

Administrative Rulemaking Process

Judy Cutler, Agency of Education

* Presentation modified from the Vermont Secretary of State's *Vermont Administrative Procedures Act – Filing Administrative Rules* PowerPoint

Introduction

- Requirements for filing proposed and emergency rules set out in 3 V.S.A. Ch. 25.
- Rules adopted under this process have the force and effect of law.

Who can make rules and why?

Who

Rulemaking authority is a special power granted by the Vermont Legislature to:

- State Agencies
- Boards
- Other governmental entities

Why

The adoption of rules may result from:

- Legislation
- Petition
- Due Process

* **Note:** When rulemaking is requested by petition, the agency has 30 days to initiate rulemaking or respond in writing with its reasons for denial.

How are rules adopted?

- Administrative rules are adopted through a series of filings, hearings, and review by:
 - The Interagency Committee on Administrative Rules (ICAR)
 - The Office of the Secretary of State (SoS)
 - The Legislative Committee on Administrative Rules (LCAR)

Interagency Committee on Administrative Rules (ICAR):

- Members of this committee are appointed by the governor and serve at the governor's pleasure.
- The committee assists agencies with:
 - the creation of a strategy for maximizing public input, and
 - reviews rules for style, consistency with the law, and legislative intent.

Office of the Secretary of State:

- The Secretary of State is charged with specific duties in the Administrative Procedures Act. The Secretary of State has adopted a rule entitled “Rule on Rulemaking” to assist in discharging these duties, which includes:
 - Creation of filing forms.
 - Review of rule filings for required elements.
 - Publication of notices online and in the newspapers.
 - Publication of adopted rules in a bulletin (The Code of Vermont Rules).
 - Providing a repository for rule filings.

Legislative Committee on Administrative Rules (LCAR):

- Consists of eight members of the General Assembly.
- This committee reviews the content of final proposed, and emergency rules and votes to:
 - Approve the rule.
 - Approve the rule with modifications.
 - Take no action.
 - Object to the rule.
 - Certify their objection with the Secretary of State.
 - Extend the eight month adoption deadline.

Adoption Process:

- Pre-filing with ICAR.
- Proposed Rule Filing with Secretary of State.
- Publication of Notices.
- Hearing and Comment Period.
- Final Proposed Rule Filing with Secretary of State.
- LCAR Review.
- Adopted Filing with Secretary of State.

Pre-filing with ICAR:

- Except for emergency rules, proposed rules must be pre-filed with the ICAR 15 days before filing the proposed rule with the Office of the Secretary of State.
- After receiving 12 copies of the proposed rule, ICAR will schedule the rule for review.
- The adopting agency attends the hearing to answer any questions and to develop a strategy for maximizing public input.
- A memorandum regarding the review process and the committee's recommendations for the rule is sent to the adopting agency, the Office of the Secretary of State, and to LCAR.

Proposed Rule Filing with SoS:

- A proposed rule must be filed at the Vermont State Archives & Records Administration located in Middlesex.
- The filing should contain the following:
 - Proposed Coversheet.
 - Adopting Page.
 - Economic Impact Statement.
 - Public Input Statement.
 - Scientific Information Statement (if applicable).
 - Incorporation by Reference Statement (if applicable).
 - Clean text of the rule.
 - Annotated text showing the changes.

*Note: An agency has 8 months from filing a proposed rule to file the rule in its adopted form unless extended by LCAR.

Publication of Notices:

- The notice and comment period begins with the filing of the proposed rule with the Office of the Secretary of State. During this period the notices are published and agencies receive and consider public comments on the proposed rule.
- The Office of the Secretary of State publishes notices of rulemaking:
 - **Online** – Posting will occur on the Wednesday of the week following receipt of the proposal (<https://secure.vermont.gov/SOS/rules/>).
 - **Newspapers** – Published 8 days following the posting of the online notice in newspapers of record.

Hearing and Comment Period:

- Agencies are not required to hold a hearing unless requested as described in 3 V.S.A. § 840. However, it is recommended.
- Agencies shall:
 - Schedule a hearing (if one is to be held) no less than 30 days following posting of the notice online.
 - Afford reasonable opportunity for the submission of data, views or arguments, orally or in writing through the seventh day following the last public hearing.
 - Consider all written and oral submissions concerning the proposed rule.
 - Provide information to all individuals, who submitted written or oral comment, on the procedure for adoption of rules and how to obtain changes in the proposed rule.
 - Record public hearings.

Final Proposed Rule Filing with LCAR and SoS:

- The filing should contain the following:
 - Final Proposed Coversheet.
 - Adopting Page.
 - Economic Impact Statement.
 - Public Input Statement.
 - Scientific Information Statement (if applicable).
 - Incorporation by Reference Statement (if applicable).
 - Clean text of the rule.
 - Annotated text showing the changes.
 - Copy of ICAR memo.
 - Responsiveness Summary and copies of any comments received.

LCAR Review:

- LCAR has 45 days to review all Final Proposed and Emergency Rule Filings. During this time, the committee:
 - Distributes a summary of the filings to the chairs of the appropriate standing committees and to other committee members if so requested.
 - Schedules a public hearing to review the rule and receive testimony from interested parties.
 - May request an extension of the 45 day review period; or extend the 8-month adoption deadline.
 - Votes on what action to take (approve, approve with modifications, object, or file certified objection).

LCAR Review - Grounds for Objection:

- During the review period the committee may vote to 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 the interagency committee on administrative rules.
 - an Emergency Rule is not necessitated by an imminent peril to public health, safety or welfare sufficient to justify adoption of an emergency rule. (*emergency rules only*).
 - the proposed rule is not written in a satisfactory style.
 - the economic impact statement fails to recognize a substantial economic impact.

* Note: (The last two objections will not result in a certified objection.)

LCAR Review – What Happens if LCAR Objects?

- Agencies have 14 days to respond in writing to LCAR and the committee will reconvene to consider the agency's response and may:
 - withdraw the objection.
 - approve the rule.
 - approve the rule with modifications.
 - file its objection in certified form with the secretary of state.
 - take no further action.
- Certified Objection:
 - After considering the agency's response to an objection LCAR may by majority vote certify their objection with the Office of the Secretary of State.
 - The certified objection has legal effect under 3 V.S.A. § 842(b) such that to the extent that the objection covers a rule or portion of a rule, the burden of proof thereafter shall be on the agency in any action for judicial review or for enforcement of the rule.

(An agency may still adopt the rule even if LCAR certifies the objection).

Adopted Rule Filing with SoS:

- The filing should contain the following:
 - Adopted Coversheet.
 - Adopting Page.
 - Clean Text of the Rule.
 - Letter explaining any changes from the final proposed filing.
- Rule goes into effect 15 days from the day it was adopted unless a later date is specified within the text of the rule.

Opportunities for Public Participation:

- Members of the public and interested stakeholders may participate during the following stages of the rulemaking process:
 - Public comment period
 - Public hearing(s)
 - Orally or in writing to the SBE
 - ICAR review
 - LCAR hearing

Questions?

* Note: Full Vermont Secretary of State's *Vermont Administrative Procedures Act - Filing Administrative Rules* PowerPoint available at: <https://www.sec.state.vt.us/media/68687/VTAPA.pps>.