Legislative Review of Major Substantive Agency Rules

What is the legislative role in reviewing agency rules?

A rule is a judicially enforceable standard, requirement or statement adopted by a state agency. Rules implement, interpret or make specific law administered by the agency or describe procedures or practices of the agency. Before an agency may adopt a rule on a matter, the Legislature must have enacted a law granting the agency such rulemaking authority. Rules must be consistent with the law under which they are adopted and must be adopted by an agency in accordance with the Maine Administrative Procedures Act, Title 5, chapter 375, subchapters 2 and 2-A.

In some cases, the Legislature is involved in formally reviewing proposed rules before the agency finally adopts them. Whether the Legislature is involved in the formal review of a rule depends on how the rule is categorized. Rules categorized as "**routine technical rules**" are not subject to formal legislative review. Rules categorized as "**major substantive rules**" are subject to formal legislative review.

When are rules categorized as "Routine Technical" or "Major Substantive"?

Since 1996, whenever the Legislature enacts a law authorizing a state agency to adopt rules, that law must designate the rules as either "routine technical" or major substantive." The categorization of rules as routine technical or major substantive is a matter of legislative discretion. The key consideration is whether the Legislature wishes to review the rule before it is finally adopted by the agency. The APA provides certain categorization guidelines, but these are not binding on the Legislature: *Routine Technical Rules are generally* rules that are not expected to be controversial or to have a significant public impact; *Major Substantive Rules are generally* rules that, *in the judgment of the Legislature* require the exercise of significant agency discretion or interpretation or will cause a significant public impact.

How is a major substantive rule adopted?

All rules must be adopted in accordance with a public process defined in the APA, which ensures public notice and opportunity for comment. The public process is the same for both major substantive rules and routine technical rules, except that major substantive rules are subject to an additional step – formal legislative review.

An agency must draft the rule in accordance with the law granting the rulemaking authority. Prior to adopting the rule, the agency must give public notice. The agency must accept and respond to public comments on the proposed rule. The agency may choose to hold a public hearing on the proposed rule, and is required to do so if at least 5 interested persons request a hearing. Rules must also be reviewed and approved for legality by the Office of the Attorney General. Once this process has been completed, a routine technical rule may be finally adopted; a major substantive rule may be *provisionally* adopted.

To finally adopt a major substantive rule, the agency must then submit the provisional rule to the Legislature for formal review. Under the APA, major substantive rules that are required to comply with federal law or to qualify for federal funds are not required to be submitted for legislative review, provided the rules impose no requirements or conditions that exceed federal requirements. The process for legislative review of major substantive rules is as follows.

1. The agency submits the provisional rule to the Legislature.

2. The rule and a Resolve proposing to allow the agency to adopt the rule are referred to the committee with jurisdiction over the rule's subject matter.

3. The Committee generally holds a public hearing and work session on the Resolve in the same manner as it does for other bills.

4. The Committee reviews the proposed rule and makes its recommendation as to whether and how the rule should be allowed to go forward. The Resolve is the vehicle through which the committee to makes its recommendations on the rule.

5. The Resolve with the committee's report(s) is reported to the House or Senate and acted upon in the same manner as any other bill or resolve. The agency's ability to finally adopt the rule depends on the final disposition and content of the finally enacted Resolve.

How does a committee review a major substantive rule?

The APA requires the committee to review the rule in a public meeting. As noted above, the public meeting usually occurs as a public hearing on the Resolve authorizing final adoption of the rule. The committee must notify the agency of the meeting. The APA sets forth certain criteria that may be considered by the committee in its evaluation.

After reviewing the rule, the committee may vote to recommend that the Legislature:

- Pass the Resolve without amendment (this authorizes the agency to adopt the rule as drafted);
- Pass the Resolve as amended to authorize the agency to finally adopt the rule if certain changes are made, or to finally adopt only a part of the rule; or
- Pass the Resolve as amended to specify that the agency may not adopt the rule.

The APA provides that, unless otherwise provided by the Legislature, a committee must make its report to the Legislature not less than 30 days before the statutory adjournment date.

What happens after the resolve is passed?

If the Resolve specifies that final adoption of the rule is not authorized, the agency may not adopt the proposed rule (the agency may develop and submit a new proposed rule, if the law permits). If the Resolve authorizes the agency to adopt the rule in some form (e.g., as submitted or in some modified form), the agency has 60 days after the effective date of the Resolve to finally adopt the rule, unless the Resolve specifies a different deadline. If the Resolve requires the agency to modify the rule, the agency must make the required modifications before finally adopting the rule.

What happens if the legislature fails to act on the resolve?

If the Legislature fails to act on a rule properly submitted during the statutorily defined *legislative rule acceptance period,* the agency may finally adopt the rule. The legislative rule acceptance period begins on July 1st preceding the convening of the regular session and ends at 5:00 p.m. on the 2nd Friday in January after the convening of that regular session. Consequently, if the Legislature wishes to prohibit adoption of such a rule, it should enact a Resolve, or legislation of some sort, that specifically provides that adoption of the rule is *not* authorized.

This only applies to rules submitted in the defined period. If a rule is submitted *outside* the legislative rule acceptance period, the agency may not finally adopt the rule without specific legislative authorization (failure to act on such a rule does not allow the agency to adopt the rule).