

RULEMAKING UNDER THE OKLAHOMA ADMINISTRATIVE PROCEDURES ACT

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INTRODUCTION

“Rulemaking Under the Oklahoma Administrative Procedures Act” is not a topic often found in the headlines; but with the publication of the Oklahoma Administrative Code, the role of administrative rulemaking has become more public and prominent. For those engaged in the day-to-day business of state government, the rulemaking provisions of the Administrative Procedures Act, 75 O.S. 2001, §§ 250 – 308.2, play an important and crucial role.

State government could not function without the operations of the hundreds of existing State agencies, bureaus and commissions. For those entities to operate legally and effectively, they must do so pursuant to rules – and those rules must be promulgated in accordance with the Administrative Procedures Act (APA).

After having created the comprehensive, complex and sometimes confusing agency rulemaking scheme found in Article I¹ of the APA, the Legislature makes important changes on a yearly basis. Consequently, those who must cope with the rulemaking requirements of the APA – whether seasoned veterans or neophytes – must return to the language of the statutes over and over. Nothing can instill an immediate familiarity with the numerous requirements and deadlines; and those who think they have mastered the process and proceed on statutes which have been amended may find the product of their labors being declared invalid.

These materials provide an overview of the major features and requirements of the APA, and highlight some of the common problem areas. They will also attempt to briefly explain how the advent of the Oklahoma Administrative Code affects the rulemaking landscape. We recommend that readers acquire the rule-making checklists developed by the Office of Administrative Rules. These provide invaluable guidance for day-to-day rulemaking and an “at a glance” overview of the entire process. The checklists are available on the web at www.sos.state.ok.us/oar/oar_info.htm.

* We gratefully acknowledge former Assistant Attorney General Rebecca Rhodes for her work in writing the original article in 1990.

¹ Article I of the APA deals with rulemaking. Article II deals with hearings conducted under the APA, and is not covered in these materials.

I. SCOPE OF THE APA

Who is bound by the rulemaking requirements of the APA? With exceptions, the answer is straightforward: Article I applies to every “agency” which is not specifically exempted. An “agency” is defined in 75 O.S. 2001, § 250.3(3). It “includes but is not limited to any constitutionally or statutorily created state board, bureau, commission, office, authority, public trust in which the state is a beneficiary, or interstate commission.” *Id.*

It is not clear what the inclusion of “includes but is not limited to” is meant to do for the definition. Presumably, the Legislature intended that any public entity, regardless of its title or means of creation, which performs the functions of what would otherwise be an “agency” should be included in the definition. Section 250.3(3) also specifically exempts “the Legislature or any branch, committee or officer thereof” and “the courts.” Exemptions to the compliance requirement are found in Section 250.4. Despite this growing list, most divisions of State government are bound by Article I requirements.

II. WHAT IS A RULE?

This is one of the most fundamental and yet most difficult questions contained in the APA. Obviously, the first place to look for guidance is the definition provided in the APA.

A. DEFINITION

“Rule” means any agency statement or group of related statements of general applicability and future effect that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of the agency. The term “rule” includes the amendment or revocation of an effective rule

75 O.S. 2001, § 250.3(15). Based on this language, then, the critical characteristics of a rule are (1) *general applicability*; (2) *future effect*; (3) *implementation, interpretation, or prescription of law of policy*; or (4) *description of procedure or practice requirements*.

As helpful as this list of characteristics may be in some instances, there will be numerous occasions in which an intended agency action may appear to fall somewhere between the delineations of this definition. Perhaps in recognition of precisely this problem, the Legislature did not stop with a catalogue of “rule” traits; it went on to list explicit agency actions which are *not* included within the definition of “rule” under the APA, and has amended the list as it deems necessary to clarify the definition. Often careful comparison of an intended agency

action to this list of “non-rules” can be more helpful than an evaluation in light of the general definition. The rulemaking requirements of the APA as listed in Section 250.3 of Title 75 will not apply to:

- a. [T]he issuance, renewal, denial, suspension or revocation or other sanction of an individual specific license,
- b. the approval, disapproval or prescription of rates. For purposes of this subparagraph, the term “rates” shall not include fees or charges fixed by an agency for services provided by that agency including but not limited to fees charged for licensing, permitting, inspections or publications,
- c. statements and memoranda concerning only the internal management of an agency and not affecting private rights or procedures available to the public,
- d. declaratory rulings issued pursuant to Section 307 of this title,
- e. orders by an agency, or
- f. press releases or “agency news releases”, provided such releases are not for the purpose of interpreting, implementing or prescribing law or agency policy[.]

Id.

This list of “non-rules” appears primarily to define clear exclusions; still, there has been a great deal of largely unresolved debate focusing on just what is meant by “not affecting private rights or procedures available to the public.” The question of whether prison inmates are members of the “public” for purposes of some administrative rules has been discussed in an Attorney General Opinion. In A.G. Opin. 99-56, the Attorney General held that the formula used by the Board of Corrections for calculating the prison system population under the Prison Overcrowding Emergency Powers Act is not subject to the notice and filing requirements of Section I of the APA. In A.G. Opin. 99-51, the Attorney General held that statements and memoranda which concern the duties, scope of employment and parameters of actions by parole officers do not affect the private rights of prisoners or procedures available to the public; instead, they are “housekeeping” functions prescribing the conduct of its staff, and are therefore not rules to be promulgated under the APA. These Opinions are set forth in the 1999 volume, and the reader is referred to them for a more thorough discussion.

Still, there remain many questions about the scope of the phrase “not affecting private rights or procedures available to the public.” Not yet specifically answered are questions such as what constitutes the “public.” Does it include the public in a general sense, or only the “regulated public?” It is generally thought that for the rules to have any meaningful effect, the term must include both the public and the agency’s regulated public. These questions will likely remain unresolved. However, as with all other aspects of rulemaking under the APA, if a doubt exists as to whether the statements and memoranda fall under the definition of “rule,” the safest course is to assume they do and promulgate them in accordance with the APA. This statement is not intended to encourage an unnecessary, shotgun approach to rulemaking; rather, if there exists a *legitimate* doubt as to whether something is a rule and the item meets the definition of a rule, it should be promulgated pursuant to the APA.

B. FEES VS. RATES

The distinction between rates and fees merits some attention. One of the “non-rule” exceptions to the definition in Section 250.3 explicitly provides that “the approval, disapproval or prescription of rates” shall be exempt from the rulemaking requirement of the APA. As Section 250.3(15)(b) makes clear, this exemption does not extend to fee schedules. This is because fee schedules customarily apply to the general public or a group of licensees as a whole; consequently, they are of “general applicability” and, in effect, will likely constitute a “practice requirement” (remember the Section 250.3 characteristics). *Cf.* A.G. Opin. 01-5 (differentiating a statutorily authorized “administrative penalty,” which need not be promulgated pursuant to the Administrative Procedures Act, from a “fee,” which must be so promulgated).

On the other hand, the term “rates” used in this context refers to the end result of a ratemaking process specifically geared to the determination of rates applicable to a particular person or entity, or a narrow class of people or entities. Generally, rates approved by an administrative agency will be rates which a regulated entity or industry is then authorized to charge its customers. Perhaps the clearest example can be found in the utility or insurance fields, in which the regulating body has other elaborate hearing processes and formulas established to determine and set specific rates that specific companies or groups of companies are then permitted to charge their consumers.

Another point: when attempting to distinguish fees from rates, it is important to keep in mind the defining characteristics of a “rule.” If an agency has developed a list of “charges,” it does not matter whether those charges are labeled rates or fees; if those charges apply generally, customarily they must be promulgated under the APA.

One final point concerning fees: even those agencies which are exempted from the rulemaking provisions of the APA are restricted when it comes to raising fees. In Title 74, the title specifically dealing with State government, the Legislature has inserted a provision which prohibits any “agency, constitutionally or statutorily created state board, bureau, commission, office, authority, public trust in which the state is a beneficiary, or interstate commission, except an institutional governing board within The Oklahoma State System of Higher Education” from establishing or increasing any fee except when the Legislature is in session. The only exception to this prohibition is when the Legislature itself or federal legislation has mandated the increase, or when a failure to establish or increase fees would conflict with an order issued by a court of law. *See* 74 O.S. 2001, § 3117. The provision requires the agency seeking to raise fees to notify both the executive and legislative branches of government in much the same way as is required under the APA itself.

C. SECTION 302 REQUIRED RULES

In addition to any agency action which meets the definition of “rule” under Section 250.3, each agency with rulemaking authority must also promulgate rules in accordance with Section 302. Although Section 302 rules are mandatory under the APA, they have in the past been too often overlooked.

Section 302 rules are of tremendous significance, because they essentially establish the organizational and procedural framework of the agency. They also provide the necessary channels through which the public can gain information about the agency and its functions.

Section 302 applies to each agency which has rulemaking authority. The section mandates that each agency promulgate a rule providing a description of the agency’s organization, the general course and method of its operations, and information on how the public can obtain information or make submissions or requests.

These required rules should include an agency’s rules of practice and should describe both informal and formal procedures and a description of any forms or instructions for use by the public. These rules should also provide for public access to agency rules and should provide for public inspection of all final orders, decisions, and opinions of the agency, pursuant to the Open Records Act.

It is particularly important that the public have access to prior orders, opinions and decisions of an agency. Amendments to Section 302 require that each agency “that issues precedent-setting orders” shall be required to maintain and index all its orders that the agency intends to rely upon as precedent. If an order is not maintained and indexed for public review, it cannot be relied upon to the detriment of any person. The reason for this is clear; the Legislature is seeking

consistency in an agency's application of its rules and orders "to each person subject to the jurisdiction of the agency."

III. NECESSARY BACKGROUND

The APA requires every agency with rulemaking authority to file its rules as a precondition to the validity of those rules. The specific consequences for failure to properly file rules are discussed below.

A. THE ROLE OF THE SECRETARY OF STATE

The Secretary of State plays the central role in the administration of the APA. The Secretary of State, and more specifically the Office of Administrative Rules within the Secretary of State's office, serves as a kind of coordinating agency for the purposes of the APA. The Office of Administrative Rules (OAR) has developed and promulgated an extensive set of Administrative Rules on Rule-making (ARR) which govern the specific details of rulemaking under the APA; it publishes *The Oklahoma Register*, the publication vehicle for administrative rules in Oklahoma; and oversees the publication and distribution of the Oklahoma Administrative Code. Among the oversight powers granted to the Secretary of State by the Legislature is the power to refuse to accept for publication any document which does not substantially conform to the ARR. 75 O.S. 2001, § 251(C).

B. PREPARATION OF RULES

I. RULEMAKING AUTHORITY

Although the nature of agency rulemaking authority is a basic, threshold issue, it is one which is too often overlooked and consequently, too often the source of agency rulemaking problems. Questions have been posed about what exactly it takes to confer rulemaking authority upon a subdivision of State government: does it require the magic words "rulemaking authority," or is some lesser designation sufficient?

While these questions are interesting in the abstract, in reality the problems arise not from a lack of rulemaking authority, but from agency attempts to promulgate rules outside the scope of that authority or failing to promulgate policies as rules.

Agency rulemaking authority is conferred by the Legislature, whether by express words or by broader implication. These grants of power are most often found in an agency's enabling act, the statutes which establish and define the specific agency, its duties, and functions. It is important to note, however, that other important grants of rulemaking authority may be conferred by the Legis-

lature in wholly separate statutes. An agency's rulemaking authority is, by its nature, limited to the regulatory areas within that agency's purview as defined in the enabling act and other specifically relevant statutes.

Administrative rulemaking is, in essence, lawmaking within a limited area of expertise. Under the APA, at Section 308.2(C), administrative rules which have been promulgated in accordance with the APA have the force and effect of law. Any agency rules which stray beyond that agency's scope of expertise and exceed the legislative grant of rulemaking authority, however, will be void and of no effect.

2. STATUTORY LANGUAGE

Rule drafting is the most important part of the rule development process, yet many agencies yield to the temptation to avoid the important duty to interpret the statutes and to explain agency implementation of statutes in favor of simply promulgating statutory language. Section 251(B)(2)(a) clearly requires that an agency preparing rules for promulgation shall prepare its rules in plain language which can be easily understood. This directive alone might seem to rule out the use of what is often cumbersome statutory language, but even more explicitly, Section 251(B)(2)(b) requires that agency rules:

[S]hall not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to effectively convey the meaning of a rule interpreting that language, the reference shall clearly indicate the portion of the language which is statutory and the portion which is the agency's amplification or interpretation of that language

Id.

Obviously, this prohibition itself contains the recognition that sometimes, and perhaps even often, a rule must refer directly to an agency's enabling act or to other relevant statutes. Neither Section 251(B) nor the Administrative Rules on Rulemaking, however, envision or permit the kind of statutory echo which is present in so many agency rules.

Whenever possible, agencies should try to avoid this tendency simply to parrot statutory language. Rules which are little more than carbon copies of an agency's enabling act do very little to provide meaningful additional guidance to agency personnel, nor do they better inform the public about an agency's operations. Although it is difficult to imagine quite how a challenge to rules on this ground might be formulated, the APA does specifically prohibit the mere repetition of statutory language.

3. *INCORPORATION BY REFERENCE*

Section 251(D) provides that an agency may incorporate by reference the published standards established by organizations and technical societies of recognized national standing, other State agencies, or federal agencies. The Legislature provided for incorporation by reference “[i]n order to avoid unnecessary expense,” and incorporation by reference can be useful in a variety of contexts. Incorporation by reference is not, however, a substitute for the thoughtful formulation of specific rules by an agency, and using incorporation by reference brings with it a host of new problems. *Id.*

First, and seemingly most common, among these problems is the tendency of agencies to incorporate by reference prospectively. Professor Arthur Earl Bonfield, a noted authority on administrative law, has aptly described the multitude of dangers inherent with prospective incorporation. He explains that:

Prospective incorporation entirely removes from the usual rule-making process individual consideration, by the public and the agency, of each future change to the matter incorporated by reference, thereby effectively denying the many benefits of that process to those who may object to the legality or merits of the new amendments or additions. This is not an inconsiderable loss. It is equivalent to a declaration by the agency that it will not hold rule-making proceedings of any kind on the specific contents of each of those future amendments to or editions of the matter incorporated by reference²

Additionally, Professor Bonfield notes that prospective incorporation by reference involves an inappropriate delegation of power by the Legislature and the involved agency. When an agency incorporates a technical society’s rules “as they are now and as they may be amended in the future,” that agency effectively denies the Legislature and Governor any control over the future content of the rules.

Incorporation by reference can be a useful tool, and in many cases it is not only appropriate, but also prudent and cost effective. Agencies should take care, however, to avoid an open-ended endorsement of the rules of some other body, particularly if it is a private organization. Prospective incorporation is, at the very least, a violation of the principles of prior approval and public input which lie at the heart of the APA; at worst, prospective incorporation may constitute an unconstitutional delegation of power. In the realm in between, it is quite possible that rules which incorporate by reference prospectively would not be enforced by Oklahoma courts.

² ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULE MAKING 325 (1986).

IV. PROCEDURAL REQUIREMENTS

It would be foolish to deny that the series of hoops established by the APA through which agencies must properly jump to effectively formulate administrative rules can be somewhat intimidating. As numerous as the procedural requirements are, and as cumbersome as they may appear to be, when they are broken down into their simple components, they lose much of their daunting aspect.

To help calm the rulemaking anxiety generated by the APA procedural requirements and to help assure compliance with those requirements, the Office of Administrative Rules has developed checklists for both permanent and emergency rulemaking actions. These checklists (referred to earlier) help break down the cumbersome statutory and administrative requirements into their component parts and are valuable resources for agencies going through the rulemaking process. These checklists can serve as both a guide through the process and as an easy reference point in the rulemaking record.

While there is certainly something appealing about the streamlined brevity of these checklists, there are, nevertheless, some aspects of the procedural requirements for rulemaking which deserve greater attention here. For that reason, the procedural steps for both permanent and emergency rulemaking will be examined in more detail.

A. PERMANENT RULEMAKING

1. *THE RULEMAKING RECORD*

Section 302(B) of Title 75 requires that each agency maintain a rulemaking record for each proposed rule or promulgated rule. The first step toward promulgating a rule under the APA is opening the official agency rulemaking record. Section 302(B)(2) sets out in detail the specific required contents of the rulemaking record; there are nine types of documents which the APA requires be included in that record. As warned up front, one must refer, and keep referring, to the statutes.

The agency rulemaking record is more than a necessary evil under the APA; it can sometimes prove to be a tremendous asset to the promulgating agency. The rulemaking record can provide specific documentary evidence necessary to defend a challenge that a rule was not promulgated in substantial compliance with the APA. The agency rulemaking record compiled under Section 302, while not the exclusive basis for judicial review, will constitute the official rulemaking record.

2. NOTICE OF RULEMAKING INTENT

Section 303(A) - (C) provides that before adopting, amending, or repealing any rule, an agency shall prepare a notice of rulemaking intent to be published in the *Register*. It cannot be emphasized strongly enough how important it is to plan for the publication of this notice. Submission deadlines for publication in the *Register* are available from the OAR's website and appear elsewhere in this book. These deadlines must be considered when establishing a rulemaking schedule to ensure sufficient time for the necessary comment period and adoption by the agency in time to make the April 1st submission deadline. The Administrative Rules on Rulemaking (ARR) establish the format for this notice; both paper and diskette copies must be filed with the Office of Administrative Rules for publication in the *Register*.

The APA and the ARR contain the general requirements that a notice of rulemaking intent identify the proposed rules (the ARR does specify that a chapter number and heading be included, at a minimum) and provide a summary of the effect of the proposed rule changes, including the circumstances which create the need for the rule change. The vague nature of these requirements leaves the question of what exactly is an adequate notice. The two important issues in determining the adequacy of an agency rulemaking notice are whether the agency has been specific enough in citing the affected or proposed rules and whether the agency's summary or description of the intended action is sufficient.

When determining with what degree of specificity to describe the affected rules, an agency must walk a tightrope between the problems created by too great a degree of specificity and the possibility that the rules will be challenged or disapproved if the description of the rulemaking action is too broad or imprecise. If the rules are described too specifically, say section by section, there is the increased likelihood that individual rules may be inadvertently omitted in the gubernatorial approval, especially when an agency rulemaking action affects a large number of sections. Too broad a description, like citing the chapters and headings only, however, may mislead the public or make it impossible to determine the real nature of the rulemaking action, thereby inviting challenge or disapproval. The same problems may arise if an agency's summary of the rulemaking action is too broad. Yet, if an agency is too specific in its summary the danger arises that the notice will not be broad enough to encompass changes to the rules which may become necessary as a result of the rulemaking process, a common problem in rulemaking.

The rule of thumb to keep in mind – both when formulating the original notice of rulemaking intent and when determining if subsequent notice is necessary because of changes made during the process – is that the public must be able to determine from the notice the contents of the proposed rule change and the possible effects on their interests, so they can decide how to proceed. An agency

should keep in mind that an evaluation of the extent of any changes made to rules during the rulemaking process and the effects of those changes must also be conducted when deciding whether an original notice is sufficient to encompass significant deviations from the originally proposed rules. For more information regarding the scope of the notice of rulemaking intent see BONFIELD, at 169–79.

The notice of rulemaking intent must also contain a provision for a comment period of at least 30 days from the date of the publication of the notice of rulemaking intent in the *Register*. Additionally, if an agency is scheduling a hearing on its own accord (see further discussion below), the hearing must be scheduled for a date which is also at least 30 days following the date of the publication of the notice in the *Register*. If an agency decides not to schedule a hearing of its own accord, but decides to await written request for a hearing, that agency must announce the time, place, and manner in which persons may demand a hearing on the proposed rulemaking action (Section 303(B)(9)).

Section 303 also requires that an agency must mail a copy of the notice of rulemaking intent and a copy of the rule impact statement (if available) to all persons who have made a timely request for advance notice of rulemaking proceedings by that agency; this notice must go out to these parties prior to or within three days after the notice of rulemaking intent is published in the *Register* (Section 303(B)(10)). The Legislature has also added a requirement that an agency which determines that a rule affects business entities must solicit comments from the business entities as to how the rule will affect direct costs such as fees, and indirect costs such as “reporting, recordkeeping, equipment, construction, labor, professional services, revenue loss, or other costs expected to be incurred” by the particular entity if the rule is promulgated. 75 O.S. Supp.2003, § 303(B)(6). These notice requirements are summarized in A.G. Opin. 00-27, where the Attorney General determined that Section 303 requires publication of the notice in the *Register* containing a brief summary of the proposed rule, its proposed effect and the legal basis for its adoption. The Opinion also held the agency must notify business entities if it determines the proposed rule will affect those entities, and must request that the entities give an estimate of the cost of compliance. Additionally, the Opinion states that, if the notice does not provide for a public hearing, it must set forth how a hearing can be requested.

3. RULE IMPACT STATEMENT

The rule impact statement requirement at Section 303(D) is seen by many agencies as the most cumbersome part of the process for promulgation of permanent rules under the APA; increasingly it is also seen by the Legislature as the most important part of the rule document submitted to it. The significance attached to

the rule impact statement by the Legislature is reflected by additional requirements added to it over the years. Now, the rule impact statement must reflect not only things such as a description of the purpose of the proposed rule and a description of the classes of persons who will most likely be affected; it must also reflect information on cost impacts received by the agency from any private or public entities, probable benefits to the agency if the rule is promulgated, an explanation of the measures the agency has taken to minimize compliance costs, and a determination of the effect of the proposed rule on public health, safety and the environment.

The requirement for a rule impact statement may be waived in limited circumstances, but only if the agency obtains a written waiver from the Governor *before it publishes its notice of rulemaking intent*. A rule impact statement may be waived only if the rule impact statement is unnecessary or contrary to the public interest, *see* 75 O.S. Supp.2003, § 303(D)(3), or if the agency is merely implementing statutory or federal requirements without interpreting or describing those requirements.

Section 303(D) sets out the eleven required elements of the rule impact statement; essentially these requirements together constitute a cost-benefit analysis on the proposed rule. Here again, those dealing with rulemaking should refer to this section regularly, as the requirements were amended in 2003.

As daunting a task as the preparation of the statement may be for some rulemaking actions, detailed and thoughtful analysis at this planning stage often will serve an agency well. There are potential rewards for the preparation of a thorough statement. Perhaps in recognition of the often herculean nature of the task, the Legislature has specifically provided in Section 303(D)(4) that the inadequacies of a rule impact statement are not grounds for invalidating a rule. However, inadequacies in the rule impact statement may be grounds for legislative or gubernatorial disapproval or for a request that an agency withdraw its rules (as an alternative to outright disapproval).

In addition, if the agency determines in the rule impact statement that the proposed rule will have an economic impact on any political subdivisions or require their cooperation in implementing or enforcing a proposed permanent rule, a copy of the proposed rule and the rule report are required to be filed, within ten (10) days after adoption of a permanent rule, with the Oklahoma Advisory Committee on Intergovernmental Relations for its review. While advisory only, the Committee may communicate any recommendations to the Governor, the Speaker of the House of Representatives and President Pro Tempore of the Senate.

4. PUBLIC COMMENT AND HEARING

a. Public Comment

Section 303(A)(2) provides for a comment period (of at least 30 days) during which all interested parties may submit data, views or arguments, either orally or in writing. The agency shall consider fully all written and oral comments concerning a proposed rule. In addition, an agency must consider the effect of its action upon any affected business and governmental entities (Section 303(A)(4)) and the potential impact on various types of consumer groups (Section 303(A)(5)).

Agency consideration of any public response concerning the potential impact of a proposed rule is obviously a fundamental aspect of the APA. Agency rulemaking action is, in effect, legislative action. Because agency heads are, for the most part, appointed and not elected, public response to ill-advised agency rulemaking is not as certain or swift as action taken by the Legislature; however, this cannot justify inattention to public response. Agencies should not be cowed by negative public reaction to a necessary and valid rulemaking action, but agencies are without the vast information gathering resources of the Legislature, and often legitimate and unforeseen problems with proposed rules may be raised first in the context of public comment.

b. The Hearing

As already alluded to, a public hearing is not absolutely required under the APA unless, within 30 days after the published notice of rulemaking intent, a written request for a hearing is submitted by: (1) at least 25 people; (2) a political subdivision; (3) an agency; (4) an association having not less than 25 members; or (5) the Small Business Regulatory Review Committee (Section 303(C)(1)). Notwithstanding, the majority of agencies contemplating permanent rulemaking action hold a public hearing. Not only does a hearing guarantee a forum for the rulemaking agency to gather information about the potential impact of its intended action, the reality is that most agency rulemaking actions, especially ones dealing with matters of substance, will ultimately draw a request for a hearing. Agencies seem to prefer simply to schedule a hearing at the time the notice of rulemaking intent is filed; this provides an agency with the opportunity for advance scheduling.

5. ADOPTION OF THE PROPOSED RULE

Sometime after the completion of the comment period and after the hearing (the hearing and adoption may occur on the same day), the rulemaking authority must meet to adopt the proposed rules. Obviously, the extent to which other steps need to be taken in a particular instance will depend upon an agency's reaction to public comment. It may be that, in light of the public comment which has been received, an agency will decide to forego the rulemaking action en-

tirely or to so alter the intended action that new public comment should or must be sought. As discussed briefly above, when significant changes are made to proposed rules during the rulemaking process, a question arises regarding the sufficiency of the original notice of rulemaking intent. In some instances it may well prove necessary to publish a second notice which reflects significant changes to allow the public to reevaluate whether their interests are affected and whether they want to participate.

Assuming, however, that the agency decides to proceed with the promulgation of its proposed rules, the rulemaking authority must meet to adopt the rules. Although there is no time period specified for how soon after the end of a comment period the adoption must come, it is important for agencies to remember that they will have only **10 days** from the adoption of the rules until those rules **must** be submitted to the Governor and the Legislature. This is a common problem area. If an agency's rulemaking action is significant with broad-ranging implications, 10 days may not prove sufficient time to assemble the agency rule report which must be submitted with the rules; the majority of the work on this report must therefore, realistically, be completed before adoption. In fact, in the face of a tremendous public response and a contested public hearing, ten days may not be enough time to fully respond. Therefore, the date of adoption must be picked carefully with the 10-day deadline in mind.

6. SUBMISSION FOR REVIEW

As has already been noted, within 10 days of the adoption of a rule or set of rules, an agency must submit two copies of the regulatory text of its rules to the Governor along with an agency rule report, the contents of which are set out in Section 303.1(E). Within this same 10-day period, the agency must also submit two copies of the regulatory text of its rules and two copies of the agency rule report to both the Speaker of the House of Representatives and the President Pro Tempore of the Senate. The agency must also prepare a Statement of Submission for Gubernatorial and Legislative Review to the Office of Administrative Rules for publication in the *Register*. The agency must submit one paper copy and one diskette copy to the Office of Administrative Rules.

7. GUBERNATORIAL REVIEW

The Governor's office has 45 days in which to act to approve or disapprove submitted rules. Failure to act within 45 days results in disapproval of the agency rule submission. If the Governor approves the intended rulemaking action, the Governor's office sends a copy of the approval to the agency, the Speaker of the House of Representatives, and the President Pro Tempore of the Senate. The agency then prepares a notice of Gubernatorial Approval and submits it to the Office of Administrative Rules for publication in the *Register*. Likewise, upon disapproval by the Governor, the Governor's office returns the entire docu-

ment to the agency with written reasons why the rule is not approved, and sends copies to the Speaker and President Pro Tempore. The agency then sends a notice of disapproval to the *Register*. If the Governor does not approve the rules, they cannot become effective unless otherwise approved by the Legislature by joint resolution.

Further, as APA rules have encompassed significant policy issues, added to the APA under Section 250.10 is the authority of the Governor, the Legislature, a small business, and the Small Business Regulatory Review Committee to request agencies to review for amendment, repeal or redrafting any existing rules. The agency is required to respond to such requests within 90 calendar days.

8. LEGISLATIVE REVIEW

The process of legislative review under the APA can appear confusing, largely because there are several possible results depending upon when the Legislature receives an agency's rules and what action the Legislature takes upon those rules. The Legislature has reserved for itself:

The right to disapprove a permanent or emergency rule at any time if the Legislature determines such rule to be an imminent harm to the health, safety or welfare of the public or the state or if the Legislature determines that a rule is not consistent with legislative intent.

75 O.S. 2001, § 250.2(B)(6).

More specifically, the Legislature generally has 30 legislative days from the date of submission in which to review agency rules. The confusion arises because rules submitted late in a regular session may not allow the Legislature the full 30 days for review. The resulting statutory scheme is found in Section 308. The possible scenarios and results are as follows:

If the Legislature remains in regular session for 30 legislative days after the submission of agency rules without disapproving them by joint or concurrent resolution, the rules will be deemed approved by operation of law (notice this is contrary to the default disapproval by the Governor's office).

If, however, the Legislature adjourns the regular session prior to the expiration of the 30 legislative days after submission, the result will depend upon whether the rules were submitted to the Legislature before or after April 1 of that year. If the rules were submitted before April 1, the rules will again be considered approved by operation of law upon sine die adjournment. If, however, the rules were submitted after April 1, the rules will be considered approved if the Legislature remains in session for 30 legislative days and fails to disapprove the rules. If the Legislature adjourns before it completes 30 legislative days, and the Legislature does not waive the legislative review period by concurrent resolution,

the rules are carried over for consideration by the Legislature beginning on the first day of the next regular session.

Legislative approval, then, may come in the form of a resolution or in several different ways by operation of law. Legislative disapproval may come in the form of joint resolution or concurrent resolution. If the Legislature does disapprove an agency's rules, that disapproval must be filed for publication in the *Register*.

9. FINAL ADOPTION, PROMULGATION AND EFFECTIVENESS

When a rule has been approved by the Governor and the Legislature or has been approved by the Legislature by joint resolution, a rule is considered finally adopted. At this point an agency may no longer withdraw from the rulemaking process and must prepare a permanent rule document pursuant to the Administrative Rules on Rulemaking. Upon acceptance by the OAR and publication in the *Register*, a rule is considered promulgated and may become effective as soon as ten (10) days after publication.

B. EMERGENCY RULEMAKING

For an agency to properly promulgate rules on an emergency basis, Section 253(A) requires that the agency must first determine that "an imminent peril exists to the preservation of public health, safety, or welfare, or that a compelling public interest, requires an emergency rule, amendment, revision, or revocation of an existing rule." This section was changed in 1998. Previously, the agency had to determine that "an imminent peril to the preservation of public health, safety, or welfare, or other compelling extraordinary circumstance" existed. The reason must still be "compelling" but there need not be an "extraordinary circumstance" for the rule, merely a "public interest." Therefore, it is believed that substitution of "compelling public interest" for "compelling extraordinary circumstance" has somewhat relaxed the standard necessary for an emergency rule. An emergency rule which is effective before the first day of a legislative session will no longer expire with adjournment of the session but will expire on the July 15th immediately following the end of the session. With the constitutionally mandated shorter session, this July 15th expiration date provides agencies with the time necessary to supersede expiring emergency rules with the necessary permanent rules.

Agencies should note that Section 253(H)(3)(b) categorically prohibits an agency from "piggy-backing" emergency rules. Once an emergency rule has expired and become void, no new emergency rule of similar scope or intent will be entertained by the Governor, unless authorized by the Legislature by concurrent resolution or by law. This places responsibility upon the agency to ensure that emergency rules of an enduring nature will be superseded by permanent rules.

1. RULEMAKING RECORD

Next the agency must open the rulemaking record: See (A)(1) above.

2. OPTIONAL STEPS

The notice of rulemaking intent, the comment period, and the public hearing are all optional steps during the emergency rulemaking process. Obviously the same justifications for public comment and for conducting a public hearing apply in the emergency context. Given the nature of emergency rules, however, it is common that the demands of a situation simply will not permit the delay necessitated by such procedures; whenever possible, however, it seems a prudent course for an agency to avail itself of these procedures.

3. ADOPTION

The actual process of rule adoption here is, not surprisingly, much the same as in the context of permanent rulemaking. The essential difference is that the agency must affirm its finding of an emergency when it adopts the rules.

4. SUBMISSION TO THE GOVERNOR AND LEGISLATURE

After adoption of the emergency rules the agency must, within 10 days, prepare an emergency rule document and rule impact statement and submit two copies of each to the Governor, the Speaker of the House of Representatives and the President Pro Tempore of the Senate. The Administrative Rules on Rulemaking dictate the format of this emergency rule document. The basic requirements are (1) a document heading; (2) preamble; (3) enacting clause; (4) the regulatory text of the rules (if over 75 pages a summary must be included); and (5) an attestation.

5. GUBERNATORIAL ACTION

The Governor has 45 days in which to act upon an emergency rule; failure to act during this time will constitute disapproval of the emergency rule. The Governor may, of course, also disapprove in writing before the expiration of the 45 days. Any gubernatorial approval of an emergency rule must be written. Additionally, upon approval by the Governor, the agency submits copies of the approval and copies of the emergency rule document to the Office of Administrative Rules for publication in the *Register*.

6. PROMULGATION AND EFFECTIVENESS

Upon approval by the Governor, an emergency rule shall be considered promulgated and shall be in force immediately or upon some later date if an agency has so specified in the preamble of the rule document.

7. NOTIFICATION TO THE LEGISLATURE AND PUBLICATION

Upon approval by the Governor, a copy of that approval must be submitted to the Speaker of the House of Representatives and to the President Pro Tempore of the Senate. Publication in the *Register* will be handled by the Office of Administrative Rules after transmission from the agency upon submission of a diskette copy of the emergency rule from the agency.

8. INITIATION OF PERMANENT RULEMAKING AND EXPIRATION OR TERMINATION OF EMERGENCY RULES

If an emergency rule is of a continuing nature, the agency must initiate proceedings for the promulgation of a permanent rule to supersede the emergency rule. This is a critical step because emergency rules will be effective only until July 15th immediately following the regular legislative session, or some earlier date if specified by the agency, unless the emergency rule is superseded by permanent rule. An emergency rule may also be superseded by the agency replacing the emergency rule itself or by the Legislature disapproving the rule or any permanent rule based upon it. As discussed above, the inability of an agency to replace emergency rules with new emergency rules of the same or similar scope or intent makes initiating superseding permanent rules all the more important.

V.

CONCLUSION

CONSEQUENCES OF FAILING TO FOLLOW THE RULEMAKING REQUIREMENTS OF THE APA

Section 308.2(A) sets out the general penalty for failure to promulgate rules in accordance with the requirements of the APA. The general penalty is a stiff one; rules which are not promulgated as required in the APA are not valid or effective against any person or party, nor may such rules be invoked by the agency for any purpose. This penalty has in fact been applied when an agency has made no attempt to comply with the provisions of the APA nor even attempted to promulgate policies as rules.

The penalty provisions which seem to draw the greatest attention from agencies and aggrieved parties, however, are those contained in Sections 252 and 303. In Section 252, the Legislature simply states that any rule enacted after the passage of the APA may, in fact, be held void and of no effect by the courts or the Legislature pursuant to Sections 306 and 307. Section 303(E) reiterates that failure of an agency to adopt rules "in substantial compliance" with the specific procedural requirements of that section renders those rules invalid.

These sections make it clear the Legislature meant the penalties under the APA to represent a serious threat to ensure compliance. As with so many other

aspects of the APA, there has been little or no opportunity for Oklahoma courts to give effect to these penalty provisions. True, failure even to attempt promulgation has been rewarded with the penalty of nullity, but the extent to which this severe penalty will be applied for less flagrant violations of the APA is unknown.

Although it is unclear how the courts will handle future challenges to rulemaking deficiencies, it is likely that the frequency of these challenges will increase in coming years, made easier by the publication of the *Oklahoma Administrative Code*. Inclusion in the Code or its supplements is a precondition to the validity and effectiveness of a rule. Even a properly promulgated rule cannot be effective if it is either intentionally or inadvertently omitted from the Code.

With the increased visibility and accessibility of agency rules, and the explicit requirement that a rule must be included in the Code to be valid, the inadvertent failure or unwillingness of an agency to promulgate its policies as rules will certainly become much more apparent. In addition, the increased accessibility of rules is likely to create a greater general awareness of agency rules and of the requirements of the APA. As more people become aware of the rulemaking requirements of the APA, it is likely that the number of challenges to agency actions for failure to comply with those requirements will increase. Suddenly the seemingly obscure and technical requirements of the APA will be cast into the daylight.

No agency wants to be the test case for the APA penalties. To avoid all of the dangerous uncertainties inherent in sloppy rulemaking under the APA or, worse still, no attempt at formal rulemaking at all, the best and safest course will always be to promulgate what one reasonably believes to be rules under the APA definition, to take the process of public comment seriously, and to enact rules carefully and in compliance with the requirements of the APA and the Secretary of State's Administrative Rules on Rulemaking.

Rulemaking Checklists

FOR

OKLAHOMA'S RULEMAKING PROCESS

FOR USE WITH THE SECRETARY OF STATE'S

ADMINISTRATIVE RULES ON RULEMAKING [OAC 655:10]

HAVE BEEN PREPARED BY

AND ARE AVAILABLE FROM THE

OFFICE OF ADMINISTRATIVE RULES (OAR)

SECRETARY OF STATE

220 WILL ROGERS BUILDING

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Note: The checklists are also available on the web at www.sos.state.ok.us/oar/oar_info.htm.

REGISTER PUBLICATION DATES AND FILING DEADLINES

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January 15, 2004	December 24, 2003	December 31, 2003
February 2, 2004	January 9, 2004	January 15, 2004
February 17, 2004	January 23, 2004	January 30, 2004
March 1, 2004	February 6, 2004	February 13, 2004
March 15, 2004	February 24, 2004	March 1, 2004
April 1, 2004	March 9, 2004	March 15, 2004
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May 3, 2004	April 9, 2004	April 15, 2004
May 17, 2004	April 23, 2004	April 30, 2004
June 1, 2004	May 7, 2004	May 14, 2004
June 15, 2004	May 26, 2004	June 1, 2004
July 1, 2004	June 9, 2004	June 15, 2004
July 15, 2004	June 25, 2004	July 1, 2004
August 2, 2004	July 9, 2004	July 15, 2004
August 16, 2004	July 23, 2004	July 30, 2004
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¹ To allow for the OAR's 6-calendar-day review period, as set forth in 655:10-11-1, documents must be submitted to the OAR no later than 4:30 p.m. on this deadline date.

² Pursuant to 655:10-9-3, documents must be **accepted** by the Office of Administrative Rules (OAR) no later than 4:30 p.m. on this deadline date.

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