Minnesota rulemaking: a well-established process with stringent safeguards

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In Minnesota, when an agency has the statutory authority to adopt rules, it must complete multiple procedural steps before it can legally adopt a rule. First, an agency must publish at least three rule notices in the State Register, Minnesota’s official publication of rules, executive orders, and other government notices. Second, the agency must prepare a plan to identify and notify people who may be significantly affected by the agency’s rule. Third, the agency must draft a Statement of Need and Reasonableness (SONAR) in which the agency justifies the need and reasonableness for the rule by marshaling evidence and other information — scientific data, for example. Fourth, the agency must notify the Legislature of its intent to adopt the rule. And fifth, the agency must either hold a rule hearing or notify affected people of its intent not to hold a hearing; but if 25 or more people request a hearing, the agency must hold one. People can comment on a rule before, during, or after the hearing, and, critically, the agency must respond to public comments and may even significantly amend the rule in response.

A rule must pass legal scrutiny

While an agency must go through many procedural steps to adopt a rule, an agency must still ensure its rule passes legal scrutiny. And to pass legal scrutiny, the agency’s rule must be approved by two state offices: one from the legislative branch, and one from the executive branch. First, an agency’s rule must be approved as to style and form by the revisor’s office, a nonpartisan legislative office that provides drafting support and legal advice to the Legislature and state agencies. Second, and more important, the rule must be approved by the Office of Administrative Hearings (OAH), an independent state agency composed of judges, attorneys, and support personnel.

Effectively, OAH serves as an independent court that reviews the rule, SONAR, and various procedural steps to ensure that an agency has legally complied with rulemaking requirements and has not acted arbitrarily and capriciously. When OAH approves or disapproves a rule, it writes a detailed report, published freely online, for Minnesotans to read. This detailed report is a legal review, not an advisory report — that is, an agency must correct any identified legal defects before it can properly adopt its rule. By serving as a neutral, nonpartisan check on agency rulemaking, OAH warrants that a rule is legal, needed, and reasonable.

Several executive and legislative checks

Even after an agency adopts a rule, there are several executive and legislative checks that can weaken, blunt, or even repeal the rule. First, the governor can veto a rule. And while a governor is unlikely to veto a rule from a governor-controlled agency, the threat of such a veto can shape a rule’s scope or even be leveraged by the legislature. Second, the legislature can check a rule through several meaningful ways:
• Even before an agency can adopt a rule, the Legislature has instituted cost-threshold limits for businesses and restricted an agency’s ability to establish fines, fees, and criminal penalties.

• Agencies must submit two annual rulemaking reports, so the Legislature can use these reports to stay engaged and current on agency rulemaking. And agencies must keep a record of all rulemaking proceedings and make the record available to anyone who requests it, including the legislature.

• The Legislature can hold committee hearings on a rule and allow the public to comment, and the Legislature can send letters to an agency or otherwise engage with the agency during the rulemaking process.

• Both the House and the Senate can pass a resolution that delays, but does not prevent, a rule from becoming effective. An even stronger power exists in which a House or Senate committee with jurisdiction over state-governmental operations can object to a rule and place a burden on an agency “in any proceeding for judicial review or for enforcement of the rule to establish that the whole or portion of the rule objected to is valid.”

• Most important, the Legislature can 1) repeal a rule, 2) require an agency to amend a rule, 3) repeal an agency’s statutory authority, 4) establish time limits for an agency to adopt a rule, 5) or prohibit an agency from adopting rules on specific topics. Although all these actions would require the governor’s signature, they can still serve as enticing bartering tools or be used when one party has unified government control.

Because rulemaking affects Minnesotans in their daily lives, they too have the power to challenge or otherwise question an agency’s rule. First, a person or entity may petition an agency for a variance from a rule (a variance waives a requirement as it relates to a person’s or entity’s circumstances). Second, a person may petition an agency to adopt, amend, or repeal a rule, and a local government unit may petition an agency to amend or repeal a rule. Third, a person or entity may petition OAH to determine whether an agency is “enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule.” And last, a person or entity — including the House or Senate state-governmental-operations committee — may petition the Minnesota Court of Appeals to declare a rule invalid if the court “finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rulemaking procedures.”