

Rulemaking under the Alabama Administrative Procedure Act

What is the APA?

The Alabama Administrative Procedure Act (APA),¹ enacted in 1981, establishes the “minimum procedural code” by which an agency, board, or commission of state government may adopt administrative rules. Before the adoption of the APA, there was no uniform procedure by which agencies adopted rules; consequently, the procedure and timeline varied from agency to agency. The APA established a uniform process with the intent of providing notice to the public, promoting fairness in and access to rulemaking, and encouraging increased public participation in the process.²

The APA directs the Legislative Services Agency (LSA) to compile and maintain the official Alabama Administrative Code, a comprehensive publication containing the complete administrative rules of all agencies of the state, and to publish the Alabama Administrative Monthly (AAM), a monthly register of proposed rule additions, amendments, and repeals, as well as a list of certified final rules adopted by agencies during the preceding month. Both publications are available to the public free of charge on the website of the Alabama Legislature.³ LSA also coordinates the filing process and provides administrative assistance to the Legislature in carrying out its oversight duties. All proposed rules must be submitted to LSA to begin the rulemaking process, and all final adopted rules must be certified to LSA in order to complete the process.

Legislative Oversight

From time to time, the Legislature delegates to an agency of the state the authority to adopt rules to better carry out the day-to-day operations of the agency without the necessity of going through the full Legislative process of enacting new legislation. All rulemaking under the APA is subject to the legislative oversight of the Joint Committee on Administrative Rule Review, a statutorily created legislative committee comprised of 10 members of the House of Representatives, 10 members of the Senate, and the Lieutenant Governor, as a nonvoting member.⁴

LSA assists the Joint Committee in its oversight function by examining each filing submitted to it for compliance with the format and timelines established in the APA. LSA summarizes each proposed submission for the Joint Committee and alerts the Joint Committee if, in its opinion, any submission clearly exceeds the agency’s rulemaking authority. The APA, in and of itself, does not give an agency the power to adopt rules; the agency must have express statutory authority outside of the APA to adopt rules for a specific purpose. Generally, an agency’s rulemaking authority appears in the statute specifying the duties and powers of the agency.

Who is subject to the APA?

Generally, every state agency having the authority to adopt rules is subject to the APA unless specifically exempt. Subdivision (1) of Section 41-22-3, Code of Alabama 1975, defines the term “agency” as every board, bureau, commission, department, officer, or other administrative office or unit of the state unless exempted. Those entities not considered an agency for purposes of the APA include: The Legislature and its agencies, the Court System, units of local government (counties and municipalities), the State Port Authority, the Public Service Commission, the State Banking Department, Boards of Trustees of Postsecondary Institutions, Boards of Plans administered by public pension systems, and agencies whose rules or administrative decisions are subject to approval by the Supreme Court and the Department of Insurance.⁵

The Alabama Administrative Monthly

The Alabama Administrative Monthly (AAM) is a register of rule changes proposed by state agencies during a month. Each agency subject to the APA must file a notice of all rule changes with LSA for publication in the AAM. LSA publishes the AAM on the legislative website on the last business day of each month. The AAM contains a listing of notices of all rules submitted during the month that are proposed to be added, amended, or repealed. Each notice describes the substance of the proposed rule change, specifies a comment period, and provides the manner in which a member of the public may submit comments to the agency regarding the proposal.

The AAM also contains a listing of all final adopted rules certified by the agency during the preceding month and a list of final adopted rules certified to LSA during the preceding month. Final certifications are those rules entering the final phase of the rulemaking process. An agency may adopt a final rule and certify it to LSA only after completion of the comment period specified in its notice. A final certification becomes effective 45 days after publication of the certification in the AAM unless the Joint Committee disapproves it within the 45-day waiting period.⁶

The Proposal

The formal rulemaking process begins with a proposal. LSA requires the agency initiating the proposal to submit a transmittal sheet, notice, and a copy of the text of the proposal with the language proposed to be added or deleted highlighted. If the agency determines that the rule will have an economic impact, the agency must also attach an economic impact statement. As part of the required documentation, the agency proposing the new rule or amending or repealing an existing rule must specify a notice and comment period of 35 to 90 days following publication of the proposal in the AAM. The purpose of the notice is to give parties affected by the rule and other interested members of the public an opportunity to comment; therefore, the notice should provide a clear and reasonable method by which the agency will accept comments. Before adopting the final rule, the agency must “consider fully all written and oral submissions respecting a proposed rule.”⁷

Economic Impact Statements

The APA requires the agency to submit a fiscal note with a proposal if the proposed new rule or rule change would have an economic impact on the public if adopted. The agency is responsible for preparing the fiscal note using the Economic Impact Statement Form created by LSA. The form generally tracks the information required by Section 41-22-23, Code of Alabama 1975. This section requires the fiscal note, at a minimum, to include the following information:

- “(1) A determination of the need for the rule and the expected benefit of the rule.
- (2) A determination of the costs and benefits associated with the rule and an explanation of why the rule is considered to be the most cost effective, efficient, and feasible means for allocating public and private resources and for achieving the stated purpose.
- (3) The effect of the rule on competition.
- (4) The effect of the rule on the cost of living and doing business in the geographical area in which the rule would be implemented.
- (5) The effect of the rule on employment in the geographical area in which the rule would be implemented.
- (6) The source of revenue to be used for implementing and enforcing the rule.
- (7) A conclusion on the short-term and long-term economic impact upon all persons substantially affected by the rule, including an analysis containing a description of which persons will bear the costs of the rule and which persons will benefit directly and indirectly from the rule.
- (8) The uncertainties associated with the estimation of particular benefits and burdens and the difficulties involved in the comparison of qualitatively and quantitatively dissimilar benefits and burdens. A determination of the need for the rule shall consider qualitative and quantitative benefits and burdens.
- (9) The effect of the rule on the environment and public health.
- (10) The detrimental effect on the environment and public health if the rule is not implemented.”

The Joint Committee may request additional information from the agency or from other sources during its review of the proposed rule.⁸

Certification of the Final Adopted Rule

When the final date for comments and completion of notice published with the proposal arrives, the clock for certifying the final adopted rule to LSA begins to tick. Final certification to LSA must occur within 90 days of the final date for comment listed in the agency's proposal **and** within 15 days of transmission of the final adopted rule to the agency's administrative procedure secretary.⁹ Certification may occur as soon as the day following completion of the notice, but if it does not occur within 90 days, the agency must start the process over by submitting a new proposal. After considering all comments it receives during the notice period, the board or governing authority of the agency will meet to adopt the final rule. The agency may adopt the final rule either with or without changes in response to comments. If the agency receives conflicting views during the comment period, the agency is required to issue a concise statement on the certification of the principal reasons for or against the adoption of the rule. The statement should specify the agency's reasons for overruling any consideration urged against the adoption of the rule.¹⁰

Once the agency adopts the final rule, it must transmit a copy of the final adopted rule to the person designated by the agency to serve as its administrative procedure secretary. The individual serves as a contact person to LSA for purposes of the rulemaking process. The administrative procedure secretary has 15 days to certify the final adopted rule by filing it with LSA. After LSA receives the final certification, LSA will publish the certification in the next issue of the AAM. Unless the agency specifies a later date, the rule will become effective 45 days following the publication of the certification in the AAM. At any time before the rule becomes effective, the Joint Committee may convene a hearing on the rule and disapprove it, send it back to the agency with suggested amendments, or take no action at all, thereby allowing the rule to become effective at the end of the 45-day waiting period.

Emergency Rules

The APA allows an agency to adopt an emergency rule if the rule is necessary due to an immediate danger to the public health, safety, or welfare, or if federal law or regulation requires immediate adoption.¹¹ There is no notice period required to adopt an emergency rule and the APA does not provide a process for review of an emergency rule by the Joint Committee. The emergency rule is effective on the date the agency files it with LSA, and it expires after 120 days. The agency may not adopt a new rule on the same or on a similar subject for nine months after the emergency rule expires unless the agency clearly establishes that it could not have foreseen during the initial 120-day period that the emergency would continue or would likely reoccur during the following nine months. The burden of proof is on the agency to establish that a continuing or reoccurring emergency was not foreseeable. Emergency rules are strictly construed and are not valid except to the extent necessary to prevent, mitigate, or resolve an immediate danger to the public health, safety, or welfare. When adopting an emergency rule, the agency must make reasonable efforts to apprise persons who may be affected.¹²

Anti-Trust Review

The APA requires LSA to review each rule certified to it by a state board or commission that regulates a profession if a controlling number of members of the board or commission are active market participants in the profession. The purpose of the review is to determine whether the rule may significantly lessen competition and, if it does, whether the rule was adopted pursuant to a clearly articulated state policy to displace competition. If LSA determines that the rule is anticompetitive, LSA must notify the Joint Committee of its determination. The Joint Committee must review the substance of the rule and either approve the rule or notify the board or commission that it agrees with the determination of LSA, effectively disapproving the rule.¹³ A new board or commission's initial rules are inherently anticompetitive, and, as such, the rules are not operative until the Joint Committee approves them. A board of commission may ask LSA to review an existing rule and issue an opinion. The Joint Committee must review any such opinion and either approve or disapprove LSA's determination.

Where to Find Us

More information regarding the administrative rulemaking process is available on the website of the Alabama Legislature or by calling the Legislative Services Agency at 334-261-0600. To find us on the legislative website, click on the "Legal Resources" tab.

¹ Act 81-855, 1981 Regular Session. The APA is codified as Chapter 22 of Title 41 of the Code of Alabama 1975.

² Section 41-22-2, Code of Alabama 1975.

³ Alabama Legislature (legislature.state.al.us).

⁴ The membership of the Joint Committee is identical to that of the Legislative Council, created pursuant to Sections 29-6-1 and 29-6-2, Code of Alabama 1975.

⁵ Section 41-22-3(1), Code of Alabama 1975.

⁶ Sections 41-22-5.1(h) and 41-22-23(b)(1), Code of Alabama 1975.

⁷ Section 41-22-5, Code of Alabama 1975.

⁸ Section 41-22-23(f), Code of Alabama 1975.

⁹ Section 41-22-6(b), Code of Alabama 1975.

¹⁰ Section 41-22-5(a)(2), Code of Alabama 1975.

¹¹ Section 41-22-5(b), Code of Alabama 1975.

¹² Id.

¹³ Section 41-22-21.1, Code of Alabama 1975.