

Agency Guidance and the Administrative Rules Review Committee (ARRC)

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Question from the ARRC

- When can a state agency implement a bill through guidance instead of or prior to rulemaking? What are relevant considerations?
- Short answer: It depends, and the answer isn't always clear

Background: ARRC delays

- Iowa Code §§17A.4(7), 17A.8(9)
- ARRC can delay the effective date of a newly adopted rule 70 days and/or until the adjournment of the NEXT regular legis. session
- Takes 7 votes of 10 members (2/3) to pass, can be lifted by same margin
- No statutory criteria or limits on use
- About 4 70-day delays, 3 session delays a year

Background: HF 2392, Div. II (2016)

- Many substantive and technical changes relating to career and technical education (CTE)
- Establishment of and standards for revised career and technical education services areas, secondary career and technical education programs, regional secondary career and technical education planning partnerships
- Various duties for Board of Ed., Director of DOE, school districts, community colleagues, and private sector
- Some sections explicitly require rulemaking
- Div. I is not a problem

DOE rules

- DOE adopts rules to implement Div. II: ARC 2947C
- Adopted rules reviewed at March 2017 ARRC meeting
- Public comments from voc. ag. teachers asserting the bill (not rules) negatively affects a funding stream
 - Concerns were also raised in ARRC review of notice
- Session delay passes 8-2, effective until adjournment of 2018 session
- Members say bill had unintended consequences, needs a legislative fix
- No bill on this enacted in 2017 session
 - Some related legislation, none directly dealing with voc. ag. issue
- Unclear whether voc. ag. was actually an issue from Div. II or not

Special review at June ARRC

- DOE said Div. II is “self executing,” will be implemented through “guidance,” session delay “no longer serves any useful purpose”
 - Acknowledged rules are preferable, more permanent
 - Asserted (accurately) guidance language largely mirrors statute
 - Largely mirrors delayed rules as well
 - Discussion of possible legislation in 2018
- Guidance: <https://www.educateiowa.gov/adult-career-and-community-college/career-and-technical-education/cte-redesign/division-ii-cte>
- ARRC members displeased, request further review in July
- No precedent for circumventing a session delay
- ARRC counsel memo requested by chair

Special review at July ARRC

- DOE provides chart of statutory vs. guidance language, mostly same, some differences
 - “Drag and drop”
- DOE cites importance of June 30 deadline in bill, says Div. II has now largely been implemented
- DOE says failure to timely distribute funds may be out of compliance with federal law (?)

Discussion of July ARRC counsel memo

- Question: Can DOE implement Div. II thru guidance before expiration of session delay?
- Short answer: Unclear, but arguably yes in this specific instance
- Several factors in legal analysis

Factor: Deadline

- Non-rule-based deadline: “[r]egional career and technical education planning partnerships shall be established in accordance with [section relating to rulemaking] no later than June 30, 2017.” §46
 - No deadline for completing the rulemaking in Div. II
 - Div. I had immediate effective date, authorized emergency rules
 - Partnerships are given various duties
- How should DOE balance this deadline vs. ARRC session delay?

Factor: Non-rule-based duties

- Div. II provides duties to:
 - Director of DOE
 - School districts
 - Community colleges
 - Private sector
- These entities don't make rules
- Are these entities bound by the June 30 implementation deadline? Does DOE have a duty to assist them in complying?

Factor: “Interpret”

- Director of DOE has broad statutory to “interpret the school laws and rules relating to the school laws,” §256.9(16)
- Director has many duties in Div. II on same subjects as rulemaking requirements
- “Interpret” = enhanced authority, judicial deference
- §17A.19(10)(c), (l): “erroneous” vs. “irrational, illogical, or wholly unjustifiable”

Factor: “Drag and drop”

- Much of the substance of the rules and guidance was directly taken from Div. II
 - But not all
- Therefore, Div. II was at least somewhat self-executing, though not entirely so
- ARRC cannot delay a statute, only a rule

Conclusion

- These factors *arguably* gave DOE enough discretion to implement Div. II via guidance prior to expiration of the session delay
- Definitive yes or no answer isn't clear
- Session delays generally can't be disregarded, but each situation must be analyzed separately, will depend on relevant statutes
- DOE had choice between abiding by implementation deadline in Div. II or respecting the session delay
 - Both outcomes problematic
 - No good solution when an agency is given mutually exclusive legal directives

Outcomes: July

- Motion to lift session delay fails on 3-6 vote, no further ARRC action on ARC 2947C
- Chair requests additional memo for August meeting on more general question of when an agency can implement a bill through guidance, laying out different scenarios

August ARRC counsel memo

- Short answer: It depends. A variety of factors can affect an agency's authority to implement a bill through guidance before or in lieu of rulemaking
- These factors can generally be controlled through the drafting process
- Memo discussed these factors and a few possible approaches to dealing specifically with guidance

First, what is “guidance?”

- Good question!
- Undefined in chapter 17A or elsewhere
- Policymaking by an agency that isn’t rulemaking or contested case proceedings
- Policymaking vs. mere explanation
 - Common scenario: guidance that is only explanatory, says nothing new
- Binding or nonbinding?
 - Less of a concern if doesn’t purport to be binding
- Written or oral?
- Definition of “rule” in 17A.2 is broad
 - “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....” (12 exceptions)
 - If guidance purports to be binding, should possibly be done by rule

Guidance, continued

- Difficult to track or quantify this
- Unregulated, so easy for agency to create or rescind
- One attempt to define legislatively in relation to DOE, SF 475, §18, (2017) not enacted:
 - “a document or statement issued by the department, the state board, or the director that purports to interpret a law, a rule, or other legal authority and is designed to provide advice or direction to a person regarding the implementation of or compliance with the law, the rule, or the other legal authority being interpreted.”
 - Distinguishes binding vs. nonbinding, some exceptions
 - A more limited version of this was enacted, HF 565 §6
- Focus in DOE issue here is on written, binding guidance
- Could be defined differently in another context

Issue: Statutory silence = agency discretion

- Agencies only have as much authority as is (explicitly or implicitly) delegated to them by the Legislative Branch
 - §17A.23(3), *Northwestern Bell Telephone v. Iowa Utilities Board*, 477 N.W.2d 678, 682 (Iowa 1991)
- But many agencies are explicitly given broad policymaking/rulemaking authority in their subject areas. E.g.:
 - Director of DOT: 307.12(1)(j): “Adopt rules ... as the director deems necessary for the administration of the department and the exercise of the director’s and department’s powers and duties.”
- Means by which an agency implements a particular statute is almost entirely subject to legislative control (except federal law, court rulings)
- Statutory language on rulemaking, guidance, implementation procedures, etc., must be followed if possible
- But detailed (or any) language on this subject is often not included in bills

Statutory silence, continued

- Statutory silence gives agencies discretion to implement by rule or case-by-case
 - Young Plumbing and Heating Co. v. Iowa Natural Resources Council, 276 N.W.2d 377, 382 (Iowa 1979)
 - Guidance may be an option
 - But see broad definition of rule, §17A.2
- If implementation by rule or other specific implementation procedures such as deadlines are contemplated, must explicitly include them in the bill to ensure they are carried out
 - Agreements during session may not be enforceable if not explicitly included in the bill!

Issue: Rulemaking deadlines

- A bill can include a deadline for an agency to begin or complete the rulemaking process, e.g. (preferred language):
 - SF 274, (2017): Sec. 5. DIRECTIVE TO STATE BOARD OF EDUCATION. The state board of education shall submit a notice of intended action to the administrative rules coordinator and the administrative code editor pursuant to section 17A.4, subsection 1, paragraph “a”, not later than December 13, 2017, for the adoption of rules to implement....
- Different drafting approaches, such as specifying effective date
- Can be paired with emergency rulemaking authorization to ensure quick implementation
- Such deadlines are binding, but need to give agency enough time if not using emergency rulemaking
- May mean guidance is less of an issue

Issue: Non-Rule-Based Implementation Deadlines

- Bills can include implementation deadlines that don't reference rulemaking
- Agencies may arguably be required to abide by such deadlines even if rulemaking isn't complete
- Ideally, rulemaking should be scheduled with this in mind, possibly including emergency rulemaking
- An agency may face a dilemma if required rulemaking cannot be completed before a non-rule-based implementation deadline
 - ARRC delays can be a complicating factor
- Analysis will vary from bill to bill. Some scenarios to consider... (nonexclusive list)

Scenario 1: HF 291, Div. I (2017)

- Major changes to public employee collective bargaining procedures
- Required parties currently engaged in collective bargaining to immediately stop and restart
- New C.B. process for state employees had to be completed by Mar. 15, about 1 month after enactment
- March 15 deadline not made contingent on completing rulemaking
- PERB was given emergency rulemaking authority to handle the transition

HF 291, continued

- PERB got emergency rules in place ahead of March 15
- No rules issues in the new, shortened C.B. process
- What if rules hadn't been done on time, or had been delayed by the ARRC?
- Duties for state and non-state entities
- Would state collective bargaining process have been held up for lack of rulemaking? Seems unlikely.
- PERB would have faced a dilemma, probably would have issued guidance of some kind
- Wouldn't have had much time to find a solution

Scenario 2: SF 489 (2017)

- Fireworks bill
- State fire marshal required to adopt rules to permit sale of certain fireworks between June 13 and July 8 each year
- Permitting process must be adopted by rule
- Intent was for sale to begin summer 2017
- Immediate effective date, emergency rules authorized
 - But no language specifically requiring sale to occur in 2017
- Rules were done on time, no complications

SF 489, continued

- What if rules hadn't been done on time, or had been delayed by the ARRC?
- Local governments and private entities dependent on process
- Would fireworks not have been sold this summer? Seems unlikely.
- State fire marshal would have faced a dilemma, probably would have issued guidance of some kind
- Again, wouldn't have had much time to find a solution
- Could lack of specific implementation date made a difference?

Scenario 3: HF 2392, Div. II (2016)

- Required that regional career and technical education planning partnerships be “established in accordance with §258.3A, subsection 5 ... no later than June 30, 2017.” §46
 - §258.3A(5) does reference rulemaking, but §46 doesn’t
- Bill was enacted a year ahead of that deadline, no emergency rulemaking authorized
- Insufficient time to get rulemaking done due to ARRC session delay
- DOE has duties, but what about duties of school districts, community colleagues, and the private sector as of June 30?
 - How should DOE assist them?
- DOE had a dilemma, Div. II didn’t offer clear answers
- DOE chose guidance despite the ARRC session delay
- Both options problematic

Non-Rule-Based Implementation

Deadlines, Conclusion

- Most bills don't have complex implementation issues like this
- Analysis and possible outcomes will vary from bill to bill
- When implementation deadlines do not contemplate rulemaking, conflicts between deadlines and rulemaking requirements are possible
 - Agency can be put between a rock and a hard place
- Probably best to specify what role rulemaking will play
- Guidance will often be an agency's only option to implement a bill if rules aren't available, and bill language alone isn't sufficient
- Language on this in bills is uncommon, but can shape an agency's options, prevent complications
- Consider how much time is given for implementation and whether entities who don't make rules are reliant on rulemaking being carried out

Issue: “Self-executing” bills

- An agency must comply with any duties or limitations imposed on it by a bill
- How much detail is included in the bill? Some bills are extremely detailed, some not
- Some bills do not have enough detail to function on their own without elaboration by an agency (even if rulemaking isn't explicitly required)
- If a bill includes sufficient detail that no further policymaking by an agency, by rule or guidance or otherwise, is necessary at all, the bill is “self executing”
- Such determinations may involve judgment calls
- More a spectrum than a bright line
 - Many bills aren't easily classified; specificity matters

“Self-executing” bills, continued

- The more detail included in a bill, the less discretion left to an implementing agency
 - Bill can specify how these gaps get filled in (or not)
 - Remember broad definition of “rule” in §17A.2
- The amount of discretion to be given to an agency is something to weigh in the drafting process
- No correct one-size-fits all approach, lack of detail can be intentional
 - How much trust in agency’s expertise vs. legislative policymaking?
 - How much time is there in session to resolve questions?
 - More complex bills can be harder to pass

Self-executing bills, examples

- Self-executing: SF 482 (2015), social and charitable gambling
- Some provisions were detailed enough that DIA rescinded its rules on altogether: “With these updated and new provisions in the Iowa Code, the Department has concluded that it is unnecessary at this time to supplement these Iowa Code provisions with administrative rules.” ARC 3190C, 3192C

Self-executing bills, examples

- Not self-executing: HF 518, §18 (2017), work comp. bill, establishes New Career and Vocational Training and Education Program
- Retraining for certain employees who sustain shoulder injuries
- Provides some information about the program, such as the program's goal, who is eligible, that the program will be offered at community colleges, and some information about financial support for the program
- \$15,000 payment from employer or insurer

Self-executing bills, examples

- No mention of rulemaking
- Annual report on the program to the General Assembly beginning on or before December 1, 2018, suggesting that the program should be operating before then
- Much policymaking delegated to IWD
 - When will program start operating?
 - What does IWD evaluation of possible candidates look like?
 - What training is appropriate? How determined?
 - How does the billing work exactly?
 - Presumably contested case hearing if candidate or employer disagrees with decisions?
 - How does \$15,000 interact with other possible financial aid?
 - How is money for program dropouts handled?
- If fewer participants, fewer details may need to be sorted out
- Could possibly handle case-by-case rather than rule, maybe guidance
- Unsure of current status

Self-executing bills, examples

- HF 2392, Div. II: somewhere in the middle
- Contains fairly detailed duties for State Board of Education, the Director of DOE, some duties for school districts, community colleagues, and private sector
- Various requirements for the structure of the affected programs and partnerships
- But also explicitly requires that certain policymaking matters, such as standards relating to career and technical education planning partnerships, be carried out by rule
- Not entirely self-executing, but perhaps some provisions are

Issue: Agency Authority to “Interpret” Statutes

- Some agencies are explicitly given the authority to “interpret” one or more statutes they administer
- Can be broad or narrow
- “Interpret” = enhanced authority, judicial deference
- Is Legis. shifting interpretative authority from judicial branch to an agency
- Suggests agency has authority to expand upon a statute, doesn’t have to adhere as closely to the text
- §17A.19(10)(c), (l): “erroneous” vs. “irrational, illogical, or wholly unjustifiable”
- Court can find agencies implicitly have this authority, but generally don’t
- *Renda v. Iowa Civil Rights Commission*, 784 N.W.2d 8 (Iowa 2010)

“Interpret,” continued

- Uncommon in Iowa Code
- Broad interpretive authority: IFA, Board of Medicine and similar boards, Director of DOE
- Some limited authority for specific purposes: EDA, DHS, Revenue, etc.
- 2017 bills: EDA’s expanded, HF 231; PERB’s removed, HF 291
- No right or wrong approach here, is a legis. judgment call
- One method by which an agency might interpret a statute is through guidance
 - May increase use of guidance by an agency
 - May give enhanced judicial deference to guidance
 - Again, consider binding vs. nonbinding and whether interpretation falls under definition of “rule”

Issue: Restating statutory language verbatim in rules/guidance

- A rule (or guidance) may restate language from a statute verbatim or nearly verbatim when accounting for differences in style and format
- “Drag and drop”
- Why?
 - Have entire regulatory scheme in one place
 - Use statutory lang. as piece of something else
 - Habit
- Generally not legally necessary, but may be valid reasons for doing so

Restating statutory language, continued

- Effect?
 - Guidance or rule restating statute is redundant, relies on statute for legal authority
 - Challenging such a rule or guidance is the same as challenging the statute
 - Guidance restating a statute is fine, doesn't really do anything
 - ARRC delay on a rule doesn't affect the underlying statute; ARRC doesn't have the authority to affect a statute
 - While ARRC can still delay such a rule, the delay may not have desired effect

Restating statutory language, continued

- DOE rules and guidance both had significant amount of verbatim lang. from HF 2392, Div. II
- DOE asserted this means that rules shouldn't have been delayed by ARRC, and guidance was valid
- But both also contained substantive lang. not included in the bill, as ARRC noted
- Not DOE's best argument in this situation, but could at times be used to circumvent an ARRC delay

Issue: Federal law

- Some agencies have responsibility for implementing certain federal laws
- Where conflicts occur, federal law supersedes state law, including chapter 17A
- Federal funding may also be at stake
- If a state agency has mandatory duties under federal law, but is unable to use or complete the rulemaking process, then guidance may be necessary
- Little can be done on the state level to prevent such guidance

Federal law, continued

- §17A.21 covers federal conflicts where application of 17A requirements would “cause denial of funds or services” or be otherwise “inconsistent with requirements of federal law”
 - Allows A.G. to suspend a provision of chapter 17A “only to the extent necessary” to fix the problem, report issue to Legis.
 - Unknown if this has ever been invoked
 - Guidance might be a solution, but issue will usually be rulemaking timeline
- DOE asserted a possible federal conflict if HF 2392, Div. II was not timely implemented, but did not follow up with an explanation or citation
 - Could have been DOE’s strongest argument

Approaches

- August memo also set out a few specific approaches for addressing guidance issues
- The right solution will vary from one situation to another
- These focused more on guidance than on implementation issues in general

Approach: Explicit reference to agency guidance

- Sometimes guidance is authorized by statute on a specific subject but undefined, e.g.:
 - §84A.1B(2), Workforce Development Board, statewide workforce development matters
 - §256.9(54), Director of DOE, federal and state education initiatives which the area education agencies must implement statewide
- May not always be explicitly authorized
 - Wasn't for HF 2392, Div. II
- Guidance can be explicitly limited
 - HF 565 §6 (2017)(enacted) uses language similar to that of SF 475, §18 (not enacted) to limit guidance by DOE relating to certain school funds unless “required or reasonably implied by any statute, rule, or other legal authority.”
- Any statutory language on guidance would control
 - But rarely mentioned in statute

Approach: Implementation of Bill Prior to Rulemaking

- Many bills require that policymaking be done by rule
- But rulemaking requirements alone do not ensure bill won't be implemented prior to completion of rulemaking
 - As happened with HF 2392, Div. II
 - Safe at Home Program
- A bill could include language prohibiting implementation until required rules are done
 - No such language ever used
 - Such language would have no effect if bill doesn't require rulemaking to implement

Approach: Agency Implementation of Statutes when ARRC Delays Involved

- No precedent for an agency implementing a bill prior to expiration of a relevant ARRC delay
- ARRC delay powers in §17A.4, 8 do not contemplate such a scenario
 - Only reference rules, not statutes or guidance
- Language could be added to chapter 17A or to a specific bill prohibiting implementation via guidance or other means when related rulemaking is delayed by ARRC
- ARRC's purview and powers have been limited to rules, not statutes
- Possible separation of powers concerns

Approach: Exclusion from rulemaking

- A bill can explicitly exclude a particular policy matter from the rulemaking process
- Suggests that some form of guidance is probably appropriate
- Generally used for ministerial policymaking, e.g.:
 - §135C.2(3)(d), DIA, certain federal guidelines
 - §535.2(3), Banking, usury rates
- See also exclusions from definition of “rule” in §17A.2
 - Internal agency matters, advisory opinions, prices for goods and services, etc.

Outcomes: August

- No further discussion on DOE in August or after
- Subsequent queries on subject to other states, of limited value
- No further outcomes as of yet, but may be revisited in future legislation

Takeaways

- The results of this kind of analysis will vary from bill to bill, depending on bill text and related statutes
- Answer may not always be clear
- Concerns regarding implementation of any particular bill can be addressed during drafting
 - Often easier to address these matters on the front end
 - But all issues may not be foreseeable

Takeaways, continued

- Agencies only have as much discretion as they are given, must abide by whatever implementation instructions are included in a bill
 - But specificity matters
 - Instructions must be possible to implement (consider time, money, staffing)
- Most bills do not address this in detail, if at all
 - But many bills may not need to
- Implementation, rules, or guidance could be regulated generally or specifically

Questions?