



Members Brief

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

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Administrative Rulemaking

There are two procedures by which Ohio administrative agencies adopt rules. One procedure, in the Administrative Procedure Act, requires notice and hearing. The other procedure does not require notice or hearing. In the course of rulemaking, agencies prepare a rule summary and fiscal analysis and publish information in the *Register of Ohio*. As a result of 2019 legislation, some agencies must comply with a temporary procedure (through June 2023) to reduce the number of regulatory restrictions in their rules.

This information brief outlines generally how agencies adopt rules. That is, it explains rulemaking procedure, but does not address when rulemaking is appropriate or the role rules play in agency operations.

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Introduction to rulemaking procedure

An important technique by which agencies are empowered to implement statutes is by rulemaking. The General Assembly often directs an 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, suppose a public utilities statute entitles a public utility to a “fair and reasonable return on its investment.” The General Assembly might direct the relevant 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 a statute, but the agency in fulfillment of the rulemaking authority it has been delegated by the General Assembly.

Rulemaking procedure in general

An administrative rule can be effective as part of the law only after its adopting agency has taken it through a statutorily prescribed rulemaking procedure. There are two general statutory rulemaking procedures, one in the Administrative Procedure Act (APA) – R.C. Chapter 119 – and the other in R.C. 111.15.¹ Generally, if an agency is not required to follow the APA rulemaking procedure, it must follow the procedure of R.C. 111.15. The R.C. 111.15 procedure therefore is a default.

Whether an agency is required to follow the APA or R.C. 111.15 procedure is a matter of legislative choice. The major difference between the two is that the APA 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 notice and public hearing requirement. It therefore often is called the “abbreviated rulemaking procedure.”

Rules adopted under the APA are referred to as “119 rules.” Rules adopted under the abbreviated rulemaking procedure are referred to as “111 rules.”

Rulemaking under the APA

The 119 rulemaking procedure is diagrammed in “**Appendix A**”. When an agency intends to adopt a 119 rule, it proceeds as follows:

- 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. 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 public hearing. In addition, the agency may give 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.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) (see below) with the Secretary of State (SOS) and the Legislative Service Commission (LSC). The agency also files the notice, proposed rule, and RSFA with the Joint Committee on Agency Rule Review (JCARR) for legislative review. The notice, proposed rule, and RSFA are published in the *Register of Ohio*.³
- The agency holds a public hearing on the proposed rule not earlier than the 31st day nor later than the 40th day after its filing with the SOS and LSC. At the hearing, a person affected by the proposed rule, or the person’s attorney, may present the person’s

¹ The rulemaking phase of the Administrative Procedure Act appears in R.C. 119.01 (definitions) and in R.C. 119.02 to 119.04 (rulemaking procedure).

² R.C. 119.03(A).

³ R.C. 119.03(B) and (C).

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 of time before, after, or both before and after the hearing.⁴

- The agency considers the positions, arguments, and contentions. It then prepares two documents. One is a hearing summary of the positions, arguments, and contentions and a statement of the issues they raise. The other is a hearing report that explains, with regard to each issue, how it is reflected in the proposed rule. If an issue is not reflected in the proposed rule, the agency explains in the report why it is not.⁵
- Sixty-six days after filing the proposed rule, if the time for JCARR's legislative review has expired, the agency may adopt the proposed rule and file it in final form. An adopted rule must be consistent with the synopsis included in the notice that pertained to the rule as proposed.⁶
- Finally, the agency makes a reasonable effort to inform persons affected by the rule of its adoption, and to have copies of it available for distribution to persons requesting a copy.⁷

An adopted 119 rule takes effect as specified by the agency, but not earlier than the 10th day after being filed in final form. Adopted 119 rules are published in the *Register of Ohio* and in the Ohio Administrative Code (O.A.C.).

Emergency APA rulemaking

On an agency's request, the Governor may issue a written order suspending the normal APA rulemaking procedure for a particular 119 rule if an emergency exists. The agency then immediately may adopt the rule without complying with the notice, hearing, and other proposal requirements. An emergency 119 rule takes effect immediately on filing, but expires on the 121st day after its effective date—unless, in the meantime, the agency has readopted the 119 rule under the normal APA rulemaking procedure. Some examples of emergency 119 rules include:

- O.A.C. 4301:1-1-80 (July 31, 2020): limiting hours of on-premises liquor sales and consumption and expanding sales of beer, wine, mixed beverages, and spirituous liquor for off-premises consumption;
- O.A.C. 4729:9-1-01.2 (May 22, 2020): adding the opium derivative Isotonitazene to controlled substance schedule I;

⁴ R.C. 119.03(A) and (D).

⁵ R.C. 119.03(D).

⁶ R.C. 119.03(E).

⁷ R.C. 119.03(F).

- O.A.C. 5160-1-21.1 (June 12, 2020): expanding access to telehealth services during the COVID-19 state of emergency.

Emergency 119 rules are published in the *Register of Ohio*.⁸

Rulemaking under R.C. 111.15

The 111 rulemaking procedure is diagrammed in “**Appendix B.**” An agency that intends to adopt a 111 rule first determines whether the proposed rule is subject to legislative review. A 111 proposed rule is subject to legislative review unless it has characteristics described in a statutory list of exemptions.⁹

If the proposed rule is not subject to legislative review, the agency immediately may adopt the proposed rule and file it in final form.

If, however, the proposed rule is subject to legislative review, the agency files it and an RSFA with the SOS, LSC, and JCARR at least 65 days before adopting the rule. In this case, the agency may not adopt the rule and file it in final form earlier than the 66th day after the proposed rule was filed, and only after the time for legislative review has expired.

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.¹⁰

Proposed 111 rules and RSFAs are published in the *Register of Ohio*. Adopted 111 rules are published in the *Register of Ohio* and in the Ohio Administrative Code.

Emergency R.C. 111.15 rulemaking

An agency may immediately adopt an emergency 111 rule without complying the proposal requirements that normally apply to R.C. 111.15 rulemaking. (Unlike emergency APA rulemaking, the Governor’s authorization is not required.) An emergency 111 rule takes effect immediately on being filed or on a later date and time specified by the agency, but expires on the 121st day after its effective date—unless, in the meantime, the agency has readopted the rule according to the normal R.C. 111.15 rulemaking procedure.¹¹ Some examples of these emergency rules include:

- O.A.C. 5160:1-2-01 (July 8, 2020): modifying the responsibilities of the Department of Medicaid and agents authorized to determine Medicaid eligibility;
- O.A.C. 5160:1-5-01 (July 8, 2020): modifying the Medicaid residential state supplement program;
- O.A.C. 5160:1-6-06.1 (July 8, 2020): modifying the treatment of annuity purchases and transactions under the Medicaid Program for specified individuals.

⁸ R.C. 119.03(G).

⁹ R.C. 111.15(B)(1)(b) and (D).

¹⁰ R.C. 111.15(B)(1) and (D).

¹¹ R.C. 111.15(B)(2).

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

Reduction in regulatory restrictions

The 2019 operating budget act (H.B. 166 of the 133rd General Assembly) enacted a stipulation that, through June 30, 2023, “a state agency may not adopt a new regulatory restriction unless it simultaneously removes two or more other existing regulatory restrictions.” Importantly, this reduction requirement does not apply to rules, but rather to regulatory restrictions contained in rules.¹² A “regulatory restriction” is a provision of a rule that requires or prohibits an action. Words that are considered to signal the presence of a regulatory restriction include “shall,” “must,” “require,” “shall not,” “may not,” and “prohibit.”¹³

The reduction requirement applies to rulemaking by only the following state agencies:

- The state departments and administrative department heads that constitute the Governor’s cabinet; plus
- The Department of Education, the State Lottery Commission, the Ohio Casino Control Commission, the State Racing Commission, and the Public Utilities Commission.

Rules adopted by an otherwise independent official or entity that is organized under one of those agencies are attributed to the agencies under which the official or entity is organized.¹⁴

An agency subject to the reduction requirement must prepare an inventory of the regulatory restrictions contained in its rules. The inventory includes:

1. A description of the regulatory restriction;
2. An explanation of whether state or federal law specifically requires the regulatory restriction or whether it was adopted under the agency’s authority;
3. An explanation whether removing the regulatory restriction would require a change in state or federal law; and
4. Any other information JCARR considers necessary.

The agency must publish the inventory on its website and transmit it to JCARR. JCARR reviews and transmits it to the Speaker of the House and President of the Senate.¹⁵

An agency is not required to inventory a regulatory restriction that is contained in an internal management rule or an emergency rule, is required to be adopted verbatim by state or federal law, is contained in materials incorporated by reference into a rule, regulates access to

¹² R.C. 121.95(F).

¹³ R.C. 121.95(B).

¹⁴ R.C. 121.95(A). The Governor’s cabinet consists of the administrative departments created in R.C. 121.02 and the administrative department heads, the offices of which are created in R.C. 121.03.

¹⁵ R.C. 121.95(B), (C), and (D).

confidential personal information, concerns instant lottery games, or is not subject to legislative review.¹⁶

Rule summary and fiscal analysis

When an agency files a proposed rule, it also files a rule summary and fiscal analysis. JCARR designs the form, which may solicit any information JCARR considers necessary to make the proposed rule and its fiscal effect fully understandable, such as:

- A brief summary of, and the legal basis for, the proposed rule, including a citation to the statute that authorizes or requires the rule and the statute the agency intends to amplify or implement by adopting the rule;
- Reasons why the rule is being proposed;
- 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;
- A summary of the estimated cost to all directly affected persons of complying with the rule;
- 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;
- If the rule imposes a fee, an explanation of how the fee directly relates to the cost the agency actually incurs in performing the function for which the fee is charged.¹⁷

Register of Ohio

The *Register of Ohio* is an electronic gazette published free of charge by LSC on the internet.¹⁸ When a statute requires that a rulemaking or rule-related document be published in the *Register of Ohio*, that publication is legally sufficient to give notice of the document to persons who are subject to or affected by its 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 it.¹⁹

¹⁶ R.C. 121.95(E).

¹⁷ R.C. 106.024.

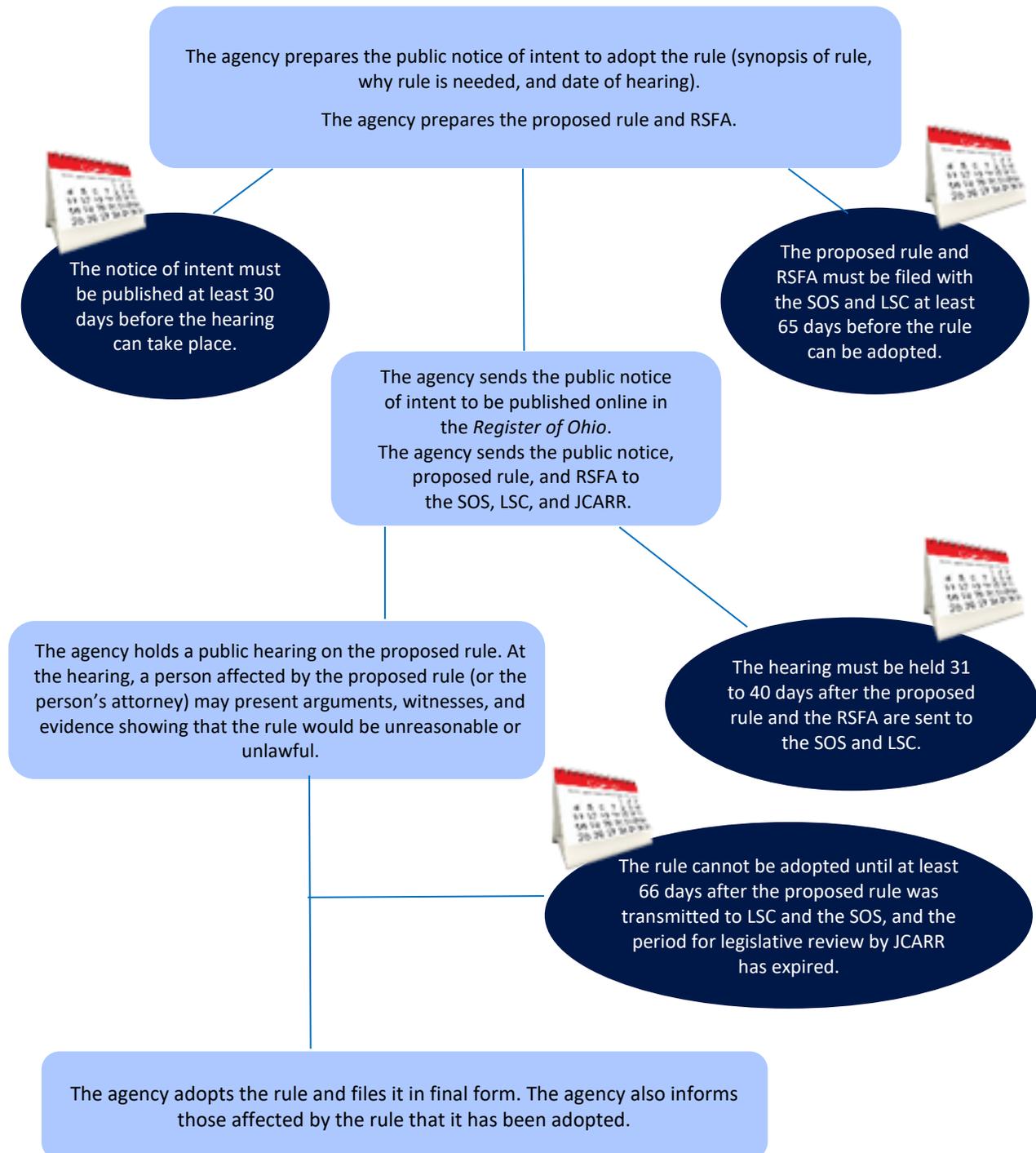
¹⁸ R.C. 103.051. A "gazette" is an official publication that gives official notice and official information. The *Register's* web address is: <http://www.registerofohio.state.oh.us/>.

¹⁹ R.C. 119.037.

Appendix A

Chapter 119 Rulemaking Process

(R.C. 119.03)



Appendix B

Chapter 111 Rulemaking Process

(R.C. 111.15)

