

# AGENCY RULEMAKING and LEGISLATIVE REVIEW OF AGENCY RULES

A Summary of Legislative Issues

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## WHAT IS A RULE?<sup>1</sup>

A rule is a judicially enforceable standard, requirement or statement adopted by a state agency in order to provide details about the implementation or interpretation of a statute, or to describe internal agency procedures. Rules must be consistent with the statute under which they are adopted.

## HOW ARE RULES ADOPTED?

The process for adopting rules is set forth in the Maine Administrative Procedures Act, Title 5, chapter 375, subchapters II and II-A. The process used depends on which category the rule falls within.

### *Category #1*

Rules that are categorized as “**routine technical rules**” and rules that were adopted under rulemaking authority granted to the agency before January 1, 1996 fall into one category.

### *Category #2*

Rules categorized as “**major substantive rules**” fall into the 2<sup>nd</sup> category. Before adopting a major substantive rule, an agency must submit the proposed rule to the Legislature for review.

## WHAT DETERMINES WHETHER A RULE IS “ROUTINE TECHNICAL” OR “MAJOR SUBSTANTIVE”?

The statute giving the agency authority to adopt the rule determines the rule’s category. Beginning January 1, 1996, when the Legislature enacts a statute giving rulemaking authority to a state agency, the statute must specify whether the rule is “routine technical” or “major substantive.” If the statute does not specify, the rule is usually treated as routine technical. If the rule was adopted under authority granted to the agency before January 1, 1996, the rule is also treated like a routine technical rule.

## HOW DOES THE LEGISLATURE DETERMINE THE CLASSIFICATION OF A RULE?

The classification is a matter of legislative discretion, but the following guidelines apply:

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<sup>1</sup> Rules are sometimes referred to as “regulations,” however that term should be used to refer only to federal regulations. In Maine, the proper term is “rules.”

### *Routine Technical*

Routine technical rules are rules that are not expected to be controversial or to have a significant public impact.

### *Major Substantive*

Major substantive rules are rules that, *in the judgment of the Legislature*:

- ❑ require the exercise of significant agency discretion or interpretation in drafting; or
- ❑ due to the subject matter or anticipated impact, are reasonably expected to result in a significant increase in the cost of doing business, a significant reduction in property values, the loss or significant reduction of government benefits or services, the imposition of state mandates on units of local government as defined in the Constitution of Maine, Article IX, Section 21, or other serious burdens on the public or units of local government

### **HOW IS A ROUTINE TECHNICAL RULE ADOPTED?**

Before adopting a routine technical rule, the state agency must give public notice of the proposed rule, and must accept and respond to public comments on the proposed rule. The agency may choose to hold a public hearing, and is required to do so if at least 5 interested persons request the hearing. The rule must also be reviewed and approved for legality by the Office of the Attorney General.

### **HOW IS A MAJOR SUBSTANTIVE RULE ADOPTED?**

To adopt a major substantive rule, the agency must follow the same process as for a routine technical rule, except that instead of finally adopting the rule at the end of the process, the agency provisionally adopts the rule. It must then submit the rule to the Legislature for review before finally adopting the rule except to the extent the rule is required by federal law or required to qualify for federal funds.

The timeline and process for review of major substantive rules is as follows:

1. The agency must submit the provisionally adopted rule to the Legislature by 5:00 p.m. on the 2<sup>nd</sup> Friday in January.<sup>2</sup>
2. The rule and a Resolve proposing to allow the agency to adopt the rule, as drafted, 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 may vote to amend the Resolve to not authorize the rule or to direct amendments to the rule or to recommend passage of the Resolve without amendment.

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<sup>2</sup> This submission date was changed from "at least 45 days before statutory adjournment" to the second Friday in January by Public Law 2005, chapter 586. This law takes effect 90 days after adjournment of the 2<sup>nd</sup> Regular Session of the 122<sup>nd</sup> Legislature.

5. The Resolve is reported out on the floor of the House or Senate and acted upon like any other bill. The agency's ability to finally adopt the rule depends on the content of the final Resolve. If the rule was submitted within the required time limit, but the Legislature fails to take final action on the Resolve, the agency may finally adopt the rule.

#### **HOW DOES A COMMITTEE REVIEW A RULE?**

The statute requires the committee to review the rule in a public meeting. As stated above, the public meeting usually occurs as a public hearing on the Resolve authorizing final adoption of the rule. The committee must notify the agency of the meeting. The statute also sets forth the following criteria to be considered by the committee:

- Has the agency exceeded the scope of its authority?
- Does the rule conform to the legislative intent of the statute it implements?
- Does the rule conflict with other rules or laws?
- Is the rule necessary to accomplish the objectives of the law?
- Is the rule reasonable?
- Could the rule be made less complex or easier to understand?
- Have the proper procedures been followed in adopting the rule?
- If the rule significantly reduces property value, is the reduction necessary or appropriate and does the rule avoid an unconstitutional taking?

After reviewing the rule, 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 allow the agency to finally adopt the rule with changes, 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 committee is required to make its report to the Legislature not less than 30 days before the statutory adjournment date.

#### **WHAT HAPPENS AFTER THE RESOLVE IS PASSED?**

If the Resolve authorizes the agency to adopt the rule or any part of the rule with or without change, the agency has 60 days after the effective date of the Resolve to finally adopt the rule. The Resolve may specify a different deadline or procedure for adoption.

If the Resolve required the agency to change the rule before final adoption, the agency may finally adopt the rule only if the final rule complies with the Legislature's directives.

#### **WHAT HAPPENS IF THE LEGISLATURE FAILS TO ACT ON THE RESOLVE?**

If the rule was submitted to the Legislature within the required deadline, but the Legislature fails to act on it, the agency may finally adopt the rule. If the Legislature wants to prohibit adoption of the rule, it should enact legislation specifically stating that the rule is not authorized.

**WHAT HAPPENS IF THE AGENCY FAILS TO SUBMIT THE RULE WITHIN THE REQUIRED TIME LIMIT?**

If the agency fails to submit the rule and accompanying documents on time, the Legislature may consider it, but is not required to do so. If the rule came in late, and the Legislature failed to act on it, the agency is not authorized to proceed to final adoption.

**SUMMARY OF STEPS IN THE LEGISLATIVE REVIEW PROCESS FOR MAJOR SUBSTANTIVE RULES**

1. Legislature enacts a statute authorizing an agency to adopt a major substantive rule
2. Agency conducts APA rulemaking proceedings and provisionally adopts the rule
3. Agency files provisional rule with the Legislature not later than 5:00 p.m. on the 2<sup>nd</sup> Friday in January
4. Rule is referred to the appropriate policy committee, along with a Resolve proposing to authorize the agency to finally the adopt the rule
5. Committee reviews the rule and reports its recommendation to the full Legislature within 30 days before statutory adjournment
6. Legislature considers committee report and enacts legislation approving or rejecting final adoption of the rule

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