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## Administrative Agencies: A Comparison of New Hampshire and Federal Agencies' History, Structure and Rulemaking Requirements

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# Administrative Agencies: A Comparison of New Hampshire and Federal Agencies' History, Structure and Rulemaking Requirements

## **Abstract**

[Excerpt] "In this day and age it is difficult to think of anything that is not regulated in some way by a state or federal agency. State and federal agencies routinely make decisions that impact our daily lives. The air we breathe, the water we drink, the food we eat, the clothes we wear, and the places where we live and work are all regulated to some extent.

Agencies sometimes regulate things in ways that lead to strange results. For example, New Hampshire, state regulations allow anyone to own a yak, a bison, a wild boar, or an emu, but do not permit a person to own a capuchin monkey unless that person is an "exhibitor" of animals. This may not seem like a big deal, but the result of this restriction is that people with disabilities cannot possess a capuchin monkey as a service animal unless they qualify as an "exhibitor."

Most people with disabilities that need a capuchin monkey as a service animal will not meet the "exhibitor" requirements. They don't intend to exhibit the animal; they just need the animal to help them with daily activities. Therefore, the result of the agency's rules is that people in New Hampshire are able to possess yaks or wild boar with little or no agency oversight, but cannot possess an animal that will bring great benefit to their daily lives.

This article discusses where New Hampshire and federal agencies obtain the authority to make agency rules or regulations, and the similarities and differences in the way they make them. This article also compares the way that New Hampshire and federal agencies are structured and controlled by the executive and legislative branches of government."

## **Keywords**

government agencies, federal, state, regulations, rules

# Administrative Agencies: A Comparison of New Hampshire and Federal Agencies' History, Structure and Rulemaking Requirements

SCOTT F. JOHNSON\*

## I. INTRODUCTION

In this day and age it is difficult to think of anything that is not regulated in some way by a state or federal agency. State and federal agencies routinely make decisions that impact our daily lives. The air we breathe, the water we drink, the food we eat, the clothes we wear, and the places where we live and work are all regulated to some extent.

Agencies sometimes regulate things in ways that lead to strange results. For example, New Hampshire, state regulations allow anyone to own a yak, a bison, a wild boar, or an emu, but do not permit a person to own a capuchin monkey unless that person is an "exhibitor" of animals.<sup>1</sup> This may not seem like a big deal, but the result of this restriction is that people with disabilities cannot possess a capuchin monkey as a service animal unless they qualify as an "exhibitor."<sup>2</sup>

Most people with disabilities that need a capuchin monkey as a service animal will not meet the "exhibitor" requirements. They don't intend to exhibit the animal; they just need the animal to help them with daily activities.<sup>3</sup> Therefore, the result of the agency's rules is that people in New Hampshire are able to possess yaks or wild boar with little or no agency

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1. See N.H. Code Admin. R. Fis. 803.02, 803.06 (2006). An "Exhibitor" is "any person engaged in the showing, displaying or training of wildlife for the purpose of public viewing of the wildlife whether or not a fee is collected, and who possesses a current United States Department of Agriculture exhibitor's permit or U.S. Fish and Wildlife Service permit to exhibit." *Id.* at 801.07.

2. Capuchin monkeys are often trained to be service animals to assist people with disabilities in performing a variety of daily tasks. See generally *Helping Hands: Monkey Helpers for the Disabled, Welcome to Helping Hands: Monkey Helpers for the Disabled!*, <http://www.helpinghandsmonkeys.org> (accessed May 22, 2006). New Hampshire's rules do not provide for any accommodations for people with disabilities to obtain these animals.

3. Obtaining the permits to become an exhibitor is a very detailed and burdensome process. There are a myriad of requirements that must be met. N.H. Code Admin. R. Fis. 810.02; see generally U.S. Dept. of Agric., *Licensing and Registration Under the Animal Welfare Act Guidelines for Dealers, Exhibitors, Transporters, and Researchers*, <http://www.aphis.usda.gov/ac/awlicreg/awlicreg.pdf> (accessed May 22, 2006).

oversight, but cannot possess an animal that will bring great benefit to their daily lives.

This article discusses where New Hampshire and federal agencies obtain the authority to make agency rules or regulations, and the similarities and differences in the way they make them. This article also compares the way that New Hampshire and federal agencies are structured and controlled by the executive and legislative branches of government.

## II. FEDERAL AGENCIES

### A. *History and Development – Evolving from a Sewer Commission*

The emergence of federal administrative agencies is often associated with President Roosevelt's New Deal Era, but federal departments and agencies have been around since the beginning of our Nation. The Departments of State, War and Treasury were all established in 1789 as part of President Washington's Cabinet.<sup>4</sup> The first two federal agencies were also created in 1789; one to "estimate the duties payable" on imports, and the other to adjudicate claims to military pensions for "invalids who were wounded and disabled during the late war."<sup>5</sup>

The creation of these departments and agencies met some resistance, mostly over the specifics of what authority the departments and agencies would have, and over the appointment and removal of the department and agency heads. The idea of having the departments and agencies was itself not controversial.<sup>6</sup> This is likely because the Constitutional Framers and subsequent First Congress were familiar with agencies from English law and colonial governance.

Under English law, agencies began with "sewer commissioners" in the 13th century.<sup>7</sup> The King established these commissioners, and they directed the draining of English wetlands. A statute in 1478 formally authorized the commissioners and gave them the powers of courts, and of inquiry and administration. When the commissioners were ultimately used to increase the land holdings of aristocrats, the process of supervising and reviewing the work of the commissioners became necessary. That started an

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4. David Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161, 195-208 (1995).

5. James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 Stan. L. Rev. 1041, 1044-45 (1975).

6. Currie, *supra* n. 4, at 195-208; Freedman, *supra* n. 5, at 1044-46.

7. Charles H. Koch, Jr., *Administrative Law and Practice*, 1 Admin. L. & Prac. § 1.3 (2d ed., West 2005).

evolution of English administrative law that later found its way to the colonies.<sup>8</sup>

The United States Constitution itself anticipates the need for administrative agencies. Article II, Section 2 expressly recognizes that there will be “executive departments” and that the President can demand written opinions from the “principal officer” of these departments. Section 2 also provides the President with the authority to appoint “Officers of the United States” with the advice and consent of the Senate, and provides Congress with the authority to give “Heads of Departments” the ability to appoint “inferior officers.”<sup>9</sup>

From 1789 to the Civil War, a handful of additional agencies were created. The subsequent creation of the Civil Service Commission in 1883, and the Interstate Commerce Commission in 1887, is regarded by many as the point at which the administrative process officially came of age in the United States.<sup>10</sup> The New Deal, or Roosevelt Era, is recognized as the period during which federal agencies became widespread.<sup>11</sup>

During the New Deal era of the 1930’s, President Roosevelt and Congress created a number of federal agencies to oversee governmental programs intended to help the country recover from the Depression. Agencies included the National Recovery Administration, the National Labor Relations Board (“NLRB”), the Social Security Administration, and the Securities and Exchange Commission (“SEC”).<sup>12</sup>

The expansion of the federal government through administrative agencies was met with resistance from various fronts. Agencies like the NLRB and SEC were opposed by business owners and others who objected to the efforts of the agencies to regulate labor and the exchange of capital.<sup>13</sup> Some New Deal initiatives were met with federal court challenges. The United States Supreme Court ultimately determined that some agencies, or programs within the agencies, were unconstitutional because Congress did not provide sufficient parameters to define what these agencies or programs were supposed to do.<sup>14</sup>

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8. *Id.*

9. See John H. Reese & Richard H. Seamon, *Administrative Law, Principles and Practice* 7 (2d ed., West 2003).

10. Freedman, *supra* n. 5, at 1045. “About one-third of the federal administrative agencies were created before 1900, and another third before 1930.” *Id.* (citing Kenneth C. Davis, *Administrative Law Treatise* vol. 1, § 1.04, 24 (West 1958)).

11. Davis, *supra* n. 10, at 27.

12. *Id.*

13. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1563-65 (1996).

14. *Id.*

Congress also began to exercise more control over federal agency actions. In 1946, Congress passed the Administrative Procedure Act (“APA”) to place some limits and consistency on federal agency actions.<sup>15</sup> One of the sponsors of the APA called the law “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated” by federal agencies.<sup>16</sup> The law today is still a mainstay of the federal administrative process and provides a number of standards that federal agencies must follow when making regulations.<sup>17</sup>

Some contend that the APA has not adequately controlled federal agencies and has instead paved the way for the modern regulatory state that we live under today. This has been accomplished by giving agencies broad freedom to create and implement policies in the many areas those agencies control, and by providing only weak procedural requirements and judicial review standards to protect individuals.<sup>18</sup>

Today, there are fifteen federal departments. Each department has a myriad of federal agencies located within it and each agency has a number of divisions, sections, or bureaus that oversee particular areas within the jurisdiction of the agency. There are also numerous independent agencies that exist outside of the federal departments.

#### B. *Federal Agency Creation and Structure*

Federal administrative agencies are generally established by Congress through statutes referred to as “enabling statutes” or “organic statutes.” Agencies are generally created to act as agents for the executive branch.<sup>19</sup> There are generally two types of federal agencies: dependent and independent. A dependent federal agency is part of one of the fifteen federal departments that make up the President’s Cabinet. These departments, and the dependent agencies within them, are headed by a person appointed by the President with the advice and consent of the Senate. That person then serves at the pleasure of the President, meaning

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15. *Id.*; see also Charles A. Wright & Charles H. Koch, Jr., *Federal Practice & Procedure – Evolution of the Federal Administrative Procedure Act*, 32 Fed. Prac. & Proc. Judicial Review § 8134 (West 2006).

16. David H. Rosenbloom, *Framing a Lasting Congressional Response to the Administrative State*, 50 Admin. L. Rev. 173, 178 (1998); Shepherd, *supra* n. 13, at 1558.

17. Koch, *supra* n. 7, at § 2.32.

18. See Shepherd, *supra* n. 13, at 1558.

19. A few agencies are part of the legislative branch. These include the Government Accountability Office, the Library of Congress, and the Government Printing Office. The United States Sentencing Commission is an agency that is part of the judicial branch.

the President can remove the department or agency head for any reason, or for none whatsoever.<sup>20</sup>

Departments and dependent agencies are influenced and controlled by the President in a variety of ways. Additional mechanisms of executive control over agencies include control over the agency's budget through a centralized budgeting process within the executive branch's Office of Management and Budget ("OMB"), and the ability to issue executive orders requiring departments and dependent agencies to take or refrain from taking certain actions.<sup>21</sup>

One of the best known executive orders is President Clinton's Executive Order No. 12866 requiring departments and dependent federal agencies to develop bi-annual regulatory plans and to consider certain factors when developing regulations.<sup>22</sup> A division of the OMB, called the Office of Information and Regulatory Affairs, reviews regulations to ensure compliance with the requirements of the executive order.<sup>23</sup>

Independent agencies fall into two categories: (1) independent executive branch agencies; and (2) independent regulatory agencies. Independent executive branch agencies, sometimes called "freestanding" executive agencies, are very much like dependent agencies. Because they are part of the executive branch, the only real difference in terms of structure is that they are not located within one of the fifteen federal departments. The President has essentially the same means of oversight and control of these independent executive agencies as he does over dependent agencies.<sup>24</sup> Well-known examples of independent executive branch agencies include the Social Security Administration and the Environmental Protection Agency ("EPA"), though the EPA has been given "cabinet-level rank" by Presidents Clinton and Bush.<sup>25</sup>

Independent regulatory agencies are structured differently. They are not technically part of the executive branch and have no official

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20. See generally Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* § 15.3-4 (2d ed., West 2001).

21. See *id.* at § 15.1.

22. See generally Aman & Mayton, *supra* n. 20, at § 15.1; William F. Fox, Jr., *Understanding Administrative Law* § 7.06 (4th ed., Lexis 2000); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1, 5 (1995). This executive order was actually a continuation in many respects of prior executive orders issued by Presidents Carter and Reagan. *Id.*

23. See Fox, *supra* n. 22, at § 7.06; Aman & Mayton, *supra* n. 20, at § 15.1.

24. See Fox, *supra* n. 22, at § 1.03.

25. Cabinet-level rank means that while the Department is not officially part of the President's Cabinet, the Secretary of Administrator of the department is permitted to attend Cabinet meetings. Other cabinet-level officials or departments include the Vice President, the OMB, the United States Trade Representative and the Office of National Drug Control Policy. See The White House, *President Bush's Cabinet*, <http://www.whitehouse.gov/government/cabinet.html> (accessed May 22, 2006).

constitutional home.<sup>26</sup> As a result, they are not subject to the same formal supervision or control by the President. For example, independent regulatory agencies are generally governed by multi-member panels that have set terms in office. While the members are still appointed by a President, with the advice and consent of the Senate, their terms may outlast a current President's term. They can generally be removed prior to the expiration of their term only "for cause" as defined in the enabling statute of their particular agency.<sup>27</sup> Furthermore, it is generally accepted that independent regulatory agencies are not required to comply with the President's executive orders, although they may do so voluntarily.<sup>28</sup>

Examples of independent regulatory agencies include the Federal Communications Commission ("FCC"), the Federal Trade Commission ("FTC"), and the SEC. Presidents do still exercise considerable control over independent regulatory agencies. As noted, they appoint the multi-member panels that govern independent agencies and they influence the agencies' budget through OMB.<sup>29</sup>

### C. Separation of Powers – Delegation of Legislative Authority

Congress can provide a federal agency (dependent or independent) with various types of authority. Some common examples include the ability to make regulations (also referred to as rules), the ability to investigate matters within the jurisdiction of the agency, and the ability to enforce laws or regulations through adjudication or other means.<sup>30</sup> This article focuses on agency authority to make or promulgate regulations.

Agency regulations have the force and effect of law. This raises constitutional separation of powers issues regarding the ability of Congress to delegate the authority to make laws to the executive branch, even though the normal constitutional role of the executive branch is to enforce the laws that Congress makes.<sup>31</sup>

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26. See Koch, *supra* n. 7, at § 7.11.

27. William F. Funk et al., *Administrative Procedure and Practice* 12 (2d ed., West 2001); Fox, *supra* n. 22, at § 1.03.

28. Pildes & Sunstein, *supra* n. 22, at 15 (1995); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 669 (1984); see also Fox, *supra* n. 22, at § 3.04[b] (discussing a Department of Justice Memorandum positing that independent regulatory agencies might be forced to comply with executive orders if the Supreme Court would repudiate dicta in the *Humphrey's Executor* case, but that trying to do so would trigger a confrontation with Congress that Presidents have not wanted to create).

29. Freedman, *supra* n. 5, at 1062.

30. Federal agencies can do a wide range of other things as well, like issuing licenses or permits, administering benefits programs, or administering other types of programs. For example, NASA administers the nation's space program. See generally, Funk, *supra* n. 27, at 13-22.

31. The United States Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States[.]" U.S. Const. art. I, § 1.



The Supreme Court addressed this issue in a number of cases and held that Congress may constitutionally delegate responsibility to create regulations with the force of law to administrative agencies as long as Congress establishes an “intelligible principle” that limits the decision-making power of the agency.<sup>32</sup> Under this standard, Congress must clearly delineate the general policy, the public agency which is to apply the policy, and the boundaries of the delegated authority.<sup>33</sup> The court distinguishes between “the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.”<sup>34</sup>

In other words, the intelligible principle limitation ensures that the federal agency does not have the same lawmaking authority as Congress. Rather, it can only make regulations within the parameters established by Congress. In effect, the agency is carrying out or enforcing congressional intent by making regulations.

During the New Deal Era, there was a triage of cases where the court found that Congress violated the intelligible principle standard when providing authority to agencies under some of the New Deal programs.<sup>35</sup> These cases became part of the impetus of the tension between the Court and President Roosevelt that resulted in Roosevelt’s infamous Court packing plan and the subsequent “switch in time to save nine.”<sup>36</sup>

Since that time, the Supreme Court has continued to apply the intelligible principle standard, but it has not invalidated any federal legislation under that standard and displays much greater deference to Congress’ power to delegate regulatory power to agencies than it did in the 1930’s.<sup>37</sup>

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32. *Field v. Clark*, 143 U.S. 649, 692-93 (1892); see also *J.W. Hampton, Jr. & Co. v. U.S.*, 276 U.S. 394, 409 (1928).

33. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

34. *Field*, 143 U.S. at 693-94.

35. *Carter v. Carter Coal Co.*, 298 U.S. 238, 316 (1936); *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 551 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935).

36. See Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 Ind. L.J. 239, 260-268 (2005); Shepherd, *supra* n. 13, at 1563.

37. See e.g. *Loving v. U.S.*, 517 U.S. 748, 769 (1996) (upholding delegation of authority to the President to promulgate rules for court-martials, specifying aggravating factors for capital sentencing); *Touby v. U.S.*, 500 U.S. 160, 167 (1991) (upholding delegation of authority to the Attorney General under the Controlled Substances Act); *Mistretta v. U.S.*, 488 U.S. 361, 374 (1989) (upholding delegation of authority to the United States Sentencing Commission); see also *Whitman v. Am. Trucking Assn. Inc.*, 531 U.S. 457 (2001). For a more complete discussion of the topic see Krotoszynski, *supra* n. 36, at 260-68.

#### D. Appointment of Agency Officers

Additional separation of powers issues sometimes arise from congressional efforts to control, or limit the ability of the Executive Branch to control, agencies. One way Congress attempts to control agency actions is by influencing the appointment and removal of agency heads. Article II of the United States Constitution provides the President with the authority to nominate and appoint, with the advice and consent of the senate, "Officers of the United States." It also provides that Congress can vest the appointment of "inferior officers as they think proper in the President alone, in the Courts of Law, or in the Heads of Departments."<sup>38</sup> The Supreme Court has interpreted this language as creating two classes of officers: "principal officers," who must be nominated by the President and appointed by the President with the advice and consent of the Senate; and "inferior officers," where Congress can choose from the three methods of appointment mentioned in the Constitution.<sup>39</sup>

The heads, or multi-member groups, that govern federal departments and agencies are considered principal officers, meaning they must be appointed by the President with the advice and consent of the Senate.<sup>40</sup> Consequently, congressional efforts to enact statutes that would allow Congress to appoint members to govern independent regulatory agencies have been rejected by the Court.<sup>41</sup> Congress can, however, impose some criteria or qualification requirements on the type of person the President can appoint as a commission member of an independent regulatory agency.<sup>42</sup>

Other agency appointees can also be officers under the Constitution. An officer is "any appointee exercising significant authority pursuant to the laws of the United States" or that performs "a significant governmental duty exercised pursuant to a public law."<sup>43</sup> The question of whether an

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38. U.S. Const. art. II, § 2.

39. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976); see also *Morrison v. Olson*, 487 U.S. 654, 670-73 (1998).

40. See *Buckley*, 424 U.S. at 124-26; Aman & Mayton, *supra* n. 20, at § 15.3.

41. See *Buckley*, 424 U.S. at 132-36.

42. For example, the Consumer Product Safety Act requires the President to nominate five commissioners to head the independent agency and the commissioners must consider individuals who, by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission. 15 U.S.C. § 2053(a) (2006). Not more than three of the Commissioners can be affiliated with the same political party. *Id.* at § 2053(c).

43. *Buckley*, 424 U.S. at 124-26, 141.

officer is a “principal” or an “inferior” officer is important because the distinction makes a difference in terms of the appointment process.<sup>44</sup>

The court has declined to provide an exact distinction between “principal” and “inferior” officers. In *Morrison v. Olson*, the court held that the independent legal counsel was an inferior officer because she was subject to removal by the Attorney General, had the authority to perform only certain limited duties, had limited jurisdiction, and was occupying a temporary position or appointment.<sup>45</sup> These four factors (tenure, jurisdiction, removal, and duties) establish a standard for courts to consider when deciding whether an officer is “principal” or “inferior.”<sup>46</sup>

#### E. Removal of Agency Officers

The flip side of the power to appoint agency officers is the power to remove them from office. Congress itself may not remove officers except by impeachment.<sup>47</sup> While the Constitution expressly addresses the President’s ability to nominate and appoint officers, it does not expressly address removal. The Supreme Court has determined that the President has the implicit authority to remove officers from federal departments and agencies under the “executive power” and under the authority to “take care that the laws be faithfully executed.”<sup>48</sup>

In the context of principal officers in federal departments and independent agencies, the President’s power to remove seems virtually absolute. These officers serve at the pleasure of the President and can be

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44. Issues also arise when presidents attempt to fill vacant agency head positions with deputies or assistants from within the department that previously did not go through the appointment and confirmation process. This issue arose in 2003 when President Bush had to fill a vacancy of director of the OMB. The President wanted to have the position filled with an “acting director” for a period of time to allow time for selection and confirmation of a full time director. Normally, the assistant or deputy director would fill that slot, but in this case that position was also vacant and the next level within OMB was the executive associate director who had not previously gone through the Senate confirmation process. The issue became whether the President could unilaterally appoint a person to a role of a principal officer (director of the department) without going through the confirmation process. The Office of Legal Counsel to the President opined that the President could do so because even though the director of the OMB was a principal officer, an acting director would be an inferior officer that could be appointed by the President alone. See United States Department of Justice, *The United States Attorney General’s Memorandum Opinion for the Deputy Counsel to the President Regarding Designation of Acting Director of the Office of Management and Budget*, [http://www.usdoj.gov/olc/opinions/06122003\\_ombdirector2.pdf](http://www.usdoj.gov/olc/opinions/06122003_ombdirector2.pdf) (June 12, 2003).

45. 487 U.S. at 671-73.

46. *Weiss v. U.S.*, 510 U.S. 163, 192 (1994) (Souter, J., concurring) (applying the *Morrison* factors to decide if military judges are principal officers); Tracey A. Hardin, *Rethinking Independence: The Lack of an Effective Remedy for Improper For-Cause Removals*, 50 Vand. L. Rev. 197, 215 (1997).

47. *Bowsher v. Snyder*, 478 U.S. 714, 714-15 (1986).

48. See *Parsons v. U.S.*, 167 U.S. 324, 343 (1897). For a more detailed discussion of the President’s removal authority see Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Séance*, 60 Tenn. L. Rev. 841 (1993).

removed at any time, for any reason, or for none whatsoever.<sup>49</sup> Congressional efforts to impose limits on the President's ability to remove these principal officers have been ruled unconstitutional by the Supreme Court.<sup>50</sup>

The President's authority, however, to remove principal officers in independent regulatory agencies, and to remove inferior officers, is not absolute. Congress can pass laws that limit the President's ability to remove these officers.<sup>51</sup> In *Morrison*, the court developed the "core function test" to assess the constitutionality of congressional efforts to limit the President's removal powers. The test is designed to ensure that congressional limitations on removal do not interfere with the President's ability to exercise the "core functions" of executive power and faithfully execute laws as required under Article II of the Constitution.<sup>52</sup> In *Morrison*, the court determined that a statute imposing a good cause limitation on the removal of independent counsel (an inferior officer at a dependent agency) passed the core function test and did not impermissibly burden the President's ability to exercise core functions.<sup>53</sup>

#### F. Congressional Control of Agency Rulemaking

There are a number of permissible ways for Congress to control agency rulemaking. As noted above, each agency generally has an enabling statute that defines what that agency may do. These statutes can also establish protocols or procedures that the agency must follow when making regulations. Additionally, Congress has passed a number of general statutes like the APA,<sup>54</sup> the Paperwork Reduction Act,<sup>55</sup> and the Congressional Review Act<sup>56</sup> that apply to numerous agencies. These laws require all the agencies within the scope of their corresponding law to follow certain requirements when promulgating regulations.

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49. See *Myers v. U.S.*, 272 U.S. 52, 116-28, 176-77 (1926) (The United States Supreme Court struck down a congressional statute which provided that first-class postmasters could not be removed from office by the President unless the Senate concurred. The President's power to remove such postmasters without senatorial approval was upheld.); see also *Aman & Mayton*, *supra* n. 20, at § 15.1.

50. *Myers*, 272 U.S. at 177.

51. *Morrison*, 487 U.S. 654 (upholding a statute that allowed for removal of independent counsel (an inferior officer) only for good cause); *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935) (upholding a statute that permitted removal of the Commissioner of the FTC for inefficiency, neglect of duty, or malfeasance in office).

52. *Morrison*, 487 U.S. at 690-91.

53. See *id.* at 690-94.

54. See generally 5 U.S.C. §§ 551 et seq. (2006).

55. See generally 44 U.S.C. §§ 3501 et seq. (2006).

56. See generally 5 U.S.C. §§ 801 et seq.

One way that Congress cannot control agency rulemaking is through a “legislative veto” of specific agency actions or rules. In *INS v. Chadha*, the United States Supreme Court ruled that such vetoes were unconstitutional because they were issued only by the House of Representatives.<sup>57</sup> The Supreme Court held that to allow one part of Congress to overturn an agency action violated the bi-cameralism requirement in the Constitution since it requires both the House and Senate to approve “legislative acts.”<sup>58</sup> The Court held that the veto also violated the Presentment Clause of the Constitution which requires legislative acts to be presented to the President to be signed into law or vetoed.<sup>59</sup>

Since *Chadha*, Congress has passed a number of laws in an effort to maintain similar oversight of specific agency actions. For example, the Congressional Review Act requires agencies to submit rules or regulations to Congress and the General Accounting Office (“GAO”) to review “major rules” before they go into effect. Congress has sixty days to review the rules and may disapprove of a rule through a joint resolution passed in both the House and Senate. The joint resolution then goes to the President who may approve the joint resolution, with the effect of negating the agency’s rule, or veto the resolution, allowing the agency’s action to stand unless Congress can override the President’s veto through a supermajority vote.<sup>60</sup>

### G. Federal Rulemaking Process – Informal Rulemaking Requirements

One of the primary activities of federal agencies is to issue regulations (also called rules) that implement the statutes the agency is charged with enforcing. The regulations themselves have the force of law and have been referred to as “little statutes.”<sup>61</sup> Federal agencies issue more than 4,000 regulatory actions each year.<sup>62</sup>

The APA serves as a baseline of legal requirements that virtually all federal agencies must follow when promulgating regulations or rules.<sup>63</sup>

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57. 462 U.S. 919, 959 (1983).

58. *Id.* at 945-48.

59. *See id.* at 949-54. *Chadha* involved an agency adjudicatory decision. The United States Supreme Court applied *Chadha* to agency rulemaking in subsequent cases. *See Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983) (summarily affirming a Court of Appeals decision striking a congressional veto of a Federal Trade Commission regulation).

60. *See* Fox, *supra* n. 22, at § 2.04 (providing further explanation of the law); *see also* Cong. Research Serv., *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, October 10, 2001, <http://www.senate.gov/reference/resources/pdf/RL31160.pdf> (Oct. 10, 2001).

61. Reese & Seamon, *supra* n. 9, at 13.

62. U.S. Gen. Acctg. Off., *OMB’s Role in Reviews of Agencies’ Draft Rules and the Transparency of Those Reviews*, GAO-03-929 at 17 (September 2003).

63. The APA applies to federal agencies as defined in Section 551(1) of the law. 5 U.S.C. § 551(1). That definition includes the fifteen federal cabinet-level executive departments and the agencies within these departments. It also includes independent agencies. *See* Reese & Seamon, *supra* n. 9, at 10.

The APA has a number of requirements for administrative regulations and for the process of making regulations. The APA defines a regulation or rule as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”<sup>64</sup> Rulemaking is defined as the agency’s process for “formulating, amending or repealing a rule.”<sup>65</sup>

There are generally three categories of rulemaking at the federal level: informal, formal and hybrid. Informal rulemaking requirements are often referred to as “notice and comment” rulemaking because the main requirements are that agencies provide notice of the proposed rule and give interested parties the chance to comment on the proposal.<sup>66</sup>

With informal rulemaking, an agency generally drafts a proposed regulation internally based on staff recommendations, or recommendations of committees or groups formed to research an issue within the jurisdiction of the agency.<sup>67</sup> Individuals or groups outside the agency may also petition to engage in rulemaking.<sup>68</sup> Sometimes the agency will submit an “Advance Notice of Proposed Rulemaking” to the public through the Federal Register asking the public to provide information and comments that will help develop a proposed regulation.

In 1990, Congress passed the Negotiated Rulemaking Act, giving agencies the option of involving outside stakeholders in the process of drafting a proposed rule.<sup>69</sup> The process is voluntary and agencies have discretion on whether or not to utilize it.<sup>70</sup>

When an agency does use a negotiated rulemaking process, it uses a committee (called a negotiating committee) to develop the substance of the proposed rule. The process starts with the agency giving notice in the Federal Register of the subject and scope of the rule to be developed, along with a list of interests likely to be significantly affected by the rule, and a

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64. 5 U.S.C. § 551(4).

65. *Id.*

66. Reese & Seamon, *supra* n. 9, at 183.

67. Under Exec. Or. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993), and the Regulatory Flexibility Act, 5 U.S.C. § 602 (1996), most agencies must also develop a regulatory agenda that describes regulatory actions they are developing or have recently completed. The agenda is published in the Federal Register twice a year, usually during April and October. See GPO Access, *The Unified Agenda*, <http://www.gpoaccess.gov/ua/index.html> (accessed May 22, 2006).

68. 5 U.S.C. § 553(e). The agency is required to receive and consider rulemaking petitions by individuals or groups outside of the agency, but it can deny the petition and decline to enter rulemaking. The agency’s denial of a petition is subject to judicial review, but the court reviews a denial only to ensure that the agency adequately explained its reasons for declining to enter rulemaking. See *Ark. Power & Light Co. v. Interstate Commerce Commn.*, 725 F.2d 716, 723 (D.C. Cir. 1984); *N. Spotted Owl v. Hodel*, 716 F. Supp 479, 482 (W.D. Wash. 1988).

69. 5 U.S.C. § 561.

70. The law provides some criteria for agencies to consider when deciding whether negotiated rulemaking would be an appropriate process to use for a particular rule. *Id.* at § 563.

list of outside persons proposed to represent said interests on the negotiating committee.<sup>71</sup> The agency may use “conveners” to help them determine who should be on the committee.<sup>72</sup> The notice must also inform the public that others may apply, or nominate still others, to be on the negotiating committee.<sup>73</sup>

The agency is part of the negotiating committee, but does not run or facilitate the committee. The committee is instead led by an impartial facilitator from outside the agency who tries to help members reach unanimous consensus on the substance of a proposed rule.<sup>74</sup> If the committee does reach unanimous consensus, then the proposed rule goes through the remaining portions of the notice and comment requirements.<sup>75</sup>

The rationale behind negotiated rulemaking is that the negotiation process will make the remaining parts of the notice and comment process run smoother, and there will be less objection to the proposed rule because the key stakeholders affected by the rule helped draft it. The process is utilized successfully by a number of agencies,<sup>76</sup> but it also has critics who suggest that federal agencies should not aim to please the groups they govern. Rather, the agency should make its own independent determination of its activities based on statutory and regulatory obligations and the public interest.<sup>77</sup>

After a proposed regulation is drafted by an agency, either under traditional methods or the negotiated rulemaking process, it generally goes to the OMB for review for compliance with Executive Orders, and laws like the Paperwork Reduction Act,<sup>78</sup> the Unfunded Mandates Reform Act<sup>79</sup> and

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71. See Aman & Mayton, *supra* n. 20, at § 2.1.1(b).

72. 5 U.S.C. § 563(b).

73. *Id.* at § 564(a)-(b).

74. *Id.* at § 562(2)-(4).

75. See Aman & Mayton, *supra* n. 20, at § 2.1.1(b).

76. The EPA uses negotiated rulemaking in a variety of areas including regulations regarding Brownfields. See e.g. Environmental Protection Agency, *Convening Assessment Report on the Feasibility of a Negotiated Rulemaking Process to Develop the All Appropriate Inquiry Standard Required Under the Small Business Liability Relief and Brownfields Revitalization Act*, <http://www.epa.gov/brownfields/pdf/regfinal.pdf> (Dec. 17, 2002); Environmental Protection Agency, *Negotiated Rulemaking Fact Sheet*, <http://www.epa.gov/brownfields/html-doc/negregfs.htm> (accessed May 22, 2006).

77. See William F. Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 Duke L.J. 1351, 1374-87 (1997).

78. See generally 44 U.S.C. §§ 3501 et seq. Under this law, OMB reviews and approves (or disapproves) each collection of information by all Federal agencies (including all independent agencies). This includes information collections contained in agency regulations.

79. See 2 U.S.C. §§ 1532-1535 (2006). Under this law, each agency must prepare a specific kind of benefit-cost analysis for any proposed and final rule “that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year.” When preparing such an analysis, the agency must also “identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.” OMB reports annually to Congress on agency compliance with these requirements.

the Congressional Review Act.<sup>80</sup> For example, regulations promulgated by dependent agencies, or independent executive agencies,<sup>81</sup> that involve a “significant regulatory action,”<sup>82</sup> must go to OMB to ensure compliance with Executive Order No. 12866. The review includes a cost-benefit analysis of the regulation to ensure it entails the “least net cost to society.”<sup>83</sup> If the regulation is considered “economically significant,” meaning it is likely to result in an annual impact of \$100 million or more, the agency must also prepare a Regulatory Impact Analysis (“RIA”) as part of the OMB review. The RIA must assess the costs and benefits, as well as feasible alternatives, to the planned regulatory action.<sup>84</sup>

OMB may suggest changes to the scope, impact, or costs and benefits of the rules, or it may return the rules for reconsideration by the agency.<sup>85</sup> In some cases, OMB requests that the agency withdraw the rule altogether.<sup>86</sup> Under Executive Order No. 12866, an agency can technically promulgate rules without OMB approval, but this rarely occurs. Rather, the agency generally follows OMB’s recommendations or requests.<sup>87</sup>

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80. See generally 5 U.S.C. §§ 801 et seq. Under this law, the OIRA Administrator determines if an agency final rule is “major” (in general, having an annual economic effect of over \$100 million), and thus subject to special provisions of that Act that allow Congress to consider the regulations on a fast track basis and may disapprove of a rule through a joint resolution that is passed in both the House and Senate and approved by the President.

81. Independent regulatory agencies do not have to submit regulations to OMB for compliance with executive orders.

82. Section 3(f) of Exec. Or. 12866 defines “significant” regulatory actions as:

Any regulatory action that is likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive order.

83. See Aman & Mayton, *supra* n. 20, at § 15.1.3; see also Off. of Mgmt. and Budget, *Memorandum For The President’s Management Council – Presidential Review of Agency Rulemaking by OIRA*, [http://www.whitehouse.gov/omb/inforeg/oira\\_review-process.html#N\\_15\\_](http://www.whitehouse.gov/omb/inforeg/oira_review-process.html#N_15_) (Sept. 20, 2001).

84. An economically significant rule is also a “major” rule under the Congressional Review Act which subjects the rule to a special fast track process described in *supra* n. 80. 5 U.S.C. § 804(2). For a more detailed explanation see Off. of Mgmt. and Budget, *Memorandum For The President’s Management Council – Presidential Review of Agency Rulemaking by OIRA*, *supra* n. 83.

85. Aman & Mayton, *supra* n. 20 at § 15.1.3-1.4; Off. of Mgmt. and Budget, *Memorandum For The President’s Management Council – Presidential Review of Agency Rulemaking by OIRA*, *supra* n. 83.

86. *Id.*

87. Aman & Mayton, *supra* n. 20 at § 15.1.4; see also Peter M. Shane, *Political Accountability in a system of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 Ark. L. Rev. 161, 185-88 (1995); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 Geo. Wash. L. Rev. 533, 546-49, 560-61 (1989).



After OMB review, if an agency still intends to go forward with a regulation, the APA requires the agency to provide notice of its intent to promulgate the regulation. This is done by placing the substance of the regulation, or a description of the subjects and issues involved in the regulation, in the Federal Register<sup>88</sup> along with: (1) a statement of the time, place and nature of public rulemaking proceedings; and (2) reference to the legal authority under which the rule is proposed.<sup>89</sup> Under the APA, the agency must “give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without the opportunity for oral presentation.”<sup>90</sup>

The purpose of providing notice is to give interested parties an opportunity to effectively participate in the rulemaking process. The notice must fairly apprise interested persons of the subjects and issues under consideration by the agency. Courts have interpreted the APA’s notice requirement to mean that the notice must let interested parties know that their interests are “at stake” or “on the table.”<sup>91</sup>

To do this, the agency notice must inform interested parties of the legal basis for, and the data and methodology underlying, the proposed rule.<sup>92</sup> This allows interested parties to participate by making comments that respond to the basis relied upon by the agency for proposing the rule.

The agency then reviews the comments and determines if it will change its original proposed rule based on the comments, or leave the rule in its original form. The agency must take into account, and publicly respond to, comments that are “significant” or “of cogent materiality.”<sup>93</sup> The agency must either change the rule to address these comments, or explain why it will not do so.<sup>94</sup>

After the public notice and comment process is complete, some rules must be resubmitted to OMB for a final review.<sup>95</sup> OMB may again recommend changes to the rules. In addition to OMB review, under the Congressional Review Act, all agencies must submit most rules to both houses of Congress and to the Comptroller General of the GAO before the rule

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88. The Federal Register is a legal newspaper published every business day by the National Archives and Records Administration (NARA). It is the official daily publication for rules, proposed rules, and notices of federal agencies and organizations, as well as executive orders and other presidential documents. *See generally* 44 U.S.C. §§ 1501 et seq.

89. 5 U.S.C. § 553(b).

90. *Id.* at § 553(c).

91. *See Am. Med. Assn. v. U.S.*, 887 F.2d 760, 767-68 (7th Cir. 1989); Aman & Mayton, *supra* n. 20, at § 2.1.2.

92. *See* Aman & Mayton, *supra* n. 20, at § 2.1.2.

93. *Id.* at § 2.1.4.

94. *Id.*

95. For example, regulations subject to Exec. Or. 12866 must be submitted again to OMB for a compliance review before the final rule is published. *Id.* at § 15.1.3.

can go into effect.<sup>96</sup> Agencies must also submit a report to help Congress evaluate the rule. The report must include any cost-benefit analyses that have been performed and an assessment by the agency of compliance with applicable laws, such as the Unfunded Mandates Act and the Regulatory Flexibility Act.<sup>97</sup>

If the rule is not considered a “major rule,”<sup>98</sup> then it can go into effect after submission of the report itself. If the rule is a “major rule,” the GAO performs an analysis to determine if the agency complied with the requirements of applicable Executive Orders, and with the various statutes that may apply such as the Unfunded Mandates Act,<sup>99</sup> the Regulatory Flexibility Act,<sup>100</sup> the Paperwork Reduction Act,<sup>101</sup> and the APA.<sup>102</sup> Congress then has sixty days to review major rules and may disapprove of a rule through a joint resolution passed in both the House and Senate and presented to the President for approval or veto.<sup>103</sup>

After the Congressional Review Act process, the agency publishes the final version of the rule in the Federal Register with responses to the public comments and an explanation of any changes it made based on OMB review.<sup>104</sup> The rule also contains an effective date and sometimes an expira-

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96. See generally 5 U.S.C. §§ 801-808. There are some exceptions in the statute for certain regulations that do not need to be submitted. Agency statements that are policy statements, rules of practice, procedure or organization, or interpretive rules under the APA are also exempted. See *id.* at §§ 804, 807.

97. *Id.* at § 801(a)(1)(B). The report must also contain a concise general statement of the rule, a statement of whether the rule is a “major rule” and the proposed effective date of the rule. *Id.* at § 801(a)(1)(A).

98. The definition of a major rule is essentially the same definition OMB uses to determine “significant” regulations. A rule is major if it has an annual effect of \$100 million or more on the United States economy; or results in a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or has significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. *Id.* at § 804(2).

99. 2 U.S.C. §§ 1532-1535.

100. 5 U.S.C. §§ 603-605, 607, 609.

101. 44 U.S.C. §§ 3501-3520.

102. 5 U.S.C. §§ 551 et seq.

103. See Aman & Mayton, *supra* n. 20, at § 16.3; Fox, *supra* n. 22, at § 2.04 (providing further explanation of the law); Cong. Research Serv., *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, <http://www.senate.gov/reference/resources/pdf/RL31160.pdf> (Oct. 10, 2001).

104. See 5 U.S.C. § 552; Aman & Mayton, *supra* n. 20, at § 15.1.3-1.4; U.S. Gen. Acctg. Off., *OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929 at 17 (Sept. 2003). The description of notice and comment requirements in this part of the article is the general process that agencies follow. In some situations, agencies can also promulgate interim rules that are issued without prior notice and are effective immediately. The interim rule is designed to respond to an emergency situation and is usually followed by a final rule document which confirms that the interim rule is final, addresses comments received, and includes any further amendments. There are also “direct final rules” which is where an agency adds, changes, or deletes regulatory text at a specified future time, with a duty to withdraw the rule if the agency receives adverse comments within the period specified by the agency. See Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51

tion date.<sup>105</sup> The rule subsequently becomes part of the Code of Federal Regulations (“CFR”).<sup>106</sup>

Although the final version of the rule may be different from the original proposed rule, it must be a “logical outgrowth” of the original rule. Whether a final rule is a “logical outgrowth” is a fact-intensive inquiry that courts have acknowledged is not always easy to answer.<sup>107</sup> The standard relates back to the notice provisions of the APA that require agencies to let interested parties know that their interests are at stake, or that the agency is considering certain actions.<sup>108</sup> Courts have found that a final rule is not a “logical outgrowth” when the agency provided no notice or indication in the original proposed rule of an issue addressed in a final rule, or when the final rule changes a pre-existing agency practice that was not addressed in the proposed rule.<sup>109</sup>

The effect of the logical outgrowth test is that if an agency makes significant changes to a rule based on public comments to the initial proposed rule, or based on OMB review, it may have to start over with a second stage of notice and comment if the initial notice did not provide sufficient information to let the public know that the changes in the final rule were “on the table.”<sup>110</sup>

#### H. Formal and Hybrid Rulemaking Requirements

The informal rulemaking process is governed by Section 553 of the APA and is the most common form of rulemaking. If the agency’s enabling statutes are silent on the rulemaking procedures the agency must follow, then the agency follows the APA’s Section 553 requirements.<sup>111</sup>

If an agency’s own statutes or regulations add additional rulemaking requirements, like allowing the public to make oral presentations to the agency about a rule, or requiring the agency to perform a cost benefit

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Admin. L. Rev. 703 (1999); Ronald M. Levin, *More On Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 Admin. L. Rev. 757 (1999).

105. The publication of a final rule in the Federal Register must be made not less than thirty days before the effective date of a rule. 5 U.S.C. § 553(d).

106. The CFR is a codification (arrangement of) the general and permanent rules published in the *Federal Register* by the executive departments and agencies of the Federal Government. It was created by the Federal Register Act in 1934 to provide for the custody of presidential proclamations, executive orders, and administrative rules, regulations, notices, and other documents of general applicability and legal effect and for the prompt and uniform printing and distribution of them. The Federal Register Act at 44 U.S.C. § 1510 as implemented in 1 C.F.R. § 8.1 requires rules that have general applicability and legal effect to be published in the CFR.

107. *Chocolate Mfrs. Assn. v. Block*, 755 F.2d 1098, 1105 (1985).

108. *Id.*

109. *Am. Med. Assn.*, 887 F.2d at 767-68.

110. *Id.*

111. Reese & Seamon, *supra* n. 9, at 184-86.

analysis of proposed regulations, then the process is considered “hybrid” rulemaking.<sup>112</sup>

Formal rulemaking requirements are in Sections 556 and 557 of the APA and they include the same notice requirements as informal rulemaking, but add a requirement that the agency have a formal public hearing on the record regarding the proposed rule, as opposed to just giving the public a chance to submit written comments to the agency on the proposed rule.<sup>113</sup>

Formal rulemaking is relatively rare and there is a general judicial presumption against applying it to agency rulemaking proceedings.<sup>114</sup> The presumption is overcome only if Congress clearly intends that the agency follow formal rulemaking requirements by stating in the agency’s enabling statutes that the agency must follow Sections 556 and 557 of the APA, or stating in the enabling statutes that the agency’s rules must be “made on the record after opportunity for an agency hearing.”<sup>115</sup>

Sections 556 and 557 of the APA also govern formal adjudicatory hearings, so formal rulemaking requires something similar to a formal adjudicatory proceeding (a trial-type proceeding). A board or body of the agency, or an administrative law judge, considers evidence presented by parties on the record. There are some differences between the formal adjudicatory hearing requirements and formal rulemaking requirements. With rulemaking, the agency has the ability to limit evidence to written submissions as long as it does not prejudice any of the parties.<sup>116</sup> Parties are, however, still entitled to submit rebuttal evidence based on the written submissions and they can cross-examine other parties where necessary for “a full and true disclosure of the facts.”<sup>117</sup> After all of the evidence is presented, the agency develops the rule based on the information in the formal record and it is then posted in the Federal Register and the CFR.<sup>118</sup>

### *I. Exceptions to the APA’s Requirements*

There are some rules or regulations that are exempt from the APA’s notice and comment requirements. These include exceptions for certain kinds of rules like rules concerning military or foreign affairs functions,

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112. The common example of hybrid rulemaking is found in the Federal Trade Commission. When promulgating trade regulations, Congress by statute requires the FTC to follow the notice and comment requirements of § 553 of the APA and to also have an informal hearing with oral or written submissions by interested persons and cross-examination if material facts are in dispute. 15 U.S.C. § 57(a).

113. Koch, *supra* n. 7, at § 4.34.

114. *Id.*; Aman & Mayton, *supra* n. 20, at § 8.2.2.

115. *U.S. v. Fla. E. Coast Ry.*, 410 U.S. 224, 240-41 (1973).

116. 5 U.S.C. § 556(d).

117. Koch, *supra* n. 7, at § 4.34.

118. *Id.* at § 4.46.

rules concerning agency management or personnel, and rules concerning public property, loans, grants, benefits, or government contracts.<sup>119</sup> It also includes more general exceptions for (1) rules of practice, procedure and organization, (2) interpretative rules, (3) general statements of policy, and (4) rules that fit under the “good cause exception” of the APA.

### 1. *Practice, Procedure and Organization*

Rules of practice, procedure and organization are considered procedural rules, as opposed to substantive ones, and generally affect the agency’s internal organization, or the way the agency conducts proceedings like administrative hearings. Rules are generally considered procedural as long as they do not substantially alter the rights or interests of parties governed by the agency. Courts have recognized that procedural rules can often have substantive impact on the rights and interests of those governed by the agency, so to determine if a rule fits into this exception, courts use a balancing test to decide if the interests promoted by requiring notice and comment are outweighed by the agency’s counter-veiling interests in effectiveness, efficiency, expedition and reduction in expense.<sup>120</sup>

For example, in *JEM Broadcasting Co. v. FCC*, the FCC changed its procedures for reviewing applications for FM radio license applications.<sup>121</sup> The agency had previously given applicants a chance to correct errors or defects in their applications, but changed their rules to deny applications that contained errors or defects without giving the applicant a chance to fix the application.<sup>122</sup> The court held that the rule did not need to go through the notice and comment process because the change was procedural and the interest in public participation in developing the rule was outweighed by the agency’s efficiency interests.<sup>123</sup>

### 2. *Interpretative Rules*

Under the APA, interpretative rules are “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”<sup>124</sup> This is contrasted with substantive rules

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119. 5 U.S.C. § 553(a).

120. *JEM Broad. Co. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994).

121. *Id.* at 322.

122. *Id.*

123. *Id.* at 327.

124. FSU College of Law, *Attorney General’s Manual on the Administrative Procedure Act* 39 (1947), <http://www.law.fsu.edu/library/admin/1947iii.html> (accessed May 22, 2006) [hereinafter *A.G. Manual*].

which are “issued by an agency pursuant to statutory authority . . . [and] have the force and effect of law.”<sup>125</sup>

Interpretative rules are sometimes referred to as “non-legislative rules” since the agency is not using its legislative authority (the power to make rules) when enacting them. Rather, the agency is using its executive authority to interpret what various laws or rules mean. When an agency has rulemaking authority, courts generally use a “legal effect test” to determine if an agency rule or statement fits into this interpretative rule exception. Under the legal effect test, courts look at a number of factors to try to determine if the agency’s statement adds a new legal requirement or simply interprets current requirements in existing rules or statutes. The factors include:

- (1) How the agency characterized or labeled its rule or statement including whether the agency purported to use its rulemaking authority when issuing the rule or statement and whether the agency published it in the CFR;
- (2) Whether the rule or statement imposes a new standard of conduct or new obligations;
- (3) Whether the rule or statement has mandatory language; and
- (4) Whether the agency intends to be bound by the terms of the statement or rule, or if it leaves the agency free to exercise discretion in the future.<sup>126</sup>

For example, in *Community Nutrition Institute v. Young*,<sup>127</sup> a court considered whether Food and Drug Administration (“FDA”) rules that set levels of allowable contaminants in certain foods were interpretive rules. The court looked to the factors in the legal effect test and found that the rules were not interpretative because it had mandatory language, the FDA intended the rules to have a legal or binding effect, and the FDA used the rules in enforcement proceedings to determine if the contaminants in certain foods violated the agency’s statutes.<sup>128</sup>

By contrast, in *American Mining Congress v. Mine Safety & Health Administration*,<sup>129</sup> the same court found that program policy letters issued by the Mine Safety and Health Administration that stated the agency’s position that certain x-ray readings qualify as a diagnosis of lung disease

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125. *Id.*

126. *Alaska v. Dept. of Transp.*, 868 F.2d 441, 446 (D.C. Cir. 1989).

127. 818 F.2d 943 (D.C. Cir. 1987).

128. *Id.* at 947-48.

129. 995 F.2d 1106 (D.C. Cir. 1993).

under the agency's regulations were interpretative. The court based its decision on the fact that the policy letters did not impose any new obligations on those governed by the agency, the agency did not purport to utilize its rulemaking authority when issuing the policy letters, and the agency did not include the letters in the CFR.<sup>130</sup>

### 3. Policy Statements

Another exemption from the APA's notice and comment requirements are general statements of policy under Section 553(b) of the APA. Policy statements are "issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."<sup>131</sup>

Courts use the "binding effect test" to determine if an agency statement fits in this category. Generally speaking, if an agency merely announces what the agency is going to do in the future, such as providing a method by which it will determine substantive questions in the future, and just provides guidance to agency officials in exercising their discretion, it is a statement of policy. If the agency imposes a current duty or obligation and narrowly limits agency officials' discretion in implementing the statement, it is not a policy statement because it has a present or binding effect.<sup>132</sup> Like the legal effect test, courts consider a number of factors including whether the agency's statement was published in the CFR and the agency's characterization of the statement, but the characterization is not determinative.<sup>133</sup>

For example, in *Lewis-Mota v. Secretary of Labor*,<sup>134</sup> the Secretary of the Department of Labor issued a directive that changed the precertification of certain occupations for visa issuance. The agency claimed it was a statement of general policy, but the court rejected the argument because the directive changed existing rights and obligations by requiring pre-certified aliens to submit proof of specific job offers, as well as a statement of their qualifications, which they did not have to do previously.<sup>135</sup>

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130. *Id.* at 1112-13.

131. *A.G. Manual*, *supra* n. 124, at 39. The United States Supreme Court adopted this definition in *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993). In *Vigil*, the court held that an agency announcement about the way it planned to allocate unrestricted funds was a statement of policy and not subject to notice and comment. *Id.*

132. *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1015 (9th Cir. 1987); *Hudson v. FAA*, 192 F.3d 1031, 1034 (D.C. Cir. 1999).

133. *Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1418-20 (D.C. Cir. 1998).

134. 469 F.2d 478, 480 (2d Cir. 1972).

135. *Id.* at 481-82.

By contrast in *American Hospital Association v. Bowen*,<sup>136</sup> a court considered whether a Request for Proposals (“RFP”) submitted by the Department of Health and Human Services was a policy statement. The court noted that the RFP was not binding on the agency and the terms of the contract awarded to a successful applicant could vary from the terms in the RFP.<sup>137</sup> As a result, the court found that the RFP was merely the agency’s tentative intentions for the future and that those intentions could be modified by the agency depending on the responses to the RFP. Hence, the RFP did not have present effect and did not limit the agency’s discretion, so it was a policy statement.<sup>138</sup>

#### 4. *The Good Cause Exception*

Agency rules or regulations may also be exempt from the APA’s notice and comment requirements under the “good cause” exception in Section 553(b). The good cause exception permits agencies to bypass the notice and comment requirements if they are “impracticable, unnecessary, or contrary to the public interest.”<sup>139</sup> The purpose of the good cause exception is to allow agencies to avoid rulemaking procedures such as notice and comment when following the procedures would do real harm.<sup>140</sup> Courts construe the exception narrowly.<sup>141</sup>

The exception generally applies when (1) providing notice would defeat the objective of a rule, (2) immediate agency action is necessary to avoid a health hazard or imminent harm, or (3) agency inaction would lead to serious dislocation in governmental programs or in the marketplace.<sup>142</sup>

Under the APA, if an agency intends to rely upon the good cause exception as a basis to avoid the notice and comment process, the agency must incorporate its findings of good cause and a brief statement of the reasons for the finding when it publishes the rule in the Federal Register.<sup>143</sup> This ensures that the agency does not act in silence and it gives courts a basis for reviewing the exception.<sup>144</sup>

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136. 834 F.2d 1037 (D.C. Cir. 1987).

137. *Id.* at 1053.

138. *Id.*

139. 5 U.S.C. § 553(b)(B).

140. *Nat. Resources Def. Council, Inc. v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003).

141. *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992).

142. *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983); Ellen R. Jordan, *The Administrative Procedure Act’s “Good Cause” Exemption*, 36 Admin. L. Rev. 113 (1976).

143. 5 U.S.C. § 553(b).

144. *U.S. v. Garner*, 767 F.2d 104, 121 (5th Cir. 1985).



### J. Judicial Review of Rules

The standard of judicial review of agency rules promulgated through informal or hybrid rulemaking is generally the arbitrary and capricious standard.<sup>145</sup> The standard is a fairly deferential one with the court generally looking to see if there is a rational connection between the information the agency received during the rulemaking process and the decision the agency ultimately made.<sup>146</sup> In making this determination, courts give the rulemaking record (the information the agency developed or relied upon in making the rule and the information submitted to the agency by public comment) a “hard look” to ensure that the agency’s decision is based on relevant facts and is not a clear error of judgment.<sup>147</sup>

Courts have found agency rules arbitrary and capricious when the agency

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>148</sup>

For formal rulemaking, the standard of review is the “substantial evidence” standard. Under the substantial evidence standard, a court will uphold an agency rule promulgated through formal rulemaking as long as the rule is reasonable or the administrative record contains “such reasonable evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>149</sup>

If the rule involves the agency’s interpretation of a statute or of statutory obligations or requirements, then courts apply a different standard (regardless of whether the rule was developed through informal, hybrid or formal rulemaking). Under *Chevron v Natural Resources Defense Council, Inc.*,<sup>150</sup> the court first looks to see if Congress has “directly spoken to the precise question at issue.”<sup>151</sup> If Congress has, then “that is the end of

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145. 5 U.S.C. § 706(2)(A).

146. *Motor Veh. Mfrs. Assn. v. St. Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

147. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 420 (1971); Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509, 511 (1974).

148. *Motor Veh. Mfrs. Assn.*, 463 U.S. at 43.

149. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Some have suggested that there really is not any functional difference between the arbitrary and capricious standard and the substantial evidence standard. See *Assn. of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of the Fed. Reserve Bd.*, 745 F.2d 677, 683-84 (D.C. Cir. 1984).

150. 467 U.S. 837 (1984).

151. *Id.* at 842.

the matter; for . . . the agency must give effect to the unambiguously expressed intent of Congress.”<sup>152</sup>

In other words, if congressional intent on the statutory requirement at issue is clear, then the agency must abide by it and cannot issue a regulation that is contrary to that intent. If Congress did not address the question at issue, then the court looks to see if the agency’s interpretation is based on a “permissible” or “reasonable” construction of the statute.<sup>153</sup> The court’s rationale behind the different standard for this situation is that Congress delegated to the agency the role of implementing the statute and filling in the specific details left open by Congress in the statute, so a court should only overturn the agency’s interpretation if it is “manifestly contrary to the statute.”<sup>154</sup>

### III. NEW HAMPSHIRE AGENCIES

#### A. *History and Development*

New Hampshire also has a long history of administrative agencies. A number of state agencies had their beginnings in the mid-1800’s. For example, in 1865 New Hampshire established a Fish and Game Department, the first one of its kind in New England, to oversee and conserve New Hampshire’s fish and wildlife.<sup>155</sup> Two years later in 1867, the State established a Board of Education.<sup>156</sup>

Like federal agencies, state agencies were provided with authority to perform a number of tasks, including developing administrative rules. Agency enabling statutes, however, were not consistent in requirements for developing rules. As a result, each agency tended to develop its own process and had its own idiosyncrasies in the way it developed rules.<sup>157</sup> Additionally, there was some confusion on when agency statements were

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152. *Id.* at 842-43.

153. *Id.* at 843-44.

154. *Id.*

155. N.H. St. Govt., *New Hampshire Almanac: A Brief History of New Hampshire*, <http://www.state.nh.us/nhinfo/history.html> (accessed May 22, 2006). Historically, fishing played a big role in New Hampshire’s settlement and economic development and the Fish and Game Department became necessary to oversee this area.

156. R. Stuart Wallace & Douglas E. Hall, *A New Hampshire Education Timeline* 4, <http://www.nhhistory.org/edu/support/nhlearnmore/nhedtimeline.pdf> (Aug. 8, 2004) (accessed May 22, 2006). The state enacted a major education reform law in 1919 that gave the Board and the Department of Education much of its current structure and authority. *Id.* at 5.

157. Patrick T. Hayes, *The Development of Administrative Law in New Hampshire*, 23 N.H.B.J. 133, 133 (1982).

“rules” that were meant to be binding on the public and when they were just “recommendations” that the public “should” follow.<sup>158</sup>

To resolve these issues, New Hampshire adopted its first administrative procedure act in 1973.<sup>159</sup> The law was based on a Model State Administrative Procedure Act developed in 1946 and revised in 1961 by the National Conference of Commissioners on Uniform State Laws.<sup>160</sup> The law provided procedural requirements that agencies had to follow when developing or promulgating rules.<sup>161</sup> The law also required that agency regulations be accessible to the public and published in a uniform manner.<sup>162</sup>

Initially, some agencies resisted the new law’s procedural requirements, but the New Hampshire Supreme Court made clear in a number of cases that the requirements had to be followed by the agency, if the agency wanted its administrative rules to be valid and binding.<sup>163</sup> In 1981, the law was amended to require all state agencies to readopt all of their administrative rules under the law’s requirements within two years.<sup>164</sup> Rules that were not readopted under this process would sunset and no longer be valid at the two year deadline.<sup>165</sup>

The National Conference of Commissioners on Uniform State Laws revised the Model State Administrative Procedure Act in 1981 and New Hampshire incorporated a number of those changes into its law in 1983 as part of an effort to restructure New Hampshire’s administrative agencies.<sup>166</sup> These changes gave the law many of its current requirements and codified the law as New Hampshire Revised Statutes Annotated § 541-A.

### B. Agency Creation and Structure

The structure of New Hampshire’s administrative agencies is different than the federal structure in part because of differences in New Hampshire’s form of government as compared to the federal system. For example, New Hampshire has a split executive with a Governor and an Execu-

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158. Stephen C. Shaw, *Current Status of the Administrative Procedures Act*, 23 N.H.B.J. 137, 138 (1982).

159. Hayes, *supra* n. 157, at 133-34; Shaw, *supra* n. 158, at 137.

160. Koch, *supra* n. 7, at § 1.5; Hayes, *supra* n. 157, at 133-34.

161. Hayes, *supra* n. 157, at 134.

162. Shaw, *supra* n. 158, at 137.

163. See e.g. *In re Denman*, 419 A.2d 1084, 1088 (N.H. 1980) (holding an agency’s “oral regulation” invalid because the agency did not follow the requirements of the Administrative Procedure Act in developing the regulation and stressing that state agencies must comply with the law for the rules to have effect).

164. Shaw, *supra* n. 158, at 137.

165. *Id.*

166. N.H. Rev. Stat. Ann. §§ 21-G:2, 541-A (1983); Koch, *supra* n. 7, at § 1.5.

tive Council. Both are elected by popular vote every two years.<sup>167</sup> The five Executive Council members each represent a geographic portion of the state.<sup>168</sup> The Governor and the Executive Council share executive authority under the New Hampshire Constitution.<sup>169</sup> With respect to administrative agencies, the most relevant shared authority is the appointment and removal of department or agency heads and the shared control over department and agency budgets and expenditures.<sup>170</sup> The Governor alone possesses the ability to issue executive orders to New Hampshire departments and agencies, much like the President at the federal level.<sup>171</sup>

In 1983, the New Hampshire legislature restructured executive branch agencies to try to reduce and streamline them. The legislature noted at that time that state agencies had grown in number from 32 in 1900 to more than 140 in 1983.<sup>172</sup> Today there are over one hundred rulemaking agencies in New Hampshire.<sup>173</sup>

The reorganization created “departments” as the principal administrative units of the executive branch.<sup>174</sup> Departments have internal divisions, bureaus and sections that manage particular areas under the department’s jurisdiction. Departments are often referred to as state agencies and they are defined as agencies under state law.<sup>175</sup> While called departments, they are not quite the same as the cabinet-level departments in the federal system. They are more analogous to a mix of independent and dependent agencies.

State departments are usually headed by a “Commissioner” that is nominated by the Governor and jointly appointed by the Governor and Executive Council by majority vote.<sup>176</sup> Unlike the federal system and its advice and consent of the Senate requirement, the legislative branch does not play any official role in the appointment of specific agency heads under New Hampshire law. Commissioners are the chief administrative officers

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167. N.H. Const. pt. II, arts. 42, 60.

168. *Id.* at art. 65; Lorenca Consuelo Rosal, *Eternal Vigilance: The Story of the New Hampshire Constitution* 210-211 (N.H. Const. Educ. Corp. 1986).

169. N.H. Const. pt. II, arts. 46, 47; Rosal, *supra* n. 168, at 210.

170. N.H. Const. pt. II, arts. 46, 47; N.H. Rev. Stat. Ann. §§ 9:8(I), 16, 21-G:8 (2006); Rosal, *supra* n. 168, at 210.

171. The Governor issues executive orders under the authority granted in Part II Article 41 of the New Hampshire Constitution.

172. N.H. Rev. Stat. Ann. § 21-G:2(II) (1983).

173. Scott F. Eaton, *Legislative Oversight of Administrative Rulemaking in New Hampshire*, 1 RISK 131, 131 (1990).

174. N.H. Rev. Stat. Ann. § 21-G:5(VI) (2006).

175. *Id.* at § 21-G:5(III).

176. *Id.* at § 21-G:8(I).

of departments and have a number of powers and duties defined by state statute.<sup>177</sup> Commissioners report directly to the Governor.<sup>178</sup>

Commissioners are generally appointed for four years, which is two years longer than the terms of New Hampshire's Governor and Executive Councilors.<sup>179</sup> Unlike the federal system, Commissioners of New Hampshire departments do not serve at the pleasure of the Governor or the Executive Council and generally can only be removed for cause as defined by state statutes.<sup>180</sup> As a result of these two factors, Commissioners often serve under Governors and Executive Council members that did not appoint them and incoming Governors must often work with Commissioners that they did not appoint.

New Hampshire also has some "administratively attached agencies" which are defined as independent agencies that are linked to a department for administrative purposes.<sup>181</sup> These agencies are often boards that oversee a specific area like the Board of Podiatry, the Board of Nursing and the Juvenile Parole Board, all of which are all administratively attached to the Department of Health and Human Services.<sup>182</sup> Administratively attached agencies are independent in the sense that they generally exercise their powers, duties and functions without the approval or control of the department. They generally have multi-member boards or commissions that are in charge of the agency, much like an independent agency at the federal level. The board members are generally appointed by the Governor and Executive Council for a set period of time and, like Commissioners, they can only be removed for cause as defined by relevant state statutes.<sup>183</sup>

Unlike independent regulatory agencies at the federal level, these attached agencies are still part of the executive branch and subject to the same control and oversight mechanisms of the Governor and Executive Council.<sup>184</sup>

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177. *Id.* at § 21-G:9.

178. *Id.* at § 21-G:9(I). There are some exceptions to this general structure. For example, the agency head of the Fish and Game Department is referred to as an executive director and the department has eleven Commissioners that serve in a policy making capacity similar to a board of directors for a corporation. *Id.* at § 206:2(I), 4-a, 8(I). The Commissioners are appointed by the Governor and Executive Council and then they nominate the executive director to be appointed by Governor and Executive Council. *Id.* at § 206:2(I), 8(I). The New Hampshire Department of Education has a similar structure except that the department head is called a Commissioner and its governing board is called the Board of Education. *Id.* at § 21-N:3(I), 10(I).

179. N.H.Const. pt. II, arts. 42, 60; N.H. Rev. Stat. Ann. § 21-G:8(III).

180. N.H. Rev. Stat. Ann. § 4:1 (2006). The agency's enabling statute also may contain language regarding the appointment and removal of the Commissioner.

181. *Id.* at § 21-G:5(I), 10(I).

182. *Id.* at §§ 170-H:13(I), 315:1-a, 326-B:3(XII).

183. *Id.*; *see also id.* at §§ 4:1, 21-G:10.

184. For example, administratively attached agencies submit their budget requests through the department they are attached to and the requests are treated the same as other agency budget requests. The

*C. Separation of Powers – Delegation of Legislative Authority*

New Hampshire has an express state constitutional provision regarding separation of powers that states:

[T]he legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.<sup>185</sup>

The separation of powers doctrine “does not require the erection of impenetrable barriers between the branches of our government.”<sup>186</sup> The doctrine “contemplates some overlapping and duality in the division as a matter of practical and essential expediency.”<sup>187</sup> However, when the actions of one branch of government “defeat or materially impair the inherent functions of another branch, such actions are not constitutionally acceptable.”<sup>188</sup> The growth of administrative agencies has long been accepted as consistent with the separation of powers provisions.<sup>189</sup>

Much like the federal system, the New Hampshire legislature may delegate aspects of legislative authority to administrative agencies within certain boundaries. For example, the legislature may provide administrative agencies with the authority to develop rules to “fill in the details” and “effectuate the legislative purpose” of statutes and to enforce statutes.<sup>190</sup>

Much like the federal system, the New Hampshire legislature may not provide an administrative agency with unbridled discretion to perform these tasks.<sup>191</sup> Rather, in order to constitutionally provide rulemaking power to an agency, the legislature must declare a general policy and prescribe standards for the agency to follow.<sup>192</sup> This New Hampshire standard is very similar to the “intelligible principle standard” that is utilized at the federal level.<sup>193</sup>

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Governor can also require the agency to provide information through the department. *Id.* at § 21-G:10(I); see also N.H. St. Govt., *New Hampshire Almanac: An Overview of NH State Government*, <http://www.state.nh.us/nhinfo/stgovt.html> (accessed May 22, 2006).

185. N.H. Const. pt. 1, art. 37.

186. *In re Mone*, 719 A.2d 626, 631 (N.H. 1998).

187. *McKay v. N.H. Compen. App. Bd.*, 732 A.2d 1025, 1029 (N.H. 1999).

188. *In re N.H. Bar Assn.*, 855 A.2d 450, 453-54 (N.H. 2004).

189. *In re Boston & Maine Corp.*, 251 A.2d 332, 335 (N.H. 1969).

190. *Guillou v. N.H. Div. of Motor Vehicles*, 503 A.2d 838, 840 (N.H. 1986); *Ferretti v. Jackson*, 188 A. 474, 476 (N.H. 1936).

191. *Opinion of the Justices*, 509 A.2d 734, 741 (N.H. 1986).

192. *Opinion of the Justices*, 431 A.2d 783, 786 (N.H. 1981); *Ferretti*, 188 A. at 303.

193. The New Hampshire Supreme Court has recognized the similarities between this approach and the intelligible principle standard. *Smith Ins., Inc. v. Grievance Comm.*, 424 A.2d 816, 819 (N.H. 1980).

For example, in *Guillou v. New Hampshire Division of Motor Vehicles*, the New Hampshire Supreme Court determined that a state statute that authorized the Director of Motor Vehicles to suspend or revoke a driver's license "for any cause which he may deem sufficient" was an unconstitutional delegation of legislative authority because it "fail[ed] to declare a general policy and prescribe standards for administrative action."<sup>194</sup> The court said the statutory language provided "no guidance, standards, or conditions" for the agency to follow when deciding whether to suspend or revoke a license. As a result, the court determined that the delegation of authority violated the separation of powers provisions of the New Hampshire Constitution.<sup>195</sup>

Similarly, in *Ferretti v. Jackson*, the New Hampshire Supreme Court held that a statute called the Milk Control Act violated separation of powers because it did not contain sufficient parameters on the authority delegated to an agency.<sup>196</sup> The Act created a Milk Control Board and gave the board the "power to supervise, regulate and control the distribution and sale of milk for consumption and/or use within the state" and the power to "adopt, promulgate and enforce all rules and regulations necessary to carry out the provisions of this act."<sup>197</sup>

The court held that such a "sweeping and general delegation of power clearly exceed[ed] constitutional limits" because agency authority could not be provided in such a "skeletonized . . . manner."<sup>198</sup> The court said that to be constitutional, the extent and limits of agency control must be determined by the legislature and failing to do so results in agencies that are "unconfined and vagrant" and is a "delegation running riot."<sup>199</sup>

#### D. Appointment of Agency Officers

Unlike the United States Constitution, the New Hampshire Constitution does not address the appointment or removal of most agency or department officials. The New Hampshire Constitution does address the appointment of judicial officers, military officers and the Attorney General.<sup>200</sup> It requires them to be nominated and appointed by the Governor and Executive Council. The New Hampshire Constitution also

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194. 503 A.2d at 839-40.

195. *Id.* at 840.

196. 188 A. at 478.

197. *Id.* at 475.

198. *Id.* at 479.

199. *Id.* at 480 (citing *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 551-53 (one of the federal cases finding a New Deal statute unconstitutional under the intelligible principle standard)).

200. N.H. Const. pt. II, art. 46; N.H. Rev. Stat. Ann. § 21:M-3(I).

provides that the Secretary of State and the State Treasurer be chosen by joint ballot of the Senate and the House.<sup>201</sup>

The process of appointing and removing other agency heads is based on state statutes. As a result, the state legislature has more ability to control this aspect of administrative agencies than its federal counterpart because it can develop the standards and the process for appointment and removal without much constitutional interference.<sup>202</sup>

The primary statute for the appointment of agency heads is New Hampshire Revised Statutes Annotated § 21-G:8 which requires appointment by the Governor and Executive Council for all department heads (“Commissioners”). In the appointment process, the Executive Council serves a role that is similar to the United States Senate’s role in the federal process in that the appointment is with the advice and consent of the Council.<sup>203</sup> The Governor generally has the sole authority to nominate Commissioners,<sup>204</sup> but needs a majority vote of approval from the Executive Council for the appointment of the Commissioner, much like the President needs a majority vote of approval from the Senate.<sup>205</sup>

This mix of power between the Governor and Executive Council has created a number of stand-offs over the years in the nomination and appointment process.<sup>206</sup> In practice, it generally results in the Governor

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201. N.H. Const. pt. II, art. 67.

202. N.H. Const. pt. II, art. 5; *Brouillard v. Gov. & Council*, 323 A.2d 901, 905 (N.H. 1974).

203. N.H. Rev. Stat. Ann. § 21:31-a; *Brouillard*, 323 A.2d at 904.

204. The appointment of the departmental division directors within state departments is similar, but the Commissioner of the department has the nominating authority and then the Commissioner’s nominee goes to the Governor and Executive Council for appointment. N.H. Rev. Stat. Ann. § 21-G:8(II).

205. Sometimes the enabling statute of a specific agency or department creates a different process for the nomination and appointment of department or agency heads. For example, at one time state statutes created an Advisory Commission of the Department of Health and Welfare to develop a list of nominees from which the Governor and Executive Council could appoint a Commissioner for the Department of Health and Welfare. *Brouillard*, 323 A.2d at 902. When the Governor and Executive Council refused to appoint any of the people on the list, the New Hampshire Supreme Court upheld the legislature’s authority to create this nomination process and ruled that the Governor and Executive Council must appoint someone from the list of nominees. *Opinion of the Justices*, 316 A.2d 174, 176 (N.H. 1974).

Administratively attached agencies also sometimes follow a different approach as they are normally governed by multi-member groups (usually called boards or commissions) that are nominated by the Governor and appointed by the Governor and Executive Council. These agencies may also have a director or administrator that is appointed by the multi-member group or by some combination of that group and the Commissioner of the Department that the agency is attached to. *See e.g.* N.H. Rev. Stat. Ann. §§ 318:2, 2-a, 309-A to 332-E; *In re Westwick*, 546 A.2d 1051, 1052 (N.H. 1988).

206. Perhaps the most famous stand-off is the one between the Governor and Executive Council regarding the appointment of the Commissioner of Health and Welfare. As noted *supra* n. 205, the legislature created a statutory advisory committee to develop potential nominees for the position. The Governor did not approve of any of the people on the list, but decided to present two of them to the Executive Council to vote on. The Executive Council voted to approve both in separate votes. After each vote, the Governor “negated” the appointment. The ordeal created three New Hampshire Supreme



“floating” a potential nominee’s name by the Executive Councilors and checking informally about a person’s chances of receiving approval before formally nominating the person for consideration by the Council.<sup>207</sup>

#### E. Removal

The process of removing department or agency officials is also largely governed by state statutes. Unlike the federal system, New Hampshire law does not use a principal and inferior officer distinction or a core function test. Instead, the requirements for removing agency officials that are appointed under state statutes is left to the legislature to determine by statute.

The general New Hampshire statute on removal is New Hampshire Revised Statutes Annotated § 4:1. Under this statute, department or agency officers that are appointed by the Governor and Executive Council can only be discharged or removed “for cause” which is defined as “malfeasance, misfeasance, inefficiency in office, incapacity or unfitness to perform assigned duties, or for the good of the department, agency, or institution to which such official is assigned.”<sup>208</sup> Unless a department or agency’s enabling statute specifically says otherwise, only the Governor and Executive Council can remove an agency or department head and they can only do so by following the requirements of New Hampshire Revised Statutes Annotated § 4:1.<sup>209</sup>

The “for cause” language in the statute is fairly broad and there are few cases defining the parameters or requirements of the statutory language.<sup>210</sup> There have been relatively few efforts to remove agency officials.<sup>211</sup>

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Court opinions and the final one said that the Governor did not have the authority to negate statutory appointments once they were presented and approved by the Executive Council. *Brouillard*, 323 A.2d at 904-05. However, because the Governor did not intend for either of the two people he submitted to the Council to be appointed, the court held that it would not allow the appointment of either of these two people to occur “by accident” and essentially upheld the Governor’s negation of the appointments in this one case only. *Id.*; see also *Opinion of the Justices*, 316 A.2d 174; *Opinion of the Justices*, 312 A.2d 702 (N.H. 1973).

207. The media also plays a big role in this process. Often a potential nominee is made known to the media by the Governor’s office in some informal fashion and then as part of the story the media writes on the potential nominee, the media contacts the Executive Councilors for their view on whether they would vote to approve that person or not. Potential nominees that don’t receive public support from a majority of Councilors are generally not presented for formal consideration.

208. N.H. Rev. Stat. Ann. § 4:1. The statute provides protection to all state officials who are not “classified employees.” Non-classified employees include all agency officials that are elected by popular vote or by the legislature; the chief executive officer of each department and institution and independent agency; the deputy of any department head provided for by special statute; officers whose salary is specified or provided by special statute. *Id.* at § 21-I:49.

209. *Corson v. Thomson*, 358 A.2d 866, 869 (N.H. 1976).

210. *Bennett v. Thomson*, 363 A.2d 187, 191 (N.H. 1976) (upholding the removal of the Director of Division of Economic Development when the Director made public remarks in his official capacity that

Under New Hampshire Revised Statutes Annotated § 4:1, the Attorney General, the Governor, any member of the Executive Council, or the appointing authority of such official,<sup>212</sup> may petition the Governor and Council for the removal of an agency official by setting forth the grounds and reasons for removal. If the Governor and three or more members of the Executive Council vote to accept the petition, then they schedule a hearing.<sup>213</sup> The exact contours or requirements of the hearing process are not defined by the statute and seem to develop on an ad hoc basis. The New Hampshire Supreme Court has recognized that an agency official subject to a removal hearing is protecting a valid property interest, so constitutional procedural due process requirements apply.<sup>214</sup>

At the conclusion of the hearing, a vote of three or more Council members, in concurrence with the Governor, is required to remove the state official from office. The Governor and Council must provide written findings, including a time frame for removal, in support of a decision to remove an official from office. Failure to obtain the required vote and concurrence of the Governor results in the dismissal of the petition.<sup>215</sup> The Governor and Executive Councilors' decision is appealable to the New Hampshire Superior Court. An agency official who successfully defeats a petition for removal is also entitled to have the state pay for his or her attorney's fees.<sup>216</sup>

#### F. Legislative Control of Agency Rulemaking

Legislative control of administrative agency rulemaking in New Hampshire has some similarities and some differences as compared to the federal system. Like federal law, New Hampshire agencies are created by statutes that provide the agencies with authority and provide limits on that authority. New Hampshire also has a state administrative procedure act

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were knowingly insubordinate and seriously compromised his ability to effectively carry out the responsibilities of the department).

211. A few notable efforts to remove that made court cases include the removal of the Director of Division of Economic Development for making an insubordinate speech. *Id.* Another included the New Hampshire Probation Department's effort to remove the Director of Probation. The Governor recused himself from presiding over the proceeding and the Senate President took his place in the proceedings. After fifty days of hearings over the course of nearly a year, the Senate President and Executive Council denied the removal petition. *King v. Thomson*, 400 A.2d 1169, 1170 (N.H. 1979).

212. As noted *supra* n. 205, sometimes an agency may have a different appointment process.

213. N.H. Rev. Stat. Ann. § 4:1.

214. *King*, 400 A.2d at 1171.

215. N.H. Rev. Stat. Ann. § 4:1(III).

216. *Id.* at § 4.1(IV)-(VI); *King*, 400 A.2d. at 1171.

that provides a baseline that state agencies must follow when making regulations and adjudicating claims.<sup>217</sup>

Much like the United States Supreme Court, the New Hampshire Supreme Court has declared legislative veto efforts unconstitutional. In an *Opinion of the Justices* case, the court considered the constitutionality of a proposed law that established standing committees in the House and Senate to review and possibly reject rules proposed by State agencies.<sup>218</sup> The court noted that since the rulemaking authority of administrative agencies derived solely from the power that the legislature delegated to them, the legislature could properly condition the exercise of that delegated authority upon its approval.<sup>219</sup> Thus, the court said that the creation of a legislative veto was not “per se unconstitutional.”<sup>220</sup>

The court, however, went on to state that allowing standing committees to decide if a rule should be approved or not was unconstitutional. The court reasoned it did not represent “legislative will” and violated provisions of the New Hampshire Constitution that required the “legislative authority” of the government to be exercised only by a quorum of both the House and Senate.<sup>221</sup>

The court also noted that the proposed legislative veto was unconstitutional because it did not include a role for the Governor in the process. The court noted that the effect of this was to allow the legislature to make a law without giving the Governor the constitutionally required opportunity to approve or veto the law.<sup>222</sup> The court’s rationale was identical to the rationale used by the United States Supreme Court two years later in *Chadha* when it rejected the legislative veto at the federal level.<sup>223</sup>

New Hampshire subsequently developed a new scheme of legislative oversight that addressed the constitutional deficiencies the court noted in its *Opinion of the Justices* case. The oversight has some aspects of a legislative veto, but it does not include the final veto power itself. The process involves a Joint Legislative Committee on Administrative Rules (“JLCAR”). The Committee is composed of five state senators and five state representatives. The Committee is appointed every two years by the Senate President and House Speaker, respectively, with no more than three senators and three representatives from each party. The Committee meets year round at least once a month.<sup>224</sup>

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217. See generally N.H. Rev. Stat. Ann. § 541-A; *supra* pt. II(A).

218. 433 A.2d 783.

219. *Id.* at 787.

220. *Id.*

221. *Id.* at 788.

222. *Id.* at 788-89.

223. *Supra* pt. I(F) (discussing *Chadha*).

224. N.H. Rev. Stat. Ann. § 541-A:2(II).

In its monthly meetings, JLCAR reviews agency rules and may approve a rule or object to it.<sup>225</sup> The details of the process are explained in Part III(G) of this article. An objection is not the same as the legislative veto because the agency's rule still goes into effect even if the agency does not change the rule to address JLCAR's objection. The objection does have an effect on judicial review of the rule.

JLCAR also has the statutory authority to issue a "joint resolution." The joint resolution must be approved by a majority vote of both the House and Senate and presumably presented to the Governor for approval or veto.<sup>226</sup> The joint resolution is similar to the resolution process available to Congress at the federal level under the Congressional Review Act.<sup>227</sup> A JLCAR vote to sponsor a "joint resolution" prevents the agency from adopting and filing the rule until final legislative action is taken on the resolution or the passage of ninety consecutive calendar days during which the general court shall have been in session, whichever occurs first.<sup>228</sup> If the resolution is passed into law, it invalidates the agency's proposed rule.

#### G. New Hampshire Rulemaking Process – Regular Rules

Like federal rules, state rules or regulations promulgated by New Hampshire "administrative agencies pursuant to a valid delegation of authority have the force and effect of laws."<sup>229</sup> The rulemaking authority which may be delegated by the legislature is limited. The administrative agency's authority allows it to "fill in details to effectuate the purpose of the statute."<sup>230</sup> Administrative rules which go beyond filling in details are invalid.<sup>231</sup> "Rules adopted by State boards and agencies may not add to, detract from, or in any way modify statutory law."<sup>232</sup>

There are certain things that New Hampshire agencies cannot do through the rulemaking process unless they have express authority to do so. For example, New Hampshire agencies cannot provide for penalties or fines, or require licenses or fees unless a state statute provides the agency with specific authority to do so.<sup>233</sup>

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225. *Id.* at § 541-A:13.

226. *Id.* at § 541-A:13 (VII)(f).

227. *Supra* pts. I(F) and I(G) (discussing the Congressional Review Act).

228. N.H. Rev. Stat. Ann. § 541-A:13(VII)(c).

229. *Opinion of the Justices*, 431 A.2d at 787.

230. *Kimball v. N.H. Bd. of Accountancy*, 391 A.2d 888, 889 (N.H. 1978); *Reno v. Hopkinton*, 349 A.2d 585, 585 (N.H. 1975).

231. *Kimball*, 391 A.2d at 889; *Reno*, 349 A.2d at 586.

232. *Kimball*, 391 A.2d at 889.

233. N.H. Rev. Stat. Ann. § 541-A:22(III).

Then there are some situations where agencies must make rules in order to fill in the details left open by a statutory requirement before the agency can take other actions like adjudicating claims.<sup>234</sup> The reason for requiring a rule in this situation is to “give persons fair warning as to what standards the agency will rely on when making a decision [and to] eliminate any need to develop standards on a case by case basis, which is time-consuming; may lead to inconsistent results; and severely inhibits judicial review.”<sup>235</sup> As long as an individual is not prejudiced by the agency’s failure to adopt rules, however, the agency’s actions will not be overturned.<sup>236</sup>

New Hampshire’s Administrative Procedure Act (“New Hampshire’s APA” or “state APA”) governs the rulemaking process for most New Hampshire agencies.<sup>237</sup> There are a number of New Hampshire statutes that grant rulemaking authority to agencies in some specific area that are exempt from the state APA’s requirements.<sup>238</sup> Since New Hampshire’s APA is based on the model state APA legislation, it is similar to many other states’ administrative procedure acts.<sup>239</sup>

New Hampshire does not have the same informal, formal and hybrid categories as the federal system. Rather, the process for promulgating New Hampshire rules under the state APA depends on the kind of rule the agency is attempting to enact. Under New Hampshire law, there are three categories of rules: regular rules, interim rules and emergency rules.

Regular rules are analogous to the rules passed by federal agencies.<sup>240</sup> They are defined as:

[E]ach regulation, standard, or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency, whether members of the general public or personnel in other agencies.<sup>241</sup>

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234. *Nevins v. N.H. Dept. of Resources and Econ. Dev.*, 792 A.2d 388, 391-92 (2002). There is some case law to this effect at the federal level. Federal agencies, however, generally have broad discretion in deciding whether to proceed with rules or adjudicatory hearings to address issues. See e.g. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

235. *Nevins*, 792 A.2d at 391-92.

236. *Id.*

237. See generally N.H. Rev. Stat. Ann. § 541-A.

238. *Id.* at § 541-A:21.

239. Koch, *supra* n.7, at §§ 1.5, 2.31; *supra* pt. II(A).

240. Some federal agencies do have the authority to promulgate interim rules. For example, the Consumer Product Safety Commission is allowed to make interim consumer product safety standards in some circumstances. See generally 15 U.S.C. § 2082; Asimow, *supra* n. 104.

241. N.H. Rev. Stat. Ann. § 541-A:1(XV).

Like federal law, there are some agency statements that are not rules and do not have to go through the rulemaking process. These include:

(a) internal memoranda which set policy applicable only to its own employees and which do not affect private rights or change the substance of rules binding upon the public, (b) informational pamphlets, letters, or other explanatory material which refer to a statute or rule without affecting its substance or interpretation, (c) personnel records relating to the hiring, dismissal, promotion, or compensation of any public employee, or the disciplining of such employee, or the investigating of any charges against such employee, (d) declaratory rulings, or (e) forms.<sup>242</sup>

These “non-rules,” or exceptions from the rulemaking process, are different than the ones used in the federal system. New Hampshire, for example, does not exempt rules of practice, procedure and organization from public notice and comment requirements.<sup>243</sup> There is also not a specific exception for “policy statements” or “interpretative rules” in New Hampshire’s APA like in the federal APA.<sup>244</sup> Agency statements, policies and interpretations that do not fit within the definition of a “rule,” however, would not need to go through rulemaking requirements.

Like the federal system, New Hampshire rules generally start at the agency level with the agency deciding to enter into the rulemaking process for various reasons. Like the federal APA, New Hampshire’s APA has a “rulemaking petition” provision that allows any interested person to petition an agency to adopt, amend or repeal a rule.<sup>245</sup> Unlike the federal APA, the state APA has a specific deadline that requires the state agencies to determine whether to grant or deny the petition within thirty days.<sup>246</sup>

Regular rules are generally developed internally by the agency staff. Some agencies and departments have governing boards that assist in the development of the rule and possess the official rulemaking authority for the agency.<sup>247</sup> Unlike the federal system, New Hampshire does not have a formal negotiated rulemaking process to try to develop a consensus on the language of a proposed rule, but many state agencies informally convene groups of stakeholders to help develop proposed rules.

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242. *Id.*

243. *Id.* at § 541-A:16.

244. *See Petition of Pelletier*, 484 A.2d 1119, 1123 (N.H. 1984); Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 Admin. L. Rev. 631, 638 (2002).

245. N.H. Rev. Stat. Ann. § 541-A:4.

246. *Id.* at § 541-A:4(I).

247. *Id.* at § 541-A:12, N:9.

New Hampshire agencies may also solicit public comment in written form or in public hearings on subjects the agency is considering for rulemaking. The agency solicitation occurs by “Request for Advance Public Comment on Subject Matter of Possible Rulemaking” in the New Hampshire Rulemaking Register.<sup>248</sup> This is akin to the federal system’s “Advanced Notice of Proposed Rulemaking.”

In drafting the rule, the agency must follow the *New Hampshire Drafting and Procedural Manual for Administrative Rules*. It details the procedural requirements in the rulemaking process and explains the style, format and organizational requirements that New Hampshire administrative rules must meet.<sup>249</sup> For example, it states that rules must be “drafted in plain English . . . [and] in a ‘clear and coherent manner.’”<sup>250</sup>

Once a proposed rule is drafted, the agency must obtain a “Fiscal Impact Statement” from the Office of Legislative Budget Assistant (“LBA”).<sup>251</sup> The LBA is an entity within the legislative branch that conducts investigations, analysis and research into the financial activities of New Hampshire governmental entities. It also assists in the budget process.<sup>252</sup> It has some similarities to the GAO at the federal level.

The fiscal impact statement is something of a blend of the federal cost-benefit requirements in Executive Order 12866, and some of the requirements of federal statutes like: (1) the Paperwork Reduction Act;<sup>253</sup> (2) the Unfunded Mandates Reform Act;<sup>254</sup> and (3) the Small Business Regulatory Enforcement Fairness Act.<sup>255</sup>

The LBA obtains information from the agency about the proposed rule and develops a statement that assesses the costs and the benefits of the rule. The analysis determines the cost to the citizens of the state and to the political subdivisions of the state, the cost to state funds, and an explanation

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248. *Id.* at § 541-A:11(VIII).

249. The manual has a detailed overview of the rulemaking process including a helpful flow chart. *New Hampshire Drafting and Procedural Manual for Administrative Rules* ch. 3, § 2.1 (2001) [hereinafter *New Hampshire Manual*] (available at <http://www.gencourt.state.nh.us/Rules/manualtc.html>).

250. *Id.*; see also N.H. Rev. Stat. Ann. § 541-A:7.

251. N.H. Rev. Stat. Ann. § 541-A:5.

252. *Id.* at § 14:31.

253. See generally 44 U.S.C. § 3501. Under this law, OMB reviews and approves (or disapproves) each collection of information by all federal agencies (including all independent agencies). This includes information collections contained in agency regulations.

254. See generally 2 U.S.C. §§ 1532-1535. Under this law, each agency must prepare a specific kind of benefit-cost analysis for any proposed and final rule that may result in the expenditure by state, local, and tribal governments of \$100 million or more (adjusted annually for inflation) in any one year. When preparing such an analysis, the agency must also identify and consider a “reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.” *Id.* at § 1535(a). OMB reports annually to Congress on agency compliance with these requirements.

255. See generally 5 U.S.C. §§ 601-612.

of any relevant federal mandates.<sup>256</sup> The LBA also prepares an analysis of the impact of the rule on “independently owned businesses,” including a description of the reporting and recordkeeping requirements on small businesses.<sup>257</sup>

Once the fiscal impact statement is prepared, the agency submits a Rulemaking Notice to the Division of Administrative Rules in the Office of Legislative Services (“Division”) for publication in New Hampshire’s Rulemaking Register.<sup>258</sup> Rules that do not comply with the *New Hampshire New Hampshire Drafting and Procedural Manual for Administrative Rules* are rejected by the Division and returned to the agency to revise the rule to comply with the manual.<sup>259</sup>

New Hampshire’s APA has a variety of requirements that the notice must meet including: (1) a summary explaining the rule; (2) the fiscal impact statement; (3) the person at the agency to contact regarding the rule; and (4) the deadline to submit written comments to the agency about the proposed rule.<sup>260</sup>

New Hampshire law also requires agencies to have at least one public hearing on proposed rules. The notice of the hearing must include the date of the hearing and must provide at least twenty days notice of the hearing.<sup>261</sup> The notice must also contain a statement by the agency that the proposed rules do not violate Part I, Article 28-as of the New Hampshire Constitution.<sup>262</sup> This New Hampshire Constitutional provision prohibits the State from imposing new unfunded mandates on local communities.<sup>263</sup> If the notice submitted by the agency does not comply with these requirements, the Division can refuse to publish it.<sup>264</sup>

The agency must provide notice, beyond the notice in the rulemaking register, to all persons regulated by the proposed rules who hold occupational licenses issued by the agency, and to all persons who have made

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256. N.H. Rev. Stat. Ann. § 541-A:5.

257. *Id.* at § 541-A:5(IV)(e).

258. *Id.* at § 541-A:8, 12(I). The Division of Administrative Rules (“Division”) is the New Hampshire state government office where all proposed and adopted administrative rules, subject to RSA 541-A and the Administrative Procedure Act, must be filed by state executive branch agencies to make the adopted rules effective. Together the effective agency rules comprise the *New Hampshire Code of Administrative Rules*. The Division also serves as the clerical and legal staff to the Joint Legislative Committee on Administrative Rules (JLCAR).

259. *Id.* at § 541-A:8.

260. *Id.* at § 541-A:6.

261. *Id.* at § 541-A:6(I).

262. *Id.* at § 541-A:6(I)(j).

263. *Opinion of the Justices (Materials in Solid Waste Stream)*, 608 A.2d 870, 872 (N.H. 1992); *Nashua School Dist. v. State*, 667 A.2d 1036, 1039-40 (N.H. 1995).

264. N.H. Rev. Stat. Ann. § 541-A:6(II).



timely request for advance notice of rulemaking proceedings.<sup>265</sup> Upon request, the agency must also send notice to the President of the Senate, to the Speaker of the House of Representatives, to the Chairperson of the Fiscal Committee, and to the chairpersons of the legislative committees having jurisdiction over the subject matter.<sup>266</sup>

After notice is provided, the agency holds the public hearing. It must make the proposed rule available to the public at least five days prior to the hearing.<sup>267</sup> At the hearing, the agency must “afford all interested persons reasonable opportunity to testify and the agency must also allow interested person to submit data, views, or arguments in writing” or in electronic format after the hearing.<sup>268</sup>

After considering the received public comments and any comments made by the Division committee staff regarding the rules compliance with the *New Hampshire Drafting and Procedural Manual for Administrative Rules*, the agency develops and adopts a final proposed rule that is filed with the Division.<sup>269</sup> This must be done within 150 days of publishing the notice in the rulemaking register.<sup>270</sup> Part of the final rule proposal must include an amended fiscal impact statement explaining whether there is any change in the fiscal impact of the final rule as compared to the original proposed rule.<sup>271</sup>

New Hampshire agencies do have to consider the public comments and testimony submitted during the process, but unlike federal law, they do not have to respond to comments or testimony unless an “interested person” requests the agency to “issue an explanation of the rule.”<sup>272</sup> The agency’s explanation must provide a concise statement of the principal reasons for and against the rule and an explanation of why the agency overruled the arguments against the rule and decided to adopt the rule.<sup>273</sup>

The rule then goes for review by the JLCAR. JLCAR reviews agency regular rules to ensure that they are within the authority of the agency, consistent with the intent of the legislation and in the public interest.<sup>274</sup>

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265. *Id.* at § 541-A:6(III). The statute provides that notice to occupational licensees “shall be by U.S. Mail, agency bulletin or newsletter, public notice advertisement in a publication of daily statewide circulation, or in such other manner deemed sufficient by the committee.” *Id.*

266. *Id.*

267. *Id.* at § 541-A:11(IV)(d).

268. *Id.* at § 541-A:11. The people with rulemaking authority for the agency must attend the hearing. If the agency’s rulemaking authority is with its governing board, then a quorum of the board must attend. *Id.* at § 541-A:11(II).

269. *Id.* at § 541-A:12(I).

270. *Id.*

271. *Id.* at § 541-A:12(II)(d).

272. *Id.* at § 541-A:11(VII).

273. *Id.* at § 541-A:11(VII)(a)-(b).

274. *Id.* at § 541-A:13(III).

JLCAR also examines rules to see if they will have a substantial economic impact that is not recognized in the fiscal impact statement.<sup>275</sup> JLCAR serves a role that is similar to the OMB at the federal level. One major difference between JLCAR and OMB is that JLCAR is part of the legislative branch, whereas OMB is part of the executive branch.

JLCAR holds a public hearing on each rule it considers, and the public may comment on the rule at the hearing.<sup>276</sup> After its review and hearing, JLCAR may decide to approve the rule as is, or conditionally approve the rule if the agency makes changes suggested by JLCAR, or it may object to the rule.<sup>277</sup>

If JLCAR objects to the rule, it first makes a “preliminary objection” to the agency in writing. Then the agency must respond in some way to the objection in writing prior to the Committee’s next regularly scheduled monthly meeting. The agency may amend the rule to cure the defect and adopt the rule, or it may seek to adopt the rule without change, or it may withdraw the rule entirely. If the agency does not respond prior to the Committee’s next meeting, then the rule is invalidated and the agency must start the rulemaking process all over again with a new rulemaking notice.<sup>278</sup>

After receiving the response from the agency, JLCAR may accept the response and withdraw the objection, or it may make a final objection by a majority vote of the entire JLCAR Committee.<sup>279</sup> If the Committee files a final objection regarding the rule and the agency goes forward with the rule anyway, then the burden of proof shifts to the agency in any action for judicial review or for enforcement of the rule to establish that the part objected to is within the authority delegated to the agency, is consistent with the intent of the legislature, and is in the public interest.<sup>280</sup>

Rules that are approved by JLCAR and properly complete the other requirements of the rulemaking process are considered to “be valid and binding on persons they affect [and] prima facie evidence of the proper interpretation of the matter they refer to.”<sup>281</sup> As noted in Part III(F) of this article, New Hampshire statutes also provide JLCAR with the authority to recommend legislative action by sponsoring a “joint resolution.” The

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275. *Id.* at § 541-A:13(IV)(d).

276. *Id.* at § 541-A:2, 13.

277. *Id.*; *New Hampshire Manual*, *supra* n. 249, at ch. 3 § 2.15-16.

278. N.H. Rev. Stat. Ann. § 541-A:13(V)(c); *New Hampshire Manual*, *supra* n. 249, at ch. 3 § 2.15-19.

279. There is also a process where an agency can request that JLCAR issue a revised objection. This gives the agency a chance to address JLCAR’s concerns before JLCAR moves towards formal objection. *New Hampshire Manual*, *supra* n. 249, at ch. 3 § 2.18-19.

280. N.H. Rev. Stat. Ann. § 541-A:13(VI).

281. *Id.* at § 541-A:22(II).

sponsored “joint resolution” would invalidate the agency’s rule if approved by a majority vote of both the House and Senate and presented to the Governor for approval or veto.<sup>282</sup>

After the JLCAR review process runs its course, the agency may adopt the rule. But the agency must file the final adopted rule with the Division for it to become effective.<sup>283</sup> There are a variety of detailed statutory requirements that the final rule must meet in order to be considered properly filed.<sup>284</sup> If the Division determines that the rule meets these requirements, it issues a receipt to the agency and notice of the adopted rule is published in the *New Hampshire Rulemaking Register*.<sup>285</sup> Rules become effective the day after they are filed with the Division.<sup>286</sup> The agency then publishes an official version of the adopted rule. All rules are published in hard copy and most rules are now available electronically.<sup>287</sup>

If the Division determines that the final rule submitted by the agency does not meet the statutory requirements or other requirements delineated in the *New Hampshire Drafting and Procedure Manual for Administrative Rules*, then it can refuse to consider the rule as valid.<sup>288</sup>

Most regular New Hampshire rules expire in eight years.<sup>289</sup> The agency must readopt its rules before the expiration period or they become

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282. *Id.* at § 541-A:13(VII).

283. The JLCAR process runs its course after:

(a) The passage of 45 days from filing of a final proposal under RSA 541-A:12, I, or 60 days from filing under RSA 541-A:12, I-a, without receiving notice of objection from the committee; (b) Receiving approval from the committee; (c) Written confirmation is sent to the agency by committee legal counsel relative to agency compliance with the committee’s conditional approval pursuant to RSA 541-A:13, V(a); (d) Passage of the 50-day period for committee review of the preliminary objection response, or revised objection response, if applicable, provided that the committee has not voted to sponsor a joint resolution pursuant to RSA 541-A:13, VII; or (e) Final legislative action, as defined in RSA 541-A:1, VI-a, is taken on the joint resolution sponsored pursuant to RSA 541-A:13, VII(b) or the passage of the 90 consecutive calendar days specified by RSA 541-A:13, VII(c), whichever occurs first.

N.H. Rev. Stat. Ann. § 541-A:14.

284. These include basic things like the name of the agency, the identification of the rule by number, the final rule being the same as the final proposed rule that went through the JLCAR process and the effective date of the rule if different from the standard effective date which is the day after filing. *See id.* at § 541-A:3-a; *New Hampshire Manual, supra* n. 249, at ch. 3 § 2.21.

285. N.H. Rev. Stat. Ann. § 541-A:14(IV), 15.

286. *Id.* at § 541-A:14(VII), 16(III).

287. *Id.* at § 541-A:15(I).

288. *See New Hampshire Manual, supra* n. 249, at ch. 3 § 2.21. The legal effect of the Division declining to accept a final rule for filing is a little unclear. The Rulemaking manual acknowledges that only a court can declare a rule invalid. The Rulemaking manual states that the Division’s actions would only indicate that the Division does not consider the rule to be valid or effective. As a result, the rule would not be issued as an effective rule by the Division, as other rules are. *Id.*

289. N.H. Rev. Stat. Ann. § 541-A:17(I). Rules of practice, procedure and organization do not expire unless a statute is adopted or amended in a way that renders these rules inaccurate. If that occurs, the

invalid and unenforceable. The readoption process is the same as the process for initially adopting the rule.

#### H. Agency Rulemaking Process – Interim and Emergency Rules

New Hampshire also has “interim” and “emergency” rules. Interim rules are generally used when an agency has to act quickly to conform to a new statutory requirement, to a court decision, or to a federal requirement.<sup>290</sup> Agencies also adopt interim rules to prevent regular rules from expiring before the agency can complete the readoption process of the regular rule. In other words, the interim rule has the same substance or content as the regular rule, and it just replaces the regular rule for a brief period of time to ensure that the issue or subject matter is still regulated by the agency.<sup>291</sup> Interim rules may not remain in effect for more than 180 days from the day they take effect. They cannot be renewed or readopted as an interim rule.<sup>292</sup>

Interim rules do not have to go through the public comment period with the agency, but the agency does have to provide public notice of the rule.<sup>293</sup> Interim rules also have to comply with certain requirements in the *New Hampshire Drafting and Procedure Manual for Administrative Rules* and they must be filed with the Division.<sup>294</sup> Interim rules also go through the JLCAR review process and the public does have an opportunity to comment on the proposed interim rule at the JLCAR hearing.<sup>295</sup> Unlike regular rules, interim rules must actually be approved by JLCAR.<sup>296</sup> An agency cannot go forward with the rule over a JLCAR final objection like it can with a regular rule.

Emergency rules are permitted only when an agency finds that “an imminent peril to the public health or safety requires adoption of a rule with less notice than is required [for regular rules].”<sup>297</sup> Emergency rules do not go through the same public notice and comment process as regular rules. Rather, the agency need only “make reasonable efforts to ensure that emergency rules are made known by persons who may be affected by them.”<sup>298</sup> They are filed with the Division, but do not go through the same

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rules expire one year after the effective date of the statute, unless the rules are amended, superseded or repealed. *Id.* at § 541-A:16, 17(II).

290. *Id.* at § 541-A:19(I)(a)-(c).

291. *Id.* at § 541-A:19(I)(d).

292. *Id.* at § 541-A:19(X).

293. *Id.* at § 541-A:19(II)(a)-(b).

294. *Id.* at § 541-A:19(II)-(VIII).

295. *Id.*

296. *Id.* at § 541-A:19(IX)-(X).

297. *Id.* at § 541-A:18(I).

298. *Id.* at § 541-A:18.

filing process as regular or interim rules. The agency must include in its filing an explanation of the nature of the imminent peril to the public health or safety, including a summary of the effect upon the state if the emergency rule is not adopted.<sup>299</sup> The Division publishes notice of the rule in the New Hampshire Rulemaking Register. Emergency rules become effective upon filing.<sup>300</sup> Like interim rules, emergency rules may not remain in effect for more than 180 days from the day they take effect. They cannot be renewed or readopted as emergency rules.<sup>301</sup>

Emergency rules do not go through the same JLCAR approval process as regular or interim rules. JLCAR may not object to emergency rules.<sup>302</sup> JLCAR does review the agency's statement of the reason the emergency rule is required and, it may petition the agency to repeal the rule if JLCAR finds the explanation inadequate or that the rule is not necessary.<sup>303</sup>

### I. Judicial Review of Rules

The New Hampshire Supreme Court has said that judicial review includes a responsibility to insure that administrative agencies do not substitute their will for that of the legislature.<sup>304</sup> To fulfill this function, the court examines agency rules substantively to determine if they are within the intended scope and purpose of the rulemaking power granted by the legislature.<sup>305</sup>

State statutes set some of the standards that the court must follow when reviewing agency rules. For example, rules that are properly promulgated through the JLCAR and the Division process, mentioned in Parts III(G)-(H) of this article, are considered "valid and binding [and] prima facie evidence of the proper interpretation of the matter that they refer to."<sup>306</sup>

State statutes require the court to review rules that are promulgated by the agency over a JLCAR objection differently. In that situation, the agency has the burden "of proving that the rules are within the agency's delegated authority, consistent with the legislature's intent, and in the public interest."<sup>307</sup>

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299. *Id.* at § 541-A:18(III)(a)-(g).

300. *New Hampshire Manual*, *supra* n. 249, at ch. 3 § 4.2.

301. N.H. Rev. Stat. Ann. § 541-A:19(X).

302. *New Hampshire Manual*, *supra* n. 249, at ch. 3 § 4.1-3.

303. N.H. Rev. Stat. Ann. § 541-A:18(IV).

304. *Opinion of the Justices*, 431 A.2d at 786.

305. *In re N.H. Dept. of Transp.*, 883 A.2d 272, 279 (N.H. 2005); *In re Anderson*, 784 A.2d 1205, 1206 (N.H. 2001).

306. N.H. Rev. Stat. Ann. § 541-A:22(II).

307. *In re Toczo*, 618 N.H. 800, 803 (N.H. 1992).

Much like the federal judicial review standards, New Hampshire courts will overturn an agency's decision if it is clearly unreasonable or unlawful.<sup>308</sup> But courts are not free to substitute their judgment on the wisdom of the rules for that of the agency.<sup>309</sup>

Like the federal standard, New Hampshire courts review whether the agency's rule "was fairly based on a consideration of all relevant factors."<sup>310</sup> The fact that an agency did not adopt suggestions made in comments submitted to the agency during the rulemaking process does not suggest that it did not consider them.<sup>311</sup>

Also, like the federal standards, the court provides administrative agencies with "substantial deference" when the rule involves the agency's interpretation of a statutory requirement.<sup>312</sup> New Hampshire courts often find the administrative agency's interpretation to be persuasive.<sup>313</sup>

State statutes provide that a party may challenge the validity or applicability of an administrative rule through a declaratory judgment action in state superior court.<sup>314</sup> A party may challenge an administrative rule on procedural grounds as well. By statute, certain procedural deficiencies will prevent a rule from taking effect. These include failing to file the rule with the Division or with JLCAR, or failing to respond to an objection by JLCAR. Other procedural deficiencies do not affect the validity of the rule.<sup>315</sup> These include failing to meet the style requirements in the administrative rulemaking manual and inadvertent failures to mail notice or copies of the rule.<sup>316</sup>

For procedural violations not covered by statute, the court may fashion appropriate relief.<sup>317</sup> The court, however, "will not set aside an agency's decision for a procedural irregularity . . . unless the complaining party shows material prejudice."<sup>318</sup>

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308. *Denman*, 419 A.2d at 1087.

309. *In re Concord Nat. Gas Corp.*, 433 A.2d 1291, 1296 (N.H. 1981); *LUCC v. Public Serv. Co. of N.H.*, 402 A.2d 626, 631 (N.H. 1979).

310. *Concord Nat. Gas*, 433 A.2d at 1296 (citing *Citizens to Preserve Overton Park*, 401 U.S. at 416).

311. *Id.* at 1296.

312. *Hamby v. Adams*, 376 A.2d 519, 521 (N.H. 1977).

313. *N.H. Retirement System v. Sununu*, 489 A.2d 615, 618 (N.H. 1985); *N.H. Dept. of Rev. Administration v. Public Emp. Lab. Rel. Bd.*, 380 A.2d 1085, 1086 (N.H. 1977). An agency's interpretation of its regulations is also accorded great deference, but the court's deference to an agency's interpretation of its own regulations is not total. The court still examines the agency's interpretation to determine if it is consistent with the language of the regulation and with the purpose which the regulation is intended to serve. *In re Land Acquisition*, 767 A.2d 948, 950-51 (N.H. 2000).

314. N.H. Rev. Stat. Ann. § 541-A:24.

315. *Id.* at § 541-A:23.

316. *Id.*

317. *Id.*

318. *Concord Nat. Gas*, 433 A.2d at 1295.

#### IV. CONCLUSION

Both the Federal government and the New Hampshire government have promulgated administrative procedure acts in response to the expanding importance of agencies in the day-to-day lives of citizens. The New Hampshire administrative process parallels the structure of the federal administrative process in many ways. As noted in this article, however, the New Hampshire process differs from the federal process in some important instances. It is important to be aware of the differences when dealing with New Hampshire agencies, or when navigating the New Hampshire rule-making process.