

Illinois Rulemaking Process

Law basically exists in 4 forms: constitutional law, statutory law, administrative law and case law. Constitutional law creates broad guidelines. Legislation creates specific restrictions, authorities and programs. Administrative law adds the detail often necessary to implement statutory law. If these 3 categories of law do not sufficiently address all the variables, case law evolves.

In 1975, the Illinois General Assembly enacted the Illinois Administrative Procedure Act (IAPA) [5 ILCS 100] to create a procedure through which administrative agencies would exercise the authority delegated to them by the legislature to create administrative law through the adoption of agency regulations. In 1977, the IAPA was amended to add a process by which the General Assembly would oversee the exercise of this delegated authority through the Joint Committee on Administrative Rules (JCAR), a service agency of the General Assembly.

Rules of an administrative agency are valid and enforceable only after they have been through the rulemaking process prescribed in the IAPA. Rules are for the purpose of interpreting or implementing provisions of a statute and should not actually expand or limit the scope of the statute.

Types of Rulemakings

Proposed Rules. These can be new rules or amendatory rulemakings. Frequently this is referred to as "regular rulemaking" or "permanent rulemaking". A 2-step (First Notice and Second Notice) process is followed, requiring from 90-365 days. Aside from the basic 90 days, the agency controls the timing. Both the general public and the General Assembly, through JCAR, can have input prior to adoption.

Emergency Rules. Rules are effective immediately upon the agency filing them with the SOS or within 10 days after filing. These rules can be developed unilaterally by the agency; JCAR reviews after the rules are adopted. An emergency rulemaking lasts 150 days unless an earlier date is specified or the emergency rule is replaced by a permanent rulemaking. Emergency rulemaking can be used only if the agency finds a threat to the public interest, safety or welfare exists that the rulemaking will address.

Peremptory Rules. The IAPA provides for the immediate adoption of a rule required as a result of a federal law, federal rule, collective bargaining agreement, or a court order under conditions that preclude discretion by the agency concerning the rule's content. Peremptory rules are effective upon filing with the SOS or on the date required by the federal law, federal rule or court order. JCAR reviews these rules after their adoption.

Exempt or Identical in Substance Rules. The IAPA, the Environmental Protection Act and the Illinois Emergency Management Act create a special process through which PCB and IEMA can adopt regulations that are identical in substance to federal regulations that the State is required to adopt and enforce. These rulemakings are reviewed by JCAR after adoption.

Required Rulemaking. These are rules of an agency that can be adopted unilaterally by the agency by filing with the SOS. Examples are organization charts, principal address, Freedom of Information Act information, hearing officer qualifications, etc. JCAR reviews required rules after their adoption.

The Process ---

Drafting of Rules. Administrative rules are drafted by State agencies; there is no central drafting bureau as for statutes. The involvement of the public in the initial drafting is at the discretion of the agency; however, the IAPA encourages early public involvement and requires agencies to semiannually publish a Regulatory Agenda indicating, to the best of the agency's knowledge, the scope of the next 6 months' rulemaking activity.

First Notice. The First Notice period commences upon publication of an agency's Notice of Rulemaking in the Illinois Register. First Notice lasts a minimum of 45 days and terminates when the agency files with JCAR, commencing the Second Notice period. The only limitation is that a rulemaking expires if not adopted within 1 year after commencement of First Notice.

The IAPA requires that, during First Notice, the Department of Commerce and Economic Opportunity review each proposed rulemaking to determine possible impact on small business. The general public can submit comment on the rulemaking proposal to the agency and a public hearing may or may not be held during this period. The agency can volunteer to hold a hearing or must conduct one at the request of the Governor, JCAR, an association representing over 100 persons, 25 individuals, or a local government. Requests for hearing must be filed within 14 days after publication of the First Notice. The agency can modify the rulemaking during First Notice by submitting a First Notice Changes document to JCAR when it gives Second Notice.

Second Notice. The Second Notice period commences upon the agency's filing of the Second Notice with JCAR and lasts for a maximum of 45 days, unless extended for an additional 45 days by mutual agreement of JCAR and the agency. During the Second Notice Period, legislative review of the rules is conducted first by the JCAR staff and then at a meeting of the legislative members. JCAR reviews the proposed rules for statutory authority, propriety, standards for the exercise of discretion, economic effects, clarity, procedural requirements, technical aspects, etc.

During the JCAR review, JCAR and the agency can agree to modifications in the rulemaking that are adopted through written JCAR Agreements. The Agreements are appended to the Certificate of No Objection issued by JCAR at its regular meeting, or are still applicable if no Certificate is issued but the agency proceeds to adopt. If the agency does not choose to modify a rulemaking or if policy differences cannot be resolved during the review process, JCAR can take one of several actions.

JCAR Motions ---

Certificate of No Objection. With the Certificate, the agency can proceed to adopt the rules by filing them with the SOS for publication in the Illinois Register.

Recommendation. (Issued along with a Certificate of No Objection) The agency should respond to the Recommendation in writing within 90 days and can modify or withdraw the rule in response to a JCAR Recommendation. (After going to Second Notice, the agency cannot unilaterally modify/withdraw a rulemaking.) However, the agency can also adopt the rules with no changes at any time after receipt of the Certificate of No Objection.

Objection. An agency has to respond to an Objection in writing within 90 days, but after responding can proceed to adopt. The agency can modify or withdraw in response to a JCAR Objection or adopt the rules without changes. JCAR Agreements still apply.

Filing Prohibition/Suspension. If JCAR determines that a rulemaking constitutes a threat to the public interest, safety or welfare, the members can, by a 3/5 (8 members) vote, prohibit filing of a proposed rulemaking (or suspend an emergency or preemptory rule). As a result, the proposed rulemaking may not be accepted for filing by the Secretary of State or enforced by the agency. An emergency or preemptory rule, which has already been adopted, becomes null and void for a period of 180 days, after which, it is automatically repealed.

Public Notification ---

Illinois Register is the official State publication through which the public is informed of rulemaking activity. The Illinois Register is prepared by JCAR and published by the Secretary of State every Friday and can be accessed through the General Assembly website (www.ilga.gov) or the Secretary of State's website. The Register contains First Notice publication of rulemaking proposals, JCAR actions, a list of Second Notices received by JCAR, notices of final adoption of rulemakings, regulatory agendas (in January and July), executive orders and proclamations, and quarterly indexes to the current and previous issues. Over the course of a year, the Register contains around 20,000 pages. It can be ordered in hardcopy from the Secretary of State for \$290/year, can be seen on both the General Assembly's and the Secretary of State's websites, and is available electronically through private publishers.

The Flinn Report: Illinois Regulation is a 4-6 page weekly publication by JCAR that summarizes the rulemaking activity depicted in the matching issue of the Illinois Register. The Flinn Report is mailed free of charge to anyone who requests it and is also available weekly on the General Assembly's website at www.ilga.gov.

Illinois Administrative Code. The compilation of all agency rules is known as the Illinois Administrative Code. The Code, which is larger than the Illinois Compiled Statutes, is maintained electronically by JCAR/LIS. That database is located on the General Assembly's website at ilga.gov and State agencies can request from JCAR downloads of specific Sections to use for drafting purposes.

Public Participation

One of the main reasons the IAPA was enacted was to give the public input into the rulemaking process. Any interested persons may contact an agency during the First Notice period to record a position on a rulemaking proposal. Additionally, many agencies consult with their identified interest groups during the pre-First Notice drafting process.

When the rulemaking goes to Second Notice, JCAR receives a copy or summary of all written comment submitted to the agency. In addition, the public may contact JCAR directly, and frequently does so if the agency refused to modify in response to public comment, or if they discovered the existence of the proposal too late for the First Notice public comment period.

Public comment is vital to the JCAR review process. Frequently, it is only through this comment that the Committee fully recognizes the effect of a rule on the individual, business or local government that has to adhere to it on a daily basis.

The public may also lodge complaints about existing rules. Agencies are required to allow the public to suggest rule revisions. Additionally, JCAR may open an investigation into an existing rule on its own volition or based on public complaint.