

Article 7 Rules Review Issues memo

DOES YOUR STATE HAVE A FORMAL (I.E., STATUTORY OR CONSTITUTIONAL) RULES REVIEW FUNCTION?

Delaware: Delaware does not have a formal rules review function. There are two informal methods that rules can be reviewed. The Sunset committee, which reviews several executive branch agencies each year includes an informal rules review in the process. There is also a method of rules review that has never been used, at least as long as I have been here, by which the chair of the committee that oversees an agency can review a rule when the General Assembly is not in session.

Idaho: Yes, the formal review process is outlined in statute (IAPA). A cursory review by the germane joint subcommittees is done when proposed rules are filed with my office and the legislative services office. At the beginning of each legislative session the individual germane committees of the legislature review all rules that have been submitted for final approval.

Iowa: Yes (Administrative Rules Review Committee) see Iowa Code section 17A.8.

Montana: Yes, Part 4 of the Administrative Procedure Act provides for the Legislative Review of Rules.

New York: Yes, preproposal review by the Governor's Office of Regulatory Reform

(GORR) , Executive Order. 20, Governor George E. Pataki, continued by Executive Order 1, Eliot Spitzer.

Minimum Comment period after proposal (45 or 60 days) - SAPA, 202 5-year review by adopting agencies of rules five years after adopting, SAPA 207

Oklahoma: Yes

South Dakota: Yes

Texas: Statutory

Utah: Yes. Utah Code Section 63-46a-11 creates an Administrative Rules Review Committee (ARRC). Additionally, an executive order dated 3/22/1988 establishes executive review of rules by the Governor's Office of Planning and Budget (GOPB).

Wisconsin: Yes

Wyoming: Yes, found in 29A-3-10 (<http://www.wvsos.com/adlaw/rulemaking/wvcapa.htm>) Legislative Rule Making Review Committee (LRMRC)

IS IT AN EXECUTIVE, LEGISLATIVE, JUDICIAL, OR COMBINED FUNCTION OR AGENCY?

Idaho: Formally, this function is legislative. In practice most agencies perform some sort of internal review and in some cases the governor's office does a review but none of these reviews are considered formal nor are they addressed in statute.

Iowa: Legislative: 5 senators and 5 representatives

Montana: Legislative function

New York: Executive review, except for the review by the Administrative Regulations Review Commission during the comment period which is Legislative.

Oklahoma: Executive (Governor) and Legislative (House and Senate) - Policy, authority, legal review Office of Administrative Rules (Secretary of State) --- Format, numbering review

South Dakota: Legislative

Texas: Legislative* Judicial** Administrative***

* The APA provides a procedure for rules to be referred to standing committees for review. In practice, this provision is rarely (if ever) implemented.

** The APA provides for judicial review, but probably not applicable in this context. It describes how a court may render a declaratory judgment to invalidate or remand and rule when an agency is sued in district court.

*** The APA directs agencies to self review their rules every four years to determine if the justification for their adoption is still valid. The goal is to repeal obsolete rules.

Utah: Legislative (statutory) and executive (executive order).

Wisconsin: Legislative

Wyoming: Legislative

IS IT BEFORE OR AFTER THE FINAL RULE IS ADOPTED BY THE RULEMAKING AGENCY?

Idaho: It is after the agency's formal adoption of a rule. Rules adopted by the agency are called "pending rules" because they are pending legislative review for final approval. In Idaho a rule cannot become final and effective until it has been submitted to the legislature for review. Rules become final on the adjournment date of the legislative session unless they are acted on by concurrent resolution or some other effective date has been approved.

Iowa: The Administrative Rules Review Committee reviews both proposed and adopted rules and may schedule a special review at any time.

Montana: 2-4-402, MCA provides for the review of proposed rules by the administrative rules review committees. These committees are the interim committees and the Environmental Quality Council.

New York: For GORR it is before the rule is proposed.
Comment period is after the rule is proposed but before it is adopted.
5-year review is five years after the rule is adopted

Oklahoma: Before

South Dakota: The final rules are "adopted" by the state agency, but cannot be filed with the Secretary of State and become effective until the rules

committee has reviewed them. If the committee does not meet before the deadline for adopting rules has expired, the agency can proceed with filing the rules. The rules will become effective; however, they are still subject to a review by the committee. So in these few cases, the review will actually take place after the rules are adopted, filed, and become effective.

Texas: Legislative review is for Proposed rules

Utah: The ARRC has statutory authority to review proposed and effective rules. GOPB reviews proposed rules.

Wisconsin: Both

Wyoming: Before for Legislative rules

DOES IT – THE RULES REVIEW – APPLY TO A REVIEW OF:

- **PERMANENT PROPOSED RULES --**

- **Idaho:** Yes
- **Iowa:** Yes, the Administrative Rules Review Committee reviews all proposed rules.
- **Montana:** Yes
- **New York:** Rules proposed for permanent adoption - GORR review applies and comment period applies
- **Oklahoma:** Yes
- **South Dakota:** Yes
- **Texas:** Yes
- **Utah:** Yes
- **Wisconsin:** Yes
- **Wyoming:** We have 3 types of permanent rules, Legislative, Procedural & Interpretive. Only Legislative go through LRMRC

- **TEMPORARY PROPOSED RULES --**

- **Idaho:** Yes
- **Iowa:** No
- **Montana:** Not Excluded
- **New York:** Rules are temporary by statute. (Effective for 60 or 90 days). GORR review does not apply to emergency rule makings. There is no formal required comment period for emergency rules. However, comments may be submitted and if

subsequent emergency adoptions occur, any comment submitted must be considered.

- **Oklahoma:** n/a
- **South Dakota:** We don't have "temporary" rules
- **Texas:** Yes
- **Utah:** N/A, Utah doesn't have anything called a temporary proposed rule.
- **Wisconsin:** N/A
- **Wyoming:** No temporary rules
- **EMERGENCY PROPOSED RULES --**
 - **Idaho:** Idaho has no emergency rules; they are temporary rules.
 - **Iowa:** Yes, the Administrative Rules Review Committee reviews all proposed and adopted rules.
 - **Montana:** Not Excluded
 - **Oklahoma:** Yes (Governor and OAR/SOS only)
 - **South Dakota:** Yes
 - **Texas:** Yes
 - **Utah:** Yes
 - **Wisconsin:** Published emergency rules
 - **Wyoming:** Emergency rules are approved by the Secretary of State. An emergency rule may be effective for a total of 15 months. This is the condition of a Legislative rule only, and cannot be filed without a companion Legislative rule with it.

DOES YOUR REVIEWING ENTITY (INCLUDING THE CODE PUBLISHER) HAVE THE AUTHORITY TO MAKE OR REQUIRE:

- **TECHNICAL, STYLISTIC, GRAMMATICAL, NON-SUBSTANTIVE CHANGES --**
 - **Idaho:** Although the Idaho APA allows the legislature to "approve, reject, amend or modify" agency rules by concurrent resolution, they were advised to only approve and reject (in whole or in part) rules that are before them for review to avoid a separation of powers challenge. As the Code publisher I can make most of the changes mentioned here with the exception of substantive changes to the content.
 - **Montana:** No
 - **New York:** NO, technical changes by DOS only, for example, the numbering scheme of a code or rule.
 - **Oklahoma:** Spelling only

- **Texas:** Secretary of State--yes, with agency's knowledge
- **Utah:** No
- **Wisconsin:** Yes the revisor has authority under s. 13.93 (2m) (b), Wis. Stats.
- **SUBSTANTIVE CHANGES TO THE CONTENT OF THE RULES --**
 - **Iowa:** The Administrative Code Editor has the authority, as set out in Iowa Code section 2B.13(2). The Administrative Rules Review Committee cannot change a rule.
 - **Montana:** No. **The appropriate administrative rule review committee may prepare and submit recommendations and/or submit comments at a rulemaking hearing.**
 - **New York:** Yes, GORR can require substantive changes during the rule making process. Approval by GORR is required before permanent rules can be proposed and before subsequent substantive changes to a proposed rule can be made. The Department of State and the Code publisher do not have the authority to make substantive changes to proposed rules.
 - **Oklahoma:** No
 - **South Dakota:** The reviewing entity (which is also the publisher) recommends technical, stylistic, grammatical, and other non-substantive changes. The reviewing entity does not make substantive changes.
 - **Texas:** No
 - **Utah:** No. HOWEVER, the ARRC must prepare legislation to reauthorize administrative rules each year. Using that bill, the Legislature may decide to not reauthorize a rule or part of a rule, as it did this year -- see S.B. 122 (2007) at <http://le.utah.gov/~2007/htmdoc/sbillhtm/sb0122.htm> where the Legislature did not reauthorize Section R277-437-1. This process was crafted in 1989, post-Chadha. The process is codified at Utah Code Section 63-46a-11.5
 - **Wisconsin:** The Legislative committees can strongly "suggest" substantive changes to the agency to consider during legislative review of proposed rules. Final rules can only be suspended in whole or part, not revised
 - **Wyoming:** LRMRC may ask for all of the above changes. If changes are accepted, the Agency files a "Modified" rule, which is then submitted to the entire Legislature. It is given both a House and Senate bill number and sent to at least one

committee, sometimes 2 committees & sometimes 3 committees. The rules always end up in the Judiciary Committee. There the rules are "bundled" together, (such as all Environmental rules will be bundled together) and then passed. The Legislature may approve the rule as submitted to them, they may make significant changes or they may disapprove the rule altogether. After the rules bill passes, the Governor signs, the Agency final files the rule & establishes an effective date (unless mandated by the rules bill).

DOES YOUR REVIEWING ENTITY HAVE THE AUTHORITY TO PREVENT A RULE FROM TAKING EFFECT?

Idaho: Yes. The legislature can reject a rule before it takes effect.

Iowa: Yes. The Administrative Rules review Committee can delay the effective date for 70 days or until the end of the next General Assembly. The General Assembly can nullify a rule.

Montana: No. However, 2-4-412, MCA allows the legislature to repeal any rule in the ARM.

2-4-403, MCA also allows for the polling of legislators when not in session to determine if a proposed rule is consistent with the intent of the legislature. We had this occur in the Summer of 2006 for the first time (per sponsor of that bill being enacted). However, this does not prevent a rule from being adopted.

New York: GORR can refuse to grant consent to an agency to propose a rule. DOS can refuse to accept a rule that is not in substantial compliance with SAPA.

Oklahoma: Yes . . . Proposed permanent rules must be approved by both the Governor and Legislature, or by joint resolution of the Legislature. Proposed emergency rules must be approved by the Governor. In addition, the SOS's Office of Administrative Rules has the authority to reject any Register filing that does not substantially comply with statutes or the SOS's rules.

South Dakota: Yes

Texas: No. (But district court may invalidate a rule or remand a rule to agency.)

Utah: No. However, both the ARRC and GOPB may exercise a good deal of political pressure if they believe something should be changed.

Wisconsin: Yes

Wyoming: The code says:

(c) After reviewing the legislative rule, the committee shall recommend that the Legislature:

- (1) Authorize the promulgation of the legislative rule; or
- (2) Authorize the promulgation of part of the legislative rule; or
- (3) Authorize the promulgation of the legislative rule with certain amendments; or
- (4) Recommend that the proposed rule be withdrawn.

The committee shall file notice of its action in the state register and with the agency proposing the rule: *Provided*, That when the committee makes the recommendations of subdivision (2), (3) or (4) of this subsection, the notice shall contain a statement of the reasons for such recommendation.

PLEASE GIVE ANY STATUTORY OR ADMINISTRATIVE CODE REFERENCES TO YOUR:

- **APA:**
 - **Idaho:** Title 67, Chapter 52, Idaho code
 - **Iowa:** Iowa Code chapter 17A
 - **New York:** 202
 - **Oklahoma:** 75 O.S., Sections 250 et seq. (specifically, Sections 303.1 and 308) . . . <http://www.lsb.state.ok.us/>
 - **South Dakota:** SDCL ch 1-26
 - **Texas:** Texas Government Code, Chapters 2001 and 2002
 - **Utah:** Utah Code Title 63, Chapter 46b (Utah's APA addresses only adjudication)
 - **Wisconsin:** Chapter 227, Wis. Stats
 - **Wyoming:**
<http://www.wvsos.com/adlaw/rulemaking/wvcapa.htm>
- **OTHER GENERIC RULEMAKING STATUTES:**

- **Iowa:** Iowa Code chapter 2B (legal publications)
- **South Dakota:** I'm not sure exactly what you are meaning here, but I can tell you that each agency has its own statutes that must provide the basis for the rules it has or is attempting to adopt. If the agency does not have rule-making authority, it is prohibited from adopting rules...which isn't always a bad thing!! At any rate, our general rulemaking statutes are sprinkled throughout our code.
- **Utah:** Utah Code Title 63, Chapter 46a (this is the Utah Administrative Rulemaking Act)
- **RULEMAKING ADMINISTRATIVE CODES:**
 - **New York:** NYCRR 260, Executive Order 20
 - **Oklahoma:** Oklahoma Administrative Code (specifically OAC 655:10)
 - **South Dakota:** This would be our APA located in SDCL ch 1-26
 - **Texas:** Texas Administrative Code, Title 1, Part 4, Chapter 91
 - **Utah:** Not certain what you're looking for here. The citation requiring the creation of the Utah Administrative Code is Utah Code Subsection 63-46a-10(1)(e). The UAC's structure is defined at Section 63-46a-9.6. Judicial notice is required at Section 63-46a-16.
 - **Wisconsin:** s.35.93 Wis.Stats

ANYTHING ELSE YOU WANT TO ADD:

New York: Terminology can be confusing because Rule Review in New York has a specific purpose. Looking at a rule in five-year intervals after it is adopted.

Utah: A copy of the Utah Administrative Rulemaking Act is available online at <http://www.rules.utah.gov/main/index.php?module=Pagesetter&func=viewpub&tid=1&pid=12> . The 1988 Governor's Executive Order is available online at <http://www.rules.utah.gov/main/index.php?module=Pagesetter&func=viewpub&tid=1&pid=22>.