ARIZONA ADMINISTRATIVE PROCEDURE ACT: Agency Rulemaking

INTRODUCTION

The primary purpose of rulemaking is to provide public notice of the substantive or procedural requirements that an agency has for activities falling within its statutory authority. The Arizona Administrative Procedure Act (APA) provides procedures for agency rulemaking and for appealing agency decisions. For purposes of this brief, the term agency is used to refer to a state agency, board or commission.

An agency may make rules only if the Legislature has given it the authority to do so, unless exempt from rulemaking procedures. A rule is valid only if it is made in substantial compliance with the APA or other statutory procedures applicable to the agency which are designed to ensure adequate public participation in the rulemaking process. Each agency and the Secretary of State (SOS) shall post prominently on their website notice of an individual's right to petition the agency and the Governor's Regulatory Review Council (GRRC) for review of an agency practice, substantive policy statement or final rule.¹

RULEMAKING PROCESS

The APA requires most agencies, by December 1 of each year, to prepare and make publicly available the regulatory agenda for the agency during the next calendar year. Any agency that intends to work on a particular rule must inform the public by publishing a Notice of Rulemaking Docket Opening in the Arizona Administrative Register (Register), published monthly by the SOS.²

The rulemaking docket includes the subject of the proposed rule, agency contact information, where copies of pertinent information may be inspected, the status of the proposed rule, any known

¹ A.R.S. § 41-1033
² A.R.S. § 41-1021.02
timetable for agency decisions or actions on the
rule, and pertinent dates regarding the rule.3

The rulemaking docket must remain open
while the rulemaking proceeding is pending. A
rulemaking proceeding is pending from the time
the agency considers proposing the rule until one
of the following occurs: 1) the agency decides to
no longer pursue the rule; 2) no action is taken
one year after the Notice of Rulemaking Docket
Opening is published; 3) the rule becomes
effective; 4) no action is taken one year after the
Notice of Proposed Rulemaking is published; or
5) there is a notice of termination. After
providing notice of a docket opening, the agency
may meet informally with any interested party to
discuss the proposed rulemaking action and may
post public notice of these meetings in the
Register.4

Once the rule is drafted and the agency is
ready to start the process of making the rule into
law, a Notice of Proposed Rulemaking is filed
with the SOS. This notice includes the preamble,
an economic impact statement, why the rule is
necessary and the exact wording of the rule.

At the same time the Notice of Proposed
Rulemaking is filed with the SOS, the agency
must notify any person who requested to be
advised of the proposed rulemaking. An agency
may purge its list of persons requesting
notification once per year. During this time, the
agency must allow at least a 30-day public
comment period after the proposed rule is
published. If the agency receives a written
request to conduct a public hearing on the
proposed rule, the agency must provide a 30-day
notice of the scheduled proceeding.5,6

If the agency determines that a proposed rule
requires substantial change, resulting from public
comment or holding a public hearing, the agency
issues a Notice of Supplemental Proposed
Rulemaking for publication in the Register.

Once the comment period is over, the
rulemaking record is closed. The agency has 120
days from the close of the record to either
terminate the proceeding or to submit the rule to
GRRC or the Attorney General (AG) for
approval. However, if the rule is exempt pursuant
to A.R.S. § 41-1005 the final rule is filed with the
SOS’ office.7

**EXPEDITED RULEMAKING**

An agency is allowed to conduct expedited
rulemaking if the rulemaking does not increase
the cost of regulatory compliance, increase a fee
or reduce procedural rights of regulated persons
and does one or more of the following: 1) amends
or repeals rules made obsolete by repeal or
supersession of an agency’s authority; 2) amends
or repeals rules for which the statute authorizing
the rule has been declared unconstitutional; 3) corrects
typographical errors, makes address or name
changes or clarifies rule language without
changing its effect; 4) adopts or incorporates, by
reference without material change, federal
statutes or regulations, A.R.S. or rules of other
agencies; 5) reduces or consolidates steps,
procedures or processes; 6) amends or repeals
outdated, redundant or otherwise unnecessary
rules; 7) implements action proposed in a five-year
review report without material change made
within 180 days of filing proposed expedited
rulemaking with the SOS; or 8) adopts, without
material change, rules of another agency that has
been or will be consolidated into the agency.8

Agencies are required to notify the President
of the Senate, the Speaker of the House of
Representatives, the Governor, GRRC and the
Administrative Rules Oversight Committee of the
expedited rulemaking prior to submitting the
notice with the SOS for publication in the next
Register. The agency and GRRC are required to
post a notice of the proposed expedited
rulemaking on their websites.

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3 A.R.S. § 41-1021
4 A.R.S. § 41-1021
5 A.R.S. § 41-1022
6 A.R.S. § 41-1023
7 A.R.S. § 41-1024
8 A.R.S. § 41-1027
EXEMPT RULEMAKING

In 2016, changes were made to the one-time rulemaking exemption process. An agency with a one-time rulemaking exemption from the Legislature must, within one year of adoption, have the rule reviewed under the rulemaking exemption to determine if the rule should be amended or repealed. The agency must prepare a written report and receive approval from GRRC.9

Statute exempts some agencies from the GRRC approval process and instead requires submittal of the rule package to the AG. These agencies include the Arizona Corporation Commission and any agency headed by a single elected official. However, statute permits exempt agencies to follow GRRC’s rulemaking requirements instead of submitting the rule package to the AG. The AG is required to approve or disapprove the rule within 60 days of its receipt. For AG approval, the rule must be clear, in proper form, within the power of the agency and in compliance with any appropriate procedures.10

FIVE-YEAR REVIEW REPORT

Agencies must review their rules at least once every five years to determine if their rules need to be amended or repealed. Statute requires an agency to consider specific factors which include evaluating its effectiveness and whether the rule is authorized by existing statute. The report must also include any written criticisms received by the agency among other considerations. Any person who is regulated or who may be required to obtain a license may petition GRRC to require an agency to consider additional recommendations in the five-year report.

GRRC maintains a five-year calendar of when each agency must review its rules and submit its report summarizing its findings. GRRC may review rules outside of the five-year review process if requested by at least four GRRC members. GRRC approves or returns, in whole or in part, the agency’s report upon its review. If an agency fails to submit its report, the rules scheduled for review expire and are no longer enforceable. To reestablish the rules, the agency must go through the rulemaking process.

SUBSTANTIVE POLICY STATEMENTS

An agency must annually publish a directory summarizing all rules and substantive policy statements and make them available to the public at the office of the agency director.11 Substantive policy statements must also be filed with the SOS to be published in the Register.12

Additionally, agencies are required to post on their websites the full text of each rule or substantive policy statement currently in use, or the web address to access it.13

A substantive policy statement is a written expression that informs the general public of an agency’s current approach to, or opinion of, the requirements of laws and court orders, including the agency’s current practice, procedure or method of action based upon that approach or opinion. The statement is advisory only and does not include internal procedures.

ADDITIONAL PETITION OF AGENCY ACTIONS

Laws 2018, Chapter 337 allows a person to petition GRRC to review an existing agency practice, substantive policy statement, final rule or regulatory licensing requirement that is not specifically authorized by law. This petition is based on the person's belief that the agency practice, policy statement, final rule or licensing requirement is unduly burdensome or not necessary to fulfill a public health, safety or welfare concern.

9 A.R.S. § 41-1095
10 A.R.S. § 41-1044
11 A.R.S. § 41-1091
12 A.R.S. § 41-1013
13 A.R.S. § 41-1091.01
**Agency Rulemaking**

GRRC must review the petition for the outlined reasons if it determines the agency practice, policy statement, final rule or licensing requirement applies to a profession for which the average wage in Arizona does not exceed 200 percent of the federal poverty guidelines for a family of four. However, a person may not petition GRRC for rules or policies that apply to abortion clinics or related professions.

If GRRC determines the existing agency practice, substantive policy statement, final rule, or regulatory licensing requirement that applies to a profession with a median wage as outlined, does not meet the outlined requirements, GRRC can modify, revise or declare it void.

**GOVERNOR’S REGULATORY REVIEW COUNCIL**

GRRC was established by Executive Order in May 1981, and for most agencies is the final step in the rulemaking process. GRRC consists of six Governor-appointed members who serve staggered, three-year terms. The Director or Assistant Director of the Arizona Department of Administration is responsible for administering GRRC and serves as an ex officio member and chairman. GRRC is required to meet at least once a month. Members are eligible to receive $200 for each day on which GRRC meets and reimbursement for expenses.

GRRC is responsible for reviewing each agency’s rules to ensure that they are necessary and to avoid duplication and adverse impact on the public. GRRC assesses whether a rule is clear, concise, understandable, legal, consistent with legislative intent, within the agency’s statutory authority, and whether the benefits of a rule outweigh the cost. If a rule does not meet these criteria, GRRC returns it to the agency for further consideration. GRRC is required to review the rule package and approve or return it, in whole or in part, within 90 days of its receipt.

Once a rule is approved, either by GRRC or the AG, the rule package is filed with the SOS who affixes to each document the time and date of filing, indicating the rule is final. The rule becomes effective 60 days after filing with the SOS, apart from expedited rulemaking which takes effect 30 days after filing with the SOS. All final rules are published in the Register and the Arizona Administrative Code, which contain the full text of each final rule, including rules made by statutory exemption.

**ADDITIONAL RESOURCES**

- Arizona Secretary of State
  1700 W. Washington, 7 Floor
  Phoenix, AZ 85007-2888
  602-542-4285
  www.azsos.gov
- Arizona Administrative Code
  [https://azsos.gov/rules/arizona-administrative-code](https://azsos.gov/rules/arizona-administrative-code)
- Arizona Administrative Register
- Arizona Administrative Procedure Act A.R.S. Title 41, Chapter 6
- Governor’s Regulatory Review Council
  [www.grrc.state.az.us](http://www.grrc.state.az.us)

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14 Laws 2018, Chapter 337; A.R.S. § 41-1033
15 A.R.S. § 41-1033
16 A.R.S. § 41-1051