

Elements of the Rulemaking process

The Four Functions of the Rulemaking Process.

- Provides public notice of proposed administrative rules--by publication in the Iowa Administrative Bulletin.
- Provides a limited opportunity for public comment. The right to comment does NOT imply public approval of a rule is required for the rule to be lawful. An agency is free to adopt whatever rule it wants as long as it is within the authority of the agency and is "reasonable".
- Provides publication of the final rule.
- Provides an opportunity for gubernatorial and legislative oversight.

Notice and Public Participation

The administrative rulemaking process begins with the publication of a notice of intended action in the Iowa Administrative Bulletin (IAB). The IAB is similar to the Federal Register, containing both notices of intended actions and the text of all rules adopted in final form. Agencies are required to publish their rules in the IAB but may also use more extensive notice if they choose. In some cases statutory provisions may require more extensive notice. The IAB also contains opinions of the Iowa Attorney General, opinions of the Iowa Supreme Court and various other notices approved by the Iowa General Assembly's Administrative Rules.

Notice of Intended Action-§17A.4

Notice must be published in the Iowa Administrative Bulletin (IAB) 35 days before the proposed rules 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. While the actual text is not necessarily required to be published in the IAB, there must be enough information for the average person to understand the nature and scope of the proposal. If the actual text is not published in the IAB, the agency must provide a copy of the text upon request. If the text is not yet developed, a second notice of intended action must be published when the text is available.

The agency must also submit a copy of the notice to the chairpersons and ranking members of the appropriate standing committees of the general assembly for additional study.

Scope

The scope of the notice is set by the agency. A notice of intended action can address entire rules or chapters of rules or it can change individual words within a particular rule. A rule can add new rules, amend existing rules or delete existing rules. 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.

Synopsis of the Proposal

Prior to the text or the summary the notice contains a synopsis of the subject and a citation to the specific statutory authority for the proposal. The notice must include a brief explanation of the principal reasons for its action. In certain situations the agency must also include a brief explanation of why the rule does not include a provision for a waiver to the rule.

This preamble also contains information regarding the availability of a public hearing and the time and method for the submission of written comments. An agency may use the preamble as a mechanism to present its thinking behind the proposal or to detail its history.

Opportunity for Public Presentation

The public must be allowed not less than a 20 day time period to submit written comments on the agency's proposal. The method and deadlines for these submissions are set out in the initial notice of the agency's proposal. The notice must also identify the mechanism for requesting an 'opportunity for oral presentation'. This "opportunity" is nothing more than the right to express views and make arguments; it does not include the many "due process rights" which are expected in a trial-type hearing.

Public participation is open to any interested person—literally anybody. This phrase includes anybody or anything: individuals, corporations, 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.

The "opportunity for oral presentation" is established in, §17A.4 (1)"b" of the Iowa Administrative Procedures Act (IAPA). This phrase was specifically chosen to ensure there was no confusion with a due process, judicial type hearing. The oral presentation was originally developed as an alternative to written comments, designed for those persons who could not effectively make written presentations. In short, this opportunity for oral presentation is simply 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 hearing is not an automatic right. Only a limited number of persons can demand that a hearing be held:

- Administrative Rules Review Committee (ARRC);
- Petition signed by 25 persons;
- A group representing 25 persons;
- A government agency; or
- The Governor.

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 rule-making process over 40 days. Notice must be published for 20 days, plus a minimum 19 day delay to get the notice published in the IAB. For this reason agencies should routinely schedule a hearing as part of any rulemaking that might be controversial.

Oral Presentation Conduct

Once an oral presentation is scheduled, everyone is entitled to attend and make a presentation. Participation is not limited to the persons or groups who make the initial request. §17A.4 of the IAPA refers to “*interested persons*.” This literally means anybody with an interest, even if that interest is mere curiosity. A transcript (verbatim testimony) is not required at the oral presentation; notes or a tape recording are sufficient. The agency is not required to provide a presiding officer to interact with the public.

Agency Consideration of Comments

Agencies are required to “*fully consider all written and oral submissions*”. Agency policy makers are not required to be present at the meeting. However, the agency decision maker must be fully and adequately informed as to the content of the public comment; this can be accomplished through adequately prepared staff synopsis of the public comment.

“Record” of Rulemaking Proceeding

Rulemaking is not similar to a judicial decision; Iowa law does not require -that the decision to adopt a rule be supported by the testimony or evidence in the record. The decision to adopt a rule does not need to be supported by testimony and 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. A rulemaking record is simply the collection of written and oral comments and other materials are required in uniform rule. An agency is required to give public comment “full and fair” consideration.

While an agency is required to fairly consider the public comment it remains free to use its expertise to adopt whatever rule it feels appropriate, as long as it can show a “rational basis” for that decision and that the rule is within its delegated authority. Agency decision makers do not need to read all public submissions, but they must be familiar with the basic content.

“Concise statement” Record Based on Agency’s Decision

In a rulemaking preceding 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, based on its decision. Any interested person {meaning literally anybody} 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.*” This provision requires a synopsis of the most important arguments for and against the proposal. The request may be made at any time during the rulemaking, up to 30 days after the final adoption. The statement must be completed with 35 days of the request.

A detailed analysis of every detail is not required; however, all of the reasons for the final adoption of the rule must be set out in the statement. The failure to include all of the reasons supporting a rule adoption means only those reasons contained in the statement can later be introduced in court to justify the rule. The request for a concise statement forces the agency to review and analyze all the testimony and other written material submitted during the rulemaking. Because the agency must set out all of its reasons for adopting the rule over public objections, the agency will have to identify any information considered by the agency from the rulemaking proceeding and any other sources.

Period for Adoption-§§17A.5, 17A.5

The notice period is limited, the agency has 180 days to either adopt the proposal in final form or terminate the rulemaking. The period begins either on the date the notice was published, 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 notice of intended action can be adopted no sooner than 35 days after publication of the notice of intended action. Generally adoption takes longer; that precise timing occurs only in non-controversial rulemaking proceedings where every one of the time deadlines have been met.

Substantive proposals require full and fair consideration before adoption by the agency. Since 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. More commonly the notice period runs 45 to 90 days, depending on the complexity of the public comment. The maximum period for adoption is 180 days. A notice which is not adopted within that period is void and the process must begin again.

Requirement for Substantial Compliance-§17A.4 (3)

A rule is void unless promulgated in substantial compliance with the mandates of the rulemaking process. The term “substantial compliance” does not require strict adherence to every procedural detail. There are three criteria that basically 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, and,
- The extent to which the defect was an isolated occurrence or part of an ongoing scheme to avoid the requirements of the rulemaking process.

All three of these factors are examined together; if the defect did not significantly involve any one of these criteria, then the rulemaking remains valid. Generally speaking, the principle ‘no harm, no foul’ applies.

Statute of Limitations

Unless the validity of a rulemaking proceeding is challenged within two years of the effective date, the rule will be presumed valid. 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.

Legislative Review-§§17A.4, 17A.8

At some point during this process, both the proposed rule and the final adoption are reviewed by the legislature's Administrative Rules Review Committee (ARRC). Generally, the proposed rule is evaluated by the ARRC after the “Adopted and Filed” version is published in the IAB.

The ARRC may object to a rule. This action eliminates the presumption that the rule was valid in the event the rule is taken up in a subsequent judicial review.

The ARRC may postpone the adoption of a proposed rule for 70 days, allowing time for additional review. The ARRC may also delay the effective date of an adopted rule for an additional 70 days, for additional study or the committee may delay the adopted rule pending additional review by the General Assembly (the session delay). Although it does not occur frequently the Iowa General Assembly has the ability to rescind any administrative rule by joint action of both the Senate and the House chambers. This oversight power is held by only a few state legislatures.

Regulatory Analysis-§17A.4

This provision is a fusion of old “economic impact statement” and “regulatory flexibility analysis”. Each regulatory analysis must include quantifications of the data and must account for 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.

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 a summary of the analysis is published in the IAB. For rules adopted on an “emergency” basis, the summary must be published within 70 days of the request.

A regulatory analysis may be requested by the Iowa General Assembly’s Administrative Rules Review Committee (ARRC) or the Governor’s Administrative Rules Coordinator. The analysis must evaluate the probable economic, cost benefit, and other impacts to the particular persons and the state affected by the proposed rule.

Small Business Regulatory Analysis

An agency must issue a small business regulatory analysis of a proposed rule, upon request, if the rule would have a substantial impact on small business. The request for this small business analysis may be made not only by the ARRC or the Administrative Rules Coordinator, but also by petition of at least twenty-five persons who each qualify as a small business or by an organization representing at least twenty-five 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 or simplified regulations, performance standards or small business exemptions:

Fiscal Impact Statement-§25B.6

Iowa Code, section 25B.6 provides for a general against rules that are not mandated or authorized by statute which will require expenditures by political subdivisions or their contracting entities. . If a rule will increase annual expenditures by more than \$100,000 for these affected parties then a fiscal impact statement outlining these costs of the administrative rule is required. This provision can snag any agency which is unaware that in reality this part of the rulemaking process.

The fiscal impact statement must be submitted to the administrative rules coordinator for publication in the IAB, along with the notice of intended action, and to the Iowa General Assembly Legislative Council's fiscal committee.