Chapter 21. Exempt and Expedited Rules

Original Author: Stephen Swanson
Revised 2014 by Jodi Pope

21.1 Exempt Rules: Introduction

Exempt rulemaking is an abbreviated rulemaking process that yields rules that may be in effect indefinitely or for only two years.[1] Some of the other general provisions of the APA apply to exempt rulemaking and are addressed in some detail later in this chapter and in greater detail in other chapters of this treatise. However, to place the discussion that follows in context, it is appropriate to identify those provisions at the outset. An exempt rule is a *rule*, as that term is defined in the APA.[2] While not subject to all of the general provisions of the APA, exempt rules are still subject to (1) rule form and approval of form by the revisor of statutes;[3] (2) petitions for adoption of rules;[4] (3) effect of *State Register* publication;[5] (4) legal effect of adoption;[6] (5) legislative review;[7] and (6) judicial review.[8] The exempt rulemaking process was created by the legislature in 1995.[9] It replaced the emergency rulemaking procedure that had been earlier called "temporary" rulemaking.

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.[10] 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.[11]

---

[1] Minn. Stat. §§ 14.385-.388 (2014)

[2] *Id*. § 14.02, subd. 4 ("'Rule' means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.")

[3] *Id*. §§ 14.07, .08, .28, .385, .386; *see* ch. 18.

[4] Minn. Stat. § 14.09 (2014); *see* § 17.1.2.

[5] Minn. Stat. §§ 14.37, .386 (2014).

[6] *Id*. § 14.386, .388. However, unlike rules adopted under the general provisions of the APA, the effective date is upon publication of the rules in the *State Register* and not five-working days after publication of the rules in the *State Register*.

[7] *Id*. §§ 3.841-.843; *see* ch. 25.

[8] Minn. Stat. §§ 14.44-.45 (2014); *see* § 22.7; ch. 24.

[9] 1995 Minn. Laws ch. 233, art. 2, §§ 27-29, at 2100-04.

[10] 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.

[11] *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

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 that should be reserved for emergencies.[12] 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,[13] and the effect of a court order.[14] Other federal case law interprets the "unnecessary, impractical, or contrary to the public interest" standard.[15]

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.

[12] *Jewish Cmty. Action v. Comm'r of Pub. Safety*, 657 N.W.2d 604, 610 (Minn. Ct. App. 2003).

[13] *Wash. State Farm Bureau v. Marshall*, 625 F.2d 296, 307 (9th Cir. 1980).

[14] *SEIU, Local 102 v. Cnty. of San Diego*, 60 F.3d 1346, 1352-53 (9th Cir. 1995).

[15] *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.

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.[16]

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 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.

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).

[16] 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).

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.[17] Otherwise, they are invalid.[18] 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.[19]

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.[20] 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.[21] 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

---

[17] Minn. Stat. § 14.386 (2014).

[18] *See, e.g., White Bear Lake Care Ctr. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982).

[19] Minn. Stat. § 14.386(a)(1) (2014).

[20] *Id.* § 14.388, subd. 2.

[21] *Id.* § 14.386(a)(3); *see* Minn. R. 1400.2400 (2013) (listing documents that must be submitted to the OAH).

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.[22]

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.[23]

The OAH is directed to review an exempt rule in regard to its "legality."[24] All questions regarding the form of a rule have been assigned to the revisor of statutes.[25] 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;[26] (2) the rule exceeds the agency's statutory authority;[27] (3) the rule conflicts with applicable state and federal law;[28] (4) the rule grants the agency discretion beyond that permitted by its enabling legislation;[29] (5) the rule is unconstitutional or illegal;[30] (6) the rule contains an improper delegation of agency power to another agency, person, or group;[31] (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;[32] or (8) the rule, by its terms, cannot have the force of law.[33] In addition to the above, the OAH must determine whether the agency has established its exemption from rulemaking.[34]

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.[35]

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.[36] 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

---

[22] Minn. R. 1400.2400, subp. 2 (2013).

[23] Minn. Stat. § 14.386(a)(3) (2014).

[24] *Id*.

[25] *Id*. §§ 14.08, .385.

[26] *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).

[27] Minn. R. 1400.2100(D) (2013).

[28] *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).

[29] Minn. R. 1400.2100(D) (2013).

[30] *Id.* (E).

[31] *Id.* (F).

[32] Minn. Stat. § 14.02, subd. 4 (2014); Minn. R. 1400.2100(G) (2013).

[33] Minn. R. 1400.2100(G) (2013).

[34] *Id*. 1400.2400, subp. 3.

[35] *Id*. subp. 4a.

[36] Minn. Stat. § 14.388, subd. 1 (2014).

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.[37]

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,*[38] 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.[39] 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.[40]

The final option is for the agency to ask the chief judge to review a rule that has been disapproved.[41] 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.[42] 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.[43]

21.4 Effective Date of Exempt Rules

By statute, an exempt rule is effective upon publication or from the date of publication in the *State Register*.[44]

21.5 Effective Period of Exempt Rules

An exempt rule adopted under section 14.386 is effective for a period of two years from the date of publication in the *State Register*. The authority for the rule expires at the end of the two-year period.[45]

---

[37] *Id.* subd. 3.
[38] *Id.* § 14.05, subd. 3.
[39] Minn. R. 1400.2400, subp. 4a (2013).
[40] *Id.*
[41] *Id.* subp. 5.
[42] Minn. Stat. § 14.08(a), (c) (2014); MINN. R. 1400.2400, subp. 4 (2013).
[43] Minn. Stat. § 14.386(a)(4) (2014).
[44] Minn. Stat. §§ 14.386(b), 14.388, subd. 1 (2014).
[45] Minn. Stat. § 14.386(b) (2014).

If a rule is adopted under section 14.388, the "good cause" exemption, the effective period will vary depending on the criteria that was used to adopt the rule. If a rule was exempt because it was needed to address a serious and immediate threat to the public health, safety or welfare or to comply with a court order or a requirement in federal law in a manner that does not allow for compliance with the APA, the rules are effective for a period of two years from the date of publication of the rule in the *State Register*.[46] However, if the adopted rules obtained the exempt status because they were needed to incorporate specific changes set forth in applicable statutes or to make changes that did not alter the sense, meaning, or effect of a rule, the rules are effective upon publication in the *State Register* and are in effect until repealed.[47]

21.6 Expedited Rules

The process for expedited rules was created by the legislature in 1997.[48] The expedited rule process may only be used when there is specific law requiring or authorizing its use.[49] The process is abbreviated like the process for exempt rules, but there are some differences including the possibility of a hearing if required by law and if a sufficient number of hearing requests are received.

Once the expedited process has been authorized by the legislature, the agency must publish notice of the proposed rule in the *State Register* and must mail the notice by United States mail or electronic mail to the persons who have registered with the agency to receive mailed notices.[50] Like permanent rules, the mailed notice must include either a copy of the proposed rule or a description of the nature and effect of the proposed rule and a statement that a free copy is available from the agency upon request. The rule is also published in the *State Register*. The public has 30 days after publication to comment on the rule.[51]

After receiving comments on the proposed rule, the agency may modify the rule if the

---

[46] *Id*. § 14.388, subd. 1.

[47] *Id*.

[48] 1997 Minn. Laws ch. 187, art. 5, § 5, at 1327-28.

[49] Minn. Stat. § 14.389, subd. 1 (2014). In recent years, the legislature has authorized several expedited rulemakings. *See, e.g.*, 2014 Minn. Laws ch. 285, § 8, at 6 (removing sunset on Board of Pharmacy's authority to add additional substances to Schedule I using expedited rule process); 2014 Minn. Laws ch. 309, § 6, subd. 10(b), at 3 (authorizing Campaign Finance and Public Disclosure Board to adopt expedited rules related to audits and investigations); 2014 Minn. Laws ch. 311, § 6, at 5 (authorizing commissioner of health to adopt expedited rules related to medical cannabis if notice published before January 1, 2015); 2013 Minn. Laws ch. 9, § 7, subd. 8, at 11-12 (authorizing Minnesota Insurance Marketplace board of directors to adopt expedited rules related to the Marketplace); 2013 Minn. Laws ch. 85, art. 3, § 8, subd. 7, at 54 (authorizing commissioner of employment and economic development to adopt expedited rules related to the Minnesota Job Creation Fund); 2013 Minn. Laws ch. 116, art. 5, § 29, at 126 (authorizing commissioner of education to adopt expedited rules related to special education).

[50] Minn. Stat. § 14.389, subd. 2 (2014). Rules setting out the contents and form of the notice of intent to adopt an expedited rule were adopted in 2001. Minn. R. 1400.2085, .2570 (2013); 26 Minn. Reg. 391-92 (Sept. 17, 2001).

[51] Minn. stat. § 14.389, subd. 2 (2014).

modifications do not make the rule substantially different from the proposed rule.[52] Similar to exempt rules, an administrative law judge must review the rules for legality and within 14 days approve or disapprove the rule.[53] A rule adopted under the expedited process is effective upon publication in the *State Register*.[54]

What is unique about the expedited rule process is that the enabling legislation may require that the notice of intent to adopt rules include a statement that a public hearing will be held if 100 or more people request a hearing. If 100 or more people request a hearing, the agency is required to hold a public hearing and comply with the requirements of chapter 14 for rules adopted after a public hearing.[55]

21.7 Judicial Review of Exempt and Expedited Rules

As with other rules, the validity of an emergency or exempt and expedited rule may be challenged through a preenforcement declaratory judgment or contested case action in the court of appeals.[56] The court may decide, as it did with temporary rules, that an exempt or expedited rule must be declared invalid if it "finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rulemaking procedures."[57] Although these standards are stated in rather general terms,[58] they are sufficient to provide a basis for a declaratory judgment that a temporary, and now an exempt or expedited rule is invalid because (1) the rule violates provisions of the United States or Minnesota constitutions,[59] (2) the rule exceeds the agency's statutory authority,[60] (3) the agency has failed to comply with applicable provisions of the APA[61] or other requirements

---

[52] *Id.* § 14.389, subd. 3.

[53] Minn. Stat. § 14.389, subd. 4 (2014). A rule governing the review of expedited rules adopted without a public hearing was adopted in 2001. Minn. R. 1400.2410 (2013); 26 Minn. Reg. 391 (Sept. 17, 2001); 25 Minn. Reg. 1751-52 (May 7, 2001).

[54] Minn. Stat. § 14.389, subd. 3 (2014).

[55] *Id.*, subd. 5.

[56] Minn. Stat. § 14.44 (2014). An exempt or expedited rule could also be challenged in an enforcement action commenced by the agency. *See, e.g., Broen Memorial Home v. Minn. Dep't of Human Servs.*, 364 N.W.2d 436, 440 (Minn. Ct. App. 1985) (considering validity of a rule used for calculating Medicaid paybacks as a "matter properly raised in a contested case hearing and fully briefed"); *see also* ch. 25 (providing a general discussion of judicial review).

[57] Minn. Stat. § 14.45 (2014); *Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480, 485-87 (Minn. 1995) (finding emergency rules invalid where they conflict with purpose of the parent statute and where they infringe on judge's discretion).

[58] For a general discussion of the scope of judicial review under the standards prescribed in MINN. STAT. § 14.45, see Carl Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151, 214-22 (1979).

[59] Minn. Stat. § 14.45 (2014).

[60] *Id.*

[61] *Id.; White Bear Lake Care Ctr. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982). Although the qualification is not stated, the word *compliance* might be interpreted to mean "substantial compliance." Auerbach, *supra* note 58, at 215. *But cf. Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 241-42 (Minn. 1980) (recognizing that doctrine of substantial compliance could be read into Minnesota APA through application of the harmless error doctrine but declining to do so in this case).

governing rulemaking,[62] (4) the rule conflicts with applicable state or federal law,[63] (5) the rule is not reasonable,[64] (6) the rule is not necessary, or (7) the rule is substantially different from the rule as proposed.[65]

With respect to emergency, exempt, or expedited rules, the question is unsettled as to the extent of the record on which the court of appeals is to base its decision in a preenforcement challenge to temporary rule. In 1984, a section was added to the APA requiring that agencies maintain an "official rulemaking record" for every rule adopted.[66] That section provides that the record "constitutes the official and exclusive agency rulemaking record with respect to agency action on or judicial review of the rule.[67] The APA does not limit judicial review to this official rulemaking record.[68] But in *Manufactured Housing Institute v. Pettersen,*[69] the supreme court held that in a preenforcement declaratory judgment action challenging the validity of a permanent rule, the court's review is limited to the rulemaking record.[70] In support of this holding, the court noted that the petitioner had participated vigorously in the rulemaking hearing, and emphasized that the permanent rulemaking process facilitates the gathering, review, and close scrutiny of relevant evidence and allows for the development of a complete hearing record.[71]

However, a different result may be possible in an exempt or expedited rule proceeding where the parties may not have had the same opportunity to participate in the rulemaking process. By contrast, the exempt and expedited rulemaking process requires no presentation of the agency's basis for a proposed rule, allows for no questioning of agency representatives, limits the participation of interested persons to the submission of written comments, and results in a rulemaking record that contains no explanation of the basis for the adopted rule. Thus, unlike the process in permanent rulemaking, the exempt and expedited rulemaking process does not require the preparation by an agency of a statement of need and reasonableness,[72] and the agency is not required to present facts establishing the need for and the reasonableness of the proposed exempt or expedited rule.[73]

Nevertheless, an exempt and expedited rule must be necessary and reasonable, and

---

[62] While the reference in Minn. Stat. § 14.45 (2014) is to "statutory" rulemaking procedures, the court should also review the issue of compliance with the rules of the OAH governing exempt rulemaking. *See* Auerbach, *supra* note 58, at 216.

[63] *E.g., Sellner Mfg. Co. v. Comm'r of Taxation*, 295 Minn. 71, 74, 202 N.W.2d 886, 888 (2013).

[64] *E.g., Mfrd. Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 243 (1984); *Lee v. Delmont*, 228 Minn. 101, 114, 36 N.W.2d 530, 539 (1949); *Juster Bros., Inc. v. Christgau*, 214 Minn. 108, 118, 7 N.W.2d 501, 507 (1943).

[65] Minn. Stat. § 14.05, subd. 2 (2014); *see* § 23.5 (providing a general discussion of the "substantial difference" doctrine).

[66] Minn. Stat. § 14.365 (2014); 1984 Minn. Laws ch. 640, § 23, at 1792.

[67] Minn. Stat. § 14.365 (2014).

[68] *Id.* §§ 14.44, .45; *see also id.* § 480A.06, subd. 4 (giving the Minnesota Court of Appeals jurisdiction for administrative review of rules and administrative decisions in contested cases); § 25.6 (discussing the record for judicial review).

[69] 347 N.W.2d 238 (Minn. 1984).

[70] *Id.* at 240-41.

[71] *Id.* at 241.

[72] *Cf.* Minn. Stat. §§ 14.131, .23 (2014).

[73] *Cf. id.* §§ 14.14, subd. 2, .26, subds. 1, 3.

while it may be appropriate to the nature of exempt rulemaking to allow an agency considerable latitude and flexibility in the adoption of the rule, an exempt rule has the force of law,[74] and should be subject to meaningful scrutiny after adoption. Accordingly, in a preenforcement declaratory judgment action, the petitioner should be afforded the opportunity to introduce evidence to prove that there is no rational basis for the rule and that the agency has acted in an arbitrary and capricious manner.[75] Concomitantly, the agency should be afforded the opportunity to introduce evidence demonstrating a rational basis for the rule and showing that it made a "reasoned determination."[76] Depending on the nature of the emergency or exempt rule at issue, a detailed factual inquiry may be necessary.[77]

21.8 Repeal of Obsolete Rules

As of July 1, 2001, a simplified method has been available to state agencies to repeal obsolete rules. This procedure requires an agency to draw up and implement a notice plan, publish notice of the proposed repeal in the *State Register*, and send notices to its rulemaking list.[78] The agency does not need to prepare a statement of need and reasonableness. The agency must then allow 60 days for written comments. If 25 or more persons object to the simplified procedure, the agency must use the standard APA rulemaking process. If not, the rule repeal is submitted to the Chief Administrative Law Judge for a legal review and the repeal is effective upon publication.

[74] *Id*. § 14.38, subd. 1.

[75] *See Mfrd. Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 243-44 (Minn. 1984).

[76] *Id.* at 245-46.

[77] For a thorough discussion of the subject of requiring a demonstrated factual basis for a rule, see 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.5, at 628 (5th ed. 2010).

[78] Minn. Stat. § 14.3895 (2014).