



The Rules are the Rules:

*A Primer on Legislative Rulemaking
Requirements, with Recommendations*

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Investigative Report 23-09

Mission Statement: The mission of the Auditor’s Office is to hold State government accountable by evaluating whether taxpayer funds are being used effectively and identifying strategies to eliminate waste, fraud, and abuse.

Investigative Report: An investigative report is a tool used to inform citizens, policymakers, and State agencies about issues that merit attention. It is not an audit and is not conducted under generally accepted government auditing standards. Unlike an audit, which contains formal recommendations, investigative reports include information and possible risk-mitigation strategies relevant to the topic that is the object of the inquiry.

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Executive Summary

The State Auditor’s Office has been monitoring rulemaking conducted by state agencies in accordance with new or amended statutes between 2018 and 2022, and examining how the process could be improved. The topic of rulemaking may sound boring, or like “inside baseball,” but rulemaking is often the most important aspect of implementing the Legislature’s highest policy priorities.

We found that legislative rulemaking provisions appeared in inconsistent ways: some included deadlines for adoption while others did not; some required agencies to provide committees with status reports while others did not. Executive branch compliance with those provisions was erratic: some rules simply had not been drafted let alone adopted, and others were adopted later than required. Information about rulemaking requirements was also challenging to find – no single place included information about which rules are due and by when, nor was there a single repository of all information related to a specific rule.

We have previously made recommendations to the Legislative Committee on Administrative Rules (LCAR), which has begun to act on them working with Legislative Counsel. This includes creating a master list of all new rulemaking provisions each legislative session, and guidance to committee chairs for structuring rulemaking legislation. The purpose of this memo is to provide a primer on the rulemaking process, summarize our recent work, and make several new recommendations. The new recommendations encourage annual updates to committees about outstanding rulemaking provisions, and one-stop locations for all rulemaking provisions and information. Combined, these will strengthen and simplify the Legislature’s oversight function over Executive branch agencies and will better serve the interested public.

Introduction

Administrative rules are regulations adopted by state agencies and departments to support the implementation of statutes as enacted by the Legislature. These rules carry the force of law and detail how government programs, services, and activities are to be executed. Their purpose is to ensure that laws are implemented effectively, interpreted consistently, and applied uniformly

across the state. They also fill in the gaps left by broader statutory language and help agencies translate legislative intent into action.

When statutes are enacted or amended, state agencies are sometimes *required by the Legislature* to develop specific administrative rules to implement and enforce them. In these instances, legislation indicates that a particular state entity “shall” adopt a rule. Other statutes do not *require* that new rules be developed but merely grant rulemaking authority to agencies. In these cases, the legislation indicates a state entity “may” adopt a rule. Without a legislative mandate or statutory requirement (a “shall”), the decision to engage in rulemaking lies within the discretion of administrators, so long as the rules have been authorized by the Legislature with a “may”. By granting rulemaking authority, the Legislature defers to the expertise of individual agencies and provides flexibility to respond to changing circumstances while working to achieve the state’s policy goals.

To determine if state agencies and departments have complied with legislative rulemaking requirements, we inventoried every bill signed into law between 2018 and 2022 that required new administrative rules (used “shall”). Many bills did not give agencies a specific deadline for completing the rulemaking process. Other times, deadlines for proposing and/or adopting rules were included in the legislation.

Our review found that adherence to rulemaking requirements has been far from universal. Some agencies simply did not propose or adopt the rules the Legislature mandated. When deadlines for rule adoption were included in legislation, they were typically not met. We also found instances in which administrative agencies appeared to simply forget about time-sensitive provisions, including progress reports to the Legislature. All these findings highlight the need for additional oversight and improvements in our state’s rulemaking process.

The Importance and Process of Administrative Rulemaking

The role of administrative rules as a guide for state agencies to implement policy may sound boring, or like “inside baseball”, but neglecting to adopt them can have serious consequences. In February 2022 we issued an audit of the [Dam Safety Program](#) at the Department of Environmental

Conservation. Among the key findings was that rulemaking required by the Legislature, intended to increase dam owner responsibilities to fix dangerous dams, had not yet been initiated. The new rules were supposed to be in place by that July, but they had yet to be filed as the Legislature demanded. More than a year and a half later they still have not. This July's flooding should be a warning siren – dams held up this time, but are we confident that will be the case with future weather events? Failure to adopt rules like this imperils life and property with every day that passes.

The adoption of rules by executive branch agencies is governed by the Administrative Procedure Act, or APA ([Title 3 V.S.A. Chapter 25](#)). Once new or amended statutes are enacted, agencies responsible for specific sectors develop corresponding administrative rules aligning with the statutory framework. These rules provide detailed guidelines for enforcing and regulating various aspects within their respective domains and must comply with an agency's rulemaking authority as well as legislative intent.

Drafting is the first step toward filing a new administrative rule. During the drafting phase, agencies must consider the potential impact rules may have on businesses, individuals, and the general public. This includes assessing the potential costs and benefits of compliance. To ensure that the rules are well-informed, agencies gather input and consult with stakeholders and subject experts.

The APA stipulates that every new rule be filed at least four times throughout the rulemaking process. The first is a pre-filing with the [Interagency Committee on Administrative Rules \(ICAR\)](#).

ICAR is composed of representatives from seven state agencies (Administration, Agriculture, Commerce, Education, Human Services, Natural Resources, and Transportation) and the Departments of Labor and Financial Regulation. Its responsibilities and functions include:

- ICAR 1. Reviewing all proposed rules to ensure they do not exceed agency jurisdiction.
- ICAR 2. Ensuring compliance with statutory authority. All rules must align with legislative intent and not overstep the boundaries set by law.

ICAR 3. Harmonizing rules across different state agencies, ensuring consistency and reducing confusion for both state employees and the public.

ICAR 4. Promoting transparency and public input to foster accountability and an inclusive governance process.

The second filing, which commences the notice and public comment period is the Proposed Rule with the [Secretary of State's Office \(SoS\)](#). The SoS is charged with specific rulemaking duties:

SoS 1. Creating forms for and receiving rule filings.

SoS 2. Publishing notices of rulemaking online and in newspapers of record.

SoS 3. Facilitating the publication of a bulletin of rules (aka Code of Vermont Rules).

SoS 4. Serving as a repository for rule filings.

The third filing is the final proposed rule with the Office of the Secretary of State and the [Legislative Committee on Administrative Rules \(LCAR\)](#).

LCAR is a legislative committee composed of eight members: four from the State Senate and four from the House of Representatives. Their primary responsibility is to consider proposed rules and ensure they adhere to statutory requirements while not exceeding an agency's given authority.

The LCAR process starts when state agencies submit their proposed rules for review. Once received, the Committee publishes a public notice and provides an opportunity for public comment. Following the public comment period, LCAR reviews the proposed rules and decides whether to approve them or object to them based upon their alignment (or misalignment) with legislative intent.

Following LCAR's review, the fourth and final filing is the adopted rule - again with LCAR and the Secretary of State's Office. Rules then become effective after a minimum 15 day waiting period required by the APA [[3 V.S.A. § 845\(d\)](#)].

Compliance

Between 2018 and 2022 we found numerous rules that were initiated or adopted later than required by the Legislature, and others that were not initiated at all. Examples of rules that were late include:

- Wood Heating Appliance air quality rules were to be adopted by May 2020 but were not filed for adoption until June 2022.
- Rules to allow an alternate path to law enforcement officer certification were to be adopted by July 2023 but will not have their first hearings until late November.
- Retail and medical cannabis rules needed to implement legal cannabis marketplace were due for adoption in July 2021 but not adopted until February 2022.
- Physician Assistant licensing requirements due to be adopted in July 2021 were not adopted until November 2022.

We recognize that some required rulemaking on the part of state agencies may be delayed for valid reasons, which highlights the importance of Recommendation #3 in a later section.

The table below shows required rules that have not been initiated or adopted. The “current status” column includes a brief description of any action that agencies have taken.

Legislation (Year Signed into Law)	Summary	Agency	Deadline for Rule Adoption	Current Status
Act 54 (2021) Miscellaneous energy subjects.	Installation of energy storage facilities of all sizes.	Public Utility Commission	Rule to be proposed by March 15, 2022.	Not filed. In July 2023 the PUC claimed it lacks the authority to file such a rule.
Act 161 (2018) Regulation of dams and the testing of groundwater sources.	The establishment of dam design standards to protect the environment and ensure public health and safety.	Environmental Conservation	July 1, 2022.	Drafting stage with upcoming hearing; significant delay. The State Auditor's Office Dam Safety Audit noted the deadline was likely to be missed. Act 79 in 2023 pushed back the deadline to July 1, 2024.
Act 75 (2021) Creates the Vermont Pension Investment Commission and the Pension Benefits, Design, and Funding Task Force.	Create new standards of behavior for Commission members and a process for removal of Commission members.	Vermont Pension Investment Commission	None.	Not filed. Action to address VPIC changes (standards of behavior and removal and appointment of members) was taken outside a formal rulemaking process.
Act 69 (2021) Professions & occupations regulated by the Office of Professional Regulation.	Mixed Martial Arts licensing and safety standards.	Secretary of State	None.	Not filed.
Act 62 (2021) Miscellaneous cannabis regulation procedures.	Creating a basis and process for removal of Board members.	Cannabis Control Board	None.	Not filed.
Act 194 (2018) Rural economic development.	Certification process for nutrient management technical service providers.	Agriculture	July 1, 2019.	Not filed.

Legislation (Year Signed into Law)	Summary	Agency	Deadline for Rule Adoption	Current Status
Act 178 (2020) Professional regulation.	Requires massage therapists, bodyworkers, and touch professionals to be Registered; allows inspections when complaints are filed and defines unprofessional conduct.	Office of Professional Regulation	None.	Not filed.
Act 93 (2020) Unclaimed property.	New assessment methods for unclaimed properties	Treasurer	None.	Not filed.
Act 85 (2020) Employee misclassification.	Establishment of a Self-Employment Assistance Program within the Unemployment Insurance program.	Labor	None.	Not filed.
Act 119 (2018) Professional licensing for service members and veterans.	Allows veterans with certain military and civilian qualifications to obtain a food establishment license.	Department of Health	None.	Not filed.

Here again we recognize that some failures to comply with legislative requirements will have reasonable explanations. For the Legislature to perform its oversight function, though, legislators need, at a minimum, to hear those explanations to determine if any additional action is warranted.

Previous Recommendations to the Legislature and Actions Taken

The following recommendations were made to LCAR members in 2022. Below each we describe the actions taken by LCAR or Legislative Counsel.

- **Recommendation #1:** Formally task someone at the end of each legislative session with producing a list of all new rulemaking provisions that have been enacted, including the responsible agency and any deadlines.

At present, no single office is responsible for this. As a result, some rulemaking requirements fall through the cracks, some deadlines are not met, and legislators do not have a one-stop location to monitor agency compliance with rulemaking provisions. This could be done by Legislative Counsel, the Agency of Administration, and / or the Secretary of State's Office.

Action Taken: Beginning with the 2023 session, Legislative Counsel has created an inventory of all rulemaking provisions [Recommendation #4 below would make this information easily accessible to all legislators and the public].

- **Recommendation #2:** Whenever possible, when rulemaking is *required* by the Legislature ("shall"), include a deadline for either the proposed rule to be filed or to be adopted.

The very presence of a deadline has the effect of increasing the likelihood that rules will be promulgated as envisioned.

Action Taken: In an April 2023 memo to all legislative standing committee chairs and the Director of Legislative Counsel, LCAR provided a framework for considering whether and how to include deadlines or timeframes when including rulemaking provisions in new legislation.

- **Recommendation #3:** When new rules are compulsory, include a requirement that the responsible agency provide a brief progress report to the relevant committees. There are sometimes valid reasons for delays in rulemaking, and the sooner the committees of jurisdiction are aware of the delays the better for all involved. This doesn't need to be a time-consuming report – even a brief email to the committees would be useful.

Action Taken: The April 2023 memo includes this consideration for standing committees.

The actions described above, however modest they may appear, will provide greater surety that legislative initiatives will be carried out, and will enhance the Legislature's oversight of Executive branch agencies.

Recommendations

The legislative process cannot be compelled to adhere to rigid rules. Nonetheless, wherever possible best practices should be systematized, and the process should not be reliant upon individual legislators or legislative committees. We are pleased that LCAR and Legislative Counsel have begun to promote these principles where rulemaking is concerned. We offer these additional recommendations which we believe will benefit both legislators and the general public.

- **Recommendation #4:** Legislative Counsel should post its inventory of all rulemaking provisions on the LCAR committee website. Doing so would create a one-stop location for any legislator or member of the public to know what administrative work is supposed to be occurring and when it is expected to be complete.

- **Recommendation #5:** At the beginning of each legislative session, Legislative Counsel should provide a list of outstanding reports and rulemaking to each standing committee that are relevant to the committee's jurisdiction.
- **Recommendation #6:** The Legislature should direct Legislative Counsel, the Secretary of State's Office, and the Agency of Administration to collaborate to make all information related to a particular rulemaking process easy to find. At present, someone interested in the development of a rule needs to search through three websites – LCAR's committee page, the Secretary of State's rules page, and the rulemaking agency's site. Our own experience was that this was time-consuming, confusing, and inconsistent. While each of the three parties described has different rulemaking responsibilities, we believe they can create a standard process to present all relevant information, or links to it, in one spot.

Summary

When the Legislature directs administrative agencies to adopt rules, it often does so to accomplish important objectives like improving water quality or keeping Vermonters safe from harmful chemicals. Without such mandated rules being adopted, legislators' efforts are not honored, and the public loses the benefits the rules are intended to bring. The recommendations included in this memo will support greater compliance with legislative directives. We also note that Executive branch agencies have many responsibilities, and the Legislature's mandates should reflect the time and resources rulemaking will take. In addition, rules are often late or postponed for understandable reasons – the pandemic, federal funding or policy changes, etc. At the core, this memo encourages better communication between rulemaking agencies and the Legislature to make sure there are no surprises.