively made subject to gubernatorial approval.[183] A bill can also implicitly render a rule void by abolishing the agency that adopted the rule, eliminating or reducing the agency's rulemaking authority, or substantively altering the specific statute from which the rule is derived in such a way that the rule is in conflict with statute and hence is no longer good law.

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[180] Statutes relating to review of rules primarily appear in Iowa Code §§7.17, 17A.4, 17A.5, 17A.6, 17A.7, 17A.8, and 17A.33.
[181] Christensen, 944 N.W.2d at 909.
[182] Iowa Const. art. III, §40. ("The general assembly may nullify an adopted administrative rule of a state agency by the passage of a resolution by a majority of all of the members of each house of the general assembly."). While the procedure is commonly referred to as a "veto," it is more properly referred to as a "nullification."
[183] See, e.g., 2016 Iowa Acts, ch. 1007 (HF 2433), §§6-7.

During a legislative session or the interim, a legislative committee other than the ARRC can also exercise general oversight over a rule at any time by holding a hearing or requesting information from the adopting agency about the rule. Such actions have no substantive effect on the rule itself.

2. Governor

The Governor, being vested with the "supreme executive power" in this state, has a constitutional mandate to direct the operations of the executive branch.[184] This power was buttressed with the enactment of the Reorganization Act of 1986,[185] which increased and codified gubernatorial control over the principal agencies of state government. The Governor often does not use the formal powers set out in statute, instead using informal communications to effect changes in administrative rules.

3. Administrative Rules Coordinator

The ARC is an integral part of the Governor's office, providing the Governor with direct control and oversight over the rulemaking process.[186] The statutory responsibilities of the ARC include receiving rule filings electronically submitted by agencies and assigning them an ARC number,[187] consulting with the ACE regarding the style and form for all rules,[188] and advising the Governor on rulemaking issues.[189] The ARC also preclears notices of intended action prior to assigning them an ARC number. Often the ARC also serves as the Governor's legal counsel, advising on government issues generally. The ARC also traditionally serves as an ex officio, nonvoting member of the ARRC. Serving on the ARRC allows the ARC to participate in the discussion and take testimony being presented on specific rules issues.

4. Administrative Rules Review Committee

This special legislative committee was established in 1963,[190] a decade before the enactment of the IAPA, to provide general oversight over the rulemaking process on behalf of the General Assembly. Unlike most other legislative committees, the ARRC is established by statute.[191] The ARRC consists of 10 members, five from each house. The majority leaders in the Senate and House appoint three members each, and the minority leaders in the Senate and House appoint two members each. This split guarantees equal representation between the Senate and House, and guarantees the two major political parties will each supply at least four of the 10 members.[192] By tradition, the ARC sits on the committee as an ex officio, nonvoting member. The ACE serves as the secretary to the ARRC.[193]

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[184] Iowa Const. art. IV, §1. By contrast, the United States Constitution only vests the President with the "executive Power." U.S. Const. art. II, §1. Iowa courts have never attached any significance to—and have rarely even mentioned—the Iowa Constitution's use of the word "supreme." See Ryan v. Wilson, 300 N.W. 707 (Iowa 1941); State v. Dist. Court of Jefferson Cnty., 238 N.W. 290 (Iowa 1931); Rathbun v. Baumel, 191 N.W. 297 (Iowa 1922).

[185] 1986 Iowa Acts, ch. 1245.

[186] Iowa Code §7.17.

[187] Iowa Code §§17A.4(1)(a), 17A.5(1).

[188] Iowa Code §2B.5A(2).

[189] Iowa Code §7.17.

[190] The ARRC was originally established as the Departmental Rules Review Committee. 1963 Iowa Acts, ch. 66 (HF 17), §2.

[191] Iowa Code §17A.8.

[192] The ARRC approval of a delay, suspension, or emergency objection requires seven votes, and all other ARRC action requires six votes. Therefore, ARRC action always requires bicameral, and often bipartisan, support. The ARRC can reverse a prior action taken by the same number of votes as was required to approve it.

[193] Iowa Code §17A.8(4)(a).

The IAPA requires the ARRC to meet in the Capitol on the second Tuesday of every month unless an alternative date is established by the ARRC.[194] The ARRC may also hold additional meetings as needed at any time and any place in Iowa, although such meetings are rare.[195] The ARRC meetings are open to the public, and give interested persons the opportunity to "be heard and present evidence."[196] The phrase "interested person" is used elsewhere in the IAPA and is interpreted broadly to mean any person or entity, with no legal interest required.[197] This opportunity is treated as a right rather than a privilege. The ARRC may also require the attendance of a representative of an agency whose rule or proposed rule is under consideration.[198] In practice, the ARRC requires representatives of each agency with a rule reviewed at a meeting to attend. Legislative Services Agency legal counsel staff the ARRC, and LSA fiscal analysts and partisan staff for the four legislative caucuses also assist the committee.

While the ARRC can review rules "whether proposed or in effect,"[199] the ARRC reviews mainly proposed and adopted rules, as they appear in the IAB.[200] The monthly meetings typically involve review of rules published in the previous two or three issues of the IAB. Most such rules are reviewed each month. Typically all notices of intended action are reviewed, along with all but the most noncontroversial adopted rules. An agenda, containing specific times for each rule to be reviewed, is prepared by ARRC staff, subject to the approval of the committee chair and vice chair, approximately one week in advance of the meeting.[201]

While the ARRC is not a standing committee, it can sponsor legislation relating to rules that is then referred to a standing committee for consideration. Such legislation is exempt from various procedural requirements applicable to most legislation.[202]

5. Attorney General

In addition to the Attorney General's usual functions of providing legal advice and representation to most agencies, the Attorney General is empowered by Iowa Code section 17A.4(6) to object to administrative rules. The Attorney General has not objected to a rule in decades. The Attorney General may also object to the filing of a rule without notice pursuant to Iowa Code section 17A.4(3)(b). Under Iowa Code section 17A.21, the Attorney General may also suspend a provision of the IAPA on a limited basis if necessary to avoid the denial of federal funds or otherwise avoid inconsistency with the requirements of federal law.

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[194] Iowa Code §17A.8(5).
[195] Iowa Code §17A.8(5).
[196] Iowa Code §17A.8(6).
[197] See Iowa Code §17A.4(1)(b). See also Bonfield, The Iowa Administrative Procedure Act, at 852, explaining that the phrase means "quite literally anyone" because "all citizens have an 'interest' in the making of sound law."
[198] Iowa Code §17A.8(6).
[199] Iowa Code §17A.8(6).
[200] The powers of the ARRC are primarily set out in Iowa Code §§17A.4 and 17A.8. To a great extent, those powers are specifically tied to the effective date of rules; once that date is passed, the ARRC's role becomes largely advisory. A major exception to this is the objection. An objection may be imposed on any rule, whether proposed or in effect. The ARRC reviews existing rules as time permits. See Iowa Code §17A.33.
[201] Current and archived agendas are available on the ARRC's Internet site at www.legis.iowa.gov/committees/meetings/meetingsListComm?groupID=705.
[202] Joint Rules of the Senate and House of Representatives 19 and 20 (2019), *available at* www.legis.iowa.gov/docs/publications/JR/1151289.pdf.

B. Major Oversight Powers and Framework

Each reviewing entity has one or more powers it may exercise over agency rulemaking to influence or delay the rulemaking process. With the exception of the general referral, objection, and legislative nullification, these powers are specifically tied to the rulemaking process. Review of a rule can occur at any time, but many of these limited powers can no longer be used once the rulemaking process has concluded. In many respects, the framework for review extends to the period between the publication of the first notice of intended action and the final effective date of the rules. These powers can generally be exercised over an entire rule or a severable portion thereof.

The more significant rule oversight powers are as follows:

1. Objection

The objection is used almost exclusively by the ARRC, but is also available to the Governor and the Attorney General.[203] The ARRC may object to a rule on a majority vote of six members. An objection may be issued for any rule, including proposed rules and those already in effect. An objection is a formal finding that all or part of a rule is "unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency." The objecting party must then submit a written copy of its findings to the affected agency and the ACE. Notice of the objection appears in the IAB and the IAC. An objection to a rule or portion of a rule is noted in the rule itself in the IAC, and the text of the objection is published at the end of the chapter in which the rule is located.[204]

An objection does not directly impact the validity of a rule, but it can influence a judicial action challenging the rule by shifting the presumption of a rule's validity. In an ordinary judicial proceeding, "[a]n agency rule is presumed valid and the burden is on the party challenging it to demonstrate that a rational agency could not conclude the rule was within the agency's delegated authority."[205] After an objection, however, "the burden shifts to the agency in a judicial review proceeding to prove the validity of the rule."[206] To effectively shift the burden of proof, the objection must be detailed enough to adequately notify the agency of the grounds for its objection, although it need not be lengthy or in the form of a legal brief.[207] In litigation concerning a rule subject to an objection, the burden is shifted only in regard to the grounds asserted in the objection, not any other issues raised in the litigation.[208]

According to Professor Bonfield, an objection "must be sufficient to apprise the agency of the precise nature and scope of the objection."[209] Such an objection serves two purposes. First, it alerts the agency to the exact grounds for the objection, and gives the agency an opportunity to correct the rule before facing a judicial challenge. Second, a precise objection provides a reviewing court with standards to evaluate

[203] Iowa Code §17A.4(6).
[204] See 199 IAC 20.20 and 265 IAC 32.7 for examples of recent objections by the ARRC.
[205] Iowa-Ill. Gas & Elec. Co. v. Iowa State Commerce Comm'n, 334 N.W.2d 748, 751-52 (Iowa 1983) (citations omitted).
[206] Id. at 752 (Iowa 1983) (citations omitted); see also Barker, II, v. Iowa Dep't of Transp., Motor Vehicle Dep't, 431 N.W.2d 348, 349-50 (Iowa 1988); Iowa Code §17A.4(6)(a) (declaring the burden of proof shifts to the agency to establish the rule "is not unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to it").
[207] See Schmitt, 263 N.W.2d at 743.
[208] Iowa-Ill. Gas & Elec. Co., 334 N.W.2d at 752.
[209] Bonfield, The Iowa Administrative Procedure Act, at 911.

whether a rule is "arbitrary, capricious, or otherwise beyond the authority delegated to it."[210]

If a court overturns a rule on grounds specified in an objection, the agency must pay the challenging party's court costs, including "a reasonable attorney fee," from its appropriations.[211] For complex, lengthy litigation, this may amount to a considerable sum.

The effect of imposing an objection on a rule after litigation regarding the rule has already commenced is unclear. Professor Bonfield has contended that an objection could still be applied if it occurred prior to the final decision in a legal proceeding.[212] The ARRC has traditionally declined to take action on a rule that is the subject of active litigation.

2. Gubernatorial Rescission

The Governor has the power to rescind any rule up to 70 days after it takes effect.[213] This time period provides the Governor with a brief period to observe the rule in operation before taking action. Unlike the ARRC's power of delay, the rescission of a rule is effectively a veto, which the Governor can exercise after a rule takes effect. The Governor rescinds a rule by issuing an executive order—a formal gubernatorial pronouncement that is published in the IAB.[214]

3. Oversight of Emergency Rulemaking

Under Iowa Code section 17A.4(3)(b), the ARRC, the Governor, and the Attorney General each have the power to sunset an emergency rule by filing an objection to the filing of a rule without notice; the rule ceases to be effective 180 days after the objection is filed. During that six-month period, the agency could then adopt that same rule using the regular rulemaking process. While an objection under Iowa Code section 17A.4(6) is a finding that a rule has a legal defect of some kind, which might involve a variety of legal grounds, an objection under section 17A.4(3)(b) is more limited; it is only a finding that the emergency rulemaking procedures provided in Iowa Code section 17A.4(3)(a) were improperly used in some respect. In the event of litigation concerning the validity of the agency's use of emergency rulemaking, the agency has the burden to prove that the use of regular rulemaking would have been impracticable, unnecessary, or contrary to the public interest. The ARRC may suspend the current implementation of an emergency rule for 180 days if the ARRC has filed such an objection. One hundred eighty days after that action, the sunset takes place and the suspended rule ceases to be effective permanently.

The ARRC may suspend the applicability of an emergency rule for 70 days under Iowa Code section 17A.8(10). Such a suspension may only be imposed within 35 days of the publication of the rule in the IAB.

The ARRC may suspend the applicability of an emergency rule, within 35 days of the publication of the rule in the IAB, until the adjournment of the next regular session

[210] See Schmitt, 263 N.W.2d at 744-45 (quoting Bonfield, The Iowa Administrative Procedure Act, at 911).
[211] Iowa Code §17A.4(6)(b).
[212] Bonfield, The Iowa Administrative Procedure Act, at 912-13.
[213] Iowa Code §17A.4(7).
[214] Iowa Code §17A.4(7). See, e.g., Exec. Order No. 77 (May 11, 2012), *available at* www.legis.iowa.gov/docs/publications/EO/966063.pdf.

of the General Assembly under Iowa Code section 17A.8(9). If a session suspension is imposed on an emergency rule, the rule is forwarded to the Speaker of the House of Representatives and the President of the Senate who will forward the rule to the appropriate standing committee for further action.

The emergency objection and all committee suspensions of emergency rules require a two-thirds vote of the ARRC (seven members).

4. Session Delay

With approval from two-thirds of its members, the ARRC may impose a session delay on an adopted rule. The action must be taken prior to the effective date of the rule. The session delay prevents an adopted rule from taking effect "until the adjournment of the next regular session of the [G]eneral [A]ssembly."[215] This means that a delay imposed during a legislative session will continue until the adjournment of the following session. Unlike the objection, the ARRC need not give any grounds for imposing a session delay. Following the imposition of a session delay, the ARRC must refer the rule to the President of the Senate and the Speaker of the House of Representatives, who then refer the rule to an appropriate standing committee in each chamber. Within 21 days of this referral, the reviewing committee must formally take action on the rule.[216] The rule becomes void only if the General Assembly passes a joint resolution formally nullifying the rule; otherwise, the rule takes effect when the General Assembly adjourns sine die. Instead of nullifying the rule, the General Assembly may instead pass regular legislation concerning the subject matter of the rule that requires the agency to amend or rescind the rule or take other relevant action.

5. Seventy-Day Delay

With approval from two-thirds of its members, the ARRC may impose a 70-day delay on an adopted rule.[217] As with the session delay, the action must be taken prior to the effective date of the rule. The 70-day delay postpones the effective date of a rule by 70 days beyond the date it would otherwise take effect. Similar to the session delay, the 70-day delay requires no grounds for the delay. The rule automatically takes effect upon the expiration of the 70-day delay unless the ARRC takes further action.

The 70-day delay is a neutral action; it does not necessarily imply that the ARRC is opposed to the rule. Because the ARRC does not maintain a formal docket that requires persons to register complaints or concerns in advance of its meetings, issues sometimes arise at its meetings at the last minute and without warning. The 70-day delay often provides a mechanism to temporarily delay an adopted rule while the issues are studied and discussed. The 70-day period is often used to determine whether imposition of a session delay might be necessary.

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[215] Iowa Code §17A.8(9). The General Assembly begins its sessions on the second Monday of each year. See Iowa Code §2.1. The General Assembly has no fixed date for adjournment, although it usually adjourns in late April or early May, soon after the legislators' per diem payments expire. See Iowa Code §2.10(1) (ending the legislators' per diem 110 calendar days after the session begins in odd-numbered years, and 100 calendar days after the session begins in even-numbered years).

[216] Iowa Code §17A.8(9) (requiring the committee act "by sponsoring a joint resolution to nullify the rule, by proposing legislation relating to the rule, or by refusing to propose a joint resolution or legislation concerning the rule").

[217] Iowa Code §17A.8(10).

6. General Referral

On a majority vote, the ARRC may issue a general referral of a rule, referring the rule to the General Assembly.[218] Unlike the objection and delay powers, the general referral has no legal effect on a rule. It is only a mechanism to bring particular rule issues to the attention of the General Assembly.

A general referral sends any rule, whether proposed or in effect, to the leaders of each chamber of the General Assembly. The leaders then refer the rule to the appropriate standing committees for further consideration.[219] After a general referral, an adopted rule takes effect as usual unless the General Assembly passes a joint resolution nullifying the rule or takes other action.

7. Regulatory Analysis

Two forms of regulatory analysis can be required under Iowa Code section 17A.4A. This Iowa Code section is a combination of two earlier provisions; one providing for an economic impact statement, and a second providing for a regulatory flexibility analysis. Each form of regulatory analysis must include quantifications of the relevant data and must take into account both short-term and long-term consequences. An agency must issue a regulatory analysis of a proposed rule if an appropriate request is made within 32 days after the notice is published. A summary of the regulatory analysis must be published in the IAB, but is not assigned an ARC number. When an analysis has been requested, the agency must extend the time for public comment on the proposed rule for 20 days beyond the date the summary is published in the IAB. For emergency rules, the summary must be published within 70 days of the request.

A regulatory analysis under Iowa Code section 17A.4A(2)(a)[220] may be requested by the ARRC or the ARC and must contain all of the following:

- A description of the classes of persons who probably will be affected by the proposed rule, identifying those who will benefit from the rule and those who will bear the costs.
- A description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons, which also identifies the costs of compliance.
- The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.
- A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction.
- A determination of whether less costly methods or less intrusive methods exist for achieving the purpose of the proposed rule.

[218] Iowa Code §17A.8(7).
[219] Iowa Code §17A.8(7).
[220] For an example of a regulatory analysis requested under Iowa Code §17A.4A(2)(a), see www.legis.iowa.gov/docs/aco/bulletincontent/10-21-2009.Bulletin_Component_5260818182031060.pdf. IAB Vol. XXXII, No. 9 (10/21/09) p. 1091.

- A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

An agency must issue a small business regulatory analysis of a proposed rule under Iowa Code section 17A.4A(2)(b)[221] upon request if the rule would have a substantial impact on small business.[222] The request for this small business analysis may be made not only by the ARRC or the ARC, but also as a result of a petition of at least 25 persons who each qualify as a small business or by an organization representing at least 25 such persons. The agency must reduce the impact of a proposed rule that would have a substantial impact on small business by using these methods if that action is legal and feasible. This analysis must determine whether it would be reasonable to:

- Establish less stringent compliance or reporting requirements in the rule for small business.
- Establish less stringent schedules or deadlines in the rule for compliance or reporting requirements for small business.
- Consolidate or simplify the rule's compliance or reporting requirements for small business.
- Establish performance standards to replace design or operational standards in the rule for small business.
- Exempt small business from any or all requirements of the rule.

A rule will not be invalidated due to deficiencies in the content of a regulatory analysis so long as the agency makes a good-faith effort to comply with the statutory requirements.[223] This is because "[t]he predictions contained in a regulatory analysis cannot be executed with guaranteed precision."[224]

8. Suspension of Notice

Iowa Code section 17A.4(8) empowers the ARRC to suspend further action relating to a notice of intended action for 70 days upon the vote of two-thirds of its members. The suspension must occur before the notice is adopted.

9. Legislative Nullification

Under the Iowa Constitution, the General Assembly has an independent power to nullify any administrative rule. This process is commonly known as the legislative veto. Nullifying a rule begins with the same procedure used to enact a bill; both actions require a constitutional (absolute) majority vote in each legislative chamber.[225] Unlike

[221] For an example of a regulatory analysis requested under Iowa Code §17A.4A(2)(b), see www.legis.iowa.gov/docs/aco/bulletincontent/11-25-2015.Bulletin_Component_6357666592883400.pdf. IAB Vol. XXXVIII, No. 11 (11/25/15), p. 839.
[222] A definition of "small business" is included in Iowa Code §17A.4A(8).
[223] Iowa Code §17A.4A(7).
[224] Bonfield, Amendments to Iowa Administrative Procedure Act, at 32.
[225] This procedure requires a constitutional majority, not just a majority of those present and voting. An administrative rule nullification requires 26 votes in the Senate and 51 votes in the House of Representatives, assuming all seats in each chamber are currently filled.

a bill enactment, however, a nullification resolution does not require the signature of the Governor.[226]

The brief procedure set out in the constitutional amendment specifies the use of a resolution. The General Assembly uses joint resolutions for the nullification process.[227] Joint resolutions are the most formal resolutions used by the General Assembly. This ensures that nullification resolutions are treated with the same scrutiny as bills. Nullification resolutions may be introduced into either chamber, and they must be referred to a standing committee. To proceed, the resolution must be passed by the committee, then placed on the debate calendar, then called up for debate, and then passed by the membership of that chamber. The process must be completed in each chamber. The constitutional amendment does not specify when the effective date occurs for these resolutions; however, the joint rules of the Senate and House of Representatives require that the effective date of a nullification resolution be stated in the resolution.[228] The joint rules also prohibit amendment of the resolution on the floor of the Senate or House.[229]

A nullification resolution has only one function, specified in the constitution; it nullifies a specific rule. It cannot be used to modify or add a rule, nor can it revise statutory language. Those actions must follow the traditional legislative process. The effect of nullification is that the rule is void, and the ACE will remove it from the IAC.

Without explicit constitutional approval, legislative nullification raises significant separation of powers issues. The federal courts and most state courts agree nullification is legislative action, which must pass the full legislature and be presented to the head of the executive branch to have legal effect.[230] A 1967 Iowa Attorney General opinion declared the legislative veto of an administrative rule is unconstitutional for at least two reasons.[231] First, because the rule has the "force and effect of law," the legislature must satisfy the lawmaking process to change the rule.[232] Second, the rulemaking power belongs to the executive branch and the review power belongs to the judicial branch, and the legislative veto is an impermissible encroachment by the legislature on these powers.[233] Iowa's constitution was amended to explicitly authorize nullification by the General Assembly in 1984.[234]

C. Comprehensive Five-Year Review of Rules

An additional mechanism for review of rules relies on the agency's own efforts. Beginning July 1, 2012, each agency is required under Iowa Code section 17A.7(2) to

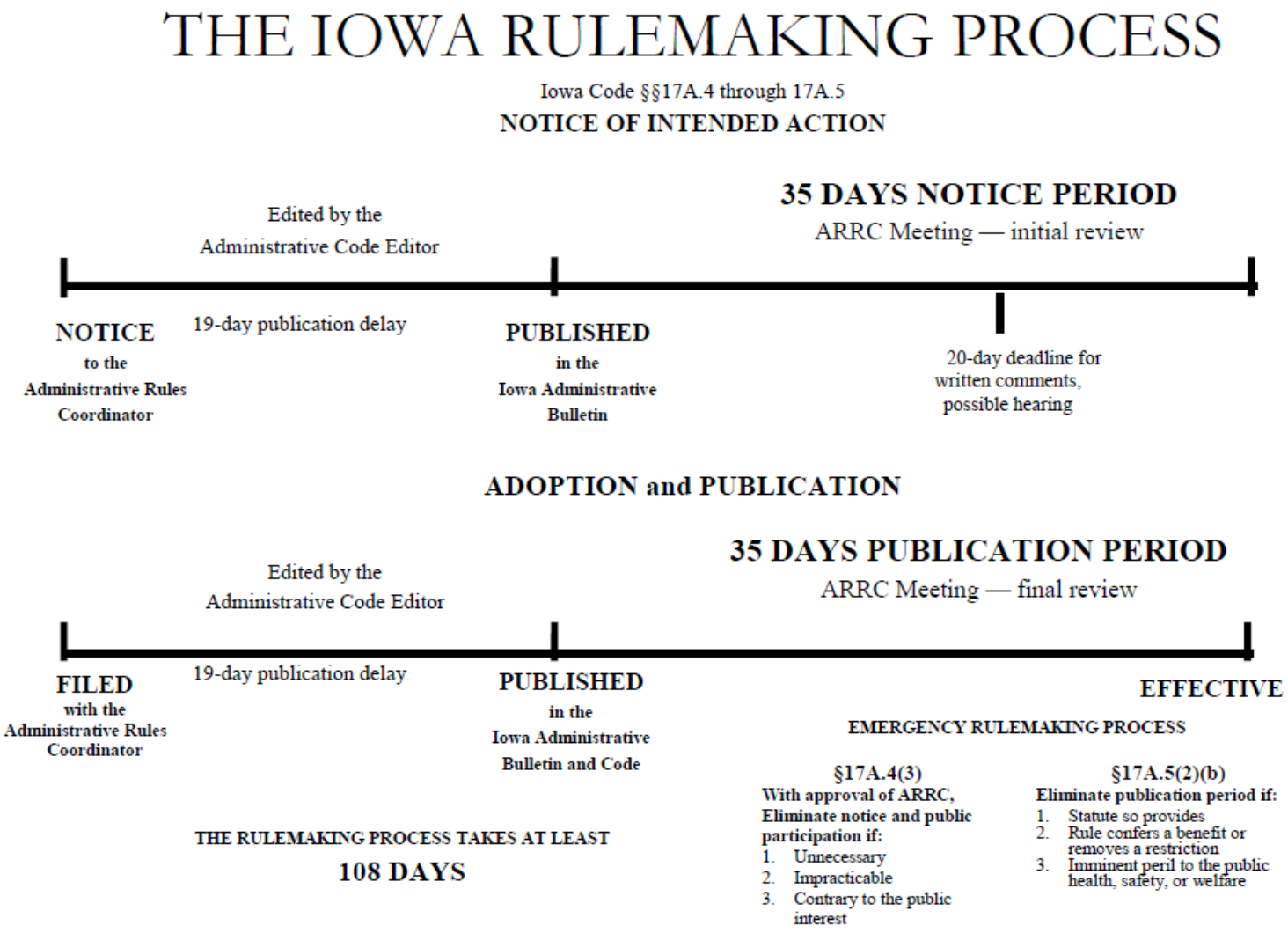
[226] See Iowa Const. art. III, §40.
[227] See 2016 Iowa Acts, ch. 1140 for an example of a nullification resolution.
[228] Joint Rule of the Senate and House of Representatives 22 (2019), *available at* www.legis.iowa.gov/docs/publications/JR/1151289.pdf.
[229] Id.
[230] See, e.g., Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983); State v. ALIVE Voluntary, 606 P.2d 769 (Alaska 1980); Legislative Research Comm'n v. Brown, 664 S.W.2d 907 (Ky. 1984); Opinions of the Justices, 431 A.2d 783 (N.H. 1981); Gen. Assembly of N.J. v. Byrne, 448 A.2d 438 (N.J. 1982); State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981). But see Mead v. Arnell 791 P.2d 410 (Idaho 1990) (holding a veto of administrative rule by resolution is not "law," and therefore, need not be presented to the executive).
[231] 1968 Op. Iowa Att'y Gen. 78 (5/10/67), *available at* govt.westlaw.com/iaag/Document/I5d9c544a968f11df9b8c850332338889.
[232] Id. at 79-80.
[233] Id. at 80.
[234] Iowa Const. art. III, §40.

conduct an ongoing and comprehensive review of all of its rules. The reviews continue over each five-year period thereafter.[235] The goal of the review is the identification and elimination of all rules of the agency that are outdated, redundant, or inconsistent or incompatible with statute or its own rules or those of other agencies. When an agency completes a five-year review, the agency must provide a summary of the results to the ARC and the ARRC. The review process has resulted in a significant amount of updates to rules.[236]

[235] The Iowa Utilities Board has established a schedule by rule for carrying out this review. 199 IAC 3.11. Most agencies have scheduled reviews on a more informal basis.

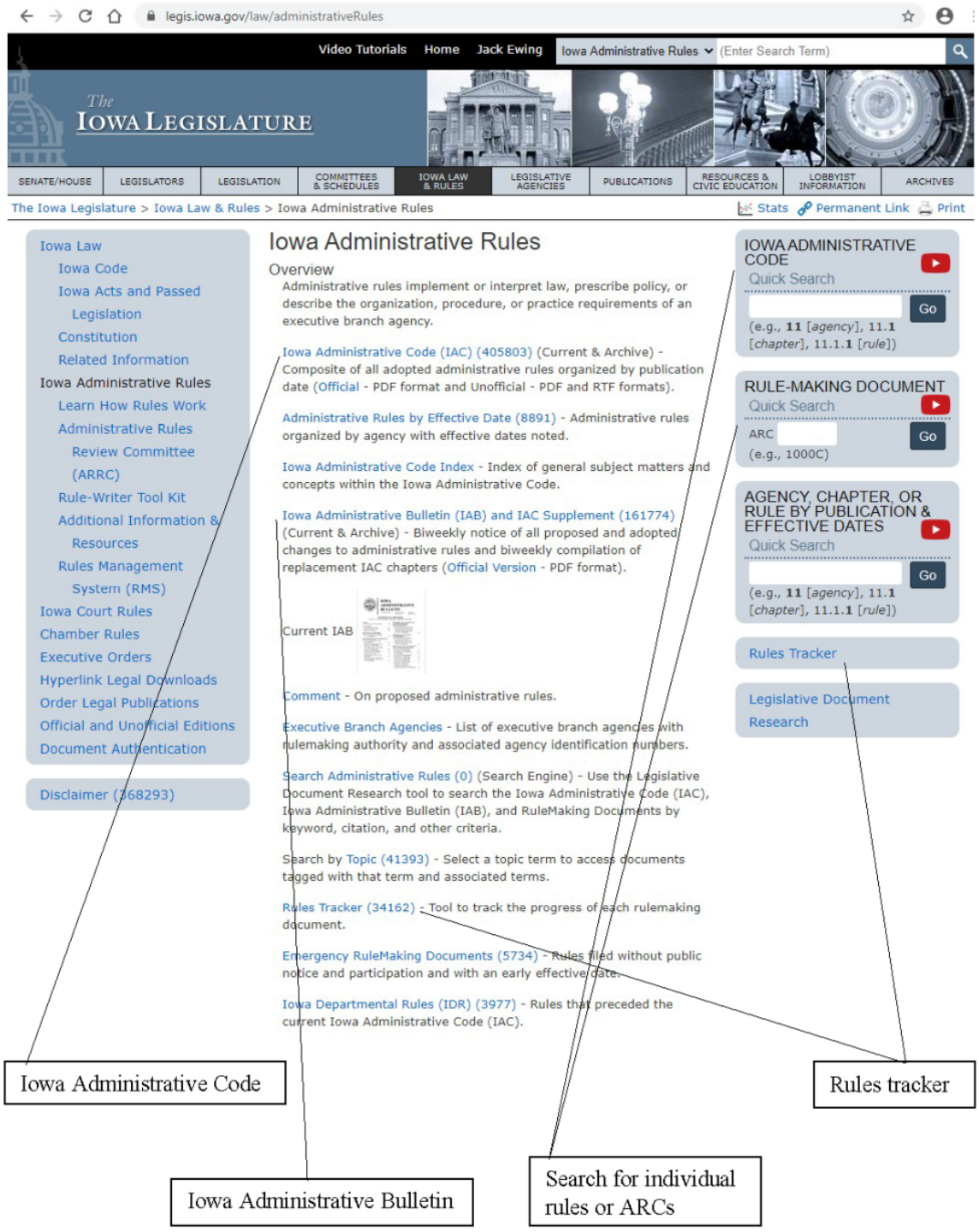
[236] See, e.g., IAB Vol. XLI, No. 15 (1/16/19) p. 1731, ARC 4243C; IAB Vol. XLI, No. 15 (1/16/19) p. 1739, ARC 4245C; IAB Vol. XLI, No. 16 (1/30/19) p. 1833, ARC 4267C.

Appendix A — The Iowa Rulemaking Process Diagram

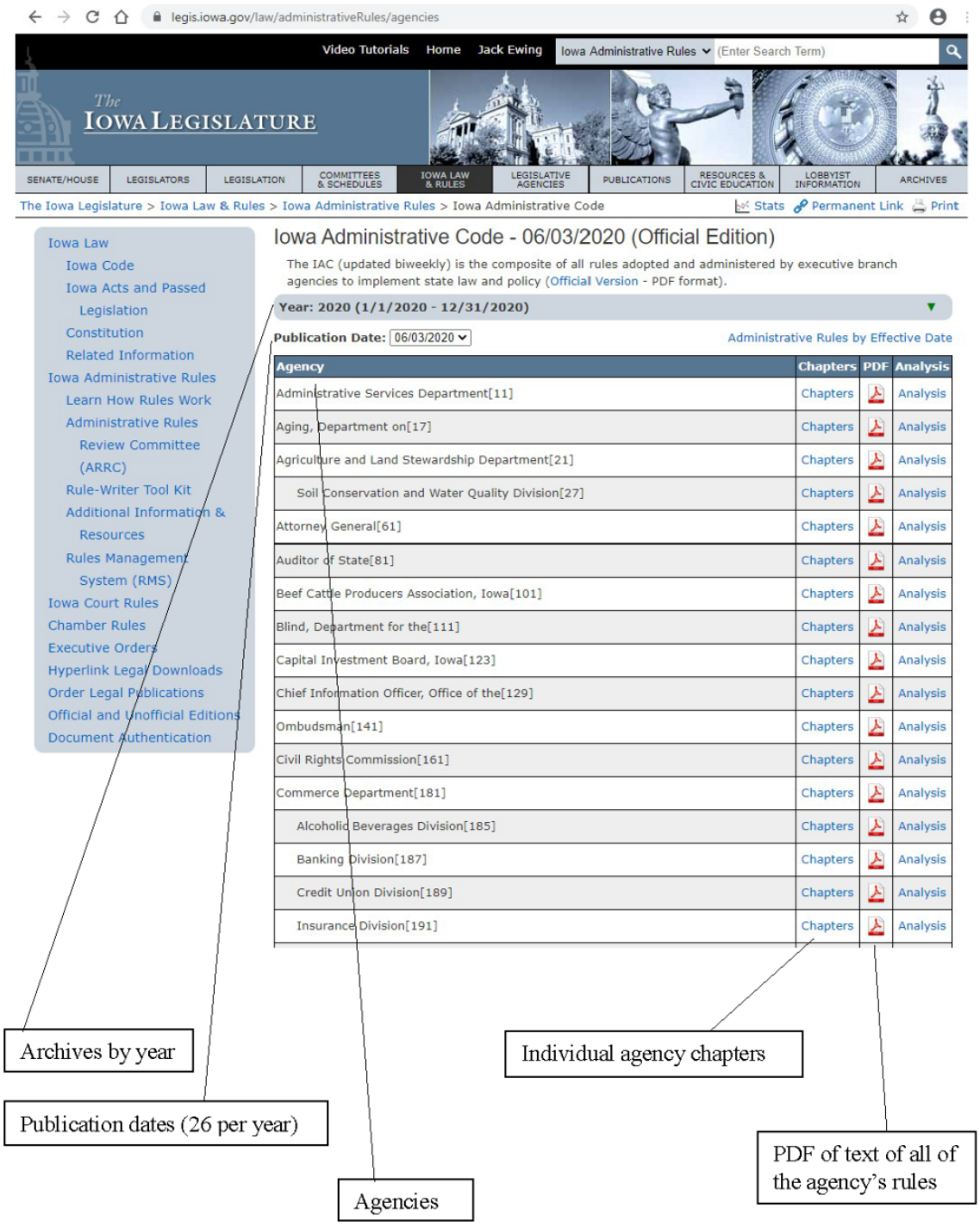


Appendix B — Internet Access to Information on Rules

Homepage for Rules on General Assembly Internet Site



Iowa Administrative Code Internet Site



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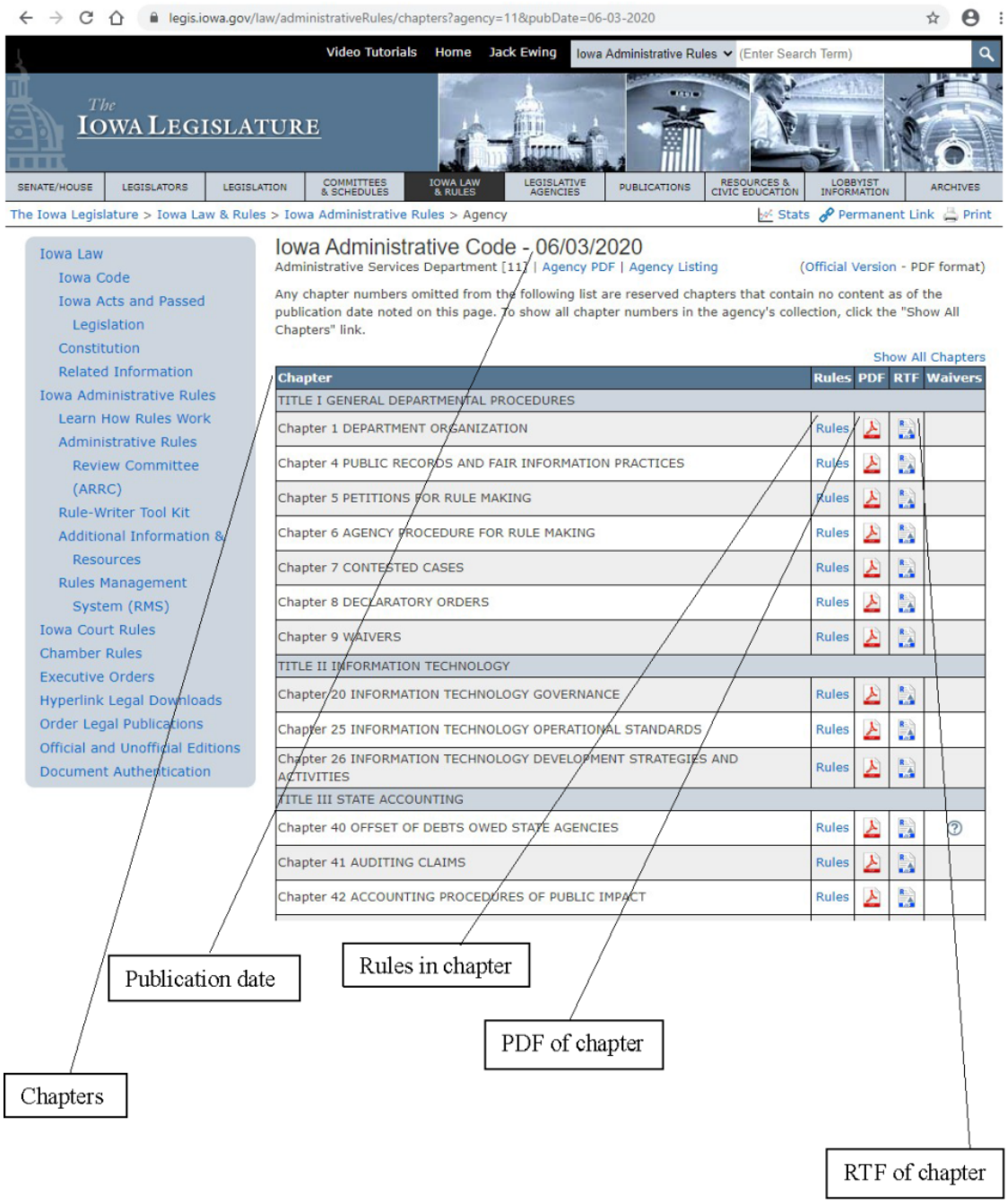
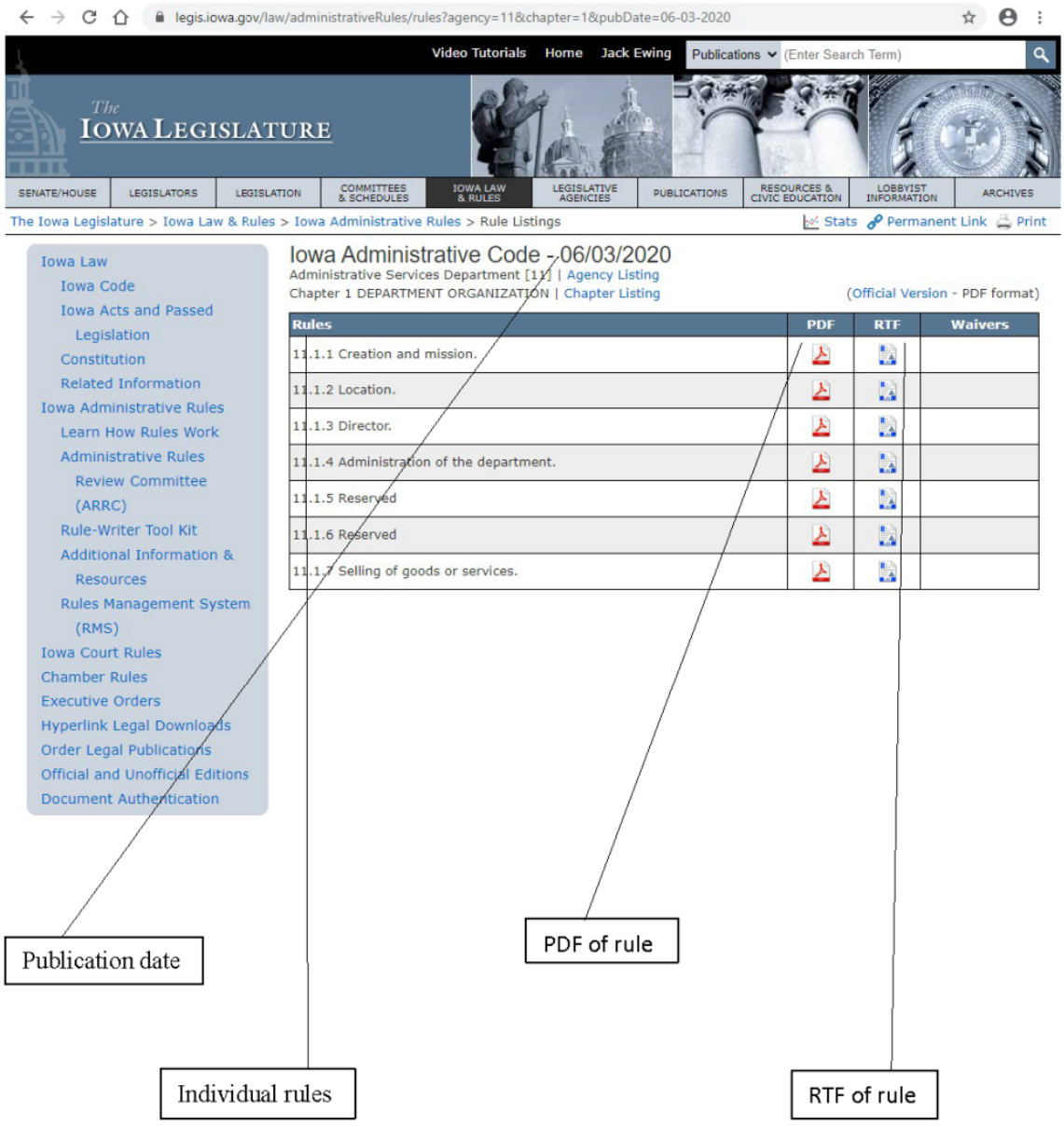
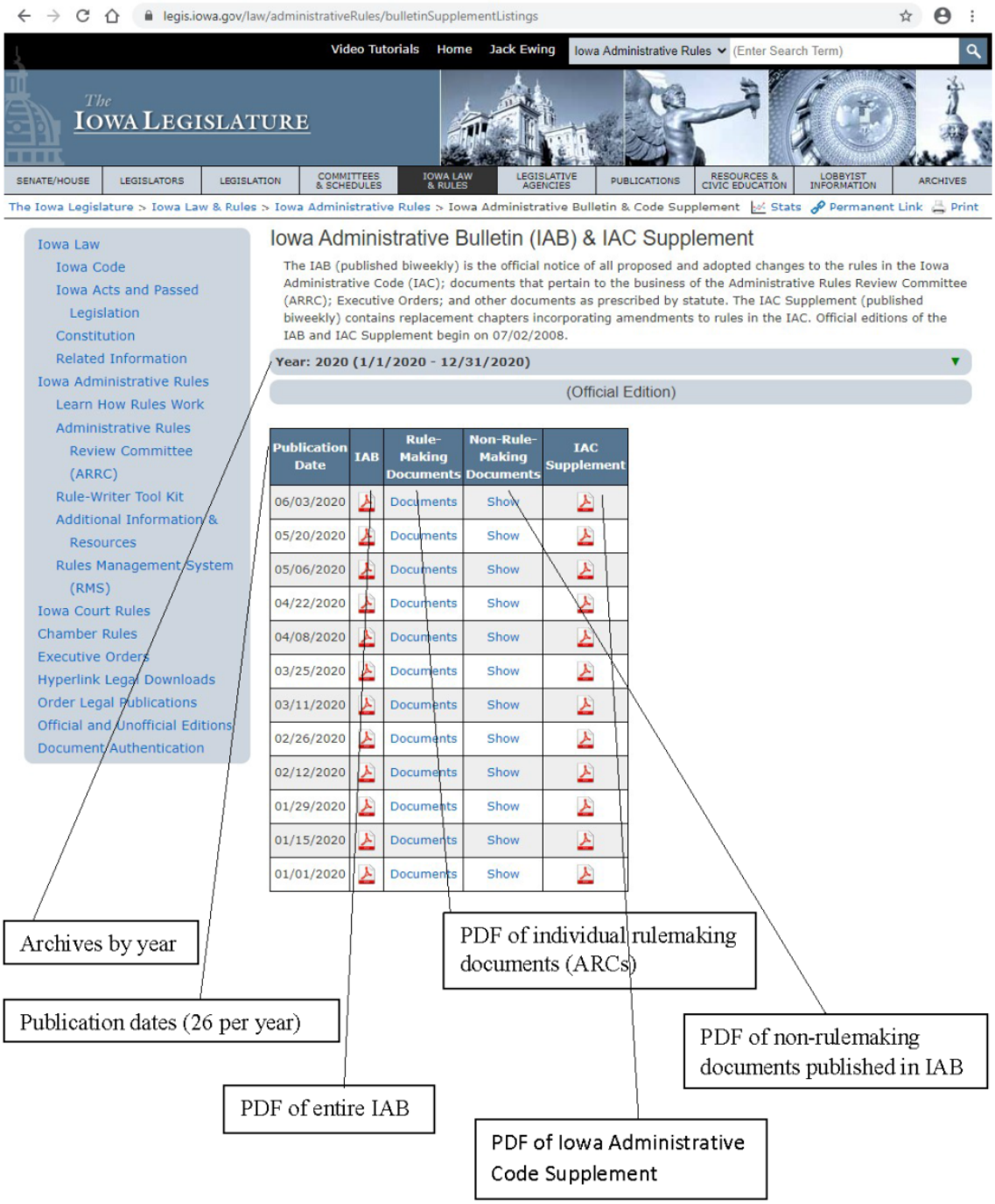


Rules in a Chapter



Iowa Administrative Bulletin (IAB) Internet Site



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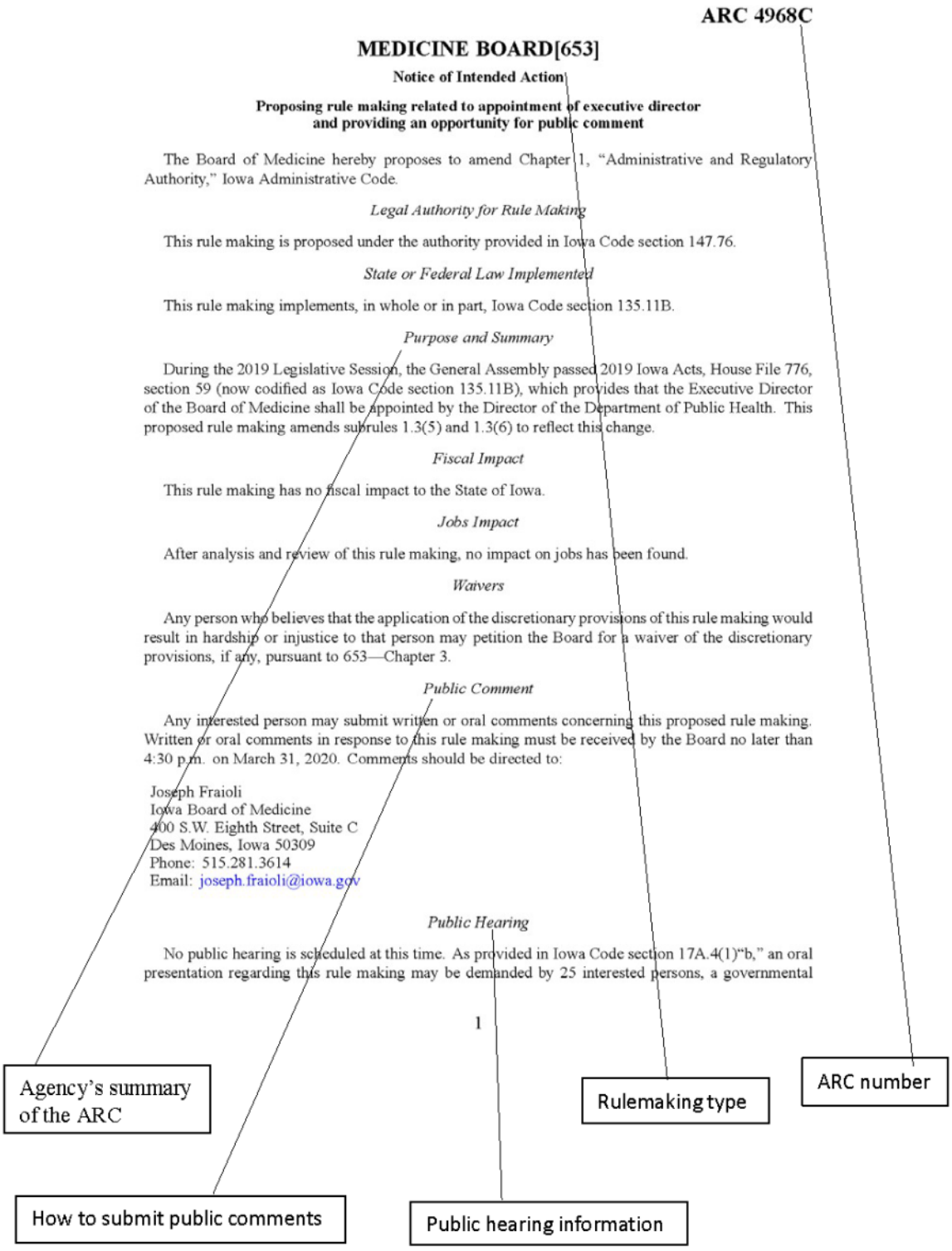

ARC 4968C

MEDICINE BOARD[653]

Notice of Intended Action

Proposing rule making related to appointment of executive director and providing an opportunity for public comment

The Board of Medicine hereby proposes to amend Chapter 1, "Administrative and Regulatory Authority," Iowa Administrative Code.

Legal Authority for Rule Making

This rule making is proposed under the authority provided in Iowa Code section 147.76.

State or Federal Law Implemented

This rule making implements, in whole or in part, Iowa Code section 135.11B.

Purpose and Summary

During the 2019 Legislative Session, the General Assembly passed 2019 Iowa Acts, House File 776, section 59 (now codified as Iowa Code section 135.11B), which provides that the Executive Director of the Board of Medicine shall be appointed by the Director of the Department of Public Health. This proposed rule making amends subrules 1.3(5) and 1.3(6) to reflect this change.

Fiscal Impact

This rule making has no fiscal impact to the State of Iowa.

Jobs Impact

After analysis and review of this rule making, no impact on jobs has been found.

Waivers

Any person who believes that the application of the discretionary provisions of this rule making would result in hardship or injustice to that person may petition the Board for a waiver of the discretionary provisions, if any, pursuant to 653—Chapter 3.

Public Comment

Any interested person may submit written or oral comments concerning this proposed rule making. Written or oral comments in response to this rule making must be received by the Board no later than 4:30 p.m. on March 31, 2020. Comments should be directed to:

Joseph Fraioli
Iowa Board of Medicine
400 S.W. Eighth Street, Suite C
Des Moines, Iowa 50309
Phone: 515.281.3614
Email: joseph.fraioli@iowa.gov

Public Hearing

No public hearing is scheduled at this time. As provided in Iowa Code section 17A.4(1)"b," an oral presentation regarding this rule making may be demanded by 25 interested persons, a governmental

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Agency's summary of the ARC

How to submit public comments

Public hearing information

Rulemaking type

ARC number

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subdivision, the Administrative Rules Review Committee, an agency, or an association having 25 or more members.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rule making by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rule making at its regular monthly meeting or at a special meeting. The Committee's meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

The following rule-making actions are proposed:

ITEM 1. Amend paragraph **1.3(5)"n"** as follows:

n. ~~Hire and supervise the executive director.~~ Advise the director of the department of public health in evaluating potential candidates for the position of executive director, consult with the director in the hiring of the executive director, and review and advise the director on the performance of the executive director in the discharge of the executive director's duties.

ITEM 2. Amend subrule 1.3(6) as follows:

1.3(6) ~~Appoints~~ Guides and directs a full-time executive director who:

a. Is not a member of the board.

b. Under the supervision of the director of the department of public health and the guidance or direction of the board performs administrative duties of the board including, but not limited to: staff supervision and delegation; administration and enforcement of the statutes and rules relating to the practice of medicine and surgery, osteopathic medicine and surgery, and the practice of acupuncture; issuance of subpoenas on behalf of the board or a committee of the board during the investigation of possible violations; and enunciation of policy on behalf of the board.

Item statements with text of changes to rule language

Rules Tracker