

# Chapter 19. Rulemaking without a Hearing

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## 19.1 Introduction

This chapter describes a commonly used process to adopt rules in Minnesota: rulemaking without a hearing. Although the primary purpose of this chapter is to describe rulemaking without a hearing, other issues are necessarily touched on that are covered more completely elsewhere. These other issues include the drafting of rules,<sup>1</sup> the role of the revisor of statutes,<sup>2</sup> the Statement of Need and Reasonableness (SONAR),<sup>3</sup> the issue of substantial change,<sup>4</sup> legal review of rules by the Office of Administrative Hearings (OAH)<sup>5</sup> and the judicial and legislative review of rules.<sup>6</sup>

## 19.2 Adopting Rules Without a Hearing: A General Comment

Rulemaking, particularly that of federal agencies, is often characterized as either “informal” or “formal.”<sup>7</sup> *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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> At the least formal end of the spectrum are rulemaking procedures such

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<sup>1</sup> See ch. 17.

<sup>2</sup> See ch. 18.

<sup>3</sup> See ch. 17.

<sup>4</sup> See ch. 22.

<sup>5</sup> See ch. 23.

<sup>6</sup> See chs. 24, 25.

<sup>7</sup> 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).

<sup>8</sup> 5 U.S.C. § 553(2012).

<sup>9</sup> *Id.* at 243.

<sup>10</sup> 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

as Minnesota's exempt and expedited rulemaking processes,<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

The intent behind the twenty-five-person trigger mechanism appears to be to require a hearing if there is significant opposition to proposed rules.<sup>14</sup> The agency is presented with an 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.

### 19.3 Proposal, Comment, and Negotiation

Minnesota statutes and rules specifically govern the use of the rulemaking without a hearing process.<sup>15</sup> The process is initiated when the rulemaking agency publishes a Request for Comments<sup>16</sup> and undertakes the principal research and drafting of the rules and the SONAR.<sup>17</sup> The agency may also conduct preliminary informal negotiation with affected persons, convene an advisory task force, or facilitate a special statutory advisory panel review.<sup>18</sup> At this point, as a matter of practice, the rulemaking agency works on the text of the draft rules with the revisor's office. This facilitates the revisor's review and certification of the rule that is ultimately adopted.<sup>19</sup>

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REVIEW 1-10 (2011).

<sup>11</sup> Minn. Stat. §§ 14.385-.389 (2014).

<sup>12</sup> *Id.* §§ 14.131-.20.

<sup>13</sup> *Id.* § 14.25.

<sup>14</sup> *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).

<sup>15</sup> *See* Minn. Stat. §§ 14.22-.28 (2014); Minn. R. 1400.2300-.2310 (2013). Other generally applicable provisions of the APA also affect the adoption of rules without a public hearing. *E.g.*, Minn. Stat. § 14.02, subd. 4 (2014) (defining *rule*). Since such provisions do not uniquely apply to adopting rules without a public hearing and are generally addressed elsewhere, they will not be discussed here.

<sup>16</sup> Minn. Stat. § 14.101 (2014); Minn. R. 1400.2050, .2510 (2013).

<sup>17</sup> *See* § 17.2.

<sup>18</sup> *See generally* ch. 17.

<sup>19</sup> Minn. Stat. §§ 14.08, .28 (2014).

### 19.3.1 Notice and Comment

After the agency has developed the rule and the SONAR, the next step under the APA occurs with publication of a notice of its intent to adopt proposed rules without a public hearing.<sup>20</sup> The notification process involves publishing the notice of proposed rulemaking in the *State Register*<sup>21</sup> and mailing or e-mailing it to those persons registered with the agency to receive such notices.<sup>22</sup> The *State Register* must contain the text of the proposed rule. However, the chief administrative law judge (ALJ) may authorize an agency to omit the text of a proposed rule from the notice if publication in the *State Register* would be unduly cumbersome, expensive, or otherwise inexpedient.<sup>23</sup> The mailed or e-mailed notice must include either a copy of the proposed rule or an easily readable and understandable description of the nature and effect of the rule and a statement that a free copy of the proposed rules is available on request from the agency.<sup>24</sup>

As part of the notice process, each agency must make reasonable efforts to notify persons or classes of person who may be significantly affected by the rule being proposed by giving notice of its intention in newsletters, newspapers, or other publications, or through other means of communication.<sup>25</sup> Many agencies also publish the notice, proposed rules, the SONAR and other rule documents on the agency's web site. The notice invites public comment on the proposed rule for a thirty-day period, identifies the date on which the comment period ends, and states that a hearing will be held if 25 or more persons submit written requests for a hearing by that date.<sup>26</sup> The notice also notes the possibility of modification of the proposed rules as a result of the comments received.

Persons commenting on the proposed rule are encouraged in the notice to identify the portion of the proposed rule addressed, the reason for the comment, and any change

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<sup>20</sup> *Id.* § 14.22 (2014); Minn. R. 1400.2080 (2013).

<sup>21</sup> The *State Register* is published by the Minnesota Department of Administration and is the state's official publication for all agency rules, executive orders, and other official notices. Minn. Stat. § 14.46, subd. 1 (2014). The *State Register* is published weekly and is available online at [https://www.revisor.mn.gov/state\\_register/](https://www.revisor.mn.gov/state_register/).

<sup>22</sup> Minn. Stat. §§ 14.14, subd. 1(a), .22, subd. 1 (2014). Each agency maintains its own rulemaking mailing list, which includes all persons registered with the agency to receive these notices. Persons may register to receive notice by submitting their electronic mail address or their name and United States mail address.

<sup>23</sup> *Id.* § 14.22, subd. 1(b). In addition, the chief ALJ must find that knowledge of the rule is likely to be important to only a small class of persons. The notice must state that a free copy of the entire rule is available upon request to the agency, state in detail the specific subject matter of the omitted rules, cite the statutory authority and provide detail about the proposed rule's purpose and motivation.

<sup>24</sup> *Id.* §§ 14.14, subd. 1 (a), .22, subd. 1(a).

<sup>25</sup> *Id.* An agency may request prior binding approval of its plan for giving "additional notice" from the OAH. Minn. R. 1400.2060 (2013); *see also* Minn. Stat. § 14.116 (2014) (requiring agencies to send the notice and SONAR to the chairs and ranking minority members of legislative policy and budget committees with jurisdiction over the subject matter, and to the Legislative Coordinating Commissioner. If the notice is mailed within two years of the effective date of the grant of the rulemaking authority, agencies are also required to send the notice and SONAR to all sitting chief authors of the bill granting the authority).

<sup>26</sup> Minn. Stat. § 14.22, subd. 1(a) (2014).

proposed.<sup>27</sup> Persons requesting a public hearing are required to state their names and addresses, to identify the portion or portions of the rule to which the person objects or a statement that the person opposes the entire rule. Written requests for a public hearing that do not comply with the statutory requirements are invalid and must not be counted by the agency in determining whether a public hearing must be held.<sup>28</sup> Finally, the notice states that if a hearing is not required, the date of submission of the proposed rule to the OAH for review and approval will be mailed to any person requesting notification of this date.<sup>29</sup>

### 19.3.2 Negotiation

If the rulemaking agency receives 25 or more written requests for a public hearing, it must proceed under the “hearing” rulemaking provisions of the APA,<sup>30</sup> including providing notice of the required rulemaking hearing.<sup>31</sup> The agency must, in addition, send notice of the public hearing to all persons who submitted a request for public hearing. If an agency receives 25 or more requests for a public hearing the agency may attempt to negotiate the withdrawal of those hearing request to below 25.<sup>32</sup> If enough requests for a public hearing have been withdrawn to reduce the number of requests below 25, the agency must give written notice of the fact to all persons who have requested the public hearing. The notice must explain why the hearing requests are being withdrawn, and must include a description of any action the agency has taken or will take that affected or may have affected the decision to withdraw the request. The notice must also explain that persons may submit written comments about the withdrawal to the agency within five working days.<sup>33</sup> If the hearing requests have been reduced to below 25 and the agency has complied with the necessary notice requirements, the agency may adopt the rule and submit it to the OAH for review. Even if sufficient requests are withdrawn, a hearing may not be cancelled by an agency within three working days of the hearing.<sup>34</sup> As part of the legal review, the ALJ will review the notice and any written comments to determine whether the withdrawal of the hearing requests is consistent with the purposes of the APA.<sup>35</sup>

The alternative procedure of allowing the agencies to obtain the withdrawal of hearing

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<sup>27</sup> *Id.* subd. 1(a)(2).

<sup>28</sup> *Id.* § 14.25, subd. 1.

<sup>29</sup> *Id.* § 14.22, subd. 1(a)(7); *see also* Minn. R. 1400.2080 (2013) (listing requirements for additional notice where a public hearing is not required); MINNESOTA RULEMAKING MANUAL: A REFERENCE BOOK FOR THE PRACTITIONER ch. 5, at 36-50 (Patricia Winget et al. eds., 19th ed. 2014), *available at* <http://www.health.state.mn.us/rules/manual/2014manual.pdf> (further discussing the drafting of notice of intent to adopt rules without a hearing).

<sup>30</sup> *See* Minn. Stat. §§ 14.14-.20, .25, subd. 1 (2014); *see also* ch. 20.

<sup>31</sup> Minn. Stat. § 14.25, subd. 1 (2014); Minn. R. 1400.2200-.2240 (2013). However, if under Minn. Stat. § 14.22, subd. 2 (2014), an agency published a “dual notice,” the notice of hearing and hearing date have already been published and the agency may proceed to hearing without publishing a new notice of hearing.

<sup>32</sup> *See* Minn. Stat. §§ 14.25, subd. 2 (2014) (addressing withdrawal of hearing requests).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* The ALJ should consider the APA purposes of public accountability of administrative agencies, public access to governmental information, and public participation in the formulation of administrative rules. *See id.* § 14.001(2), (4)-(5).

requests instead of proceeding directly to a hearing allows the agency to negotiate with the public after the publication of the proposed rule in the *State Register*. This procedure can be helpful to all parties involved in the process. For example, members of the public may request a public hearing so they have the opportunity to introduce a new proposal or a change to the proposed rule. Upon receiving the requests for a hearing, the agency may agree that the new proposal or rule change is a good idea and should be included in the adopted rule. Through a process of negotiation, the agency is able to obtain the withdrawal of the hearing request by agreeing to incorporate the new proposal or change into the adopted rule. Thus all parties benefit by having an improved rule and avoiding the time and expense of going to a public hearing. However, all modifications to a rule will still be subject to a review by the ALJ to determine if the modified rule is “substantially different” from the rule as proposed in the notice of intent to adopt rules or notice of hearing.<sup>36</sup> And, the rights of persons not involved in the negotiations are protected by the procedure described in the prior paragraph. If, in spite of negotiations, sufficient written requests for a hearing remain, a rulemaking hearing will be conducted.<sup>37</sup>

The agency's SONAR, as well as other statutorily required analyses, is of particular interest in determining the impact of the proposed rules or attempting to negotiate with the rulemaking agency. Before the date of the notice of intent to adopt a rule without a hearing, the agency must have made its SONAR available to the public.<sup>38</sup> Other special analyses may also be required to be made available by the agency at this point. These special analyses, which are more fully discussed in chapter 17, may be required or allowed to be included in the SONAR. The special analyses often relate to the projected costs of compliance with the proposed rule.

### 19.3.3 Dual Notice Rulemaking

An agency may publish a “dual notice” which notifies the public of the proposed adoption of rules without a hearing notice of a contingent rulemaking hearing. The dual notice must include a statement that the agency intends to cancel the hearing if 25 or more persons do not request one. If a hearing is required, there must be at least ten days between the last day to request a hearing and the day of hearing.<sup>39</sup> The OAH has adopted rules for the form and content of the dual notice.<sup>40</sup> This dual notice allows the agency to schedule the hearing earlier than logistics would permit if the agency initially published a notice of intent to adopt rules without a hearing and received 25 requests for a hearing pursuant to that notice.<sup>41</sup> If the agency

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<sup>36</sup> *Id.* § 14.05, subd. 2; Minn. R. 1400.2100(C) (2013). An agency may adopt a substantially different rule if it complies with the procedure in Minn. R. 1400.2110 (2013).

<sup>37</sup> Minn. R. 1400.2100(H) (2013); *see* Minn. Stat. § 14.25, subd. 1 (2014) (requiring the hearing to be conducted in accordance with §§ 14.14-.20).

<sup>38</sup> Minn. Stat. §§ 14.131, .23 (2014); Minn. R. 1400.2070 (2013) (describing the minimum general content of the SONAR).

<sup>39</sup> Minn. Stat. § 14.22, subd. 2 (2014).

<sup>40</sup> Minn. R. 1400.2540 (2013).

<sup>41</sup> *See* Minn. Stat. § 14.14, subd. 1(a) (2014). If the agency initially filed a notice of intent to adopt rules without a hearing and then received more than 25 requests for a hearing, the agency is required to publish and send a second notice (the notice of hearing), reserve a location for the hearing, and obtain the approval of notice by an ALJ to conduct the hearing. With a dual notice, these steps are already arranged

has published a dual notice and receives 25 requests for a hearing (and is unable to negotiate their withdrawal), it then proceeds to the already scheduled hearing date. If fewer than 25 requests are received, the agency can proceed without a hearing. The dual notice provides a telephone number to call to check as to whether or not the hearing will be held. Many agencies also provide information on their web pages about whether the hearing will be held.<sup>42</sup>

## 19.4 Rule Adoption, Review and Approval by the Office of Administrative Hearings; Revisor of Statutes

If no hearing is required under Minnesota Statutes section 14.25 (2014), the rulemaking agency may adopt the rule, either as proposed or as modified.<sup>43</sup> The agency examines all the comments received and makes modifications to the proposed rule either based on the comments or on the agency's own initiative.<sup>44</sup> However, the rule as modified cannot be "substantially different" than the rules proposed, unless the agency meets the requirements of Minnesota Rule, part 1400.2110 for adopting a substantially different rule.<sup>45</sup>

The agency must then submit the rule and related documents to the OAH,<sup>46</sup> which must approve or disapprove the rule within 14 days of submission.<sup>47</sup> The agency's submission of the rule must take place within 180 days of the day the comment period on the rule is over or the rule is automatically withdrawn and the agency must begin the rulemaking process again.<sup>48</sup>

Among the specific documents that must accompany the submission of the adopted

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when the notice is published. The process for requesting approval of notice by an ALJ is prescribed in Minn. R. 1400.2080, subp. 5 (2013).

<sup>42</sup> Further discussion on adopting rules using a dual notice can be found in chapter 6 of MINNESOTA RULEMAKING MANUAL, *supra* note 29, at 51-68.

<sup>43</sup> Minn. Stat. § 14.26, subd. 1 (2014); *see* Minn. R. 1400.2300-.2310 (2013).

<sup>44</sup> MINNESOTA RULEMAKING MANUAL: A REFERENCE BOOK FOR THE PRACTITIONER ch. 8, at 84 (Patricia Winget et al. eds., 19<sup>th</sup> ed. 2014), available at <http://www.health.state.mn.us/rules/manual/2014manual.pdf>

<sup>45</sup> After a determination by the chief ALJ that the modifications are substantially different, part 1400.2110 requires the agency to mail or deliver, to each person or group that made a comment during the rule proceeding or registered at the rule hearing, a copy of the substantially different rule and a statement stating that the chief judge found the rule to be substantially different, explaining the agency's reasons for modifying the rule, telling the recipient that the agency must accept written comments for 15 days, and giving the end date for the comment period. The agency then takes into consideration any comments received on the substantially different rule and submits the comments, any agency response to the comments, and the notice documents to the chief ALJ. The chief ALJ will review the agency's submission to determine whether (1) the agency has met the procedural requirements of part 1400.2110; (2) the substantially different modifications to the rule are based on comments or evidence in the record; (3) the substantially different rule complies with the legal standards under part 1400.2100; and (4) in light of the nature of the substantially different modification and the course of the rule proceeding, it would not be fair to affected persons to allow the agency to adopt the modification without initiating a new rule proceeding. Minn. R. 1400.2110, subp. 4 (2013); *see also* § 22.3.

<sup>46</sup> Minn. Stat. § 14.26, subd. 1 (2014); Minn. R. 1400.2300, .2310 (2013).

<sup>47</sup> Minn. Stat. § 14.26, subd. 3 (2014).

<sup>48</sup> *Id.*, subd. 1 ("The agency shall report its failure to adopt the rules and the reasons for that failure to the Legislative Coordinating Commission, other appropriate legislative committees, and the governor.").

rule to the OAH is the agency's Order Adopting Rules, which explains any modifications made from the proposed rule and why those changes do not make the rules substantially different.<sup>49</sup> Other documents that the agency must submit to the OAH include the Request for Comments published in the *State Register*;<sup>50</sup> a petition for rulemaking if the rule was proposed in response to it;<sup>51</sup> the proposed rule, including the revisor's approval; the SONAR;<sup>52</sup> the notice of intent to adopt rules as mailed and as published in the *State Register*;<sup>53</sup> a copy of the document authorizing the omission of the publication of text from the *State Register*, if applicable;<sup>54</sup> the certificate of mailing the notice of intent to adopt rules and certificate of mailing list; the certificate of additional notice, if given; documentation showing that the SONAR was sent to the legislative reference library;<sup>55</sup> written comments and submissions on the proposed rules; any requests for hearing and withdrawals of requests for hearing; required documents showing that the agency obtained the withdrawal of hearing requests to reduce the number of requests for a hearing below 25 and evidence that the agency sent a notice of withdrawal to persons who requested a hearing, if applicable;<sup>56</sup> a copy of the adopted rule showing any modifications and the revisor's approval of them; documentation of compliance with the procedure for adopting a substantially different rule, if applicable; the order adopting the rule; documentation that notice of submission of the rule to OAH was provided to anyone who requested this notice; and other documents or evidence required to show compliance with any other law or rule.<sup>57</sup>

On the day of receipt, the OAH must send one copy of the rule to the revisor of statutes, who has five working days to approve or disapprove the form of the rule.<sup>58</sup>

The OAH conducts a review of the legality of the rule<sup>59</sup> and must disapprove the rule if it—

1. was not adopted in compliance with the procedural requirements of chapter 1400 of the Minnesota Rules, chapter 14 of the Minnesota Statutes, or other law or rule;<sup>60</sup>
2. is not rationally related to the agency's objective or the record does not

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<sup>49</sup> Minn. R. 1400.2310(N) (2013); *see id.* 1400.2090 (listing requirements for the order adopting rules).

<sup>50</sup> *See* Minn. Stat. § 14.101, subd. 1 (2014).

<sup>51</sup> *See id.* § 14.09.

<sup>52</sup> *See id.* § 14.23.

<sup>53</sup> *See id.* § 14.22, subd. 1(a).

<sup>54</sup> *See id.* (b).

<sup>55</sup> *See id.* § 14.23.

<sup>56</sup> *See id.* § 14.25.

<sup>57</sup> *See, e.g.,* MINNESOTA RULEMAKING MANUAL, *supra* note 44 at 84 (requiring approval from the Governor's office). Chapter 8 of the rulemaking manual includes a detailed discussion of state agency procedures for adopting rules without a public hearing. *Id.* at 84-90.

<sup>58</sup> Minn. Stat. § 14.08(a), (b) (2014); *see* ch. 18 (providing a thorough discussion of the Revisor's powers and duties).

<sup>59</sup> Minn. Stat. § 14.26, subd. 3 (2014); *see* ch. 23 (providing a general discussion of review for legality).

<sup>60</sup> Minn. Stat. § 14.26, subd. 3 (2014); Minn. R. 1400.2100(A) (2013). An ALJ may find that a procedural error must be disregarded if the error meets the criteria under Minn. Stat. § 14.15, subd. 5 (2014), or Minn. Stat. § 14.26, subd. 3(d) (2014).

demonstrate the need for or reasonableness of the rule;<sup>61</sup>

3. is substantially different than the proposed rule, and the agency did not follow the procedures of Minnesota Rules, part 1400.2110;<sup>62</sup>
4. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law;<sup>63</sup>
5. is unconstitutional or illegal;<sup>64</sup>
6. improperly delegates the agency's powers to another agency, person, or group;<sup>65</sup>
7. is not a "rule" as defined in Minnesota Statutes section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law;<sup>66</sup> or
8. is subject to the requirements of Minnesota Statutes section 14.25, subdivision 2, regarding withdrawal of hearing requests and the withdrawal is not consistent with section 14.001, clauses (2), (4), and (5).<sup>67</sup>

In disapproving a rule, the ALJ must state in writing the rule's deficiencies and make recommendations to overcome the defects. The written reasons for disapproval must be submitted to the chief judge for review, who must approve or disapprove the ALJ's determination within five working days.<sup>68</sup> This written document must be filed with the rulemaking agency, the Legislative Coordinating Commission, the attorney general, the revisor of statutes, the governor, the house of representatives and senate policy committees with primary jurisdiction over state governmental operations and persons who requested notification that the chief judge's report is available.<sup>69</sup> The disapproved rule cannot be filed with the secretary of state or be published in the *State Register* and cannot, therefore, become effective until the agency corrects the defects.<sup>70</sup>

If the rule is disapproved on the grounds that the need and reasonableness has not been established, and if the agency does not elect to follow the recommendations of the chief ALJ to correct the defect, then the agency must submit the proposed rule to the Legislative Coordinating Commission and to the house of representatives and senate policy committees with primary jurisdiction over state governmental operations review for advice and comment. The agency may not adopt the rule until it has received and considered the advice of the commission and committees. The agency is not required to wait more than 60 days for the commission's or committee's advice.<sup>71</sup>

If an agency makes a procedural error in the rulemaking process, the rule will not be

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<sup>61</sup> Minn. R. 1400.2100(B) (2013).

<sup>62</sup> *Id.* (C).

<sup>63</sup> *Id.* (D).

<sup>64</sup> *Id.* (E).

<sup>65</sup> *Id.* (F).

<sup>66</sup> *Id.* (G).

<sup>67</sup> *Id.* (H).

<sup>68</sup> Minn. Stat. § 14.26, subd. 3(b) (2014); Minn. R. 1400.2300, subp. 6 (2013).

<sup>69</sup> Minn. R. 1400.2300 (2013).

<sup>70</sup> See Minn. Stat. §§ 14.26-.28 (2014).

<sup>71</sup> *Id.* § 14.26, subd. 3(c); see also ch. 25.

disapproved if the ALJ determines that the error or corrective action to cure the error or defect did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.<sup>72</sup> Therefore, if the agency makes what has been determined to be a “harmless error” in the rulemaking proceeding, the agency will not have to start the rulemaking process all over but can proceed with the adoption of the rule.

The rulemaking agency may cure the rule defects that have not been found to be “harmless” and resubmit the rule for another OAH review<sup>73</sup> as long as it does so within the 180-day period after the end of the rule's comment period. This period is effectively extended, however, if it expired during the OAH's review of the rule that led to the rule's disapproval. In this case, the agency is permitted to resubmit the rule within 30 days of the date it received written notice of the disapproval.<sup>74</sup> If the OAH approves the rules, four copies of the rules are filed with the secretary of state, who in turn forwards one of the copies to the revisor of statutes, one to the agency, and one to the governor.<sup>75</sup> The governor may veto all or a several portion of a rule by submitting notice of the veto to the *State Register* within 14 days of receiving a copy of the rule from the secretary of state. The veto is effective when the veto notice is submitted to the *State Register*. The governor must notify the chairs of the legislative committees having jurisdiction over the agency whose rule was vetoed.<sup>76</sup>

## 19.5 Effective Date

Once the rulemaking agency receives approval of the rule's legality from the OAH and approval of the rule's form from the revisor of statutes, the notice of adoption may be published in the *State Register*<sup>77</sup> and becomes effective five working days after this publication, unless otherwise specified by law or in the rule.<sup>78</sup>

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<sup>72</sup> Minn. Stat. § 14.26, subd. 3(d) (2014).

<sup>73</sup> If the text of the rule is modified as a result of the OAH's review, the rule must be resubmitted to the revisor of statutes for recertification of approval of its form. Minn. Stat. § 14.08(a) (2014).

<sup>74</sup> *Id.* § 14.26, subd. 2.

<sup>75</sup> *Id.*, subd. 3.

<sup>76</sup> *Id.*, subd. 6. The veto authority applies only to the extent the agency itself has authority to take action through rulemaking.

<sup>77</sup> Interestingly, the agency need not publish the notice of adoption within any time period. *See* Minn. Stat. §§ 14.26-.27 (2014). *Contra* Minn. Stat. § 14.19 (2014) (relating to 180-day publication deadline for adoption, amendment, suspension, or repeal of rules adopted after a public hearing).

<sup>78</sup> Minn. Stat. §§ 14.18, .27 (2014).