



Members Brief

An informational brief prepared by the LSC staff for members and staff of the Ohio General Assembly

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Administrative Rule and Order Invalidation by the General Assembly

The General Assembly often enacts laws directing Ohio’s administrative agencies to implement legislative policies by adopting rules or issuing orders. Under specific circumstances, the General Assembly may adopt a concurrent resolution invalidating an agency’s rules or rescinding its orders. This information brief summarizes the differences between administrative rules and orders and provides an overview of how the General Assembly may invalidate or rescind them through concurrent resolutions.

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Introduction

The General Assembly may enact laws containing general guiding policies and designating a relevant agency to adopt administrative rules to carry out those policies. Ohio law defines a “rule” as a regulation or standard having a general and uniform operation adopted and enforced by a statewide elected officer or state agency under the authority of law.¹ Like a statute, a rule is a formal, written statement of law. An administrative rule must be adopted via a statutorily prescribed rulemaking procedure to be effective. There are two general rulemaking procedures: the Administrative Procedure Act (APA) (R.C. Chapter 119) and R.C. 111.15. Additional information about the two procedures is available in the LSC *Members Brief* titled [Administrative Rulemaking \(PDF\)](#), available on LSC’s website: lsc.ohio.gov.

An administrative agency also may have statutory authority to implement legislative policy by issuing an order.² Ohio law does not define “order.” According to Black’s Law Dictionary,

¹ R.C. 107.43, 111.15, and 119.01.

² *Disc. Cellular, Inc. v. PUC*, 112 Ohio St.3d 360, 365-366 (2007).

an administrative order is either an order issued by a government agency after an adjudicatory hearing or an agency regulation that interprets or applies a statute.³ The law does not prescribe a uniform process for issuing an order. An adjudication order, for example, may be issued by an agency, if the agency is authorized by law to issue one, only after notice and a hearing in accordance with the APA.⁴ On the other hand, a statute may authorize an agency to issue an order under a separate procedure that may not require notice and a hearing and determine its effect.⁵ The official or agency that issues an order may rescind it.⁶

Both the judicial and legislative branches have the power to review administrative rules and orders. Courts, for example, may hear challenges on the constitutionality of a rule or that an agency exceeded its authority in adopting it.⁷ An individual also may appeal a final agency order to a court.⁸ This brief focuses on the General Assembly's role in the review process: invalidating proposed and existing rules and vacating certain administrative orders.

Invalidating a proposed rule

Ohio law requires legislative oversight in almost all instances where an agency proposes adopting, amending, or rescinding an administrative rule. Generally, the agency proposing the rule must (among other actions) submit the rule to the Joint Committee on Agency Rule Review (JCARR) for legislative review at least 65 days before adopting it.⁹ During the 65-day period, JCARR may, for reasons specified in law, recommend that the General Assembly adopt a concurrent resolution invalidating the proposed rule. JCARR may recommend the resolution if it makes any of the following findings:

- The proposed rule exceeds the scope of the adopting agency's statutory authority.
- The proposed rule conflicts with the legislative intent of the statute under which it was proposed.

³ Black's Law Dictionary, "order" (11th ed. 2019).

⁴ R.C. 119.06.

⁵ Compare *Forest Hills Utility Co. v. Whitman*, 41 Ohio St.2d 25, 32-33 (1975) (describing a statutory process under which the Environmental Protection Agency (EPA) Director may issue an order regulating water use only after providing notice and holding a hearing) with *Disc. Cellular* at 365 (describing a "streamlined process" that does not require notice and a hearing used by the Public Utilities Commission of Ohio to order that a telephone company is exempt from certain requirements).

⁶ See, e.g., R.C. 1707.20 (Division of Securities discretion to rescind orders as necessary to carry out its duties), R.C. 4909.30 (Public Utilities Commission discretion to rescind orders relating to railroad rates), R.C. 6109.04 (EPA Director discretion to "revoke" orders pertaining to public water systems), and *Hal Artz Lincoln-Mercury v. Ford Motor Co.*, 28 Ohio St.3d 20 (1986), paragraph three of the syllabus (noting agencies have inherent authority to reconsider or set aside their own decisions).

⁷ See, e.g., *McFee v. Nursing Care Mgmt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, ¶ 24 and *Sterling Drug, Inc. v. Wickham*, 63 Ohio St.2d 16, 19 (1980).

⁸ See, e.g., R.C. 119.12.

⁹ R.C. 111.15(D) and 119.03(B).

- The proposed rule conflicts with another proposed or existing rule.
- The proposed rule incorporates a text or other material by reference and the incorporating citation makes the text or material unreasonably difficult to find or inspect, or the agency incorrectly determined the text or material was exempt from laws governing incorporation by reference.
- The agency has failed to prepare a complete and accurate summary and fiscal analysis of the proposed rule as required by law.
- The agency has failed to demonstrate that the regulatory intent of the proposed rule justifies its adverse impact on Ohio businesses.
- If the agency is required to reduce regulatory restrictions in administrative rules, the agency has failed to justify a proposed rule containing a regulatory restriction.
- The proposed rule implements a federal law or rule in a manner that is more stringent or burdensome than the federal law or rule requires.¹⁰

Each chamber has until the later of 65 days after the agency filed the proposed rule with JCARR, or the fifth voting session occurring after the date JCARR recommends invalidation, to adopt the resolution. If both chambers adopt the resolution, the agency proposing the rule must cease all rulemaking activity related to it for the remaining General Assembly term. If one or both chambers fails to adopt the resolution, the agency may adopt the proposed rule.¹¹

Invalidation of existing rules and vacating orders

Five-year rule review

Every state agency must review each rule it adopts no less than once every five years.¹² During the review, the agency must evaluate whether the rule should be amended or rescinded for reasons similar to those for which a proposed rule may be invalidated and for any of the following reasons:

- The rule provides inadequate flexibility at the local level.
- The rule creates a compliance or oversight burden for the adopting agency, or for any person or entity, that is greater than the burden that would be created if the agency accomplished the intended purpose by other means.
- The rule is no longer useful or beneficial.
- The rule duplicates, overlaps with, or conflicts with other state or federal laws or rules.
- The rule has an adverse impact on businesses, as determined by the agency using an analysis instrument developed by the Common Sense Initiative Office (CSIO), or on any other person or entity.

¹⁰ R.C. 106.02 and 106.021.

¹¹ R.C. 106.023 and 106.042.

¹² R.C. 106.03, 106.031(B), 111.15(B), and 119.04(A).

- The rule contains words or phrases whose meanings, in contemporary usage, are understood as being derogatory or offensive.
- The rule requires liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure.
- The rule imposes a more severe duty or liability than restrictions in neighboring states in order to accomplish the same goal.

If the agency determines the rule needs to be amended or rescinded, the agency must start the amendment or rescission process using the same procedure it used to adopt the rule. If the agency determines the rule does not need to be amended or rescinded (referred to as a “no change rule”), the agency must submit its determination to JCARR.¹³ If a no change rule has an adverse impact on businesses, the agency must prepare and transmit a business impact analysis to the CSIO. After considering any recommendations made by the CSIO, the agency either must amend or rescind the rule or, if the agency does neither, prepare a memorandum of response that explains why the agency is not amending or rescinding it. JCARR publishes notice of the agency’s decision not to amend or rescind the rule in the Register of Ohio for four consecutive weeks after the agency files it.

During the 90-day period after the agency files a no change rule and the determination not to change it with JCARR, but after the four-week notice period has ended, JCARR may recommend that the General Assembly adopt an invalidating resolution. When determining whether to recommend invalidation, JCARR must apply the standards listed above. If the agency must reduce the number of regulatory restrictions in its rules, JCARR also may recommend invalidation if the agency fails to justify retaining a rule containing a regulatory restriction.

If an agency fails to conduct a five-year rule review, JCARR must allow the agency to appear before it and show cause why the agency has not done so. If the agency fails to appear, or appears and fails to show cause, JCARR may recommend invalidation.¹⁴

Rules and orders responding to an emergency or contagious disease

The General Assembly may, without a recommendation from JCARR, adopt a concurrent resolution invalidating or rescinding, in whole or in part, either of the following:

- A rule or order issued, adopted, or amended in response to a declared state of emergency by the Governor, Lieutenant Governor, Secretary of State, Auditor of State, Attorney General, or Treasurer of State (a statewide elected official) or by a state agency, including emergency rules not subject to JCARR review;
- A special or standing order or rule issued or adopted by the Department of Health to prevent the spread of contagious or infectious disease, regardless of whether there is a declared state of emergency.

¹³ R.C. 106.03.

¹⁴ R.C. 106.031.

If the General Assembly invalidates or rescinds either type of rule or order, an official or agency may not reissue or readopt the rule or order for 60 days. The official or agency also may not issue or adopt a rule or order that is substantially similar to the invalidated or rescinded rule or order within the 60-day period. During the 60-day period, a statewide elected official or the Governor, on behalf of a state agency, may request that the General Assembly allow the readoption or reissuance of an invalidated or rescinded rule or order. After reviewing the request, the General Assembly may adopt a concurrent resolution authorizing the request, in whole or in part. An invalidated or rescinded rule or order that is readopted without an authorizing concurrent resolution from the General Assembly is invalid and has no legal effect.¹⁵

¹⁵ R.C. 101.36 and 107.43.