

Rule Making (Administrative Procedure Act)

From: 2014 Administrative Law Handbook, Office of the Attorney General

To State Agency and Local Government Officials, Administrators, Counsels and Staff:

Public officers and agencies work hard to serve Texans. In support of the multiple duties required of state and local entities, my office has prepared the 2014 Administrative Law Handbook as a reference tool and guide to three important state statutes. As the 83rd Legislature has now drawn to a close, this 2014 edition provides legislative and judicial updates concerning the Administrative Procedure Act, the Texas Public Information Act and the Texas Open Meetings Act.

The Administrative Procedure Act provides practice and procedure standards for the rules, rates and orders of state agencies that affect the lives of Texas residents in significant ways. The Public Information Act and Open Meetings Act are open government laws that apply to state and local governmental entities and contain important protections for the public.

This Handbook is intended as an aid to understanding the basic protections and requirements of these laws. It is not intended as a substitute for legal advice, but it will explain the fundamental principles of each statute. More detailed guidance on the Public Information Act and Open Meetings Act is also prepared by my office, and these publications are available on the attorney general's website at www.texasattorneygeneral.gov.

We are committed to giving state and local agencies the best possible legal advice and support, and I hope the 2014 Administrative Law Handbook will be a helpful resource to accomplish that goal. Please feel free to contact my office whenever you need legal assistance.

Sincerely,

Greg Abbott
Attorney General of Texas

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Rulemaking

Overview

The APA defines a rule as: “a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency.”¹²¹ The definition specifically excludes statements governing purely internal agency management or organization. Over the years, there has been some controversy about whether certain agency statements are rules as defined by the APA. One agency was temporarily enjoined from enforcing a supervisor’s inter-office memo directed to agency staff, based on the plaintiff’s theory that the memo was a rule and not adopted in compliance with the APA.¹²² The merits of the ruling were not reached in that particular court case. Not every statement or policy established by an agency is a rule, however.

In 2008, the Texas Supreme Court concluded that an agency’s application of certain claim calculations was in conflict with the agency’s published rules, and therefore the new calculation was invalidated for violating the APA. The Court held the agency’s interpretation was invalid, because it was not adopted as a rule even though it met the APA’s definition of a rule.¹²³ In 2009, a court of appeals invalidated an agency’s letter setting out a new interpretation of statute.¹²⁴ In that case, the court held that because the agency intended to enforce the new interpretation in the regulated community, it was a rule that should have been adopted pursuant to the notice and comment provisions of the APA. State agencies should consult with legal counsel and carefully review whether their statements and other actions might trigger the APA rulemaking requirements. While there are a number of

cases holding that an agency engaged in illegally ad hoc rulemaking, there are also many cases holding that an agency's statement is not a rule.

The following are examples of agency statements that the courts have decided are not rules under the APA: a penalty matrix used by agency staff to recommend sanctions that would be assessed by the Commission;¹²⁵ advisory letters to members of the regulated community about whether electronic machines were illegal gambling devices;¹²⁶ an agency decision in a contested case;¹²⁷ notices that simply restated published rules;¹²⁸ and internal policies establishing the appearance of certain driver's licenses.¹²⁹

In this Handbook the word "rule" refers to amendments or repeals of existing rules as well as to new rules. Similarly, the word "rulemaking" refers to the process by which new rules or amendments to rules are proposed and adopted in accordance with APA procedures.

Sources of Rules

Agencies are required to adopt rules of practice setting forth the nature and requirements of all available formal and informal procedures.¹³⁰ For example, a licensing agency should adopt rules regarding the procedural steps an applicant must follow in applying for licensure.

Additionally, some enabling statutes require agencies to promulgate rules on specific aspects of their regulatory responsibilities. Some general statutes require that agencies adopt rules on specific issues. To illustrate, all agencies with advisory committees are required to adopt rules relating to those committees.¹³¹ Other enabling statutes simply authorize an agency to enact rules as necessary to accomplish the agency's statutory duties.

New legislation may also be the source of a new rule. The APA authorizes a state agency to prepare for the implementation of legislation that has become law but has not yet taken effect by adopting rules or taking other administrative action necessary, if the agency would have been authorized to take action had the legislation been in effect at the time of the action. The rules may not take effect earlier than the legislation being implemented takes effect, however, and the rules may not result in enforcement of the legislation or rule before the legislation takes effect.¹³²

All state agencies must review and consider for re-adoption all rules not later than the fourth anniversary date of their effective date and every four years thereafter. The review must include an assessment of whether the reasons for initially adopting the rule continue to exist.¹³³ As part of rule review, an agency will determine whether a new rule is needed or if an existing rule is no longer necessary and should be repealed.

The APA authorizes agencies to appoint committees of experts or interested persons or representatives of the general public to advise them with respect to contemplated rulemaking.¹³⁴ The APA does not specify how an agency should proceed in appointing members or how these committees should operate. The APA provides that these committees merely have advisory powers. Nevertheless, these committees may assist in drafting rules in addition to providing input on rules throughout the proposal and adoption process.

Any "interested person" may petition an agency requesting the adoption of a rule.¹³⁵ The definition of "person" includes "an individual, partnership, corporation, association, governmental subdivision, or public or private organization that is not a state agency."¹³⁶ If an agency receives a petition requesting rulemaking, the APA requires the agency within 60 days to either deny the petition in writing, stating the reasons for denial, or initiate a rulemaking proceeding.¹³⁷

Negotiated Rulemaking

The area of negotiated rulemaking is relatively new in a state agency context. Negotiated rulemaking has been defined in several different ways including:

A process by which representatives of an agency and of the interests affected by the subject of rulemaking seek to reach consensus on the terms of a proposed rule and on the process by which it is negotiated.¹³⁸

In 1997, the 75th Legislature enacted the Governmental Dispute Rulemaking Act to further encourage negotiated rulemaking. This Act delineates procedures which a state agency, including the attorney general, SOAH and certain institutions of higher education, must follow during negotiated rulemaking.¹³⁹ The Act requires the appointment of a “convenor” to assist the agency in its determination of whether or not to proceed with negotiated rulemaking.¹⁴⁰ The “convenor” must follow specific guidelines set out in the Act.¹⁴¹

Upon deciding to proceed with negotiated rulemaking, an agency is required to publish a “notice of intent” both in the Texas Register (Register) and “in appropriate media.”¹⁴² The notice of intent must include:

1. a statement that the agency intends to engage in negotiated rulemaking;
2. a description of the subject and scope of the rule to be developed;
3. a description of the known issues to be considered in developing the rule;
4. a list of the interests likely to be affected by the proposed rule;
5. a list of the individuals the agency proposes to appoint to the negotiated rulemaking committee to represent the agency and affected interests;
6. a request for comments on the proposal to engage in negotiated rulemaking and on the proposed membership of the negotiated rulemaking committee; and
7. a description of the procedure through which a person who will be significantly affected by the proposed rule may, before the agency establishes the negotiated rulemaking committee, apply to the agency for membership on the committee or nominate another to represent the person’s interests on the committee.¹⁴³

The agency is required to consider the comments received and appoint a Negotiated Rulemaking Committee to serve until the proposed rule is adopted.¹⁴⁴ Similarly, the agency is required to appoint a Negotiated Rulemaking Facilitator under the criteria found in the Act.¹⁴⁵ The Facilitator utilizes alternative dispute resolution skills to attempt to arrive at a consensus on a proposed rule.¹⁴⁶ If consensus is reached, the Negotiated Rulemaking Committee sends a written report to the agency that contains the text of the proposed rule. If partial consensus is reached, the written report shall name the unresolved issues and include any other information or recommendations of the Committee.¹⁴⁷ If the agency intends to proceed with rulemaking after the Negotiated Rulemaking Committee’s report, the agency is required, within its notice of a proposed rulemaking, to state its intention, the fact that it used negotiated rulemaking, the fact that the Negotiated Rulemaking Committee Report is public information and the report’s location.¹⁴⁸ Finally, the rule must be proposed under the regular APA procedures.¹⁴⁹

Texas Register and Texas Administrative Code

The Texas Register is an official publication of the state of Texas, published by the Texas Register Section of the Office of the Secretary of State. The Register reflects the state’s public policy “to provide adequate and proper public notice of proposed state agency

rules and state agency actions”¹⁵⁰ It is published weekly on Fridays and contains notices of proposed rules, proposed rule reviews, withdrawn rules and adopted rules. Other items published in the Register include open meeting notices, summaries of requests for attorney general opinions and Texas Ethics Commission Opinions, opinions of these agencies, executive orders and appointments, and other information of general interest to the public, including requests for proposals, federal legislation or regulations affecting the State or state agencies, and agency organizational or personnel changes.¹⁵¹

The Texas Administrative Code (TAC), published by the Secretary of State, contains all agency rules, other than emergency rules. Rules published in the TAC are to be officially noticed and are prima facie evidence of the text of the rules and of the fact that they are in effect.¹⁵² The TAC as published on the Secretary of State website is current each day. Consult the Texas Register for pending and emergency rules.¹⁵³

Public Notice of Proposed Rules

Rulemaking is formally initiated by an agency’s publication in the Register of the agency’s notice of a proposed rule. The Texas Register Section of the Office of the Secretary of State has rules and policies pertaining to the submission and formatting of documents for publication in the Register.¹⁵⁴ Agencies should access these rules and the Liaison Center from the Texas Register website <http://www.sos.state.tx.us> to ensure compliance with submission procedures.¹⁵⁵ An agency must designate at least one individual to act as liaison between that agency and the staff of the Texas Register Section.¹⁵⁶

The notice of a proposed rule must be published a minimum of 30 days in advance of the intended adoption date of the rule.¹⁵⁷ The notice requirement in the APA gives the public advance notice of rulemaking proceedings and of the contents of proposed rules so that interested persons may decide whether they wish to comment on the proposal.

Although the agency is responsible only for filing the notice of a proposed rule with the Texas Register Section,¹⁵⁸ the APA specifically provides that notice of a proposed rule is not effective until published in the Register.¹⁵⁹ It is, therefore, a wise practice for the agency to confirm publication in the Register before moving on to subsequent steps of the rulemaking proceeding.

Certain individual notices of proposed rules are required. Agencies must mail notice of a proposed rule to all persons who have made timely written request for advance notice of its rulemaking proceedings.¹⁶⁰ When an agency files a notice of a proposed rule with the Texas Register Section, copies must be delivered to the lieutenant governor and to the speaker of the House.¹⁶¹ On a majority vote of members of a standing committee of the legislature, a committee may send a state agency a statement supporting or opposing adoption of the proposed rule.¹⁶² Additionally, the Commission on Jail Standards and the Commission on Law Enforcement Officer Standards and Education must provide law enforcement agencies with notice of the adoption of rules that affect those agencies before their rules are effective.¹⁶³

Finally, it should be noted that before an agency even submits a proposed rule to the Texas Register Section, the agency must determine whether the rule will have an impact on local economies.¹⁶⁴ If such a possibility exists, the agency must prepare a local employment impact statement.¹⁶⁵

Contents of the Notice of Proposed Rule

The APA provides a detailed list of information that must appear in the notice of a proposed rule.¹⁶⁶ Further, certain major environmental rules require a regulatory analysis and a

draft impact analysis for the rules to be valid.¹⁶⁷ In drafting the notice of a proposed rule, an agency should refer to the list of required components. When in doubt about the sufficiency of a notice for a proposed rule, an agency should consult its attorney.

The notice of a proposed rule must contain the following eight elements [*note from executive director – since publication of the handbook, several additional elements have been added which are included in this list*]:

1. a brief explanation of the proposed rule;
2. the text of the proposed rule;
3. a statement of statutory authority for the proposed rule and the statutory provision affected by the proposed rule;
4. a fiscal note for each year of the first five years that the rule will be in effect;
5. a note about public benefits and costs for each year of the first five years that the rule will be in effect;
6. the local employment impact statement, if required;
7. a request for comments on the proposed rule;
8. any other statement required by law;¹⁶⁸
9. *economic impact statement and regulatory flexibility analysis if adverse economic effect on small businesses or rural communities;*
10. *government growth impact statement; and*
11. *whether proposed rule is a major environmental rule restricting property*

Agencies should provide an explanation of the proposed rule that is sufficient to apprise the public of the rule's purpose. Although not required in the proposal, agencies may include, as part of the brief explanation of the rule, a statement of the rule's factual basis or reasons for the rule. This information is beneficial in the proposal because it assists the board in considering all aspects of a rule as early as possible and provides the public with an analysis of the proposed rule's underpinnings. Furthermore, an analysis of a rule's factual basis in the proposal preamble facilitates the development of the rule's reasoned justification discussed below. The required statement of authority is a concise explanation of the particular statutory provision of law that authorizes the agency to adopt the rule. The agency must also identify that portion of its enabling statute or other provision of law that the proposed rule is intended to implement. In addition, there must be a certification that the proposed rule has been reviewed by legal counsel and found to be within the agency's statutory authority.¹⁶⁹

The required fiscal note must show the name and title of the officer or employee responsible for preparing or approving it. It must state, for each year for the first five years that the rule will be in effect, the costs or reduction in costs and the increase or decrease in revenues to state and local governments. If applicable, the fiscal note may simply state that enforcing or administering the rule has no foreseeable economic implications relating to costs or revenues of the state or local governments.¹⁷⁰ The Texas Register Liaison Center checklists gives suggested wording of the opening sentence to be included, both for rules that do and do not have fiscal implications.

The public benefit-cost note must state the name and title of the officer or employee responsible for preparing or approving the note and must show, for each of the first five years that the rule will be in effect, (1) the public benefits to be expected as a result of the rule and (2) the anticipated economic cost to persons who are required to comply with the rule.¹⁷¹ The Texas Register Section will reject proposals that do not address the fiscal im-

plications of a rule. Worse yet, failure to engage in the required analysis may result in a reviewing court's concluding that the rule was not adopted in substantial compliance with APA section 2001.024.¹⁷²

The APA also requires, in the notice of proposed rules, "any other statement required by law."¹⁷³ An agency's enabling statute may require the inclusion of specific information. Various federal statutes or regulations may also require including other information in the notice of a proposed rule. The Third Court of Appeals has held that Government Code, section 2006.002, requires agencies to conduct an analysis in a proposed rule's preamble to determine whether the rule will have an adverse economic effect on small businesses.¹⁷⁴ The current section 2006.002 requires agencies to determine if a rule will have an adverse economic effect on small businesses and micro-businesses. If a rule may have an adverse economic effect on these businesses, an agency must prepare and include in the proposed rule an economic impact statement, as described in the provision, and a regulatory flexibility analysis, that includes alternative methods of achieving the purpose of the rule to lessen the effect on small or micro-businesses. A copy of the proposed rule that is submitted to the Texas Register must also be provided to the Senate and House standing committees that are charged with reviewing the proposed rule. Interim guidelines are available to assist state agencies with this requirement. They may be found on the OAG website.¹⁷⁵ Additionally, if an agency is considering a rule that will have an adverse economic impact on small businesses or micro-businesses (defined as entities formed to make a profit, that are independently owned and operated, and that have no more than 20 employees), the agency must take certain steps to reduce the adverse effect, if doing so is legal and feasible considering the purpose of the statute under which the rule is to be adopted.¹⁷⁶

The notice of the proposed rule must include a request for comments.¹⁷⁷ The request for public comment on the proposed rule from any interested person must state the name, address, and telephone number of the contact person to whom comments may be submitted. The Texas Register Section recommends stating the request as follows: "Comments may be submitted to [name, title, and address of contact person]." It is becoming common practice to include the fax number or e-mail address of the contact person. The agency may also want to include in the notice a time limit of no less than 30 days for the public to comment. This limitation will assist the agency to avoid the necessity of addressing last minute comments in the preamble of the final order adopting the rule.

When amending any part of an existing rule, the text of the entire part of the rule being amended must be set out, the deleted language must be bracketed and stricken through, and new language must be underlined. If a proposed rule is new or if it adds a complete section to an existing rule, the new language must be underlined.¹⁷⁸

Filing the Notice

The Texas Register requires all agency submissions, including rulemakings, to be submitted in electronic format. If an agency files in paper format, publication may be delayed.¹⁷⁹ As mentioned before, notice of a proposed rule is effective when published in the Register, not when filed with the Texas Register Section.¹⁸⁰

Once the rule is published in the Register, an agency should carefully proof the text for publishing errors. If errors are found, the agency should immediately notify the Texas Register Section in writing of the error and ask for correction. The Register will not accept corrections that conflict with the text on file with the Secretary of State after the effective date of a rule.¹⁸¹ In the event of a conflict, the official version of a rule is the text on file with the Secretary of State, not the text published in the Register.¹⁸²

Comments on Proposed Rules

Agencies must provide all interested persons a reasonable opportunity to submit data, views, or arguments relating to a proposed rule.¹⁸³ The public is entitled to have at least 30 days' notice of a proposed rule before the agency adopts the rule. Generally, the public comment period begins immediately after the proposed rule is published in the Register and continues for at least 30 days. The comments may be oral or submitted in writing.¹⁸⁴

A public hearing may be held on a proposed rule and must be provided if requested by a governmental subdivision or agency, by 25 or more persons, or by an association with at least 25 members.¹⁸⁵ Occasionally an agency may choose to hold multiple public hearings. For example, if there is substantial public comment from a particular region of the state, the agency may convene a hearing in that area, as well as in Austin. It is within the agency's discretion to determine the type, number, duration and location of public hearings. The public hearing(s) should be conducted during the published comment period to streamline the response to comment process.

A member of the agency staff or one or more board members conducts the public hearing. The person conducting the hearing sets the order of speakers, may ask questions to clarify the comments, may impose time limits on speakers, and may determine other procedural matters. The board members of the agency may attend the public hearing or even conduct the hearing themselves. Regardless of who conducts the hearing, the purpose of the public hearing is to give the public an opportunity to provide oral comments. The oral comments received at the public hearing are in addition to any written comments submitted to the agency. The agency should respond to all written and oral comments that were received during the comment period in its formal order adopting the rule.¹⁸⁶

A public hearing on a proposed rule under the APA must be distinguished from a meeting of a quorum of a board under the Open Meetings Act. A public hearing under the APA includes an opportunity to address the agency. The Open Meetings Act itself does not grant the public a right to speak at public meetings; it only establishes a right to attend and listen. If a quorum of a board chooses to conduct the public hearing on a proposed rule, since deliberations between the quorum are very likely to occur during the public hearing, the Open Meetings Act is implicated and proper notice should be posted. Whether or not required by the Open Meetings Act, publication of a notice of a hearing on a proposed rule in the Register and at other regular posting locations is advisable to ensure public participation.

Although not required, sometimes it may be advantageous to the public comment and hearing process for agency staff to develop formal staff comments regarding a proposed rule. These comments should be filed with the agency contact person and made available for review by the public. Staff comments do not include advice given by the agency's legal counsel, unless the board decides to waive the confidentiality of the advice and disclose it to the public.

Responding to Comments

An agency must consider fully all written and oral submissions concerning the proposed rule.¹⁸⁷ Frequently, agencies will revise rules in response to comments received during the rulemaking process. The question then arises whether the agency should re-propose the rule, republish it to start the rulemaking process anew, or adopt the rule with revisions to the version originally published. To some extent, the APA envisions that an agency will

modify a proposed rule based on public comments; otherwise it makes little sense to give the public the opportunity for comment. Nevertheless, if an agency changes a rule in nature or scope so much that it could be deemed a different rule, if the rule as adopted would affect individuals who would not have been impacted by the rule as proposed, or if the rule as adopted imposes more stringent requirements for compliance than the proposed version, the prudent course would be to republish the rule.¹⁸⁸

Agency Order Adopting a Rule

An agency may not adopt a proposed rule sooner than 30 days or later than six months after it is published in the Register.¹⁸⁹ A proposed rule is automatically withdrawn six months after its publication in the Register if the agency does not publish an order adopting or withdrawing the rule before that time.¹⁹⁰

The agency order adopting a rule must include a reasoned justification of the rule, a statement of the authority under which the rule is adopted, and a legal certification.¹⁹¹ [See Figure 26: Sample Preamble and Adopted Rule; and Figure 27: Order Adopting a Rule.] The agency's justification must explain "how and why it reached the conclusions it did."¹⁹² The agency must present its justification "in a relatively clear, precise, and logical fashion."¹⁹³ The justification must include:

1. a summary of comments received from parties interested in the rule that shows the names of interested groups or associations offering comment on the rule and whether they were for or against its adoption;
2. a summary of the factual basis for the rule as adopted that demonstrates a rational connection between the factual basis for the rule and the rule as adopted; and
3. the reasons why the agency disagrees with party submissions and proposals.¹⁹⁴

The Supreme Court has explained that "section 2001.033 places an affirmative duty on an agency to summarize the evidence it considered, state a justification for its decision based on the evidence before it, and demonstrate that its justification is reasoned."¹⁹⁵ The duty to present a reasoned justification exists independently of the duty to include the foregoing three elements in the order.¹⁹⁶

A state agency "shall consider fully all written and oral submissions."¹⁹⁷ It is in the reasoned justification of the agency's order adopting a rule that the agency should summarize the comments it received, affirmatively state its agreement with comments, or if it disagrees, it must state its reasons for disagreement. The reasoned justification of the rule needs to demonstrate in a relatively clear and logical fashion that the rule is a reasonable means to a legitimate objective.¹⁹⁸

The factual basis should address the underlying reasons for the rule and any data or information considered by the agency in formulating the rule. The APA requires the order adopting the rule to include a summary of the factual basis which demonstrates a rational connection between the factual basis for the rule and the rule as adopted.¹⁹⁹

The order adopting the rule must also restate the rule's statutory authority and how the agency interprets that authority as authorizing or requiring the rule.²⁰⁰ The agency should explain the nexus between the statutory authority and rule with enough specificity that a reviewing court can understand how the rule falls within the agency's authority. Finally, the order must include a statement that the rule has been "reviewed by legal counsel and found to be a valid exercise of the agency's legal authority."²⁰¹

The order adopting the rule may be viewed as the culmination of the rulemaking process. Upon approving an order adopting a rule, the agency forwards the adopted rule for publication in the Register. With three exceptions, set out in the APA, the rule is effective 20 days after the date the adopted rule is filed with the Secretary of State, Texas Register Section.202

Section 2001.030 of the APA provides that an agency must state the principal reasons for and against the adoption if requested by an interested party before or within 30 days after the adoption of the rule. The agency must include in the statement its reasons for overruling the considerations against adoption.

Internet Access to Rules

State agencies must make their rules available on the Internet. The text of each current agency rule and other materials that explain or interpret any rule must be made available on a generally accessible Internet site. The site must provide an opportunity for the public to send questions about the agency's rules to the agency electronically and for the public to receive answers to its questions electronically.203 State agency rules are also available online through the TAC.

Emergency Rules

An agency may adopt emergency rules without first publishing proposed rules, but only in the presence of an "imminent peril to the public health, safety, or welfare" or in response to a requirement of state or federal law.204 In either case, the agency adopts the emergency rule upon finding that it is not practical to provide the usual 30 days' prior notice and hearing. Such circumstances occur infrequently. An agency must still comply with the posting requirements of the Open Meetings Act before it may adopt emergency rules.205

The agency must file the emergency rule for publication in the Register, with a written statement explaining the reasons for the agency's action. In addition, the agency must take appropriate measures to make emergency rules known to affected persons.206 An emergency rule is effective immediately on filing with the Texas Register Section.207 An emergency rule is effective for no longer than 120 days. It may be renewed once for no longer than 60 days. During this period, an identical rule may be filed and adopted according to normal rulemaking procedures prescribed by the APA.208

Judicial Review of Agency Rules

A declaratory judgment is available to determine the validity or applicability of any agency rules, including emergency rules.209 A rule may be reviewed "if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff."210 "[T]he remedy . . . is limited to declarations concerning the rule—that the rule is null and void, in the case of a validity challenge, or that the rule did not impose a right, duty, or obligation on the plaintiff, in the case of an applicability challenge . . ."211 The action may be brought only in a Travis County district court, and the agency must be made a party. In some instances, upon motion of either party or motion by the district court in Travis County, a case may be transferred to the Third Court of Appeals for an accelerated review.212

Agencies must possess statutory authority to adopt rules and a rule may not exceed that statutory authority.²¹³ For example, a licensing agency may not adopt a rule requiring an applicant for a license to serve a two-year apprenticeship if the agency's enabling legislation does not impose an apprenticeship requirement. Similarly, an agency may not require an applicant to pay a licensure application fee of \$200 if the agency's enabling legislation caps the fee at \$100. Rules that exceed the agency's statutory authority are void.²¹⁴ Generally, an agency rule may not conflict with other statutes either.²¹⁵

An agency rule must comport with constitutional provisions and be adopted in accordance with proper APA procedures.²¹⁶ A rule is voidable if it is not adopted in substantial compliance with sections 2001.0225-2001.034 of the APA.²¹⁷ Further, a mere technical defect that does not result in prejudice to a person's rights or privileges is not grounds for invalidation of a rule.²¹⁸ In a procedural challenge, the court's review is limited to the "four corners" of the order adopting the rule to determine an agency's substantial compliance with the APA.²¹⁹ An action challenging a rule for noncompliance with APA rulemaking requirements must be filed within two years of the effective date of the rule.²²⁰ If a court finds that an agency has not substantially complied with one or more procedural requirements of the APA, the court may remand the rule, or a portion of the rule, to the agency and, if it does remand, shall provide a reasonable time for the agency to either revise or readopt the rule through established procedure. During the remand period, the rule shall remain effective unless the court finds good cause to invalidate the rule or a portion of the rule, effective as of the date of the court's order.²²¹

In a case that involves only the applicability of a rule, the plaintiff must show why a rule should not apply to the plaintiff. In essence, a plaintiff must plead facts explaining why plaintiff falls outside the reach of the rule or why the rule was not designed to apply to plaintiff. If the agency has no intention of applying the rule to the plaintiff, the defendant's attorney should file a plea to the jurisdiction, indicating that the agency has no intent to apply the rule against the plaintiff.²²²

Endnotes:

121 TEX. GOV'T CODE § 2001.003.

122 *Tex. Alcoholic Beverage Comm'n v. Amusement & Music Operators of Tex., Inc.*, 997 S.W.2d 651 (Tex. App.—Austin 1999, pet. dismissed w.o.j.).

123 *El Paso Hosp. Dist. v. Tex. Health & Human Servs. Comm'n*, 247 S.W.3d 709, 714-15 (Tex. 2008).

124 *Combs v. Entm't Publ'ns, Inc.*, 292 S.W.3d 712 (Tex. App.—Austin 2009, no pet.).

125 *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 442-43 (Tex. 1994).

126 *Brinkley v. Tex. Lottery Comm'n*, 986 S.W.2d 764 (Tex. App.—Austin 1999, no pet.).

127 *R.R. Comm'n v. WBD Oil & Gas Co.*, 104 S.W.3d 69 (Tex. 2003).

128 *Tex. Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 704 (Tex. App.—Austin 2011, no pet.).

129 *Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 903-05 (Tex. App.—Austin 2009, no pet.).

130 TEX. GOV'T CODE § 2001.004.

131 TEX. GOV'T CODE § 2110.005. 132 TEX. GOV'T CODE § 2001.006.

133 TEX. GOV'T CODE § 2001.039.

134 TEX. GOV'T CODE § 2001.031.

135 TEX. GOV'T CODE § 2001.021.

136 TEX. GOV'T CODE § 2001.003.

137 TEX. GOV'T CODE § 2001.021.

138 *A Guide to Negotiated Rule Making and Pilot Rule Making*, Washington State Office of Financial Management, Revised February 15, 1996.

139 TEX. GOV'T CODE § 2008.002.

140 TEX. GOV'T CODE § 2008.052.

141 TEX. GOV'T CODE § 2008.052.

142 TEX. GOV'T CODE § 2008.053.

143 TEX. GOV'T CODE § 2008.053(a).

144 TEX. GOV'T CODE § 2008.054.
145 TEX. GOV'T CODE § 2008.055.
146 TEX. GOV'T CODE § 2008.056(a)(2).
147 TEX. GOV'T CODE § 2008.056(d).
148 TEX. GOV'T CODE § 2008.053(b).
149 TEX. GOV'T CODE § 2008.058.
150 TEX. GOV'T CODE § 2002.002.
151 TEX. GOV'T CODE § 2002.011.
152 TEX. GOV'T CODE § 2002.054.
153 The Texas Register (<http://www.sos.state.tx.us/texreg/index.shtml>) and the Texas Administrative Code (<http://www.sos.state.tx.us/tac/index.shtml>) are available on the Internet.
154 1 TEX. ADMIN. CODE §§ 91.1-74.
155 The Texas Register Liaison Center is available by password to designated agency liaisons. Texas Register Section of the Office of the Secretary of State.
156 TEX. GOV'T CODE § 2002.021.
157 TEX. GOV'T CODE § 2001.023.
158 TEX. GOV'T CODE § 2001.023(b).
159 TEX. GOV'T CODE § 2001.025.
160 TEX. GOV'T CODE § 2001.026.
161 TEX. GOV'T CODE § 2001.032.
162 TEX. GOV'T CODE § 2001.032(c).
163 TEX. GOV'T CODE § 2001.028.
164 TEX. GOV'T CODE § 2001.022.
165 TEX. GOV'T CODE § 2001.022(a).
166 TEX. GOV'T CODE § 2001.024.
167 TEX. GOV'T CODE § 2001.0225.
168 TEX. GOV'T CODE § 2001.024(a).
169 TEX. GOV'T CODE § 2001.024(a)(3)(C).
170 TEX. GOV'T CODE § 2001.024(a)(5).
171 Unified Loans, Inc. v. Pettijohn, 955 S.W.2d 649, 654 (Tex. App.—Austin, 1997, no pet.).
172 TEX. GOV'T CODE § 2001.024(a)(8).
173 Unified Loans, Inc. v. Pettijohn, 955 S.W.2d at 654.
174 TEX. GOV'T CODE § 2006.002.
175 http://www.oag.state.tx.us/AG_Publications/pdfs/hb3430guidelines2008.pdf
176 TEX. GOV'T CODE § 2006.002(a).
177 TEX. GOV'T CODE § 2001.024(a)(7).
178 TEX. GOV'T CODE § 2001.024(b).
179 TEX. GOV'T CODE § 2002.016.
180 TEX. GOV'T CODE § 2001.025; see also 1 TEX. ADMIN. CODE § 91.4.
181 1 TEX. ADMIN. CODE § 91.5(d).
182 TEX. GOV'T CODE § 2001.037.
183 TEX. GOV'T CODE § 2001.029(a).
184 TEX. GOV'T CODE § 2001.029(a).
185 TEX. GOV'T CODE § 2001.029(b).
186 See TEX. GOV'T CODE § 2001.033.
187 TEX. GOV'T CODE §§ 2001.029, .033.
188 TEX. GOV'T CODE § 2001.035; Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex., 136 S.W.3d 643 (Tex. 2004); State Bd. of Ins. v. Deffebach, 631 S.W.2d 794 (Tex. App.—Austin 1982, writ ref'd n.r.e.).
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190 TEX. GOV'T CODE § 2001.027.
191 TEX. GOV'T CODE § 2001.033.
192 Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins., 925 S.W.2d 667, 669 (Tex. 1996).
193 Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins., 925 S.W.2d at 669; Lambright v. Tex. Parks & Wildlife Dep't, 157 S.W.3d 499, 504-05 (Tex. App.—Austin 2005, no pet.).
194 TEX. GOV'T CODE § 2001.033(a)(1).
195 Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins., 925 S.W.2d at 669.
196 Tex. Natural Res. Conservation Comm'n v. Accord Agric., Inc., No. 03-98-00340-CV, 1999 WL 699825, at *10-12 (Tex. App.—Austin Sept. 10, 1999, no pet.) (not designated for publication); Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins., 925 S.W.2d at 669.

197 TEX. GOV'T CODE § 2001.029(c).
198 TEX. GOV'T CODE § 2001.035(c).
199 TEX. GOV'T CODE § 2001.033(a)(1)(B); Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins., 925 S.W.2d 667 (Tex. 1996); Tex. Med. Ass'n v. Tex. Workers' Comp. Comm'n, 137 S.W.3d 342, 353 (Tex. App.—Austin 2004, no pet.).
200 TEX. GOV'T CODE § 2001.033(a)(2).
201 TEX. GOV'T CODE § 2001.033(a)(3).
202 TEX. GOV'T CODE § 2001.036.
203 TEX. GOV'T CODE § 2001.006.
204 TEX. GOV'T CODE § 2001.034; Nat'l Ass'n of Indep. Insurers v. State Bd. of Ins., No. 91-14131 (Travis County Dist. Ct.), reprinted in 1992 Texas Administrative L.J. 16, 34; Hon. F. Scott McCown, Emergency Rule-making, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, 8 Advanced Administrative Law Course (1993).
205 TEX. GOV'T CODE §§ 551.041, .043-45.
206 TEX. GOV'T CODE § 2001.036(b).
207 TEX. GOV'T CODE § 2001.036(a)(2).
208 TEX. GOV'T CODE § 2001.034.
209 TEX. GOV'T CODE § 2001.038.
210 TEX. GOV'T CODE § 2001.038.
211 State v. BP Am. Prod. Co., 290 S.W.3d 345 (Tex. App.—Austin 2009, pet. denied).
212 TEX. GOV'T CODE § 2001.038(f).
213 Pruet v. Harris Cnty. Bail Bond Bd., 249 S.W.3d 447, 452 (Tex. 2008); Fulton v. Associated Indem. Corp., 46 S.W.3d 364 (Tex. App.—Austin 2001, pet. denied); State Bd. of Ins. v. Deffebach, 631 S.W.2d 794, 798 (Tex. App.—Austin 1982, writ ref'd n.r.e.); see also Tex. Att'y Gen. Op. Nos. GA-0649 (2008), GA-0234 (2004), GA-0020 (2003).
214 State v. Pub. Util. Comm'n, 131 S.W.3d 314 (Tex. App.—Austin 2004, pet. denied).
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216 Bullock v. Hewlett-Packard Co., 628 S.W.2d 754, 756 (Tex. 1982); Tex. Liquor Control Bd. v. Attic Club, Inc., 457 S.W.2d 41, 45 (Tex. 1970). 217 TEX. GOV'T CODE § 2001.035(a). 218 TEX. GOV'T CODE § 2001.035(d). 219 Tex. Med. Ass'n v. Tex. Workers' Comp. Comm'n, 137 S.W.3d 342, 353 (Tex. App.—Austin 2004, no pet.) (citing Reliant Entergy, Inc. v. Pub. Util. Comm'n, 62 S.W.3d 833, 840 (Tex. App.—Austin 2001, no pet.)). 220 TEX. GOV'T CODE § 2001.035(b). 221 TEX. GOV'T CODE § 2001.039. 222 Pub. Util. Comm'n v. City of Austin, 728 S.W.2d 907, 911 (Tex. App.—Austin 1987, writ ref'd n.r.e.).