

## 21.3 PROCEDURE FOR ADOPTION OF EXEMPT RULES

### 21.3.1 Introduction

Unless a specific exception is made by the legislature, exempt rules must be adopted in accordance with the exempt rulemaking provisions of the APA.<sup>1</sup> Otherwise, they are invalid.<sup>2</sup> Agencies have great latitude to solicit public input in developing a proposed exempt rule. Agencies are not required to obtain comments from the public before adopting an exempt rule. However, depending on the time considerations and the nature and scope of the rule, some agencies will seek comments from the affected parties. Listed below are the procedures that the agencies must follow to properly adopt an exempt rule. This procedure applies whether an agency is adopting an exempt rule with direct statutory authority or using the “good cause” exemption.

### 21.3.2 Approval of Form by Revisor of Statutes

The agency’s exempt rule must be certified approved as to form by the Revisor of Statutes. As in general rulemaking, the agency needs to submit a draft of its rule to the Revisor of Statutes who will put it into the proper format and style.<sup>3</sup>

#### 21.3.2 (1) Notice and Comment Procedure for Rulemaking under the Good Cause Exemption

Under a 2003 amendment, an agency adopting rules under the good cause exemption must give notice to its rulemaking list no later than the date that the agency submits the proposed rule to the OAH for review.<sup>4</sup> The notice must include the proposed changes, must explain why the rule meets the requirements of the good cause exemption, and must state that interested parties have five days to submit comments to OAH. This amendment was the result of the use of the good cause exemption to adopt a controversial drivers’ license rule that the legislature felt lacked adequate public notice.

### 21.3.3 Submission of Exempt Rule to the Office of Administrative Hearings

The agency must submit the exempt rule to the OAH for review.<sup>5</sup> The agency must file with the OAH the certified copy of the rule, and a proposed Order Adopting the Rule which must include: (1) any explanation needed to support the legality of the rule, (2) the citation to the rule’s statutory exemption from the rulemaking procedures and any argument needed to support the claim of exemption; or an explanation of why the rule meets the requirements of the good cause exemption, and (3) any other information required by law or rule.<sup>6</sup>

<sup>1</sup> MINN. STAT. § 14.386 (2014).

<sup>2</sup> *See, e.g.,* White Bear Lake Care Ctr. v. Minn. Dep’t of Pub. Welfare, 319 N.W.2d 7, 9 (Minn. 1982).

<sup>3</sup> MINN. STAT. § 14.386(a)(1) (2014).

<sup>4</sup> *Id.* § 14.388, subd. 2.

<sup>5</sup> *Id.* § 14.386(a)(3); *see* MINN. R. 1400.2400 (2013) (listing documents that must be submitted to the OAH).

<sup>6</sup> MINN. R. 1400.2400, subp. 2 (2013).

### 21.3.4 Review by the Office of Administrative Hearings

The OAH must approve or disapprove the exempt rule submitted by the agency within 14 days after the agency submits it for approval.<sup>7</sup>

The OAH is directed to review an exempt rule in regard to its “legality.”<sup>8</sup> All questions regarding the form of a rule have been assigned to the revisor of statutes.<sup>9</sup> With respect to questions of legality, the scope of the OAH's review, given its importance, is necessarily broad. An exempt rule will be disapproved if (1) the agency has failed to comply with applicable provisions of the APA, or other law or rule, unless the administrative law judge decides that the error must be disregarded as a harmless error;<sup>10</sup> (2) the rule exceeds the agency's statutory authority;<sup>11</sup> (3) the rule conflicts with applicable state and federal law;<sup>12</sup> (4) the rule grants the agency discretion beyond that permitted by its enabling legislation;<sup>13</sup> (5) the rule is unconstitutional or illegal;<sup>14</sup> (6) the rule contains an improper delegation of agency power to another agency, person, or group;<sup>15</sup> (7) the rule is not a statement of general applicability and future effect adopted to implement or make specific the law enforced or administered by the agency;<sup>16</sup> or (8) the rule, by its terms, cannot have the force of law.<sup>17</sup> In addition to the above, the OAH must determine whether the agency has established its exemption from rulemaking.<sup>18</sup>

If an exempt rule is disapproved, the OAH must prepare a written statement of the reasons for the disapproval, together with recommendations for overcoming the stated defects, or tell the agency why the rule is not exempt from rulemaking procedures.<sup>19</sup>

In the case of a rule adopted under the good cause exemption, the ALJ must review any public comments submitted along with the agency submissions.<sup>20</sup> If the proposed rule is disapproved by the ALJ, the agency may ask the Chief ALJ to review that determination. However, the agency must again give notice to its rulemaking list no later than the date of its request for review by the Chief ALJ, and must include in its notice a summary of any information or arguments it is submitting to the chief judge that were not submitted to the ALJ.<sup>21</sup>

<sup>7</sup> MINN. STAT. § 14.386(a)(3) (2014).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* §§ 14.08, .385.

<sup>10</sup> *See, e.g.,* White Bear Lake Care Ctr. v. Minn. Dep't of Pub. Welfare, 319 N.W.2d 7, 9 (Minn. 1982); MINN. R. 1400.2100(A) (2013).

<sup>11</sup> MINN. R. 1400.2100(D) (2013).

<sup>12</sup> *E.g.,* Sellner Mfg. Co. v. Comm'r of Taxation, 295 Minn. 71, 74, 202 N.W.2d 886, 888 (1972); MINN. R. 1400.2100(D) (2013).

<sup>13</sup> MINN. R. 1400.2100(D) (2013).

<sup>14</sup> *Id.* (E).

<sup>15</sup> *Id.* (F).

<sup>16</sup> MINN. STAT. § 14.02, subd. 4 (2014); MINN. R. 1400.2100(G) (2013).

<sup>17</sup> MINN. R. 1400.2100(G) (2013).

<sup>18</sup> *Id.* 1400.2400, subp. 3.

<sup>19</sup> *Id.* subp. 4a.

<sup>20</sup> MINN. STAT. § 14.388, subd. 1 (2014).

<sup>21</sup> *Id.* subd. 3.

### 21.3.5 Agency Action Following Disapproval

If an exempt rule is disapproved by the OAH, the agency has three options. First, the agency can elect to proceed no further with the exempt rule, publish a notice of withdrawal in the *State Register*,<sup>22</sup> and either end the rulemaking or begin the exempt rulemaking process again. Second, the agency can attempt to correct the defects stated by the OAH and resubmit the exempt rule to the OAH.<sup>23</sup> The number of times that an exempt rule can be disapproved, corrective action taken, and the rule resubmitted is not limited. Any resubmission is subject to the same review provisions that were applicable to the original submission.<sup>24</sup>

The final option is for the agency to ask the chief judge to review a rule that has been disapproved.<sup>25</sup> The agency must make this request within five working days of receiving the judge's decision. The chief judge then has 14 days to review the agency's filing and either approve or disapprove it under the same legality standards discussed above.

### 21.3.6 Filing and Publication of Approved Exempt Rule

On approval of an exempt rule by the OAH and approval of the form of the rule by the revisor of statutes, the OAH must file three copies of the approved rule with the secretary of state.<sup>26</sup> Upon approval of the rule the agency must publish it in the *State Register* in order for the rule to have the force and effect of law.<sup>27</sup>

<sup>22</sup> *Id.* § 14.05, subd. 3.

<sup>23</sup> MINN. R. 1400.2400, subp. 4a (2013).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* subp. 5.

<sup>26</sup> MINN. STAT. § 14.08(a), (c) (2014); MINN. R. 1400.2400, subp. 4 (2013).

<sup>27</sup> MINN. STAT. § 14.386(a)(4) (2014).