

Legislative Oversight of Agency Rules

Legislative authority required to adopt rules

A rule is a judicially enforceable standard, requirement or statement adopted by a state agency. Rules implement, interpret or make specific law administered by the agency or describe procedures or practices of the agency. A rule is sometimes referred to as a “regulation,” however that term should be used to refer only to federal regulations. In Maine, the proper term is “rule.”

Before an agency may adopt a rule on a matter, the Legislature must have enacted a law granting the agency such rulemaking authority. Rules must be consistent with the law under which they are adopted and must be adopted by an agency in accordance with the Maine Administrative Procedure Act (APA), 5 MRSA chapter 375, subchapters 2 and 2-A.

Categorization of rules as “routine technical” or “major substantive”

Since 1996, when the Legislature enacts a law authorizing a state agency to adopt rules, that law must designate the rules as either “routine technical” or “major substantive.” The categorization of rules as “routine technical” or “major substantive” is a matter of legislative discretion. The key consideration is whether the Legislature wishes to review the rule before it is finally adopted by the agency – major substantive rules are subject to formal legislative review whereas routine technical rules are not. The APA provides guidelines for categorization but these are not binding on the Legislature: major substantive rules are generally rules that, in the judgment of the Legislature, require the exercise of significant agency discretion or interpretation or will cause a significant public impact; routine technical rules are generally expected to be less controversial, technical or have less significant public impact.

APA requirements for agencies proposing rules

Agencies are required to provide notice of proposed rules to interested parties, the general public and to the Legislature. The Executive Director of the Legislative Council accepts notices of rulemaking from agencies on behalf of the Legislature and forwards each notice to the appropriate legislative committee or committees with jurisdiction over the subject matter addressed in the rule. Agencies must accept and respond to public comments on the proposed rule. Agencies may choose to hold a public hearing on the proposed rule and are required to do so if at least five interested persons request a hearing or the rule is major substantive. Rules must also be reviewed and approved for legality by the Office of the Attorney General. Once this process has been completed a routine technical rule may be finally adopted; a major substantive rule may be provisionally adopted.

Legislative review of major substantive rules

To finally adopt a major substantive rule, the agency must submit the provisionally adopted rule to the Legislature for formal review. The only major substantive rules that are not required to be submitted to the Legislature are major substantive rules required for compliance with federal law or to qualify for federal funds provided that there are no requirements or conditions exceeding federal requirements. The process for legislative review of major substantive rules is as follows.

1. The agency submits the provisional rule to the Legislature.
2. The rule and a resolve proposing to allow the agency to adopt the rule are referred to the committee with jurisdiction over the rule’s subject matter.
3. The committee generally holds a public hearing and work session on the resolve in the same manner as it does for other bills.
4. The committee reviews the proposed rule and makes its recommendation as to whether and how the rule should be allowed to go forward. The resolve is the vehicle through which the committee makes its recommendations on the rule.

5. The resolve with the committee's report(s) is reported to the House or Senate and acted upon in the same manner as any other bill or resolve. The agency's ability to finally adopt the rule depends on the final disposition and content of the finally passed resolve.

After reviewing the rule and corresponding resolve, the committee may vote to recommend that the Legislature:

- Pass the resolve without amendment (this authorizes the agency to adopt the rule as drafted);
- Pass the resolve as amended to authorize the agency to finally adopt the rule if certain changes are made, or to finally adopt only a part of the rule; or
- Pass the resolve as amended to specify that the agency may not adopt the rule.

The APA provides that, unless otherwise provided by the Legislature, a committee must make its report to the Legislature not less than 30 days before the statutory adjournment date. If the resolve specifies that final adoption of the rule is not authorized, the agency may not adopt the proposed rule (the agency may develop and submit a new proposed rule, if the law permits). If the resolve authorizes the agency to adopt the rule in some form (e.g., as submitted or in some modified form), the agency has 60 days after the effective date of the resolve to finally adopt the rule, unless the resolve specifies a different deadline. If the resolve requires the agency to modify the rule, the agency must make the required modifications before finally adopting the rule.

Failure of the Legislature to act

If the Legislature fails to act on a rule properly submitted during the statutorily defined legislative rule acceptance period, the agency may finally adopt the rule. The legislative rule acceptance period begins on July 1st preceding the convening of the regular session and ends at 5:00 p.m. on the 2nd Friday in January after the convening of that regular session. Consequently, if the Legislature wishes to prohibit adoption of a particular major substantive rule, it should pass a resolve (or enact legislation of some sort) that specifically provides that adoption of the rule is not authorized. However, if a rule is submitted outside the legislative rule acceptance period, the agency may not finally adopt the rule without specific legislative authorization. Enactment or final passage of legislation is action; a resolve that dies between the bodies or is vetoed by the Governor and upheld by the Legislature would constitute a failure to act.

Review of agency regulatory agendas

The APA also requires each state agency to submit a regulatory agenda to the appropriate legislative committee or committees with jurisdiction over that agency. The regulatory agenda must be submitted on an annual basis between the beginning of a legislative session and 100 days after adjournment. An agency's regulatory agenda includes a list of the rules that the agency expects to propose before the next regulatory agenda is issued, the statutory or other basis for adoption of the rule, the purpose of the rule, the anticipated schedule for adopting the rule, a listing of potentially benefitted and regulated parties for each rule, and a listing of all rules adopted on an emergency basis since the last regulatory agenda was issued. A legislative committee must review each regulatory agenda at a meeting called for that purpose. Committees may review more than one regulatory agenda at a meeting.

Review of agency rulemaking activity

The Legislature also receives annual lists of agency rulemaking activity in accordance with 5 MRSA §8053-A, sub-§§5 and 6. By February 1st of each year, the Secretary of State must provide to the Legislative Council's Executive Director a list of all rules adopted by each agency in the previous calendar year. The Executive Director refers each list to the appropriate legislative committee for review. After each committee has received a list of rulemaking activity, the committee may require an agency to appear before the committee and may report out legislation in the same legislative session in which the report is received to adjust rulemaking authority related to the rules adopted in the previous calendar year.