

Rule-Making Under the *APA*

A Briefing for Members of the House Regulatory
Reform Committee

Outline

- ✓ Definition of regulation
- ✓ Different kinds of regulatory authority
- ✓ Source of executive branch regulatory authority
- ✓ Purpose of the APA
- ✓ Permanent rule-making process
- ✓ Potential future action
- ✓ Conclusion

Definition

*“**Regulate** – To govern or direct according to rule; to bring under the control of law or a constituted authority.”*

*“**Regulation** – An authoritative rule dealing with details or procedure; a rule or order having the force of law issued by an executive authority of a government.”*

Kinds of Regulatory Authority

Government regulation comes in many forms:

- ✓ State and federal statutes
 - ✓ State and federal rules
 - ✓ Local ordinances
 - ✓ Judicial order and opinions
- This presentation deals primarily with regulations created by State agencies.

Source of Executive Branch Regulatory Authority

- NC Constitution vests the legislative power of the State in the General Assembly.
- The General Assembly is authorized to prescribe the functions, powers, and duties of administrative agencies.
- The power of administrative agencies to create regulations is entirely dependent upon the General Assembly.
- Once given, the legislature is limited in its ability to directly control the exercise of the power.

The Administrative Procedure Act

- *Purpose* – to establish a uniform system of administrative rule-making and adjudicatory procedure for State agencies.
- Insures that due process is observed in the rule-making process.
- Does not apply to legislature, judiciary, or local government.

The Administrative Procedure Act

- “*Rule* means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. . . .” (*G.S. 150B-2(8a)*)

The Administrative Procedure Act

Steps in Adopting a Permanent Rule

Step 1: The Agency Determines a Rule is Needed

In developing and drafting a proposed rule, the agency must adhere to regulatory principles and post information on its website.

The Administrative Procedure Act

Steps in Adopting a Permanent Rule

Step 2: *Federal Certification*

The agency must prepare a certification whenever a proposed rule is necessary to implement or comply with federal law.

The Administrative Procedure Act

Steps in Adopting a Permanent Rule

Step 3: *Preparation of Fiscal Note*

- State fiscal impact
- DOT analysis
- Local fiscal impact
- Substantial economic impact

The Administrative Procedure Act

Steps in Adopting a Permanent Rule

Step 4: *Publication of Notice of Text*

This is the beginning of the formal rule-making process. The agency sends the proposed rule to OAH for publication in the *NC Register*.

The Administrative Procedure Act

Steps in Adopting a Permanent Rule

Step 5: Public Hearing and Comment

The agency must accept public comment on both the proposed rule and the fiscal note for *at least 60 days*.

The Administrative Procedure Act

Steps in Adopting a Permanent Rule

Step 6: Adoption of the Rule

An agency may not adopt a rule:

- Until the comment period has elapsed.
- If more than 12 months past the end of the comment period.
- That differs substantially from the proposed text published in the *NC Register*.

The Administrative Procedure Act

Steps in Adopting a Permanent Rule

Step 7: Review by the RRC

Once adopted by the agency, rules must be approved by the RRC before becoming effective. The RRC determines if the rule is:

- Within the statutory authority delegated to the agency.
- Clear and unambiguous.
- Reasonably necessary.
- Adopted in accordance with the APA.

The Administrative Procedure Act

Steps in Adopting a Permanent Rule

Step 8: *Rule Becomes Effective*

Rules approved by the RRC become *effective on the 1st day of the month* following approval, unless the RRC receives written objections.

If 10 or more people object to the rule, the rule cannot become effective until the 31st legislative day of the next regular session of the General Assembly.



The Administrative Procedure Act

Other Agency Duties and Limitations

- Annual Review of Existing Rules
- Limitation on Certain Environmental Rules

Potential Future Action

- APO recommendation on expiration of existing rules.
- Simplify process for repeal of rules.
- Strengthen the review of existing rules process.

Conclusion

- The legislature has ultimate authority over State agency regulations.
- It is important to distinguish between problems caused by process and problems caused by the underlying policy.

Questions?