

# Rulemaking

## Topics for Legislators

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# For Legislators

This presentation covers topics about rulemaking that may be of particular interest to legislators:

- Responsibilities of the Senate's State Government Finance and Policy and Elections Committee
- Legislative Oversight of Rulemaking
- Drafting Grants of Rulemaking Authority

# Jurisdiction of the State Government Committee over Rulemaking

- Administrative Procedure Act – Minnesota Statutes, Chapter 14
  - Procedures for adopting rules; and
  - Procedures for resolving disputes about the enforcement of rules or statutes ("contested cases")
- All grants of rulemaking authority to any agency
- Rulemaking on the topics within the jurisdiction of the State Government Committee

# Legislative Oversight of Rulemaking

- Standing committee can advise agency not to adopt a rule (Minn. Stat. section 14.126)
- Rules costing over \$25k do not apply to small businesses or cities unless approved by the legislature, if the business claims the exemption (Minn. Stat. section 14.127)
- LCC can hear complaints from people aggrieved by a rule (Minn. Stat. section 3.842)
- LCC can object to rules and can take certain civil law action (Minn. Stat. section 3.842)
- An agency cannot adopt or increase fees without legislative approval (Minn. Stat. section 16A.1283 and 14.18)
- Legislature can direct an agency to amend or repeal a rule.
- Legislature can pass statutes that would render a rule unenforceable.
- Rule notes – a standing committee hearing a bill with a grant of rulemaking authority may require an agency to prepare a rulemaking note (Minn. Stat. section 3.985)

# How to Monitor Rulemaking

- Legislature receives notice of rulemaking
  - chairs and ranking minority members receive agency rulemaking dockets by January 15 (Minn. Stat. section 14.116)
  - Agencies must mail a “notice of intent to adopt rules” to chairs, ranking minority members, and authors of the bill that authorizes rulemaking
- Rules Status System on the Revisor’s site

# Rulemaking Authority

- Must be granted by law.
  - Explicitly
  - Standing statutory exemption under 14.388 – authorizes an agency to amend, repeal or adopt rules if certain conditions are met.
  - Standing statutory authority under 14.06 – for a body of contested case decisions.
- The Office of Administrative Hearings (OAH) reviews rules during the rulemaking process and evaluates:
  - whether the rules comport with the scope of rulemaking authority granted to the agency;
  - Whether the rule is unconstitutional or otherwise illegal;
  - whether the agency followed proper rulemaking procedures, including whether the agency has established a need for and reasonableness of the proposed rule;
  - Whether the rule constitutes an undue delegation of authority to another entity;
  - Whether the proposed language meets the definition of a rule.
- The OAH will reject, and courts will invalidate, rules that exceed or conflict with legislative delegation of rulemaking authority or with statute.
- The Revisor's Rules Status System identifies the rulemaking authority relied upon.

# Scope of Rulemaking Authority

- General - An agency may have rulemaking authority in its enabling statute to promulgate rules necessary to implement statutory duties.
- Specific - An agency may have specific rulemaking authority to enact rules to accomplish specific things.
- Combination – Sometimes an agency's authority may seem broad – such as to adopt any rules necessary to implement a chapter – but the agency's responsibilities are narrow to begin with, so even such broadly worded authority is constrained by the limits on the agency's power

# Options for Rulemaking Process

- Which rulemaking process is most appropriate? Balance need for due process against efficiency and time constraints
  - Full
  - Expedited – section 14.389.
  - Exempt
    - Specified in the grant of rulemaking authority, but some process for rulemaking should be specified, such as that in section 14.386 (Effective for two years unless otherwise specified.)
    - Good cause exemption under 14.388 - available for any rulemaking that meets the criteria specified in 14.388 (Effective for 2 years.)
    - Exempt permanent – exempt, but without the two-year limit
- Unless otherwise specified, an agency must follow a full rulemaking process to adopt rules

# Issues to consider in authoring or evaluating a grant of rulemaking authority

- PROCESS: Which rulemaking process is most appropriate? Balance need for due process against efficiency and time constraints
  - Permanent
  - Expedited – section 14.389
  - Expedited permanent
  - Exempt
    - Specified in the grant of rulemaking authority. Some process for rulemaking should be specified, such as that in section 14.386 (Effective for 2 years, unless otherwise specified.)
    - Good cause exemption under 14.388 - available for any rulemaking that meets the criteria specified in 14.388 (Effective for 2 years, unless otherwise specified in law.)
- SCOPE: Broad vs specific – does the scope of authority match what is needed?
- TIMING: Time needed for rulemaking – depends on the process to be used, the extensiveness of the rules to be adopted, and perhaps other rulemaking that the agency may be required to conduct.
- EFFECTIVE DATE – consider making rulemaking authority effective the day after enactment, even if the law that the rules support has a future effective date
- DEADLINE – by statute, an agency must start a rulemaking process within 18 months of a law authorizing rulemaking. (Minn. Stat. 14.125.)
- AGENCY AUTHORITY TO AMEND RULES – as long as an agency starts a rulemaking process within 18 months of a grant of rulemaking authority, the agency has statutory authority to later amend those adopted rules. (Minn. Stat. section 14.125.) If the legislature doesn't want the agency to have this authority to amend rules, then this should be specified.
- A rule is a rule, whether it's called a "rule," "policy," "standard". A rule is any "agency statement of general applicability and future effect."
- Revisor's Manual, 2013 Edition – pp. 153-159 – Has useful information about the form of language for authorizing rulemaking.