

Vermont Legislative Council

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MEMORANDUM

To: New members of the Joint Legislative Committee on Administrative Rules
From: BetsyAnn Wrask, Legislative Counsel
CC: Rebecca Wasserman, Legislative Counsel;
Charlene Dindo, LCAR Assistant
Date: February 13, 2019 [*updating 2/7/19 memo*]
Subject: Welcome to the Joint Legislative Committee on Administrative Rules

I. Introduction

Welcome to the Joint Legislative Committee on Administrative Rules, commonly referred to as LCAR. Rebecca Wasserman and I are jointly staffing LCAR during the 2019 session. Please feel free to contact either of us for more information. We can be reached by telephone at 828-2231; by email at bwrask@leg.state.vt.us or rwasserman@leg.state.vt.us; or stop by our office. Charlene Dindo is LCAR Assistant and she can be contacted by telephone at 828-5952 or by email at charlene@leg.state.vt.us, and her desk is on the first floor of the Legislative Council office.

This memorandum is meant to help familiarize you with LCAR's role in the rulemaking process. *See also* the Vermont Administrative Procedure Act ([3 V.S.A. chapter 25](#)) and [LCAR's procedural rules](#).

II. Background

Often the General Assembly finds it has neither the time nor the expertise to provide a sufficient level of detail in legislation. As a result, the General Assembly 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 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 General Assembly has established a process that State agencies must adhere to when adopting rules, known as the Vermont Administrative Procedure Act or APA. Toward the end of this process, LCAR is required to review State agency rules.

III. Overview of APA Rulemaking Requirements

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 the Secretary of State and LCAR
6. Rule reviewed by LCAR
7. Responding to objections or concerns of LCAR
8. Filing adopted rule with the 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 180 days

See 3 V.S.A. [§ 836](#) (procedure for adoption of rules); [§ 845\(d\)](#) (effect of rules); and [§ 844\(a\) and \(b\)](#) (emergency rules).

IV. Details Regarding APA Rulemaking Requirements

The following paragraphs elaborate on the steps of the rulemaking 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 ICAR are appointed by the Governor from the Executive Branch. ICAR'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 rulemaking 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. [3 V.S.A. § 820](#). 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. [3 V.S.A. § 837](#).

2. *Filing proposed rule with the Secretary of State.* Pursuant to [3 V.S.A. § 838](#), the filing must include:
 - the name of the agency and the subject or title of the rule;
 - an analysis of economic impact;
 - an analysis of environmental impact;
 - an explanation of all material incorporated by reference, if any;
 - the text of the proposed rule and an annotated text showing changes from existing rules;
 - an explanation of the strategy for maximizing public input on the proposed rule as prescribed by ICAR;
 - a brief summary of the scientific information upon which the rule is based, if applicable;
 - a concise, plain language summary explaining the rule and its effect;
 - the specific statutory authority for the rule or the general statutory authority, as applicable;
 - an explanation of why the rule is necessary;
 - an explanation of the people, including government entities, affected by the rule;

- the contact information for the individual in the agency able to answer questions or receive comments on the rule;
 - a proposed schedule for completing the requirements of the APA;
 - information regarding any exemption from the Public Records Act set forth in the rule; and
 - a signed and dated statement by the adopting authority approving the contents of the rule.
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. [3 V.S.A. § 839](#). Hearings can be scheduled no sooner than 30 days after the first notice given. [3 V.S.A. § 840\(a\)](#).
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. 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. [3 V.S.A. § 840](#). An agency must also adhere to the strategy for maximizing public input prescribed by ICAR. [3 V.S.A. § 820\(c\)](#). An agency may revise a rule prior to filing its final proposal. [3 V.S.A. § 841\(b\)](#).
5. *Filing final proposed rule with the Secretary of State and LCAR.* LCAR is composed 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 appointed by the Senate Committee on Committees, not all from the same party. LCAR elects a chair and a vice chair from among its members. [3 V.S.A. § 817\(a\)](#).

After considering public comment on the rule, an agency files its final proposal with the Secretary of State and LCAR. LCAR may require an agency to include an electronic copy of the final proposal with its filing. [3 V.S.A. § 841\(a\)](#). The filing must include all of the

information required to be filed with the original proposal—with revisions that address any changes made in the rule—and statements addressing how the proposed rule is within agency authority; why it is not arbitrary; compliance with ICAR’s prescribed strategy for maximizing public input; sufficiency of the economic and environmental impact analyses; and a description of why the agency decided not to revise the rule in response to comments it received, if applicable. [3 V.S.A. § 841\(b\)](#).

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; this includes a distribution to the Chairs of the House and Senate Committees on Government Operations when the filing identifies a Public Records Act exemption in the rule. In addition, upon request, each member of the appropriate standing committee will be notified by e-mail or in summary fashion that the final proposed rule has been filed and the date of filing and, upon request, will be provided with a copy of the filing. [3 V.S.A. § 841\(c\)](#); [LCAR Rule § 5\(b\)](#). 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 after it is filed, unless the agency consents to an extension of LCAR’s review period. [3 V.S.A. § 842\(a\)](#). LCAR may also review existing rules and object to them in the same manner, and based upon the same standards, as those for final proposed rules.

[3 V.S.A. § 817\(d\)](#).

a. When reviewing a rule, LCAR may:

- approve a rule, [3 V.S.A. § 843\(a\)\(2\)](#), [LCAR Rule § 4\(i\)\(1\)](#);
- approve a rule with modifications agreed upon by the agency, [3 V.S.A. § 843\(b\)](#), [LCAR Rule § 4\(i\)\(2\)](#);
- take no action on a rule (*see* [3 V.S.A. § 843\(a\)\(1\)](#) and [§ 844\(a\)](#), which address the time frame in which an agency may adopt a standard rule, and the ability of an agency to adopt an emergency rule, respectively);
- object to a rule, [3 V.S.A. § 842](#), [LCAR Rule § 4](#).

- b. Pursuant to [3 V.S.A. § 842\(b\)](#), 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 the style required by [3 V.S.A. § 833](#);
 - the economic impact analysis fails to recognize a substantial economic impact; or
 - the environmental impact analysis fails to recognize a substantial environmental impact.
- c. The failure of LCAR to object to a rule is not an implied legislative authorization of its substantive or procedural lawfulness. [3 V.S.A. § 842\(c\)\(3\)](#).
- d. LCAR also has the following powers:
- 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. [3 V.S.A. § 831\(c\)](#).
 - 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. [3 V.S.A. § 834\(a\)](#).
 - Hold hearings on and file objections to existing rules. [3 V.S.A. § 817\(d\)](#).
 - Request standing committees to review issues relating to final proposed rules it considers. [3 V.S.A. § 817\(e\)](#).
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. [3 V.S.A. § 842\(a\)](#), [LCAR Rule § 4\(e\)](#). If the agency's response is not satisfactory, LCAR may file its objection in certified form with the Secretary of State. [3 V.S.A. § 842\(c\)\(1\)](#), [LCAR Rule § 4\(h\)](#). An agency's failure to respond to LCAR's objection will prevent a rule from taking effect. [3 V.S.A. § 846\(a\)\(4\)](#).

- 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). [3 V.S.A. § 842\(a\) and \(c\)\(1\)](#), [LCAR Rule § 4\(e\) and \(h\)](#).
 - b. Once an objection is filed in certified form, that portion of the rule objected to will no longer be presumed valid by a court. Instead, pursuant to [3 V.S.A. § 842\(c\)\(2\)](#), the agency will bear the burden of proving that:
 - that part of the rule is within the authority delegated to the agency;
 - that part of the rule is consistent with the intent of the Legislature;
 - that part of the rule is not arbitrary;
 - that part of the rule is written in accordance with [3 V.S.A. § 833](#);
 - the agency did adhere to the strategy for maximizing public input prescribed by ICAR; and
 - the agency's economic and environmental impact analyses did not fail to recognize a substantial economic or environmental impact.
8. *Filing adopted rule with the Secretary of State and LCAR.* The final step an agency must take in the rulemaking process is filing the adopted rule.
- a. Pursuant to [3 V.S.A. § 843\(a\)](#), an agency may adopt a properly filed final proposed rule after:
 - 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;
 - receiving notice of approval from LCAR; or
 - responding to an objection of LCAR.
 - b. An agency must adopt a rule within eight months from the date of the initial filing with the Secretary of State, unless this deadline is extended by LCAR. [3 V.S.A. § 843\(c\)](#).

* At its 2/7/19 meeting, LCAR agreed that [3 V.S.A. § 843\(a\)\(1\)](#) should be amended so that the period for rule adoption conforms to the period for LCAR review set forth in [3 V.S.A. § 843\(a\)](#), as that latter section was amended in the [2018 VAPA Act](#) on pg. 23.

- c. An agency is required to correct an adopted rule within 30 days after discovering that the text of the rule deviates from the text of the rule as approved by LCAR. [3 V.S.A. § 843\(c\)\(1\)](#).
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. [3 V.S.A. § 845](#).
10. *Emergency rules are effective when filed and valid for 180 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 180 days. An agency may propose a permanent rule on the same subject at the same time that it adopts an emergency rule. Emergency rules must be filed with the Secretary of State and with LCAR. [3 V.S.A. § 844\(a\)–\(c\)](#).

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. An agency may make a germane change to an emergency rule in response to LCAR's expressed concern. Such a change does not extend the period during which the emergency rule remains in effect. [3 V.S.A. § 844\(f\)](#). Moreover, an agency may withdraw an emergency rule if LCAR objects. [3 V.S.A. § 844\(e\)\(3\)](#).

LCAR may object to an emergency rule if the rule is beyond the authority of the agency; contrary to the intent of the Legislature; arbitrary; or 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 the emergency rule is within the authority delegated to the agency, consistent with legislative

intent, not arbitrary, and is justified by an imminent peril to the public health, safety, or welfare. [3 V.S.A. § 844\(e\)\(1\) and \(2\)](#).

An agency may also make emergency amendments to existing rules that implement a program controlled by federal law or a multistate entity, due to time-sensitive changes required for that program. Statute provides grounds for LCAR objection that are specifically tailored to these types of emergency amendments to existing rules. [3 V.S.A. § 844\(g\)](#).

V. 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 and the validity of the rule is thereafter challenged, 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, that the rule is not contrary to legislative intent, that the rule is not arbitrary, or that the rule meets the other criteria set forth in [3 V.S.A. § 842\(c\)\(2\)](#) for standard rules or in [3 V.S.A. § 844](#) for emergency rules. As a result, State agencies generally prefer that LCAR will approve their rules so as to avoid the time and expense of defending a rule LCAR objected to, and also because LCAR represents the General Assembly, which is the lawmaking branch of State government.