19.2 ADOPTING RULES WITHOUT A HEARING: A GENERAL COMMENT

Rulemaking, particularly that of federal agencies, is often characterized as either "informal" or "formal."[1] *Informal rulemaking* is the term generally used to describe the "notice and comment" rulemaking process required under section 553 of the federal Administrative Procedure Act.[2] Under the informal rulemaking approach, the federal rulemaking agency gives notice of proposed rules in the *Federal Register*, receives comments from interested parties, and then promulgates final rules along with a concise general statement of the basis and purpose of the rules. *Formal rulemaking,* on the other hand, is the term commonly used to describe the process required under sections 553(c), 556, and 557 of the federal act, in which the agency is obligated to conduct rulemaking on the record after a trial-type hearing.[3]

In reality, there is currently a spectrum of rulemaking between informal and formal rulemaking, both at the federal level and in Minnesota. This spectrum represents a range of increasing formality in the substantive and procedural requirements imposed on the rulemaking agency.[4] At the least formal end of the spectrum are rulemaking procedures such as Minnesota's exempt and expedited rulemaking processes,[5] where both the substantive requirements placed on the agency and the structured opportunities for public participation are comparatively few. At the most formal end of the spectrum would be a federal trial-type hearing or the adoption of a rule with a public hearing in Minnesota.[6] Minnesota's process for adopting a rule without a public hearing falls between these two ends of the spectrum.

Adopting a rule without a public hearing is more like the federal "notice and comment" or informal rulemaking proceeding. However, it is not a *pure* notice and comment proceeding. For example, unlike the federal informal rulemaking process, which *never* involves a hearing, in Minnesota the public *may* request a hearing and thereby convert a nonhearing rulemaking process into a formal rulemaking proceeding involving a hearing. The Minnesota APA allows a plebiscite of sorts in this respect, as the nonhearing rulemaking process is automatically converted into a hearing-based rulemaking proceeding if 25 or more persons submit timely written requests for a hearing.[7]

The intent behind the twenty-five-person trigger mechanism appears to be to require a hearing if there is significant opposition to proposed rules.[8] The agency is presented with an

1 *See, e.g.,* Aaron Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 238-40 (2014) (contrasting informal rulemaking with formal rulemaking).

2 5 U.S.C. § 553(2012).

3 *Id.* at 243.

4 *Cf.* Stephen F. Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 425-36 (1975) (discussing a spectrum of "hybrid rulemaking cases"). For a description of the current range of federal rulemaking procedures, see VANESSA K. BURROWS & TODD GARVEY, CONG. RESEARCH SERV., PUB. NO. R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 1-10 (2011).

5 MINN. STAT. §§ 14.385-.389 (2014).

6 *Id.* §§ 14.131-.20.

7 *Id*. § 14.25.

8 *See, e.g.*, MODEL STATE ADMIN. PRO. ACT § 3–104 cmt. (1981). *But cf.* REVISED MODEL STATE ADMIN. PRO. ACT § 306 (2010) (eliminating the 25- hearing request trigger and incorporating instead the federal notice-and-comment approach).

incentive to avoid the time and expense of going to hearing if agency staff can discuss and negotiate a compromise on proposed rules with persons who will consequently refrain from filing, or perhaps even withdraw, requests for a hearing.