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An Overview of Administrative Rule-Making Procedure in Ohio

PREPARED BY: MICHAEL BURNS, LSC ATTORNEY

REVIEWED BY: BETHANY BOYD, LSC ATTORNEY

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Administrative rule making

When the subject of a statute is technically complex, the General Assembly often creates or authorizes an administrative agency to implement the statute. A classic example is public utilities legislation. Regulation of public utilities often involves technically complex matters that are better understood by an agency that deals with these matters on a frequent basis.

An important technique by which agencies are empowered to implement statutes is by rule making. That is, in enacting an agency-empowering statute, the General Assembly often directs the agency to adopt rules for particular purposes. A rule is a formal, written statement of general principles of law, as is a statute. For example, in a public utilities statute that entitles a public utility to a "fair and reasonable return on its investment," the General Assembly might direct the agency to adopt rules stating criteria by which a fair and reasonable return can be determined. The criteria are general principles of law just as is the statutory phrase under which they are adopted, but the criteria are defined, not by the General Assembly, but by the adopting agency in fulfillment of the rule-making power it has been given by the General Assembly.

This informational brief outlines how agencies undertake adopting rules. That is, it explains rule-making procedure, but does not address when rule making is appropriate or the role rules play in agency operations.

Administrative agencies often are required to adopt rules to implement statutes that have been enacted by the General Assembly. Rules are formal, written statements of general principles of law, as are the statutes under which they are adopted.



An administrative rule is law only after its adopting agency has put it through a statutorily prescribed rule-making procedure. There are two rule-making procedures, one in the Ohio Administrative Procedure Act, R.C. Chapter 119., and the other in R.C. 111.15. Which procedure applies to a rule is a matter of legislative choice, and depends upon whether public input to the rule-making process is considered important.

In rule making under R.C. Chapter 119., an agency gives public notice of its intention to adopt a rule and then holds a public hearing on the proposed rule. In rule-making under R.C. 111.15, an agency neither gives public notice nor holds a public hearing.

Rule-making procedure in general

An administrative rule can be effective as part of the law in Ohio only after its adopting agency has taken it through a statutorily prescribed rule-making procedure. While a rule is being taken through the rule-making procedure, it is called a “proposed rule.” When the rule-making procedure has been completed, and the rule is to become effective as part of the law, it is called an “adopted rule.”

There are two general statutory rule-making procedures: one in the Ohio Administrative Procedure Act, R.C. Chapter 119., and the other in R.C. 111.15. In general, if an agency is not required to follow the rule-making procedure of R.C. Chapter 119., it is required to follow the rule-making procedure of R.C. 111.15. (Compare R.C. 111.15(A)(1) and (2) with R.C. 119.01(A) and (C).) Rules subject to adoption under R.C. Chapter 119. are called “119” rules. Rules subject to adoption under R.C. 111.15 are called “111” rules.

Whether an agency is required to follow the R.C. Chapter 119. or R.C. 111.15 rule-making procedure is a matter of legislative choice. The major difference between the two rule-making procedures is that R.C. Chapter 119. requires an agency to give public notice of its intention to adopt a rule and then to conduct a public hearing on the proposed rule. R.C. 111.15 does not impose

a similar public notice and hearing requirement. Consequently, if it is thought important for an agency to consider public input in its rule making, the R.C. Chapter 119. rule-making procedure is chosen. If, however, it is not thought important for an agency to consider public input in its rule making, the R.C. 111.15 rule-making procedure may be chosen. It probably is fair to say that the majority of rules are required to be adopted under the R.C. Chapter 119. rule-making procedure.

Special rule-making procedures apply to the Auditor of State (R.C. 117.20), to the Director of Job and Family Services in adopting unemployment compensation rules (R.C. 4141.14), to the Director of Development in adopting rules for the Energy Credit Program (R.C. 5117.02), to the Tax Commissioner and Board of Tax Appeals generally (R.C. 5703.14), and to “parity rules” giving state financial institutions the same powers as federal financial institutions (R.C. 1121.05, 1121.06, 1155.18, 1163.22, and 1733.412). Because of the specialized nature of these rule-making procedures, they are not discussed in the following overview.

Rules adopted under R.C. Chapter 119.

In considering proposal of a 119 rule, an agency may appoint an advisory committee to advise the agency concerning the rule’s develop-

ment, and may otherwise consult with persons representing interests that would be affected by the rule were it actually to be proposed and adopted (R.C. 119.035).

When an agency intends to adopt a 119 rule, it proceeds as follows:

(1) The agency gives public notice of its intention to adopt the rule in the *Register of Ohio* at least 30 days before its scheduled hearing on the proposed rule (see below). The notice includes a synopsis of the proposed rule, a statement of the agency's reason or purpose for proposing the rule, and the date, time, and place of the hearing. (In addition to notice in the *Register of Ohio*, the agency also may give whatever other notice it reasonably considers necessary to ensure that all persons who will be subject to or affected by the rule will be constructively notified of its proposal.) (R.C. 119.03(A).)

(2) At least 65 days before adopting the rule, the agency files the notice, the proposed rule, and a rule summary and fiscal analysis (RSFA) of the proposed rule (see below) with the Secretary of State and the Legislative Service Commission (LSC) (R.C. 119.03(B) and 127.18). The agency also files the notice, proposed rule, and RSFA with the Joint Committee on Agency Rule Review (see below) (R.C. 119.03(H) and 127.18). Proposed 119 rules, together with their notices of intended adoption and RSFAs, are published in the *Register of Ohio*. (R.C. 119.03(A) and (B).)

(3) The agency holds a public hearing on the proposed rule not earlier than the 31st nor later than the 40th day after its filing with the Secretary of State and LSC. At the hearing, a person affected by the proposed rule (or the person's attorney) may present the person's positions, arguments, and contentions, orally or in writing; offer and examine witnesses; and present evidence showing that the proposed rule, if adopted, will be unreasonable or unlawful. An agency also may permit a person to present positions, arguments, or contentions in writing for a reasonable period before, after, or both before and after the hearing. (R.C. 119.03(A) and (C).)

(4) Sixty-six days after filing the proposed rule, and if the time for legislative invalidation has expired (see below), the agency may adopt the proposed rule (R.C. 119.03(D)) and file it in final form (R.C. 119.04(A)(1) and (2)). An adopted rule must be consistent with the synopsis included in the public notice that pertained to the rule as proposed (R.C. 119.03(D)).

(5) Finally, the agency makes a reasonable effort to inform those affected by the rule of its adoption and to have copies of the rule available for distribution to those requesting such a copy (R.C. 119.03(E)). An adopted 119 rule takes effect as specified by the adopting agency, but not earlier than the 10th day after being filed in final form (R.C. 119.03(D) and 119.04(A)(1)).



An agency may adopt rules on an emergency basis without complying with the normal rule-making procedure. (Emergency rules adopted under R.C. Chapter 119. require the Governor's approval.) Emergency rules take effect immediately upon being filed in final form, but remain in effect for only 90 days unless in the meantime they are readopted in compliance with the normal rule-making procedure.

Adopted 119 rules are published in the *Register of Ohio*.

Emergency 119 rules

At the request of an agency, the Governor may suspend the normal 119 rule-making procedure for a particular 119 rule upon determining that an emergency exists. The agency may then immediately adopt the rule without complying with the notice, hearing, and other proposal requirements that normally apply in the adoption of 119 rules. An emergency 119 rule takes effect immediately upon being filed, but expires on the 91st day after its effective date—unless, in the meantime, the agency has readopted the rule according to the normally applicable 119 rule-making procedure. (R.C. 119.03(F).)

Emergency 119 rules are published in the *Register of Ohio*.

Rules adopted under R.C. 111.15

Unless exempted from this requirement by R.C. 111.15(D), an agency that intends to adopt a 111 rule files copies of the proposed rule and a rule summary and fiscal analysis (RSFA) thereof with the Secretary of State and LSC at least 65 days before adopting the rule (R.C. 111.15(D) and (E)). Agencies do not give public notice of proposed 111 rules. Nor are proposed 111 rules subject to a public hearing. Consequently, the R.C. 111.15 rule-making procedure

often is referred to as the “abbreviated rule-making procedure.”

If exempt from filing a 111 rule as a proposed rule, an agency may immediately adopt the rule and file it in final form (R.C. 111.15(B)(1) and (3)).

If, however, an agency is required to file a 111 rule as a proposed rule, it may not adopt the rule and file it in final form until the time for legislative invalidation has expired (see below) or earlier than the 66th day after the rule was filed as a proposed rule (R.C. 111.15(B)(1) and (3) and (D)). An adopted 111 rule takes effect as specified by the adopting agency, but not earlier than the 10th day after being filed in final form (R.C. 111.15(B)(1) and (3)).

Proposed and adopted 111 rules, and RSFAs for proposed 111 rules, are published in the *Register of Ohio*.

Emergency 111 rules

An agency may immediately adopt an emergency 111 rule without complying with the proposal requirements that normally apply to 111 rules (R.C. 111.15(B)(2) and (3) and (D)(1)). (Unlike as is the case with emergency 119 rules, the Governor’s authorization is not required.) An emergency 111 rule takes effect immediately upon being filed or on a later date and time specified by the adopting agency, but expires on the 91st day after its effective date—unless, in the meantime, the agency has readopted the rule

according to the normally applicable 111 rule-making procedure (R.C. 111.15(B)(2)).

Emergency 111 rules are published in the *Register of Ohio*.

Rule-making process guides

Agencies that propose 119 rules publish guides to their rule-making processes to assist members of the public who participate, or who may wish to participate, in the agency's rule making. An agency's rule-making process guide includes: (1) a statement of the agency's regulatory mission, (2) a description of how the agency is organized to achieve its regulatory mission, (3) an explanation of rule making the agency is authorized or required to engage in to achieve its regulatory mission, (4) an explanation of the agency's rule-making process, (5) an indication of the points in the agency's rule-making process at which members of the public can participate, (6) an explanation of how members of the public can participate at each indicated point of participation, and (7) other information the agency reasonably concludes will assist members of the public meaningfully to participate in the agency's rule making. An agency publishes its guide both as a printed pamphlet and electronically in the *Register of Ohio*. (The agency may charge a fee for its pamphlet guide;

the fee cannot exceed the agency's cost of publishing and delivering the pamphlet.) An agency's failure to conform its rule-making process to its rule-making process guide is not cause for invalidating a rule adopted by the agency. (R.C. 119.0311.)

Rule Summary and Fiscal Analysis (RSFA)

When an agency files a proposed 111 or 119 rule, or a rule for cyclical review after determining that the rule does not need amendment or rescission (see below), it also files a rule summary and fiscal analysis (RSFA) of the rule. An RSFA includes: (1) the agency's name, address, and telephone number, and the name and telephone number of an individual or office within the agency that has been designated to provide information about the rule, (2) the rule's Administrative Code rule number, (3) a brief summary of, and the legal basis for, the rule, including a citation to the statute that authorizes or requires the rule, the statute the agency intends to amplify or implement by adopting the rule, and the statute that prescribes the procedure, 111 or 119, under which the rule is being proposed or was adopted, (4) an estimate in dollars of the amount by which the rule would increase or decrease revenues or expenditures during the state's current fiscal biennium, (5) a

Agencies that adopt 119 rules publish rule-making process guides to help members of the public participate in the agency's rule making.

An agency prepares a rule summary and fiscal analysis (RSFA) to accompany certain rule filings. An RSFA explains the rule and its expected effects.



The Register of Ohio is an electronic gazette, published free on the Internet, that provides notice of and information about 111 and 119 rule making.

citation identifying the appropriation that authorizes each expenditure necessitated by the rule, (6) a summary of the estimated cost to all directly affected persons of complying with the rule, (7) reasons why the rule is being proposed, (8) if the rule has a fiscal effect on school districts, counties, townships, or municipalities, an estimate in dollars of the cost of local compliance or, if dollars cannot be estimated, an explanation of why not, (9) if the rule has a fiscal effect on school districts, counties, townships, or municipalities that results from a federal requirement, an explanation that the rule conforms to the scope and intent of the federal requirement or, if the rule exceeds the federal requirement, an estimate of the excess cost, including specifically the excess cost for school districts, counties, townships, or municipalities and a justification of the excess cost, (10) if the rule has a fiscal effect on school districts, counties, townships, or municipalities, a comprehensive cost estimate that explains how the costs of compliance were calculated, identifies the major cost categories, explains the agency's and the affected governments' ability to pay for the rule's requirements, and states any impact the rule will have on economic development, (11) explanations regarding the public availability of text or material the rule incorporates by reference (see below), and (12) any other information the Joint Committee on Agency Rule Review (JCARR) considers necessary to

make the rule or its fiscal effect fully understandable. An agency prepares the RSFA on a form JCARR prescribes (see below). (R.C. 127.18.)

Register of Ohio

The *Register of Ohio* is an electronic gazette published free of charge by LSC on the Internet (R.C. 103.051): www.registerofohio.state.oh.us. (A "gazette" is an official publication that gives official notice and provides official information.) Statutorily required publication of rule-making and rule-related documents in only the *Register of Ohio* is legally sufficient to give notice of the content of the documents to persons who are subject to or affected by the content. Until a document that is statutorily required to be published in the *Register of Ohio* is so published, its content is not valid against a person who does not have actual knowledge of the content. (R.C. 119.037.) The several rule-making and rule-related documents that are published in the *Register of Ohio* are identified throughout this information brief.

Review of proposed rules

Proposed rules, whether subject to the 111 or 119 rule-making procedure, may be subject to review as explained in the following paragraphs. If a rule

is subject to such a review, copies of the rule (and, in the case of a proposed rule, copies of its rule summary and fiscal analysis (RSFA) and business review documents (if any)) are filed with the reviewing agencies at the same time they are filed with the Secretary of State and LSC. In addition, the statutes that specifically apply to an agency may make that agency's proposed rules subject to review by authorities in addition to those described below—for example, by a board that oversees the agency.

Legislative review

Proposed rules are subject to legislative review and possible invalidation under the following statutes unless they are exempted from legislative review under that or another specially applicable statute:

Proposed 111 rules
R.C. 111.15(D)

Proposed 119 rules
R.C. 119.03(H)

The legislative review procedure itself is set forth in R.C. 119.03(I).

A joint legislative committee, the Joint Committee on Agency Rule Review (JCARR), is primarily responsible for reviewing proposed rules. JCARR does not, however, have authority to invalidate proposed rules. This authority is vested solely in the General Assembly. JCARR's

authority is principally to recommend that the General Assembly invalidate a proposed rule. (R.C. 101.35.)

JCARR may recommend invalidation if it finds any of the following with respect to a proposed rule: (1) the agency exceeded the scope of its statutory authority in proposing the rule, (2) the proposed rule conflicts with another rule adopted by the same or a different agency, (3) the proposed rule conflicts with the legislative intent in enacting the statute under which the agency proposed the rule, (4) the agency failed to prepare a complete and accurate rule summary and fiscal analysis (RSFA) of the proposed rule as required by R.C. 121.24 or 127.18, (5) if the proposed rule incorporates a text or other material by reference, either the agency has failed to file the incorporated text or other material with JCARR or the incorporation by reference fails to meet the standards governing incorporations by reference in rules (see below), or (6) **the agency failed to demonstrate through a business impact analysis, recommendations from the Common Sense Initiative Office, and a memorandum of response that the regulatory intent of the proposed rule justifies its adverse impact on businesses in Ohio (see below)** (R.C. 119.03(I)(1)).

JCARR holds a public hearing on a proposed rule not earlier than the 41st day after the proposed rule was filed with it (R.C. 119.03(I)(1)).

A rule is subject to invalidation by the General Assembly if: it is not accompanied by a complete and accurate RSFA; it has an adverse impact on businesses that has not been justified; it improperly incorporates a text or other material by reference; it conflicts with another rule; it exceeds the scope of the statute that authorizes its adoption; or it conflicts with the legislative intent of the statute that authorizes its adoption.



At intervals not exceeding five years, an agency must review each of its adopted rules that was subject to legislative review to determine if the rule requires amendment or rescission to conform better to the General Assembly's delegation of rule-making authority; to improve local flexibility; to reduce paperwork; to eliminate duplication, overlap, or conflict with other rules; to ensure matter has been properly incorporated by reference; and to ensure rules do not have an adverse impact on businesses.

JCARR has special authority with respect to proposed rules that have a fiscal effect on school districts, counties, townships, or municipalities. In lieu of making a recommendation that the General Assembly invalidate such a proposed rule because the rule-making agency failed to prepare a complete and accurate RSFA, JCARR may issue, on a one-time basis, a written order requiring the agency to revise the RSFA and refile it with the proposed rule. If JCARR issues that written order, the order takes immediate effect and the rule-making agency is prevented from instituting or continuing proceedings to adopt the proposed rule until the agency revises and refiles the RSFA along with the proposed rule. If JCARR determines that the revised RSFA is still inaccurate or incomplete, it is required to recommend that the General Assembly invalidate the proposed rule. (R.C. 119.03(I)(4).)

The General Assembly may invalidate a proposed rule not later than the 65th day after the original version of the proposed rule was filed with JCARR. If, however, a revised version of a proposed rule is filed more than 35 days after the original version of the proposed rule was filed with JCARR, the General Assembly may invalidate the proposed rule not later than the 30th day after the revised version was filed. Moreover, if, after JCARR recommends invalidation, the Senate and House of Representatives do not, within the time remaining for legislative invalidation, hold at least five sessions at which a quorum

is present, the time for invalidation is extended until both houses have held five such sessions. (R.C. 119.03(I)(1).)

An agency is prohibited from adopting a proposed rule that has been legislatively invalidated (R.C. 119.03(I)(3)) and from proposing or adopting any version of a rule that has been legislatively invalidated for the duration of the General Assembly that invalidated the rule unless such a proposal or adoption is specifically authorized by that same General Assembly through the adoption of a concurrent resolution (R.C. 119.03(I)(3)).

Cyclical review by an agency of its adopted rules at five-year intervals

An agency is required to assign a “review date” to each of its adopted rules that was subject to legislative review as a proposed rule (see above). Review dates are scheduled so that the agency cyclically reviews each of its rules at not longer than five-year intervals, and so that approximately one-fifth of the agency’s rules are reviewed each year (R.C. 111.15(B)(1), 119.032(B), and 119.04(A)(1)). If an agency fails to assign a review date to a rule, or assigns a review date that exceeds a five-year interval, the review date is five years after the rule’s effective date (R.C. 111.15(B)(1), 119.032(E)(2), and 119.04(A)(1)).

An agency's cyclical review of a rule, commonly referred to as "five-year review" or "119.032 review," is for the purpose of determining (1) whether the rule should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute under which the rule was adopted, (2) whether the rule needs amendment or rescission to give more flexibility at the local level, (3) whether the rule needs amendment or rescission to eliminate unnecessary paperwork, (4) if the rule incorporates a text or other material by reference, whether the incorporation by reference meets the standards governing incorporations by reference in rules and whether the incorporated text or other material has been made available to the public (see below), (5) whether the rule duplicates, overlaps, or conflicts with other rules, and (6) whether the rule has an adverse impact on businesses (see below), and whether any such adverse impact has been eliminated or reduced (R.C. 119.032(C)). In making its cyclical review, the agency is required generally to consider the continued need for the rule, any complaints or comments received concerning the rule, and any relevant factors that have changed in the subject matter area affected by the rule (R.C. 119.032(D)).

If, as a result of its review, the agency determines that a rule needs to be amended or rescinded, it is required to file the rule as amended

or rescinded on or before the rule's review date (R.C. 119.032(E)(5)). The agency is required to assign a new review date to a rule that is so amended, so that it will again be reviewed within five years (R.C. 111.15(B)(1) and 119.04(A)(1)).

If, on the other hand, as a result of its review, the agency determines that a rule does not need to be amended or rescinded, it is required, on or before the rule's review date, to file the following with JCARR, the Secretary of State, and LSC: a copy of the rule, a statement of the agency's determination, and a rule summary and fiscal analysis (RSFA) of the rule. The agency assigns a new review date to the rule so that it will again be reviewed within five years. JCARR gives public notice of the agency's determination for four consecutive weeks in the *Register of Ohio* (R.C. 119.032(E)(2)).

During the 90-day period following its receipt of notice that an agency has reviewed a rule and determined that the rule does not need amendment or rescission, but after the four-week notice period has ended, JCARR, by two-thirds vote of its members present, may recommend that the General Assembly adopt a concurrent resolution invalidating the rule if (1) the agency improperly applied the review criteria described above in reviewing the rule and in recommending its continuance without amendment or rescission, (2) the agency failed to file proper notice with JCARR concerning its review of



LSC reviews rules to ensure they have been prepared in compliance with technical drafting requirements.

If a draft rule might have an adverse impact on businesses, the agency puts the draft rule through a special business review process before beginning the formal rule-making process.

the rule, (3) if the rule incorporates a text or other material by reference, the agency failed to file the incorporated text or other material with JCARR or failed to make it available to the public, or the incorporation by reference fails to meet the standards governing incorporations by reference in rules (see below), or (4) **the rule has an adverse impact on business, and the agency has not eliminated or reduced that impact (see below)** (R.C. 119.032(E)(3) and (G)). If JCARR does not make such a recommendation during the 90-day period, the rule continues in effect until its next review date (R.C. 119.032(E)(4)).

JCARR, after giving the agency an opportunity to show cause, and by majority vote of its members who are present, may recommend that the General Assembly adopt a concurrent resolution invalidating a rule if the agency fails to provide notice to JCARR as explained above or fails to take any other action required by the cyclical review law with respect to the rule (R.C. 119.032(F) and (G)).

Cyclical review does not apply to rules that are exempt from legislative review; to rules adopted by the Department of Taxation; to rules adopted by the several state institutions of higher education; or to rules that are consistent with and equivalent to the form required by, and within the minimum scope and intent of, a federal law (R.C. 111.15(A)(1), 119.032(A)(3), and 119.04(A)(1)).

LSC review

LSC reviews adopted rules to ensure that they have been drafted in compliance with the drafting requirements set forth in the *LSC Rule Drafting Manual* (R.C. 103.05(A), 111.15(B)(3), and 119.04(A)(2); A.C. 103-3-01 and 103-3-02). Although not required to do so, LSC also reviews proposed rules informally for the same purpose.

Business review

Business review process

In the course of developing a proposed rule, an agency (see definition below) evaluates the draft rule (see definition below) against the business impact analysis instrument (see definition below) *before* it begins the formal rule-making process. If, based on that evaluation, the draft rule will not have an adverse impact on businesses (see definition below), the agency may proceed with the formal rule-making process, and is exempt from complying with the business review process. If, however, based on that evaluation, the draft rule will have an adverse impact on businesses (see definition below), the agency complies with the following business review process before filing the draft rule with JCARR to begin the formal rule-making process:



(1) The agency incorporates into the draft rule features that will eliminate or adequately reduce any adverse impact the rule might have on businesses.

(2) The agency prepares a “business impact analysis” that describes its evaluation of the draft rule against the business impact analysis instrument, that identifies any features that were incorporated into the draft rule as a result of the evaluation, and that explains how those features, if there were any, eliminate or adequately reduce any adverse impact the draft rule might have on businesses.

(3) The agency transmits a copy of the full text of the draft rule and the business impact analysis electronically to the Common Sense Initiative Office (CSIO), an organization within the Governor’s office. CSIO makes the draft rule and business impact analysis available to the public on its web site.

(4) CSIO evaluates the draft rule and business impact analysis against the business impact analysis instrument and any other relevant criteria, and may prepare and electronically transmit recommendations to the agency on how the draft rule might be revised to eliminate or reduce any adverse impact the draft rule might have on businesses. If CSIO fails to transmit recommendations to the agency, it is as if CSIO had elected not to make any recommendations.

(5) The agency considers any recommendations made by CSIO with regard to the draft rule, and either incorporates into the draft rule features the recommendations suggest will eliminate or reduce any adverse impact the draft rule might have on businesses or documents in writing reasons why the recommendations are not being incorporated into the draft rule.

(6) Finally, the agency prepares a “memorandum of response” identifying features suggested by any recommendations that were incorporated into the draft rule, identifying features suggested by any recommendations that were not incorporated into the draft rule, explaining how the features that were incorporated into the draft rule eliminate or reduce any adverse impact the draft rule might have on businesses, and explaining why features that were not incorporated into the draft rule were not incorporated.

An agency cannot begin the formal rule-making process by filing a draft rule with JCARR earlier than the sixteenth business day after it transmitted the draft rule and business impact analysis electronically to CSIO (step 3 above). (The CSIO review period is thus approximately three weeks.) And, when the agency begins the formal rule-making process by filing the draft rule with JCARR, the agency electronically also must file one copy of the business impact

analysis, any recommendations received from CSIO, and the agency’s memorandum of response, if any, along with the draft rule. (R.C. 107.54, 121.82, and 121.83(A).)

JCARR does not have jurisdiction to review, and is to reject, the filing of a draft rule if, at any time while the draft rule is in its possession, it discovers that the draft rule might have an adverse impact on businesses and the agency has not included a business impact analysis with the draft rule or has included a business impact analysis that is inadequately prepared. JCARR electronically returns a filing that is rejected to the agency. When a filing is rejected by JCARR, it is as if the filing had not been made. But a rejection does not preclude the agency from re-filing the draft rule with JCARR after the agency has complied with the business review process outlined above. (R.C. 121.83(B).)

Business review process definitions

Definitions of several terms used in the business review process outlined above are described in the following paragraphs.

“Agency.” An “agency” is any state agency that is required to file proposed rules for legislative review under the abbreviated rule-making procedure (R.C. 111.15) or the Administrative Procedure Act (R.C. 119.01 and 119.02 to 119.04). “Agency” does not include the office

of the Governor, Lieutenant Governor, Auditor of State, Secretary of State, Treasurer of State, or Attorney General. (R.C. 121.81(A).)

“Draft rule.” A “draft rule” is the original or any revised version of a new rule, or the original or any revised version of the amendment or rescission of an existing rule, that is being drafted and that has crystallized into a text that feasibly can be subjected to business review, but that has not been formally proposed by filing the draft rule with JCARR for legislative review. A new rule, or the amendment or rescission of an existing rule, that is adopted under the emergency rule-making procedure is not a “draft rule.” But a new rule, or the amendment or rescission of an existing rule, that is being drafted to replace an emergency rule upon its expiration (see above) is a “draft rule.” (R.C. 121.81(B).)

“Adverse impact on businesses.” A draft rule that affects businesses has an “adverse impact on businesses,” requiring compliance with the business review process, if a provision of the draft rule that applies to businesses has any of the following effects: (1) the provision requires a license, permit, or any other prior authorization to engage in or operate a line of business, (2) the provision imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action (a right to bring a lawsuit), for failure to comply with its terms, or (3) the provision requires specific expenditures or the

The definition of “adverse impact on businesses” specifies the conditions under which an agency is to put a draft rule through the special business review process.



report of information as a condition of compliance (R.C. 107.52).

“Business impact analysis instrument.” CSIO develops, and as it becomes necessary or advisable improves, a “business impact analysis instrument” that is to be used to evaluate draft rules that might have an adverse impact on businesses. The instrument is to be in writing, and is to include all the following: (1) standards that encourage agencies to propose draft rules, and proposed revisions thereto, in such a manner that the rules will be as easy to understand as their subject matter permits, (2) performance measures that can be applied to evaluate the likely efficiency and effectiveness of a draft rule in achieving its regulatory objectives, (3) standards for evaluating alternative means of regulation that might reduce or eliminate the adverse impact a draft rule might have on businesses (see below), (4) standards that will promote transparency, predictability, consistency, and flexibility in the implementation and operation of a draft rule, as well as an overall balance in a draft rule between its regulatory objectives and the costs of compliance it imposes on regulated persons, (5) standards that require an agency to encourage businesses that might be adversely impacted by a draft rule to participate in the rule-making process, beginning at the earliest practicable stage, and that will encourage businesses that are or may be adversely impacted by a draft rule to offer advice and assistance to the

agency when the draft rule has been adopted and is being implemented and administered, and (6) any other standards or measures, or any other criteria, the office concludes will reduce or eliminate adverse impacts on businesses and foster improved regulation and economic development in the state. Alternative means of regulation contemplated by phase (3) of the instrument include, but are not limited to, less stringent compliance or reporting requirements, less stringent schedules or deadlines, consolidation or simplification of requirements, establishment of performance standards to replace operational standards, and exemption of businesses.

CSIO is not required to adopt the business impact analysis instrument as a rule. However, CSIO publishes the current instrument in the *Register of Ohio*. (R.C. 107.53.)

Business review comment system

CSIO establishes a system through which any person may comment concerning (1) the adverse impact on businesses a draft rule might have, (2) the adverse impact on businesses that a rule currently in effect is having, or (3) the adverse impact on businesses the implementation or administration of a rule currently in effect is having.

CSIO prepares a plan for the comment system, and revises or replaces the plan to improve the comment system in light of learning,

The “business impact analysis instrument” is a written tool to evaluate the adverse impact draft rules might have on businesses.

CSIO is to establish a business review comment system that forwards comments to agencies on the adverse impact draft rules might have on businesses, and on the adverse impact effective rules are having on businesses.



The Common Sense Initiative Office (CSIO) is responsible for reviewing draft rules for an adverse impact they might have on businesses.

The Small Business Advisory Council advises the Governor, Lieutenant Governor, and CSIO on the adverse impact draft rules might

experience, or technological development. The CSIO publishes the current plan in the *Register of Ohio*. At a minimum, the plan is to provide for communication of comments as follows: (1) CSIO is to accept comments in writing that are delivered to CSIO personally, by mail, or by express, (2) CSIO is to establish a toll-free telephone number that a person may call to offer comments, and (3) CSIO is to create a web site that enables a person to offer comments electronically. (The telephone number is to be connected to a recording device at its answering point.) In addition, the web site is to provide notice to the public of any draft rule that might have an adverse impact on businesses. Such a notice is to include a copy of the draft rule and a copy of its business impact analysis.

CSIO forwards written, telephoned, and electronically transmitted comments to the state agency that has jurisdiction over the rule. CSIO has no other duty with regard to the comments. (R.C. 107.62.)

Common Sense Initiative Office (CSIO)

CSIO is established within the Governor’s office. The Governor organizes CSIO, and then reorganizes CSIO as it becomes necessary or advisable. As necessary to enable CSIO to carry out its work efficiently and successfully, the Governor

appoints professional, technical, and clerical personnel for CSIO, and provides CSIO with office space and with furnishings, equipment, and other resources. References to CSIO in law imply action being taken by the relevant personnel of CSIO. The Governor is authorized to delegate any or all of these responsibilities as the Governor considers appropriate. (R.C. 107.61.)

Small Business Advisory Council

The Small Business Advisory Council, a nine-member organization in the Governor’s office, advises the Governor, the Lieutenant Governor, and CSIO on the adverse impact draft rules might have on small businesses. The Council meets at least quarterly. For purposes of the Council’s work, a “small business” is an independently owned and operated for-profit or nonprofit business entity, including affiliates, that has fewer than 500 full-time employees or gross annual sales of less than \$6 million, and that has operations located in Ohio.

The Governor, or the person to whom the Governor has delegated responsibilities for CSIO (see above), appoints five members to the Council, the President of the Senate appoints two members to the Council, and the Speaker of the House of Representatives appoints two members to the Council. A member serves at the pleasure of the member’s appointing authority. The appointing authorities are to consult with each

other and appoint only individuals who are representatives of small businesses. And in making appointments, the appointing authorities are to do so in such a manner that the membership is composed of representatives of small businesses that are of different sizes, engaged in different lines of business, and located in different parts of Ohio. (R.C. 107.63.)

Department of Aging review

Proposed rules are subject to review and comment by the Department of Aging if they “primarily [affect] persons sixty years of age or older.” An agency that does not revise a proposed rule in light of the Department’s comments is required to inform the Department of its decision and the reasons therefor. (R.C. 173.01(C).)

Open meetings

In addition to the above review provisions, R.C. 121.22, the Open Meetings (or “Sunshine”) Act, requires proposed rules to be deliberated upon and adopted in meetings that are open to the public unless covered by a specific exemption from the open meetings requirement.

Incorporations by Reference in Rules

Definition of “incorporation by reference”

An agency incorporates a text or other material into a rule by reference when it states in the rule that a text or other material not contained in the rule is to be treated as if it were contained in the rule (R.C. 121.72). The following are excluded from this definition and, to the extent excluded, from the special standards that govern incorporation by reference: (1) a rule that incorporates by reference a Revised Code section, an Ohio uncodified statute, or a rule in the Administrative Code (R.C. 121.76(A)), (2) an internal management rule (R.C. 121.76(B)(1)), (3) a rule that incorporates by reference a text or other material that is necessary to obtain or to maintain authorization of a federally delegated program in Ohio or that is necessary to maintain compliance with federal requirements in order to receive federal funds for a federally funded program (R.C. 121.76(B)(2)), and (4) a rule that incorporates any of the following by reference, but only if the reference consists of a citation that will be intelligible to the persons who reasonably can be expected to be affected by the rule and that

Rules that primarily affect persons age 60 or older are subject to review and comment by the Department of Aging.

Rules are deliberated upon and adopted in meetings open to the public.



An agency incorporates a text or other material into a rule by reference when it states in the rule that a text or other material not contained in the rule is to be treated as if it were contained in the rule. Subject to significant exceptions, special standards govern incorporations by reference.

JCARR reviews incorporations by reference and may recommend invalidation of a proposed rule that incorporates matter by reference under certain circumstances.

identifies the particular edition or other version of the incorporated text or other material: (a) a United States Code section, (b) an uncodified federal statute, but only if it has been appended as a legislative note to a section in the United States Code, (c) an Ohio act in the Laws of Ohio or a federal act in the Statutes at Large, (d) a regulation in the Federal Register or Code of Federal Regulations, or (e) a text or other material, including generally accepted industry standards, that is generally available to the persons who reasonably can be expected to be affected by the rule (R.C. 121.75).

Access to matter incorporated by reference

When an agency incorporates a text or other material into a rule by reference, it explains in the rule how persons who reasonably can be expected to be affected by the rule can obtain copies of the incorporated text or other material (R.C. 121.72). The agency then makes the incorporated text or other material available to the public by either (1) depositing one complete and accurate copy of the incorporated text or other material in each of five depository libraries that have been designated by the State Library Board or (2) displaying a complete and accurate copy of the incorporated text or other material on a web site maintained or made available by the agency (R.C. 121.74).

JCARR review of incorporations by reference

When an agency proposes a rule that incorporates a text or other material by reference, or files a rule that incorporates a text or other material by reference for cyclical review after determining that the rule does not need amendment or rescission (see above), it files one complete and accurate copy of the incorporated text or other material in electronic form with the Joint Committee on Agency Rule Review (JCARR). (An agency may file an incorporated text or other material in print form with JCARR if filing it electronically would be infeasible. And if an agency proposes the rescission of a rule that incorporates a text or other material by reference, the agency is not required to file the incorporated text or other material with JCARR if doing so is infeasible.) (R.C. 121.73(A).) JCARR reviews incorporations by reference and, as explained above, may recommend invalidation of the rule if the incorporated text or other material has not been filed with JCARR, the incorporation by reference fails to meet the standards for incorporation by reference, or the incorporated text or other material has not been made available to the public.

In addition to the explanations described above, the rule summary and fiscal analysis (RSFA) that

accompanies a proposed rule, or that accompanies a rule that is submitted for cyclical review after a determination that its amendment or rescission is not needed, may include one or more of the following explanations if the rule incorporates a text or other material by reference: (1) if the agency claims the rule is excluded from the definition of “incorporation by reference” because a text or other material it incorporates by reference is generally available to persons who reasonably can be expected to be affected by the rule (exclusion 4(e) above), an explanation of how the incorporated text or other material is generally available to those persons (R.C. 127.18(B)(11)), (2) if it was infeasible for the agency to file an incorporated text or other material electronically, an explanation of why filing the incorporated text or other material electronically was infeasible (R.C. 127.18(B)(12)), or (3) if the rule is being rescinded and it was infeasible for the agency to file an incorporated text or other material, an explanation of why filing the incorporated text or other material was infeasible (R.C. 127.18(B)(13)).

LSC historical file of matter incorporated by reference

Upon completing its review of a proposed rule that incorporates a text or other material by reference, or its cyclical review of a rule that

incorporates a text or other material by reference, JCARR forwards the text or other material to LSC. LSC maintains a historical file of texts or other materials that are or were incorporated by reference into rules. (R.C. 121.73(B).) This file complements the agency duty to make texts and other materials that have been incorporated by reference into rules available to the public.

Filings in electronic form

Filings of rules and of rule-making and rule-related documents, and of responses to them, are made exclusively in electronic form (R.C. 103.0511; S.B. 11, 123rd General Assembly, § 23).

Publication of rules in the Administrative Code

A rule is a formal, written statement of the law that has been established by an agency under a statute that authorizes the agency to adopt rules. Adopted rules are compiled and published in the Administrative Code (AC). (The AC is supplemented on a monthly basis by the Ohio Monthly Record (OMR).) The AC contains the full text of, or a reference to, every rule that has been adopted by the agencies of state government.

LSC determines whether the full text of, or merely a reference

Rules are compiled and published, full text or by reference, in the Administrative Code.



to, a rule is to be published in the AC (R.C. 103.05(A)). The great majority of rules are published in full text and, in the absence of a special exception, only internal management and “school rules” are published by reference. “Internal management rules” are rules that govern an agency’s day-to-day staff procedures and operations and that do not affect the rights of private individuals (R.C. 111.15(A)(3) and 119.01(K)). “School

rules” are rules adopted by the several state institutions of higher education, including the state universities, community colleges, technical colleges, and state community colleges (R.C. 103.05(A)).

Copies of rules that have been published by reference only are available from LSC, the Secretary of State, or the agency or school. Internal management rules are published in the *Register of Ohio*. 

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COMMISSION STAFF**

9th Floor
Vern Riffe Center
Columbus, Ohio
614/466-3615

Director
Mark Flanders

Deputy Director
Jim Kelly

Contributing Author
Michael Burns,
LSC Attorney

Reviewer
Bethany Boyd,
LSC Attorney

Layout & Design
Kristen Schwartz