



# 2015 Annual Meeting

## **Litigation Track**

Monday, June 15, 2015

3:30 p.m. - 5:10 p.m.

## **Effective Representation in Rulemaking Proceedings**

### **Moderator:**

Susan Low

Administrative Law Section Chair

### **Presenters**

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**Administrative Rules:**  
**A Legislative Perspective**

Iowa State Bar Association  
Annual Meeting  
June 15, 2015

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# The Administrative Rules:

## A Legislative Perspective

By George S. Eichhorn

### I. Background

#### A. Three fundamentals to remember about administrative law:

1. Agencies are generally creatures of the Legislature<sup>1</sup>;
2. Agencies have a great deal of discretion; and,
3. Courts have relatively limited roles in supervising agency conduct.<sup>2</sup>

#### B. In Iowa, an Agency is a “board, commission, department, officer or other administrative office or unit of the state” Iowa Code § 17A.2(1) (2011). It does not include “the general assembly, the judicial branch or any of its components, the office of the consumer advocate, the governor, or a political subdivision of the state or its offices and units.” Id.

#### C. Crucial to know:

1. Agencies enabling acts;
2. Specific statutes authorizing rules;
3. The rules implementing the statutes (See generally the Table of Rules Implementing Statutes at <https://www.legis.iowa.gov/law/administrativeRules/additionalInfo>);
4. Iowa Administrative Procedure Act. Iowa Code Chapter 17A; and,
5. Agency’s rules.

### II. Iowa Administrative Procedures Act (Iowa Code Chapter 17A).

#### A. Purposes of the Iowa Administrative Procedure Act

1. Intended to provide “a minimum procedural code for the operation of state agencies...” Iowa Code § 17A.1(1).
2. “The purposes of this chapter are: To provide legislative oversight of powers and duties delegated to administrative agencies; to increase public accountability of administrative agencies; to simplify government by assuring a uniform minimum procedure to which all agencies will be held in the conduct of their most important functions; to increase public access to

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<sup>1</sup> This is true in federal agencies. In Iowa, there are agencies that were created by the Governor, but they are few and generally obtain funding (Legislative involvement) at some point. See Iowa Code § 17A.2(11) recognizing an agency created by a governor’s “executive order or directive”.

<sup>2</sup> Fox, William F., UNDERSTANDING ADMINISTRATIVE LAW, 4<sup>th</sup> ED., (2000), pp2-5.

governmental information; to increase public participation in the formulation of administrative rules; to increase the fairness of agencies in their conduct of contested case proceedings; and to simplify the process of judicial review of agency action as well as increase its ease and availability.” Iowa Code § 17A.1(3).

3. Generally, the purposes include:
  - a. To give the public notice of what the agency intends to do;
  - b. To give the public a limited opportunity to participate in the decision-making process;
  - c. To publish and distribute the final policy; and,
  - d. To provide for Gubernatorial and legislative oversight.

B. Act Doesn’t Expand Authority

1. “An agency shall have only that authority or discretion delegated to or conferred upon the agency by law **and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency.** Unless otherwise specifically provided in the statute, a grant of rulemaking authority shall be construed narrowly.” Iowa Code § 17A.23(3).

III. Iowa Rules

- A. In Iowa, rules include “each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency.” Iowa Code § 17A.2(11) (2011).
- B. It includes executive orders or directives which “creates an agency or establish a program or which transfers a program between agencies...” Id.
- C. It excludes:
  1. A statement limited to internal management of an agency which does not “substantially affect the legal rights of, or procedure available to, the public...” Iowa Code § 17A.2(11)(a).
  2. “A declaratory order issued pursuant to section 17A.9, or an interpretation ... with respect to a specific set of facts and intended to apply only to that specific set of facts.” Iowa Code § 17A.2(11)(b).
  3. “An intergovernmental, interagency, or intra-agency memorandum, directive, manual, or other communication which does not substantially affect the legal rights of, or procedures available to, the public...” Iowa Code § 17A.2(11)(c).
  4. A contested case decision or order. Iowa Code § 17A.2(11)(d).
  5. An attorney general opinion. Iowa Code § 17A.2(11)(e).
  6. “Those portions of staff manuals, instructions, or other statements ... which set forth criteria or guidelines to be used by ... staff in auditing, in making inspections, in settling commercial disputes or negotiating commercial

- arrangements, or in the selection or handling of cases...” Iowa Code § 17A.2(11)(f).
7. Specifications of prices to be charged “for goods or services sold by an agency as distinguished from a license fee, application fee or other fees.” Iowa Code § 17A.2(11)(g).
  8. Statements concerning “only the physical servicing, maintenance, or care of publicly owned or operated facilities or property.” Iowa Code § 17A.2(11)(h).
  9. Statements relating to the use of public facilities, “the substance of which is indicated ... by means of signs or signals.” Iowa Code § 17A.2(11)(i).
  10. “A decision by an agency not to exercise a discretionary power.” Iowa Code § 17A.2(11)(j).
  11. Statements “concerning only inmates of a penal institution, students enrolled in an educational institution, or patients admitted to a hospital...” Iowa Code § 17A.2(11)(k).
  12. “An advisory opinion of the Iowa ethics and campaign disclosure board.” Iowa Code § 17A.2(11)(l).
- D. “No agency rule or written statement of law or policy, or interpretation, order, decision, or opinion is valid or effective against any person or party ... until it has been made available for public inspection and indexed as required by subsection 1 [Iowa Code § 17A.3], paragraphs “d” and “e”. Iowa Code § 17A.3(2). If the agency can prove the person had actual knowledge of the rule, this prohibition does not apply. *Id.*
- E. An agency is to “[a]s soon as feasible and to the extent practicable, adopt rules, in addition to those otherwise required by this chapter [Chapter 17A], embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers.” Iowa Code § 17A.3(1)(c).
- F. The Iowa Administrative Procedure Act’s provisions for agency rule making (generally, see Iowa Code §§ 17A.4-7) are to “be construed broadly to effectuate” their purposes. Iowa Code § 17A.23. Exceptions and exclusions are to be construed narrowly. *Schmitt v. Iowa Department of Social Services*, 263 N.W. 2d 739, 745 (Iowa 1978). But see, “Unless otherwise specifically provided in the statute, a grant of rulemaking authority shall be construed narrowly.” Iowa Code § 17A.23(3) and Joseph A. Royce and Jack Ewing Legislative Services Agency Opinion Letter “Narrow Construction of Rulemaking Authority”, April 20, 2015.
- G. By definition, rule making includes making policy statements. See Iowa Code § 17A.2(11).
1. General arguments in favor of agencies making policy by rulemaking include clarity, better decisions, comprehensive decision making, fairness, expedited hearings.
  2. General arguments against agencies making policy by rulemaking include legislative intent, the asserted need for a “right to a hearing” on all important issues, longstanding agency practice, when in doubt... rule against agency power.

#### IV. Iowa Rule Making Procedures (Notice of Intended Action Procedures)

##### A. Generally

1. Directed in Iowa Code § 17A.4 with filing a Notice of Intended Action; or,
2. Petitions for Rulemaking in Iowa Code § 17A.7.
3. See <https://www.legis.iowa.gov/law/administrativeRules/howDoRulesWork>. To determine status of particular rules, see <https://www.legis.iowa.gov/law/administrativeRules/tracker>.

##### B. Iowa has adopted Uniform Rules on Agency Procedure. See generally, <https://www.legis.iowa.gov/docs/Rules/Current/UniformRules.pdf> (or on the Administrative Rules site <https://www.legis.iowa.gov/law/administrativeRules/additionalInfo> and click on Uniform Rules on Agency Procedure section.

1. The Uniform Rules provide for an agency to maintain a docket of “Anticipated Rule Making.” The anticipated rule docket is generally maintained on the agency’s website.
2. Agency may solicit comments from the public on the subject matter of a possible rule. See Uniform Rules X.2.

##### C. Agency Rulemaking Internet Site

1. “Subject to the direction of the administrative rules coordinator, each agency shall make available to the public a uniform, searchable, and user-friendly rules database, published on an internet site.” Iowa Code §17A.6A(1).
2. The site is to advise the public regarding the agency’s rulemaking process and provide an opportunity for public comments or complaints concerning “proposed and adopted rules”. Iowa Code §17A.6A(2).

##### D. Executive Order 71 – Jobs Impact Statement

1. “Each agency ... must take steps to minimize the adverse impact on jobs and the development of new employment opportunities before proposing a rule. Evidence of such steps would include a Cost-Benefit Analysis of the proposed regulation.” Executive Order 71, Governor Terry Branstad.
2. Tightens definitions of “Benefit”, “Cost” and “Cost-Benefit Analysis”.
3. The Jobs Impact Statement includes, in part:
  - a. A description of the costs the agency anticipates for “state agencies, local governments, the public, and the regulated entities, including regulated businesses and self-employed individuals, will incur from implementing and complying with the rule” Id.
  - b. A description and quantification of “the nature and the impact the proposed rule will have on private sector jobs and employment opportunities including the categories of jobs and employment opportunities that are affected by the proposed rule, the number of

jobs or potential job opportunities and the regions of the state affected.” Id

- c. “Identify, where possible, the additional costs to the employer per employee for the proposed regulations,” Id.
- d. “Include other relevant analysis requested by the Administrative Rules Coordinator”. Id.

- 4. Jobs Impact Statement must be provided to the Administrative Rules Coordinator **prior to the publication of any notice of intended action.** Id.

E. Executive Order 80 – Stakeholder groups

- 1. “Each agency shall create a stakeholder rulemaking group for a specific rulemaking if requested to do so by the head of the agency or the Administrative Rules Coordinator...” Executive Order 80, Governor Terry Branstad.
- 2. Appointed by the agency “in consultation with the Administrative Rules Coordinator”. Id.
- 3. The stakeholder group is to receive public comment and “deliberate on the desirability and content of any rule it may recommend to the agency for adoption.” Id.
- 4. The stakeholder group forwards its recommendation to the agency and the agency “shall consider” the recommendation. Id.

F. Rulemaking is started by the agency filing a Notice of Intended Action (or “Emergency” rule, See Section V, *infra*) with the Administrative Rules Coordinator and the Administrative Code Editor. Iowa Code § 17A.4(1)(a). The agency also provides a copy to the chairpersons and ranking members of the Legislature’s appropriate standing committee. Id.

- 1. Administrative Code Editor arranges for publication in the Iowa Administrative Bulletin.
- 2. Rules must provide a minimum 20 days for persons to submit written comments. Iowa Code § 17A.4(1)(b).
- 3. Rules must state the mechanism for the public to request an “opportunity for oral presentation” (public hearing). Id.
  - a. Not a matter of public right for oral presentation.
  - b. Can be requested by:
    - i. Petition signed by 25 persons;
    - ii. A group representing 25 persons;
    - iii. A government agency;
    - iv. The Governor; or,
    - v. The Administrative Rules Review Committee. Id.
  - c. “The agency shall consider fully all written and oral submissions respecting the proposed rule.” Id.

4. Rules that will necessitate “additional annual expenditures of at least \$100,000.00 or combined expenditures of at least \$500,000.00 within 5 years by **all affected persons** ... shall be accompanied by a fiscal impact statement....” (emphasis added) Iowa Code § 17A.4(4).

G. Regulatory Analysis – Iowa Code § 17A.4A.

1. This code section combines a couple concepts, including an “economic impact statement” and a small business “regulatory flexibility analysis”.
2. The Administrative Rules Coordinator, Administrative Rules Review Committee or at least 25 persons who qualify as small businesses or an organization representing at least 25 such persons can request a regulatory analysis. Iowa Code § 17A.4A(1). Must be requested within 32 days after publication of the notice. .
3. When requested, the agency must extend the time of public comment for at least 20 days past the publication of the regulatory analysis.
3. If the rule was adopted by “emergency” procedures, the Administrative Rules Review Committee and the Administrative Rules Coordinator may request a regulatory analysis and it must be published within 70 days from the request. Id
4. Regulatory analysis includes:
  - a. “A description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons, including a description and amount of all the different costs that would be incurred in complying with the proposed rule.” Iowa Code § 17A.4A(a)(2).
  - b. “A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction.” Id at (a)(4).
  - c. “A determination of whether less costly methods or less intrusive methods exist for achieving the purpose of the proposed rule.” Id at (1)(5).
  - d. “A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.” Id at (a)(6).
5. If there is a substantial impact on small business there are further requirements. Iowa Code § 17A.4A.(2)(b). The analysis must include whether it would be feasible and practicable to do any of the following to reduce the impact on small business;
  - a. Whether less stringent compliance or reporting requirements could be adopted. Id at (2)(b)(1).
  - b. Whether less stringent schedules or deadlines for compliance or reporting can be adopted. Id at (2)(b)(2).
  - c. Whether compliance and reporting requirements could be consolidated or simplified. Id at (2)(b)(3).



- d. Whether performance standards could replace design or reporting standards. Id at (2)(b)(4).
  - e. Whether small businesses could be exempted from any or all of the rule requirements. Id at (2)(b)(5).
- H. During the rulemaking process, the Governor, Attorney General or the Administrative Rules Review Committee can object to a rule. Iowa Code § 17A.4(6).
  - 1. Grounds for objection are identified as “unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency. Id.
  - 2. Requires a written objection and published. Id.
  - 3. Shifts the burden of proof in a judicial review and agency has burden to show the rule is “not unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency.” Id.
  - 4. If the agency fails to carry that burden, “the court shall declare the rule or portion of the rule objected to invalid and judgment shall be entered against the agency for court costs.” Id at (6)(b).
- I. Effective date of rules
  - 1. 180 days after the later of the published notice or the public hearing, the Agency must either adopt the rule or terminate the rulemaking proceedings.
  - 2. The soonest a rule can be adopted is 35 days after publication.
  - 3. Common practice is for a notice period to run 45 to 90 days.
- J. Governor right to rescind a rule
  - 1. Within 70 days of its effective date, Governor may rescind a rule. Iowa Code § 17A.4(8).
  - 2. Exercised by Executive Order
- K. Continuing obligation to review rules
  - 1. Code authorizes Governor, Attorney General and Administrative Rules Review Committee to object to “adopted” rules. Iowa Code § 17A.4(6)(a).
  - 2. Governor Branstad’s Objection to Electrical Examining Board’s permit and inspection requirements of farms. Objection, January 23, 2012.
  - 3. Governor Branstad’s Executive Order 71.
  - 4. Governor Vilsack’s Executive Order 9.
  - 5. Administrative Rules Review Committee for “selectively reviewing rules, whether proposed or in effect.” Iowa Code § 17A.8(6).
- V. Emergency Rule Making
  - A. Agency decides whether to follow normal rulemaking procedure or to pursue “emergency” rules pursuant. (See <https://www.legis.iowa.gov/docs/ACO/RulesHelpDocs/PDF/EmergencyRulemaking.pdf>).

1. “Emergency” can be a misnomer and actually refers to a shortened rule making procedure.
2. Two procedures to potentially shorten rule making process, which can be done individually or jointly.
3. “Emergency” rule procedure – rules without publication of a notice of intended action: (Iowa Code §17A.4(3).)
  - a. Appropriate when “an agency for good cause finds that notice and public participation would be unnecessary, impracticable, or contrary to the public interest...” Id.
  - b. Requires majority vote of Administrative Rules Review Committee. Id.
  - c. Committee must find “good cause that notice and public participation would be unnecessary, impracticable, or contrary to public interest” Id.
  - d. The Committee by two-thirds vote, the governor or attorney general can object, and if they do so “the rule shall cease to be effective one hundred eighty days after the date of the objection was filed.” Iowa Code §17A.4(3)(b)(1).
  - e. In addition, the Committee by a separate two-thirds vote can suspend the applicability of the rule (or a portion of the rule) until the rule ceases to be effective. Iowa Code §17A.4(3)(b)(2)
  - f. The objection also shifts the burden of proof. Iowa Code §17A4(3)(c).
4. “Emergency” rule procedure - expedite the effective date of a rule. The agency must find:
  - a. A statute provides for a different effective date;
  - b. The rule confers a benefit or removes a restriction on the public or some segment thereof; or,
  - c. A different effective date is necessary because of “imminent peril to the public health, safety or welfare”. Iowa Code § 17A.5(2)(b).
  - d. “The agency’s finding and a brief statement of the reasons therefor shall be filed with and made a part of the rule.” Id.
  - e. Prior to indexing and publication, the agency is to make “reasonable efforts’ to notify persons who may be effected by the rule.
5. See generally See <https://www.legis.iowa.gov/docs/ACO/RulesHelpDocs/PDF/EmergencyRulemaking.pdf>.

## VI. The Administrative Rules Review Committee

### A. Permanent Statutory Committee. Iowa Code § 17A.8.

1. Comparison to Legislative Standing Committees
  - a. Legislature creates Standing Committees.
  - b. Standing committees subject to Senate Majority Leader and Speaker.

- i. Standing Committees created by Senate Majority Leader and Speaker.
  - ii. Composition number directed by Senate Majority Leader and Speaker.
  - iii. Appointments by Majority Leader & Minority Leader in Senate and Speaker and Minority Leader in House.
2. Standing committee membership at the will of the appointing person.
3. Standing committee chair at the will of the Senate Majority Leader or Speaker.
4. Standing committees meet at the will of the Senate Majority Leader or Speaker.

B. Administrative Rules Review Committee (“ARRC”)

1. Iowa Code creates ARRC. See Iowa Code § 17A.8.
2. Iowa Code creates composition of ARRC members.
  - a. Senate Majority Leader appoints 3 Senators. Iowa Code § 17A.8(1)(a).
  - b. Senate Minority Leader appoints 2 Senators. Id.
  - c. Speaker of the House appoints 3 Representatives. Iowa Code § 17A.8(1)(b).
  - d. House Minority Leader appoints 2 Representatives. Id.
3. ARRC member’s term is 4 years. Iowa Code § 17A.8(2).
4. ARRC committee elects chairperson. Iowa Code § 17A.8(4).
5. ARRC chair switches between House and Senate every two years. Iowa Code § 17A.8(4)(b).
6. ARRC is to meet the second Tuesday of each month. Iowa Code § 17A.8(5)
  - a. ARRC can vary regular meeting date.
  - b. ARRC can hold additional meetings. Id.
  - c. Chairperson can call a special meeting “at any place in the state and at any time.” Id.
  - d. Committee Rules of Procedure can vary who can call.
  - e. Committee practice can provide for telephonic meetings and/or participation by telephone.

C. ARRC meetings are public.

1. “A regular or special committee meeting shall be **open to the public** and an **interested person may be heard and present evidence.**” Iowa Code § 17A.8(6).
2. Generally committee chair invites public comment upon rules being considered.
3. Committee may require agency representatives to appear.
4. Attendance at meetings includes committee members, committee legal counsel, the Administrative Rules Coordinator (or Governor’s representative), the committee secretary, various representatives of the Legislative Services Agency, various representatives of the state agencies, legislative caucus staff members, lobbyists, lawyers and members of the public.

4. Motions can be made by any committee member and by committee rule do not need to be seconded.
5. A member can ask for a roll call of votes.

D. Rules to be reviewed / the Meeting Agenda.

1. ARRC can review rules that are “proposed or in effect.” Iowa Code § 17A.8(6).
2. Legislative staff initially reviews the Iowa Administrative Law Bulletin for rules to be placed on a meeting’s agenda.
3. Agenda is divided into the portion where the committee requires an agency representative to appear before the committee and those rules where the committee does not require an agency representative to appear.
4. A request for an agency representative to appear generally means the agency representative will provide an overview of the rule and answer committee questions.
5. Generally only those rules where an agency representative is required to appear will come up for public input.
6. The Committee Chair can amend the proposed agenda – adding rules for special review or requesting an agency representative to appear on behalf of a rule. Committee rules may provide for other members to add rules to the agenda.
7. By tradition, the Chair will place any rule on the agenda if requested by a committee member.
8. The agenda is published and put on the Committee website approximately 10 days before a meeting.

E. The Rules Digest

1. Legislative staff (Counsel for ARRC) prepares a digest of the rules that appear to be of concern before each meeting.
2. Includes a short summary of the rule, the areas that might be of concern and highlights issues for ARRC.

F. Additional Committee Documents

1. Legislative staff (Counsel for ARRC) receives communications and, where there is time, distributes materials to ARRC committee members.
2. If there is insufficient time before the meeting, copies are made and distributed at the ARRC meeting.

G. Fiscal Notes

1. Legislative Services Agency prepares.
2. Limited information from agency.
3. Possible supplement from affected persons/entities.
4. Reviewed by committee.

- H. Pre-meeting communications with ARRC members.
  - 1. No prohibition on pre-meeting communication with ARRC members.
  - 2. Often preferred / suggested.
  - 3. Need for champions.
  - 4. Informal vote tally.
  
- I. Meetings
  - 1. Sign in.
  - 2. Progress through agenda. Times approximate.
  - 3. Public comment.
  - 4. Present evidence/documents
  - 5. Committee comment/action.
  - 6. Taped record.
  - 7. Written minutes.
  - 8. Limited opportunity to supplement information.
  
- J. Committee Action.
  - 1. Informal action (committee questions, informal requests).
  - 2. Objection to proposed or adopted substantive rule. Iowa Code § 17A.4(6)(a).
    - a. Majority vote required.
    - b. Grounds for objection are “unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency. Id.
    - c. To all or part of rule.
    - d. Objection may include a referral to the Speaker of the House and President of the Senate. (see paragraph 6, below)
    - e. Shifts the burden of proof in a judicial review and agency has burden to show the rule is “not unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency.” Id.
    - f. If the agency fails to carry that burden, “the court shall declare the rule or portion of the rule objected to invalid and judgment shall be entered against the agency for court costs.” Id at (6)(b).
    - g. No effect on implementation, except informal influence on agency.
    - h. Objection doesn’t expire as long as rule remains in effect.
  - 3. Objection to “emergency” rule
    - a. Two-thirds majority vote. Iowa Code § 17A.4(3).
    - b. Rule ceases to be effective 180 days after the objection. Id.
    - c. Burden of proving procedure shifts to the agency – agency must show “impracticable, unnecessary, or contrary to the public interest and that, if a category of rules was involved, the category was very narrowly tailored.” Id.

- d. May suspend the rule or portion of a rule until it sunsets by two-thirds vote.
4. Seventy-day delay – substantive or emergency rule.
    - a. Two-thirds majority vote. Iowa Code § 17A.4(7).
    - b. Purpose: “if further time is necessary to study and examine the rule.” Id.
    - c. Expires after 70 days.
  5. Session delay – substantive or emergency rule.
    - a. Two-thirds majority vote. Iowa Code § 17A.8(9).
    - b. Delays effective date “until the adjournment of the next regular session.” Id.
    - c. Results in the rule being referred to the Speaker of the House and the President of the Senate, who then refer it to the appropriate standing committee. Id.
    - d. Once the standing committee receives the referral, the committee is to do one of the following within 21 days:
      - i. Sponsor a joint resolution to disapprove of the rule;
      - ii. Propose legislation relating to the rule; or,
      - iii. Or formally refuse to take action regarding the referral. Id.
    - e. Standing committee informs ARRC of its actions.
  6. General referral. Iowa Code § 17A.8(7).
    - a. Majority vote.
    - b. Refers rule to Speaker of the House and President of the Senate at the next regular session of the Legislature.
    - c. Referral can include a recommendation that the rule be overturned by statute. Iowa Code § 17A.8(8).
    - d. Speaker of the House and President of the Senate refers to appropriate standing committee.
    - e. Doesn’t affect the rule during the referral.
    - f. Demonstrates specific concern.
  7. Regulatory analysis. Iowa Code § 17A.4A.
    - a. Majority vote.
    - b. Available within 32 days after publication of notice.
    - c. Extends period for written comments and oral presentation for at least 20 days after the publication of the summary of the regulatory analysis.
  8. Committee may modify, rescind r reconsider any previous action at any time.

9. Informal regulatory analysis. Committee Rules of Procedure 1.2(7)
  - a. Majority vote.
  - b. Not limited to statutory period for formal regulatory analysis.
  - c. Need not conform to the statutory formal regulatory analysis requirements.

K. Rule Nullification

1. Governor can rescind an adopted rule by Executive Order within 70 days of its effective date. Iowa Code § 17A.4(8).
2. Legislature can nullify rule by joint resolution. Iowa Constitution Art. III, § 40.
  - a. No time limit.
  - b. Requires constitutional majority in each chamber.
3. Without constitutional provision, legislative veto can violate separation of powers. Typically Legislature must follow traditional legislative process and submit legislation for executive signature.

VII. Other Legislative Resources

- A. Legislative Service Agency's Legislative Guide, "Guide on Rulemaking".  
<https://www.legis.iowa.gov/docs/publications/LG/14966.pdf>
- B. Legislative Service Agency Administrative Rules Legal Counsel, Jack Ewing,  
515-281-6048



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Glen Dickinson, Director

December 18, 2014

**TO: The Honorable Kraig Paulsen  
Speaker of the House of Representatives**

**FROM: Joseph A. Royce, Sr. Legal Counsel  
Jack Ewing, Legal Counsel**

**RE: Narrow Construction of Rulemaking Delegations**

**Preface.** The Iowa Code contains over 1,000 delegations of rulemaking authority to state agencies, some broad and sweeping, others narrow and specific.

At the June 2013 meeting of the Administrative Rules Review Committee, Senators Courtney and Chelgren and Representatives Vander Linden and Olson volunteered to form a committee to fulfill the reporting requirements set forth in 2013 Iowa Acts, Chapter 140, §13. That provision requires that the committee consider “the scope, impact, and long-term consequences of recently enacted legislation requiring delegations of authority to state agencies to be construed narrowly.”

That legislation is 2013 Iowa Acts, Chapter 114, §5 which amended Iowa Code §17A.23 by revising the third paragraph to read as follows:

3. An agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency. Unless otherwise specifically provided in statute, a grant of rulemaking authority shall be construed narrowly.

Prior to the enactment of that legislation, that paragraph was simply a restatement of common law. An administrative agency does not have any independent law-making power. An agency has only that authority that is either expressly or by necessary implication delegated to that agency.<sup>1</sup>

**Narrow construction limited to rulemaking.** By its own terms, this limitation to narrow construction applies only to the “grant of rulemaking authority”; the limitation does not apply to the interpretation of the statute itself. Statutes are often construed according to their context. For example, a criminal statute is construed narrowly; every element of the crime must be set out in the statute. Some statutes may be construed broadly, especially if they are intended to have a remedial effect.

<sup>1</sup> Northwestern Bell Telephone Co. v. Iowa Utilities Board, 477 N.W.2d 678, 682 (Iowa 1991), and Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 519 (Iowa 2012).



Once it is established that an agency has specific rulemaking authority relating to a statutory provision, the agency may have the authority to interpret that provision through rulemaking. However, as set out below, Iowa's courts place restrictions on an agency's ability to interpret a statute.

**Narrow construction definition.** Narrow construction of a statute generally occurs when the language in a statute is given its exact and technical meaning, and no other equitable considerations or reasonable implications are considered. In terms of delegation of rulemaking authority, narrow construction eliminates any implied rulemaking authority, unless such authority is expressly set out in statute. The duty to administer a statute does not imply the authority to adopt rules to implement the statutory scheme. In strict construction, the agency can only look to the statute as written in order to develop a rule; the agency may not interpret the statutory language beyond the actual text.

For example, the Iowa Telecommunications and Technology Commission has been delegated rulemaking authority to “[a]dopt rules pursuant to chapter 17A as deemed appropriate and necessary, and directly related to the implementation and administration of the duties of the commission.”<sup>2</sup> A narrow construction of that delegation limits the commission's rulemaking authority to the specific items set out in paragraphs “a” through “k” of the duties section of that statute.

However, Iowa's 24 health-related licensing boards have two grants of authority, one specific provision relating to examinations,<sup>3</sup> and a second broad grant of authority “to administer and interpret” the licensing statutes.<sup>4</sup> This second delegation, broad in scope and specifically including the power to interpret the statutes,<sup>5</sup> is not subject to a narrow interpretation.

Several statutory delegations specifically provide for a broad or liberal interpretation and are exempt from a narrow construction.<sup>6</sup>

**Delegation language in Iowa statutes.** Only one provision is included in the Iowa Code which specifically provides for a narrow construction of a rulemaking delegation;<sup>7</sup> otherwise, three types of statutory delegations of rulemaking authority are contained in the Iowa Code: general delegation, general delegation including specific requirements, and limited delegation including specific requirements. The last type of delegation automatically requires a narrow construction. Examples of each type are provided in the appendix.

General delegations are usually a one-sentence provision empowering an agency to adopt rules to implement the provisions in one or more Iowa Code chapters or sections. For example, see the Iowa Civil Rights Commission, §216.5(10): “10. To adopt, publish, amend, and rescind regulations consistent with and necessary for the enforcement of this chapter.” This antiquated language dates from the 1960s. One of the broadest delegations relates to rulemaking by Iowa's 24 health-related boards: “The boards for the various professions shall adopt all necessary and proper rules to administer and interpret this chapter and chapters 148 through

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<sup>2</sup> Iowa Code §8D.3(3)(b)(2014).

<sup>3</sup> Iowa Code §147.36(2014).

<sup>4</sup> Iowa Code §147.76(2014).

<sup>5</sup> *Houck v. Iowa Bd. of Pharmacy Exam'rs*, 752 N.W.2d 14, 17 (Iowa 2008).

<sup>6</sup> See, e.g., Iowa Code §16.1(1)(ae); §16.34; §19B.2; §103A.22; §216.18; §282.18(1)(a)(2014).

<sup>7</sup> Iowa Code §303.3B(2)(2014). See Appendix B.

158, except chapter 148D.”<sup>8</sup> The phrase “administer and interpret” is especially significant; as discussed below, delegating the power to interpret the statutory scheme indicates to the court that the agency has broad interpretive authority.

The court will review an agency’s interpretation of a statute under a highly deferential “irrational, illogical, or wholly unjustifiable” standard or under the nondeferential “errors-at-law” standard. The court gives deference to an agency only if a statute clearly vests authority to interpret the statutory provision with the agency.<sup>9</sup>

### **Example templates for delegation:**

#### GENERAL DELEGATION

Powers and duties. The [agency head or agency policymaking body] shall do all of the following:

Adopt rules for the administration of this [chapter/section].

**NOTE:** This is a broad delegation of power, allowing rulemaking on any matter set out in the statute itself. If the delegation refers only to a specific section, then rulemaking is limited only to that section.

Many statutes include the phrase “pursuant to chapter 17A.” This phrase is unnecessary. The rulemaking process set out in Iowa Code chapter 17A automatically applies to all rules.

#### GENERAL DELEGATION INCLUDING SPECIFIC REQUIREMENTS

The [agency head or agency policymaking body] shall adopt rules for the administration of this [chapter/section], which **shall include, but not be limited to**:

- a. ---
- b. ---
- c. ---

**NOTE:** This is a broad delegation of power, but it includes an enumeration of specific topics that must be set out in rule. Many statutory delegations contain a list of specific items requiring rulemaking. Such a list is a narrow delegation; however, often these delegations are preceded with the phrase “shall include, but not be limited to”; use of this phrase negates the effect of a specific list by providing a broad grant of authority as well.

#### GENERAL DELEGATION PROVIDING FOR INITIAL SO-CALLED EMERGENCY RULES.

Subject to prior approval by the Administrative Rules Review Committee the [agency head or agency policymaking body] shall adopt rules for the administration of this [chapter/section]. Initial rules shall be promulgated on an emergency basis as provided in Iowa Code sections 17A.4 and 17A.5.

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<sup>8</sup> Iowa Code §147.76(2014).

<sup>9</sup> Iowa Dental Ass’n v. Iowa Insurance Division, 831 N.W.2d 138, 143 (Iowa 2013).

## LIMITED DELEGATION INCLUDING SPECIFIC REQUIREMENTS

The key to restricting rulemaking is to specify the subjects for rulemaking and add statutory detail on the content of these rules. A specific list set out in statute implies that only the items on that list may be considered. This is an example of limited delegation language:

The [agency] shall adopt rules to:

- a. ---
- b. ---
- c. ---

**Judicial perspective.** Since 2010, the Iowa Supreme Court has also more strongly restricted agency discretion in promulgating rules. Recent decisions examine statutory delegations of rulemaking authority to determine whether an agency interpretation of a statute would bind the court, or whether the court could substitute its own interpretation of the statute for that of the agency.

In *Renda v. Iowa Civil Rights Commission* the Court stated:

It is generally inappropriate, in the absence of any explicit guidance from the legislature, to determine whether an agency has the authority to interpret an entire statutory scheme. ...[I]t is possible that an agency has the authority to interpret some portions of or certain specialized language in a statute, but does not have the authority to interpret other statutory provisions. *Accordingly, broad articulations of an agency's authority, or lack of authority, should be avoided in the absence of an express grant of broad interpretive authority.* [emphasis added]<sup>10</sup>

The Iowa Supreme Court has concluded that “the mere grant of rulemaking authority does not give an agency authority to interpret all statutory language.”<sup>11</sup> Indications that the legislature has delegated interpretive authority include rulemaking authority, decision-making, or enforcement authority that requires the agency to interpret the statutory language, and the agency’s expertise on the subject or on the term to be interpreted.<sup>12</sup>

When an express grant of interpretive authority has been delegated to an agency, the agency interpretation is binding unless it is “irrational, illogical, or wholly unjustifiable.”<sup>13</sup> When an express grant of interpretive authority has not been specifically delegated, the court is not bound by the agency interpretation, and may substitute its own interpretation of the statutory provisions.

**Impact on rules review.** The narrow construction requirement will impact both gubernatorial and legislative rules review. The Administrative Rules Coordinator (ARC) reviews and preapproves rules filings while the Administrative Rules Review Committee (ARRC) holds public

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<sup>10</sup> *Renda v. Iowa Civil Rights Commission*, 784 N.W.2d 8, 13-14 (Iowa 2010).

See also *Iowa Land Title Ass’n v. Iowa Finance Authority*, 771 N.W.2d 399 (Iowa 2009).

<sup>11</sup> *Neal v. Annett Holdings, Inc.* supra at 519.

<sup>12</sup> *Renda*, supra.

<sup>13</sup> Iowa Code §17A.19(10)(I)(2014).

meetings, providing legislative oversight and a stakeholder forum for input and discussion concerning proposed rules.

Rules review will now initially include a focus on reviewing the breadth or narrowness of underlying statutory authority to promulgate rules. Without specific delegation, broad rulemaking authority can no longer be implied from the context of the statute itself.

Each rulemaking will require scrutiny of the specific language the agency is implementing and a review of the specific duties and authority delegated to the agency with respect to implementing and enforcing particular statutory provisions.

**Conclusion.** 2013 Iowa Acts, Chapter 140, §13, calls for the ARRC to consider the following three aspects of the narrow construction of statutory delegations of authority to adopt rules: the scope, impact, and long-term consequences of narrow construction:

- **SCOPE.** An agency has only the rulemaking authority specifically set out in statute; however, a general delegation of rulemaking authority, especially one which includes interpretive authority and is without specific limitations, may continue to give an agency wide discretion in adopting rules.
- **IMPACT.** Narrow construction may increase scrutiny by the ARC and the ARRC concerning the statutory authority supporting a rule. A focus on the exact rulemaking authority delegated to the agency may occur more often. Rulemaking authority cannot be implied simply from the context of the statute. A delegation of rulemaking authority which only lists specific rulemaking items may be limited to just those items.
- **CONSEQUENCES.** Some of the flexibility of the rulemaking process may be diminished. Rules are commonly used to add detail to bare-bones statutory programs. Regulatory schemes must be detailed in statute unless broad rulemaking authority is delegated. One possible result is reduced flexibility in program administration. Minor issues that once were addressed through rulemaking may require a retooling of the underlying statute.

## Appendix A — Case Studies

These two cases illustrate the impact that a broad or narrow construction will have on the application of a statute.

**Broad construction.** The 2013 Iowa Supreme Court decision in *Iowa Medical Society v. Iowa Board of Nursing* provides a good example of a broad interpretation of a statute. The Iowa Board of Nursing adopted rules authorizing specially trained advanced registered nurse practitioners (ARNP) to supervise operators of fluoroscopy equipment. At issue was the interpretation of Iowa Code chapter 152, relating to the practice of nursing. The statute allows nurses to perform additional acts “which are recognized by the medical and nursing professions and approved by the board as proper to be performed by a registered nurse.”<sup>14</sup> Iowa Code §147.76 expressly granted licensing boards interpretive rulemaking authority: “The boards for the various professions shall adopt all necessary and proper rules to administer and interpret this chapter and chapters 148 through 158, except chapter 148D.”

The district court struck down these rules, stating that the Nursing Board could not set forth or point to any recognized standards showing that the medical or nursing professions have recognized ARNP supervision of fluoroscopy.<sup>15</sup> The Iowa Supreme Court reversed this ruling, concluding that the plain language of Iowa Code §152.1(6)(d) allows the Nursing Board to decide [through rule] whether the medical and nursing professions have recognized a particular practice of nurses. The Court stated that if the legislature had intended to give another agency or organization the power to determine recognition by the medical profession, it would have said so in the statute.

Note that if the narrow construction requirement had been in place in 2013 the phrase “which are recognized by the medical and nursing professions and approved by the board” might not have been construed to delegate the same level of discretion to the board. In this example the action of the district court demonstrates that a narrow interpretation would probably have required greater evidence of approval by the medical profession.

**Narrow construction.** The 2014 Iowa Supreme Court decision in *State of Iowa vs. Nicoletto* provides a good example of a narrow interpretation of a statute. Nicoletto was a volunteer coach holding a coaching authorization. The coach engaged in sexual activity with a student in violation of Iowa Code §§709.15(3)(a) and (5)(a), which prohibited sexual exploitation by a licensed professional. The Court overturned his conviction on the grounds that Nicoletto was not a school employee as that term is used in the criminal statute. The Court construed this criminal statute narrowly and stated: “To apply the term “licensed professional” to Nicoletto, who worked the night shift at a pipe manufacturer and received a very small stipend for his coaching services, would not comport with our longstanding rule of narrowly construing criminal statutes.”<sup>16</sup>

The case demonstrates that a narrow construction of a statute may also lead to unintended consequences. In this case narrow construction required the court to determine that a part-time coach was not a school employee because the Court was bound by the strict language of the statute. Quoting an earlier case, the Court stated:

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<sup>14</sup> Iowa Code §152.1(6)(d)(2014).

<sup>15</sup> Case No. CV 8252 (10/31/2011).

<sup>16</sup> 845 N.W.2d 421, 427 (Iowa 2014).

“It is not our function to rewrite the statute. If changes in the law are desirable from a policy, administrative, or practical standpoint, it is for the legislature to enact them, not for the court to incorporate them by interpretation.”<sup>17</sup>

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<sup>17</sup> Id. at 431.

### Appendix B — Additional Examples of Delegation

The Iowa Code has over 1,000 specific statutory delegations of rulemaking authority. What follows is a sampling of the various types of delegations that occur, from brief, broad delegations to highly detailed and restrictive delegations setting out specific standards the agency must follow. Unless otherwise noted, references below are to the 2014 Iowa Code.

#### GENERAL (BROAD) STATUTORY DELEGATION OF RULEMAKING AUTHORITY

**2013 Iowa Acts, Senate File 368** — complete delegation of future rulemaking authority to federal government

This is an extremely broad delegation. By eliminating the “date certain” Iowa law will now automatically adopt any future federal regulation, without review or approval.

Section 1. Section 537.1302, Code 2013, is amended to read as follows:

**537.1302 Definition — Truth in Lending Act.** As used in this chapter, “*Truth in Lending Act*” means Tit. 1 of the Consumer Credit Protection Act, in subch. 1 of 15 U.S.C. ch. 41, ~~as amended to and including July 1, 2010,~~ and includes regulations issued pursuant to that **Act prior to July 1, 2010.**

Gubernatorial approval is required. This is an unusual requirement.

**Department of Management** — general delegation

8.6(8) Rules. To make such rules, **subject to the approval of the governor,** as may be necessary for effectively carrying on the work of the department of management. The director may, with the approval of the executive council, require any state official, agency, department or commission, to require any applicant, registrant, filer, permit holder or license holder, whether individual, partnership, trust or corporation, to submit to said official, agency, department or commission, the social security or the tax number or both so assigned to said individual, partnership, trust or corporation.

**Administrative Services Department** — general delegation

8A.104 Powers and duties of the director. The director shall do all of the following:

\* \* \*

5. Adopt rules deemed necessary for the administration of this chapter in accordance with chapter 17A.

**Terrace Hill Commission** — general delegation

Rulemaking is discretionary.

8A.326(5) The commission **may** adopt rules to administer the programs of the commission. The decision of the commission is final agency action under chapter 17A.

**Inspections and Appeals Department** — general delegation

10A.104(5) Powers and duties of the director — Adopt rules deemed necessary for the implementation and administration of this chapter in accordance with chapter 17A.

## Economic Development Authority — general authority of commission

### 15.106A General powers of the authority.

1. The authority has any and all powers necessary and convenient to carry out its purposes and duties and exercise its specific powers, including but not limited to the power to:

\* \* \*

*m.* Make, alter, interpret, and repeal rules consistent with the provisions of this chapter, and subject to chapter 17A.

broad delegation including interpretive authority

\* \* \*

## Labor Division — elevator code — general delegation, with specific requirements

### 89A.3 Rules.

1. The safety board may adopt rules governing maintenance, construction, alteration, and installation of conveyances, and the inspection and testing of new and existing installations as necessary to provide for the public safety, and to protect the public welfare.

2. The safety board shall adopt, amend, or repeal rules pursuant to chapter 17A as it deems necessary for the administration of this chapter, **which shall include but not be limited to** rules providing for:

*a.* Classifications of types of conveyances.

*b.* Maintenance, inspection, testing, and operation of the various classes of conveyances.

*c.* Construction of new conveyances.

*d.* Alteration of existing conveyances.

*e.* Minimum safety requirements for all existing conveyances.

*f.* Control or prevention of access to conveyances or dormant conveyances.

*g.* The reporting of accidents and injuries arising from the use of conveyances.

*h.* The adoption of procedures for the issuance of variances.

*i.* The amount of fees charged and collected for inspection, permits, and commissions. Fees shall be set at an amount sufficient to cover costs as determined from consideration of the reasonable time required to conduct an inspection, reasonable hourly wages paid to inspectors, and reasonable transportation and similar expenses.

*j.* Submission of information such as plans, drawings, and measurements concerning new installations and alterations.

3. **The safety board shall adopt rules for conveyances according to the applicable provisions of the American society of mechanical engineers safety codes for elevators and escalators, A17.1 and A17.3, as the safety board deems necessary. In adopting rules the safety board may adopt the American society of mechanical engineers safety codes, or any part of the codes, by reference.**

4. The safety board **may** adopt rules permitting existing passenger and freight elevators to be modified into material lift elevators.

5. **A rule adopted pursuant to this section which adopts standards by reference to another publication shall be exempt from the requirements of section 17A.6, subsection 2, if the following conditions exist:**

*a.* The cost of the publication is an unreasonable expense when compared to the anticipated usage of the publication.

*b.* A copy of the publication is available from an entity located within the state capitol complex.

*c.* The rule identifies the location where the publication is available.

broad delegation

enumerated duties a- j

rule based on national code

discretionary

standards for availability of national code



- d. The administrative rules coordinator approves the exemption.
6. The commissioner shall furnish copies of the rules adopted pursuant to this chapter to any person who requests them, without charge, or upon payment of a charge not to exceed the actual cost of printing of the rules.
7. The safety board **may** adopt rules permitting inclined or vertical wheelchair lifts in churches and houses of worship to service more than one floor.
8. The commissioner **may** adopt rules pursuant to chapter 17A relating to the denial, issuance, revocation, and suspension of special inspector commissions.

discretionary

### Dental Board — licensing

153.35 Construction rule.

This chapter shall be deemed to be passed in the interest of the public health, safety and welfare of the people of this state, and its provisions shall be **liberally construed** to carry out its object and purposes.

mandate for broad construction

### Human Services Department — foster care licensing

237.3 Rules.

\* \* \*

broad delegation coupled with detailed standards

2. Rules applicable to licensees shall **include but are not limited to**:
- Types of facilities which include but are not limited to group foster care facilities and family foster care homes.
  - The number, qualifications, character, and parenting ability of personnel necessary to assure the health, safety and welfare of children receiving child foster care.
  - Programs for education and in-service training of personnel.
  - The physical environment of a facility.
  - Policies for intake, assessment, admission and discharge.
  - Housing, health, safety, and medical care policies for children receiving child foster care. The medical care policies shall include but are not limited to all of the following:
    - Provision by the department to the foster care provider at or before the time of a child's placement of the child's health records and any other information possessed or known about the health of the child or about a member of the child's family that pertains to the child's health.
    - If the health records supplied in accordance with the child's case permanency plan to the foster care provider are incomplete or the provider requests specific health information, provision for obtaining additional health information from the child's parent or other source and supplying the additional information to the foster care provider.
    - Provision for emergency health coverage of the child while the child is engaged in temporary out-of-state travel with the child's foster family.
  - (1) The adequacy of programs available to children receiving child foster care provided by agencies, including but not limited to:
    - Dietary services.
    - Social services.
    - Activity programs.
    - Behavior management procedures.
    - Educational programs, including special education as defined in section 256B.2, subsection 1, paragraph "b", where appropriate, which are approved by the state board of education.

Rules must include detailed standards for these program components.

(2) The department shall not promulgate rules which regulate individual licensees in the subject areas enumerated in this paragraph “g”.

h. Policies for involvement of biological parents.

i. Records a licensee is required to keep, and reports a licensee is required to make to the administrator.

j. Prior to the licensing of an individual as a foster family home, a required, written social assessment of the quality of the living situation in the home of the individual, and a required compilation of personal references for the individual other than those references given by the individual.

k. Elements of a foster care placement agreement outlining rights and responsibilities associated with an individual providing family foster care. The rights and responsibilities shall include but are not limited to all of the following:

(1) Receiving information prior to the child’s placement regarding risk factors concerning the child that are known to the department, including but not limited to notice if the child is required to register under chapter 692A.

(2) Having regularly scheduled meetings with each case manager assigned to the child.

(3) Receiving access to any reports prepared by a service provider who is working with the child unless the access is prohibited by state or federal law.

**State Board of Education**

256.7(5) Adopt rules under chapter 17A for **carrying out the responsibilities** of the department.

This broad delegation is not limited by any specific criteria or Code section.

**NARROW STATUTORY DELEGATION**

**Economic Development Authority**

16.171 Recovery zone bonds — reporting — reallocation.

\* \* \*

6. **The authority shall promulgate rules to implement the provisions of this section**, including any rules necessary to assure compliance with federal laws relating to the issuance of recovery zone bonds.

specific delegation to implement Iowa and federal law

**Labor Division — OSHA standards**

88.5 Occupational safety and health standards.

1. Promulgation of rules. The commissioner shall, by rule, promulgate standards as needed to conform state occupational safety and health standards to federal occupational safety and health standards. The commissioner shall follow the rulemaking procedures of chapter 17A, and shall file a notice of intended action within ninety days of federal publication of a new, amended, or revoked federal standard.

conformity with federal standards

delegation with specific timeframe

**Labor Division — boiler rules**

89.14 Boiler and pressure vessel board — created — duties.

\* \* \*

5. The board shall adopt rules pursuant to chapter 17A necessary to administer the duties of the board. Rules adopted by the board shall be in accordance with accepted engineering standards and practices. The board shall adopt rules relating to the equipment covered by this chapter that are in accordance with the ASME code, which may include addenda, interpretations, and code cases, as soon as reasonably practical following publication by the American society of mechanical engineers. The board shall adopt rules to require that operation of equipment cease in the event of imminent danger.

rules based on industry standards and national code

\* \* \*

7. Not later than July 1, 2005, and every three years thereafter, the board shall conduct a comprehensive review of existing boiler rules, regulations, and standards, including but not limited to those relating to potable hot water supply boilers and water heaters.

\* \* \*

discretionary

mandatory review of rules

9. The board may adopt rules governing the conversion of power boilers to low pressure boilers.

10. The board may adopt rules establishing an internal inspection interval of up to four years for objects that are subject to inspection pursuant to section 89.3, subsection 4, and are owned and operated by electric public utilities subject to rate regulation under chapter 476.

**Electrical Licensing Board — electrical code**

103.6 Powers and duties.

This narrow delegation is specifically tied to a national standards code. Rulemaking is specifically tied to public safety and health.

1. The board shall:

a. Adopt rules pursuant to chapter 17A and in doing so shall be governed by the minimum standards set forth in the most current publication of the national electrical code issued and adopted by the national fire protection association, and amendments to the code, which code and amendments shall be filed in the offices of the state law library and the board and shall be a public record. The board shall adopt rules reflecting updates to the code and amendments to the code. The board shall promulgate and adopt rules establishing wiring standards that protect public safety and health and property and that apply to all electrical wiring which is installed subject to this chapter.

**Public Health Department — licensure of hospitals**

multiple approvals required

135B.7 Rules and enforcement.

1. a. The department, with the advice and approval of the hospital licensing board and approval of the state board of health, shall adopt rules setting out the standards for the different types of hospitals to be licensed under this chapter. The department shall enforce the rules.

b. Rules or standards shall not be adopted or enforced which would have the effect of denying a license to a hospital or other institution required to be licensed, solely by reason of the school or system of practice employed or permitted to be employed by physicians in the hospital, if the school or system of practice is recognized by the laws of this state.

2. a. The rules shall state that a hospital shall not deny clinical privileges to physicians and surgeons, podiatric physicians, osteopathic physicians and surgeons, dentists, certified health service providers in psychology, physician assistants, or advanced registered nurse

specific rule provisions required by statute

practitioners licensed under chapter 148, 148C, 149, 152, or 153, or section 154B.7, solely by reason of the license held by the practitioner or solely by reason of the school or institution in which the practitioner received medical schooling or postgraduate training if the medical schooling or postgraduate training was accredited by an organization recognized by the council on postsecondary accreditation or an accrediting group recognized by the United States department of education.

*b.* A hospital may establish procedures for interaction between a patient and a practitioner. The rules shall not prohibit a hospital from limiting, restricting, or revoking clinical privileges of a practitioner for violation of hospital rules, regulations, or procedures established under this paragraph, when applied in good faith and in a nondiscriminatory manner.

*c.* This subsection shall not require a hospital to expand the hospital's current scope of service delivery solely to offer the services of a class of providers not currently providing services at the hospital. This section shall not be construed to require a hospital to establish rules which are inconsistent with the scope of practice established for licensure of practitioners to whom this subsection applies.

*d.* This section shall not be construed to authorize the denial of clinical privileges to a practitioner or class of practitioners solely because a hospital has as employees of the hospital identically licensed practitioners providing the same or similar services.

3. **The rules shall require** that a hospital establish and implement written criteria for the granting of clinical privileges. The written criteria shall include but are not limited to consideration of all of the following:

*a.* The ability of an applicant for privileges to provide patient care services independently and appropriately in the hospital.

*b.* The license held by the applicant to practice.

*c.* The training, experience, and competence of the applicant.

*d.* The relationship between the applicant's request for the granting of privileges and the hospital's current scope of patient care services, as well as the hospital's determination of the necessity to grant privileges to a practitioner authorized to provide comprehensive, appropriate, and cost-effective services.

4. **The department shall also adopt rules requiring** hospitals to establish and implement protocols for responding to the needs of patients who are victims of domestic abuse, as defined in section 236.2.

#### **Elder Affairs Department** — assisted living facilities

<p>Specific subject matter delegation. Requires stakeholder consultation, but not approval.</p>
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#### 231C.3 Certification of assisted living programs.

1. **The department shall establish by rule in accordance with chapter 17A minimum standards for certification and monitoring of assisted living programs.** The department may adopt by reference with or without amendment, nationally recognized standards and rules for assisted living programs. The rules shall include specification of recognized accrediting entities and provisions related to dementia-specific programs. **The standards and rules shall be formulated in consultation with affected state agencies and affected industry, professional, and consumer groups;** shall be designed to accomplish the purposes of this chapter; and shall include but are not limited to rules relating to all of the following:

*a.* Provisions to ensure, to the greatest extent possible, the health, safety, and well-being and appropriate treatment of tenants.

*b.* Requirements that assisted living programs furnish the department with specified information necessary to administer this chapter. All information related to a provider application for an assisted living program submitted to the department shall be considered a public record pursuant to chapter 22.

c. Standards for tenant evaluation or assessment, and service plans, which may vary in accordance with the nature of the services provided or the status of the tenant. When a tenant needs personal care or health-related care, the service plan shall be updated within thirty days of occupancy and as needed with significant change, but not less than annually.

d. Provisions for granting short-term waivers for tenants who exceed occupancy criteria.

\* \* \*

discretionary

6. The department **may** also establish by rule in accordance with chapter 17A minimum standards for subsidized and dementia-specific assisted living programs. **The rules shall be formulated in consultation with affected state agencies and affected industry, professional, and consumer groups.**

\* \* \*

mandatory

8. The department **shall** adopt rules regarding the conducting or operating of another business or activity in the distinct part of the physical structure in which the assisted living program is provided, if the business or activity serves nontenants. **The rules shall be developed in consultation with affected state agencies and affected industry, professional, and consumer groups.**

\* \* \*

## Human Services Department — child care facilities

### 237A.12 Rules.

1. Subject to the provisions of chapter 17A, the department shall adopt rules setting minimum standards to provide quality child care in the operation and maintenance of child care centers and registered child development homes, **relating to all of the following:**

a. The number and qualifications of personnel necessary to assure the health, safety, and welfare of children in the facilities. Rules for facilities which are preschools shall be drawn so that any staff-to-children ratios which relate to the age of the children enrolled shall be based on the age of the majority of the children served by a particular class rather than on the age of the youngest child served.

b. Physical facilities.

limited delegation a–h only

c. The adequacy of activity programs and food services available to the children. The department shall not restrict the use of or apply nutritional standards to a lunch or other meal which is brought to the center, child development home, or child care home by a school-age child for the child's consumption.

d. Policies established by the center for parental participation.

e. Programs for education and in-service training of staff.

f. Records kept by the facilities.

g. Administration.

h. Health, safety, and medical policies for children.

\* \* \*

4. If a building is owned or leased by a school district or accredited nonpublic school and complies with standards adopted by the state fire marshal for school buildings under chapter 100, the building is considered appropriate for use by a child care facility. **The rules adopted by the administrator under this section shall not require the facility to comply with building requirements which differ from requirements for use of the building as a school.**

rules content  
prohibited

**State Board of Education** — education standards

256.11 Educational standards.

The state board shall adopt rules under chapter 17A and a procedure for accrediting all public and nonpublic schools in Iowa offering instruction at any or all levels from the prekindergarten level through grade twelve. **The rules of the state board shall require that a multicultural, gender fair approach is used by schools and school districts. The educational program shall be taught from a multicultural, gender fair approach. Global perspectives shall be incorporated into all levels of the educational program.** \* \* \*

rules content  
prescribed

**Department of Cultural Affairs**

303.3B Cultural and entertainment districts.

\* \* \*

specific narrow construction language

2. A city or county may create and designate a cultural and entertainment district subject to certification by the department of cultural affairs, in consultation with the economic development authority. A cultural and entertainment district is encouraged to include a unique form of transportation within the district and for transportation between the district and recreational trails. A cultural and entertainment district certification shall remain in effect for ten years following the date of certification. Two or more cities or counties may apply jointly for certification of a district that extends across a common boundary. **Through the adoption of administrative rules, the department of cultural affairs shall develop a certification application for use in the certification process. The provisions of this subsection relating to the adoption of administrative rules shall be construed narrowly.**

**Department of Transportation** — motor carrier safety

321.449 Motor carrier safety rules.

rulemaking tied to specific federal standard

1. a. A person shall not operate a commercial vehicle on the highways of this state except in compliance with rules adopted by the department under chapter 17A. **The rules shall be consistent with the federal motor carrier safety regulations promulgated under United States Code, Title 49, and found in 49 C.F.R. pts. 385, 390--399 and adopted under chapter 17A.**

**Environmental Protection Commission** — air quality

complicated and specific delegations

**NOTE:** These following statutes relating to the Department of Natural Resources delegate rulemaking authority with narrow and precise language, specifying the content, if not the actual detail of the rules.



## 455B.133 Duties.

\* \* \*

2. Adopt, amend, or repeal rules pertaining to the evaluation, abatement, control, and prevention of air pollution. The rules may include those that are necessary to obtain approval of the state implementation plan under **section 110 of the federal Clean Air Act as amended through January 1, 1991.**

implementation of federal law limited to "date certain"

3. Adopt, amend, or repeal ambient air quality standards for the atmosphere of this state on the basis of providing air quality necessary to protect the public health and welfare and to reduce emissions contributing to acid rain pursuant to **Tit. IV of the federal Clean Air Act Amendments of 1990.**

\* \* \*

4. a. (3) **A design, equipment, material, work practice or operational standard promulgated under this paragraph shall be promulgated in terms of a standard of performance when it becomes feasible to promulgate and enforce the standard in those terms.**

performance standards

\* \* \*

classification of emissions

5. **Classify air contaminant sources according to levels and types of emissions, and other characteristics which relate to air pollution.** The commission may require, by rule, the owner or operator of any air contaminant source to establish and maintain such records, make such reports, install, use and maintain such monitoring equipment or methods, sample such emissions in accordance with such methods at such locations and intervals, and using such procedures as the commission shall prescribe, and provide such other information as the commission may reasonably require. Such classifications may be for application to the state as a whole, or to any designated area of the state, and shall be made with special reference to effects on health, economic and social factors, and physical effects on property.

specific rulemaking delegation

6. a. Require, by rules, notice of the construction of any air contaminant source which may cause or contribute to air pollution, and the submission of plans and specifications to the department, or other information deemed necessary, for the installation of air contaminant sources and related control equipment. The **rules shall allow** the owner or operator of a major stationary source to elect to obtain a conditional permit in lieu of a construction permit. The rules relating to a conditional permit for an electric power generating facility subject to chapter 476A and other major stationary sources shall allow the submission of engineering descriptions, flow diagrams and schematics that quantitatively and qualitatively identify emission streams and alternative control equipment that will provide compliance with emission standards. Such **rules shall not specify** any particular method to be used to reduce undesirable levels of emissions, nor type, design, or method of installation of any equipment to be used to reduce such levels of emissions, nor the type, design, or method of installation or type of construction of any manufacturing processes or kinds of equipment, nor specify the kind or composition of fuels permitted to be sold, stored, or used unless authorized by subsection 4 of this section.

\* \* \*

grandfather clause

7. Commission rules establishing maximum permissible sulfate content shall not apply to an expansion of an industrial anaerobic lagoon facility which was constructed prior to February 22, 1979.

consistent but not identical rules required

specific  
rulemaking  
delegation

8. a. Adopt rules consistent with the federal Clean Air Act Amendments of 1990, Pub. L. No. 101-549, which require the owner or operator of an air contaminant source to obtain an operating permit prior to operation of the source. The rules shall specify the information required to be submitted with the application for a permit and the conditions under which a permit may be granted, modified, suspended, terminated, revoked, reissued, or denied. For sources subject to the provisions of Tit. IV of the federal Clean Air Act Amendments of 1990, permit conditions shall include emission allowances for sulfur dioxide emissions. The commission may impose fees, including fees upon regulated pollutants emitted from an air contaminant source, in an amount sufficient to cover all reasonable costs, direct and indirect, required to develop and administer the permit program in conformance with the federal Clean Air Act Amendments of 1990, Pub. L. No. 101-549. \* \* \*

9. Adopt rules allowing asphalt shingles to be burned in a fire set for the purpose of bona fide training of public or industrial employees in fire fighting methods only if a notice is provided to the director containing testing results indicating that the asphalt shingles do not contain asbestos. Each fire department shall be permitted to host two fires per year as allowed under this subsection.

10. Adopt rules allowing a city to conduct a controlled burn of a demolished building subject to the requirements that are in effect for the proper removal of all asbestos-containing materials prior to demolition and burning. The rules shall include provisions that a burn site have controlled access, that a burn site be supervised by representatives of the city at all times, and that the burning be conducted only when weather conditions are favorable with respect to surrounding property. For a burn site located outside of a city, the rules shall include a provision that a city may undertake not more than one such controlled burn per day and that a burn site be limited to an area located at least six-tenths of a mile from any inhabited building. For burn sites located within a city, the rules shall include a provision that a city may undertake not more than one such controlled burn in every six-tenths-of-a-mile-radius circle in each calendar year. The rules shall prohibit a controlled burn of a demolished building in Cedar Rapids, Marion, Hiawatha, Council Bluffs, Carter Lake, Des Moines, West Des Moines, Clive, Windsor Heights, Urbandale, Pleasant Hill, Buffalo, Davenport, Mason City, or any other area where area-specific state implementation plans require the control of particulate matter.

## Environmental Protection Commission — underground storage tanks

455B.474 Duties of commission — rules.

specific rulemaking  
delegation

The commission shall adopt rules pursuant to chapter 17A relating to:

This section includes dozens of specific and detailed rulemaking requirements.



## ADMINISTRATIVE RULES REVIEW COMMITTEE

*Iowa Code section 17A.8*

The Administrative Rules Review Committee (ARRC) is bipartisan and is composed of five members of the House of Representatives and five members of the Senate.

Iowa Code section 17A.8(5) requires that a regular Committee meeting be held on the second Tuesday of each month. However, a special meeting may be called by the Chair or Vice-chair at any place in the state and at any time.

The Committee meets for the purpose of selectively reviewing rules, whether the rule is proposed or is in effect. Meetings are open to the public and any interested person may appear and present testimony. The Committee may require a representative of an agency whose rule or proposed rule is under consideration to attend a Committee meeting.

During the Legislative Session, the Committee finds it increasingly difficult to devote the necessary time for thorough study of massive filings. The Committee has requested agencies to plan rule making so that the majority of administrative rules may be considered at times other than the months of February through May.

Inquiries may be directed to:

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Jack Ewing, Statehouse, Des Moines, Iowa 50319. Telephone (515)281-6048. Email: [jack.ewing@legis.iowa.gov](mailto:jack.ewing@legis.iowa.gov). Tim Reilly, Statehouse, Des Moines, Iowa 50319. Telephone (515)725-7354. Email: [tim.reilly@legis.iowa.gov](mailto:tim.reilly@legis.iowa.gov).

## COMMITTEE RULES OF PROCEDURE

### PROCEDURE FOR ADMINISTRATIVE RULES REVIEW COMMITTEE MEETINGS

#### CHAPTER 1

#### RULES OF PROCEDURE

### **1.1(17A) Organization and operation.**

**1.1(1) Membership.** The Administrative Rules Review Committee consists of ten members, five from the House of Representatives and five from the Senate.

**1.1(2) Staff.** The Committee has two staff persons. Two legal counsels are located in the Capitol, Des Moines, Iowa 50319, telephone (515)281-6048 or (515)725-7354.

The Administrative Code Editor serves as the ex-officio committee secretary and is located in the Ola Babcock Miller State Office Building, Third Floor, Des Moines, Iowa 50319, telephone (515)281-3355.

**1.1(3) *Quorum.*** A quorum of the Committee consists of three Committee members from each chamber physically present. However, for a special meeting called for the purpose of approving an emergency rule, a quorum may also be satisfied by members participating by telephone, and such members may vote on a motion to approve an emergency rule. Except as specifically provided by law, a majority vote of the entire Committee is required to take any action. Voting by Committee members not physically present is prohibited except as provided in this rule.

**1.1(4) *Special meetings.*** The Chair or Vice-chair may call special meetings, giving at least one week's notice of that meeting. However, the Chair or Vice-chair need only give 24 hours' notice of a special meeting called for the purpose of approving an emergency rule. The Chair or Vice-chair shall call a special meeting on the written request of two or more Committee members.

**1.1(5) *Agenda of meetings.*** An agenda shall be prepared for each meeting and is available at the Committee staff office in the Capitol or through subscription at the legislative website: <http://www.legis.iowa.gov/Subscribe/committeeSubscriptions.aspx>. Each agency whose rules are scheduled for review by the Committee shall be provided with a copy of the agenda. The agency is then responsible to have a representative present at the meeting, unless attendance is waived by the Committee.

**1.1(6) *Date of regular Committee meetings.*** The Committee shall hold its regular monthly meeting on the second Tuesday of each month. However, in each month in which the Committee anticipates the General Assembly will be in session on the second Tuesday of the month, the Committee shall instead hold its regular monthly meeting on the Friday immediately preceding the second Tuesday of the month. If a two-day regular monthly meeting is necessary, the first or second day of the meeting shall be held on a date required by this rule.

**1.1(7) *Oral presentation.*** Any Committee member may request, on behalf of the Committee, that an agency schedule an opportunity for oral presentation on a proposed rule.

**1.1(8) *Motions.*** Motions do not require seconds and may be made by any member of the Committee. If any member requests a roll call motion, the ayes and nays shall be recorded.

**1.1(9) *Procedure.*** In cases not covered by these rules, Mason's Manual of Legislative Procedure shall govern.

**1.1(10) *Minutes.*** The secretary is responsible for the taking of minutes of each meeting. When approved by the Committee, these minutes are public information and constitute the only official record of Committee proceedings. Recordings used to prepare the minutes are available only with the approval of the Chair or Vice-chair. The recording or minutes are available only after the minutes have been approved by the Committee.

**1.1(11) *Oral public comments on rules only.*** Oral public comments shall be limited to the subject of the proposed or adopted rule being reviewed by the Committee.

**1.2(17A) Committee actions.**

**1.2(1) *Objections.*** Pursuant to the authority of Iowa Code section 17A.4(6), the Committee may object to any proposed or adopted rule or portion of a rule. An objection voted by the Committee shall be certified either by the Chair or Vice-chair.

**1.2(2) *Session delay.*** Pursuant to the authority of Iowa Code section 17A.8(9), the Committee may, by two-thirds vote, delay the effective date of a rule or portion of a rule until the adjournment of the next regular session of the General Assembly. The Committee shall refer the rule or portion of a rule to the Speaker of the House and President of the Senate. The Speaker and President shall refer the rule or portion of a rule to the appropriate standing committee of the General Assembly. The standing committee shall review the rule or portion of a rule within 21 days after the referral. The standing committee shall take formal committee action by sponsoring a joint resolution to disapprove the rule or portion of a rule, by proposing legislation relating to the rule or portion of a rule, or by refusing to propose a joint resolution or legislation concerning the rule or portion of a rule. The standing committee shall inform the Committee of the action taken concerning the rule or portion of a rule. The delay will expire upon adjournment if no additional action is taken.

**1.2(3) *Seventy-day delay.*** Pursuant to the authority of Iowa Code section 17A.4(7), the Committee may, by two-thirds vote, delay the effective date of an adopted rule or portion of a rule 70 days beyond its normal effective date. Pursuant to Iowa Code section 17A.4(9), the Committee may also, by two-thirds vote, suspend further action relating to a Notice of Intended Action by an agency for 70 days. The Committee may schedule additional review within that 70-day period. Unless the Committee takes additional action, the delay or suspension expires automatically on the seventieth day.

**1.2(4) *Rescission of earlier actions.*** The Committee may at any time review earlier actions it has taken and may modify, rescind, or reconsider that action. Any modification or rescission shall follow the same procedure required for the original action.

**1.2(5) *General referrals.*** Pursuant to the authority of Iowa Code section 17A.8(7), the Committee may refer a rule or portion of a rule to the Speaker of the House and President of the Senate for review during the next regular session of the General Assembly. The referral may include a recommendation that the Legislature adopt a law to supersede the rule or portion of a rule. The Speaker and President shall refer the rule or portion of a rule to the appropriate standing committee of the General Assembly.

**1.2(6) *Regulatory analysis.*** The Committee may request a regulatory analysis of a proposed rule pursuant to Iowa Code section 17A.4A(1).

**1.2(7) *Informal regulatory analysis.*** The Committee may informally request an agency to conduct a regulatory analysis of a rule after the statutory period for requesting a regulatory analysis pursuant to Iowa Code section 17A.4A has elapsed. Such a request

may include a rule that is already in effect. An informal regulatory analysis need not conform to the requirements of Iowa Code section 17A.4A if the Committee so provides.

**1.2(8) *Committee bills.*** Pursuant to Joint Rule 19, the Committee, by vote of a majority of Committee members from each chamber, may sponsor a bill relating to rules for introduction in either chamber. The bill must be referred to a standing committee, which must take action on the bill within three weeks of referral, except bills referred to appropriations and ways and means committees.

**1.3(17A) Committee actions on emergency rules.**

**1.3(1) *Approval of emergency rules.*** Pursuant to Iowa Code section 17A.4(3), a rule or portion of a rule adopted without notice and an opportunity for public participation cannot be filed without prior approval of the Committee. The standard for filing an emergency rule remains unchanged: “notice and public participation would be unnecessary, impracticable, or contrary to the public interest.”

**1.3(2) *70-day suspension.*** Pursuant to Iowa Code section 17A.4(7), the Committee, by a two-thirds vote, may suspend the effect of an emergency rule or a portion of an emergency rule, within 35 days of the its effective date, for 70 days.

**1.3(3) *Session suspension.*** Pursuant to Iowa Code section 17A.8(9), the Committee, by a two-thirds vote, may suspend the effect of an emergency rule or a portion of an emergency rule, within 35 days of the its effective date, until the adjournment of the next regular session of the General Assembly. The Committee shall refer the rule or portion of a rule to the Speaker of the House and President of the Senate. The Speaker and President shall refer the rule or portion of a rule to the appropriate standing committee of the General Assembly. The standing committee shall review the rule or portion of a rule within 21 days after the referral. The standing committee shall take formal committee action by sponsoring a joint resolution to disapprove the rule or portion of a rule, by proposing legislation relating to the rule or portion of a rule, or by refusing to propose a joint resolution or legislation concerning the rule or portion of a rule. The standing committee shall inform the Committee of the action taken concerning the rule or portion of a rule. The suspension will expire upon adjournment if no additional action is taken.

**1.3(4) *Emergency rule objection and suspension.*** Pursuant to Iowa Code section 17A.4(3), the Committee, by a two-thirds vote, may object to the emergency filing of a rule or a portion of an emergency rule. The rule will sunset after six months. The Committee may also, by a two-thirds vote, suspend the rule or portion of a rule until it sunsets.

**1.4 (17A) Substantive rules.** In examining and evaluating rules, the Committee has developed a number of informal policies. These policies are set out below.

**1.4(1) *Changes in the text between a Notice of Intended Action and Adopted rule.*** The Committee will object to any adopted rule in which the text of that rule has been so changed from the Notice of Intended Action that interested persons did not have adequate notice of the actual rule adopted by the agency. This determination will be based on the following factors:

## Administrative Rules Review Committee-Procedures

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*a.* The extent to which an individual concerned with the adopted rule should have understood that the proposed rule could have affected their interests;

*b.* The extent to which the subject matter or issues involved in the adopted rule differed from those of the proposed rule; and

*c.* The extent to which the effects of the adopted rule differed from the effects that would have occurred if the proposed rule had been adopted.

**1.4(2)** *Quorum requirements and related matters.* Iowa Code section 17A.2 specifically establishes a quorum requirement, for boards and commissions, of not less than two-thirds of the entire membership, unless otherwise provided by statute. In addition to this requirement, the Committee insists that any action taken by a board or commission be based on a majority vote of the entire board or commission. The Committee will object or take other action on any rule that allows board or commission action based on a majority of those present and voting.

**1.4(3)** *Adoption of materials by reference.* If a rule adopts an Iowa statute or an Iowa administrative rule by reference, that adoption includes all subsequent amendments to that statute or rule. Any other material adopted by reference cannot include subsequent amendments and the citation must include a date certain identifying either the effective date or publication date of the material.

***Effective Representation in Rulemaking:  
Governor's Office Perspective***

Larry Johnson, Jr., Deputy Legal Counsel to Governor Branstad

## I. Accomplishing the Governor's Job Growth Goals

*Eventually we will end up with. . . administrative rulings, a whole complex set of laws which deal with new circumstances and which we are prepared to modify over time in light of this public debate.*<sup>1</sup>

### **The Intersection of Law and Economics: Planning and the Rule of Law**

Our free enterprise system works best when the government is bound by rules that are fixed and announced ahead of time. Businesses thrive on certainty and predictability in the law and regulations. You need to be able to see how government will use its power to make your individual business decisions. If the Government takes over the decisions through regulation, then we have a centrally planned government economy that is destined for failure and inefficiency. Freedom loses. Production quotas and price controls oppose common sense regulations that put meat on the bones of laws. Good regulations provide predictability and stability – furthering the rule of law.

In order to make Iowa competitive by creating and retaining jobs, it is necessary to make sure that Iowa has a predictable business climate that fosters innovation and creation. Rules need to be based on law, designed to create and retain jobs, regulate in the least restrictive manner possible, user-friendly, and accessible to members of the public.

The need for regulatory reform is now. Iowa dropped five places and ranks 22<sup>nd</sup> on the “Best & Worst States to Conduct Business” by Chief Executive.<sup>2</sup> Over 500 CEOs were surveyed and determined that Texas, North Carolina, Florida, Tennessee, and Georgia ranked in the top five states to conduct business.<sup>3</sup> Michigan, New Jersey, Illinois, New York, and California ranked as the five worse states to conduct business.<sup>4</sup> Indiana was the highest ranked state in the Midwest to conduct business and Michigan and Illinois were the worse states to conduct business in the Midwest.<sup>5</sup> The Development Counsellors International (dci) notes that states ranked as the best states to conduct business have a pro-business

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<sup>1</sup> Stephen G. Breyer, *Reflections of a Junior Justice*, 54 Drake L. Rev. 7, 11 (2005).

<sup>2</sup> “CEOs Select Best, Worst States for Job Growth and Business,” *Chief Executive*, May 3, 2011, <http://chiefexecutive.net/best-worst-states-for-business> (September 19, 2011).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

environments, low taxes, and incentive offerings.<sup>6</sup> It also notes that the five worst states, California, New York, Illinois, New Jersey, and Michigan, have high taxes, anti-business climates and fiscal problems/state deficits.<sup>7</sup>

The Governor continues to work with regulators and job creators in order to ensure that Iowa is competitive in retaining and growing jobs. The Governor has enacted multiple steps to ensure that regulatory needs are met while balancing the need for a competitive jobs market, including:

- Pre-clearance
- Executive Order 71—requiring a jobs impact report for new administrative rules
- Executive Order 80—establishing stakeholder rulemaking groups, and
- Increasing the role of the Governor and state agencies in federal rulemaking

### **Pre-clearance**

All Notice of Intended Action filings are pre-cleared with the Governor's office Administrative Rules Coordinator. Iowa Code § 17A.4(1)(a). Pre-clearance ensures the creation of rules is efficient and follows the set rulemaking process. It also brings stakeholders, affected individuals, into the process before a rule is noticed.

### **Executive Order 71—Requiring Jobs Impact Statement for New Administrative Rule**

Furthering Iowa's movement towards becoming a better state to do business, the Governor signed Executive Order 71 in March 2011 for the purpose of promoting job creation and eliminating impediments to economic growth. Each new administrative rule must include a jobs impact statement to prevent unnecessary burdens on small business and economic growth. *See* Appendix 10.

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<sup>6</sup> "2011 Winning Strategies Report: Best and Worst States for Business," *Development Counsellors International*. Available at: <http://www.aboutdci.com/winning-strategies/2011-winning-strategies/> (September 19, 2011).

<sup>7</sup> *Id.*



## **Executive Order 80—Establishing Stakeholder Rulemaking Groups**

The Governor signed Executive Order 80 in August 2012 to establish stakeholder rulemaking groups in the rulemaking process for the purpose of preventing unnecessary burdens on the public, increase public input, encourage efficiency and economic growth. *See* Appendix 6.

Establishing stakeholder groups encourage information sharing between agencies and varying interests in the community, and encourage more public participation, especially regarding those individuals and groups that will be affected by new rules.

## **Impact on Federal Rulemaking**

Federal rulemaking impacts Iowans and Iowa businesses. The Governor is committed to advocating for Iowans at the federal level and keep unduly burdensome rules from going into effect.

## **RICE NESHAP Rules**

When the Environmental Protection Agency adopted new National Emission Standards for Hazardous Air Pollutants (NESHAP) for stationary reciprocating internal combustion engines (RICE) in 2010, the Iowa Department of Natural Resources adopted administrative rules to enforce the new standards. The EPA subsequently reopened the RICE NESHAP rulemaking after concerns were expressed that the standards were unworkable. *See* Appendix 1; 77 Fed. Reg. 110 June 7, 2012 (proposing new rules to accommodate emergency engines).

In April 2011, the Governor signed Executive Order 72 which prevented the state administrative rules implementing the RICE NESHAP standards from being implemented before the EPA finished reexamining the RICE NESHAP standards and a new notice and comment period was finished. *See* Appendix 1. On May 22, 2012, the Environmental Protection Agency (EPA) proposed amendments after receiving comments. The goals of the amendments are to ensure that the standards are achievable, practical, and protective. The EPA increased the hours to allow emergency engines to operate for 100 hours per year without meeting emission limits.

## **Children Working on Farms**

In August of 2011, the Department of Labor proposed to change the child labor laws for minors working in agriculture. In November 2011, the Governor and Iowa Secretary of Agriculture Bill Northey co-authored a letter to the Secretary of Labor detailing their concerns about the impact of more restrictive regulation on farmers, especially future farmers who would begin learning farming at a young age. *See* Appendix 12. The Governor continued to express his concerns during the beginning of 2012, and the Department of Labor withdrew the proposed rules placing burdensome restrictions on young people working in agriculture.<sup>8</sup>

## II. Decrease in Regulation

- a. Executive Order 71 was signed to adopt regulations that protect the health, safety and welfare of Iowans in the most effect and efficient way possible without imposing unnecessary burdens that reduce jobs and impede job growth. The breakdown of rules filings are as follows:

<b>Year</b>	<b>Agencies</b>	<b>Filings</b>
2013	56	322
2012	56	264
2011	56	310
2010	52	427
2009	56	473
2008	52	468
2007	51	446
2006	58	440
2005	54	396
2004	56	420

The Following agencies filed the most rules:

1. Department of Human Services: 91
2. Education Examiners Board: 27
3. Public Health Department: 25
4. Inspections and Appeals Department: 18
5. Labor Services Division: 13
6. Revenue and Finance Department: 12

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<sup>8</sup> “Branstad and Reynolds applaud the withdrawal of prime example of federal regulatory overreach,” *Office of the Governor of Iowa*. Apr. 27, 2011. Available at: <https://governor.iowa.gov/2012/04/branstad-and-reynolds-applaud-the-withdrawal-of-prime-example-of-federal-regulatory-overreach/>.

<sup>9</sup> *Annual Report, Administrative Rules Review Committee, Legislative Services Agency, 2* (2013).

7. Department on Aging: 10
8. Department of Education: 10
9. Secretary of State: 8
10. Department of Transportation: 8
11. Department of Economic Development: 7
12. Environmental Protection Commission: 7
13. Iowa Finance Authority: 7
14. Insurance Division: 6
15. Pharmacy Examiners Board: 6
16. Professional Licensure Division: 6
17. Board of Medicine: 5
18. Natural Resource Commission: 5
19. Dental Examiners Board: 4
20. Nursing Board: 4
21. Soil Conservation Board: 4
22. Agricultural Development Authority: 3
23. Agriculture and Land Stewardship Department: 4
24. Engineering and Land Surveying Board: 3
25. Homeland Security and Emergency Management  
Division: 3
26. Real Estate Appraiser Board: 3
27. Administrative Services Department: 2
28. College Student Aid Commission: 2
29. Iowa Public Information Board: 2
30. Regents: 2
31. Accountancy Examining Board: 1
32. Architectural Examining Board: 1
33. Attorney General: 1
34. Auditor of State: 1
35. Credit Union: 1
36. Historical Division: 1
37. IPERS: 1
38. Law Enforcement: 1
39. Racing and Gaming: 1
40. Real Estate Commission: 1
41. Treasurer: 1
42. Utilities Division: 1
43. Veterans Affairs: 1
44. Voter Registration Commission: 1

45. Workers' Compensation: 1 <sup>10</sup>

- b. Executive Order 80 was signed to increase stakeholder involvement and public input in order to prevent overregulation and create efficiencies and job creation. Stakeholder input is essential to ensuring government efficiencies.

Yes	Emergency	Filings
2013	42 (13 percent)	322
2012	21 (8 percent)	264
2011	60 (18 percent)	310
2010	113 (26 percent)	427
2009	100 (21 percent)	473
2008	52 (21 percent)	468
2007	93 (21 percent)	446
2006	65 (14 percent)	440
2005	72 (18 percent)	394
2004	59 (14 percent)	420

Of the 42 emergency rulemakings filed, 30 were filed by the Human Services Department.<sup>12</sup>

**III. Key Rules Questions when reviewing rules:**

- Does the rule do the job it sets out to do or are there unintended consequences?
- Can the goal of the rule be achieved in a more efficient/stream-lined manner?
- Does this rule require red tape that is unnecessary?
- Does another department regulate this issue? Is this duplicative?
- Does the rule burden businesses and job creation? Have industry standards changed?
- Is the purpose of this rule achieved in the least restrictive manner?
- Do the costs of this rule outweigh the benefits?
- Does it go beyond federal legal requirements?
- Is there legal authority for this rule?
- Is the paperwork required by this rule necessary? Does anyone read it?

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<sup>10</sup> *Id.* at 11-12.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 13.