

## ACCESS TO THE REGULATORY PROCESS

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The Legislature delegates to state administrative agencies, commissions and boards, the authority to make rules to implement the laws administered and enforced by the agencies commissions and boards. (Note that the Governor has the power to veto all or part of an adopted rule.) The process by which these rules are adopted is governed by the Minnesota Administrative Procedure Act (MnAPA). This process includes broad public access to information about proposed regulations and opportunities for public participation in the rulemaking process. Agencies must maintain a current public rulemaking docket containing a listing of each possible proposed rule currently under active consideration and each pending rulemaking proceeding.

Before publication of a notice of intent to adopt a rule, or a notice of public hearing on a proposed rule, agencies are required to solicit comments from the public on the subject of the rule under consideration. That solicitation must be published in the weekly *State Register* (see [www.comm.media.state.mn.us/bookstore/mnbookstore.asp?page=register](http://www.comm.media.state.mn.us/bookstore/mnbookstore.asp?page=register)) and must include a description of the subject matter of the proposal, the types of groups and individuals to be affected, the procedures for comment, and how drafts of any proposal may be obtained.

By the time notice of a proposed rulemaking is published and mailed, the agency must prepare, review and make available for public review a statement of need and reasonableness (SONAR) regarding the rule under consideration. That SONAR must contain a description of the classes of persons likely to be affected; the probable costs to the agency of implementation and enforcement of the rule; a determination of whether there are less costly or intrusive means of accomplishing the purpose of the proposed rule; a description of any alternatives considered together with the reasons for their rejection; the probable costs of compliance; and an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference. When a state agency proposes a rule change, the SONAR must specify the portion of the total costs of the rule that will be borne by identifiable categories of affected parties, such as separate classes of government units, businesses or individuals. The cost of not adopting the proposed rule change must also be specified. In 2004, the Minnesota Legislature added the requirement that agencies also had to evaluate the fiscal impact and benefits of proposed rules on local government.

The SONAR must describe how the agency considered and implemented the legislative policy supporting performance-based regulatory systems when developing rules. The policy requires agencies to develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals. In addition, the SONAR must describe the agency's efforts to notify persons or classes of persons who may be affected by the proposed rule or they must explain why these efforts were not made.

Over the course of the entire rulemaking process, agencies are required to maintain the official rulemaking record for every rule adopted under the MnAPA. This record constitutes the official and exclusive agency rulemaking record with respect to agency action on or judicial review of the rule. The official rulemaking record contains: copies of all publications in the *State Register* pertaining to the rule; all written petitions, requests, submissions, or comments received by the agency or the administrative law judge pertaining to the rule; the SONAR for the rule; the official

transcript of the hearing if one was held; or the tape recording of the hearing if a transcript was not prepared; the report of the administrative law judge, if any; the rule as submitted to the administrative law judge; the administrative law judge's written statement of required modifications, if any; other documents required by applicable rules of the office of administrative hearings; the agency's order adopting the rule; the revisor's certificate approving the form of the rule; and a copy of the adopted rule as filed with the Secretary of State. The official rulemaking record is available for public review.

Agencies are also required to maintain a current, public rulemaking docket and have the docket available for the public. The public rulemaking docket must contain a listing of each rule currently under active consideration by the agency for proposal and include the following: the subject matter of the proposed rule; a citation to all published notices relating to the proceeding; where comments may be inspected; the time during which comments may be made; the names of persons requesting a hearing; where those requests may be inspected and the time and location of any hearing; the current status of the proposed rule; the timetable for agency decisions or other action; the date of the rule's adoption and the date of filing with the Secretary of State; and the date the rule will become effective.

Agencies may withdraw a portion of a rule before it takes effect. State agencies are allowed to give rulemaking notices via e-mail or regular mail.

Any person may submit a written petition (contents are specified) to an agency for relief from a rule adopted by that agency. Such variances can be either discretionary or mandatory, and must be granted or denied in writing within sixty days of the receipt of the completed petition (unless the petitioner agrees to a later date). Mandatory variances are granted if the agency finds that the application of the rule, as applied to the petitioner, would not serve any of the purposes of the rule. Discretionary variances are granted if the agency finds that: (1) application of the rule would result in hardship or injustice; (2) variance would be consistent with public interest; and (3) variance would not prejudice substantial legal or economic rights of any person. Failure of an agency to act within that sixty-day time (unless the petitioner agreed to a later date) results in automatic approval of that petition. Note also that these changes require that in addition to any notice required by other law, an agency is required to make "reasonable efforts to ensure that persons or entities who maybe affected by the variance have timely notice of the request for the variance. The agency may require the petitioner to serve notice to any other person or entity in the manner specified by the agency." Also, agencies are authorized to issue rules setting forth general standards under which an agency will grant mandatory or discretionary variances from its rules.

With respect to the opportunity to receive relief from what is referred to as an "unadopted rule," persons may petition the Office of Administrative Hearings for an order of an administrative law judge "determining that an agency is enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard or similar pronouncement as though it were a duly adopted rule." Note also that "an agency determination is not considered an unadopted rule when the agency enforces a law or rule by applying the law or rule to specific facts on a case-by-case basis."

An agency has ten working days to respond to such a petition. In some circumstances the agency will be responsible for the costs of the Office of Administrative Hearings associated with the petition.

## **SMALL BUSINESS EXEMPTION FROM RULES**

Minn. Stat. § 14.127 provides a procedure for small businesses or small cities to claim exemption from certain state rules. Under the statute, an agency must determine if the cost of complying with a proposed rule in the first year after the rule will take effect will exceed \$25,000 for a business with less than 50 full-time employees or a statutory or home rule charter city with less than 10 full-time employees. [Note that under Minnesota’s administrative Procedure Act any proposed amendments to existing rules constitute a proposed rule. The statute is unclear in that context as to what would constitute “the cost of complying” with an amended rule. Specifically, it is silent as to whether the \$25,000 figure is for incremental (that is, new costs) only or whether those incremental costs can be added to existing costs of compliance with the existing rule to reach the \$25,000 threshold.] That determination must be made before the close of the rulemaking hearing or, in cases where there is no hearing, before submission of the record to the administrative law judge. If the agency determines that the costs will exceed \$25,000 or if the administrative law judge disapproves the agency’s determination that the costs do not exceed \$25,000, the above defined business or city may file a written statement with the agency claiming exemption from the rules. Upon filing the statement, the rules do not apply to the business or city until the rules are approved by a law enacted after the agency’s determination or the administrative law judge’s disapproval. The law applies to any rule for which the record has not closed before July 1, 2005. Certain exemptions apply (e.g., Minn. PUC rulemaking).

## **ENHANCED FEDERAL COMPLIANCE ASSISTANCE**

The federal Small Business Regulatory Enforcement Fairness Act was amended to require federal agencies that develop and publish rules for which a regulatory flexibility analysis is required by federal law to publish one or more guides to assist small entities in complying with the rule. The compliance guides, which are to be posted on the agency’s website and distributed to industry contacts of those potentially affected by the rule, shall include a description of the actions needed to meet the requirements of the rule to enable a small entity to know when such requirements are met and shall also include, if determined by appropriate by the agency, a description of possible procedures-such as tests-that may assist small entities in meeting the requirements.