

Vermont Legislative Council

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MEMORANDUM

To: New members of the Joint Legislative Committee on Administrative Rules

From: Aaron Adler, Legislative Counsel

Date: January 19, 2017

Subject: Welcome to the Joint Legislative Committee on Administrative Rules

Welcome to the Joint Legislative Committee on Administrative Rules, commonly referred to as LCAR. Feel free to contact me by telephone at 828-2236 or email at aadler@leg.state.vt.us, or stop by my office on the mezzanine. Charlene Dindo is the assistant assigned to the committee and she can be contacted by telephone at 828-5952 or by email at charlene@leg.state.vt.us, and her desk is located in the back on the first floor of the Legislative Council office.

This memorandum is to help familiarize you with the committee's role in the rule-making process. Also attached are copies of the Administrative Procedures Act (Chapter 25 of Title 3) and the procedural rules of the committee.

Background

Often the legislature finds it has neither the time nor the expertise to provide a sufficient level of detail in legislation. As a result, the legislature delegates rulemaking authority to various state agencies. For example, the Agency of Natural Resources has the authority to adopt air quality standards, the Department of Labor and Industry has the authority to adopt occupational safety and health standards, and the Board of Optometry has the authority to adopt rules relating to the licensure of optometrists.

“Rules” implement, interpret, and even prescribe law or policy and are binding on persons they affect. The legislature has established a process which state agencies must adhere to when adopting rules, known as the Administrative Procedure Act or APA. Towards the end of this process the Joint Legislative Committee on Administrative Rules is required to review state agency rules.

A brief timeline of the administrative rule-making process (APA requirements)

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| 1. Prefiling rule with the Interagency Committee on Administrative Rules (ICAR) |
| 2. Filing proposed rule with the Secretary of State |
| 3. Publishing proposed rule |
| 4. Holding public hearings and receiving public comment |
| 5. Filing final proposed rule with Secretary of State and LCAR |
| 6. Rule reviewed by LCAR |
| 7. Responding to objections or concerns of LCAR |
| 8. Filing adopted rule with Secretary of State and LCAR |
| 9. Rule takes effect 15 days after adopted rule is filed unless rule specifies a later date |
| 10. Emergency rules are effective when filed and valid for 120 days |

Detailed information pertaining to the timeline

The following paragraphs elaborate on the steps of the rule-making process described in the previous section. The paragraph numbers correspond to each numbered step.

1. *Prefiling rule with the Interagency Committee on Administrative Rules (ICAR).* ICAR was established to assist in the review, evaluation and coordination of programs and activities of state agencies. Members of the committee are appointed by the governor from the executive branch. The committee's duties include: (1) reviewing existing and proposed rules for style, consistency with the law, legislative intent and the policies of the Governor; (2) prescribing strategies for maximizing public input during the rule-making process; and (3) making reports and recommendations concerning programs and activities of designated agencies. ICAR typically has been chaired by the Deputy Secretary of Administration. Agencies must prefile their proposed rules with ICAR at least 15 days before filing with the Secretary of State. Emergency rules are not required to be filed with ICAR.
2. *Filing proposed rule with the Secretary of State.* The filing must include a cover sheet, an economic impact statement, an incorporation by reference statement, if applicable, a scientific information statement to the extent the rule depends on

scientific information for its validity, a public input statement, an adopting page, the text of the proposed rule and an annotated text showing changes from existing rules. The Secretary of State also requires proof of ICAR review.

3. *Publishing proposed rule.* The Secretary of State is required to give notice of the proposed rule. Detailed notices are published online with abbreviated notices in newspapers of record designated by the Secretary. Hearings can be scheduled no sooner than 30 days after the first notice given.
4. *Holding public hearings and receiving public comment.* An agency must afford all persons a reasonable opportunity to submit data, views or arguments, orally or in writing. An agency must also adhere to the strategy for maximizing public input prescribed by ICAR. If one or more public hearings is scheduled, the deadline for public comment is seven days after the last hearing date. An agency must schedule one or more public hearings if requested by 25 persons, a state agency or governmental subdivision, ICAR, or an organization with at least 25 members.
5. *Filing final proposed rule with Secretary of State and LCAR.* LCAR is comprised of eight members of the general assembly appointed for two-year terms ending on February 1 of odd-numbered years as follows: four members of the house of representatives, appointed by the speaker of the house, not all from the same party, and four members of the senate to be appointed by the senate committee on committees, not all from the same party. The committee elects a chair and a vice-chair from among its members.

When the Legislative Council receives a final proposed rule on behalf of LCAR, we distribute the rule to the chairs of the appropriate standing committees. In addition, upon request, each member of the appropriate standing committee will be notified by email or in summary fashion that the final proposed rule has been filed, the date of filing, and, upon request, will be provided with a copy of the filing. The attorney in Legislative Council who staffs the standing committee with jurisdiction over the subject matter of the rule also will review the rule and advise whether the rule violates any of the grounds for LCAR's objections.

6. *Rule reviewed by LCAR.* LCAR must act on a final proposed rule within 45 days or within 30 days of placing the rule on its agenda. LCAR may request that the agency grant an extension of LCAR's review period. LCAR may review existing rules and object to them in the same manner, and based upon the same standards, as those for final proposed rules.
 - a. When reviewing a rule, LCAR may:
 - Approve a rule
 - Approve a rule with modifications agreed upon by the agency
 - Take no action on a rule
 - Object to a rule
 - b. LCAR may object to a rule if:
 - The rule is beyond the authority of the agency

- The rule is contrary to the intent of the legislature
 - The rule is arbitrary
 - The agency did not adhere to the strategy for maximizing public input prescribed by ICAR
 - The rule is not written in a clear and coherent manner using words with common and everyday meanings, consistent with the text of the rule
 - The economic impact statement fails to recognize a substantial economic impact.
- c. LCAR also has the following powers:
- Agencies must adopt a rule within eight months of filing the proposed rule, unless this deadline is extended by LCAR.
 - LCAR can compel an agency to initiate rulemaking to adopt as a rule an existing practice or procedure. However, LCAR does not have the power to compel adoption of a rule.
 - Upon LCAR's written request to an agency, a rule or part of a rule that has not been adopted, readopted or substantially amended during the preceding six years will expire one year from the date of the request. However, this does not prevent the agency from adopting the same or a similar rule during that year.
7. *Responding to objections or concerns of LCAR.* Once LCAR objects, the agency has 14 days to respond. If the agency's response is satisfactory to LCAR, then it may withdraw its objection. If the agency's response is not satisfactory, LCAR may file its objection in certified form with the Secretary of State.
- a. A motion to object to a rule or file an objection in certified form must be supported by a majority of the entire committee (i.e., five votes).
- b. Once an objection is filed in certified form, that portion of the rule objected will no longer be presumed valid by a court. Instead, the agency will bear the burden of proving that:
- That part of the rule is not beyond the authority of the agency
 - That part of the rule is not contrary to the intent of the legislature
 - That part of the rule is not arbitrary
 - The agency did adhere to the strategy for maximizing public input prescribed by ICAR
8. *Filing adopted rule with the Secretary of State and LCAR.* The final step an agency must take in the rule-making process is filing the adopted rule. An agency may adopt a properly filed final proposed rule after:
- a. The passage of 30 days from the date a rule is first placed on LCAR's agenda or 45 days after filing a final proposed rule, whichever occurs first, provided the agency has not received notice of objection from LCAR; or
 - b. Receiving notice of approval from LCAR; or
 - c. Responding to an objection of LCAR.
9. *A rule takes effect 15 days after the adopted rule is filed unless the rule specifies a later date.* By taking effect a rule is valid and binding on persons it affects, and has

the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise.

10. *Emergency rules are effective when filed and valid for 120 days.* When an agency believes that there exists an imminent peril to public health, safety or welfare, it may adopt an emergency rule. The rule may be adopted without having been prefiled or filed in proposed or final proposed form, and may be adopted after whatever notice and hearing that the agency finds to be practicable under the circumstances. The agency shall make reasonable efforts to ensure that emergency rules are known to persons who may be affected by them. Emergency rules shall not remain in effect for more than 120 days. An agency may propose a permanent rule on the same subject at the same time that it adopts an emergency rule.

An emergency rule is adopted and is typically effective when filed. As a result, LCAR reviews emergency rules even though they are already in effect. Therefore, it is not possible for the agency to modify the text of an emergency rule at the request of LCAR, although an agency may withdraw the emergency rule if LCAR objects. Emergency rules must be filed with the Secretary of State and with LCAR. In addition to the grounds for objection listed in paragraph six, LCAR may object to an emergency rule if the rule is not necessitated by an imminent peril to public health, safety or welfare sufficient to justify adoption of an emergency rule. This objection, if filed in certified form, will shift the burden to the agency of proving in court that there is an emergency justifying the adoption of the emergency rule.

Effect of Committee's Objection

Occasionally a lawsuit is brought to challenge the validity of a rule. In a court challenge to a rule, a person aggrieved by the effect of a rule will typically argue that the agency lacks the authority to adopt the rule, the rule is contrary to legislative intent, or the rule is arbitrary. Lawsuits are usually unsuccessful because courts traditionally grant a great deal of deference to the expertise of state agencies. A court's analysis of the validity of a rule generally begins with a "presumption of validity" in favor of the rule, i.e. the rule is presumed valid so the person bringing the lawsuit bears the burden of proving the rule's invalidity.

When LCAR files an objection to a rule in certified form the burden of proof shifts to the state agency to prove the validity of a rule. In other words, LCAR's objection effectively removes the "presumption of validity" of the rule. The agency would then have to prove that it does have the authority to adopt the rule, the rule is not contrary to legislative intent, or the rule is not arbitrary. State agencies generally do not prefer to defend the validity of a rule if LCAR has objected due to the time and expense of such a defense. These agencies also understand that LCAR represents the General Assembly which is responsible for approving their budgets as well as other proposed initiatives. As a result, they hope that the committee will approve their rules.