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Testimony of Nate Cloutier

Before the Joint Standing Committee on Labor
March 4, 2025

Neither for Nor Against LD 87, *"An Act Regarding the State Workforce Board"*

Senator Tipping, Representative Roeder, and distinguished members of the Labor Committee, my name is Nate Cloutier, and I am here today on behalf of HospitalityMaine, representing Maine's restaurant and lodging industries. I am also testifying on behalf of the Maine Tourism Association (MTA). MTA has been promoting Maine and supporting members in every type of tourism business such as lodging, restaurants, camps, campgrounds, retail, guides, tour operators, amusements, and historical and cultural attractions for over 100 years. We appreciate the opportunity to provide comment neither for nor against LD 87, *"An Act Regarding the State Workforce Board."*

Regarding the State Workforce Board, we note LD 87 makes the following changes:

- Limits membership to those already established in existing law.
- Removes legislative review of member appointments.
- Changes rulemaking for industry partnerships from major substantive to routine technical rules.

We take no position on whether the Legislature should forgo its oversight role in appointing board members. However, we note that the Legislature ultimately determines whether a particular rule is classified as routine technical or major substantive when enacting the authorizing law.

For your reference, I have attached a document prepared by nonpartisan committee staff (December 2020) outlining the distinction between routine technical and major substantive rules. If the committee opts to remove the confirmation process for board appointments, it may wish to retain major substantive rulemaking to ensure policy considerations remain within the Legislature's purview.

Thank you for consideration. I am happy to answer any questions.

Legislative Review of Major Substantive Rules

Legal authority required to adopt rules

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

Two types of rules: "routine technical" or "major substantive"

Under the APA, all laws enacted after January 1, 1996, that delegate rulemaking authority to an agency must specifically indicate whether the rules are "routine technical" or "major substantive." Although the APA provides the following guidelines, the ultimate decision whether a particular rule is routine technical or major substantive is made by the Legislature when it enacts the law authorizing adoption of the rule:

- "Routine technical rules," are those that establish standards of practice or procedure for agency business including, for example, rules that set a fee within a range specified by statute.
- "Major substantive" rules are rules that, in the judgment of the Legislature, either (1) require the exercise of significant agency discretion or interpretation in drafting or (2) are reasonably expected to result in a significant increase in the cost of doing business, significant reduction in property values, significant reduction of government benefits or services, serious burden on the public or serious burden on units of local government.

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).

APA procedural requirements for agency rulemaking

Agencies must provide notice of proposed new or amended 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. After providing notice, agencies must accept and respond to public comments on the proposed rule. Agencies are required to hold a public hearing on proposed major substantive rules. Proposed rules must also be reviewed and approved for legality by the Office of the Attorney General.

Once this process is complete, a major substantive rule may only be provisionally adopted by the agency and does not have legal effect until it has been reviewed by the Legislature and finally adopted by the agency. By contrast, a routine technical rule may be finally adopted by the agency without additional legislative review.

Legislative review of major substantive rules

When a provisionally adopted major substantive rule is properly submitted by an agency, a resolve is printed that proposes to allow the agency to adopt the rule. The resolve is then referred to the committee with jurisdiction over the rule's subject matter and serves as the vehicle through which the committee recommends whether and how the rule should be adopted.

The APA provides certain useful criteria (5 M.R.S.A. §8072(4)) for a committee to consider when reviewing a rule.

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

- That the agency be authorized to finally adopt the provisionally adopted rule (1) as drafted by the agency, (2) only in part, or (3) contingent upon the agency making changes to the rule or
- That the agency not be authorized to finally adopt the provisionally adopted rule.

The committee's recommendation must be reported out not less than 30 days before statutory adjournment.

Timing of agency submission of rules for review; effect of Legislature's failure to act

The APA directs agencies to submit provisionally adopted new (or amended) major substantive rules for review during the "rule acceptance period," which begins on July 1st before each regular session and ends at 5:00 p.m. on the 2nd Friday in January after the convening of that regular session. Filing a rule outside the acceptance period affects both the legislative review process and the agency's adoption authority.

If the provisionally adopted rule is submitted within the rule acceptance period, a rule resolve is automatically prepared and then referred to the appropriate committee for review.

- If the Legislature fails to act—for example, by allowing the resolve to die between the bodies or sustaining a veto of the resolve—the agency may finally adopt the rule as drafted. A committee vote of ONTP on the resolve is considered a failure to act on the rule.
- If the Legislature wishes not to authorize final adoption of a timely submitted rule, it must pass legislation prohibiting the agency from finally adopting the rule (this is typically done through an amendment to the resolve).
- If the Legislature wishes to authorize the rule but only if the rule is amended, the Legislature must pass legislation describing the changes the agency must make before final adoption is authorized (this is typically done through an amendment to the resolve).

If the provisionally adopted rule is submitted late, the Legislative Council decides whether to accept the rule for review. If it accepts the rule, a resolve for review of the rule will be prepared and referred to the appropriate committee.

- If the Legislature fails to act on a late-filed rule (see examples above), the agency may not finally adopt the rule.
- If the Legislature wishes to prevent adoption of a late-submitted rule, it does not need to act on the rule (a vote of ONTP on the resolve is considered a failure to act on the rule).
- If the Legislature wishes to allow the agency to adopt the late-submitted rule, with or without amendments, it must pass some version of the resolve (or pass other legislation) authorizing the agency to act.

Final adoption of rule

The agency must finally adopt the rule, with any required amendments, within 60 days of the effective date of the legislation approving the rule (or within 60 days of the adjournment of the session if the Legislature fails to act on a timely submitted rule).