Elements of the Rulemaking Process

Chapter 17A, the Iowa Administrative Procedure Act

The statute governing rulemaking by state agencies, establishing the ARRC, and various other matters.

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

A biweekly publication containing all rulemaking proposed or adopted by state agencies. The IAB also contains other notices required by statute or approved by the ARRC that are not related to rules.

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

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

The ARRC may delay the effective date of an adopted rule for an additional 70 days or until the end of the next regular session of the General Assembly. The ARRC may object to a rule. An objection eliminates the presumption that the rule was legally valid in the event the rule is taken up in subsequent judicial review relating to the subject of the objection. The ARRC has additional, less commonly used powers as well. The General Assembly has the constitutional authority to nullify any administrative rule by joint action of both the Senate and the House.

Scope of Rulemaking

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

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

Notice must be published in the IAB 35 days before proposed rules can be adopted in final form. This notice is referred to as a “notice of intended action.” The notice must contain either the terms or substance of the proposal or set out a description of the matters involved.

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

Prior to the text of the rule language itself, a rulemaking document contains a synopsis of the
subject and a citation to the specific statutory authority for the proposal, as well as various other information. This is called the preamble to the rulemaking. An agency may use the preamble as a mechanism to present its thinking behind the proposal or to detail its history. This preamble also contains information regarding the availability of a public hearing and the time and method for the submission of written comments to the agency.

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

The public must be allowed at least 20 days to submit written comments on the agency’s proposed rulemaking. The method and deadlines for these submissions are set out in the notice of intended action. The notice must also identify the mechanism for requesting an “opportunity for oral presentation.” This “opportunity” is only a right to express views and make arguments about a proposed rule before a representative of the proposing agency. While commonly referred to as a “public hearing,” it does not include the many due process rights which are expected in a trial-type hearing. An agency can schedule multiple public hearings for a single proposed rulemaking.

Public participation is open to any interested person. This phrase includes anybody or anything: individuals, corporations, or associations. A particular legal interest is not required. Anyone is entitled to offer comment on a proposed rule without regard to the nature of their interest.

Unlike written comments, a public hearing is not an automatic right. Only a limited number of persons can demand that a hearing be held:

- The ARRC
- A petition signed by 25 persons
- An association representing 25 persons
- A government agency
- The Governor

Twenty days’ notice of the hearing must be given by publishing notice in the IAB. When the agency does not schedule a hearing on its own in the initial notice of intended action, a subsequent request delays the entire rulemaking process over 40 days while a new, amended notice is published in the IAB. For this reason agencies should routinely schedule a hearing as part of any rulemaking that might be controversial.

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

Period for Adoption-§17A.5

The notice period for rulemaking is limited. 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. An agency has 180 days to either adopt proposed rulemaking in final form or terminate the rulemaking. The 180-day period begins either on the date the notice was published or the date of the last public hearing, whichever is later. The minimum timeframe generally occurs only in non-controversial rulemaking proceedings where every one of the procedural deadlines have been met at the earliest possible date.
Proposed rules require full and fair consideration before adoption by the agency. As the first 20 of the minimum 35 days of the process are dedicated to public comment, this leaves only 15 days for consideration and analysis of that public comment by the agency. More commonly the notice period runs 45 to 90 days, depending on the complexity of the rulemaking and the public comment. A notice of intended action that is not adopted within 180 days is void. The agency can later begin the process again.

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

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

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

Agencies do not possess any innate rulemaking authority, only that which is delegated to them by law or necessarily inferred. Such delegations are construed narrowly. See §17A.23(3), *Iowa Power & Light Co. v. Iowa State Commerce Commission*, 410 N.W.2d 236, 240 (Iowa 1987), and various subsequent cases.

**Fiscal Impact Statement—§17A.4(4)**

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

**Jobs Impact Statement—§17A.4B**

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

**Regulatory Analysis—§17A.4A**

A regulatory analysis can be requested by the ARRC or the Governor’s Administrative Rules Coordinator under §17A.4A(2)(a). The analysis must evaluate the probable economic, cost-benefit, and other impacts to the particular persons and the state affected by the proposed rule. 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.
Rulemaking Resources

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 emergency rulemaking, the summary must be published within 70 days of the request.

An agency must instead or also issue a small business regulatory analysis of a proposed rule upon request under §17A.4A(2)(b) if the rule would have a substantial impact on small business. The request for 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.

This analysis must determine whether it would be reasonable to establish less stringent or simplified regulations or small business exemptions. The agency must reduce the impact of a proposed rule that would have a substantial impact on small business if that action is legal and feasible.

**Requirement for Substantial Compliance, Statute of Limitations, Judicial Review—§§17A.4(5), 17A.19**

A rule is void unless promulgated in substantial compliance with the requirements of the rulemaking process in chapter 17A. The term “substantial compliance” does not require strict adherence to every procedural detail. There are three 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.

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.

Unless the validity of a rulemaking proceeding is challenged within two years of the effective date, the rule will be presumed valid. This presumption applies only to possible procedural defects. The substance of a rule can be challenged at any time a person is “aggrieved or adversely affected” by the rule, per §17A.19.

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