

## 21.2 AUTHORITY TO ADOPT EXEMPT RULES

An agency has the authority to adopt exempt rules under quite limited circumstances. An agency may adopt an exempt rule when directed to do so by a statute that authorizes or requires rules to be adopted but excludes the rules from the usual rulemaking provisions of the APA or from the definition of a rule.<sup>1</sup> If an agency does not have direct statutory authority to adopt an exempt rule, an agency can try to adopt a rule using the “good cause” exemption.<sup>2</sup> The “good cause” exemption may be used by an agency if an agency for good cause finds that the rulemaking provisions of chapter 14 are unnecessary, impracticable, or contrary to the public interest when adopting, amending, or repealing a rule to:

- (1) address a serious and immediate threat to the public health, safety, or welfare;
- (2) comply with a court order or a requirement in federal law in a manner that does not allow for compliance with sections 14.14 to 14.28;
- (3) incorporate specific changes set forth in applicable statutes when no interpretation of law is required; or
- (4) make changes that do not alter the sense, meaning, or effect of a rule,

An agency has to meet one of the above criteria in order to have a rule adopted under the “good cause” exemption procedures. The first factor would apply in an emergency situation, where there is a serious and immediate threat to the public health. In the first two years after adoption of the exempt rulemaking statute, no agency requested approval of a rule based on this emergency factor. However, in 2002, the Commissioner of Public Safety adopted an exempt rule relating to proof of identity and residence for drivers’ licenses under the serious and immediate threat criteria. The Minnesota court of appeals found the rule to be invalid because the Department had not demonstrated that the normal rulemaking process was “unnecessary, impractical or contrary to the public interest” as required by the exempt rulemaking statute. The court determined that the agency had not shown how much delay would be caused by normal rulemaking or how delay would harm the public interest. The court described exempt rulemaking as an exceptional procedure

<sup>1</sup> MINN. STAT. § 14.386 (2014). This statutory section applies to statutes enacted after January 1, 1997, authorizing or requiring rules to be adopted but excluded from chapter 14 or from the definition of a rule.

<sup>2</sup> *Id.* § 14.388. The “good cause” exemption is similar to the exempt rule procedures in the 1981 Model State Administrative Procedure Act and the federal Administrative Procedures Act, 5 U.S.C. § 553 (b)(B), but much more limited. Section 14.388 was added to this state’s APA by the legislature in 1995. According to 1981 Model Act § 3-108(a), (b), if an agency makes a specific finding, for good cause, that any of the procedural requirements of the act are “unnecessary, impracticable, or contrary to the public interest,” the agency may proceed to adopt a rule without regard to those requirements. The findings and a statement of supporting reasons must be incorporated into the rule, and if an action is brought challenging the rule, the burden is on the agency to demonstrate that its findings are justified under “the particular circumstances involved.” In contrast, the 2010 Revised Model State APA, which was not available to the Minnesota legislature in 1995 when the legislature adopted the state’s good cause exemption, includes an emergency rule provision (section 309) in place of exempt rule procedures. The emergency rule provision requires the agency to find “imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program” to justify noncompliance with a procedural requirement.

that should be reserved for emergencies.<sup>3</sup> The second criteria, while not absolutely clear, is likely to be interpreted to apply in cases where a timetable for rulemaking imposed by federal law or a court order could not be met if the usual APA procedures, including a rule hearing, were followed. Some federal case law exists that interprets similar “good cause” language related to both serious threat,<sup>4</sup> and the effect of a court order.<sup>5</sup> Other federal case law interprets the “unnecessary, impractical, or contrary to the public interest” standard.<sup>6</sup>

The first two criteria have a sense of urgency attached to them in that rules presumably need to be adopted quickly to address an immediate problem. Therefore, the legislature allowed agencies leeway in the rulemaking process by not having to comply with all of the rulemaking procedures of the APA. However, in order to recognize the limited process needed to adopt these exempt rules, rules adopted, amended, or repealed under clauses (1) and (2) are only effective for a period of two years from the date of publication of the rule in the *State Register*. The limited effective date gives the agency an opportunity to quickly adopt the rules that are needed immediately but it also gives the public a chance to be involved in the rulemaking process during the later development of the permanent rules. Usually, the agency will begin the permanent rulemaking process shortly after the adoption of the exempt rules, so that the permanent rules are ready to be adopted at the time the exempt rules expire.

The third and fourth criteria have less of an urgency factor to them and have been interpreted by the Office of Administrative Hearings (OAH) to have more of an updating or correction purpose. The third criteria has been used by an agency to incorporate specific changes set forth in applicable statutes when no interpretation of law is required. For example, if the legislature makes a change to an agency’s program by statute, that change could also be updated in the agency’s corresponding rule so that the statute and the rule are consistent. No interpretation of law would be required because the statutory language prevails. For example, if the legislature repeals a particular program of an agency and if the agency has rules that implement the program, the agency might be able to proceed to repeal the rules through the good cause exemption procedures. It would argue that since the statutory authority for the rules have been repealed, there is no interpretation of law required in proposing that the rules also should be repealed.<sup>7</sup>

The fourth criteria is similar, but instead of making a change based on a specific change set forth in applicable statutes, the criteria allows for an agency to make a rule modification if that change does not alter the sense, meaning, or effect of a rule. This criteria has been construed narrowly by the OAH, and is harder for an agency to comply with in that there are

<sup>3</sup> Jewish Cmty. Action v. Comm’r of Pub. Safety, 657 N.W.2d 604, 610 (Minn. Ct. App. 2003).

<sup>4</sup> Wash. State Farm Bureau v. Marshall, 625 F.2d 296, 307 (9th Cir. 1980).

<sup>5</sup> SEIU, Local 102 v. Cnty. of San Diego, 60 F.3d 1346, 1352-53 (9th Cir. 1995).

<sup>6</sup> N.C. Growers’ Ass’n v. United Farm Workers, 702 F.3d 755, 766-67 (4th Cir. 2012) (discussing all three components of the standard); Nat’l Nutritional Foods Ass’n v. Kennedy, 572 F.2d 377, 385 (2d Cir. 1978) (discussing the impractical standard); see also Juan Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 381 (1989).

<sup>7</sup> In recent years, the legislature has specifically authorized agencies to use the good cause exemption in section 14.388, subdivision 1, clause (3), to make conforming changes to a rule. See, e.g., 2014 MINN. LAWS ch. 244, § 2, at 1 (authorizing Peace Officer Standards and Training Board to use good cause exemption in Minn. Stat. § 14.388, subd. 1(3) (2014), to delete references to part-time peace officer licenses to bring rules into conformity with statutory elimination of this type of licensure).

few instances where a modification in a rule will not change or alter the sense or effect of the rule. However, there are editorial changes are likely to fall into this category. Changes to correct rule or statutory citations, or to correct typographical errors are some examples of how this criteria can be useful.