Administrative Rulemaking

March 1993

Program Evaluation Division
Office of the Legislative Auditor
State of Minnesota

Program Evaluation Division

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JAMES R. NOBLES, LEGISLATIVE AUDITOR

March 5, 1993

Senator Phillip J. Riveness, Chair
Legislative Audit Commission

Dear Senator Riveness:

In April 1992, the Legislative Audit Commission directed us to evaluate state agency rulemaking in Minnesota. Legislators wanted to know how well the rulemaking process was working and whether the Administrative Procedure Act (APA), which governs rulemaking, needed to be modified.

We found that while Minnesota's APA contains many safeguards and due process requirements, it does not set standards for the informal negotiations that often decide the content of rules. As a result, many people who should be involved in the complete rulemaking process are not given an opportunity to participate. We recommend changes in the APA to encourage fair and open public participation in rulemaking and to make rules more responsive to the concerns of the Legislature.

In conducting our evaluation, we received the full cooperation of the Office of the Attorney General, the Office of Administrative Hearings, the Office of the Revisor of Statutes, and the staff of the Legislative Commission to Review Administrative Rules. We also appreciate the cooperation of the state employees and private citizens who responded to our inquiries and who returned our survey questionnaire.

Our report was researched and written by Marlys McPherson (project manager), David Chein, Jan Sandberg, and Kathi Vanderwall, with assistance from Jeff Bostic.

Sincerely yours,

James Nobles
Legislative Auditor

Roger Brooks
Deputy Legislative Auditor

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Administrative Rulemaking

EXECUTIVE SUMMARY

The Legislature often directs executive branch agencies to develop rules that specify or implement a statute. Once properly adopted, rules have the force and effect of law. Minnesota, like the federal government and most other states, has an Administrative Procedure Act (APA) that is intended to protect the public from abuse of agency power. The act establishes minimum due process requirements and specifies the procedures that state agencies must follow in adopting rules.

Since agencies are supposed to carry out legislative policy when they adopt rules, legislators are justifiably interested in how well the APA is working, whether it is achieving its goals, and whether agencies follow required procedures. In addition, many agency staff think that rulemaking has become too cumbersome, while some citizens complain that rulemaking has become so complicated and technical that the public is ill-prepared to participate.

In light of these concerns, the Legislative Audit Commission directed us to study administrative rulemaking in Minnesota. Our study addressed the following questions:

- **How many rules are adopted each year, and which state agencies adopt them? What is the source of most rules?**

- **How long does it take agencies to adopt rules? How much does it cost? Why do some rules take longer to adopt than others? What problems do state agencies have with rulemaking requirements?**

- **Do Minnesota's rulemaking procedures promote meaningful public participation in rulemaking? Is the rulemaking process fair and open? Are affected members of the public satisfied with their impact on agency rulemaking?**

- **Do current mechanisms for rules review ensure that agencies comply with the APA? Do they provide for adequate accountability for agency rules?**

- **Can Minnesota's Administrative Procedure Act be improved to make rulemaking more efficient while ensuring that the process is open and accessible to the public?**

To answer these questions, we analyzed all 262 rules reviewed by the Attorney General's Office and Office of Administrative Hearings in fiscal years 1991 and 1992 and conducted phone interviews with agency staff for a sample of 54 of those rules. In addition, we sent a questionnaire to a sample of individuals on agency mailing lists related to the 54 rules and analyzed the 341 responses we received. We also analyzed data from the Revisor of Statutes, Legislative Commission to Review Administrative Rules, *State Register*, and other sources, including legislation and recent court cases. Finally, we interviewed people knowledgeable about rulemaking in Minnesota and surveyed the national literature.

We evaluated the processes agencies use to adopt rules against the following criteria: 1) rules should be legally authorized and adopted according to appropriate statutory procedures; 2) agency rules should reflect the policies established by the Legislature; 3) public participation should be encouraged; 4) rules should be technically sound; 5) the rulemaking process should be flexible; and 6) the public should be generally satisfied with the rulemaking process.[1]

Our evaluation shows that Minnesota's rulemaking requirements are generally flexible. However, the rulemaking process does not always offer meaningful opportunities for public participation. We found that a majority of people affected by rules who responded to our survey say they hear about rules too late for their input to make a difference. For several reasons, important decisions affecting the content of rules are often made outside the formal part of the rulemaking process. We also found that current rule review mechanisms emphasize legal compliance with procedural requirement, but may not ensure that rules are acceptable to the Legislature and the public. We recommend changing the Administrative Procedure Act to improve opportunities for meaningful public participation and to strengthen oversight of agency rules. We also recommend changes aimed at making agency rulemaking more efficient and less cumbersome.

RULEMAKING TRENDS

About 126 rules are adopted each year.

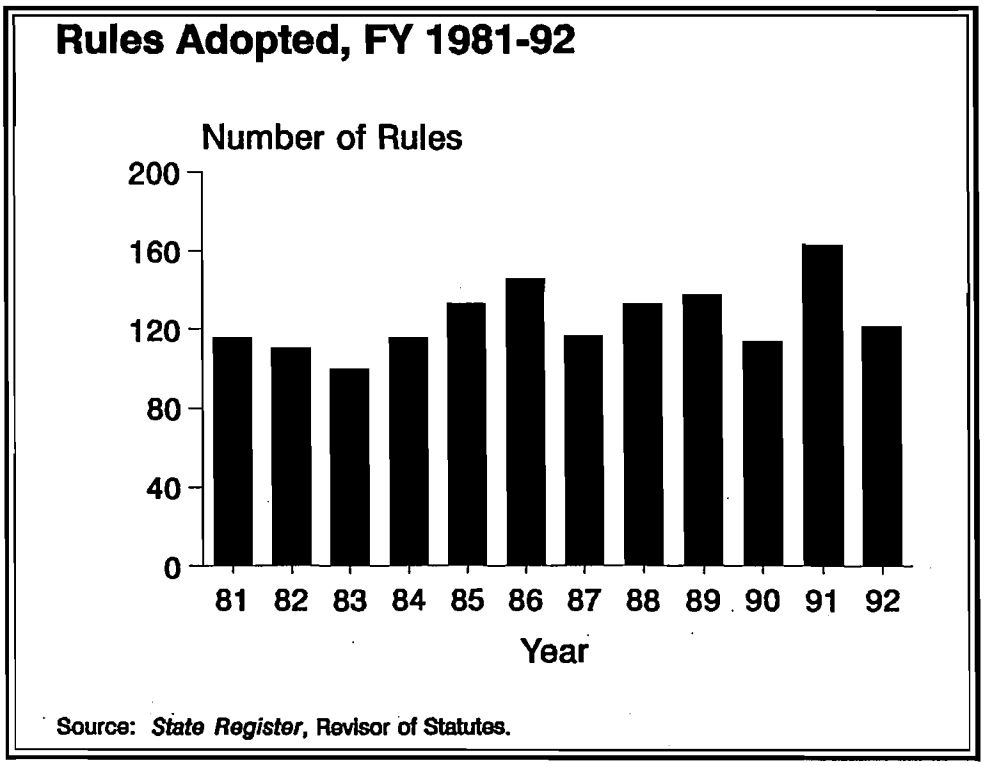
There have been an average of 126 rules adopted each fiscal year since 1981. As shown in the figure below, the general trend has been slightly upward.

We found that:

- **About two-thirds of the rules adopted in fiscal years 1991 and 1992 were amendments to existing rules.**

When the Legislature enacts new programs, agencies have to adopt rules to implement them. In addition, agencies have to amend existing rules to incorporate legislative changes to existing programs, as well as to reflect techno-

1 See Arthur Earl Bonfield, *State Administrative Rulemaking* (Boston: Little Brown, 1986).



logical, economic, social, and other changes. Of the 262 rulemaking actions in fiscal years 1991 and 1992, 82 (31 percent) were proposed new rules, 175 (67 percent) were amendments to existing rules, and five (2 percent) were repeals of existing rules.

We also found that:

- **Most rules are enacted in response to legislative mandates or requirements.**

One-third of all rules are from the Human Services and Health Departments and the Pollution Control Agency.

These come in the form of statutes that establish new programs and require or permit agencies to adopt rules to implement and administer a program. About 10 percent of the rulemaking actions in fiscal years 1991 and 1992 were prompted by changes in federal programs that required commensurate changes in state rules to remain in compliance and retain eligibilty for federal funds.

During fiscal years 1991 and 1992, a total of 56 agencies developed 262 rules that went through the formal APA process. Three agencies, the Pollution Control Agency (30 rules), the Department of Human Services (30 rules), and the Department of Health (27 rules), wrote substantially more rules than others. These agencies accounted for one-third of all the proposed rules and almost half of the rules that had a public hearing.

MINNESOTA'S RULEMAKING PROCESS

The Legislature has changed the Administrative Procedure Act (APA) a number of times since it first enacted procedural rulemaking requirements in 1945. The changes made over the years reflect efforts to balance the APA goals of public participation and agency accountability, and the general concern for government efficiency. The APA was substantially revised in 1975 in response to concerns that the existing law did not guarantee sufficient due process or provide enough checks against possible agency abuse. In 1980, the APA was changed to allow agencies to adopt some rules without a public hearing.

The three types of formal rulemaking proceedings established in 1980--rules adopted with a hearing, rules adopted without a hearing, and emergency rules--remain in effect today. The three types of proceedings have different requirements for public notice and participation, as well as different rules review procedures. Agencies may adopt a rule without a public hearing unless 25 or more people request one during the 30-day comment period.

We compared Minnesota's APA to the 1981 "Model State Administrative Procedure Act," which many other states have used as the basis for their APAs, and we conclude that:

- **Minnesota's APA provides more incentives than the Model APA for agencies to avoid public hearings.**

Minnesota's APA contains public notice-and-comment provisions that are similar to the Model APA, but the latter does not provide for alternative processes. By providing for alternative rulemaking and rules review processes, Minnesota's APA encourages agencies to negotiate with interested parties before proposing a rule, in order to avoid the time and expense of a public hearing. Typically, therefore, before the public hearing occurs, the agency has had considerable informal contact with at least some interested people and has heard the various points of view.

In most states, agencies hold their own rulemaking hearings, while in Minnesota they are held before an administrative law judge.

In contrast, under the Model APA, the agency presides at "oral proceedings," which are held to give interested persons an opportunity to present arguments in person to the agency. In Minnesota, an administrative law judge from the state's Office of Administrative Hearings, an independent agency not affiliated with the agency proposing the rule, presides at rulemaking hearings, and agencies are billed for the services provided by administrative law judges. We were able to identify only three other states where public rulemaking hearings are presided over by administrative law judges.

RULEMAKING TIME AND COSTS

We examined how long the administrative rulemaking process takes in Minnesota and how much it costs. We conclude that:

- **By allowing most rules to be adopted without a public hearing, Minnesota's Administrative Procedure Act has produced some efficiencies.**

Rulemaking costs about $3.4 million annually.

We estimate that for the 125 to 130 rules adopted each year, the rulemaking process costs about $3.4 million annually. On average, it takes about 16 months to adopt a rule in Minnesota from the time agency staff begin working on it until it becomes effective. The large majority of rules--over 80 percent--are adopted without a public hearing, and these take an average of 14 months to adopt. The APA also provides for an emergency rulemaking process, which contains fewer requirements and takes less time. However, this process is rarely used (emergency rules represented 5 percent of rules reviewed in fiscal years 1991 and 1992). Agency staff told us the timeframe for emergency rules is too short to permit development of good rules that eventually must be adopted as permanent rules.

We also found that:

- **There are a small number of rules that take an unusually long time to adopt because they are very controversial and because agency staff may proceed at their own pace in drafting a rule.**

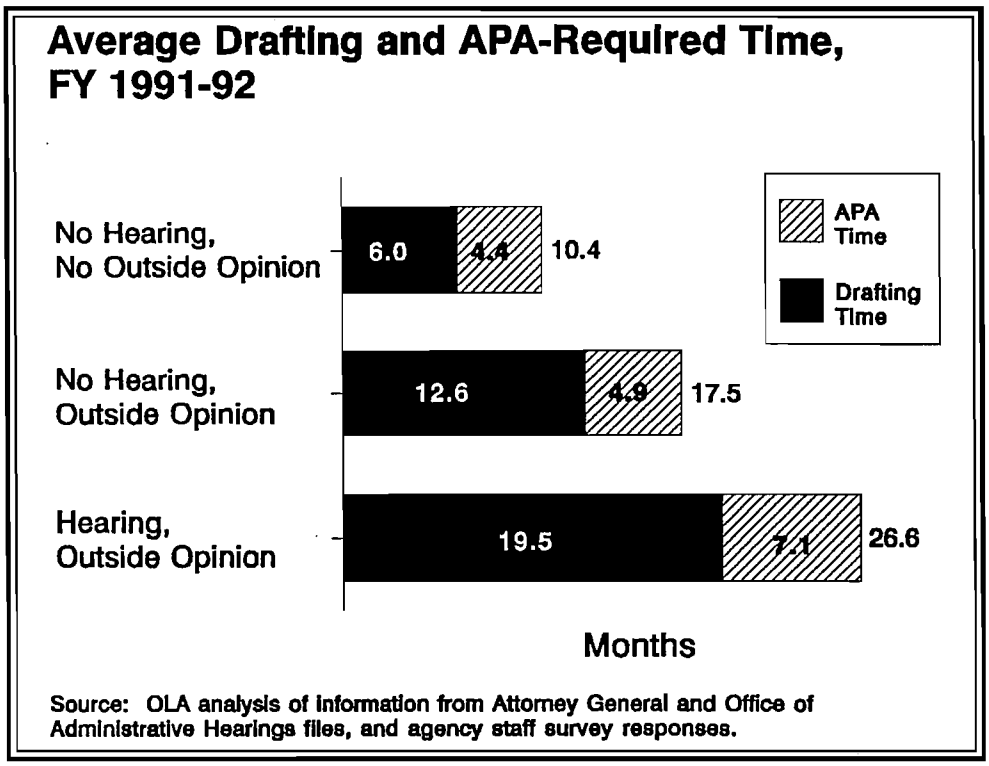
Rules that require a public hearing take nearly twice as long to adopt as those without a hearing. With a hearing, rules take an average of 26-1/2 months to adopt. This average is influenced by the fact that a few rules have taken up to 13 years to adopt. As the figure below shows, rules that do not require a hearing take less time, just over 10 months if no outside opinions are sought, and 17-1/2 months if they are sought.

Rules that require a public hearing tend to be more controversial: they are more likely to regulate industries, affect health or safety, involve multiple competing interests, impose large costs, or involve highly technical issues. Controversial rules take longer because conflicts left unresolved by the Legislature when it enacts a law may have to be resolved during rulemaking. Under Minnesota's APA, agencies are encouraged to negotiate with affected parties, reach a compromise, and avoid a public hearing, with no enforceable limits on the length of time agencies have to do so.

We also found that:

- **Rulemaking is a lengthy process principally due to the demands of rule drafting and the need to accommodate competing interests, not because of procedural requirements contained in the APA.**

On average, almost 70 percent of the time it takes to adopt a rule is spent on drafting.



The above figure also shows that almost 70 percent of rulemaking time is spent drafting the rule, not meeting APA requirements. This is the case regardless of whether a rule requires a hearing or not. Agency staff told us that rulemaking delays are more likely to be caused by insufficient staff, vague or ambiguous legislation, or controversies associated with a rule, than by the formal APA process.

In addition, we conclude that:

- **The time and costs of rulemaking could be reduced if fewer procedural and substantive errors were made by state agencies.**

We found that 28 percent of proposed rules contained procedural or substantive errors, which resulted in delays and higher costs. For instance, when errors were made, the formal adoption process took nearly three months longer than when there were no errors. Between 7 and 10 percent of rules contain the type of errors that require an agency to republish a proposed rule, and sometimes to hold a second public hearing. In addition, we found some inaccurate perceptions of APA provisions and requirements among agency staff.

PUBLIC PARTICIPATION

We evaluated agency rulemaking as both a legal and a political process. We examined the due process requirements in Minnesota's Administrative Procedure Act to see whether they ensure that people affected by proposed rules

receive timely notice and have adequate opportunity to provide comments. We also assessed the informal ways in which agencies negotiate with the conflicting groups and interests that are often involved in rulemaking. Finally, we asked people affected by rules for their opinions about the adequacy of agencies' rulemaking performance.

We found that:

- **There is a great deal of public input into rulemaking, and many agencies do a good job of securing broad-based public participation.**

"Negotiated" rulemaking is now commonplace.

However:

- **Encouraging agencies to negotiate rules before formally proposing them has made the formal public notice-and-comment process mandated by the APA less meaningful; and**

- **Since there are no requirements or guidelines governing the negotiation process, those people selected to help an agency draft rules have an unfair advantage over those who are not asked to participate.**

"Negotiated" rulemaking is now commonplace. We estimate that for about 80 to 85 percent of all rules, agencies solicit informal comments from affected parties before officially proposing a rule. Sometimes agencies even negotiate to get people to withdraw their requests for a public hearing. We learned from our survey of affected parties that those people who are in direct personal contact with agency staff and who participate during the rule drafting phase, for example, by serving on a rules advisory committee, are much more likely to have favorable opinions about agency rulemaking performance.

One unintended consequence of negotiated rulemaking is that the public participation process mandated by the APA has become less important because the content of rules is largely decided during the negotiation phase. As a result, by the time a rule is formally published in the *State Register* with a request for public comments, an informal agreement between an agency and parties to the negotiation may already have been reached. Those groups and individuals not consulted often are left out. Nearly 70 percent of the affected parties who responded to our survey said they hear about rules too late for their input to make a difference. People who live outside the Twin Cities area were much more likely to feel unable to influence the rulemaking process and to express dissatisfaction with agency rulemaking performance generally.

Many people find out about proposed rules too late for their input to make a difference.

Furthermore, the rule negotiation process is not part of the official rulemaking record nor subject to statutory controls or legal review that would guarantee equal access. Therefore, it can easily be dominated by those groups and organizations with more resources. In the absence of formal guidelines or standards, agency practices vary, and some agencies are better than others at obtaining broad-based input.

We also conclude that:

- **The formal public notice mechanisms may be inadequate to ensure timely notice and meaningful participation in rulemaking; and**

- **The prohibition of "substantial changes" after rules are proposed is often misunderstood by agency staff and may inhibit them from incorporating public comments made through official mechanisms.**

Only a small minority of the people affected by rules whom we surveyed (between 10 to 15 percent) were very familiar with Administrative Procedure Act requirements and found the process easy to follow. Furthermore, few people hear about rules from the *State Register*, which is where proposed rules are published. This makes agencies' own efforts to notify people even more important. Fewer than 25 percent of affected parties who responded to our survey communicate directly with agency staff about rules. The remaining three-quarters of survey respondents are on an agency's regular mailing list or hear about rules only indirectly from organizations they belong to. Those who learn about rules indirectly may hear too late to submit comments that an agency is likely to use.

Sometimes agencies do not publish an outside solicitation notice when it is required by the APA.

Although the initial public notice (to solicit outside opinion) is published for 62 percent of all rules, it is not uniformly understood and used by agency staff. We found that for an additional 15 to 20 percent of rules, an agency did not publish the required notice when it should have. Agency staff told us that the notice to solicit outside opinion usually does not elicit useful comments because it does not contain enough information about the rule. This assessment was confirmed by a number of affected parties we surveyed.

Finally, many agency staff are reluctant to change a rule after it has been published in the *State Register*, in part because they misunderstand the APA provision prohibiting substantial changes. In fact, large changes are frequently permitted, and rules are almost never rejected by the offices that review rules (Attorney General's Office and Office of Administrative Hearings) for violation of the substantial change provision.

DEFINING WHEN RULEMAKING IS NEEDED

In Minnesota, a rule is defined as "every agency statement of general applicability and future effect" and must be adopted in accordance with the APA. In addition, all changes to existing rules (regardless of magnitude and including rule repeals), as well as "interpretive rules," which make specific an existing statute, must go through the formal rulemaking process.

We found that:

- **The definition of agency statements that require formal rulemaking is so broad and inclusive that agencies have difficulty complying.**

We could not determine the extent to which agencies may be avoiding formal rulemaking by issuing improper policy "guidelines," applying general standards in case-by-case decisions that should be rules, or permitting seriously outdated rules to remain in effect instead of formally amending them. Both agency staff and people affected by rules told us these things happen, but we do not know how often.

But neither forcing agencies to comply fully with the current definition nor changing it to permit greater agency discretion is a practical solution that also meets the goals of the Administrative Procedure Act. Agencies would like to be able to issue informal policy guidelines--without the force and effect of law--that can be changed more easily than rules. However, if agencies expect regulated parties to follow their guidelines, they would be equivalent to rules, in practice, and should be adopted following appropriate procedures. If agencies do not expect their guidelines to be followed, it is not clear what purpose they would serve. In our opinion, efforts to permit agencies to make enforceable policies without appropriate legislative delegation or proper procedures and oversight raise serious legal questions. We think the solution lies in better prioritization of agency rulemaking.

There is confusion about whether fees should be established by rules.

We also conclude that:

- **Current policies regarding fee rules and exemptions to rules need to be clarified.**

The establishment of fees to offset program costs has become a common method of funding some services. We found that there is confusion about which fees should be established by rules and conclude that legislative clarification is needed. Also, there is no policy covering exemptions to rulemaking, and some programs are exempt from formal rulemaking while similar ones are not. In addition, we found that there is almost no external review of exempt rules, even though exempt rules also have the force and effect of law.

JUSTIFYING THE NEED AND REASONABLENESS OF RULES

The Legislature wants agencies to adopt technically sound rules that are also sensitive to the costs that rules impose on people affected by them. It has tried to accomplish these goals by enacting procedural requirements for agencies to follow.

We found that:

- **Agency statements that justify the need and reasonableness of rules are useful, but could be improved and should receive wider public distribution.**

Agency "Statements of Need and Reasonableness" vary in quality.

The APA requires that agencies prepare written "statements of need and reasonableness" that justify their rules. Agency staff told us that these statements help them to write better rules. However, some agency staff misunderstand how they should be be written, and we found that the quality of these statements varies widely. The results of our survey suggest that most people affected by rules do not think that agencies provide adequate justification for their rules.

We also found that:

- **The additional requirements placed on agencies by the APA--small business and agricultural land impact statements and fiscal notes for effects on local governments--have not had their desired effects, yet have made rulemaking more cumbersome.**

Agency compliance with these requirements is inconsistently reviewed and enforced, and few rules are modified as a result of them. Occasionally, however, if the Office of Administrative Hearings or Attorney General's Office finds that a special requirement was not addressed when it should have been, it can force an agency to restart the rulemaking process and hold another public hearing.

RULE REVIEW, OVERSIGHT, AND ACCOUNTABILITY

All states with APAs provide for review of proposed rules by entities outside the agency. The main reason is that, unlike the Legislature which authorizes rules, the agency staff who write them are not directly accountable to the public. Typically, rules are reviewed to ensure that they are legally authorized, that the appropriate procedures were followed, and that they are reasonable, in the public interest, and consistent with legislative intent. External review also minimizes judicial challenges to agency rules.

We found that:

- **Rules without a public hearing are not as thoroughly scrutinized as rules with a hearing;**

- **Rules review processes emphasize legal compliance with procedural requirements; but**

- **Current procedures may not always ensure that rules are acceptable to the Legislature and the public.**

Minnesota has an unusual structure for rules review. It emphasizes legal review of proposed administrative rules by judicial or quasi-judicial offices. The Attorney General's staff play a dual role in rulemaking: they act as legal counsel to agencies, helping them write rules, and they review the over 80 percent of rules that do not require a public hearing. The Office of Administrative Hearings' administrative law judges also have two rulemaking roles: they preside at public hearings, and they review the approximately 19 percent of rules that require a public hearing.

Minnesota's rule review process emphasizes legal compliance with procedural requirements.

We found that both offices carefully review rules to ensure that agencies have statutory authority to adopt a rule and that they comply with the APA's due process requirements. However, with respect to whether a rule is needed and reasonable, deference is given to the agency. Both offices apply a standard that requires an agency to demonstrate a rational basis for a rule but does not require the agency to show that it is the "best" rule. This is the same standard applied by the courts, if and when a rule is subjected to judicial review.

Rules reviewed by the Office of Administrative Hearings receive closer scrutiny, in part because these rules are more complex and controversial. This office found substantive errors in 47 percent of the rules it reviewed, compared to substantive errors in 5 percent of the rules reviewed by the Attorney General's Office. The Attorney General's review does not include determining whether a rule is consistent with legislative intent. While the Office of Administrative Hearings assesses consistency with legislative intent for the rules it reviews, administrative law judges find it difficult to do so. In determining legislative intent, administrative law judges told us they rely on statutory language even when legislators submit written comments or testify at a hearing, which they occasionally do.

Minnesota, along with 40 other states, also provides for legislative review of administrative rules. Most legislatures provide for systematic review of proposed rules by a bipartisan commission, like Minnesota's Legislative Commission to Review Administrative Rules, by appropriate legislative standing committees, or both. The Legislative Commission to Review Administrative Rules reviews rules in response to specific complaints. Most of the complaints the commission has investigated have involved the contents of a rule rather than the process of adopting it. The commission has rarely used its formal power to suspend a rule, in part because the constitutionality of such a suspension is in question.

RECOMMENDATIONS

In making our recommendations, we were mindful of the careful balance an APA strives to achieve between meaningful public participation and public accountability over agency rulemaking, and the need for government efficiency.

We recommend better early notification of rulemaking action to broaden public access to the process.

We considered a number of alternatives for equalizing public access to agency rulemaking and increasing public accountability for agency rules, including replacing Minnnesota's APA with the Model APA, requiring publication of rulemaking notices in major newspapers, lengthening the public comment period, adding requirements to govern agencies' informal rulemaking, and strengthening gubernatorial oversight of agency rules. However, we think that these alternatives--while they might be appropriate for some rules--would add unnecessary costs and time to other rules, without commensurate benefits.

Therefore, we recommend that:

- **The Legislature should consider amending the Administrative Procedure Act to require that a "notice of regulatory action" be published in the *State Register* and mailed to all affected parties when an agency begins drafting a rule.**

We also recommend that:

- **The Legislature should consider amending the Administrative Procedure Act to require that agencies maintain a "rulemaking docket" that contains an up-to-date listing of the status of existing rules and impending rulemaking actions, to be submitted annually to the Legislature.**

The recommendations we make are designed to revitalize the formal rulemaking process, ensure more equitable access to agencies at a time when comments can reasonably be considered, and strengthen public accountability over agency rules. We think that replacing the current "notice to solicit outside opinion," which is published for 62 percent of all rules, with a mandatory "notice of regulatory action" will not represent an undue burden on agencies. The current notice is not widely distributed and does not contain enough information to enable interested parties to respond. Therefore, we recommend that the new notice should contain more information about the rule and the process to be used in drafting it, and that it should receive wider distribution than the current notice. A mandatory rulemaking docket, to be submitted to the Legislature and made available to the public upon request, should help the Legislature monitor rulemaking and provide better oversight.

Also, we recommend the following additional changes to the Administrative Procedure Act:

Changes are needed to strengthen and streamline the APA.

- **Rules not adopted within 18 months of their authorizing legislation should require reauthorization, which would replace the current requirement that new rules be published within 180 days;**
- **A single definition of "substantial change" should be incorporated into the APA;**
- **"Regulatory analyses" should be done on rules if requested by the Governor, the Legislative Commission to Review Administrative Rules, a political subdivision, another state agency, or 300 persons; and the current special rule justification requirements relating to agricultural land, small business, and fiscal impacts on local government should be eliminated;**
- **Agency efforts to notify all people potentially affected by a rule should be made part of the official rulemaking record and subject to external examination during the rules review process;**
- **Individuals requesting a public hearing should provide their address and phone number;**
- **Everyone who has requested a hearing should be notified when agencies negotiate to secure withdrawal of hearing requests, and agreements made in negotiations should be made a matter of public record and included in the official rulemaking record;**
- **Exempt rules should be reviewed for form, statutory authority, need and reasonableness, and consistency with legislative intent; and**
- **All rules should be reviewed by the Office of Administrative Hearings, thereby eliminating the Attorney General's role in rules review.**

These recommendations are designed to: 1) shorten the rulemaking process; 2) ensure minimum due process, recognizing the political nature of rulemaking; 3) strengthen legislative oversight; and 4) minimize the requirements that may be appropriate for only a few rules. For example, we recommend replacing the current special rule justification requirements that apply to all rules, but which have had limited effectiveness, with a provision that would restrict regulatory analyses to the few rules where one is justified.

The recommendation for consolidating rules review duties within the Office of Administrative Hearings is based on the following rationale. The dual role played by the Attorney General's Office--providing legal advice to agencies during rulemaking and subsequently reviewing rules without a public hearing--is confusing and has the appearance of conflict of interest. In addition, the two rule review offices have different rules governing their procedures and do not always apply the same standards, criteria, and definitions in reviewing rules. Given that the Attorney General's primary role is acting as agencies' legal counsel, it would appear more appropriate for the independent Office of Administrative Hearings to function in the rules review capacity for all rules. The majority of affected parties we surveyed said staff of this office were fair and impartial in carrying out their rule-related responsibilities.

In addition, we recommend that:

- **The Legislature should consider revising *Minn. Stat.* §16A.128 (fee rules) to clarify the conditions under which formal rulemaking should be required; and**

- **The Legislature should consider establishing a policy and criteria for granting rulemaking exemptions and should specify the conditions under which emergency rulemaking or some other expedited process should apply.**

We found that there is sufficient confusion and disagreement about the issues of exemptions to rulemaking, fee rules, and the usefulness of the emergency rulemaking process that legislative clarification is needed.

Several of our recommended changes to the APA are designed to strengthen accountability over rulemaking. However, should the Legislature want more direct oversight, we recommend that:

- **The Legislature should consider strengthening the formal rules review and oversight powers of the Legislative Commission to Review Administrative Rules, Governmental Operations Committees, or standing policy committees.**

In addition to changing the APA and other statutes that govern agency rulemaking, we recommend that:

- **State agencies involved in rulemaking should make more efforts to broaden public participation in rulemaking.**

For example, they should make a greater effort to educate the public about how to receive direct information about rulemaking actions and make greater use of agency-held public hearings or widely publicized public meetings early

in the rulemaking process. They should also include circulation of rule drafts and "statements of need and reasonableness" earlier and more widely among all parties affected by rules. Finally, agencies should terminate the negotiation process when it fails to make progress toward resolving issues and either proceed more quickly to an official public hearing, employ the services of a professional negotiator or mediator, or return to the Legislature for guidance.

Adopting these recommendations should shorten the informal process, broaden public input in the early stages of rulemaking, and make rules more responsive to the Legislature.

Introduction

The Legislature directs executive branch agencies to develop formal rules that specify, implement, enforce, or enlarge upon particular statutes. Also, many state agencies' enabling legislation gives them broad rulemaking authority which they may use at their discretion. Once adopted, rules have the force and effect of law. Minnesota's Administrative Procedure Act (APA) governs the formal rulemaking process. It is intended to protect the public from abuse of power by establishing minimum due process requirements and specifying procedures that state agencies must follow in adopting rules.

The Legislature has changed the Administrative Procedure Act a number of times since it first enacted procedural rulemaking requirements in 1945. The APA was substantially revised in 1975 in response to concerns that the existing law did not guarantee sufficient due process or provide enough checks against agency abuse. In 1980, the formal APA requirements were changed to allow agencies to adopt some rules without having a public hearing. These and other changes over the years reflect efforts to balance the APA goals of public participation and agency accountability, and the general concern for government efficiency.

Since agencies are supposed to carry out legislative policy when they adopt rules, legislators are justifiably interested in how well the APA is working, whether agencies follow APA procedures, whether the rules they adopt are consistent with legislative intent, and whether the APA has achieved the goal of encouraging public participation in rulemaking. In addition, many agency personnel have complained that rulemaking has become too cumbersome, costly, and time-consuming. Some citizens have complained that rulemaking has become so complicated, legalistic, and technical that the general public is ill-prepared to participate.

In light of these concerns, the Legislative Audit Commission directed us to study administrative rulemaking in Minnesota. We addressed the following questions:

- **How many rules are adopted each year and which state agencies adopt them? What is the source of most rules?**

- **How long does it take agencies to adopt rules? How much does it cost? Why do some rules take longer to adopt than others? What problems do state agencies have with rulemaking requirements?**

- **Does the general public participate meaningfully in rulemaking? Are all interested parties notified of proposed rules? How does the public perceive agency rulemaking?**

- **Do current mechanisms for rules review ensure that agencies comply with the APA? Do they provide for adequate public accountability for agency rules?**

- **Can the APA be improved to make rulemaking more efficient while ensuring that the process is open and accessible to the public?**

In answering these questions, we analyzed all of the rules reviewed by the Attorney General's Office and Office of Administrative Hearings in fiscal years 1991 and 1992; conducted extensive interviews with agency staff for a sample of 54 of those rules; analyzed 341 responses to a questionnaire sent to individuals on agency mailing lists related to those rules; reviewed and analyzed data from the Revisor of Statutes, the Legislative Commission to Review Administrative Rules, the *State Register*, and other sources; analyzed legislation and court decisions affecting rulemaking; and interviewed staff from the Office of Administrative Hearings, Attorney General's Office, the Legislature, numerous state agencies, other states, trade associations, lobbyists, interest groups, and other members of the public.

Chapter 1 describes the requirements of the APA and how they have changed over time, describes rulemaking activity over the past decade, and presents our criteria for evaluating Minnesota's APA. Chapter 2 views rulemaking from the agency's perspective. We discuss how long it takes to adopt rules, some of the reasons for delays, the costs of adopting rules, and the problems that agency staff have with rulemaking requirements. Chapter 3 examines how the public views rulemaking and how effective the APA has been in providing meaningful public input into the rulemaking process. Chapter 4 analyzes the adequacy of the APA's procedures for oversight and review of rules to determine if they provide for sufficient public accountability. Chapter 5 contains our conclusions and recommendations.

Overview of Rulemaking

CHAPTER 1

In this chapter, we describe the rulemaking provisions of the Administrative Procedure Act and rulemaking trends in Minnesota. We also lay a foundation for our evaluation of the adequacy of Minnesota's rulemaking process. We ask:

- **What are the major features of Minnesota's Administrative Procedure Act (APA) and how has it changed over time?**
- **How many administrative rules are adopted each year and what are their sources? How many rules are new, versus revisions or amendments to existing rules?**
- **What is the basis for assessing the adequacy of Minnesota's rulemaking process?**

Our analysis is based primarily on a historical review of legislation affecting rulemaking, published summaries of rulemaking activities, interviews with legislative and executive agency staff, and an analysis of rulemaking reviews conducted by the Attorney General's Office and Office of Administrative Hearings in fiscal years 1991 and 1992.

We found that state agencies in Minnesota adopt or amend about 125 rules each year, and that most of them are the result of legislative actions that create new programs or make changes to existing ones. Minnesota's APA provides a process for notifying the public about proposed rules and obtaining its input, as well as a procedure for ensuring that rules are legal and reasonable. While the Legislature has strengthened the APA's procedural and review requirements over time, it has also provided alternative mechanisms to ease the administrative burden that rulemaking imposes on agencies.

LEGAL BASIS FOR ADMINISTRATIVE RULEMAKING

Legislatures often authorize executive branch agencies to adopt rules that specify, implement, or enforce particular statutes. Statutes typically provide the framework for implementing and administering programs, but agency

expertise is often needed to translate legislation into a specific set of requirements and regulations that citizens or organizations must follow. Although agencies may and do implement legislative policies by making decisions on a case-by-case basis, they also often find it necessary to establish rules that apply generally to a program. Rules increase the likelihood that agency personnel will act consistently and, therefore, that citizens will be treated equally.

Federal and state constitutions provide for a separation of powers among legislative, executive, and judicial branches of government. Legislatures establish programs and policies, executive agencies carry them out, and the courts resolve ambiguities and settle disputes. In this context, agency rules are viewed as executive actions by state agencies that implement laws and programs enacted by legislatures. The separation of powers doctrine, however, suggests that agencies may use rules to interpret and administer legislative programs but not to create new programs or establish new policies. Thus, rules must be authorized by legislatures and must be consistent with legislative intent. Conversely, legislatures are limited in the extent to which they can intervene in the rulemaking process.

Administrative procedure acts provide for uniformity and public input in rulemaking.

Most states have adopted an administrative procedure act that sets forth specific requirements that state agencies must follow when they adopt rules. An administrative procedure act is intended to provide uniform procedures for the rulemaking process. In addition, it provides individuals and groups affected by state programs with opportunities for input into rulemaking and standards or safeguards that prevent agencies from adopting unreasonable and capricious rules.[1]

Figure 1.1 lists the purposes of Minnesota's Administrative Procedure Act (APA). The act ensures that agencies follow a uniform process in adopting, amending, or repealing rules and that agencies include public input in the rulemaking process. Rules adopted according to APA procedures have the force and effect of law.[2] However, the law also recognizes that agencies should balance the APA's emphasis on public input and procedural due process with the need for efficient, economical, and effective government administration.[3] The act also establishes procedures for contested cases, which are "proceedings before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined by an agency after a hearing."[4] This report deals only with the rulemaking provisions of the Administrative Procedure Act.

Rules have the force and effect of law.

1 See Arthur E. Bonfield, "Administrative Procedure Acts in an Age of Comparative Scarcity," *Iowa Law Review* (1990), 847.

2 *Minn. Stat.* §14.38.

3 *Minn. Stat.* §14.001.

4 *Minn. Stat.* §14.02, subd. 3.

Figure 1.1: Purposes of the Administrative Procedure Act

- Provide oversight for administrative agencies;
- Increase state agencies' accountability to the public;
- Ensure minimum, uniform procedures for all agencies;
- Increase access to government information;
- Increase public participation in the formulation of rules;
- Increase fairness of agencies as they conduct contested case proceedings; and
- Simplify judicial review and increase its ease and availability.

Source: *Minn. Stat.* §14.001.

HISTORY OF ADMINISTRATIVE RULEMAKING

Administrative rules became prominent during the 1930s, as federal and state governments created new programs and expanded their regulatory roles in an effort to deal with the Depression. As rules were developed that determined program eligibility and compliance with regulations, legislators recognized that mechanisms were needed to ensure that agencies acted openly and reasonably, and that the rules they adopted were fair and responsive to public needs and legislative intent.

Minnesota first adopted rulemaking procedures in 1945 and incorporated them into an Administrative Procedure Act in 1957.

The first state administrative procedure act was enacted in North Dakota in 1941; the federal Administrative Procedure Act was enacted in 1946. Most states adopted their own acts between the mid-1940s and the 1970s. The majority of states base their acts on the Model State Administrative Procedure Act, first adopted by the National Conference of Commissioners on Uniform State Laws in 1946, and subsequently revised in 1961 and 1981.[5]

The Minnesota Legislature first adopted rulemaking procedures in 1945 and incorporated them into an Administrative Procedure Act in 1957. The act has been changed several times since then. Most of these changes represent efforts to balance the requirements of due process and the goal of maximizing public participation against the need to hold down costs and operate efficiently. Figure 1.2 shows the major changes to the APA since 1945.

5 Arthur E. Bonfield, *State Administrative Rulemaking* (Boston: Little Brown, 1986), 16-18.

Figure 1.2: Major Changes to Rulemaking Provisions of Minnesota's Administrative Procedure Act

Prior to 1945	Unless expressly forbidden by law, agency heads could adopt rules and regulations consistent with the law.
1945	First procedural requirements for rulemaking are adopted, which require agencies to hold public hearings on all proposed rules and provided for review by the Attorney General's Office. (*Minn. Laws* (1945), Ch. 452.)
1957	Rulemaking requirements are recodified into a comprehensive Administrative Procedure Act that also includes judicial review of agencies' contested case procedures. (*Minn. Laws* (1957), Ch. 806.)
1970	Attorney General's Office adopts procedural rules governing rulemaking that include a requirement that agencies provide written justifications for their rules.
1974	*State Register* is created. Agencies are required to publish rulemaking notices and the text of adopted rules in it. The Legislative Commission to Review Administrative Rules is formally created. (*Minn. Laws* (1974), Ch. 344, 355.)
1975	Administrative Procedure Act is amended to: 1) expand the definition of a rule; 2) create an independent Office of Hearing Examiners (now Office of Administrative Hearings) to hold hearings on proposed rules and contested cases; 3) require Attorney General approval on the form and legality of proposed rules; 4) require agencies to justify new rules with a "statement of need and reasonableness"; and 5) require agencies to publish the entire text of proposed rules and, when applicable, a "notice of intent to solicit outside opinion," in the *State Register*. (*Minn. Laws* (1975), Ch. 380.)
1976	State agencies are required to notify local agencies if adoption of a proposed rule is likely to cost local governments more than $100,000 per year. (*Minn. Laws* (1976), Ch. 138.)
1977	Duration of emergency rules is extended; requirements for adopting them are set forth. (*Minn. Laws* (1977), Ch. 443.)
1980	Two separate rulemaking tracks are created. Agencies are no longer required to hold a hearing on rules unless seven or more people (now 25) request one. Rules without a hearing are reviewed by the Attorney General's Office. Rules requiring a hearing are reviewed by both an administrative law judge and the Attorney General's Office. Also, Revisor of Statutes is required to publish rules and agencies must obtain Revisor's approval of rule's form. (*Minn. Laws* (1980), Ch. 615.)
1981	Exempt agencies and rules are granted the same legal standing as other rules, provided they are filed with the Secretary of State. Agencies may not adopt a rule substantially different from the one proposed without issuing a new notice of intent. (*Minn. Laws* (1981), Ch. 253.)
1983	Agencies are required to consider the impact of proposed rules on small business. Agencies are also required to inform the Legistative Commission to Review Administrative Rules if they fail to propose rules within 180 days of a legislative requirement to do so or fail to adopt a rule within 180 days of the end of the comment period or the administrative law judge's report. (*Minn. Laws,* (1983), Ch. 188, 210.)
1984	The Attorney General's role in approving rules adopted after a public hearing is eliminated, and the number of signatures necessary to require a public hearing is increased from seven to 25. (*Minn. Laws* (1984), Ch. 640.)
1992	Both the Office of Administrative Hearings and the Attorney General's Office are permitted to approve rules if procedural errors in rulemaking are found to be "harmless." Agencies are allowed to publish a single notice (dual notice) of intent to adopt a rule with or without a hearing. (*Minn. Laws* (1992), Ch. 494.)

In 1980, the Legislature created a separate process for adopting noncontroversial rules without a hearing.

The 1975 amendments expanded the definition of a "rule," created an independent office of hearing examiners, increased public notification requirements, and mandated that agencies prepare a written justification of the "need and reasonableness" of proposed rules. Prior to 1975, agencies conducted their own hearings and were not required (except by the courts) to justify their final decisions.

In response to agency complaints that the 1975 changes were an undue burden because public hearings were required for all rules, a separate process for noncontroversial rules was created in 1980.[6] The three rulemaking processes established in 1980 -- rules with a hearing, rules without a hearing, and emergency rules -- remain in effect today. In 1984, the Legislature eliminated the Attorney General's role in reviewing rules adopted after a hearing. It also increased the number of signatures necessary to require a public hearing from 7 to 25. For rules adopted without a hearing, it expanded the Attorney General's review to include a determination of whether the record demonstrates a rational basis for the need and reasonableness of the rule.

The history of the APA reflects the Legislature's desire to make the rulemaking process accountable to the public without making it so cumbersome as to impede agencies from efficiently carrying out their responsibilities. For example, the public has been protected from agencies substantially changing the substance of proposed rules during the process and a role has been created for independent administrative law judges to review proposed rules. Also, the Legislative Commission to Review Administrative Rules was created and given authority to oversee agency rulemaking activities. On the other hand, the Legislature has provided agencies with alternative mechanisms to avoid the stringent requirements of the APA, including exempting agencies and programs from APA rulemaking requirements and providing mechanisms for adopting rules without a hearing.

CURRENT ADMINISTRATIVE PROCEDURE ACT REQUIREMENTS

Figure 1.3 lists the major rulemaking provisions of the Administrative Procedure Act (APA). We have divided them into four categories: definition of a rule, public notice and input, rule justification, and oversight and review.

6 A survey conducted jointly by Senate Counsel and House Research revealed that it took longer to draft rules after the 1975 changes than before and that many state agencies believed the changes increased the cost of adopting rules. See Report from Tom Triplett, Senate Counsel, and James Nobles, Legislative Analyst, House of Representatives (January, 1977). Subsequently, a task force created by the House and Senate Government Operations Committees issued a report in February 1979 recommending many of the changes adopted in 1980.

Figure 1.3: Key Rulemaking Provisions of the Administrative Procedure Act

Definition:

- Rules include all agency statements of general applicability and future effect.
- Rules include amendments to and repeals of existing rules.
- Some agencies and many specific programs are exempt from normal rulemaking requirements.

Public Notice and Input:

- Any interested person may petition an agency to adopt, amend, or repeal a rule.
- Notice to Solicit Outside Opinion required if agency seeks outside advice.
- 30-day public comment period required after Notice of Intent to Adopt Rules appears in *State Register*.
- Public hearing required if requested by 25 or more people.
- Public hearing conducted by independent Office of Administrative Hearings.

Rule Justification:

- Statement of Need and Reasonableness must accompany all proposed permanent rules.
- Other special requirements include considering impact on small business, local government, agricultural land, and fees.

Oversight and Review:

- Office of Administrative Hearings reviews proposed rules with a hearing.
- Attorney General's Office reviews rules proposed without a hearing and emergency rules.
- Rules reviewed for:
  - Statutory authority,
  - Adherence to procedural requirements,
  - Substantial change, and
  - Need and reasonableness.
- Rule form must be approved by Revisor of Statutes.
- Legislative Commission to Review Administrative Rules may hold hearings and delay implementation of rules.
- Parties may seek judicial review of rules.

Source: *Minn. Stat.*, Ch. 14.

Definition of a Rule

A rule is an agency statement of general applicability and future effect.

In Minnesota, a rule is defined as "every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to make specific the law enforced or administered by that agency or to govern its organization or procedure."[7] By defining rules as statements of "general applicability," Minnesota excludes specific rulings in individual cases from rulemaking requirements. On the other hand, every change to a rule, no matter how minor, must be made according to APA procedures.

As shown in Figure 1.4, Minnesota's APA exempts several agencies from rulemaking requirements.[8] In addition, when the Legislature enacts specific programs, it sometimes exempts them from APA procedural requirements.[9] According to the Revisor of Statutes, the Legislature exempted 123 programs from rulemaking between 1985 and 1992.

Public Notice and Input

In Minnesota, any individual may petition an agency to adopt, amend, suspend or repeal a rule. The APA does not require agencies to grant this type of request, but they must issue a specific and detailed reply in writing within 60 days as to their planned disposition of the request.[10]

Minnesota's APA provides for three types of formal rulemaking proceedings: rules adopted without a hearing, rules adopted with a hearing, and emergency rules. The three proceedings have different notice and public participation requirements. The major steps associated with these alternative processes are depicted in Figure 1.5.

Minnesota's APA allows agencies to informally seek public input into proposed rules before formally proposing them and submitting them for formal public comment. However, if an agency does consult with any external parties, it must publish a notice in the *State Register* that it is seeking outside advice (Notice of Intent to Solicit Outside Opinion), so that all interested parties may comment.[11] Agencies published such a notice in 62 percent of the rules reviewed in 1991 and 1992.

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7 *Minn. Stat.* §14.02, subd. 4.

8 The agencies in Figure 1.4 are specifically exempted in Chapter 14 from the requirements of the APA or from the definition of a "rule." A complete list of all agencies with programs exempted from rulemaking requirements is presented in Figure 4.3 in Chapter 4.

9 Both the House of Representatives and the Senate have rules requiring their Governmental Operations Committees to review bills exempting agencies from rulemaking. See House of Representatives Rule 5.10 and Senate Rule 35.

10 *Minn. Stat.* §14.09.

11 *Minn. Stat.* §14.10.

Figure 1.4: Agencies Exempted by the Administrative Procedure Act from Rulemaking Requirements

Exempt from all aspects of the APA:

- Legislative or judicial branch agencies;
- Powers exercised by the Governor during an emergency.
- The Department of Military Affairs;
- The Comprehensive Health Association;
- The tax court; and
- The regents of the University of Minnesota;

Exempt from APA rulemaking procedures:

- Rules concerning only the internal management of an agency;
- Department of Corrections rules relating to the placement and supervision of inmates serving a supervised release term, the internal management of institutions, and inmates in institutions;
- Rules relating to highway weight limitations;
- Opinions of the Attorney General;
- The systems architecture and long-range plan of the state education management information system;
- The data element dictionary and the annual data acquisition calendar of the Department of Education;
- Occupational safety and health standards; and,
- Revenue notices and tax information bulletins of the Department of Revenue.

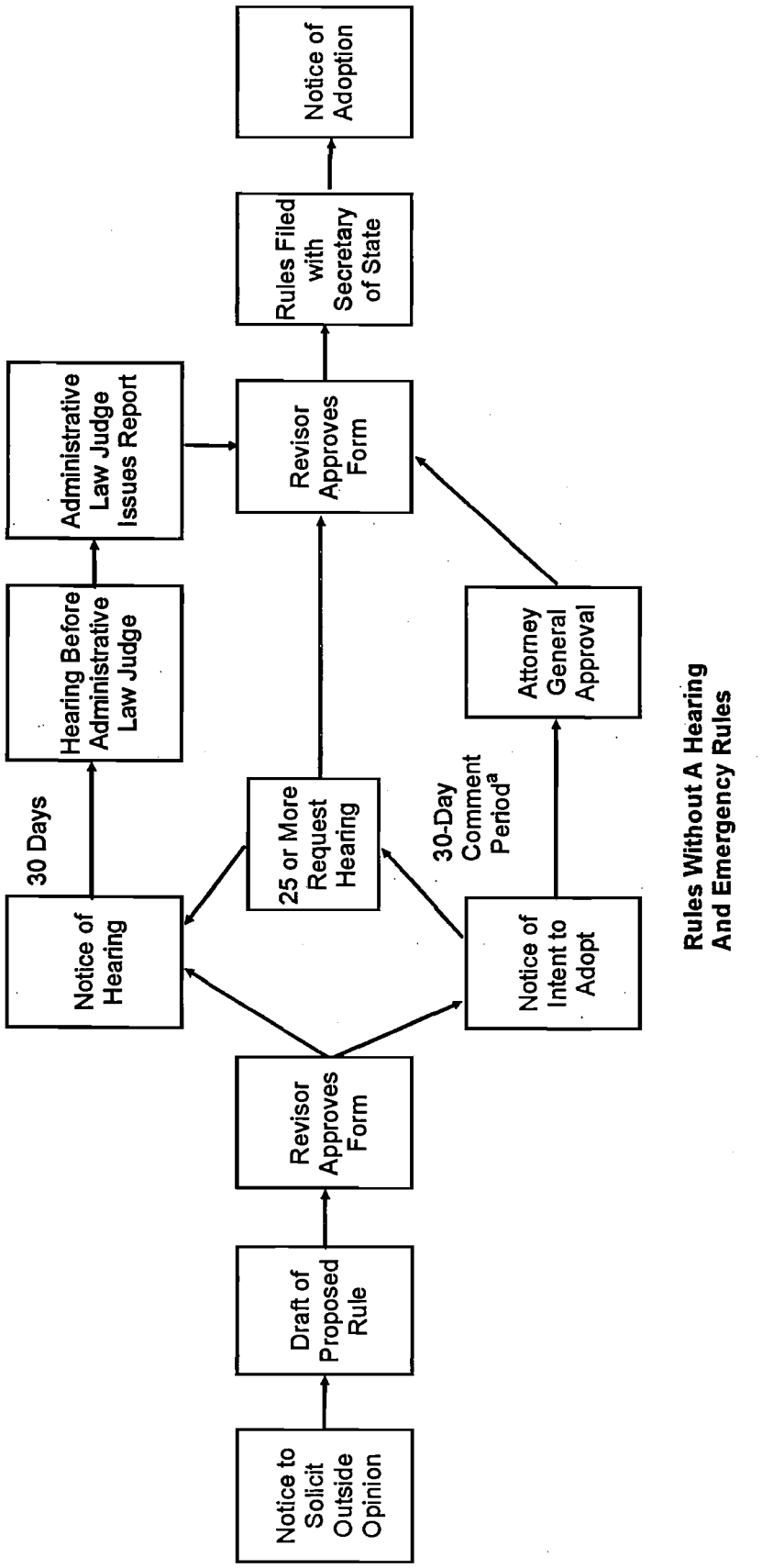
Source: *Minn. Stat.* §14.03, subds. 1 and 3.

Interested parties must be notified that rules are being proposed.

Minnesota's APA requires agencies to mail a Notice of Intent to Adopt a Rule to interested parties (those who registered with the agency to receive such notices) and publish the notice in the *State Register.* The public has 30 days to comment on the proposed rules. The agency may propose to adopt the rule without a hearing, but if 25 or more people request a public hearing during the 30-day comment period, a hearing must be held.[12]

12 Minn. Stat. §14.22. To save time, agencies often simultaneously publish a Notice of Intent to Adopt a Rule Without a Hearing and a Notice of Hearing if 25 or More Request a Hearing. This "dual notice" allows agencies to proceed immediately to hearing if one is necessary without starting the notification process over. The 1992 Legislature formally approved this strategy by codifying it into law. (*Minn. Laws* (1992) Ch. 494, sect. 9.)

Figure 1.5: Major Rulemaking Steps



[a]The comment period for emergency rules is 25 days and no hearing can be required.

Source: *Minn. Stat.* Ch.14.

We found that:

- **Eighty-one percent of Minnesota's rules (including emergency rules) reviewed in fiscal years 1991 and 1992 were adopted without a hearing.**

These are instances where the rule was not controversial (such as minor amendments to an existing rule), or where the controversies were worked out and interested parties reached agreement about the proposed rule. It is also possible that those who disagreed did not hear about the proposed rule in time to gather signatures and request a hearing. If a hearing is not requested, the agency has 180 days from the end of the comment period to adopt the rule or it is automatically withdrawn.[13]

A hearing was held in about 19 percent of the 1991 and 1992 rule proceedings, either because the agency expected controversy and proceeded directly to a hearing, or because 25 or more people requested a hearing. When a hearing is held, a Notice of Hearing must be mailed to interested parties and published in the *State Register* at least 30 days before the hearing. Hearings are conducted by an administrative law judge from the state's Office of Administrative Hearings, an independent agency not affiliated with the agency proposing the rule.[14] Administrative law judges are classified state employees appointed by the Chief Administrative Law Judge, who is appointed by the Governor and confirmed by the Senate for a six-year term.[15] There are currently 11 administrative law judges presiding over rule hearings and contested cases.[16]

The Legislature may authorize or require agencies to adopt emergency rules.[17] These rules follow the same procedure as rules adopted without a hearing, except that a statement of need and reasonableness is not required, the public comment period is only 25 days, the public cannot require the agency to hold a hearing, and the time allowed for review is expedited. Emergency rules remain in effect for up to six months, but the agency may extend them for another six months by notifying the interested parties and publishing the extension in the *State Register*.[18] Five percent of the rules reviewed in fiscal years 1991 and 1992 were emergency rules.

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13 *Minn. Stat.* §14.26.

14 *Minn. Stat.* §14.14, subds. 1a, 2, and 2a.

15 *Minn. Stat.* §14.48.

16 The office also includes "compensation judges" who preside over contested workers' compensation cases.

17 Agencies may also adopt emergency rules when directed by statute, federal law, or court order to adopt a rule in a manner that does not allow for compliance with normal rulemaking procedures. (*Minn Stat.* §14.29.) Both the House of Representatives and the Senate have rules requiring their Governmental Operations Committees to review bills granting emergency rulemaking authority. See House of Representatives Rule 5.10 and Senate Rule 35.

18 *Minn. Stat.* §14.35.

Rule Justification

Agencies must justify that proposed rules are needed and reasonable.

Before a permanent rule can be adopted, the agency must prepare a statement of need and reasonableness that justifies the proposed rules. The statement must be made available to the public and a copy sent to the Legislative Commission to Review Administrative Rules.[19] In addition, there are several special rulemaking requirements that agencies must satisfy. These requirements are listed in Figure 1.6. The statement of need and reasonableness must contain a discussion of the impact of the proposed rules on small business and a consideration of methods to reduce any adverse effects.[20] Similar statements are needed if the rule could have an adverse impact on agricultural land or if implementing the rule would cost local governments over $100,000.[21] The agency must also notify the chairs of the House Ways and Means Committee and the Senate Finance Committee and obtain approval from the Commissioner of Finance if the proposed rule establishes or modifies a fee.[22]

Figure 1.6: Additional Rulemaking Requirements

- Prepare a statement of the impact of the proposed rules on small business and the methods considered to reduce the impact.
- Prepare a statement discussing any adverse impact the proposed rule might have on agricultural land and notify the Commissioner of Agriculture.
- Prepare a statement estimating the costs to local government of implementing the rule if those costs will exceed $100,000.
- Notify the chairs of the House Ways and Means Committee and the Senate Finance Committee and obtain approval from the Commissioner of Finance if the proposed rule establishes or modifies a fee.
- Inform the Governor, the Legislative Commission to Review Administrative Rules, and other appropriate legislative committees if the agency fails to publish a Notice of Intent to Adopt a rule within 180 days of the passage of a law directing them to do so.
- Obtain the approval of the Revisor of Statutes that the rule is in the proper form.

Source: *Minn. Stat.*, Ch. 14.

Agencies must also inform the Governor, the Legislative Commission to Review Administrative Rules, and other appropriate legislative committees if they fail to adopt a rule within 180 days of the passage of a law directing them

19 *Minn. Stat.* §14.131.

20 *Minn. Stat.* §14.115.

21 *Minn. Stat.* §14.11.

22 *Minn. Stat.* §§14.1311, 14.235, 14.305, and 16A.128, subds. 1 and 2a.

to do so. The notice must include the reasons why the agency failed to meet the deadline.[23] Finally, no rule can be proposed or adopted unless the Revisor of Statutes approves its form.[24]

Review of Proposed Rules

Administrative law judges review rules on which a hearing has been held, and the Attorney General's Office reviews rules on which a hearing was not held.

Minnesota has two different review processes, depending on whether or not a hearing is held. If a hearing is held, the administrative law judge who presides over the hearing issues a written report, normally within 30 days after the close of the hearing record.[25] The administrative law judge's review is based on four main criteria: 1) Does the agency have the authority to adopt the rule? 2) Did the agency follow the procedural requirements of the APA in terms of issuing proper notice, allowing public comment, and filing required documents? 3) Is the rule that the agency proposes to adopt "substantially changed" from the proposed rule published in the *State Register*? and 4) Has the agency demonstrated that the rule is needed and reasonable?

If the administrative law judge finds that the procedural requirements were not met or that the rule was substantially changed (and the Chief Administrative Law Judge concurs), the agency must correct the deficiencies or the rule cannot be adopted.[26] If the administrative law judge finds that the agency did not establish the need and reasonableness of the proposed rule, and if the agency does not wish to follow the actions suggested by the Chief Administrative Law Judge to correct that defect, the agency can still adopt the rule but it must first submit the proposed rule to the Legislative Commission to Review Administrative Rules for non-binding advice and comment.[27]

For rules adopted without a hearing, the agency must submit the proposed rule to the Attorney General's Office, which has 14 days to approve or reject the rule (10 days for emergency rules). Three attorneys in the office's Public Finance Division are currently assigned part-time to the rule review function. These attorneys also represent state agencies involved in rulemaking, but the office does not assign the same attorneys to review rules that they helped draft.

The Attorney General's Office reviews the rule's legality and form, including the issue of substantial change, the agency's authority to adopt the rule, and whether the record demonstrates a rational basis for the need and reasonableness of the proposed rule. If the rule is disapproved, the Attorney General must state the reasons in writing and make recommendations to overcome the deficiencies. The rules cannot be filed until the deficiencies are overcome.[28]

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23 *Minn. Stat.* §14.19.

24 *Minn. Stat.* §§14.20, 14.28, and 14.36.

25 *Minn. Stat.* §§14.15, subd. 2, and 14.50.

26 *Minn. Stat.* §§14.15, subd. 3 and 14.16, subd. 2.

27 *Minn. Stat.* §14.15, subd. 4.

28 *Minn. Stat.* §14.26. In contrast to rules with a hearing, if the Attorney General finds that a rule is not needed and reasonable, the agency does not have the option to proceed after submitting the issue to the Legislative Commission to Review Administrative Rules.

Effective Date

If the administrative law judge or the Attorney General finds no defects, or if the agency corrects the defects in their review, the agency must obtain the Revisor's approval, file two copies with the Secretary of State, and publish a Notice of Adoption in the *State Register*.[29] A rule is effective five days after publication in the *State Register* unless a later date is specified in law or the rule itself.[30] Emergency rules are effective five days after approval by the Attorney General and must be published in the *State Register* as soon as practicable.[31]

Rules adopted by agencies specifically exempted from APA rulemaking requirements by *Minn. Stat.* §14.03, subds. 1 and 3 (see Figure 1.4) have the force and effect of law if the Revisor approves their form and the rule is filed with the Secretary of State and published in the *State Register*.[32] All other rules exempted from the rulemaking provisions of the APA that do not follow the above procedure still have the force and effect of law if a notice of the rule's adoption is published in the *State Register* and filed with the Secretary of State and the Legislative Commission to Review Administrative Rules. The notice must contain a copy of the rule or a description of its nature and effect and a citation to the statutory authority for the exemption.[33]

Other Review Mechanisms

Individuals may seek a declaratory judgment from the Court of Appeals to invalidate a rule if it appears that the rule threatens to impair their legal rights or privileges.[34] Alternatively, individuals may challenge agency actions that implement a rule on the basis that the underlying rule is invalid.

The Legislative Commission to Review Administrative Rules hears complaints about rules and may suspend a rule.

In addition to judicial review, the Legislative Commission to Review Administrative Rules, made up of five senators appointed by the Committee on Committees and five representatives appointed by the Speaker of the House, may hold public hearings to investigate complaints about rules. (If the complaints are about rules adopted without a hearing, the commission may request that the Office of Administrative Hearings hold one and prepare a report for the commission summarizing the testimony.) Based on the public hearing, the commission may suspend the rule and propose a bill at the next legislative session to repeal the rule. If the Legislature or the agency does not repeal the suspended rule, it becomes effective upon adjournment of the session. In practice, the commission has only suspended three rules since its creation in

29 *Minn. Stat.* §14.16, subds. 1, 3. For rules adopted without a hearing, the Attorney General files the two copies with the Secretary of State.

30 *Minn. Stat.* §14.18, subd. 1.

31 *Minn. Stat.* §§14.33, 14.34.

32 *Minn. Stat.* §14.38, subd. 7.

33 *Minn. Stat.* §3.846.

34 Minn. Stat. §14.44.

1974. The commission is also authorized to periodically review statutory exemptions to rulemaking and to make recommendations that promote adequate and proper rules and public understanding of rules. The commission may compel an agency to hold a public hearing on a commission recommendation.[35]

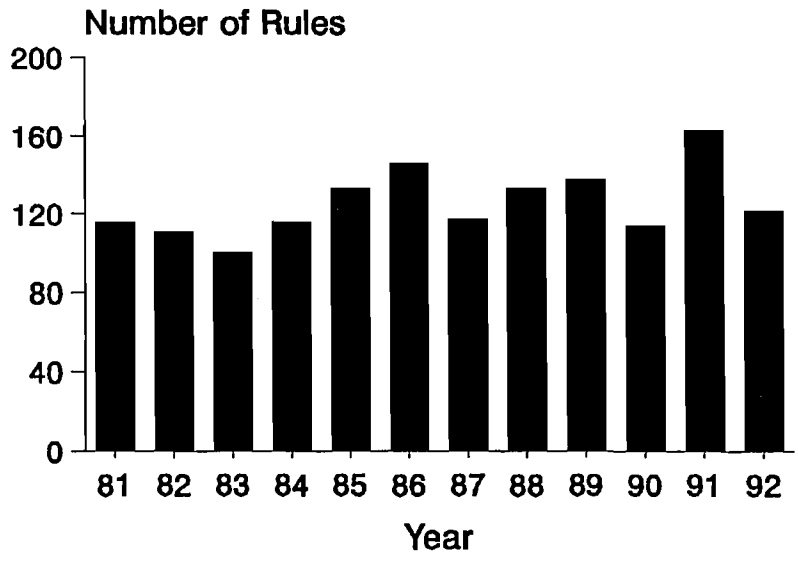
RULEMAKING TRENDS

There are about as many rules as there are statutes. As of 1991, there were 10 volumes of rules compiled and published by the Revisor of Statutes. These volumes divide the rules into 93 agencies and 502 chapters. Figure 1.7 shows the number of rules, including amendments and revisions, adopted each year since 1981. The figure shows that:

- **The number of rules adopted annually since 1981 has increased slightly.**

Between 1981 and 1992, state agencies have adopted an average of 126 rules per year.

Figure 1.7: Rules Adopted, FY 1981-92



Source: *State Register*, Revisor of Statutes.

Between fiscal years 1981 and 1992, there have been an average of 126 rules adopted per year. Although there have been year-to-year fluctuations, the general trend has been slightly upward through fiscal year 1991. In fiscal year 1992, however, there were only 122 rules adopted, down from 163 in fiscal

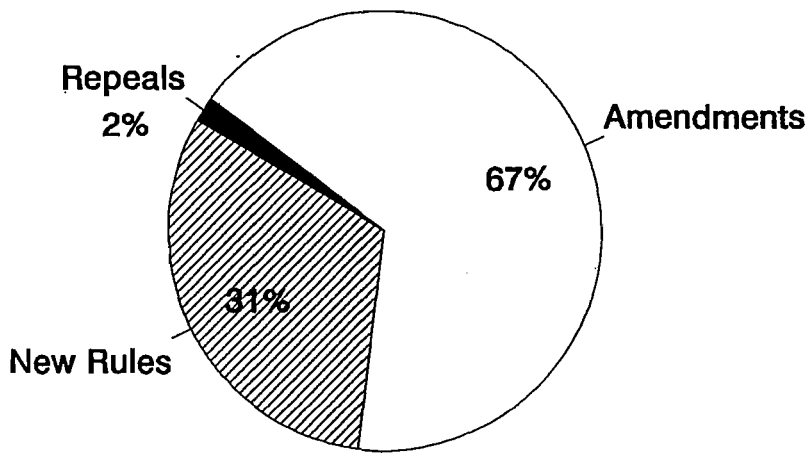
35 *Minn. Stat.* §§3.841, 3.842, 3.843.

year 1991. According to the Revisor of Statutes, agencies adopted 69 rules during the first half of fiscal year 1993 (an annual rate of 138 rules).[36]

As the Legislature enacts new programs, agencies not only have to adopt rules to implement those programs, but they have to amend existing rules to reflect legislative changes to existing programs as well as technological, economic, social, and other changes. As shown in Figure 1.8, of the 262 rulemaking actions in fiscal years 1991 and 1992, 82 (31 percent) were proposed new rules, 175 (67 percent) were amendments to existing rules, and five (two percent) were repeals of existing rules.

Most rulemaking actions are amendments to existing rules.

Figure 1.8: Types of Rulemaking Actions, FY 1991-92



Source: OLA analysis of Attorney General and Office of Administrative Hearings records.

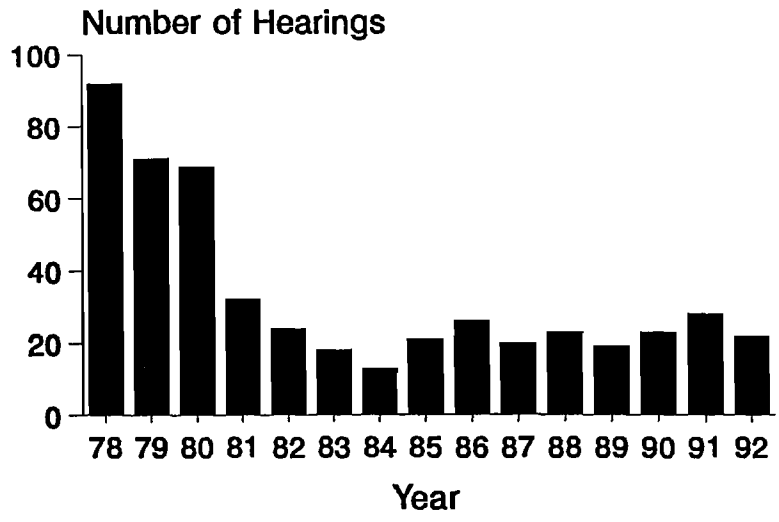
We found that:

- **The 1980 changes to the APA were successful in reducing the number of rule hearings.**

Figure 1.9 shows that the number of formal rule hearings declined dramatically after fiscal year 1980. In fiscal year 1978, there were 92 rule hearings, in 1980, there were 69 rule hearings, and since 1981, the Office of Administrative Hearings has held an average of 22 rule hearings per year.

36 These figures are influenced by the way agencies choose to group proposed rules. For example, an agency could propose to amend three sections of one chapter of existing rules in a single rule proceeding, or it could propose three separate rule changes.

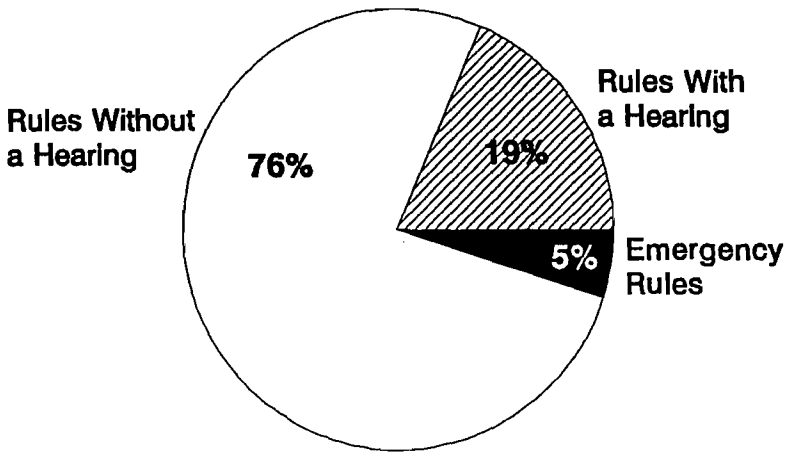
Figure 1.9: Rule Hearings, FY 1978-92



Source: Office of Administrative Hearings.

Most rules are adopted without a hearing.

Figure 1.10: Types of Rulemaking Proceedings, FY 1991-92



Source: OLA analysis of rules reviewed by the Attorney General's Office and the Office of Administrative Hearings.

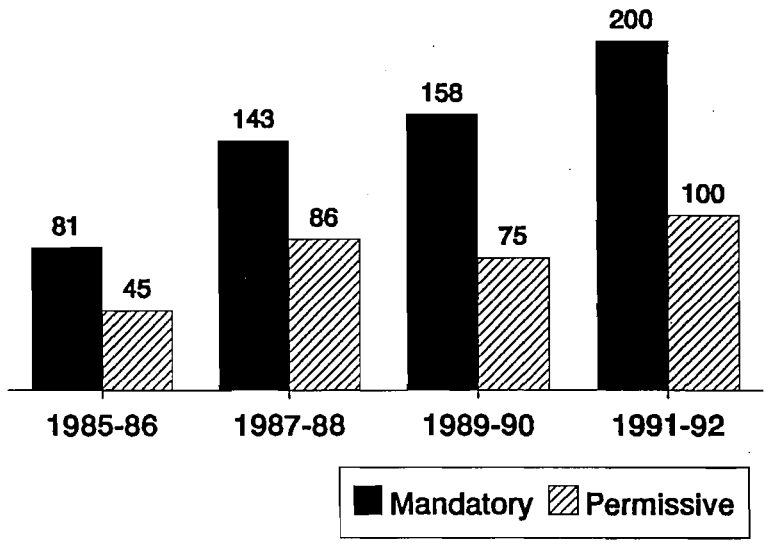
The preference to adopt rules without a hearing is also apparent from Figure 1.10, which shows that only 19 percent of the rulemaking proceedings in fiscal years 1991 and 1992 had hearings before an administrative law judge, while 76 percent were reviewed by the Attorney General without a hearing. Generally, emergency rules must be specifically authorized by the Legislature and they comprised only five percent of the rules reviewed in fiscal years 1991 and 1992.

Most rules are enacted in response to legislative mandates.

Most rules are enacted in response to legislative mandates or requirements. These come in the form of statutes that establish new programs and require (the agency "shall" or "must") or permit (the agency "may") agencies to adopt rules to implement and administer the program. Figure 1.11 shows that:

- **The number of rulemaking authorizations has increased since the 1985-86 legislative session and more are mandatory than permissive.**

Figure 1.11: Number of Legislative Rulemaking Grants, FY 1985-92



Source: Revisor of Statutes.

About 10 percent of the rulemaking actions in fiscal years 1991 and 1992 were prompted by changes in federal programs that required commensurate changes in state rules to remain in compliance and retain eligibilty for federal funds. These rules can generate controversy, however, when agencies propose rules that go beyond federal requirements.

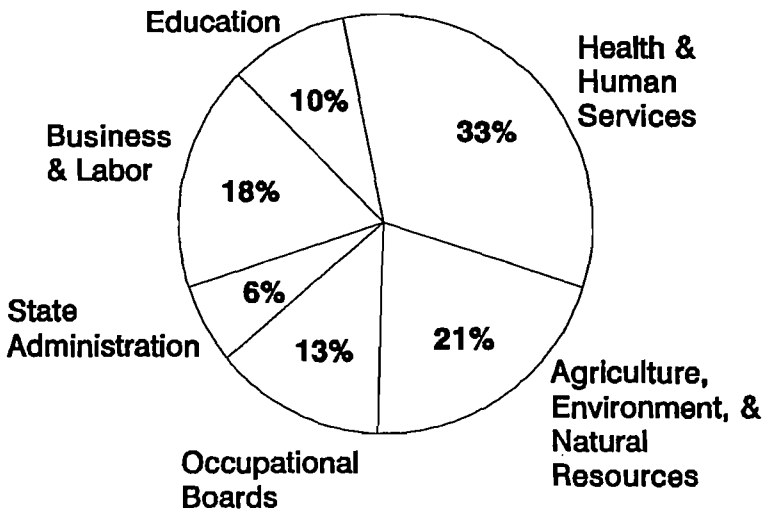
Some agencies have been given general rulemaking authority which in principle gives them discretion over when to make rules. A 1991 survey of state agencies undertaken by the Legislative Commission to Review Administrative Rules and a subsequent review of statutory rulemaking authority found that,

depending on the definition of "general," about 50 agencies have general rulemaking authority.[37] However, many of these were occupational licensing and other boards with limited responsibilities. Excluding occupational licensing boards, which we categorized separately, we found that agencies relied on their general rulemaking authority for 19 percent of the rules proposed in fiscal years 1991 and 1992.[38]

During fiscal years 1991 and 1992, a total of 56 agencies developed 262 rules that went through the formal APA process.[39] Some agencies adopt more rules than others. Figure 1.12 divides the 262 rules into six agency types. Health and human service agencies proposed almost one-third of the rules and agriculture and environment agencies proposed about one-fifth. Business and labor agencies proposed 18 percent of the rules, and occupational boards another 13 percent. Education and state administrative agencies (including constitutional offices) together accounted for the remaining 16 percent.

One-third of the rules proposed in 1991 and 1992 related to health and human services.

Figure 1.12: Rules Reviewed by Agency Type, FY 1991-92



Note: n=262 rules.

Source: OLA analysis of rules reviewed by the Attorney General's office and the Office of Administrative Hearings.

37 Legislative Commission to Review Administrative Rules, *General Rulemaking Authority Delegated to State Agencies* (January 1991).

38 Agencies which relied on general rulemaking authority included the Department of Agriculture, Department of Commerce, Higher Education Coordinating Board, Housing Finance Agency, Department of Jobs and Training, Department of Labor and Industry, Pollution Control Agency, Department of Public Safety, Public Utilities Commission, Department of Revenue, Department of Veterans Affairs, and Office of Waste Management. Some of these agencies also had specific authority for some of their rules.

39 A complete listing of the agencies is provided in Figure 2.2 in Chapter 2.

We found that:

- **Three agencies, the Pollution Control Agency (30 rules), the Department of Human Services (30 rules), and the Department of Health (27 rules), wrote substantially more rules than others.**

These agencies accounted for one-third of all the proposed rules and almost half of the rules that had a public hearing. They were also more likely than other agencies to adopt rules prompted by federal changes.

CRITERIA FOR EVALUATING RULEMAKING PROCEDURES

In the remainder of this report, we evaluate Minnesota's rulemaking procedures. We were guided in our conclusions and recommendations by the evaluation criteria listed below. These criteria form the basis for the "Model State Administrative Procedure Act" (Model APA) adopted by the National Conference of Commissioners on Uniform State Laws. At least 28 states (but not Minnesota) have based their rulemaking statutes on the Model APA. In 1981 revisions were made to the Model APA following a two-year study by the National Conference of Commissioners that examined the practice of state administrative rulemaking over the years. Arthur Bonfield, one of the foremost experts on state administrative rules, calls the Model Act's rulemaking and rule review provisions "superior to any statute now in effect or previously suggested as a model."[40] Therefore, it is reasonable to compare Minnesota's rulemaking procedures to both the Model APA and its underlying standards.

In this report, we evaluate Minnesota's APA on the basis of the following six criteria:

1. Rulemaking should be lawful.

This standard relates to the need for rulemaking to follow uniform procedures prescribed in statute. Agencies should maintain rulemaking records to verify that they complied with rulemaking statutes. Proposed agency rules should be reviewed to ensure that they are legally authorized and that appropriate administrative procedures were followed.

2. Agency rules should reflect the policies established by the Legislature.

Proposed rules should be reviewed to ensure that they are consistent with legislative intent. Existing rules should be reviewed and revised periodically to

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40 Bonfield, *State Administrative Rulemaking,* 16. For a critique of the Model APA, see Carl A. Auerbach, "Bonfield on State Administrative Rulemaking: A Critique," *Minnesota Law Review* (1987), 71:543-587. Although Auerbach criticizes some of the Model APA's provisions, he concedes that it is far superior to existing state administrative procedure acts.

ensure that they remain consistent with changes in public opinion and technologies. There should be a mechanism whereby the public can petition agencies to adopt, amend, or repeal a rule, and where the rules unacceptable to the general public and its elected representatives can be repealed.

3. Public participation should be encouraged.

There should be meaningful public input into agency rules. Persons affected by a proposed rule should receive timely notice before a rule is adopted and should be given the opportunity to be heard. The public should have sufficient opportunity to submit written comments and, in some circumstances, to demand oral proceedings.

4. Agency rules should be technically sound.

While no administrative procedure act can ensure this, procedural requirements can ensure that agencies solicit and incorporate advice on proposed rules and that they demonstrate that they give full consideration to the information and comments they receive before adopting a rule. Ultimately, agencies should be able to justify why the rules they adopt are needed and reasonable.

5. The rulemaking process should be flexible.

An administrative procedure act should provide a reasonable balance between the need for uniform rulemaking procedures and the need for flexibility. An administrative procedure act should protect the public from an agency's excessive use of discretion and abuse of power without binding the agency with a mass of minor details. It should provide sufficient flexibility to accommodate agencies with diverse missions, powers, structures, and finances, and provide alternatives for adopting rules under different circumstances.

6. The public should be generally satisfied with the rulemaking process.

Administrative procedures exist to ensure high quality rules and a responsible rulemaking process that encourages public participation. In judging Minnesota's rulemaking procedures according to these standards, we have looked both at the formal process set forth in statute and the actual experiences of state agencies and interested citizens who have participated in the rulemaking process. If existing procedures are achieving those purposes, participants in the rulemaking process, both interested members of the public and agency staff, should feel that the process is equitable and fair. Therefore, systematically obtaining their opinions is a valid measure of the adequacy of current procedures.

Agency Perspective on Rulemaking

CHAPTER 2

State agencies conduct rulemaking at the specific direction of the Legislature or as a consequence of their responsibility to administer state programs. In this chapter, we provide information about the time and costs associated with the administrative rulemaking process. We also look at the Administrative Procedure Act (APA) and rulemaking from the agency point of view. We answer the following research questions:

- **How long does the rulemaking process take? Why does it take longer to adopt some rules? To what extent are APA requirements the source of rulemaking delays?**

- **What does it cost to adopt rules? Why do some rules cost more than others?**

- **How do agency staff who write rules perceive and interpret the requirements of the Administrative Procedure Act? What kinds of problems do agencies encounter with the APA and with rulemaking in general?**

We relied primarily on two sets of data to answer these research questions. First, we collected data from files of the Attorney General's Office and from reports of administrative law judges in the Office of Administrative Hearings for all rules reviewed by these offices during fiscal years 1991 and 1992. From these files, which covered 262 rules, we learned about the types of rules adopted and which agencies adopted them. We also learned how long the formal APA process took for each rule and what problems the agency experienced.

Figure 2.1 shows the types of rules agencies adopt, which we categorized in order to simplify our analysis and discussion. Figure 2.2 lists the agencies that adopted rules during the time period covered in our study, and the number of rules they adopted. The Department of Health, Department of Human Services, and the Pollution Control Agency are listed separately, because they adopt many more rules than do other agencies.

Figure 2.1: Rule Categories

Occupational Licensing: the development of standards that govern individuals engaged in a particular profession. Designed to protect the health and safety of the general public when it uses these services.

Facility Regulation: the development of standards that a facility must follow when it provides services to certain groups. Designed to protect the health and safety of the groups, often vulnerable persons, who use the facilities.

Regulation of Industries: designed to protect the health and safety of the general public, e.g. environmental protection regulations.

Economic Regulation: designed to ensure fair trade, business, or campaign practices.

Fees and Fines: usually required to recoup the costs of services.

Benefits and Services: designed to determine who receives benefits or services, and in what amount, by laying out eligibility criteria.

Procedural Rules: define the procedures an agency will follow as they impact the general public.

Next, we selected a 20 percent sample of these rules (54 rules adopted by 31 agencies) for in-depth review.[1] We sent a questionnaire to the agency staff member responsible for each rule, and followed up with a telephone interview. From these interviews, we gained more information about why each rule was adopted, how the agency involved the public, the level and nature of any controversy surrounding the rule, and the cost of adopting the rule. A discussion of sampling methods and a copy of the interview form are contained in Appendix A.

Finally, we conducted personal interviews with rule-writing staff of the Departments of Health and Human Services and the Pollution Control Agency. We also interviewed staff in the Attorney General's Office, Office of Administrative Hearings, Revisor's Office, and the Legislative Commission to Review Administrative Rules, as well as other knowledgeable people.

On average, it takes about 16 months to adopt a rule.

As shown in this chapter, on average it takes about 16 months to adopt a rule from the time an agency begins drafting until the rule becomes effective, with most of that time spent drafting the rule. We found that APA requirements are not the source of most rulemaking delays. Instead, rules are usually delayed because there is controversy about their provisions and affected parties differ over their proposed content. By encouraging agencies to negotiate with those

1 We compared the sample to the total population of rules (n=262) and found no significant differences on major variables. We conclude that the sample is adequately representative. See Appendix A for a complete discussion.

Figure 2.2: Agency Categories and Number of Rules Adopted, FY 1991-92

Agency Category	Number of Rules
Department of Human Services	30
Department of Health	27
Other Health and Safety Agencies	
Department of Corrections	1
Emergency Response Commission	1
Hazardous Substance Injury Compensation Board	1
Housing Finance Agency	10
Department of Public Safety	13
Department of Veterans Affairs	3
Pollution Control Agency	30
Other Agriculture and Environmental Agencies	
Department of Agriculture	8
Board of Animal Health	1
Environmental Quality Board	3
Department of Natural Resources	4
Petrofund	1
Waste Management Board	6
Board of Water and Soil Resources	1
Occupational Licensing Boards	
Board of Abstractors	1
Board of Assessors	1
Board of Chiropractic Examiners	8
Board of Dentistry	2
Board of Electricity	4
Marriage and Family Therapy Board	2
Board of Medical Examiners	4
Board of Nursing	3
Board of Examiners for Nursing Home Administrators	1
Board of Pharmacy	2
Board of Podiatry	1
Private Detectives Board	1
Board of Psychology	2
Board of Social Work	1
Board of Teaching	2
Education Agencies	
Arts Board	1
Board of Education/Department of Education	3
Higher Education Coordinating Board	9
Board of Vocational Education	12
Business and Labor	
Commerce Department	6
Gambling Control Board	1
Department of Jobs and Training	6
Department of Labor and Industry	8
Public Utilities Commission	4
Racing Commission	5
Department of Revenue	5
Department of Public Service	6
Department of Trade and Economic Development	1
Department of Transportation	3
Transportation Regulation Board	1
State Administrative and Constitutional Offices	
Department of Administration	2
Office of Administrative Hearings	1
Department of Employee Relations	1
Ethical Practices Board	1
Bureau of Mediation Services	3
Public Employee Retirement Board	2
Secretary of State	6
Total	262

affected by rules, current APA provisions may indirectly prolong the rulemaking process for the most controversial rules. We also found that agency staff believe that public participation in rulemaking generally improves rules, but staff dislike the many procedural details and requirements that have been added to the APA over the years.

TIME TO ADOPT RULES

To determine how long it takes to adopt rules, we looked at three different measures. First, we determined the amount of time the APA requires agencies to spend on rulemaking, including time for public notice and comment, rule review, and lead time for publishing notices in the *State Register*. Second, because agencies typically take longer than the minimum amount of time, we calculated how long it actually took for agencies to go through the formal APA process, from the date of publishing the proposed rule in the *State Register* to the date the rule became effective. We refer to the difference between the minimum APA-mandated time and the actual time it took staff to complete the formal process as "additional APA time." Finally, agency staff told us that the first step in rulemaking is drafting the rule, and agencies often involve interested parties in the process of rule development. Therefore, for the 54 rules in our sample, we asked agency staff when work on the particular rule had actually begun. Then we calculated the total actual time it took to draft the rules and have them adopted.

We estimate that:

- **For all rules that went through the process during fiscal years 1991 and 1992, it took an average of about 16 months from the time agency staff started working on a rule until it became effective.**

There is no historical information available, so we do not know if rulemaking today takes more or less time than in the past. However, rulemaking in Minnesota apparently takes longer than it does in Virginia and Pennsylvania, where rulemaking has been studied recently. In Virginia, the rulemaking process takes an average of 12.4 months from the beginning of rule-drafting to effective date, while it takes 11.1 months in Pennsylvania.[2] Nevertheless, these results suggest to us that rulemaking is likely to be a time-consuming process, regardless of the context or procedural requirements that apply.

APA-Mandated Timeframes

The APA provides for three alternative rulemaking processes, and each imposes different time requirements on agencies. These time requirements and the procedural steps associated with them are outlined in Figure 2.3. As

2 "Staff Briefing to the Joint Legislative Audit and Review Commission Subcommittee on the Virginia Administrative Process Act (VAPA)," June 8, 1992; Independent Regulatory Review Commission, *1991 Annual Report* (Harrisburg, Pennsylvania), 3-B.

Figure 2.3: Time Requirements of the Administrative Procedure Act

	Steps	Without Public Hearing: Emergency	Without Public Hearing: Permanent	With Public Hearing
1.	Publish notice of intent to solicit outside opinion, if needed	1 week	1 week	1 week
2.	Prepare Statement of Need and Reasonableness	NA	before intent to adopt	before order for publication
3.	Submit rules to Revisor's Office	1 week	1 week	1 week
4.	File description of proceeding and request assignment of administrative law judge	NA	NA	10 days
5.	File documents with chief administrative law judge, schedule hearing, have notice approved	NA	NA	10 days
6.	Publish notice of hearing or intent to adopt	2 weeks	2 weeks	2 weeks
7.	Notify mailing list	25-day wait	30-day wait	30-day wait
8.	Submit modifications to Revisor's Office	3 days	3 days	NA
9.	Submit adopted rules to Attorney General's Office for approval	10th working day	2 weeks	NA
10.	File remaining documents with administrative law judge	NA	NA	25 days before hearing
11.	Appear at hearing	NA	NA	usually 1 day
12.	Record open for comments	NA	NA	usually 20 days
13.	Agency responds to comments	NA	NA	within 5 days
14.	Administrative law judge completes report	NA	NA	30 days
15.	Agency adopts rules	NA	NA	5 days
16.	Submit adopted rules to Revisor for approval	NA	NA	3 days
17.	Submit approved rules to Secretary of State	no deadline	"promptly"	no deadline
18.	Revisor prepares notice of adoption	2 days	2 days	2 days
19.	Submit notice of adoption to *State Register*	1 week	2 weeks	2 weeks
20.	Rule becomes effective	5 working days after A.G. approval	5 working days after publication in *State Register*	5 working days after publication in *State Register*
	Total time imposed by APA requirements:	2.6 months	3.2 months	5.3 months

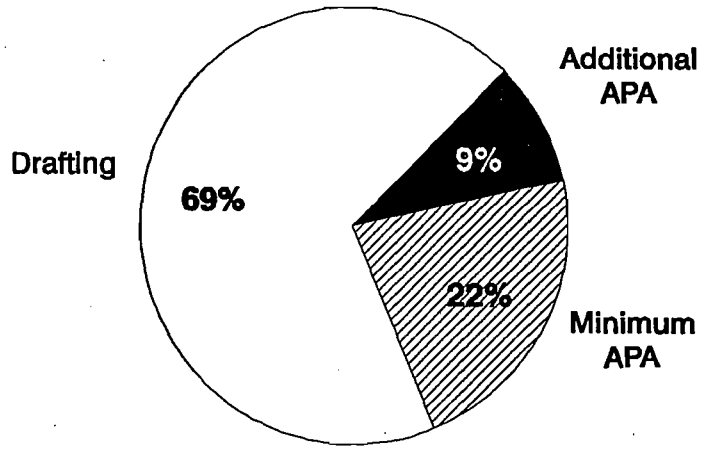
Source: *Minn. Stat.* Ch. 14.

shown, when a public hearing is required, it takes a minimum of 5.3 months for an agency to go through the steps required by the APA. Even an emergency rule takes a minimum of 2.6 months, while rules without a hearing require a minimum of 3.2 months.[3]

Meanwhile, Figure 2.4 illustrates the average proportion of time spent on various aspects of rulemaking for rules reviewed during 1991 and 1992. We found that:

- **Rulemaking is a lengthy process principally due to the demands of rule drafting, not because of the procedural requirements of the APA.**

Figure 2.4: Proportion of Time Spent on Components of Rulemaking



Note: n=257 rules.

Source: OLA analysis of information from Attorney General and Office of Administrative Hearings files, and agency staff survey responses.

On average, almost 70 percent of the time it takes to adopt a rule is spent on drafting.

As Figure 2.4 shows, for all rules, almost 70 percent of the total amount of time it takes to adopt a rule, on average, is spent on drafting before the rule is first published with a request for public comments.

Although we cannot compare current total rulemaking time to previous years, we do have data for prior time periods for how long the formal process took. We define the formal process as the time period from publishing the proposed rule or notice of public hearing in the *State Register* to the date the rule becomes effective.

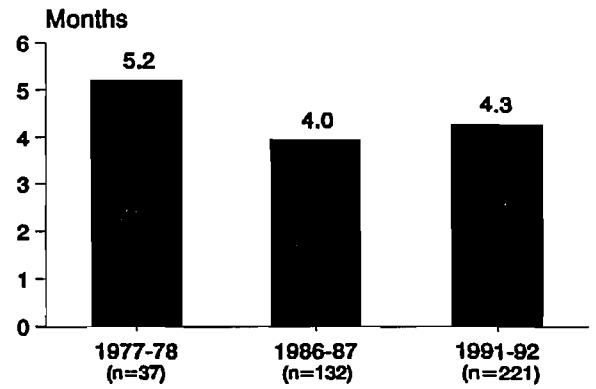
3 The rules included in our analysis were adopted prior to the "dual notice" provision enacted by the 1992 Legislature taking effect, although some agencies had been using this procedure anyway. The Legislature's action reflected actual agency practice, which was permissible under the APA.

As shown in Figure 2.5:

- **For most rules, it takes slightly less time now to move through the formal rulemaking process than it did prior to 1980 when the APA was substantially changed.**

- **However, the median rulemaking time has increased slightly since 1985.**

Figure 2.5: Comparison of Median Time from Notice of Intent to Effective Date for Three Time Periods



Note: All analyses exclude emergency rules and rules withdrawn and resubmitted. Data for 1977-78 covers one year (August 1, 1977, to August 1, 1978), while data from 1986-87 and 1991-92 each covers two fiscal years.

Source: OLA analysis of data from LCRAR, House Research, Attorney General's Office, Revisor's Office, and Office of Administrative Hearings reports.

For all rules that went through rulemaking during fiscal years 1991 and 1992, the median time from when the proposed rule was published in the *State Register* with a request for comments (or notice of public hearing) until it became effective was 4.3 months. This compares to a median time of 5.2 months in 1977-78, and 4.0 months in 1986-87.[4] As discussed in Chapter 1, prior to 1980, public hearings were held on all rules, while a public hearing was held on only 19 percent of the rules during 1991-92. These results suggest that creating separate rulemaking tracks may have shortened slightly the overall length of the formal, APA-mandated process.

However, we do not know what effect these changes, which encourage agencies to negotiate with interested parties before proposing a rule, have had on total rulemaking time. Earlier studies did not measure the time spent drafting

4 Legislative Commission to Review Administrative Rules, "Report on Rule Promulgation Time Under the 1977 Administrative Procedure (A.P.A.) Act Amendments," August 14, 1978; House Research, "State Agency Rulemaking Activity, July 1985-June 1987," (October 1987).

a rule. It is possible that agencies are spending more time negotiating rules during the drafting phase than they used to.[5]

We also found that:

- **There is considerable variation in the amount of time it takes agencies to complete the formal rulemaking process.**

Table 2.1 shows the minimum and maximum number of months from the first published notice of intent to adopt a rule to the rule's effective date for the three different rulemaking processes. As this table shows, rules reviewed during 1991 and 1992 took from as few as 2.3 months to just over 40 months to complete the formal process, which does not including drafting time. Also, the average rulemaking time is greater than the median, which is the point at which half of the rules have completed the process, because of a few rules that take much longer than all of the others. Thus, half of all rules were adopted within 4.1 months, and 75 percent within 6.0 months.

Rules reviewed during 1991 and 1992 took from 2.3 months to over 40 months to complete the formal APA process.

Table 2.1: Months from Notice of Intent to Adopt to Effective Date of Rule, FY 1991-92

	With Public Hearing (n=46)	Without Hearing Permanent (n=198)	Without Hearing Emergency (n=13)	All Rules (n=257)
Minimum	3.0	2.5	2.3	2.3
Median	6.6	4.0	2.5	4.1
Average	7.1	4.8	2.7	5.1
Maximum	16.3	40.1	3.9	40.1

Source: OLA analysis of Attorney General and Office of Administrative Hearings files.

This table also shows that:

- **The emergency rulemaking process takes much less time to complete, but it is rarely used.**

Agency staff generally prefer not to use emergency rulemaking procedures.

The APA provides for an "emergency rule" process, and grants agencies the authority to use it under certain circumstances.[6] The process was intended to shorten the time needed to adopt some rules. Of the 257 rules that were reviewed and became effective during fiscal years 1991 and 1992, only 13 (5 percent) were emergency rules. These 13 rules went through the formal rulemaking process in an average of 2.7 months, which is about half the average time for all rules (5.1 months). In discussions with agency staff, we learned that they generally prefer not to use the emergency procedures, and rarely ask the Legislature for permission to do so. Staff told us that the timeframe for adopting emergency rules is too short, so the rules adopted may be of inferior

5 We identified 19 rules during fiscal years 1991 and 1992 where the Legislature specified a date in statute for completion of rulemaking. Agency compliance with date-specific legislation is discussed in Chapter 4.

6 *Minn. Stat.* §14.29, subd. 1.

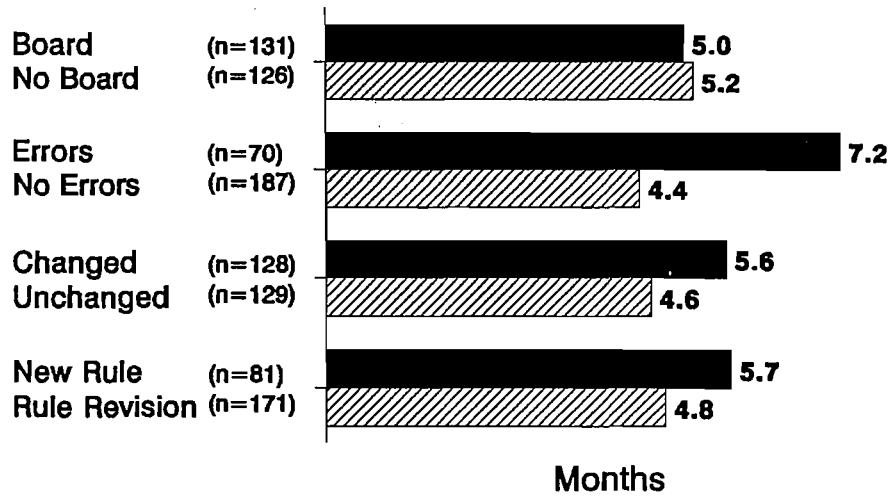
quality. In addition, because emergency rules may be in effect only 180 days (with a possible extension of another 180 days), agencies say they must begin work on permanent rules at the same time anyway. Staff believe that going through the rulemaking process twice for the same rule is inefficient.

Variation in Formal Rulemaking Timeframes

We looked at a number of factors that might explain why some rules take longer than others to adopt, including agency type, type and status of the rule, whether a board or commission was involved, whether the rule was changed, and whether errors were made. Figure 2.6 shows the differences in average time to adopt rules under various circumstances. First, we found that:

- **New rules and rules that are modified after being published take longer to adopt than rule amendments and rules that are adopted as proposed.**

Figure 2.6: Average Adoption Time from Notice of Intent to Effective Date for Different Rules



Source: OLA analysis of Attorney General and Office of Administrative Hearings files.

When errors were made, the formal process took almost three months longer.

New rules take an average of 5.7 months to go through formal rulemaking, while rule amendments take 4.8 months. Similarly, rules that are changed between the time they are proposed and become effective take 5.6 months to go through the formal process, compared to 4.6 months for unchanged rules.

We also found that:

- **If errors are made, it takes over 50 percent longer to complete the formal rulemaking process.**

There was at least one procedural error, such as an agency's failing to submit documents on time or inadvertently allowing a 29-day comment period instead of the required 30-day period, in 28 percent of the rules reviewed during fiscal years 1991 and 1992. As Figure 2.6 shows, rules without errors took 4.4 months to complete the formal rulemaking process, compared to 7.2 months for rules with one or more errors.

As explained in Chapter 1, the APA places special requirements, such as fiscal notes or small business impact statements, on some rules. Over 60 percent of the rules in our data set had at least one special requirement to fulfill. We speculated that fulfilling those requirements might increase the probability of error or add directly to the time required to adopt a rule. However, we found:

- **The number and kind of special APA requirements that apply to a rule are unrelated to how long the formal rulemaking process takes.**

In addition, several agency staff told us that boards or commissions add to rulemaking time because formal approval is required twice during the process, so staff must wait for a meeting date and arrange to be on the agenda. However, as shown in Figure 2.6:

- **Rules that require board or commission approval do not take longer to adopt than rules not requiring such approval.**

Variation in Total Rulemaking Time

As discussed above, the bulk of rulemaking time is spent drafting the rule, not meeting formal APA requirements. Interested members of the public frequently participate during the rule-drafting phase. Hence, we also looked at why some rules take considerably longer than others to complete the full rulemaking process, that is, from the time staff began working on a rule until it became effective. In general, we found that:

- **Rules that require a public hearing take nearly twice as long as those without a hearing primarily because they involve more controversy.**

The most controversial rules are the ones likely to require a public hearing.

By providing separate rulemaking tracks, Minnesota's APA encourages agencies to negotiate rules in order to avoid the time and expense of a public hearing. Hence, the most controversial rules are the ones likely to need a public hearing. In addition, agencies are required by the APA to publish a notice to solicit outside opinions in the *State Register* if the agency intends to confer with anyone outside the agency about a rule it is drafting.[7] This notice, published in 62 percent of the rules reviewed during fiscal years 1991 and 1992, may indicate that the agency suspects a rule will generate some controversy.

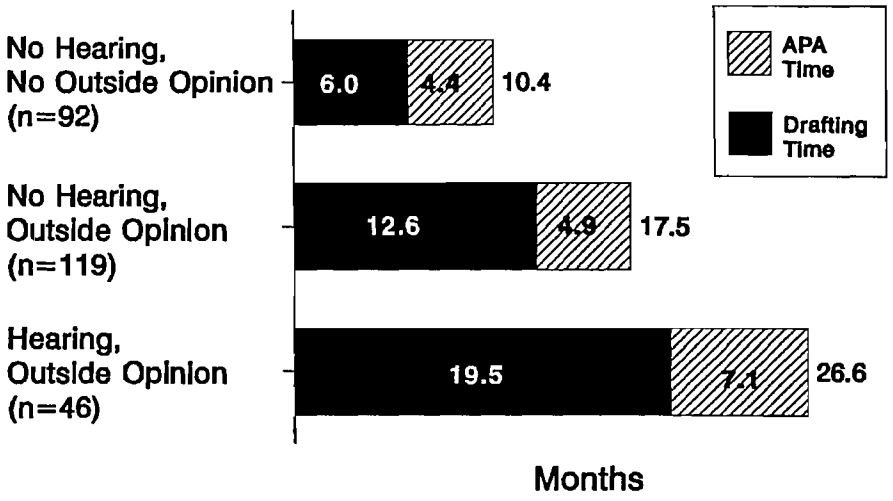
7 *Minn. Stat.* § 14.10.

As illustrated in Figures 2.7, 2.8 and 2.9, we found:

- **On average, rules that require a public hearing take over two years to adopt, while rules that do not require a hearing take about 14 months. These rules take 17 and one-half months if outside opinions are sought, and just over 10 months if opinions are not sought.**

Rules without a public hearing took an average of 14 months to adopt.

Figure 2.7: Average Drafting and APA-Required Time, FY 1991-92



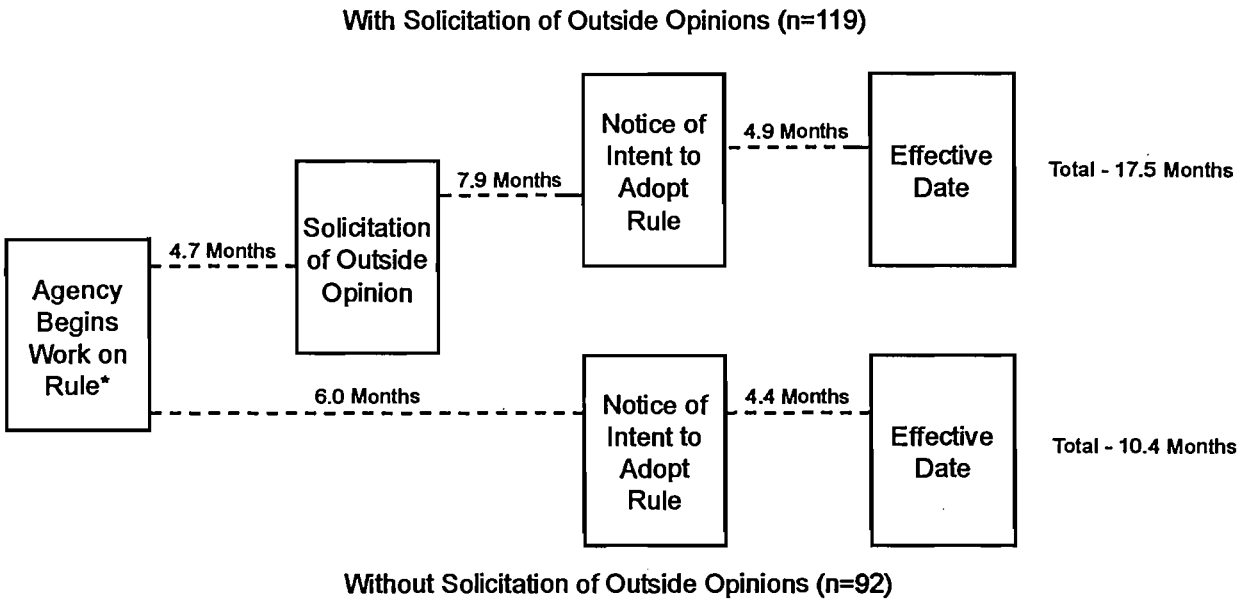
Source: OLA analysis of information from Attorney General and Office of Administrative Hearings files, and agency staff survey responses.

For the 46 rules during fiscal years 1991-92 that required a public hearing, we estimate that it took an average of 26.6 months from the time the agency began work on the rule until it became effective. This average is influenced by the fact that a few rules requiring a hearing have taken up to 13 years to adopt. If the three extreme cases are removed, the average time to adopt a rule with a hearing drops to just over 21 months. In contrast, rules without a public hearing, but where a notice to solicit outside opinion was published, took an average of 17.5 months. The least controversial rules--those without a hearing and without an outside solicitation notice--took the least amount of time, just over 10 months. The longest rule without a hearing took three and one-third years to adopt.

Public hearings were held on 19 percent of all rules, and these rules took an average of 27 months to adopt.

The three figures also show that most of the difference is associated with the rule-drafting phase, which comprises 19.5 months for rules with a hearing, 12.6 months for rules without a hearing but with outside solicitation, and 6.0 months for rules without a hearing and no outside solicitation.

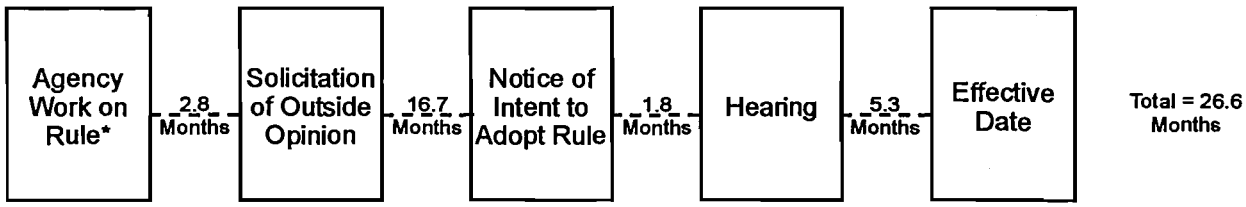
Figure 2.8: Average Time to Adopt Rules Without a Hearing, FY 1991-92



*Note: The date an agency first began to work on a rule was obtained only for those rules included in our sample survey.

Source: OLA analysis of information from Attorney General files and survey responses.

Figure 2.9: Average Time to Adopt Rules With a Public Hearing, FY 1991-92 (n=46)



*Note: The date an agency first began to work on a rule was obtained only for those rules included in our sample survey.

Source: OLA analysis of information from Office of Administrative Hearings files and survey responses.

Table 2.2 shows the types of rules which were more likely to require a public hearing. In general, rules with a public hearing are more likely to regulate industries, influence health or safety, involve multiple competing interests, impose large costs on regulated entities, or involve highly technical issues. Also, new rules were more likely to require a public hearing than rule amendments (27 percent of new rules compared to 15 percent of amended rules). No rule repeals required a public hearing.

Table 2.2: Rules Adopted With and Without Public Hearing by Type of Rule, FY 1991-92

Type of Rule	Percent With Public Hearing	Percent Without Hearing
Regulation of Industries (n=48)	33.3%	66.7%
Economic Regulation (n=27)	25.9	74.1
Facility Regulation (n=19)	15.8	84.2
Occupational Licensing (n=43)	16.3	83.7
Fees and Fines (n=25)	16.0	84.0
Benefits and Services (n=69)	15.9	84.1
Procedural Rules (n=26)	3.8	96.2
Total (n=257)	18.6%	81.4%

Source: OLA analysis of Attorney General's Office and Office of Administrative Hearings files.

Sources of Rulemaking Delays

During our interviews with agency staff, we asked about the sources of delays in the rulemaking process for the 54 sampled rules. We found that, in the opinions of agency staff:

- **Delays in rulemaking are more likely to be caused by insufficient staff, vague or ambiguous legislation, or controversies associated with the rule, than by the formal APA process.**

Most agencies do not have full-time rule-writing staff.

Apart from exempt agencies, formal rulemaking is required for all new rules, revisions to existing rules, and rule repeals. Most agencies do not have full-time rule writers, and rules are drafted by program staff who have other responsibilities in addition to writing rules.[8] According to staff we interviewed, most agencies do not have enough staff to complete all of the rule writing expected of them. Hence, they must prioritize their rulemaking activities along with their other responsibilities, which may include program management and rule enforcement. Sometimes staff working on a particular rule are reassigned to other tasks, and months will go by before they return to working on it.

8 The agencies in our sample with full-time rule writers include: the Departments of Human Services, Health, Public Safety, and Revenue, the Pollution Control Agency, Office of Waste Management, Public Utilities Commission, and the Veterans Home Board.

Rules implementing controversial laws take longer to adopt.

Staff also told us that ambiguous or incomplete legislation also results in rulemaking taking a long time, particularly if the law requiring the rule was itself controversial. According to agency staff, although the Legislature may use vague language or omit details to achieve consensus in passing a law, unresolved conflicts often re-emerge during rulemaking. As one agency staff member put it, "Rules implementing controversial legislation force agencies to come under attack from the same interest groups who lost in the legislative process." Finally, according to staff, rulemaking is more difficult and takes longer if rapid changes are occurring in the regulated field or industry.

Several examples illustrate these points. The Department of Health rule governing health maintenance organizations took about five years to adopt. The department knew the rule would be controversial, and it wanted to resolve any conflicts it could prior to a public hearing. Therefore, drafts of the proposed rule were widely circulated in 1989 and again in 1991. Only one part of the proposed rule was specifically required by the Legislature. The rest consisted of revisions to the existing rule that the department wanted. Thus, there was little urgency, and the department felt comfortable taking as long as necessary to elicit public comment, in an effort to "get it right the first time."

Another Department of Health rule, regulating home health care, took five and one-half years after its legislation was passed in 1987. The law itself was controversial and passed only after several years of debate. According to staff, parts of the legislation were "ambiguous" and overlapped with existing Department of Human Services rules. Another difficulty was that the home health care industry was new when the legislation passed, and grew rapidly afterward. The regulated industry, which was made up of small businesses in 1987, now includes some very large providers, which may need to be regulated differently. The department created an advisory group, which met over 18 months, and held public meetings to gain widespread input. The proposed rule eventually required two public hearings before an administrative law judge. After the first public hearing, the department returned to the Legislature in 1992 and asked for clarification on some issues.

The Board of Dentistry rule regarding the administration of anesthesia took about six years to adopt. Again, this was a very controversial rule, with the controversy centering on which classes of dental workers would be licensed to administer various types of anesthetics. In attempting to satisfy interested parties, the board solicited outside comment, held open forums, informational meetings, and public meetings over the first three years of the six-year period, and continued internal discussions over the last three years.

The longest process was the Public Utilities Commission rule regarding telephone filing requirements, which covered 13 years from start to finish. This rule was also controversial, with potentially large economic costs to the regulated industry. In addition, a number of other events caused delays in adopting the rule. Most important, near the beginning of the process, the telephone industry underwent great change, including the divestiture of AT&T in 1984. Two other times, in 1987 and 1989, the Minnesota Legislature enacted major

changes to the statutes regulating telephone services. And finally, the Commission experienced higher than normal staff turnover in the early years of the process, which contributed to the delay.

These scenarios suggest that some rules take a long time to adopt because rulemaking may involve conflicting interests, contentious groups, and a need to balance opposing forces. In other words, rulemaking is often more than a technical process of clarifying existing legislation. It is often a political process (not unlike the legislative process of which it is an extension) where conflicts must be resolved, and there are no time limits during the rule-drafting process for doing so.

Rulemaking is often a political process where conflicts must be resolved.

FINANCIAL COSTS OF RULEMAKING

Because agencies do not keep detailed accounting records on rulemaking, we could only estimate how much rulemaking costs.[9] Our estimates are based on interviews with agency staff. Of the 54 rules we asked about, respondents were able to give us at least some cost data about 50 of them. Although some respondents were able to provide accurate data, most gave estimates, especially for staff salaries and fringe benefits. We asked about the quality of the estimates, however, and most respondents provided a reasoned basis for them. For example, they knew when rulemaking began and ended, who worked on it and how much they earned, and approximate proportions of time spent.[10] We were able to estimate other costs fairly accurately because most were standard items with known billing rates (e.g., cost per page of publishing in the *State Register*, hourly billing rates of the Attorney General's Office and the Office of Administrative Hearings).

Based on our staff interviews, we estimate that:

- **The average rule costs about $26,500 to adopt, with most of that--nearly 80 percent--spent on agency staff salaries and benefits.**

We estimate that rulemaking costs about $3.4 million per year.

However, as with rulemaking time:

- **There is considerable variation in rulemaking costs, ranging from about $1,300 to $325,000 for the rules in our sample.**[11]

The average cost of a rule is skewed by the few rules that are very costly. Hence, 50 percent of the rules in our sample cost $8,700 or less, and two-thirds cost less than $15,000. Based on the average cost per rule and the number of rules adopted, we can estimate that the total cost of rulemaking in

9 The Department of Human Services rulewriting unit does estimate, for its own use, the cost of adopting rules of various sizes. We adapted some of their calculations for this study. However, DHS rules are not necessarily typical of other agencies, because they take longer to adopt and are more controversial than average.

10 The average cost for salaries and fringe benefits--$22 per hour or about $45,800 per year--appears reasonable given the range of staff (commissioners, lawyers, program staff, and clerks) involved in rulemaking.

11 The $325,000 figure was based on actual cost data.

fiscal years 1991 and 1992 was about $6.5 to $7 million, or about $3.4 million annually.

Table 2.3 shows the average costs of various components of rulemaking for rules with and without a hearing. As this table shows:

- **We estimate that rules that require a public hearing may cost as much as four times more than rules without a public hearing.**

Table 2.3: Average Costs of Rulemaking by Type of Process

Cost Component	With Public Hearing (n=10)	Without Hearing (n=40)	All Rules (n=50)
Salary and Benefits	$53,773	$12,876	$21,055
Attorney General Fees	4,307	1,328	1,924
Office of Administrative Hearings Fees	8,686[1]	50	1,777
Task Force	372	109	161
Publications	959	766	804
Other Costs	1,023	814	856
Total Costs	$69,120	$15,942	$26,577

[1]The Office of Administrative Hearings computed an average amount billed to agencies of $3,960 for 1991. The average cost in our sample is considerably higher because the sample included some very high-cost cases. For example, the Department of Employee Relations was billed more than $21,000 for costs associated with its Pay Equity Rule.

Source: OLA survey of agency rulemaking staff; information from Attorney General, Office of Administrative Hearings, and the Revisor's Office.

Most of the difference in cost between rules with a public hearing and those without is due to staff costs.

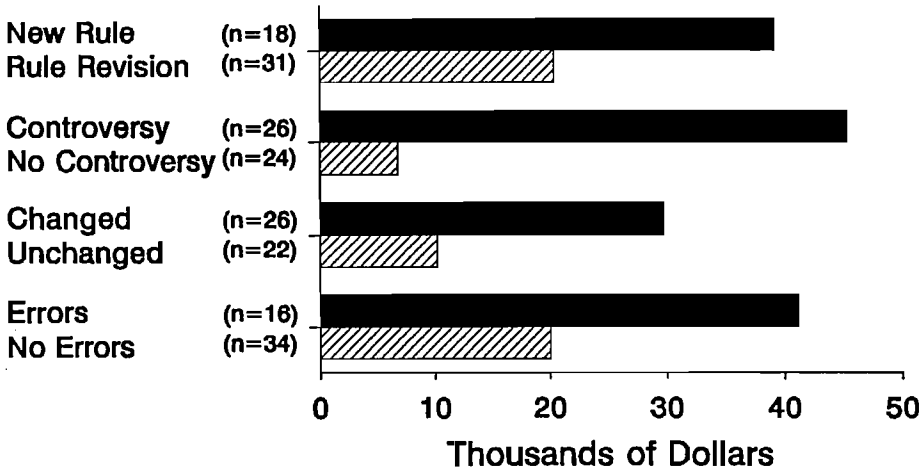
Most of the difference is due to the additional staff costs, since the estimated average number of staff hours spent on rules with a hearing is 2,490, compared to 574 hours for rules without a hearing. Our estimate for the costs associated with the Office of Administrative Hearings is higher than the actual average amount agencies were billed in 1991 ($3,960) because our sample included two rules that required more than one hearing. Since the number of rules with public hearings is small (20 to 25 per year) and hearing costs are highly variable, it is difficult to obtain reliable estimates of this cost component from a sample of rules.

This analysis suggests that some rules cost more than others to adopt for the same reason that some rules take longer than others:

- **The amount of controversy involved appears to be the main reason some rules are more costly than others.**

As illustrated in Figure 2.10, all other indicators of rule controversy show a similar relationship with cost as with total rulemaking time. It costs more:

Figure 2.10: Average Rulemaking Costs for Different Rules



Source: OLA analysis of sample of 54 rules reviewed during fiscal years 1991 and 1992; cost information provided for 50 rules.

1) to adopt new rules than to amend existing rules; 2) when outside opinions are sought; 3) when, according to agencies, rules are controversial (regardless of whether they went to hearings); and 4) when changes are made to them. As Figure 2.10 also shows, rules are more costly when errors are made while adopting them than when no errors are made.

AGENCY VIEWS OF THE RULEMAKING PROCESS

As we explained in Chapter 1, the Administrative Procedure Act was originally intended to protect the public against possible agency abuse of power. Over the years, the act has been amended many times, sometimes in an attempt to streamline the rulemaking process, and other times to strengthen the public protection measures. Today, many agency staff and others think that Minnesota's APA has become complicated and cumbersome.

Agency staff like the APA's public participation and rule justification requirements.

Table 2.4 shows the proportion of agency staff respondents that gave favorable and unfavorable assessments of various aspects of the APA.[12] It is worth noting that respondents often identified positive and negative features about the same APA provision. For example, a number of agency staff liked obtaining public input, yet also thought the official requirements did not necessarily

12 These were open-ended questions; that is, we asked agency staff to tell us what they liked or disliked about the APA process, as opposed to asking, for example, whether public notice provisions are good or bad.

Table 2.4: Agency Staff Opinions about Administrative Procedure Act Requirements (n=46)

APA Requirement	Percent Who Liked	Percent Who Disliked
Public participation provisions	59%	28%
Neutral review	11	20
Statements of need and reasonableness	50	30
Technical and procedural details	0	57
Timing requirements	0	26
Legislative Commission to Review Administrative Rules	0	9
All Requirements	7	0
Other	22	20

Note: We asked the 46 respondents to list APA requirements they liked and those they disliked, and we coded up to four responses for each question. Thus, the total is greater than 100%.

Source: OLA analysis of agency staff interviews.

Agency staff dislike some of the technical and procedural details associated with rulemaking.

ensure adequate or timely public notification and participation. As this table shows,

- **Most staff like the fact that the APA encourages public participation in rulemaking and believe that "statements of need and reasonableness" are beneficial.**

However,

- **Nearly 60 percent of the staff we interviewed identified the many procedural details and multiple reviews, which appear to them to be duplicative and unnecessary, as the features of the APA they most dislike.**

While a few agency staff liked everything about the current APA, most of them identified parts of the APA process that, in their view, were either confusing, illogical, duplicative, or ineffective. We discuss these perceptions in more detail below.

Defining When Rulemaking is Needed

In the views of agency staff:

- **It is not always clear when a rule is needed to carry out the provisions of legislation.**

When the Legislature requires an agency to adopt rules, the agency must publish a proposed rule within 180 days, or explain to the Legislature and the Governor why it has not done so. The Legislative Commission to Review Administrative Rules notifies agencies when it believes that a piece of legislation

requires the agency to adopt rules. Since 1986, in about 25 percent of the cases where the Revisor's Office and the Commission believed that the Legislature had taken an action requiring a rule, agencies disagreed. In those cases, the agencies reported to the Commission that they were not working on a rule because they thought the statute was specific enough, and did not require a rule for implementation.

The APA includes a broad definition of agency actions which must be considered rules, and which therefore must go through the formal rulemaking process. The definition includes all revisions to existing rules and rule repeals. In discussions with agency staff,

- **Some agency staff told us that the APA definition of which administrative policies require formal rulemaking is too inclusive.**

Some agency staff believe that not all policy issues lend themselves to rulemaking.

In their view, if everything went through rulemaking, as a strict interpretation of Chapter 14 would require, an inordinate amount of time would be spent on rulemaking. Furthermore, some policy issues do not lend themselves to rulemaking, in the opinion of some staff. For example, both the Pollution Control Agency and the Department of Natural Resources have permit situations in which they wish to apply general guidelines, but allow for exceptions on a case-by-case basis. These situations fall between strict case-by-case decision making, which does not require formal rulemaking, and "statements of general applicability," which do require use of the formal process.

Two agencies, the Department of Human Services and the Board of Water and Soil Resources, have tried to avoid this problem with "outcome based" rules. These rules can give regulated entities and agencies more flexibility, because only the desired outcome of the rule is specified. The regulated groups are then free to use whatever method they find efficient to attain that outcome. Some staff were uncertain, however, whether this type of rule would be permissible under the APA.

A broad definition of rulemaking can also be a problem in areas where science and technology are changing rapidly, such as pollution control. Agencies say they need greater flexibility to respond to such changes than formal rulemaking typically allows. According to some staff, on very controversial issues where rulemaking typically takes more than two years, a rule can be out-of-date before it is adopted. Some staff said they willingly risk a legal challenge and issue "guidelines" under these circumstances, sometimes at the request of affected parties.

In our survey of affected parties, respondents were asked for their opinions about various aspects of agencies' rulemaking performance. Table 2.5 shows the percent of respondents who agreed and disagreed with the statement "Agencies often issue 'guidelines' that should have been rules." As the table shows, a majority of respondents agreed with the statement, confirming what we were told by agency staff.

Table 2.5: Affected Parties' Opinions about Agency Rulemaking Performance

Adequacy of Rule Definition	Strongly Agree/ Agree	Strongly Disagree/ Disagree	No Opinion/ Undecided
Agencies do a good job of keeping rules up to date. (n=335)	25%	48%	28%
Agencies often issue "guidelines" that should have been rules. (n=334)	48%	18%	34%

Note: Analysis includes only those with valid responses.

Source: OLA Survey of Affected Parties, 1992.

Some agencies said that an "expedited" rulemaking process is needed for certain types of rules or rule changes for which an exemption or emergency rulemaking is inappropriate. In particular, a shortened rulemaking process is recommended for: the repeal of rules; nonsubstantive amendments; the straightforward adoption of federally mandated rule changes; and rules that implement programs rather than regulate facilities or industries.

Outdated Rules

Many agencies do not have enough staff to keep all rules up to date.

All amendments to existing rules must be adopted through the formal rulemaking process that is specified in the APA. We were told that many agencies do not have enough staff to keep all rules up to date and that rulemaking activities must be prioritized. This leads to rules that are not enforced as written in *Minnesota Rules*. A few agency staff said they update their rules on a regular basis, but others said that revisions occur in response to external pressure when a rule is seriously out of date. As Table 2.5 shows, affected parties who responded to our survey disagreed with the statement "Agencies do a good job of keeping rules up to date." Again, respondents tended to confirm what we were told by agency rule-writing staff.

Agencies sometimes modify the effects of outdated rules by granting waivers or variances, or by otherwise selectively enforcing them, rather than by formally amending the rule. This can be a source of confusion to regulated parties. We also found one instance where the Legislature specifically exempted an agency from APA requirements for required annual updates of a rule, although the original rule was required to be adopted following APA procedures.[13]

Exemptions

The APA grants several exemptions to its provisions, and over the years the Legislature has added numerous others. For the most part, these exemptions

13 *Minn. Laws* (1992), Ch. 510, which pertains to workers' compensation medical fees.

have been granted on an ad hoc basis, with no clear policy for determining when an exemption is appropriate. For that reason, the practice of granting exemptions may itself add to the confusion over when an agency must adopt a rule.

Fee Rules

We also found that:

Agency staff are confused about when fees should be set in rules.

- **Some agency staff are unsure about when fees should be established through formal rulemaking procedures, and some question the appropriateness of setting fees in rules.**

Fees are governed by *Minn. Stat.* §16A.128. This statute defines the kinds of fees that "need not be fixed by rule unless specifically required by law," including fees based on actual direct costs, one-time fees, and "fees that produce insignificant revenues," among others. At the same time, it says that other fees not fixed by law must be fixed by rule. Staff report difficulty in interpreting this statute, especially when there is no specific statute governing the fee.

Some staff question the appropriateness of using the rulemaking process to establish fees. They point out that, although people who testify at public hearings often complain about departmental funding levels, fees are in fact required to cover costs that have already been appropriated by the Legislature. Thus, rules define how fees should be apportioned, not total funding. Furthermore, if a proposed fee rule requires a public hearing, the process is likely to take so long that the agency is unable to recoup its expenses in a timely way through fees. Others believe that fees are a form of taxation on regulated parties or users, and so should be set by the Legislature. Approximately 10 percent of the rules in fiscal years 1991 and 1992 (25 out of 262) pertained to fees or fines, and of those, four required a public hearing.

Statements of Need and Reasonableness

Agency staff believe that statements of need and reasonableness contribute to higher quality rules.

The Administrative Procedure Act requires agencies to write a "statement of need and reasonableness" to accompany each rule. These statements are intended to provide the public with a clear justification and rationale for agency rules. Also, if carefully and thoughtfully written, they should contribute to rules being of higher quality.

According to a majority of the agency staff we interviewed:

- **Statements of need and reasonableness are beneficial to agencies but may not be useful to the public.**

Many agency staff volunteered that writing a statement of need and reasonableness is a valuable exercise for agencies because it forces them to think through and justify why each provision is needed. Staff also noted that the

statements become historical documents, as well, which they return to when new questions about a rule arise. One person said, "You should be able to justify the rule if you're going to have a rule."

At the same time, some staff thought that statements may not be as useful to people outside the agency. Some felt that they may have become too complex and "jargon-filled," "repetitive," "tedious," "trivial," or redundant. Others said the statement would make more sense if it was written later in the process so that it reflected any public comments received. Alternatively, statements of need and reasonableness might be more useful if simpler, shorter versions of them were more widely circulated earlier in the process.

Some statements of need and reasonableness are required to include a small business impact statement, an agricultural land impact statement, a fiscal note, or a notice regarding fees. Some agency staff question the value of these procedural requirements. For example, it is unclear to some staff when the small business impact statement and fiscal note apply or what their purposes are. The Attorney General's staff check to see whether an agency complied with the requirement to reference these statements, but defers to agency expertise on the amount of small business impact and efforts to mitigate it. This has led some staff to doubt whether the information is used by anyone. As one staff member put it, "The small business statement is meaningless because the AG makes no effort to enforce it."

Public Input Requirements

Agency staff think an open rulemaking process results in better rules.

As shown in Table 2.4, nearly 60 percent of the agency staff we interviewed like the APA requirement that the public be involved in the rulemaking process. Several volunteered that, in their view, an open rulemaking process that encourages public input results in better rules that are more enforceable and more responsive to public needs. At the same time, however, a number of agency staff identified problems with the formal APA participation requirements.

About 10 percent of the staff we surveyed, as well as a number of staff in separate interviews, complained about the fact that individuals requesting a public hearing do not have to state their reasons for doing so. Sometimes they receive hearing requests with an insufficient address or without a phone number. Many staff would prefer to negotiate with individuals requesting a public hearing so that they will withdraw their requests and a hearing can be avoided. In the view of these staff, the APA should be changed to require those requesting a hearing to provide more information (e.g., phone number, reasons for objecting to the rule).

In addition, according to some agency staff:

- **Publication in the *State Register* is not an effective method of notifying all interested members of the public;**

- **The formal process--notice to solicit outside opinion, intent to adopt, and public hearing (if needed)--is poorly timed to receive useful comments; and**

- **The "substantial change" provision limits the usefulness of comments received through the formal channels.**

Several staff questioned whether publishing the entire rule in the *State Register* is cost-effective since, in their opinion, few people read it. Others said the *State Register* reaches only the most interested members of the public, and that wider notice is needed for most rules.

Quite a few staff told us that, in their view, the official notices do not serve their intended purposes. Some mentioned that the "notice to solicit outside opinion," which is required if the agency intends to talk with anyone outside the agency, is not uniformly understood or utilized. Some report receiving conflicting advice from their assigned attorneys general about when an outside solicitation notice is required. Others told us that this notice rarely elicits useful information.

Meanwhile, by the time the agency publishes the proposed rule in the *State Register*, many agency staff think it is too late to incorporate changes without restarting the rulemaking process. This is due in part to the APA's "substantial change" provision, which prohibits the agency from making "substantial changes" to a proposed rule after it has been published in the *State Register*.[14]

Substantial Change

Many agency staff misunderstand the "substantial change" provision.

The Administrative Procedure Act states that:

> ...an agency may not modify a proposed rule so that it is substantially different from the proposed rule in the notice of intent to adopt rules.[15]

This "substantial change" doctrine has proven to be a source of much confusion on the part of agency rulewriting staff. During our telephone survey, we asked the 46 agency staff respondents how they defined "substantial change" in this context. We found that:

- **Fewer than 25 percent of the agency staff we interviewed have an accurate understanding of the substantial change provision, and over half either misunderstand it, are unfamiliar with it, or think there is no clear standard.**

Both the Attorney General's office, which reviews rules without a hearing, and the Office of Administrative Hearings, which reviews rules with a hearing, have adopted administrative rules governing their procedures.

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14 We discuss the effects of this provision on public perceptions of rulemaking in Chapter 3.

15 *Minn. Stat.* S14.05 Subd.2.

However, we found that:

- **The definitions of "substantial change" in the rules of the Attorney General's Office and Office of Administrative Hearings are not the same, which may contribute to confusion about it.**

In its review of rules, the Attorney General's Office applies a "notice test" in determining whether any changes made to the rule are "substantial": does the change affect a new class of people who would not have heard about the proposed rule, based on the original notice? The Office of Administrative Hearings applies the notice test, plus an "effects test": in addition to notice, does the change result in a rule that has a substantially different effect than the proposed rule? In practice, both offices permit great latitude, and only one rule of the 262 reviewed during fiscal years 1991 and 1992 was rejected for violating this provision.

The two rules review offices define "substantial change" differently.

However, of the 46 agency staff members we interviewed, only 11 (24 percent) provided a definition consistent with that used by the Attorney General's Office or the Office of Administrative Hearings. Thirteen percent (six people) thought there was no clear standard for substantial change: it depended on their assigned attorney general, the administrative law judge, or the office that conducted the rule review. Another 22 percent (10 people) knew that some changes were permitted, but their definitions of permissible changes implied their knowledge of the concept was limited. Another 13 percent were unfamiliar with the provision or had no experience with it. Finally, 28 percent (13 people) thought that only minor clarifications or grammatical changes were permitted, a definition that is inconsistent with the standards applied by the offices responsible for rules review.

More experienced rule-writing staff were more likely to have a good understanding of the substantial change provision, and they said it did not cause them problems or limit them from making changes. However, it can be used as an excuse for not making changes. As one staff member put it, "It is easy for the agency to hide behind it if it wants to."

For staff who do not adequately understand the substantial change provision, it is likely to inhibit them from making changes, as the following quotes from agency staff suggest:

> "It means that all negotiation must be done before a rule is published".
>
> "Sometimes, we're afraid to make a good change based on a comment because we're afraid we'll get the whole thing bounced back".
>
> "It makes a sham of the public hearing and a mockery of the process".

Procedural Requirements and Rules Review

Most of the specific complaints about rulemaking made by agency staff concern the many technical details, paperwork, and multiple procedural requirements and rules review that are part of the official rulemaking process. Many agency staff see them as unnecessary or cumbersome. Others fail to understand the rationale or logic for them. Several staff thought the review by the Attorney General's Office was duplicative and "didn't make any sense" since the agency already obtained legal advice from its own assigned Attorney General.[16]

If staff make mistakes, rulemaking takes longer and costs more.

However, if staff make mistakes in complying with the procedural or special requirements, rulemaking takes longer and costs more, as we saw above. We found that:

- **Agencies are required to begin the formal adoption process over again for between 7 percent and 10 percent of all rules.**

Of the 213 rules reviewed by the Attorney General's staff during 1991 and 1992, 41 (or 19 percent) had one or more procedural errors or substantive defects. In 15 of these cases (7 percent of those reviewed), the agency was required to begin the adoption process over by republishing a notice of intent to adopt in the *State Register*.[17]

During the same time period, the Office of Administrative Hearings found one or more substantive defects or procedural errors in 67 percent of the rules they reviewed.[18] That office was more likely to find nonprocedural defects, such as a lack of statutory authority, than was the Attorney General's Office. When the Office of Administrative Hearings judges found procedural errors, they were more likely than the Attorney General's staff to permit the agency to correct the error without beginning the process over again. Nevertheless, in five cases (10 percent of the rules the Office of Administrative Hearings reviewed), the agency was required to start the adoption process over again.

Even when an error does not force an agency to begin the process again, it may result in delay while the agency corrects the deficiency. Agency staff who responded to our survey reported delays of up to several weeks for this reason.

Some errors resulted when an agency failed to seek timely legal advice or when the advice an agency received was inconsistent with the subsequent legal and procedural review by the Attorney General's rule review staff or the Office of Administrative Hearings. For example, in one case an agency was

16 Attorney General's Office rules (Ch. 2010) require that the assigned attorney general who represents the agency prepare a "declaration" that the rule and rulemaking record has been examined and that the Administrative Procedure Act and Attorney General rules have been followed.

17 Many of these involved errors pertaining to the 30-day comment period (e.g., accidentally allowing only 29 days), which are likely to be considered "harmless" under the 1992 changes to the APA.

18 We discuss the rules review process more fully in Chapter 4.

advised that it did not need to write a fiscal note because it had already written one to accompany the legislation that created the need for the rule. The rule was controversial, and when it came before an administrative law judge, the judge determined that a fiscal note should have been written. The agency was forced to republish its notice of intent and hold a second public hearing, which delayed adoption of the rule by about three months, and cost additional dollars and staff time. In another case, the administrative law judge ruled that an agency should have modified a rule to reduce its impact on small businesses. That agency had to republish its rule and hold another public hearing, and the rule was not effective until six months later.

A number of agency staff who write rules told us they need more training and better technical assistance. As noted above, only a few agencies have fulltime rule-writing staff. Quite a few of the agency staff we interviewed told us they adopted rules infrequently or lacked rulemaking experience. During our interviews, we noted a number of instances when agency staff were misinformed about provisions of the APA. For example, one staff person thought that agencies are required to form an advisory committee before adopting a rule. Another thought agencies are prohibited from making multiple changes to a rule in one rulemaking process, and a third person thought that a statement of need and reasonableness must address every subpart of an existing rule, even if only a few parts are being amended. In each of these cases, the misunderstanding resulted in agency staff spending more time and money than was necessary to adopt rules.

Many agency staff said they would benefit from training and technical assistance in rulemaking.

There are two sources of rulemaking assistance available to agencies: they may seek legal advice from their assigned attorney general, which agencies are billed for, or they may ask for informal assistance from the Office of the Revisor of Statutes.[19] The Revisor also has available for agencies two publications on rulemaking. One, *Rulemaking in Minnesota: A Guide*, is a step-by-step guide designed for agencies with little or no rulemaking experience. The second publication is a rule-drafting manual that focuses on the mechanics of the process. Some staff to smaller boards and commissions told us they sought limited advice from their assigned Attorney General because of the costs involved. Attorney General's staff confirmed that some problems could have been avoided if agencies sought legal advice earlier in the rulemaking process. The Revisor's Office is prohibited from acting as legal counsel to agencies and from advising agencies on Statements of Need and Reasonableness. Otherwise, the office's assistance can cover all of the issues staff encounter in writing and adopting rules. Nevertheless, agency staff told us they would benefit from training and better technical assistance in rulemaking, perhaps indicating a lack of awareness of all resources available to them.

19 Agencies were charged for Revisor's Office services until 1990.

SUMMARY

We estimate that, overall, rulemaking costs about $3.4 million per year, with most of that spent on staff salaries and benefits. On average, a rule costs about $26,500 and takes about 16 months to adopt. Many rules are not controversial, and these cost less and require the least amount of time. Rules that are controversial are more likely to regulate large industries or impose substantial economic costs on regulated parties.

We also found, however, that rulemaking can be a lengthy and costly process largely because it is political process. Conflicts not resolved by the Legislature when it enacts a law may have to be resolved by agencies during rulemaking. The current rulemaking process encourages agencies to negotiate with interested parties to achieve a compromise, and agencies take this seriously. Since there are no formal time limits on the rulemaking process, when agencies write rules that are controversial, the negotiation period can continue for many years.

We learned that while agency staff like the public participation requirements, they do not necessarily think the formal, APA-mandated public notice and comment provisions are effective. Much public input comes from the informal methods agencies use to draft rules before they are proposed in the *State Register*. In addition, the prohibition against substantial changes after a rule is published inhibits some staff from changing rules in response to public comments.

We found that agency staff are often confused about when a rule is needed, and when they are required to comply with the various special provisions of the APA. Some agency staff said they made rules infrequently or were not familiar enough with the APA to understand its logic and purpose. Staff inexperience and confusion can lead to errors that are costly in terms of both time and money.

Public Involvement in Rulemaking

CHAPTER 3

In this chapter, we evaluate the public participation provisions in Minnesota's Administrative Procedure Act (APA). We also compare Minnesota's public input requirements to those contained in the "Model State Administrative Procedure Act" and to those found in other states. In addition, we assess the adequacy of the informal methods agencies use to involve the public in drafting rules and examine public opinions about agency rulemaking performance. Our assessment focuses on the following questions:

- **How do Minnesota's formal rulemaking requirements compare with those in other states? Do Minnesota's APA procedures promote meaningful public participation in rulemaking? Is the rulemaking process fair and open?**

- **Are proposed rules modified in response to public comments? Are affected members of the public satisfied with their impact on agency rulemaking?**

- **How do agencies informally "negotiate" rules? Are these informal rule negotiation processes consistent with the goals of the APA? Are affected parties satisfied with them and with agency rulemaking generally?**

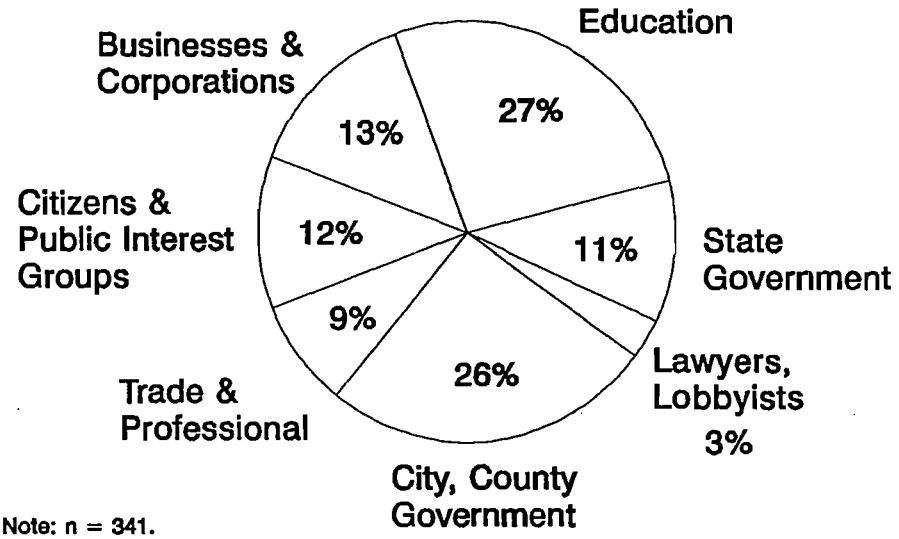
The analysis and information in this chapter come from several sources. We interviewed staff from the Legislative Commission to Review Administrative Rules, Attorney General's Office, Office of Administrative Hearings, Revisor's Office, and major rule-writing agencies. In addition, as described in Chapter 2, we selected a representative sample of 54 rules from the 262 rules that were reviewed during fiscal years 1991 and 1992. We interviewed agency staff by telephone to learn more about the procedures they used to draft the rules. (See Appendix A for a description of the sampling methods and questions asked.)

In addition, we surveyed a sample of interested persons whose comments had been solicited by the agencies proposing the 54 sample rules. For this purpose, we selected a systematic random sample of 795 people on agencies' regular mailing lists and the supplemental mailing lists for the 54 rules. These lists contain the names of organizations, businesses, groups, and individuals that have asked to receive information about an agency's rules or a particular

rule. A total of 352 questionnaires were returned (341 were usable), which is 46 percent of the deliverable surveys (29 were returned with no forwarding address).[1] Figure 3.1 illustrates the organizational affiliation of respondents to our survey of affected parties. For more information on survey methods and a copy of the questionnaire with summary responses to all questions, see Appendix B.

We surveyed people affected by rules to learn how they view the rulemaking process.

Figure 3.1: Affected Party Survey Respondents by Organizational Affiliation



Note: n = 341.

Source: OLA Survey of Affected Parties, 1992.

To learn about administrative rulemaking in other states, we surveyed the national literature and attended a national conference on rules review and legislative oversight. We also compared Minnesota's APA to the "Model State Administrative Procedure Act," which many other states have used as the basis for their statutory administrative procedures.

In this chapter, we conclude that publishing rulemaking notices in the *State Register* is not an effective method of public notification. We also conclude that agencies' informal methods of soliciting public input have a much greater impact on the content of rules than the formal public notice-and-comment procedures mandated by the APA. There are no statutory requirements regarding how public input is sought prior to publishing a proposed rule or notice of hearing. Consequently, agency practices vary. Many agencies do a good job of involving people during the rule-drafting phase. However, in some cases,

1 The affected party sample is reasonably representative of agency type and type of review process for the total population, which are the variables used to select the sample of rules. But we do not have additional information on the total population of affected parties for additional variables of interest, which would enable us to ensure that our sample is representative. We selected our sample size based on an expected return rate of 50 percent. We compared survey respondents to nonrespondents on variables for which we had information. Although we found some differences for organizational affiliation, these do not affect the findings reported in this chapter. See Appendix B for a discussion.

agencies allow a small number of people privileged access and, therefore, special influence, in helping them draft rules. Agencies are often inhibited from using public comments later in the rule adoption process because any "substantial" changes after a proposed rule has been published may result in delays and additional costs. Nearly 70 percent of the people affected by rules whom we surveyed said they hear about rules too late for their input to make a difference. We conclude that current APA provisions need improvement to ensure open and fair public input into the rulemaking process.

The APA tries to balance efficiency and public participation.

ASSESSMENT CRITERIA

In Chapter 1, we outlined the criteria used to assess the adequacy of Minnesota's Administrative Procedure Act and agencies' rulemaking performance. Below, we expand on those criteria that pertain to public involvement in rulemaking. The ideal APA represents a careful balancing of several competing goals, including:

- The efficient use of limited resources, versus providing adequate opportunities for public input into rules;
- The public's desire for uniform and fair treatment through the formal adoption of general policy statements (rules), versus agencies' need for more flexible policies that can be easily modified in response to external changes; and
- The Legislature's desire to put regulations and programs into effect quickly, versus its desire for rules that are technically sound and based on adequate public input.

Finding the right balance between these competing goals and interests is difficult. Moreover, assessments of whether or not the right balance has been achieved often come from two different perspectives.

Rulemaking is both a technical and a political process.

One perspective sees rulemaking as largely a technical and legal process. It emphasizes the due process requirements of the APA as the best way to achieve a fair and open process, and it emphasizes staff expertise and technical evidence as the best way to achieve high quality rules.

A second perspective sees rulemaking as a political process. It emphasizes whether the process produces a rule that is politically acceptable to those directly affected, as well as whether it protects the broader public interest.

We think that both these perspectives have merit, and we use them both in assessing Minnesota's rulemaking process. We review the APA's due process requirements to determine the extent to which they create a process that is fair and open. But we also assess the way in which agencies deal with the competing interests that are often involved in rulemaking.

In judging the adequacy of the APA's due process requirements, we looked principally at its provisions on notice and the opportunities it provides for submitting written and oral evidence. The public notice requirements are essential because in order for affected persons to have an opportunity to participate, they first must hear about an impending rule. Public notice provisions may be considered "adequate" if they ensure that potential participants receive timely notice and are given enough information about the rule to assess its effects.[2]

When we moved beyond the procedural requirements of the APA, we looked at how agencies negotiate with the groups and conflicting interests that are often involved in rulemaking. We also asked people affected by rules for their opinions about the adequacy of agencies' rulemaking procedures. Rulemaking is, after all, an extension of the legislative process where "special interests" must be accommodated while, at the same time, a more general "public interest" must be protected. This is a particular challenge in rulemaking (as it is in the legislative process) since people with a special interest are much more likely to participate, either directly or through an organization that represents them.

MINNESOTA'S APA COMPARED TO OTHER STATES AND TO THE MODEL APA

In this section we compare the formal rulemaking requirements contained in Minnesota's APA to provisions typically found in other state APAs. As noted in Chapter 1, the federal government and nearly all of the states have adopted administrative procedure acts that cover agency rulemaking and adjudication procedures. At least 28 states have adopted the "Model State Administrative Procedure Act" (Model APA), all or in part.[3] The 1981 Model APA addresses four issues: 1) definition of a "rule" and exemptions to rulemaking; 2) public notice and participation requirements; 3) rule justification; and 4) rules review and oversight.

Both Minnesota's APA and the Model APA require public notice of proposed rules.

Figure 3.2 compares the public notice and participation requirements in Minnesota's APA to the Model APA.[4] As this figure shows,

- **Minnesota's APA and the Model APA contain some of the same public participation requirements, but also some that are different.**

2 Arthur E. Bonfield, *State Administrative Rulemaking* (Boston: Little Brown, 1986), 169.

3 "Uniform Law Commissioners' Model State Administrative Procedure Act of 1981" (Chicago: National Conference of Commissioners on Uniform State Laws, 1981).

4 Minnesota's rule definition, rule justification, and rules review and oversight provisions are compared to the Model APA in Chapter 4.

Figure 3.2: Comparison of Public Participation Provisions in Minnesota's Administrative Procedure Act (APA) to the State "Model APA"

"Model APA"	Minnesota's APA
• Required notice if agency solicits outside opinions.	• Required outside solicitation notice and publication requirements similar to Model APA.
• Publication of proposed rule in administrative bulletin with a minimum 30-day public comment period.	• Provides for three alternative processes, emergency rules, and rules with and without a public hearing. The last two processes require a 30-day comment period.
• Agencies must hold a public hearing if requested by 25 persons, another state agency, a political subdivision, or the legislative or executive rules review authority.	• Public hearings are held before an administrative law judge if requested by 25 or more persons. The Legislative Commission to Review Administrative Rules may hold its own hearing or request that agencies hold one.
• Agencies are prohibited from making substantial changes after rule is published as proposed.	• "Substantial change" provision similar to Model APA, but without a definition in statute.
• Agencies must maintain a rulemaking docket, including current status of all rules, and publish committee membership lists if a rule-drafting committee is used.	• No requirements governing agencies' informal rulemaking procedures.
• Agencies are required to maintain an official rulemaking record that includes all materials relevant to a rule.	• Similar official rulemaking record is required that includes all written submissions received.

Source: National Conference of Commissioners on Uniform State Laws, "Model State Administrative Procedure Act, 1981"; *Minn. Stat.* Ch. 14 and *Minn. Stat.* §§3.842-3.843.

Public Notice Provisions

Both the Model APA and Minnesota's APA provide for publication of proposed rules in a state administrative bulletin, prior notice if outside opinions are sought, a mandatory public hearing if requested by 25 persons or more, and prohibition of substantial changes after a rule has been proposed. The last provision is intended to protect the public by ensuring that agencies do not substantially rewrite a rule after it has been officially proposed. The "substantially different" language in the Model APA comes from Minnesota's APA.[5] However, the Model APA spells out the criteria to be used in determining if a change is "substantial," while in Minnesota, these guidelines are contained in rules adopted by the Attorney General's Office and Office of Administrative Hearings.

Some states have included the requirement that proposed rules be published in major newspapers. The 1961 version of the Model APA, which many states

5 Bonfield, *State Administrative Rulemaking*, 230.

used as the basis for their APAs, required "publication in any specified official medium, such as newspapers of general circulation."[6] The rationale for changing the Model APA in 1981 to require publication in a state's administrative bulletin was that it is "widely circulated" and the public would eventually come to depend on it as the single source of agency rulemaking information.[7] The Model APA also requires that agencies mail copies of proposed rules to anyone requesting them, as does Minnesota's APA.

Public Comment Provisions

The Model APA specifies a *minimum* 30-day public comment period after proposed rules are published, with the possibility of extending the comment period if circumstances merit it. Minnesota's APA does not specify whether the 30-day comment period is a minimum or whether exactly 30 days are required. As Figure 3.3 shows, state APAs vary in the length of mandated public comment periods from a minimum of 10 days (Wisconsin) to 100 days (Louisiana). Fifteen states, including Minnesota, have adopted the Model APA's provision.[8] A few states encourage variation in the length of public comment periods to accommodate different circumstances, but within a specified range.

In most states, agencies hold their own rulemaking hearings.

The Model APA is based on the assumption that most public participation in rulemaking will be in the form of written submissions.[9] However, the act also recognizes that there may be circumstances where "oral proceedings" are desirable. Rather than permitting agencies to decide when a public hearing is needed, the Model APA establishes the circumstances under which interested members of the public may request an oral proceeding. However, we found that:

- **Few states provide for public rulemaking hearings before an administrative law judge, as is done in Minnesota.**

Furthermore, we conclude that:

- **Minnesota's APA, with its alternative rulemaking processes and requirement that hearings be conducted by independent administrative law judges, might provide more incentives for agencies to avoid public hearings.**

In Minnesota, hearings are held before an administrative law judge.

The main differences in public input provisions concern who conducts the public hearing, the circumstances under which one is required, and the purpose for which it is held. Under the Model APA, the agency presides at "oral

6 *1961 Model State Administrative Procedure Act* §3(a)(1).

7 Bonfield, *State Administrative Rulemaking*, 173.

8 The 1961 version of the Model APA specified a minimum 20-day comment period, which may explain its relative popularity.

9 Bonfield, *State Administrative Rulemaking*, 191.

Figure 3.3: Length of Public Comment Periods in State Administrative Procedure Acts

States with 30-Day Comment Periods	States with Shorter than 30-Day Comment Periods
Alaska	Arkansas (20)
Arizona	Colorado (20)
Connecticut	Delaware (20)
District of Columbia	Florida (21)
Georgia	Idaho (20)
Hawaii	Indiana (21)
Minnesota	Massachusetts (21)
Mississippi	Kansas (15)
Nevada	Nebraska (20)
New Jersey	New Hampshire (20)
New Mexico	North Carolina (20)
South Carolina	South Dakota (20)
Tennessee	Washington (20)
Texas	Wisconsin (10)
Utah	

States with Longer than 30-Day Comment Periods	States with Variable Public Comment Periods
Alabama (35)	Maine (30 days, no hearing; 17-24 days with hearing)
California (45)	Michigan (not less than 10 days and not more than 60 days before hearing)
Illinois (45)	Montana (not less than 30 days, not more than 6 months)
Iowa (35)	North Carolina (not less than 30 days before hearing and 60 days before adoption)
Kentucky (45)	West Virginia (not less than 30 days, not more than 60 days)
Louisiana (100)	
Maryland (45)	
New York (45)	
Virginia (60)	
Wyoming (45)	

Source: Arthur Earl Bonfield, *State Administrative Rulemaking* (Boston: Little Brown, 1986), 170, and the 1992 *Supplement to State Administrative Rulemaking*, 86.

proceedings," which are held to give interested persons an opportunity to present arguments directly and in person to the agency.[10]

Under Minnesota's APA, an independent administrative law judge presides at rulemaking hearings. About a dozen states have a centralized panel of administrative law judges like Minnesota's Office of Administrative Hearings.[11] However, their rulemaking responsibilities and organizational structures are

10 The term "oral proceeding" is used in the Model APA expressly to distinguish it from a "judicial-type," evidentiary hearing, which might "overjudicialize the rulemaking process." Under the Model APA, rulemaking is modeled upon the legislative lawmaking process (Ibid., 197-201).

11 Minnesota Office of Administrative Hearings, *Annual Report 1991*, 6.

not identical to Minnesota's. For example, in North Carolina, the Office of Administrative Hearings reports to a rules review commission that is appointed by the Legislature with the advice and consent of the Lieutenant Governor.

Executive branch offices, like California's Office of Administrative Law, typically review administrative rules after agencies propose them, but agencies hold their own hearings to obtain public input.[12] Minnesota's arrangement is unusual in combining in a single office the rules review function with the conduct of public rulemaking hearings and contested case hearings. Of the 11 states with independent administrative hearing offices we were able to contact, only three (Florida, Maryland, and Colorado), in addition to Minnesota, use administrative law judges to conduct both rulemaking hearings and contested case hearings.

In addition, the Model APA provides for more opportunities to force public hearings on proposed rules than Minnesota's APA. Under the Model APA, another state agency, any political subdivision, or the executive branch rules review body can request a hearing, in addition to the joint legislative commission and the 25-person requirement found in Minnesota's APA. At least one state (Ohio) requires public hearings on all proposed rules, as was the case in Minnesota prior to 1980. In Virginia, where the agency conducts its own discretionary public hearings to solicit public input, hearings were held on 66 percent of all proposed rules in 1990-91.[13]

Unlike the Model APA, Minnesota provides for alternative rulemaking processes.

In contrast, Minnesota's APA provides for alternative rulemaking processes that are accompanied by different rules review procedures. These were intended to encourage agencies to negotiate with interested parties before proposing a rule to avoid the time and expense of a public hearing. As noted, public hearings are currently held on about 19 percent of all rules, which suggests that Minnesota may have successfully minimized public hearings costs.[14] But we do not know what effect this may have had on total rulemaking costs, considering the lengthy negotiation process that often precedes a public hearing. One consequence of Minnesota's rulemaking arrangement is that public hearings may not serve the same purpose as they do under the Model APA, which is for the agency to learn first-hand about the public's concerns. In Minnesota, the agency has typically had considerable informal interactions with many of the interested parties who attend the hearing, so the different points of view are often known beforehand.

One final difference between Minnesota's APA and the Model APA concerns the procedures agencies use to solicit public input during the rule-drafting phase. The Model APA encourages agencies to appoint rules advisory

12 In addition to the Office of Administrative Law, California also has an Office of Administrative Hearings. Its administrative law judges preside at contested case hearings but not at rulemaking hearings, which are held by agencies with agency staff presiding.

13 Robert B. Rotz and Jim Bonevac, "Staff Briefing to the Joint Legislative Audit and Review Commission Subcommittee on the Virginia Administrative Process Act (VAPA)," June 8, 1992, 21.

14 In Minnesota, agencies are billed by the Office of Administrative Hearings at the rate of $86 per hour for costs incurred, and the average public hearing (and associated rule review) cost $3,960 in fiscal year 1992.

committees to help draft rules. However, in order to promote openness in government, the Model APA specifies that agencies should regularly publish the membership of such committees in the state administrative bulletin. Some state APAs require that agencies formulate guidelines covering informal public participation. In contrast, Minnesota's APA contains no guidelines covering informal rulemaking. The Model APA also requires that agencies maintain an official rulemaking docket that contains all information pertinent to rules under active consideration by the agency. Its purpose is to provide early public access to potential rules.[15] In Minnesota, agencies must maintain official records that cover the formal adoption process (also required by the Model APA), but they are not required to keep standard information on rules under consideration.

The Model APA provides for more controls over the informal parts of the rulemaking process than Minnesota's APA.

PUBLIC PERCEPTIONS OF AGENCY RULEMAKING

In this section, we discuss findings about key components of agency rulemaking, based on our survey of affected parties, interviews and observations, and analysis of rulemaking documents. We assess the adequacy of formal, APA-mandated provisions that specify how agencies should notify and involve the public in rulemaking. We also evaluate the informal methods that agencies use to involve selected members of the public in the rule-drafting or rule negotiation phase.

The Administrative Procedure Act

We asked affected parties how familiar they were with the rulemaking requirements contained in the APA. As shown in Table 3.1, we found that:

- **Only a small proportion of the affected public is very familiar with Administrative Procedure Act requirements, and few find the rulemaking process easy to follow.**

Only 10 percent of our survey respondents said they were very familiar with APA requirements, while 39 percent were somewhat familiar and half indicated they were not very familiar with them. In addition, only 15 percent of affected parties believe it is easy to follow rules through the required process, while 44 percent find it difficult, and 41 percent indicated they did not know enough about the process to offer an opinion. Also, more affected parties think the process takes too long (45 percent) than do not think so (33 percent), and 21 percent were unable to offer an opinion.

A number of respondents provided reasons why they find the rulemaking process hard to follow. One reason, mentioned by several people, is that rules tend to be written in technical language that is difficult for the average person to

15 Ibid., 165.

Table 3.1: Affected Parties' Opinions about the Administrative Procedure Act

Opinions	Number of Respondents	Percent of Respondents
How familiar are you with rulemaking requirements in the Administrative Procedure Act? (n=335)		
Very familiar with APA requirements	34	10%
Somewhat familiar with APA requirements	132	39
Not too familiar with APA requirements	169	50
It is easy to follow rules through the steps required by the Administrative Procedure Act. (n=332)		
Agree/Strongly agree	51	15%
Disagree/Strongly disagree	145	44
No opinion/Undecided	136	41
The rulemaking process takes too long. (n=333)		
Agree/Strongly agree	151	45%
Disagree/Strongly disagree	111	33
No opinion/Undecided	71	21

Note: Analyses include only those with valid responses. Percentages may not total 100 due to rounding.

Source: OLA Survey of Affected Parties, 1992.

Most people affected b y rules who we surveyed are relatively unfamiliar with APA requirements.

understand. In the words of one local official, "Sometimes I need to read it several times to figure out what is being said. Plain language--not legalese--would be helpful." Another respondent said that "rulemaking has become complex" and has "generated an overwhelming body of law that the average practitioner finds difficult or impossible to keep up with." Some respondents volunteered that they think the Legislature has turned over too much of its law-making authority to agency staff who are not accessible or accountable to the public.

Adequacy of APA Public Notice Provisions

The *State Register* was created in 1974 to provide a permanent, written record and central repository of all information pertaining to administrative rules and regulations.[16] It was also intended to be the accepted method for conveying

16 In addition to publishing notices of rulemaking hearings, agencies, for the first time, were required to publish all proposed rules in the *State Register* (*Minn. Laws* (1974) Ch. 344).

official government notices and other information to the public. We learned from our survey of affected parties that:

- **Few people find out about agency rules from the *State Register*. Most learn about rules from the agency or indirectly through professional associations.**

Less than 30 percent of the respondents said they or their organization subscribe to the *State Register*. Another 15 percent were not sure if their organization subscribes or not, and a few volunteered that they had not heard of the *State Register*. Respondents living in the Twin Cities metropolitan area were more likely to subscribe (37 percent) than those outside the Twin Cities metropolitan area (20 percent).

Although affected parties may use multiple channels for staying informed about rules, only 21 percent of survey respondents said they review the *State Register*. As Table 3.2 shows, most people hear about proposed rules through professional contacts (72 percent) and/or are on agency mailing lists (55 percent). A minority are in direct, personal contact with agency staff or serve on agency rules advisory committees.

Currently, just under 1,200 individuals and organizations subscribe to the *State Register*, and half are businesses and professional organizations, as shown in Table 3.3. Companies and businesses associated with the environment, energy, or science comprise the largest single group (9.5 percent).

Most people we surveyed heard about rules from the agency or from professional contacts.

Table 3.2: How Affected Parties Hear about Administrative Rules

How Respondent Hears About Rules	Number of Respondents (n=341)	Percent of Respondents[1]
Informed through professional networks/newsletters	246	72%
On agency's regular mailing list	188	55
Reviews *State Register*	73	21
Contacts agency on a regular basis	55	16
Serves on agency rules advisory committees	52	15
Agency staff call me regularly	48	14
Other methods	41	12

[1]Exceeds 100% because multiple responses were possible.

Source: OLA Survey of Affected Parties, 1992.

Nearly 12 percent of subscribers are businesses or agencies outside of Minnesota.[17] When non-subscribing survey respondents were asked why they did not get the *State Register*, 77 percent said it cost too much or they would not use it often enough to justify the cost.[18] However, as Table 3.3 shows, over 100 public libraries subscribe to the *State Register* so it is generally accessible to the public.[19]

While the *State Register* is generally accessible, few people learn about rules from it.

Table 3.3: *State Register* Subscribers by Organizational Affiliation, June 1992

	Number	Percent
Minnesota Public Agencies		
State Government	104	8.9%
County, City, Regional Governments	73	6.3
Public Libraries	102	8.7
Educational Institutions	33	2.8
Sub-Total	312	26.8%
Minnesota Companies, Firms, Associations		
Energy, Science, Environment	111	9.5%
Manufacturing Companies	53	4.6
Trade Associations, Interest Groups	62	5.3
Communications, Marketing, Advertising	57	4.9
Law Firms	53	4.6
Banking, Finance, Insurance, Accounting	52	4.5
Health, Medical	51	4.4
Architecture, Construction, Design	41	3.5
Computing, Data Management	33	2.8
Retail, Other Services	32	2.7
Community Organizations, Social Services	31	2.7
Sub-Total	576	49.5%
Out-of-State Companies, U. S. Government Agencies	134	11.5%
Affiliation Cannot Be Determined	142	12.2%
Total	1,164	100.0%

Source: OLA analysis of *State Register* mailing list from the Department of Administration.

In addition to publication in the *State Register*, the APA also requires that agencies send rulemaking notices to everyone who has asked to be on their official mailing list or on a supplemental list for specific rules. As shown in Table 3.2, 55 percent of our respondents said they were on an agency's regular mailing list, while the remaining 45 percent were apparently drawn into the sample because they were on a supplemental list. We drew our sample of affected parties from both lists, and found an average of 328 people were notified per rule. However, the number of people on these combined lists varied

17 Requests for proposals for state contracts are also published in the *State Register*, which may be the more important reason that organizations subscribe to it.

18 An annual subscription to the *State Register* costs $150 (Mondays only) or $195 (Monday and Thursday editions).

19 *Minn. Stat.* §14.46, subd. 4, requires that a free copy of the *State Register* be provided to a public library in each county of the state.

considerably, ranging from five to over 2,700 (the median was 228). About 11 percent of the names on agency rulemaking lists are other state agency staff, legislators, and legislative staff.

Often, a specific rule may affect only a small segment of the population. However, in order to get on an agency's supplemental mailing list to receive information about a particular rule, one must first hear about it. This makes the agency's own efforts to notify organizations and individuals who might be affected by their rules important, and agencies may be more or less aggressive in doing so. We think the responsibility for adequate notification about rules is shared: members of the public affected by rules have a responsibility to stay informed about rules, and agencies must make a determined effort to identify and notify organizations or individuals in advance when an impending rule is likely to affect them.

The adequacy of agency efforts to notify people affected by rules is not monitored.

Agencies must certify that their mailing lists are up to date, and copies of them are part of the official rulemaking record.[20] Agency compliance with *State Register* rule publication requirements is carefully monitored in both the Attorney General's and Office of Administrative Hearings' reviews. We learned that, in some states, those responsible for external review of proposed rules question agency staff directly about how they alert members of the public who might be affected by their rules. However, the adequacy of agency mailing lists or of agencies' own efforts to notify affected parties is not monitored or reviewed under current rules review procedures in Minnesota.

Adequacy of Formal Public Comment Requirements

We found that:

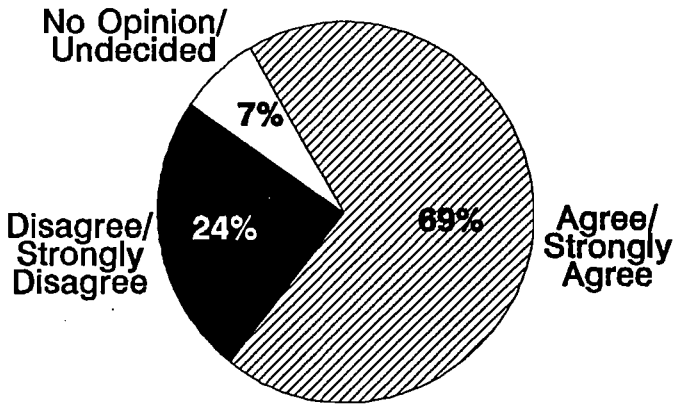
- **A large majority of affected parties think that their input comes too late in the process to make a difference.**

As Figure 3.4 shows, over two-thirds of all respondents (and 74 percent of those with an opinion) agreed that by the time they hear about a rule, the agency has already made up its mind about it.

There are several possible explanations for this. First, people who hear about rules indirectly may not have enough time to send agencies written comments within the 30-day official comment period. Over a third of respondents (36 percent) said the 30-day public comment period was too short, with most of those recommending a 60-day comment period. People who hear about rules indirectly were more likely to say a longer public comment period is needed. The director of a small association told us:

20 Our sample of affected parties (795 names) included 3.6 percent with addresses that were no longer forwardable by the Post Office. We draw no conclusions from this, however, because we looked at rules covering a two-year period.

Figure 3.4: Response to Question that Agencies Decide Before Affected Parties Hear about Proposed Rules



Note: Analysis included only those with valid responses (n=333).

Source: OLA Survey of Affected Parties, 1992.

Nearly 70 percent of the people who responded to our survey say they hear about rules too late for the agency to consider their comments.

> "The problem we run into is that we do not get early enough notification of the process. We can't afford the *State Register* for one rule every two years. [By the time we hear] we only get five days to notify our members for comment. Forget the *State Register* and create a **good** notification process."

As reported in Chapter 2, we learned from agency staff that:

- **The two formal notices provided for in the APA are not timed to elicit the kind of public comments that an agency can use in drafting its rules.**

Sometimes agencies do not publish an outside solicitation notice, when it is required by the APA.

The first official notice--to solicit outside opinions--is supposed to be published at the start of rulemaking, before the agency begins drafting, if it intends to talk with anyone outside the agency. But the one-line description contained in this notice may not provide enough information for the public to comment about, which may be why some agency staff say they rarely get useful comments when they publish it. [21] In addition, the notice to solicit outside opinions does not have to be distributed to everyone on the agency's mailing list.

We also learned that:

- **Agencies do not always publish a notice to solicit outside opinions when they should.**

21 Several respondents to our affected party survey suggested that the notice to solicit outside opinions should contain a one-paragraph description of the rule so they would know if it was likely to affect them or not.

From our analysis of 54 rules, we found some rules where agencies said they met informally with interested parties, formed a rules advisory committee, or negotiated the entire rule, but did not publish a notice to solicit outside opinions. We estimate this happened on about 15 to 20 percent of the rules in our sample.

The second required notice--publishing the proposed rule in the *State Register* and mailing it to everyone on the agency's list--comes at the end of the rule-drafting process. By providing alternative rulemaking processes with different rules review procedures, the current APA encourages agencies to negotiate with affected parties in drafting a rule. Hence, by the time a rule is proposed, the agency has consulted informally with organizations and individuals it believes will be affected. From the agency's point of view, it has already solicited the necessary public input and made an effort to incorporate it into the rule. In addition, the fact that rules may not be substantially changed after they have been proposed inhibits some agency staff from modifying rules in response to any subsequent comments received. As we saw in Chapter 2, many agency staff have an inadequate understanding of this provision and how it will be interpreted by those reviewing agency rules.

By the time a rule is formally proposed, the agency has typically negotiated with selected affected parties.

We conclude that:

- **An agency's informal process of soliciting public input may have a greater effect on the content of rules than the formal process. This may contribute to an impression that the formal public participation requirements are not very meaningful.**

The official rulemaking record contains copies of public comments received in response to the published notice. According to Attorney General's Office staff, less than half (44 percent) of the rules they reviewed in fiscal year 1991 drew public comments.[22] Attorney General staff believe this indicates that many rules are noncontroversial or of limited public interest. However, based on our analysis of the 54 sampled rules, half of the rules with no public comments in response to the official published request were rules that the agency had negotiated using a rules task force or some other means. Also, most of the rules where comments were received in response to the official request (and that did not require a hearing) were called "noncontroversial" rules by the agency.

The separation of the informal process--where rules are negotiated and written by the agency in collaboration with some interested parties--from the formal, APA-mandated process may be part of the reason that many people feel effectively left out of rulemaking. For example, survey respondents told us:

> "Once the proposed rule is published, it is never changed. It is too late to get changes. Agencies that agree to changes--or at least say they agree to changes--say it's too expensive to republish."

22 Letter to Maryanne Hruby, Director of Legislative Commission to Review Administrative Rules, from Jocelyn Olson, Assistant Attorney General, February 14, 1992.

"My perception is that determinations are already set before any hearings and/or public notice. Those involved at the decision making levels just go through the motions."

"In my experience, the only real opportunity to have an impact on the rule is to be involved with the first and second drafts. Once it gets to the Commissioner for sign-off, it is unlikely that change will occur. Also, historically special interests (i.e., advocates) have had excessive influence over rules."

"By the time the hearing happens, the agency has already made up its mind as to what it wants to do and opposing opinion is not welcomed. This makes the process frustrating ... It is more frustrating to be allowed to give an opinion only after the opinion no longer matters than it is not to be asked at all."

Adequacy of Agencies' Informal Participation Procedures

We estimate that in about 80 to 85 percent of all cases, agencies involve some affected parties in the rule drafting phase.

Agency staff told us that if a rule is controversial, they want to know about the concerns of interested parties during the rule-drafting stage. From our analysis of the 54 sampled rules, we found that:

- **On most rules, agencies used several different methods to involve affected parties informally during the rule-drafting phase.**

There were only eight rules (15 percent of the sample) where the agency made no attempt to solicit opinions informally. On average, agencies used two or three different methods to involve affected parties during the rule-drafting phase. As Table 3.4 shows, agencies often informally asked for comments from selected parties (54 percent of the rules) and met with interested parties (46 percent).

For 39 percent of the sampled rules (and 58 percent of rules that eventually required a public hearing), the agency formed a rules advisory committee that met regularly.[23] When advisory committees were used, it took longer to adopt rules (added an average of 4.3 months) and rulemaking tended to cost more, primarily because advisory committees were more often used for controversial rules.

In addition, about half of all rules were adopted by boards. Where agencies also have boards, such as the Pollution Control Agency and the Department of Education, board meetings--which are open to the public--provide another vehicle for input. Some boards, particularly smaller ones, became directly involved in rulemaking by forming subcommittees, directly soliciting input, or helping to write the rules themselves.

23 When a rules advisory committee was used, it had an average of 17 to 18 members and met an average of 7.6 times over a nine- to ten-month period. The agency picked advisory committee members about as often as it asked interested organizations to select them. On one rule, all interested parties were allowed to participate on the task force (about 60 people).

Table 3.4: Methods Agencies Use to Involve Affected Parties in Rulemaking

Method	Percent of Rules
Published notice to solicit outside opinion	63%
Informally asked for comments from selected parties	54
Met with interested parties	46
Formed a rules advisory committee or task force	39
Published rulemaking information in a newsletter	28
Solicited input at regular board meetings	15
Used professional associations to solicit opinions	13
Used mailing list to solicit comments	9
Sent press release to newspapers	7
Agency held a public hearing (not before an administrative law judge)	2
Used other methods	22

Source: OLA analysis of sample of 54 rules.

We found that:

- **About as many interested parties are satisfied as are dissatisfied with the informal procedures agencies use to involve them in rulemaking.**

As Table 3.5 shows, survey respondents are evenly divided over whether agencies provide enough opportunities for input and over whether they consult with a only few people in drafting a rule. A large majority, however, think there should be more uniform procedures for agencies to follow in involving interested parties.

Two-thirds of the people who responded to our survey think there should be more uniform procedures to involve people in rulemaking.

Table 3.5: Affected Parties' Opinions about Agencies' Rulemaking Participation Procedures

Adequacy of Agency Participation Procedures	Strongly Agree/ Agree	Strongly Disagree/ Disagree	No Opinion/ Undecided
Agencies provide ample opportunities for us to provide input. (n=334)	45%	43%	12%
Agencies only consult with a few 'favorite' parties in rule drafting. (n=333)	37%	36%	27%
Agencies are willing to change rules when public comments give good reasons to do so. (n=334)	38%	42%	20%
More uniform procedures to involve people are needed. (n=333)	65%	18%	17%

Note: Analysis includes only those with valid responses.

Source: OLA Survey of Affected Parties, 1992.

Table 3.5 also shows that more respondents think agencies are not willing to change rules in response to public input than think they are. However, we learned that agencies usually do change rules. As shown in Table 3.6:

- **In fiscal years 1991 and 1992, about half of all rules were changed between the time they were proposed in the *State Register* and the time they became effective.**

Rules regulating industries and facilities are more likely to be changed after they are proposed than other rules.

Some types of rules were more likely to be changed than others. Rules governing agency procedures and those affecting fees charged to the public were least likely to be changed, while rules that regulate industries or facilities were most likely to be changed. However, these statistics reveal nothing about the extent of the changes. In light of agency staff comments about their reluctance to significantly modify a rule after it has been published, we suspect that many of these changes may have been minor. Also, about two-thirds of the rules we sampled that became effective with no changes after being published were, in fact, modified during drafting, according to agency staff. This suggests that changes are more likely to occur during the drafting phase than after the proposed rule is published in the *State Register*.

Table 3.6: Modification of Rules by Type of Rule, FY 1991-92

	Number of Rules	Percent Adopted as Proposed (n=129)	Percent Adopted with Changes (n=128)
Occupational licensing	43	53.5%	46.5%
Facility regulation	18	33.3	66.7
Regulation of industries	47	29.8	70.2
Economic regulation	26	26.9	73.1
Fees and fines	25	76.0	24.0
Benefits and services	68	54.4	45.6
Procedural rules	25	72.0	28.0
Rule repeals	5	100.0	0.0
All Rules	257	50.2%	49.8%

Source: OLA analysis of information from Attorney General and Office of Administrative Hearings files.

One reason why some affected parties are satisfied with agencies' informal rulemaking procedures while others are dissatisfied is that:

- **Agencies vary in how they involve affected parties during the rule-drafting process because there are no formal requirements covering this part of rulemaking.**

Under the current APA, agencies have complete discretion in deciding whether to involve anyone outside the agency in the rule-drafting process, and if so, who and how to involve them. As one would expect, there is variation among agencies with respect to how they seek advice and use it in drafting

rules. Some agency staff are determined to negotiate the contents of rules and are proud of the fact they are always successful at avoiding a public hearing. When agencies use a rule advisory committee or meet with interested parties, rule-drafting often becomes a give-and-take process where rule drafts are circulated, reviewed, and changed many times. Other agencies, however, are less willing to go beyond the formal requirements in seeking public input.[24]

A negotiation process may not be appropriate for all rules.

Under current APA requirements, there are strong incentives for agencies to negotiate with interested parties and avoid a public hearing. Agencies must pay for hearing costs out of their budgets (while agency staff time is not a direct rulemaking cost). Also, in the opinion of administrative law judges, agencies may want to avoid the confrontation that often occurs at a public hearing, as well as the more strenuous rules review done by the Office of Administrative Hearings.[25] As the discussion above suggests, most agencies spend a fair amount of time and effort negotiating with affected parties before proposing a rule.

However, according to some agency staff, negotiation may not always produce the most desirable results. One problem with agencies having so much discretion over who is involved in drafting a rule is that they may exclude important points of view (either deliberately or inadvertently). Those individuals and organizations that are included in the negotiation process may have special influence on the final rule.

A second potential problem is that the agency may become co-opted by the groups it is supposed to regulate. Several agency staff told us it was easier to negotiate rules when the agency is between two or more competing groups, which ideally are balanced in numbers and resources. Some staff told us that negotiating when there are not countervailing groups may not always serve the public interest, especially if the agency is up against a single special interest that opposes the regulation. Unfortunately, as is often true in interest group politics, an intensely involved special interest group can be well organized and influential with an agency while the countervailing interests of the rest of society are not. The director of a small occupational licensing board told us that on substantive rules she often proceeds directly to a public hearing with no prior effort to negotiate. To do otherwise, she believed, would be abdicating the board's responsibility to protect the public.

Adequacy of the Public Hearing Process

The fact that not all parties will be included in the negotiation process places an additional burden on the formal APA requirements, which must ensure that those not included in the negotiation process have adequate opportunity to

24 This was substantiated by quite a few respondents to our affected party survey, who volunteered that their opinions about rulemaking performance depended on the agency involved. We were unable to analyze this systematically because most survey respondents interact with more than one state agency, and we were unable to attribute their opinions to a single agency.

25 See Chapter 4 for a more complete discussion of the different review processes for rules with and without a hearing.

provide comments to an agency. As suggested above, however, the formal public notice-and-comment periods are not timed to facilitate genuine public input. In addition, we found that:

- **The 25-signature requirement to force a public hearing is sometimes used as a bargaining chip in negotiations between an agency and a few interested parties.**

Sometimes agencies have negotiated to get people to withdraw their requests for a public hearing.

The proportion of rules with a public hearing has declined since the 1980 APA amendments creating alternative rulemaking and rules review processes. Rules without a hearing receive limited review by the Attorney General's Office (discussed in greater detail in Chapter 4), in part because attorney general staff believe the assumption built into the APA is that affected members of the public must be satisfied with the rules or 25 people or more would have requested a hearing.

Thus, the 25-signature requirement is a more important feature in Minnesota's APA than it is under the Model APA where it simply triggers an agency-held "oral proceeding." In Minnesota, the 25-signature requirement serves a political function by assuring that people who care about the rule are satisfied with it (assuming that they first received adequate notice).

We learned, however, that the 25-signature requirement can be manipulated by both the agency and affected parties. We heard about several rules during our study where affected parties used the 25-signature requirement to force concessions from an agency (i.e., a group gets 25 signatures, then offers to withdraw them if the agency changes the rule). We also heard of a few cases where the agency received more than the 25 required signatures, then negotiated with some--but not all--of the individuals to get them to withdraw their requests. The Legislative Commission to Review Administrative Rules has received several complaints about this tactic.

We were also told by agency staff about several instances where a single individual or organization got the required 25 signatures, but from people with no interest in the rule or where the rule was tangential to the real issue (e.g., the group was hoping to get concessions from the agency on another matter). Under current APA requirements, individuals requesting a hearing are not required to state their objections or indicate why they are concerned about a rule.

We also found that:

- **On average, about 40 people attend a rulemaking hearing.**

There is, however, considerable variation in the number attending public hearings, ranging from three to 300 people for the 35 rules about which we have attendance information. Attendance figures by themselves are not an adequate gauge of interest in a rule because some of those who attend represent organizations with large memberships. Of the 49 rules that required public hearings during fiscal years 1991 and 1992, seven had hearings in more than one

location to accommodate individuals or groups outside the Twin Cities area. However, a second hearing was required on four rules because errors or defects were found that forced the agency to restart the rulemaking process.

Just over a third of our survey respondents (36 percent) said their organization had been represented at a public hearing. We found that among respondents with knowledge about the public hearing process:

- **A large majority have favorable opinions about the way public hearings are handled by administrative law judges.**

As Table 3.7 shows, a majority of survey respondents whose organization was represented at a rulemaking hearing found the judge to be fair and impartial, believed the hearing was worthwhile, that everyone there had an opportunity to present their views, and that agency staff were attentive.

Table 3.7: Opinions about Public Rulemaking Hearings

Statements about the Hearing	Strongly Agree/ Agree	Strongly Disagree/ Disagree	No Opinion/ Undecided
The administrative law judge was impartial and fair. (n=117)	76%	13%	11%
The public hearing was a waste of time. (n=119)	24%	71%	5%
Everyone there had an opportunity to present their views and opinions. (n=119)	86%	10%	4%
The administrative law judge sided with the agency and didn't adequately consider the public comments. (n=120)	23%	61%	16%
State agency staff really listened to the testimony. (n=118)	53%	33%	14%
The agency changed the rule because of testimony at the hearing. (n=118)	33%	46%	21%

Note: Data includes only respondents who reported attending a hearing (n=123) and those with valid responses.

Source: OLA Survey of Affected Parties, 1992.

Most people who have attended a rulemaking hearing have favorable opinions about it.

Some agency staff we spoke with agree that the public hearing process has value, if only symbolic. It provides an opportunity to air competing viewpoints in a public forum, even if the rule is not changed as a result. Others said the administrative law judge was helpful in forging a compromise on difficult issues. However, others found the hearing to be a waste of time, with no new positions presented that the agency had not already considered.

A public hearing provides an opportunity for people to present their case before an administrative law judge.

These opinions support the view that rulemaking hearings in Minnesota are likely to perform a different function than they do elsewhere. Since the public hearing occurs at the end of rulemaking, often after lengthy periods of negotiation, from the agency's point of view the hearing does not necessarily solicit new information. From the public's point of view, however, it provides an opportunity for them to present their case before a neutral party. Nearly 40 percent of affected party respondents think that public hearings should always be held on proposed rules.

Table 3.7 also shows that:

- **More people who have attended a public hearing say that agencies do not change rules because of public testimony than say agencies do change rules.**

Although administrative law judges are neutral, they told us that they believe the APA does not authorize them to substitute their judgment for that of the agency, which is considered to have superior technical expertise. Administrative law judges do not apply a "preponderance of the evidence" standard in judging the reasonableness of rules.[26] But judges also told us the public testimony received at the hearing is important to their findings, and they think that most rules are changed as a result of the hearing. Several survey respondents complained that some administrative law judges are too prone to accept the agency's point of view. But we also saw evidence in administrative law judge reports where the opposite was true.

Explaining Affected Parties' Satisfaction with Agency Rulemaking

We identified three factors that help explain why some affected parties are more satisfied with agency rulemaking than others: 1) how respondents hear about rules; 2) how much they participate in rulemaking; and 3) where they live.[27] We found that:

- **People who hear about rules from agencies directly, who participate more extensively, and who live in the Twin Cities metropolitan area tend to have more favorable opinions about current rulemaking procedures.**

Just over 36 percent of the respondents in our survey hear about rules only indirectly (from professional contacts or the *State Register*), and another 34 percent are only on an agency's mailing list. Meanwhile, 30 percent are in direct, personal contact with agency staff about rules (they may hear in other ways as

26 The standards applied in rules review are discussed in Chapter 4.

27 We also found some differences in opinion associated with respondents' organizational affiliation. However, the results varied with the individual question; no organizational affiliation was consistently associated with unfavorable opinions about rulemaking. As noted above, there are indications that opinions about rulemaking may vary with the agencies respondents interact with, but we were unable to test this assumption with our data. Rulemaking opinions were unrelated to the number of agencies a respondent is in contact with about rules.

Table 3.8: Opinions about Agency Rulemaking by How Respondent Hears about Rules

Agreement/Strong Agreement with Statement	Hears from Agency Directly (n=98)		Only on Agency Mailing List (n=112)		Hears Indirectly (n=121)	
	n	Percent	n	Percent	n	Percent
Agencies provide ample opportunities to give input.	55	62%	50	50%	42	42%
More uniform procedures to involve people are needed.	62	71	71	76	80	86
Agencies do a good job of showing why rules are needed.	42	46	39	40	24	25
It is easy to follow rules through the APA process.	25	37	15	22	11	19

Note: Each analysis excludes respondents without an opinion and those without valid responses. Percent is of those at each level of how respondent hears about rules.

Source: OLA Survey of Affected Parties, 1992.

People who hear about rules directly from agency staff have more favorable opinions about current rulemaking procedures.

well). As Table 3.8 shows, survey respondents in direct personal contact with agency staff are more likely to say that agencies provide enough opportunities for input and do a good job of showing why rules are needed, and are less likely to say more uniform procedures are needed. They are also more likely to find it easy to follow rules through the process.

In general, people who participate more extensively in the rulemaking process tend to be more satisfied with current procedures than those who participate less often or not at all. Of the various ways that people can participate in rulemaking, we found that:

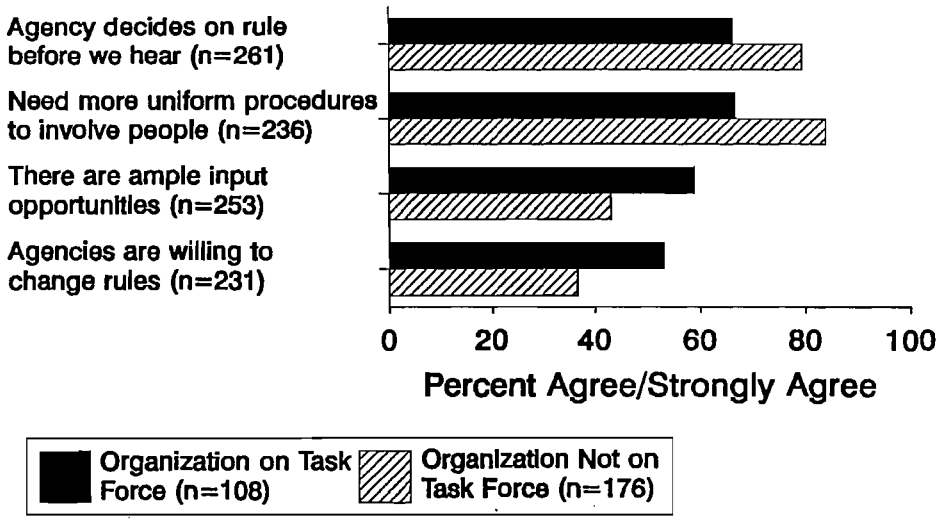
- **People who help an agency draft a rule are more likely to have favorable opinions about agency rulemaking than those who do not.**

Just about one-third of survey respondents (32 percent) belonged to an organization that participated on a rulemaking task force or advisory committee. Figure 3.5 illustrates that a higher proportion of respondents represented on a task force (59 percent) than nonparticipants (43 percent) say there are ample opportunities for input. Also, they were more likely to find agencies willing to change rules (53 percent) than nonparticipants (37 percent), and less likely to think that agencies decide before they hear (66 percent compared to 79 percent for nonparticipants). Finally, participants are less likely to say that more uniform procedures are needed (67 percent) than nonparticipants (84 percent).

As Figure 3.6 illustrates, affected parties who live in the Twin Cities metropolitan area are more likely to be satisfied with rulemaking procedures and

People who have participated on an agency's rules advisory committee have more favorable opinions about current procedures.

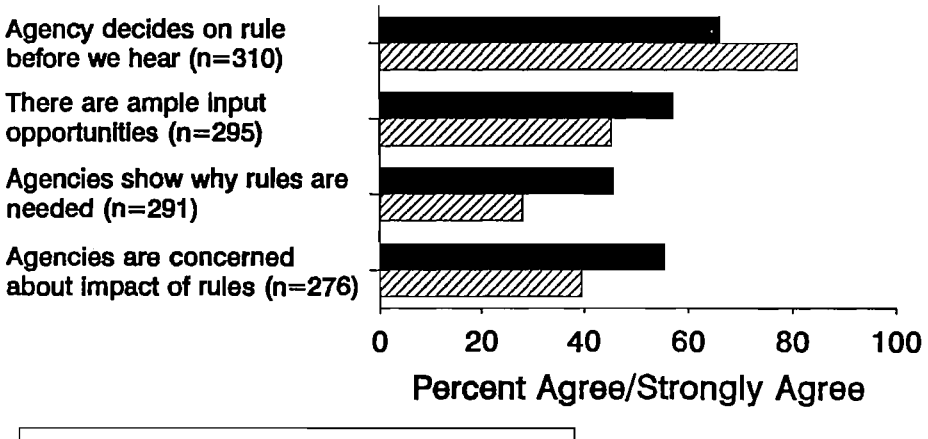
Figure 3.5: Opinions about Agency Rulemaking Performance by Task Force Participation



Note: Analysis excluded respondents without an opinion.

Source: OLA Survey of Affected Parties, 1992.

Figure 3.6: Opinions about Agency Rulemaking by Where Respondent Lives



Note: Analysis excludes respondents without an opinion.

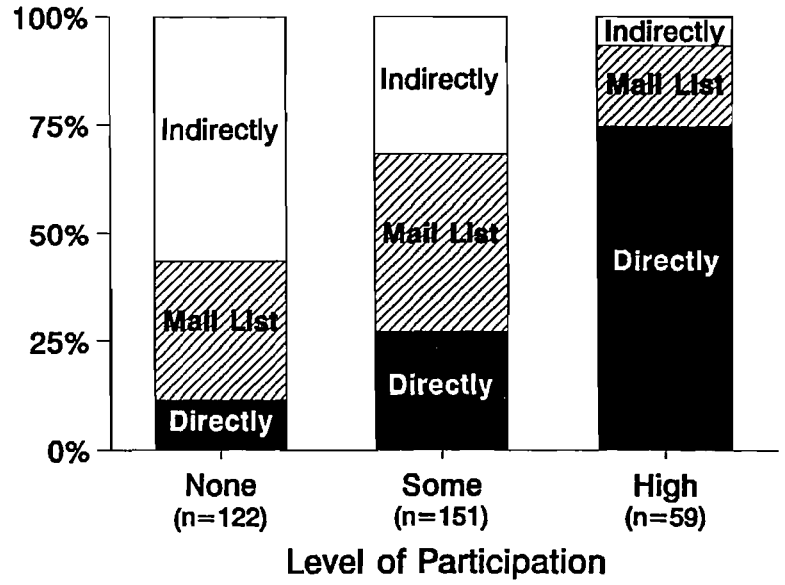
Source: OLA Survey of Affected Parties, 1992.

agency performance than those who live outside the Twin Cities. Twin Cities area respondents were less likely to say agencies decide on a rule before they hear about it (66 percent compared to 81 percent for non-Twin Cities area respondents), and were more likely to say there are ample opportunities to provide input (55 percent compared to 43 percent). Also, Twin Cities area respondents were more likely to say that agencies do a good job of showing why rules are needed (46 percent compared to 28 percent), and that agencies are concerned about the impact of their rules (56 percent compared to 40 percent).

Finally, we learned that these factors are all inter-related. As Figures 3.7 and 3.8 show,

- **People who participate more extensively in rulemaking are also much more likely to hear about rules directly from an agency and to live in the Twin Cities metro area.**[28]

Figure 3.7: Participation in Rulemaking by How Respondent Hears about Rules

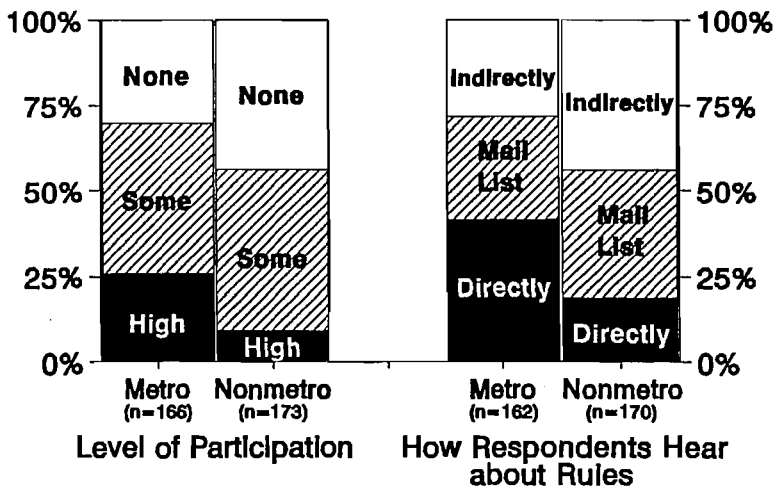


Source: OLA Survey of Affected Parties, 1992.

Figure 3.8 illustrates that Twin Cities metropolitan area respondents are both more likely to participate *and* to hear about rules directly from agencies than respondents who live outside the Twin Cities area. Quite a few respondents

28 We asked respondents if they had submitted written comments about a rule, attended a hearing, or served on a rule advisory committee. Those responding "yes" to all three are defined as having a "high" level of participation, those responding "yes" to one or two are defined as having "some" participation, and those with no "yes" responses are defined as "none" on level of participation.

Figure 3.8: Effects of Residence on Participation and How Respondents Hear about Rules



Note: Twin Cities area respondents are identified as "Metro"; others are "Nonmetro." Analysis excludes respondents without an opinion.
Source: OLA Survey of Affected Parties, 1992.

People who live outside the Twin Cities area are less likely to participate in rulemaking, and are more likely to have unfavorable opinions about current procedures.

living outside the Twin Cities area commented about their perceived inability to participate effectively in the rulemaking process, as the following quotes illustrate:

> "Many agencies set hearings at times that are most difficult for agricultural people to attend. This has given the impression that agencies do not want to hear from many of those that will be greatly impacted by the rules."

> "Most small cities feel left out of the process."

> "Most rulemaking takes place in St. Paul with little effort expended by the agencies to notify groups or people outside of the Capitol."

> "The problem with the rulemaking process is that it is based in St. Paul, and is heavily influenced by legislators and/or lobbyists who can devote time and have connections."

SUMMARY AND CONCLUSIONS

We began this chapter by presenting criteria for assessing the adequacy of public participation requirements: the public should receive adequate and timely notice of proposed rules, and the process should be open and fair and guarantee meaningful opportunities for the public to participate. If these conditions are met, we would expect members of the public who are interested in rules to be satisfied with the rulemaking process, even though they may disagree with

a particular outcome. Based on these criteria, we conclude that Minnesota's APA could be improved. We found that publishing rules in the *State Register* is not a very effective method of public notification. People interested in agency rules are much more likely to hear about rules from the agency. A large majority of people affected by rules believe their input occurs too late to make a difference. On balance, more people have unfavorable opinions about agency rulemaking than favorable opinions.

Under current APA provisions, agencies have an incentive to negotiate with interested parties during rule-drafting, to achieve an acceptable compromise, and to avoid the time and expense of a public hearing. This increases the importance of the informal negotiation process relative to the APA-mandated process of public notice and comment. Those who participate in rulemaking negotiations are generally satisfied with their influence, but those who do not participate in the negotiation phase feel effectively left out of rulemaking because they hear about rules too late to provide comments the agency will use. Unlike the Model APA, which includes requirements to ensure more open public access to the informal rulemaking process, Minnesota's APA contains no such requirements.

Finally, we outlined two alternative ways to think about administrative rulemaking, as a technical process and as a political process. In many ways, Minnesota's formal APA public input requirements were originally designed to ensure due process. They provide for public notice, written submissions in response to a proposed agency rule, and a public hearing, if requested. The public hearing is presided over by a neutral party, but with a presumption in favor of the agency because of its superior technical expertise. In other ways, however, rulemaking is a political process: agencies are encouraged to negotiate with affected parties to achieve a satisfactory compromise solution during rulemaking. This approach has certain advantages. But it is unclear whether all current due process procedures, such as the 25-signature requirement, remain adequate. Where such procedures come to be used in the bargaining process, they may no longer provide an adequate safeguard for all interested members of the public, in particular for those left out of the negotiation process. We discuss solutions for this problem in Chapter 5.

Review, Oversight, and Accountability

CHAPTER 4

In this chapter we assess the adequacy of Minnesota's rules review and oversight mechanisms that provide a check on agency power and ensure public accountability of rules. We also evaluate the extent to which these review and oversight mechanisms ensure that agencies comply with Administrative Procedure Act (APA) requirements. We focus on the following questions:

- **How do the provisions in Minnesota's APA that are designed to ensure public accountability for agency rules compare with the "Model APA" and those in other states?**

- **What types of agency actions require rulemaking in Minnesota? Which agencies are exempt from rulemaking requirements?**

- **Do current oversight mechanisms provide for sufficient public accountability for agency rules? Do they ensure that rules are consistent with legislative intent and that agencies comply with APA requirements? To what extent are agency rules successfully challenged in court?**

To answer these questions, we interviewed staff from the offices responsible for rules review and oversight: the Attorney General's Office, Office of Administrative Hearings, Office of the Revisor of Statutes, and Legislative Commission to Review Administrative Rules. We systematically examined the Attorney General's files and administrative law judge reports for rules reviewed during fiscal years 1991 and 1992. We also examined the complaint files of the Legislative Commission to Review Administrative Rules and a commission study of exemptions to rulemaking, the Revisor's records of legislation involving agency rules, and court decisions pertaining to agency rulemaking. Finally, we surveyed the national literature, attended a national conference on rules review and legislative oversight, and compared Minnesota's review and oversight mechanisms to the "State Model Administrative Procedure Act" (Model APA) and to those found in other states.

We found that some aspects of rules review and oversight in Minnesota are less rigorous than those recommended in the Model APA and found in many other states. Minnesota's provisions for rules review emphasize compliance with procedural requirements but may not always ensure that rules are

acceptable to the Legislature and the public. We found that agencies usually complied with those rulemaking requirements that are monitored by offices responsible for rules review, especially the due process requirements, but they did not always comply with other requirements. In particular, agencies did not fully comply with special APA requirements or meet legislatively mandated deadlines.

MINNESOTA'S APA COMPARED WITH THE MODEL APA

Figure 4.1 compares the provisions in Minnesota's APA that help ensure accountability for agency rules with those of the Model APA. As we noted in earlier chapters, the Model APA or major portions of it has been adopted by a majority of other states as their administrative procedure act, so it provides a useful basis for comparison with Minnesota.

Rule Definition

Minnesota and the Model APA both have broad definitions of rulemaking.

Both the Model APA and Minnesota's APA are intended to ensure that most agency policy statements that affect the general public are adopted through a fair and open process that includes public input. Both provide broad definitions of "rule." Under Minnesota's APA, a rule is "every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to make specific the law enforced or administered by that agency or to govern its organization or procedure."[1] The Model APA uses similar broad and inclusive language in its definition.[2] By calling rules statements of "general applicability," both definitions exclude from rulemaking requirements agency rulings and orders made in response to specific individual cases.

"Interpretive rules" clarify the meaning of a statute or an existing rule. Using their general power to carry out programs and enforce the laws passed by the Legislature, agencies adopt interpretive rules to set forth their policy and inform the public how they will interpret and administer a program. The Model APA exempts interpretive rules from many of the public notice and hearing requirements of rulemaking.[3] Under Minnesota's APA interpretive rules are not exempted.

1 *Minn. Stat.* §14.02, subd. 4.

2 The Model APA defines a rule as "an agency statement of general applicability that implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency." See *Model State Administrative Procedure Act* (1981), §1-102.

3 *Model State Administrative Procedure Act* (1981), §3-109.

Figure 4.1: Comparison of Provisions to Ensure Public Accountability in Minnesota's Administrative Procedure Act (APA) to the State "Model APA"

	"Model APA"	Minnesota's APA
Rule Definition	• Defines "rule" broadly as agency statements of "general" applicability. • Exempts "interpretive rules" from public participation requirements. • Contains general criteria for determining when rules should be exempted.	• Defines "rule" similarly to Model Act. • "Interpretive rules" are subject to all APA requirements. • No criteria for granting exemptions.
Rules Justification Requirements	• Statement of rule's purpose, statutory authority, and reasons for adopting the rule is required. • Regulatory analysis (cost/benefit) required if requested by 300 persons, another state agency, a political subdivision, or the legislative or executive rules review authority.	• A similar "statement of need and reasonableness" is required. • Additional rule justification requirements if agricultural land or small businesses are affected or if projected fiscal impact on local government is likely to exceed $100,000.
Oversight and Rules Review	• All rules subject to judicial review after aggrieved party has exhausted administrative remedies. • Provides for gubernatorial review of rules (through administrative rules counsel). Gives governor power to rescind or suspend rules. • Provides for a bipartisan legislative committee to review proposed or adopted rules and receive public complaints. Committee may hold hearings and make nonbinding recommendations on rules. • Annual agency review of all rules.	• Similar provision for judicial review of rules. • Individuals may challenge a proposed rule in court if it threatens their legal rights. • No gubernatorial review of rules, but review of rules by Attorney General's Office or Office of Administrative Hearings (Chief Administrative Law Judge appointed by Governor). • Bipartisan legislative commission (LCRAR) that has power to suspend a rule temporarily. • No provisions for regular updating of agency rules.

Source: National Conference of Commissioners on Uniform State Laws, "Model State Administrative Procedure Act, 1981"; *Minn. Stat.* Ch. 14.

The Model APA specifically exempts specified classes of rules from some procedural requirements and includes general criteria for exemptions.[4] Minnesota's APA does not include criteria for granting exemptions to formal rulemaking, but bills containing rulemaking exemptions are supposed to be reviewed by the House and Senate government operations committees.

Rule Justification

Differences exist in the rule justification requirements as well. Both the Model APA and Minnesota's APA require agencies to prepare written justifications for their rules, but they differ in timing and scope. Minnesota requires a "statement of need and reasonableness" for all permanent rules. The statement must be prepared before the proposed rule is published. In comparison, the Model APA requires agencies to publish a concise statement of the reasons for adopting a rule at the time of its adoption. The Model APA also specifies conditions under which agencies must analyze the costs and benefits of proposed rules. Agencies must prepare a "regulatory analysis" of a proposed rule if requested by the governor, the administrative rules review committee of the legislature, a political subdivision, another state agency, or 300 signatures to a petition.[5] In contrast, Minnesota has added several special requirements (small business statement, agricultural land impact assessment, and fiscal note on the local govenment impact) aimed at achieving a similar purpose of assessing a rule's expected costs.[6]

Rules Review and Oversight

Unlike Minnesota, the Model APA provides for gubernatorial review of rules.

Minnesota's formal rulemaking procedures also differ from the Model APA with respect to rules review and oversight. Both provide for judicial review of agency rules and for a bipartisan legislative rules review commission. However, the Model APA provides for gubernatorial rules review that includes rule suspension and recission powers. Minnesota's APA, on the other hand, relies more heavily on rules review by the Attorney General's Office and the Office of Administrative Hearings, which make binding decisions regarding the legality of rules. Finally, the Model APA requires agencies to keep their rules up to date, while Minnesota's APA does not.

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4 Agencies are exempt if, for good cause, they find any requirements to be "unnecessary, impracticable, or contrary to the public interest." Exempt rules are subjected to additional scrutiny by the legislative and gubernatorial rules review authority. (*Model State Administrative Procedure Act* §3-108.)

5 *Model State Administrative Procedure Act* (1981), §3-105.

6 Minnesota also requires the Pollution Control Agency to consider the impact of its actions on the economy and business and whether they will result in any tax burdens on municipalities (*Minn. Stat.* §§115.43, subd. 1 and 116.07, subd. 6) and the Department of Health to prepare a brief statement on the anticipated costs and benefits of proposed rules relating to nursing homes (*Minn. Stat.* §144A.29, subd. 4). See *Minn. Rules* §1400.0500, subpart 1(A).

DEFINING WHEN A RULE IS NEEDED

As noted in Chapter 2, Minnesota state agencies report considerable difficulty determining when a rule is needed and when informal guidelines suffice. They have sometimes tried to circumvent rulemaking requirements by issuing interpretive guidelines rather than rules. We reviewed Minnesota court decisions relating to administrative rules and found that:

- **Most judicial challenges are directed at agency policy guidelines that were not the result of formal rulemaking.**

In reviewing court cases, we found that:

- **Courts have usually held that whenever an agency interprets a statute by applying criteria through written policy statements or directives, it must go through the procedures outlined in the APA.**[7]

Thus, unless specifically exempted, agency "guidelines," "policy statements," and "information bulletins" must be adopted according to APA procedures if they are to have the force and effect of law. On the other hand, an agency may make policy through a series of decisions on individual cases provided that the decisions do not generalize beyond the facts presented in the cases.[8] Furthermore, if an agency issues a policy statement or directive that merely puts into writing longstanding agency policies or interpretations of an ambiguous rule or statute, rulemaking may not be required.[9]

The Legislature sometimes exempts specific programs from normal procedural rulemaking requirements.

Exemptions

As noted above, the Model APA allows an agency to forego public notice and participation requirements in adopting rules if it finds that the requirements are unnecessary, impractical, or contrary to the public interest. In Minnesota, agencies do not normally have authority to forego formal rulemaking procedures. But, when the Legislature enacts specific programs, it sometimes exempts them from APA procedural requirements. Under Minnesota's APA, rules that are exempt have the force and effect of law, but they are not subjected to external review (i.e., consistency with legislative intent, need, and reasonableness) before they become effective.[10]

We found that the Legislature granted 123 rulemaking exemptions for specific programs between 1985 and 1992, which represents about 12 percent of the

7 See *McKee v. Likens*, 261 N.W. 2d 566 (Minn. 1977). However, if the statute is unambiguous and the policy is merely a written explanation of the statute rather than an interpretation of the statute or selection among possible interpretations, then rulemaking is not required. See *Cable Communications Board v. Nor-West Cable*, 356 N.W. 2d 658 (Minn. 1984).

8 See *Bunge Corp. v. C.I.R.*, 305 N.W. 2d 779 (Minn. 1981).

9 See *White Bear Lake Care Center Inc. v. Minnesota Dept. of Public Welfare*, 319 N.W. 2d 7 (Minn. 1982).

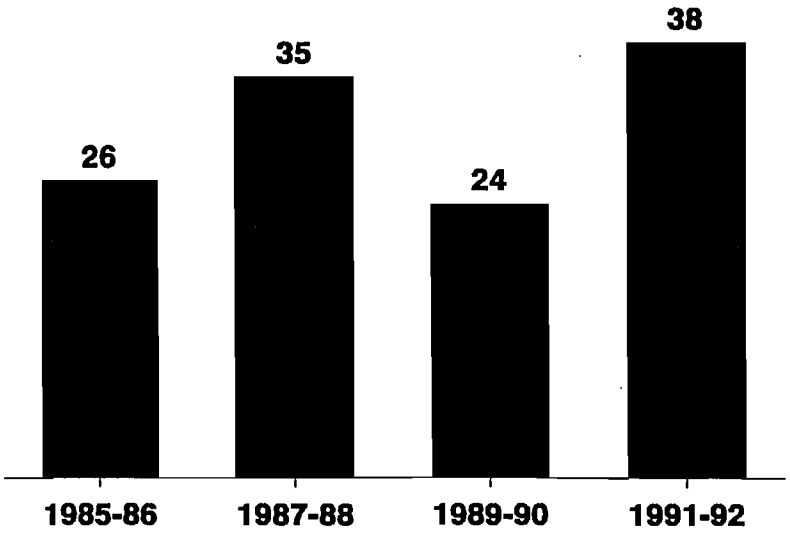
10 Rules of the House and Senate require their respective Government Operations Committees to approve all bills granting rule exemptions. Also, the Revisor of Statutes must approve the form of rules adopted by agencies exempted by *Minn. Stat.* §14.02, subd. 4.

bills that dealt with rules. Figure 4.2 shows the number of exemptions granted each legislative biennium over this time period.

We also found that:

- **The APA does not specify the conditions under which exemptions should be granted.**

Figure 4.2: Number of Rulemaking Exemptions by Biennium, 1985-92



Source: Revisor of Statutes.

Some agencies are required to go through formal rulemaking while others are exempted for similar policy actions (e.g., setting fees, establishing funding criteria, and specifying eligibility criteria).

In 1988, the Legislative Commission to Review Administrative Rules identified 48 agencies with rulemaking exemptions, 16 of them agency-wide. We updated the commission's list by adding the exemptions reported by the Revisor of Statutes from 1989 through 1992. As Figure 4.3 shows:

- **Seventeen agencies now have agency-wide exemptions. Most of these agencies are boards or commissions with limited responsibilities. An additional 35 agencies have at least one of their programs exempted from APA rulemaking requirements.**

Exemptions may require or allow an agency to adopt or amend rules without complying with the provisions of the APA (about 60 percent of the exemptions granted between 1985 and 1992) or they may instruct or allow a department to do something without adopting rules at all (40 percent). In 1992, for example, the Legislature permitted the Commissioner of Public Safety to issue

Figure 4.3: State Agencies with Rulemaking Exemptions

Agency-Wide Exemptions

Comprehensive Health Association
Greater Minnesota Corporation
Health Coverage Reinsurance Association
Higher Education Facilities Authority
Military Affairs
Rural Finance Authority
Sentencing Guidelines Commission
State Board for Community Colleges
State Board of Investments
State Board of Vocational Technical Education
State High School League
State Insurance Fund
State University Board
University of Minnesota Regents
Workers' Compensation Reinsurance Association
World Trade Center
Zoological Board

Agencies With Specific Exemptions (Number of exemptions in parenthesis)

Administration (6)
Agriculture (11)
Arts Board (1)
Attorney General (3)
Board of Chiropractic Examiners (1)
Board of Education (6)
Board of Teaching (1)
Board of Medical Examiners (1)
Bureau of Criminal Apprehension (1)
Capitol Area Architecture and Planning Board (1)
Center for Arts Education (1)
Commerce (12)
Corrections (9)
Education (5)
Employee Relations (4)
Finance (13)
Gaming (1)
Governor's Office (1)
Health (11)
Higher Education Coordinating Board (2)
Housing Finance Agency (4)
Human Services (27)
Labor and Industry (7)
Natural Resources (14)
Pollution Control Agency (2)
Public Safety (5)
Public Service (1)
Revenue (8)
Secretary of State (1)
State Auditor (1)
State Court Administrator (1)
State Planning Agency (1)
Tax Court (2)
Trade and Economic Development (3)
Transportation (7)
Waste Management Board (6)

Sources: Legislative Commission to Review Administrative Rules and Revisor of Statutes.

restricted commercial drivers' licenses and prescribe the nature of the restrictions, examination requirements, and the term of the license, all without complying with the rulemaking provisions of Chapter 14.[11] In another law, the Legislature required the Department of Agriculture to establish guidelines for testing water used to produce Grade A milk and exempted the guidelines from Chapter 14.[12]

We found that:

- **The main reason that the Legislature exempts agencies from APA requirements is its desire for quick action.**

11 Minn. Laws (1992), Ch. 581, Sec. 14.

12 Minn. Laws (1992), Ch. 544, Sec. 3.

In 1988, the Legislative Commission to Review Administrative Rules surveyed agencies with rulemaking exemptions and asked about the reasons for the exemptions. Table 4.1 summarizes their responses. The foremost reason is that immediate action is necessary, either to respond to marketplace changes, to get a program underway, to protect the public, or to respond to federal requirements. Nine of the 16 totally exempt agencies were quasi-state agencies engaged in business transactions aimed at facilitating economic development or serving a particular segment of the business community. They justified their exemptions on the need to act quickly to respond to marketplace events. They also claimed that they were not really state agencies and did not deal directly with individual citizens.[13] While these may be important considerations, it makes it more difficult for the state to ensure that the procedures of these quasi-state agencies are fair and that they do not abuse their power.

Table 4.1: Reasons Agencies Give for Their Rulemaking Exemptions

Reason	Number of Exemptions
Immediate action necessary	61
Internal agency matter - does not affect public	17
Statute is specific - no rule needed	16
Federal regulation or other agency involvement provides sufficient checks and balances	14
Item is not a rule	11
Agency is not a state agency	9
Issue requires case-by-case determinations	8
Flexibility needed to prevent cash flow problems	7
Public sufficiently involved with legislation	6
Other	28

Source: 1988 Legislative Commission to Review Administrative Rules survey of agencies with rules exemptions.

REVIEW OF PROPOSED RULES

All state APAs provide for a review of proposed rules by entities outside the agency. The main purpose of rules review is to ensure that agencies follow proper procedures in adopting rules and that the rules they adopt are reasonable, in the public interest, and consistent with legislative intent (See Figure 4.4). External review also minimizes judicial challenges to agency rules.

As described in Chapter 1, all rules in Minnesota are first reviewed by the Revisor's Office to make sure they are in the proper form. Rules are then reviewed by either the Attorney General's Office (rules without a hearing and emergency rules) or the Office of Administrative Hearings (rules with a hearing). According to the APA, the purpose of these reviews is to ensure that

13 Four agencies dealt specifically with higher education and had their own governing boards; one claimed to have advisory powers only; one said it is governed for the most part by federal regulations; and one did not respond.

Figure 4.4: Purposes of External Review of Proposed Administrative Rules

- Ensure that the agency followed the appropriate procedural requirements.
- Ensure that the rule is clear, unambiguous, understandable, and in the proper form.
- Determine whether agency acted consistent with its statutory authority.
- Assess whether the proposed rule is consistent with legislative intent.
- Determine the merits of the proposed rule: is it needed, reasonable, and in the public's interest?
- Assess whether the proposed rule duplicates or is contradictory to other existing rules.

Source: Council of State Governments National Conference, Administrative Rules Review Meeting, Des Moines, Iowa, December 3, 1992.

rules are legally authorized, APA procedures were followed, the agency has demonstrated the need and reasonableness of the rule, and the adopted rule is not substantially different from the proposed rule.

We found that:

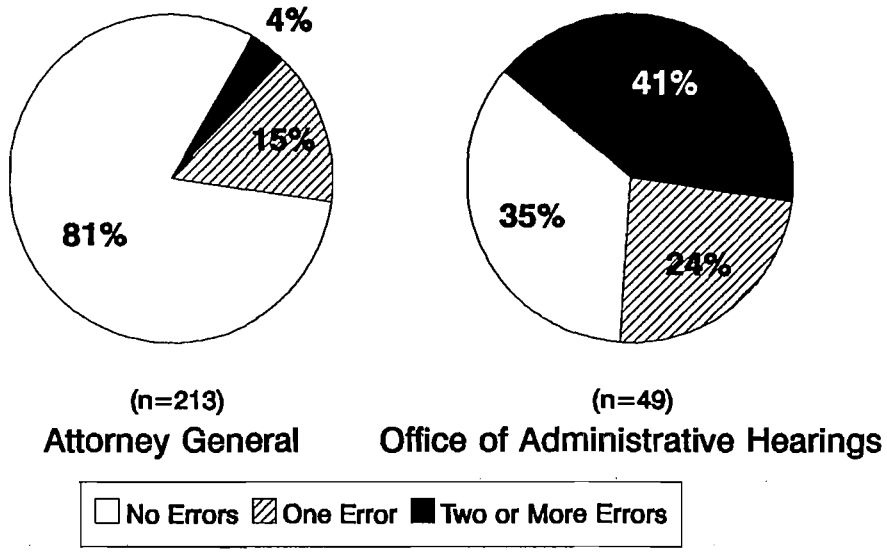
- **Rule reviews by administrative law judges are more thorough than those conducted by the Attorney General's staff, although to some extent this may be because of differences in complexity and controversy of the rules they each review.**

Administrative law judges were more likely than Attorney General reviewers to find errors.

Based on information provided by the Attorney General's Office for the 87 rules it reviewed in fiscal year 1992, we determined that reviewers spent an average of 5.9 hours reviewing each rule, and the Attorney General billed agencies an average of $256 for each rule reviewed. By contrast, the Office of Administrative Hearings conducted 17 rule hearings in calendar year 1991. It spent an average of 52.9 hours conducting public hearings and reviewing each rule and billed agencies an average of $3,960 per rule (including the cost of traveling to and presiding over hearings and preparing transcripts).

As shown in Figure 4.5, administrative law judges were more likely to find rule deficiencies than were Attorney General reviewers. Law judges found at least one error in almost two-thirds of the rules they reviewed in fiscal years 1991 and 1992 and two or more errors in 41 percent of the rules. In contrast, Attorney General reviewers found at least one error in 19 percent and two or more errors in only four percent of the rules they reviewed.

Figure 4.5: Comparison of Rule Deficiencies Found by Reviewing Agencies, FY 1991-92



Source: OLA analysis of Attorney General and Office of Administrative Hearings files.

Attorney General reviewers do not prepare formal reports for rules that did not have a hearing.

An Attorney General legal assistant completes a "rules review checklist" on rules. The assistant checks off whether the agency complied with procedural requirements, such as filing required notices, preparing a statement of need and reasonableness, and preparing special impact statements when applicable. The assistant also notes the agency's statutory authority to adopt the rule. Attorneys then review the rule and the agency's statement of need and reasonableness. The reviewers do not prepare a formal written report on the rules they review.

In contrast, the APA requires that administrative law judges issue formal reports on rules after a public hearing. In addition, hearings are usually controversial, and parties often testify and present evidence in support and opposition to proposed rules. As a result, these rules are scrutinized more thoroughly than rules without a hearing.

Procedural Requirements

We found that:

- **Both the Office of Administrative Hearings and the Attorney General's Office carefully review rules to ensure that agencies comply with the APA's due process requirements.**

Table 4.2 shows the types of errors found by Attorney General and Office of Administrative Hearings reviewers. Sixteen percent of rules reviewed by the Attorney General's Office had procedural errors, and most of them were

Table 4.2: Rule Deficiencies by Type of Review, FY 1991-92

	Attorney General (n=213)		Office of Administrative Hearings (n=49)	
Procedural Errors	Number of Rules with Errors	Percent of Rules	Number of Rules with Errors	Percent of Rules
Notice and comment	14	7%	1	2%
Special requirements	4	2	4	8
Filing deadlines, other	20	9	12	24
Total rules with procedural errors[1]	35	16%	17	35%
Substantive Errors				
Lack of statutory authority	5	2	16	33
"Need and reasonableness" defect	5	2	16	33
"Substantial changes"	0	0	1	2
Total rules with substantive deficiencies[1]	10	5%	23	47%
Total Rules with Any Errors	41	19%	32	65%

[1]Totals are not necessarily equal because rules can have multiple deficiencies.

Source: Attorney General's Office, Office of Administrative Hearings.

missed deadlines. In fact, 5 of the 20 rules withdrawn by agencies or rejected by the Attorney General's Office during 1990 and 1991 were for mistakenly allowing a 29-day public comment period instead of 30 days. Thirty-five percent of the rules reviewed by the Office of Administrative Hearings had procedural errors, mostly related to filing deadlines.

Rule reviewers are no longer required to reject rules for procedural errors deemed "harmless."

In 1992, the Legislature amended the APA to allow reviewing agencies to approve rules with "harmless" procedural errors. The first application by the Attorney General's Office of this provision was on a Racing Commission rule regarding fees, where the agency was three months late notifying the House Appropriations and Senate Finance Committee. The first time the Office of Administrative Hearings formally applied the harmless error doctrine was on a Board of Education rule where the board was late filing documents. However, we found that administrative law judges had been forgiving those kinds of errors even before the law was changed.

Rule Justification

Agencies are required to justify the need and reasonableness of their proposed rules in written statements that are part of the rulemaking record. In addition, agencies must assess the impact of proposed rules on specialized subgroups, such as small business. We found that:

- **The thoroughness and quality of agency "statements of need and reasonableness" vary considerably because there are no specific requirements for their contents.**

Attorney General rules require that statements explain the evidence and arguments that support both the need for and reasonableness of the proposed rule and show how the evidence relates to the particular choices made.[14] Office of Administrative Hearings rules require the statements to be prepared with "sufficient specificity" so that interested persons will be able to fully prepare any testimony or evidence in favor of or opposed to the proposed rules.[15]

Some statements of need and reasonableness were cursory and uninformative.

In the course of our research, we found several statements of need and reasonableness that were very cursory and uninformative. For example, one agency supported its eligibilty requirements for a grants program by saying "every grants program should have requirements for determining eligibility" rather than justifying the specific requirements included in its proposed rule. The Attorney General reviewer wrote to the agency that its statement was inadequate, but did not require the agency to redo it. Attorney General reviewers told us they sometimes find inadequate statements of need and reasonableness, but they are reluctant to reject a rule on that basis because that would require the agency to re-start the rulemaking proceeding. Attorney General reviewers may discuss the rule with the agency and they sometimes require agencies to make changes, especially when the rule contains overly broad or ambiguous language. Attorney General reviewers told us that they generally give deference to agencies and do not reject a rule on the grounds that it is not needed and reasonable.

A majority of citizens do not think agencies do a good job showing why rules are needed.

Responses to two of the items on our survey of interested parties suggest that agencies may not be doing all they could to explain and justify their rules. Only 32 percent of the survey respondents thought that agencies do a good job showing why rules are needed (55 percent disagreed and 13 percent did not know) and only 15 percent thought that agencies develop good data about the cost of their rules (69 percent disagreed and 16 percent did not know).

The APA requires agencies to consider the impact of proposed rules on small business, agricultural land, and local governments and, where applicable, to provide a statement that shows how they considered alternatives to reduce any adverse impacts. These statements are supposed to be included in agency statements of need and reasonableness.

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14 Minn. Rule §2010.0700.

15 Minn. Rule §1400.0500.

We found that:

- **Agencies sometimes provided special impact statements but the statements were often cursory and uninformative, and reviewing agencies normally did not reject a rule on this basis.**

For example, with regard to the impact of the rule on small business, we found that 49 percent of the rules reviewed by the Attorney General's Office in fiscal years 1991 and 1992 had a statement. For 51 percent of the rules, the agency said that no statement was necessary because the rule had no impact on small business. We found no instances where the Attorney General reviewers rejected a rule for failing to include a statement or because the statement was inadequate.[16]

A few rules were changed to reduce their impact on small business.

Similarly, 25 of the 49 rules (51 percent) reviewed by administrative law judges had a small business impact statement. However, 17 of the 25 said that while they considered the rule's impact on small business, they made no changes because there were no alternatives that would fulfill statutory requirements. In three cases, rules were explicitly changed to reduce their small business impact, and in four additional cases, minor changes were made. One proposed rule was rejected by an administrative law judge because it did not have a small impact statement and one was rejected because its small business impact statement was deficient.[17] On the other hand, we found one case where an administrative law judge explicitly stated that he did not find that an agency violated the small business requirement because "such a conclusion would mean the department could not adopt the rule and it would have to start over with another lengthy, expensive rulemaking proceeding."[18]

Agencies provided fiscal notes on the impact of their proposed rules on local governments (required if it is expected to exceed $100,000) in 38 of the 262 rules we reviewed (15 percent) and an agricultural land impact statement was provided for only four (two percent) of the rules. We conclude that:

- **While agencies usually fulfill the letter of the law by providing statements, the extent to which they seriously consider a rule's impact on small business, agricultural land, and local governments is mainly left to agencies' discretion and is usually not challenged by rule reviewers.**

16 Attorney General reviewers told us that they have rejected rules because of an inadequate small business statement, most recently in 1986.

17 The rule without a small business statement was an Environmental Quality Board rule on release of genetically engineered organisms. The board terminated the proceeding and issued a second notice of hearing. See Office of Administrative Hearings, Docket #3-2901-5759-1, 5-6. The second rejected rule was a Commerce Department rule requiring check cashers to post their rates for all their services. The judge found that the posting requirements were too detailed and onerous, and found no evidence that the department considered alternatives to reduce their impact on small business. The department deleted the objectionable parts of the rule. Office of Administrative Hearings, Docket # 69-1000-4615-1, 9.

18 This was a Health Department rule relating to licensing of trailer parks and campgrounds. Instead of rejecting the rule, the judge told the department to limit the fee increase it wished to impose on trailer parks and campgrounds with fewer than 50 sites. Office of Administrative Hearings, Docket # 5-0900-4796-1, 5, 7.

Review of Rules for Need and Reasonableness

The APA requires both the Office of Administrative Hearings (rules with a hearing) and the Attorney General's Office (rules without a hearing) to review the need and reasonableness of proposed rules. In addition to reviewing the agency's statement of need and reasonableness, reviewers consider the agency's statutory authority to adopt the rule, the rule's consistency with the statute, public comments filed with the agency, and in the case of rules with a hearing, public testimony and evidence presented at the hearing. Agencies do not have to show that a proposed rule is the best of all possible rules or that it is superior to all the alternatives suggested in public testimony or comment. Rather, the agency must only demonstrate a rational basis for the rule it chooses to adopt.

The results of this review for fiscal years 1991 and 1992 were shown in Table 4.2 above. Only five percent of the 213 rules reviewed by the Attorney General's Office had substantive errors. Half of these were a finding that the agency lacked statutory authority to adopt the rule, (for example, the agency allowed itself more discretion than the statute allowed) and the other half were rejected because of deficiencies in the rule's need and reasonableness.

In contrast, about one-third of the 49 rules reviewed by the Office of Administrative Hearings were found to lack statutory authority and one-third had provisions that were not shown to be needed and reasonable. Normally, when an administrative law judge finds a provision in a proposed rule to be outside the agency's jurisdiction, contrary to the statute, or unreasonable, the agency makes the changes recommended by the judge and the process moves forward.[19]

Administrative law judges we spoke with told us that determining a rule's reasonableness and consistency with legislative intent is difficult. In determining legislative intent, judges rely on statutory language.[20] Judges stressed that it is not their role to judge policy, only to determine that the agency has presented a "reasoned analysis" that its rule is consistent with the statute and other laws. The emphasis of their review is on legal compliance. We found considerable variation among judges, however, on how they approached need and reasonableness. Some judges deferred to agency judgment on most substantive matters, while others were more willing to consider public comment and recommend that agencies make changes.

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19 If an administrative law judge finds that an agency did not demonstrate the need and reasonableness of a proposed rule, the agency could submit the issue to the Legislative Commission to Review Administrative Rules for non-binding comment and adopt the rule anyway. However, agencies have only done this three times since 1975. This is not an option if the Attorney General rejects a rule because the agency did not demonstrate its need and reasonableness.

20 Sometimes, individual legislators submit comments or testify at rule hearings, but law judges do not construe their opinions to represent legislative intent. Administrative law judges told us that they would like the Legislature to put statements of intent into laws that establish programs and authorize agencies to adopt rules.

Complaints about Rules

We reviewed complaints about rules filed with the Legislative Commission to Review Administrative Rules between fiscal years 1977 and 1992. There were 445 complaints about 371 different rules, or about one complaint for every five rules adopted during that period. Rules adopted by the Department of Human Services received the most complaints (74), but complaints were made about rules adopted by all types of agencies. About 47 percent of the complaints came from legislators, but many of these were on behalf of constituents. Thirty percent of the complaints came directly from citizens, fifteen percent from interest groups, and eight percent from other government agencies.

We found that:

- **Most of the complaints were directed towards the contents of the rule rather than the process of adopting it.**

Most complaints about a rule claim it is unreasonable.

Table 4.3 shows the types of complaints filed with the Legislative Commission to Review Administrative Rules. Almost half of the complaints said a rule was unreasonable, and 14 percent said the rule was inconsistent with legislative intent. Fewer people complained that an agency adopted a policy that should have gone through rulemaking, that an agency did not follow appropriate rulemaking procedures in adopting a rule, or that an agency failed to adopt a legislatively mandated rule. While these complaints suggest some legislative and public dissatisfaction with agency rules, we are unable to say whether this is a normal outcome of policy implementation (i.e., you cannot please everyone) or an indication that the rulemaking process is not responsive to legislative and public concerns.

Table 4.3: Types of Complaints Received by LCRAR, 1977 to 1992

	Number of Complaints	Percent of Total
Rule was unreasonable	208	46.4%
Rule was inconsistent with legislative intent	64	14.4
Agency made policy that should have gone through rulemaking	29	6.8
Agency did not follow appropriate procedures	28	6.3
Agency did not adopt a legislatively mandated rule	25	5.6
Other complaints	91	20.4
Total	445	100.0%

Source: OLA analysis of Legislative Commission to Review Administrative Rules complaint files.

Timely Adoption of Rules

Finally, we examined the APA's requirement that agencies publish a proposed rule within 180 days of a law requiring rules or inform the Legislative Commission to Review Administrative Rules, the Governor, and the appropriate policy committees why the requirement was not met. Table 4.4 shows that between 1987 and 1991,

- **Only 1 in 8 rules that should have been published within 180 days met the required deadline.**

Table 4.4: Agency Compliance with 180-Day Requirement for New Rules, 1987-1991

Year	Number Rulemaking Grants	Published Rule Within 180 Days		Complied by Notifying LCRAR		Total Not in Compliance	
		#	%	#	%	#	%
1987	93	10	10.8%	10	10.8%	73	78.5%
1988	49	6	12.2	31	63.2	12	24.5
1989	67	13	19.4	35	52.2	19	28.4
1990	49	10	20.4	18	36.7	21	42.8
1991	53	0	0.0	34	64.1	19	35.8
Total	311	39	12.5%	128	46.1%	144	46.3%

Source: OLA analysis of data provided by the Legislative Commission to Review Administrative Rules.

None of the rules required by the Legislature in 1991 to be published within 180 days met the deadline.

In 1988, the Legislative Commission to Review Administrative Rules began notifying agencies before the 180 days expired that action was required, and since then, many agencies have complied with the statute by notifying the commission that the deadline would not be met. However, in 1991, none of the agencies met the 180-day deadline and only 64 percent notified the commission.

Table 4.5 shows that 59 percent of the agencies that notified the commission that the deadline would be missed said they were working on the rule. But 28 percent disputed the commission's contention that rules were required. This is consistent with the finding in Chapter 2 that agencies are unclear about when rulemaking is required.

On occasion, legislation has included specific deadlines for adopting a rule. Twelve of the new rules (excluding amendments to existing rules) reviewed in fiscal years 1991 and 1992 had specific deadlines in their authorizing legislation. While only one of those rules met the deadline, they did on average take less time from the notice to solicit outside opinion until the rule was adopted than rules without a deadline. On the other hand, reviewers found more errors in rules with a deadline than those without one.

Table 4.5: Reasons Agencies Do Not Publish Rules Within 180 Days

		Percent of Cases in Which Agency:			
Year	Number of Rules Affected	Is Working on or Has Adopted Rules	Says Rules Are Not Necessary	Is Seeking Legislative Changes	Other
1988	33	39.4%	54.5%	0.0%	6.1%
1989	57	66.7	19.3	1.8	12.3
1990	46	71.7	23.9	2.2	2.2
1991	49	51.0	22.4	16.3	10.2
Total	185	58.9%	27.6%	5.4%	8.1%

Source: OLA analysis of data from the Legislative Commission to Review Administrative Rules.

Staff to the Legislative Commission to Review Administrative Rules question whether an agency's statutory authority to adopt a rule expires if it fails to meet a statutory deadline. However, the administrative law judges and the Attorney General's Office have taken the position that the Legislature clearly intended that the agency adopt a rule and have, therefore, approved rules that missed their deadlines.[21]

JUDICIAL REVIEW

Minnesota citizens can petition the Minnesota Court of Appeals for a declaratory judgment invalidating an agency rule if the rule threatens to impair their legal rights or privileges, or they can challenge an agency action that implements a rule on grounds that the underlying rule is invalid. The grounds for granting a declaratory judgment is limited to a determination that a rule violates constitutional provisions, exceeds the agency's statutory authority, or was adopted without compliance with statutory rulemaking procedures. A rule can be challenged in the courts as unreasonable after it is applied and considered in a contested case hearing.[22]

In our review of court cases pertaining to rulemaking, we found that:

- **Challenges to rulemaking typically claim that an agency issued a policy statement when it should have gone through the formal rulemaking process, or that a rule is unreasonable or outside the agency's statutory authority.**

21 An exception is emergency rulemaking authority, which automatically expires 180 days after the effective date of its statutory authority (*Minn Stat.* §14.29, subd. 2).

22 See *McKee v. Likins*, 261 N.W. 2d 566 (Minn. 1977); *Minnesota-Dakotas Retail Hardware Association v. State*, 279 N.W. 2d 360 (Minn. 1979); and *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W. 2d 100 (Minn. Ct. App. 1991), *review denied* July 24, 1991.

Few legal challenges were brought against adopted rules on the grounds that due process requirements were not followed.

We also found that:

- **Courts have generally upheld rules when the agency had the statutory authority to adopt the rule and complied with APA procedural requirements, and when the rule was consistent with the statute.**

Courts have declared rules invalid if the agency had neither the general nor specific authority to adopt a rule (e.g., the rule was outside the agency's jurisdiction) or if the rule directly conflicted with a statute.[23] In addition, the Supreme Court has declared that a rule is invalid if it is not rationally related to the legislative ends sought to be achieved.[24]

Minnesota courts usually defer to agency expertise in reviewing the reasonableness of a rule.

If the agency has rulemaking authority and follows APA procedures, and the rule does not contradict the statute, courts usually defer to agency expertise in judging a rule's reasonableness.[25] However, if the agency's action involves a legal interpretation, it receives closer scrutiny.[26] Although courts have not been entirely consistent, they have usually found that a rule is valid unless the resulting agency action is "arbitrary and capricious." In defining arbitrary and capricious, courts have looked for a rational basis for the rule, i.e., the agency must explain on what evidence it is relying and how the evidence connects rationally to the rule involved.[27]

A few legal challenges have been raised with the courts seeking to invalidate an adopted rule that differed from the proposed rule originally published in the *State Register.* Appellants claimed that the agency should have provided for a new notice and hearing. The courts, however, have found that rule changes are permissible if they do not introduce new subject matter that would have affected parties not receiving the original rulemaking notice.[28] Court interpretations of the APA's substantial change provision appear closer to the Attorney

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23 See *Wallace v. Commissioner of Taxation*, 184 N.W. 2d 588 (Minn. 1971); *Wangen v. Commissioner of Public Safety*, 437 N.W. 2d 120 (Minn. Ct. App. 1989); *Weber v. City of Inver Grove Heights*, 461 N.W. 2d 918 (Minn. 1990); *Stasny v. Dept. of Commerce*, 474 N.W. 2d 195 (Minn. Ct. App. 1991); and *Scalf v. LaSalle Convalescent Home/Beverly Enterprises*, 481 N.W. 2d 364 (Minn. 1992).

24 *Mammenga v. State Dept. of Human Services*, 492 N.W. 2d 786 (Minn. 1989).

25 See *City of Morton v. Minnesota Pollution Control Agency*, 437 N.W. 2d 741 (Minn. Ct. App. 1989) and *Ross v. State Dept. of Human Services*, 469 N.W. 2d 739 (Minn. Ct. App. 1991), *review denied* July 24, 1991.

26 See *Matter of Hibbing Taconite Co.*, 431 N.W. 2d 885 (Minn. Ct. App. 1988); *Ebeneezer Society v. Minnesota Dept. of Human Services*, 433 N.W. 2d 436 (Minn. Ct. App. 1988); and *Matter of Kantrud*, 465 N.W. 2d 291 (Minn. Ct. App. 1991).

27 For an explicit statement of this policy, see *Manufactured Housing Institute v. Pettersen*, 347 N.W. 2d 238 (Minn. 1984) and *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W. 2d 100 (Minn. Ct. App. 1991), *review denied* July 24, 1991.

28 See *Minnesota Association for Homes for the Aging v. Dept. of Human Services*, 385 N.W. 2d 65 (Minn. Ct. App. 1986); *City of Morton v. Minnesota Pollution Control Agency*, 437 N.W. 2d 741 (Minn. Ct. App. 1989); and *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W. 2d 100 (Minn. Ct. App. 1991), *review denied* July 24, 1991.

General's definition than the more inclusive definition in the Office of Administrative Hearings rules.[29]

LEGISLATIVE REVIEW

Individuals may also file a formal complaint about a rule with the Legislative Commission to Review Administrative Rules. The commission may hold public hearings on the rule, or if the rule was adopted without a hearing, it may request that the Office of Administrative Hearings hold one.[30] Similar commissions exist in many other states and, as shown earlier in Figure 4.1, are prescribed by the Model APA.[31] As shown in Table 4.6, 10 states (and the Model APA) have both executive and legislative review of rules, 31 states have legislative review only, six states have executive branch review only, and three states have no formal review of administrative rules.

Table 4.6: States' Administrative Rules Review by Type

Type of Rules Review	Number of States	Percent
States with Executive Branch Review only	6	12%
States with Legislative Review only[1]	31	62
States with Both Executive and Legislative Review	10	20
States with No Formal Review of Rules	3	6
Total	50	100%

[1]Minnesota was included in this category.

Source: National Conference of State Legislatures, *Legislative Review of Administrative Rules and Regulations* (Denver, 1990).

Most states provide for legislative review of rules.

Figure 4.6 shows that there is considerable variation in how states structure the legislative rules review function. Although review may occur both before and after rules are adopted, most legislatures provide for systematic review of proposed rules. Rules review may be conducted by a bipartisan commission, like Minnesota's Legislative Commission to Review Administrative Rules, by appropriate standing committees of the legislature, or by both. Minnesota is one of four states whose commissions can temporarily suspend a rule.

Giving legislative commissions or committees, as opposed to the full legislature, authority to suspend rules raises certain constitutional issues. On the federal level, the United States Supreme Court has ruled that the legislative veto, whereby either chamber of Congress can pass a resolution overturning an

29 We discussed the effects of the APA's substantial change provision in Chapter 2.

30 *Minn. Stat.* §3.842, subd. 3.

31 *Model State Administrative Procedure Act* §3-203.

executive action, violates the separation of powers clause of the Constitution.[32] Since most states have similar separation of powers clauses in their constitutions, the Supreme Court's ruling has raised serious concerns about provisions in state administrative procedure acts that give joint legislative rules review commissions or standing legislative committees the formal power to suspend or veto an agency rule. On the other hand, the Wisconsin Supreme

Figure 4.6: Rules Review Powers of State Legislatures

	Type of Legislative Review				
	Bipartisan Commission			Standing Policy Committees	
Formal Powers	Reviews Proposed Rules	Reviews Adopted Rules	Reviews Both Proposed and Adopted	Reviews Proposed Rules	Reviews Adopted or Both
Amend or Disapprove	Alabama Connecticut[1] Michigan[1] West Virginia[2]			Georgia West Virginia[2]	
Rules Automatically Expire	Kentucky[2]	Colorado Tennessee	Utah	Kentucky[2]	
Amend or Disapprove with Concurrent or Joint Resolutions	Ohio Pennsylvania[1,2]	Kansas		Idaho Louisiana Massachusetts[3] Pennsylvania[1,2] South Carolina	
Temporarily Suspend or Delay Effective Date	North Carolina South Dakota[1]	**Minnesota**	Wisconsin[2]	Wisconsin[2]	
File or Publish Formal Objections	Florida Illinois Maryland Nevada New Hampshire[2] North Dakota	Indiana	Iowa Montana Vermont[2] Washington Wyoming	New Hampshire[2] Virginia	Vermont[2]
Advisory Only	Alaska Arkansas	Oklahoma[2]	Missouri[4] New York Oregon	Maine Texas	Oklahoma[2]

[1]Legislative veto provided in state constitutions. Veto authority granted only during interim in Michigan and South Dakota.

[2]Provides for review by both bipartisan commission and standing committees. Pennsylvania's commission is an independent board appointed by governor and presiding officers of the general assembly.

[3]Review is limited to capitol facilities rules only.

[4]Formal powers vary depending on authority written into each statute.

Source: OLA analysis of information in National Conference of State Legislatures, *Legislative Review of Administrative Rules and Regulations*, (Denver, 1990).

32 *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

Court recently upheld the constitutionality of its joint legislative commission's rule suspension clause.[33] Minnesota's commission has used its rule suspension authority only three times in its history, most recently in 1985. The constitutionality of this APA provision has not been challenged.

States have reacted to the constitutional separation of powers issue in several ways. Four states have passed constitutional amendments granting legislative commissions authority to veto proposed rules. Other states have rule sunset provisions that require legislative re-authorization of rules. In West Virginia, all proposed rules are subject to legislative approval, which occurs in the form of an omnibus bill.

Compared to other states, we found that:

- **Minnesota places a greater emphasis on reviewing the legality of rules and compliance with administrative procedures than on the political acceptability of rules and their responsiveness to the concerns of the Legislature.**

Minnesota relies primarily on the Attorney General's Office and the Office of Administrative Hearings to review rules. As we found, however, those reviewers focus primarily on the legal requirements of Minnesota's APA and are less assertive in questioning whether rules are politically acceptable or responsive to concerns of the Legislature. Rules are not normally reviewed by standing committees of the Legislature and the Legislative Commission to Review Administrative Rules has rarely used its authority to suspend a rule. In recent years, the commission has become more proactive and has required agency representatives to testify about proposed rules that raise legislative concerns. For example, the commission was instrumental in convincing the Department of Public Safety to modify its proposed rule on flammability protection standards for furniture. In our opinion, however, legislative oversight of agency rules in Minnesota is less prominent than in many other states.

Minnesota's APA emphasizes compliance with legal and procedural requirements rather than the content of rules.

SUMMARY

Agencies usually complied with those rulemaking requirements that are monitored by offices responsible for rules review, especially the due process requirements, but they did not always comply with special APA requirements or meet legislatively mandated deadlines. Rule reviews by administrative law judges are more thorough than those conducted by the Attorney General's staff, although this may be because of differences in complexity and controversy of the rules they each review.

33 *Martinez v. Department of Industry, Labor and Human Relations*, 478 N.W. 2d 582 (Wis. 1992).

Minnesota's APA places primary emphasis on ensuring that agencies comply with the legal and procedural requirements rather than on the content of rules. The APA requires agencies to demonstrate the need and reasonableness of rules, and the review process ensures that agencies have authority to adopt their rules and that the rules are consistent with state law. However, Minnesota's review procedures focus much less on whether rules are in the public interest or consistent with legislative intent. Courts have generally deferred to agency expertise, and have only overturned rules when they exceeded agency authority or were inconsistent with the law.

Conclusions and Recommendations

CHAPTER 5

In this chapter, we summarize our conclusions about administrative rulemaking and present our recommendations. Our discussion focuses on the following questions:

- **Does Minnesota's Administrative Procedure Act (APA) need to be modified, and if so, in what ways?**
- **What additional changes are needed to improve agency rulemaking?**

We conclude that Minnesota's rulemaking requirements are generally flexible. However, the rulemaking process does not always offer adequate opportunities for public participation.

Minnesota's APA is based on the assumption that rulemaking is primarily a technical and legal process. When the current APA is evaluated recognizing that rulemaking is also a political process, it has some weaknesses. We found that a majority of people affected by rules say their input comes too late to make a difference, mainly because the formal part of the process is not well timed to receive meaningful public input. For several reasons, important decisions affecting the content of rules are often made outside the formal part of the rulemaking process. We recommend changing the Administrative Procedure Act so that the informal and formal processes both ensure fair and equal opportunities for public participation. We also recommend changes aimed at making agency rulemaking more efficient and less cumbersome.

We recommend changes to make public participation more equitable and the rulemaking process more efficient.

We recognize that an administrative procedure act must balance competing goals. It must be flexible enough to accommodate different agencies and rules, yet provide a *uniform* process to be used throughout state government. The act must ensure a fair, open, and publicly accountable rulemaking process, yet provide for efficiency and ensure that regulations are put into effect quickly.

RULEMAKING TIME AND COSTS

We think that:

- **By allowing most rules to be adopted without a public hearing, Minnesota's APA has produced some efficiencies.**

The large majority of rules (about 80 percent) are adopted without a public hearing, and these rules take an average of 14 months to adopt from the time drafting begins until the rule takes effect. Most of that time (almost 70 percent) is spent drafting the rule, not meeting APA requirements. We estimate that for the approximately 125 to 130 rules adopted each year, the rulemaking process costs about $3.4 million annually.

We also found that:

- **The requirements contained in the APA are not a major source of rulemaking delays.**

However,

- **There are a small number of rules that take an unusually long time to adopt; and**

- **The time and costs of rulemaking could be reduced if fewer procedural and substantive errors were made.**

Rules that require a public hearing (19 percent) cost more and take an average of 26.6 months to adopt, nearly twice as long as rules without a hearing, because they deal with very controversial issues. Furthermore, there are no time limits on the drafting and negotiation phase of agency rulemaking. Conflicts left unresolved by the Legislature when it enacts a law often must be resolved during the rulemaking process, and agencies are encouraged to negotiate with affected parties to reach a compromise and avoid a public hearing. A few of the rules that eventually required a public hearing have taken as long as 13 years to adopt, but these are the extreme and quite rare. Nonetheless, rules adopted that long after the Legislature authorized them may not reflect current legislative intentions or be politically acceptable.

There are a few very controversial rules that can take many years to adopt.

We found that 28 percent of all proposed rules contain procedural or substantive errors, which results in delays and higher costs. For instance, when errors are made, the formal adoption process, which begins with publishing the proposed rule, takes nearly three months longer than when there are no errors. Furthermore, we found misperceptions and inaccurate interpretations of APA provisions and requirements among a fair number of agency staff, which may be due to inadequate legal advice, the failure to seek legal counsel, or inadequate staff training.

We suggest two alternatives to reduce the time and costs of adopting rules and to provide for greater accountability:

- **The Legislature should consider amending the APA to require reauthorization of rules not adopted within 18 months of their authorizing legislation.**

- **The Legislature should also consider using specific authorizing statutes to require that agencies report back by specified dates on rules dealing with controversial issues.**

Agencies should be required to report back to the Legislature on rules where they cannot resolve issues in a reasonable length of time.

Minnesota's current APA requires that new rules be proposed within 180 days of their authorizing legislation, but permits agencies to notify the Legislative Commission to Review Administrative Rules, the Governor, and appropriate policy committees if they fail to meet the deadline. We found that none of the rules authorized in 1991 met the 180-day deadline, most likely because it takes longer than six months to draft a new rule. Although this provision sets an unrealistic deadline, some type of accountability is necessary. We think a more workable approach may be to require regular reporting to the Legislature on those rulemaking actions that agencies cannot resolve within a reasonable length of time.[1] By requiring agencies to report back on difficult and controversial rules, the Legislature could either enact a more precise statute (making a rule unnecessary), provide agencies with better guidance and authorize them to continue rulemaking, or terminate the rulemaking effort.

We also recommend that:

- **The Department of Employee Relations should establish and coordinate a training and technical assistance program for administrative and legal staff involved in rule writing.**

Currently, the Revisor's Office provides informal help with rulemaking and distributes rulemaking guidebooks, upon request, and the Attorney General's Office puts on occasional continuing legal education seminars and informally provides assistance. But there are no formal, regularly scheduled training programs that cover all aspects of rulemaking. Further, some staff may not be aware of the assistance that is currently available from the Revisor's Office and Attorney General's Office. Training is especially important for new staff and those who write rules infrequently.

We think the training program should cover the technical and legal aspects of rule-writing, as well as its political aspects (negotiation, mediation, effective methods for obtaining input, etc.). We think the Department of Employee Relations should consult with the Revisor's Office, Attorney General's Office, and Office of Administrative Hearings in establishing the program and coordinate or incorporate existing training services and external expertise where

1 About 30 of the rules reviewed in fiscal year 1992 would not have met an 18-month deadline, and approximately 22 rules would not have met a 24-month deadline.

appropriate. In our opinion, training and technical assistance that is adequately publicized and accessible should minimize the number of errors, reduce rulemaking time, and be cost-effective in the long run.

PUBLIC PARTICIPATION

On most rules, agencies involve selected interested parties during the rule-drafting phase.

We found that there is a great deal of public input into rulemaking, and many agencies do a good job of securing broad-based public participation. However:

- **Encouraging agencies to negotiate rules before formally proposing them has made the public notice-and-comment process mandated by the APA less meaningful;**
- **In the absence of guidelines or standards governing the negotiation process, many people are effectively left out of the process while those selected to participate have an unfair advantage;**
- **The formal public notice mechanisms may be inadequate to ensure timely notice and meaningful participation in rulemaking; and**
- **The prohibition of "substantial changes" after rules have been proposed is often misunderstood by agencies and may inhibit them from adopting suggestions contained in public comments made through official mechanisms.**

"Negotiated" rulemaking is now commonplace. Sometimes agencies even negotiate to get people to withdraw their requests for a public hearing. Negotiating what will be in a rule with interested parties may be efficient and may lead to satisfaction on the part of those who are included in the negotiations, but there are also unintended consequences. Since the content of rules is largely decided in the negotiation process, the formal, APA-mandated public participation process has become less important. Also, the negotiation process is not part of the official rulemaking record nor subject to legal or statutory controls guaranteeing equal access. Therefore, it can easily be dominated by those groups and organizations with more resources.

Most people do not hear about rules from the *State Register*, which makes agencies' own notification efforts even more important. As a result, by the time a rule is formally proposed and published in the *State Register*, an informal agreement between an agency and those parties included in the negotiations may have been reached. Those groups and individuals not consulted often feel left out. Nearly 70 percent of the affected parties we surveyed said they hear about rules too late for their input to make a difference.

Furthermore, the initial public notice (to solicit outside opinions) is not uniformly used and usually does not elicit useful comments because it does not

contain enough information about the rule. Finally, many agency staff are reluctant to change a rule after it has been formally published in the *State Register*, in part because they misunderstand the APA provision prohibiting "substantial changes." In combination, these factors limit the usefulness of public input that comes through official channels.

We considered a number of alternatives for addressing these problems, including replacing the public participation provisions of Minnesota's APA with those contained in the Model APA, requiring more extensive public notice of proposed rules (such as publication in major newspapers), eliminating the "substantial change" provision, lengthening the public comment period on proposed rules to 45 or 60 days, or adding requirements to govern agencies' informal rulemaking (such as mandating rules advisory committees or specifying membership criteria). However, we believe that these alternatives--while they might be appropriate for some rules--would add either unnecessary costs or time to other rules without commensurate benefits.

We recommend an improved early notice of rulemaking action that agencies should distribute widely.

Therefore, we make the following suggestions for improving administrative rulemaking, which are designed to: 1) ensure fairer and broader public access to agencies early in the rule-drafting phase when comments can reasonably be considered; 2) ensure minimum due process, recognizing the political nature of rulemaking; and also 3) minimize the requirements that may be appropriate for only a few rules.

First, we recommend that:

- **The Legislature should consider amending the APA to require an initial "notice of regulatory action" for all rules, which would replace the "notice to solicit outside opinion," and to specify the contents of this notice, timeframes for publication, and methods of distribution.**

The current "notice to solicit outside opinion" is already published for over 60 percent of all rules, and our findings suggest that, if agencies were in full compliance with current APA requirements, it should be published for about 15 to 20 percent more. So replacing it with a mandatory "notice of regulatory action" should not represent an undue burden on agencies. We found that agencies do not have to send the current notice to people potentially affected by a rule, and it rarely elicits comments an agency can use because it does not contain sufficient information.

We think the new "notice of regulatory action" should include a short summary of the impending rule's purpose and motivation, the types of groups and individuals likely to be affected, the methods by which the agency intends to solicit informal public input, and how people may receive regular information about the rule during the drafting phase, including copies of preliminary drafts. If the agency intends to use a rules advisory committee, the notice should contain sufficient information about how members will be selected and how interested individuals can request to be included or, if not included, how they can send comments to the committee. Agencies should be required to

publish such a notice in the *State Register* and to send it to everyone on their regular agency mailing list. In addition, agencies should be required to make a reasonable effort to identify others potentially affected by the rule and send it to them as well. For new rules, agencies should be required to publish this notice within a specified number of days after the enabling law takes effect.

In addition, we recommend that:

- **The Legislature should consider amending the APA to require that agencies maintain a "rulemaking docket" that contains an up-to-date listing of the status of existing rules and impending rulemaking actions.**

The rulemaking docket should be submitted annually to the Legislative Commission to Review Administrative Rules and appropriate legislative policy committees at the beginning of the fiscal year and should be available to the public upon request.

A rulemaking docket is intended to enable the public to determine easily and in one place all potential rules the agency may be working on. The Model APA recommends that agencies be required to maintain a "public rulemaking docket," which contains the "entire current rulemaking agenda of an agency and all pertinent information related thereto" and specifies its contents.[2] We think that such a requirement added to Minnesota's APA would "level the playing field" somewhat. It would also help the Legislature monitor rulemaking and provide better oversight.

We also recommend that:

- **The Legislature should consider amending the APA to establish a single definition of "substantial change."**

There should be a single definition of "substantial change" written into the APA.

The prohibition of "substantial changes" between publication of a proposed rule and adoption is confusing enough without having two different definitions in the rules of the Office of Administrative Hearings and Attorney General's Office. In fact, a strong case could be made for eliminating this provision because it appears to conflict with the goal of seeking and using public input. However, there is a valid rationale for keeping it: to protect the public against agencies proposing one rule and then adopting something completely different. Therefore, we recommend that there be a single definition, which should be added to the APA. In addition, greater effort should be made by both the Attorney General's Office and the Office of Administrative Hearings to explain this concept to agencies, and the training program we recommended above should address the substantial change issue in depth.

2 *Model State Administrative Procedure Act (1981)*, §6.2.1.

We also recommend that:

- **The Legislature should consider amending the APA to require that individuals requesting a public hearing on a rule provide their address and phone number, that everyone who has requested a hearing be notified when agencies negotiate to secure withdrawal of hearing requests, and that agreements made in negotiations be made a matter of public record and included in the official rulemaking record.**

We recommend placing some controls over agencies' rule negotiations.

Currently, the APA requires that requests for a public hearing be in writing, but it does not specify what the request should contain. Agency staff told us they sometimes receive hearing requests without sufficient information to enable them to contact people. We think it is reasonable to require the collection of minimal information. However, we also think that if an agency intends to negotiate with anyone to withdraw a request, everyone who has requested a hearing should be invited to participate in the negotiations. Furthermore, since this is an important stage in the official rulemaking process, it should be a required part of the public record and subject to external review to ensure compliance (see below).

In addition, we recommend that:

- **The Legislature should write into authorizing legislation additional requirements when it wants an agency to seek broader public input on a particular rule.**

There may be some rules where the Legislature thinks an agency needs to go beyond the minimum requirements contained in the APA to solicit public opinions. By writing any additional rulemaking requirements into the authorizing legislation, the Legislature can ensure these provisions will be monitored during the external rules review process.

We also recommend that:

- **Agencies should make a greater effort to educate the public about how to receive direct information about their rulemaking actions.**

- **In addition, agencies should make greater use of agency-held public hearings or widely publicized public meetings early in the rulemaking process. They should include wider circulation of early rule drafts among all parties affected by rules, by issuing press releases and publishing notices in agency and association newsletters.**

- **Also, agencies should terminate the negotiation process when it fails to make progress toward resolving issues and either proceed more quickly to an official public hearing before an administrative law judge, to a professional negotiator or mediator, or return to the Legislature for guidance.**

Agencies should make greater efforts to shorten the rulemaking process.

The purpose of these recommendations is to shorten the informal process, while broadening public input in the early stages of rulemaking and making rules more responsive to the Legislature. Agencies have the authority to write rules within the APA's due process requirements, and sometimes agencies may try too hard or too long to negotiate rules and accommodate interests. The use of rules advisory committees on controversial rules has become fairly common, but these committees are not necessarily the best approach for seeking broad-based public input. Also, where agencies have a history of contentious relationships with regulated parties, an outside mediator brought into the process early might help resolve conflicts more quickly.

DEFINING WHEN RULEMAKING IS NECESSARY

We found that:

- **The definition of agency statements that must go through rulemaking is so broad and inclusive that agencies have difficulty complying.**

We could not determine the extent to which agencies may be avoiding formal rulemaking by issuing improper policy "guidelines" or "bulletins," applying general standards (which should be rules) in case-by-case decisions, or allowing seriously outdated rules to remain in effect instead of formally amending them. Agency staff and respondents to our survey of people affected by rules told us that these things occur, but we do not know how often. Our examination of court cases suggests that the issue of agencies not going through formal rulemaking when they should generates many legal challenges.

We also found that Minnesota's rule definition, which has evolved through court interpretations of the APA, is more inclusive than the one recommended by the Model State APA. It requires that "interpretive rules," which clarify the meaning of statutory language, also have the force and effect of law and must be adopted through formal rulemaking, while the Model APA exempts "interpretive rules" from some requirements.

However, we conclude that:

- **Neither forcing agencies to comply fully with the current definition nor changing the definition to permit greater agency discretion are practical solutions that simultaneously meet the goals of the Administrative Procedure Act.**

We considered a number of alternatives for addressing the problem that agencies may not be going through formal rulemaking as often as they should, including strengthening oversight to increase agency compliance and revising the APA to exempt interpretive rules. While we do recommend stronger oversight (see below), that step by itself is unlikely to ensure compliance because agencies say they do not have enough resources to engage in all the rulemaking they should. This suggests that either the APA's definition of a rule needs to be changed or rulemaking actions need to be prioritized.

A number of agency staff told us they need greater flexibility in carrying out their business than the current APA permits. Specifically, they would like to issue "interpretive guidelines," without the force and effect of law, which could be changed as needed without going through formal rulemaking. In our view, the agency perspective on this issue has some merit. However, it is difficult to see how the practical effects of "guidelines" would be different from those of rules. If agencies expect regulated parties to follow their guidelines, that would make them equivalent to rules so they should be adopted following appropriate procedures. On the other hand, if agencies do not expect their guidelines to be followed, it is not clear what purpose they would serve. In our opinion, efforts to permit agencies to make enforceable policies without appropriate legislative delegation or proper procedures and oversight raise serious legal questions.

But there are some related issues--exemptions to rulemaking, fee rules, setting rulemaking priorities--for which the Legislature could provide agencies with more specific guidance. Therefore, to help clarify when rulemaking is required for some rules and to provide for some additional flexibility, we make the following recommendations.

- **The Legislature should consider establishing a policy and criteria for granting exemptions from rulemaking and specifying the conditions under which emergency rulemaking or some other expedited process should apply.**

- **The Legislature should also consider revising the APA to provide for external review of exempt rules that have the force and effect of law for form and legality.**

Exempting programs from formal rulemaking and permitting some rules to go through an abbreviated rulemaking process are strategies for minimizing rulemaking costs and putting regulations into effect quickly. We think that the Legislature should consider establishing policies governing their use and

subjecting them to some external scrutiny, rather than proceeding on a case-by-case basis. Currently, bills containing these types of rulemaking actions are supposed to be reviewed by the House and Senate Governmental Operations Committees, but it is unclear whether this occurs consistently. Establishing a general policy might help to ensure that similar cases are treated uniformly. Also, the Legislature may wish to consider establishing an expedited process, similar to emergency rules but without expiration dates, for certain types of rules (e.g., repeals, verbatim adoption of federal requirements, and minor wording changes).

Finally, we recommend that:

There is confusion over which fees should be set in rules.

- **The Legislature should consider revising *Minn. Stat.* §16A.128 (fee rules) to clarify the conditions under which formal rulemaking should be required, which fees should be exempt from rulemaking, and which fees the Legislature may want to specify allocation formulas for in statute.**

The establishment of fees to offset program costs has become a common method for funding some services. We found that there is sufficient confusion and disagreement at present about which fees should be established by rules that legislative clarification is needed. We think there are some types of fees, such as those which offset administrative costs or where the allocation formula remains unchanged, that the Department of Finance could approve on its own.

JUSTIFYING THE NEED AND REASONABLENESS OF RULES

The Legislature wants agencies to adopt technically sound rules that are also sensitive to the costs that rules impose on people affected by them. It has tried to accomplish these goals by enacting procedural requirements for agencies to follow. We found that:

- **Agency statements that justify the need and reasonableness of rules are useful, but could be improved and should receive wider distribution; and**

- **The additional requirements placed on agencies by the APA--small business and agricultural land impact statements and fiscal notes for effects on local governments--have not had their desired effects.**

Agency staff told us that the required "statements of need and reasonableness" help them to write better rules. However, there is some misunderstanding among staff about how these statements must be written, and they do not necessarily receive wide public distribution. The results of our survey suggest that the majority of affected parties think agencies do not adequately justify

their rules. Also, the requirements that have been added to the APA to force agencies to consider or assess the impacts of their rules on some subgroups (agricultural land, small business owners, local governments) have had limited effects. Agencies are not required to change rules based on these assessments, and we found that few modify rules to make them less stringent for small businesses. Also, there are no clear guidelines for what the special requirements pertaining to agricultural land and fiscal impacts on local governments should contain.

A few rules were changed to reduce their impact on small businesses.

We considered several possible solutions, including stronger monitoring of rule justification requirements for rules without a public hearing, tougher rule justification requirements overall, and better training and technical assistance for rule-writing staff. After careful consideration, however, we conclude that the solution does not lie in trying to force agencies to comply with requirements that are both costly and unlikely to be effective. Therefore, we recommend that:

- **The Legislature should consider eliminating the APA's special rule justification requirements relating to agricultural land, small business, and fiscal impacts on local governments, and requiring instead a "regulatory analysis" under certain circumstances, similar to the Model APA's provision.**

Or, alternatively:

- **The Legislature should eliminate the special requirements that apply to all rules and use specific authorizing legislation to require that regulatory analyses be done as part of the rule-drafting process for rules that are likely to have significant fiscal impacts.**

Under the Model APA, a regulatory analysis is not required for all rules, but is required if requested by the governor, the legislative rules review committee, a political subdivision, another state agency, or 300 persons. The Model APA also requires that requests for an agency regulatory analysis must be made within 20 days after a rule is proposed. We think the period for requests should come earlier in the rulemaking process, such as following the initial notice of regulatory action. Alternatively, the Legislature could impose this requirement for those rules it deems likely to have large fiscal impacts (not limited to those affected parties currently specified in the APA, but impacts on others as well, including the state). The Model APA also specifies what such an analysis should contain.[3] Whichever approach is selected, compliance with any regulatory analysis provisions should be carefully monitored by offices responsible for the external review of proposed rules.

3 *Model State Administrative Procedure Act (1981)*, §6.5.3.

In addition, we recommend:

- **Agencies should more widely distribute their statements of need and reasonableness (or abbreviated versions of them) to affected parties, along with rule drafts, earlier in the rulemaking process.**

RULE REVIEW, OVERSIGHT, AND ACCOUNTABILITY

Our analysis has shown that:

- **Rules without a public hearing, which constitute over three-fourths of proposed rules, are not as thoroughly scrutinized as rules with a hearing;**
- **Rules review in Minnesota emphasizes legal compliance with procedural requirements; and**
- **Current procedures may not always ensure that rules are acceptable to the Legislature and the public.**

Minnesota's rule review procedures emphasize compliance with legal requirements.

All states with APAs have procedures for reviewing agency rules, both before and after they become effective, as a check on administrative power. Typically, rules are reviewed before adoption to ensure that they are legally authorized, unambiguous, needed, reasonable, and consistent with legislative intent, and that the proper procedures were followed. Minnesota has an unusual structure for rules review. The review of rules before they become effective is vested in judicial or quasi-judicial offices, which emphasize legal review.

The Attorney General's Office reviews about 80 percent of the rules. It checks to make sure that agencies have complied with due process requirements and filed the appropriate documents, and have the statutory authority to adopt the rule. In addition, this office examines the statement of need and reasonableness, but is reluctant to reject a rule for an inadequate statement because the agency would have to start the formal process over again. The Attorney General's Office found inadequate statements of need and reasonableness for 2 percent of the rules it reviewed in fiscal years 1991 and 1992, compared to 35 percent of the rules reviewed by the Office of Administrative Hearings. The Attorney General's Office does not examine rules for consistency with legislative intent and does not prepare written reports on the rules it reviews.

The rationale for not subjecting these rules to a more stringent review is that they are acceptable to those affected by them, or there would have been 25 or more requests for a hearing. We learned, however, that many people affected by rules say they do not receive adequate and timely notice and, therefore, may not hear about rules in time to submit a written request for a hearing.

Also, agencies sometimes negotiate selectively to secure withdrawals of hearing requests.

The Office of Administrative Hearings reviews rules (with public hearings) more thoroughly and writes a detailed report. However, on issues related to policy--need and reasonableness and consistency with legislative intent--there is a presumption in favor of the agency so long as it presents a reasoned case. In determining legislative intent, administrative law judges told us they rely on statutory language.

The Legislative Commission to Review Administrative Rules investigates rule-related complaints, but only recently has it begun to look critically at rules before they are adopted. In many states, the Legislature more formally and more actively monitors the adequacy of rulemaking procedures or reviews proposed rules, particularly with respect to issues of statutory authority and consistency with legislative intent. In some states, the Legislature reviews and formally authorizes all rules, mandates that rules expire unless they are legislatively reauthorized, or requires that rules be updated on a regular basis. Other states have created a stronger role for the governor to coordinate rulemaking. These mechanisms are all designed to ensure greater accountability for unelected agency staff and the rules they adopt.

Several of the recommendations we have made should contribute to greater oversight and accountability for agency rules, including that: 1) rulemaking actions taking longer than 18 months should require legislative reauthorization; 2) agencies should be required to make available to the Legislature and the public a rulemaking docket that includes the status of all rules; and 3) the Legislature should consider placing additional procedural requirements on rules likely to be controversial.

We recommend consolidating rule review within the Office of Administrative Hearings.

Beyond these, we considered other ways to improve the monitoring of agency rules, including requiring a more thorough review of proposed rules by the Attorney General's Office and creating an oversight role for the Governor. However, we recommend that:

- **The Legislature should consider amending the APA to consolidate legal review by transferring rules review duties currently handled by the Attorney General's Office to the Office of Administrative Hearings.**

The dual role played by the Attorney General's Office--providing legal advice to agencies during rulemaking and subsequently reviewing rules without a public hearing--is confusing to many agency staff. It also has the appearance of a conflict of interest since staff responsible for reviewing rules also provide legal advice during rulemaking (although not for the same agencies). In addition, the Attorney General's Office and Office of Administrative Hearings have different rules governing their procedures and do not always apply the same standards, criteria, and definitions in reviewing rules. Given that the Attorney General's primary role is acting as agencies' legal counsel, we think it

is more appropriate for the Office of Administrative Hearings to function in the rules review capacity for all rules. The majority of affected parties we surveyed said staff of this office were fair and impartial in carrying out their rule-related responsibilities.

We do not think that the Office of Administrative Hearings should subject rules without a hearing to the level of scrutiny it currently gives to rules with a hearing. However, similar standards should apply and rules without a hearing should be more closely monitored than at present.

In addition, we recommend that:

- **The APA should be amended to require that the Office of Administrative Hearings (and Attorney General's Office if separate rules review is maintained) critically examine agency efforts to notify all people affected by impending rules, and give close scrutiny to agency negotiations to secure withdrawal of public hearing requests.**

We think the rules review process should focus on how people affected by rules actually hear about them. We considered various alternatives for improving public notice, but in the end, we concluded that the responsibility for adequate public notice rests with the agency. Therefore, we think that the office responsible for external review of proposed rules should question agency staff directly about how they identify and notify additional groups and individuals who might be affected.

Also, given the way the 25-signature requirement can be manipulated, we think changes are in order. We considered amending the APA to prohibit withdrawals of hearing requests, but we found cases where withdrawals were appropriate because they involved misunderstandings. Therefore, we recommend that the Office of Administrative Hearings (and Attorney General's Office, if appropriate) closely scrutinize negotiations pertaining to withdrawals of hearing requests to ensure that minimum due process standards are met.

Finally, we considered additional ways the Legislature could monitor rulemaking more closely, if it wants to, and ensure that its directives are faithfully carried out. First, the Legislature could enact more specific, detailed laws, thereby limiting agency discretion and minimizing the need for administrative rules. The Legislature can help agencies by putting statements of intent into laws that establish programs and by being more specific in granting rulemaking authority. However, the extent to which very specific legislation can substitute for administrative rules is limited. Legislators do not have the technical expertise nor the time to write specific, detailed legislation on all the highly technical issues about which they make decisions. Developing the details of legislation in rules is an appropriate job for administrative agencies and trained technical staff.

Alternatively, the Legislature could limit the time that rules will be effective, requiring agencies to return to the Legislature to renew them. Or the Legislature could put more procedural requirements into the APA and rely on existing review bodies to monitor and enforce them. But these alternatives would place a significant burden either on the Legislature or on agencies that is unlikely to be justified for most rules. As noted above, we think a more reasonable approach, if the Legislature wants to ensure greater accountability, is to place additional specific requirements, where needed, in each substantive piece of legislation.

Should the Legislature want more oversight, we recommend that:

- **The Legislature should consider strengthening the formal rule review and oversight powers of the Legislative Commission to Review Administrative Rules, Governmental Operations Committees, or standing policy committees.**

The Legislature may want to strengthen its own monitoring of agency rules.

There are many other states to which the Legislature could look for guidance if it wants to pursue one or more of these alternatives.[4] A number of states have developed procedures whereby regular review of proposed rules is conducted by a joint legislative committee, like the Legislative Commission to Review Administrative Rules, in combination with standing committees. The commission already has the power to suspend a rule temporarily, after it has consulted with the appropriate policy committees. But that power has been used infrequently and its constitutionality is still in question.

In addition, the Legislature may want to consider giving the commission, legislative standing committees, or both the power to review proposed rules. A more regularized review of proposed rules by the Legislature would not necessarily add more time to the rulemaking process if the review were to coincide with other external review and occur within specified time limits.

Also, the statutory authority of the Legislative Commission to Review Administrative Rules could be made more explicit to provide standards or criteria for suspensions and to specify its responsibility for investigating cases of outdated rules and agencies improperly issuing "policy guidelines." The results of its investigations could be brought back to the full Legislature, through the appropriate standing committees, for action.

We also recommend that:

- **The Legislature should consider restricting the use of agencies' broad rulemaking authority on a case-by-case basis and requiring that agencies seek specific authority to adopt rules.**

The requirement for agencies to maintain rulemaking dockets and regularly submit them to the Legislature should help to keep the Legislature informed

4 See National Conference of State Legislatures, *Legislative Review of Administrative Rules and Regulations* (Denver, 1990).

of agencies' rulemaking actions. But in addition, we think that agencies should seek legislative guidance on their rule priorities. This is especially important for agencies with broad rulemaking authority, which are not required to seek specific legislative authority for all rules. There may be instances where agencies need to adopt a rule quickly, and having broad rulemaking authority enables them to do so. However, in order to ensure adequate public accountability, we think it might be more appropriate if agencies received specific legislative authority, where possible, for the rules they adopt.

Selection of the Sample of Rules

APPENDIX A

For our study, we identified 262 rules reviewed by the Attorney General's office or the Office of Administrative Hearings during the fiscal years 1991 and 1992. The following sections describe the study population, selection of the rule sample, and the agency survey.

STUDY POPULATION AND SELECTION OF THE RULES SAMPLE

The 262 rules reviewed during fiscal years 1991 and 1992 were stratified by type of APA rules review (with or without hearing) and agency type. For rules without a hearing, we stratified by whether or not the agency received public comments. We drew a sample of 54 rules, representing a random drawing of 20 percent of the rules within each combination of agency and review status, with the additional requirement that at least one rule be taken from each combination. Table A.1 compares the population of rules with the sample, and shows that the sample is reasonably representative of the population of 262 rules. Table A.2 lists the rules included in the sample.

AGENCY SURVEY

For each rule included in the sample of 54 rules, we sent a questionnaire to the agency staff member who was active in developing the rule. If that person was not available, we asked a staff member most familiar with the rule to respond. The questionnaire sought information on the reasons for adopting the rule, agency involvement of the public in developing the rule, the level and nature of controversy surrounding the rule, and costs of adopting the rule. A copy of the questionnaire is located at the end of this appendix. We then used the same form to interview the person over the telephone. We were able to interview an agency staff person for all 54 rules. In total, we interviewed 46 staff members from 31 different agencies. Each interview took an average of 42 minutes.

Table A.1 Comparison of All Rules from FY 1991 and FY 1992 and the Selected Sample of Rules

	All Rules (n = 262)		Sample of Rules (n = 54)	
	n	%	n	%
RULE REVIEW STATUS				
Office of Administrative Hearings Review	49	19%	12	22%
Attorney General Review				
Public Comments Received	94	36	17	31
No Public Comments Received	119	45	25	46
RULE AGENCY TYPE				
Human Services	30	11	6	11
Health	27	10	5	9
Other Health, Safety	29	11	7	13
Pollution Control Agency	30	11	6	11
Other Agriculture, Environment	24	9	5	9
Education	25	10	5	9
Business, Labor	46	18	9	17
Occupational Boards	35	13	7	13
State Administration and Constitutional Officers	16	6	4	7
AGENCY HAS A BOARD				
Yes	131	50	28	52
No	131	50	26	48
AGENCY REQUESTED OUTSIDE OPINION				
Yes	163	62	34	63
No	99	38	20	37
RULE STATUS				
New	81	31	20	37
Amended	176	67	33	61
Repealed	5	2	1	2
TYPE OF RULE				
Occupations	43	16	9	17
Facilities	19	7	4	7
Industries	48	18	10	19
Economic	27	10	5	9
Fees	25	10	4	7
Benefits	69	26	17	31
Procedures	26	10	4	7
Repeal	5	2	1	2

Table A.2: Rules Selected for Interview

Agency	Rule Reference
Board of Animal Health	Poultry Diseases
Board of Chiropractic Examiners	Graduate Preceptorship
Board of Education	Elementary School Prep Time
Board of Electricity	Change in Minimum Experience Required for Licensure and Approval of Electrical Equipment
Board of Medical Examiners	Physical Therapy
Board of Nursing	Prescribing Authority, Fees
Board of Podiatric Medicine	Training and Licensing
Board of Psychology	One-Time Special Fee Rule
Board of Teaching	Teacher Licenses
Bureau of Mediation Services	Public Employee Labor Relations
Department of Administration	Small Business Procurement
Department of Agriculture	Agricultural Chemical Response Board
Department of Employee Relations	Local Government Pay Equity
Department of Health	Ionizing Radiation Lab Certification - Volatile Organic Compounds Licensing of Home Care Providers, Fees Qualifications for Licensure to Seal Wells Patients' Rights
Department of Human Services	Chemical Dependency Care for Public Assistance Clients Community Health Clinic Services for Medical Assistance Medical Care Surcharge; Special Payment Professional Home-Based Mental Health Services Repeal - County Assistance for People with Mental Illness Update General Assistance Rules
Department of Jobs and Training	Rehabilitation Services for Visually Handicapped
Department of Labory and Industry	Elevator Permits and Fees Rules of Practice; Review Boards
Department of Public Safety	Pipeline Inspection Funding Pipeline Safety Model Setback Wheelchair Standards
Department of Public Service	Thermal Insulation National Standards State Building Code
Department of Revenue	Withholding for Small Employers
Department of Transportation	Bridge Inspection
Environmental Quality Board	High Voltage Lines, Power Plants
Higher Education Coordinating Board	Child Care Grants Public Safety Grants and Pre-nursing Program

Table A.2: Rules Selected for Interview, continued

Agency	Rule Reference
Housing Finance Agency	Mortgage Revenue Bonds for Hew Housing Publicly Owned Transitional Housing Receivership Revolving Loan Fund
Minnesota Veterans Home Board	Resident Rights and Responsibilities
Office of Waste Management	Grant for Litter Separation Solid Waste Reduction Grant and Loan Program
Pollution Control Agency	Household Hazardous Waste Collection Management of Hazardous Waste Using Toxicity Characteristics Open Burning Organic Air Emissions Solid Waste Management Facility Permit Fees Wastewater Treatment Grant Administration
Public Utilities Commission	Conservation Improvement Program Appeals
Racing Commission	Permanent Rules Re Pari-mutuel Horse Racing
Secretary of State	Absentee Ballot Application
State Board of Technical Colleges	Extension Instructor Licenses Technical College Counselor

OFFICE OF THE LEGISLATIVE AUDITOR

Administrative Rulemaking Study

Department Name _____

Name and Title of Respondent _____

_____

Phone Number _____

Rule Reference (Title and Citation) _____

_____

1. Why did your agency decide to adopt or amend this rule? (Check all that apply.)

   ☐ The Legislature directed us to make a rule. If yes, when did the Legislature do so? _____
   Did the legislation specify a date by which the rule must be adopted? _____
   If yes, by what date? _____

   ☐ The Legislature enacted or modified a program; as part of implementing it, we believed a rule was needed. If yes, when did the Legislature take action? _____

   ☐ It was in response to a change in federal requirements or guidelines.
   Is the rule identical to the federal requirements? _____
   If not, how is it different? _____
   _____

   ☐ The existing rule was out-of-date and needed to be revised or repealed.
   If yes, who or what was the motivator? _____

   ☐ We decided a rule was needed and relied on our general rulemaking authority.
   If yes, why? _____
   _____

   ☐ Other. Please explain: _____
   _____

2. When (month and year) did the agency begin work on this rule action?
   _____

3. How would you describe the controversy and outcome of this rule?

   ☐ Not at all controversial; no need to negotiate.

   ☐ Minor areas of controversy, which were successfully negotiated with interested parties during rule drafting.

   ☐ Major areas of controversy, which were successfully negotiated with interested parties during rule drafting.

   ☐ Negotiation over controversial issues was partially successful; hearing before an administrative law judge needed on unresolved issues.

   ☐ No effort to negotiate was made; agency proceeded via controversial rulemaking process and hearing was held.

4. If the rule was controversial, what was the controversy about?

5. Did the agency use any of the following methods to involve interested parties in the rule-drafting process, beyond the formal notification requirements of the Administrative Procedure Act (APA)? (Check all that apply.)

   ☐ Formal task force with regular meetings.
   ☐ Agency-initiated public hearings (do not include those before an administrative law judge).
   ☐ Meetings with interested parties.
   ☐ Requests for comments.
   ☐ Other (please specify)._____
   ☐ No comments beyond APA requirements were solicited.

6. For *each* of the methods identified above that were used to involve interested parties, please provide the following information:

   a. How were people notified or selected to participate?

   b. How many people participated?

   c. Which types of groups or interests were represented?

   d. How many meetings were held and over what period of time?

   e. How was this input used in the rule-drafting process (e.g., general discussions only? review of drafts? were votes taken?)?

f. Please describe any significant changes to the rule that were made as a consequence of public participation. If changes were not made, please tell us why not.

7. Please describe any other mechanisms you use to inform the public about agency rules or rulemaking (e.g., newsletters).

8. a. Who drafted this rule?

- ☐ Rule-writing staff
- ☐ Program staff
- ☐ Rule-writing and program staff
- ☐ Other (please specify) _____

b. What outside assistance did the agency use? (Check all that apply.)

- ☐ Attorney General's Office.
- ☐ Revisor's Office.
- ☐ Professional negotiator or facilitator.
- ☐ Technical consultants. If yes, what did the consultants do? _____
- ☐ Others. If yes, who were they and what did they do? _____

9. How much did it cost to adopt this rule? (Please indicate whether number is an estimate or reflects documented expenses.)

		Estimate (E) or Actual (A)
_____	Number of staff-person hours	____
$_____	Total staff salaries and fringe benefit costs	____
$_____	Amount billed by Attorney General's Office	____
$_____	Amount billed by outside consultants	____
$_____	Amount billed by Office of Administrative Hearings	____
$_____	Amount spent for task force or public hearings	____
$_____	Publication costs	____
$_____	Other costs (please identify)	____
	_____	

10. a. Please describe any delays in the rule-drafting process and what caused them.

b. What were the effects of delays on the agency and its work? What were the effects on interested parties?

11. If a hearing before an administrative law judge was held, please provide the following information:

    a. Why was there a hearing? Did the agency want it or try to avoid it?

    b. Did anyone testify at the hearing who had not previously made comments to the agency? If so, who and what was the result?

    c. What changes were made to the rule as a result of the hearing process? Were these changes suggested by those testifying or by the administrative law judge?

12. What would you do differently if you could start this rulemaking over?

13. In what ways was the process you used to draft this particular rule similar or different from other rules written by your agency?

14. a. How do you interpret the provision that a proposed rule may not be "substantially changed" after it is published?

    b. How does this provision affect your ability to change rules in response to public comments received?

15. Is there anything about the issues your division or your agency deals with that makes rulemaking difficult?

16. a. Which requirements in the Administrative Procedure Act (APA) do you think are worthwhile or effective?

    b. Which do you see as unnecessary or ineffective?

17. Do you have any suggestions for improving the APA?

Survey of Affected Parties

APPENDIX B

This appendix includes information and data pertinent to our survey of people affected by agency rules. We have also included a copy of the questionnaire with the raw data.

STUDY POPULATION

We asked agencies for their regular and rule-specific affected party mailing lists for each of the 54 rules in our sample. The combined lists for each rule ranged in size from 5 to 2,739 affected parties.

We drew a five percent sample, with the requirement that at least one name be taken from each combined agency list. Using a random starting point, we then selected every 20th name on the list, replacing any duplicates or any name that was obviously inadequate for mailing purposes with the next name on the list. This procedure resulted in a sample of 795 affected parties, about 4.5 percent of the 17,724 names on the combined agency lists. We mailed surveys to these 795 names during mid-October, 1992.

SURVEY RESPONSE

Of the original 795 surveys mailed, the Post Office returned a total of 29 surveys as undeliverable. In addition, we identified four duplicate sets of surveys (only one of each set was used). Thus, of the survey forms sent, 762 surveys were deliverable or nonduplicates. Of this 762, 353 (46 percent) were returned and 341questionnaires were used in the analysis. Twelve surveys were unusable: two were received late; one was returned without the mailing label and had been completed by someone not in the sample; one was a duplicate mistakenly remailed; seven were returned blank with notes that the respondent did not feel they knew enough to respond, and one was returned with a note that the respondent had already responded.

Table B.1 compares survey respondents to the sample originally drawn and to the population of affected parties for the 54 rules. Both the total sample and group of survey respondents appear to be representative of the population on the basis of rule agency type and review status. There was a difference

Table B.1: Comparison of Survey Respondents to the Original Sample and Population of Affected Parties

	Total Sample (n = 795)		Survey Respondents (n = 341)		Population (n = 17,724)	
	n	%	n	%	n	%
METROPOLITAN STATUS[a]						
Twin Cities Metro Area	410	52%	166	49%		
Non-Metro (Outside Twin Cities)	385	48	175	51		
RULE AGENCY TYPE						
Human Services	79	10	49	14	1,846	10%
Health	81	10	33	10	2,317	13
Other Health, Safety	34	4	13	4	747	4
Pollution Control Agency	156	20	61	18	3,702	21
Other Agriculture, Environment	43	5	18	5	880	5
Education	182	23	75	22	3,675	21
Business, Labor	110	14	43	13	2,338	13
Occupational Boards	94	12	41	12	1,940	11
State Administration and Constitutional Officers	16	2	8	2	279	2
RULE REVIEW STATUS						
Office of Administrative Hearings Review	333	42	137	40	7,018	40
Attorney General Review Public Comments Received	342	43	155	45	7,801	44
No Public Comments Received	120	15	49	14	2,905	16
AFFILIATION[b]						
Citizen, Nonprofit Group	73	10	40	12		
Private Business	115	16	46	13		
Trade Group	45	6	29	9		
Lawyer or Lobbyist	28	4	10	3		
City, County Government	164	23	88	26		
State Government	77	11	37	11		
Education	215	30	91	27		

Note: Some percentages do not total 100 due to rounding.

Source: Office of the Legislative Auditor Survey of Affected Parties, 1992.

[a]We defined metro status as any zip codes beginning 550## through 554##.

[b]We were unable to code 78 of the original 795 persons surveyed.

between respondents and the original sample of 795 with respect to organizational affiliation. The sample over-represented local government and trade groups and under-represented private business and education. However, we could not code affiliation for 78 of the nonrespondents. Moreover, the education group in the original sample was large, due to inclusion of a rule with an extremely long mailing list (2,739).

Office of the Legislative Auditor
Program Evaluation Division
1st Floor, Centennial Office Building
St. Paul, Minnesota 55155

SURVEY ON STATE RULEMAKING

Please describe your organization, correct the mailing label (if necessary), and identify yourself as the person responding to our survey. If you do not want your completed questionnaire to be included in our work papers, and hence available for public inspection, please check the box marked "confidential" below.

We are interested in learning about the rulemaking activities of **all** state agencies, boards, and commissions. We use the term "agency" to refer to all state government units whether they are called a "department," "agency," "board," or "commission." If you have any questions about our study, you may contact Marlys McPherson at 612/296-8501. Please return this questionnaire in the enclosed return envelope by ***October 20, 1992.*** Thank you for your assistance and participation.

A. Which category best describes your organizational affiliation?

#	%			
7	2	☐	(1)	Individual citizen
46	13	☐	(2)	Private business or corporation
29	9	☐	(3)	Professional or trade association
33	10	☐	(4)	Nonprofit service or public interest group
10	3	☐	(5)	Lawyer or lobbyist
88	26	☐	(6)	Local or county government
37	11	☐	(7)	State government
91	27	☐	(8)	Other (please specify)_____

B. Who does your organization represent? (Please check all that apply.)

#	%			
96	28	☐	(1)	Service providers
93	27	☐	(2)	Regulated or licensed parties
98	29	☐	(3)	Consumers or clients
46	13	☐	(4)	Employee interests
164	48	☐	(5)	The general public
110	32	☐	(6)	Governmental unit(s)
40	12	☐	(7)	Other (please specify) _____

[Place mailing label here]

Respondent's Signature:_____ Telephone Number: _____

Position: _____ Date: _____

		#	%
Check box if you want this questionnaire kept confidential:	☐	122	36
Check box if you would like a copy of our final report:	☐	238	70

1. Please indicate the state agencies whose rulemaking activities are of greatest interest to your organization. (Check as many boxes as appropriate.)

#	%			#	%
45	13	☐ (1)	Department of Agriculture		
134	39	☐ (2)	Department/Board of Education		
180	53	☐ (3)	Department of Health		
32	9	☐ (4)	Housing Finance Agency		
167	49	☐ (5)	Department of Human Services		
100	29	☐ (6)	Department of Labor and Industry		
		☐ (7)	Department of Natural Resources	97	28
		☐ (8)	Department of Public Safety	93	27
		☐ (9)	Pollution Control Agency	137	40
		☐ (10)	Public Utilities Commission	35	10
		☐ (11)	Department of Revenue	93	27
		☐ (12)	Department of Transportation	87	26

☐ (13) Other state agencies, boards, or commissions (please identify):

_____

_____

2. In general, how do you become informed about a state agency's rulemaking activity? (Check as many boxes as appropriate.)

#	%		
73	21	☐ (1)	I review the *State Register* for announcements.
55	16	☐ (2)	I contact the agency on a regular basis.
48	14	☐ (3)	Agency staff call me directly.
188	55	☐ (4)	I am on the agency's regular mailing list.
52	15	☐ (5)	I serve on agency rules advisory committees.
246	72	☐ (6)	I am informed through professional networks/newsletters.
41	12	☐ (7)	Other (please specify) _____

_____

3. Has your organization submitted written comments to a state agency about a proposed state rule or an amendment to an existing rule?

#	%			#	%			No response #	No response %
117	34	☐ (0)	No (Skip to Q. 4, page 2)	174	51	☐ (1)	Yes	47	14	☐ (9) Don't Know (Skip to Q. 4)	3	1

IF YES, please answer the following:

3(a) Please indicate when your organization **most recently** submitted written comments to an agency about a proposed rule:

		#
☐ (1)	During 1991 or 1992	136
☐ (2)	During 1989 or 1990	20
☐ (3)	Before 1989	14
	No response	171

3(b) Please identify the state agency and rule involved with your organization's **most recent** submittal of written comments about a proposed rule:

Agency: _____

Rule: _____

4. **Has anyone from your organization attended a public hearing held before an administrative law judge concerning a proposed rule or rule amendment? (Please check the appropriate box.)**

#	%			#	%		#	%		No response #	%
141	41	☐ (0) No (Skip to Q. 5, page 3)	☐ (1) Yes	123	36		70	21	☐ (9) Don't Know (Skip to Q. 5)	7	2

IF YES, please answer the following:

No response # 218

4(a) Please indicate when your organization **most recently** participated in a public rulemaking hearing:

		#
☐ (1)	During 1991 or 1992	71
☐ (2)	During 1989 or 1990	16
☐ (3)	Before 1989	36

4(b) Please identify the state agency and rule involved with your organization's **most recent** participation at a public rulemaking hearing:

Agency: _____

Rule: _____

No response # 218

4(c) Did you or other members of your organization testify at this rulemaking hearing?

☐ (0) No # 34 ☐ (1) Yes # 81 ☐ (9) Don't Know # 8

No response # 219

4(d) Did your organization submit written comments to the administrative law judge?

☐ (0) No # 22 ☐ (1) Yes # 93 ☐ (9) Don't Know # 7

4(e) Regardless of whether you supported or opposed the rule itself, to what extent do you agree or disagree with the following statements about the rulemaking hearing you attended:

#			Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion /Undecided
224	(A)	The administrative law judge was impartial and fair.	☐ 19	☐ 70	☐ 11	☐ 4	☐ 13
222	(B)	The public hearing was a waste of time.	☐ 10	☐ 19	☐ 51	☐ 33	☐ 6
222	(C)	Everyone there had an opportunity to present their views and opinions.	☐ 23	☐ 79	☐ 7	☐ 5	☐ 5
221	(D)	The administrative law judge sided with the agency and did not give adequate consideration to the public comments.	☐ 5	☐ 23	☐ 51	☐ 22	☐ 19
223	(E)	State agency staff really listened to the testimony.	☐ 11	☐ 52	☐ 29	☐ 10	☐ 16
223	(F)	The agency changed the rule because of testimony at the hearing.	☐ 8	☐ 31	☐ 40	☐ 14	☐ 25

5. Has your organization helped an agency write a rule by serving on a rulemaking task force or advisory committee?

#	%		#	%		#	%		No response #	No response %
176	52	☐ (0) No (Skip to Q. 6)	108	32	☐ (1) Yes	51	15	☐ (9) Don't Know (Skip to Q. 6)	6	2

IF YES, please answer the following:

5(a) Please indicate when your organization **most recently** participated on an agency's rulemaking task force or advisory committee:

		#
☐	(1) During 1991 or 1992	83
☐	(2) During 1989 or 1990	13
☐	(3) Before 1989	10

Don't know 1

No response 234

5(b) Please identify the state agency and rule involved with your organization's **most recent** participation on a rulemaking task force or advisory committee:

Agency: _____

Rule: _____

6. Have there been any state rules that negatively affected your organization, but which you did *not* comment on during the rulemaking process?

#	%		#	%		#	%		No response #	No response %
133	39	☐ (0) No (Skip to Q. 7)	74	22	☐ (1) Yes	118	35	☐ (9) Don't Know (Skip to Q. 7)	15	4

State Agency #	State Agency %
1	<1

IF YES, please answer the following:

6(a) Please identify the state agency, the rule involved, and the approximate date that the rule was effective.

Agency: _____

Rule: _____

Effective Date: _____

6(b) Why didn't your organization comment during the rulemaking process? (Please check as many boxes as appropriate.)

#		
6	☐	(1) Rule adopted was an emergency regulation.
3	☐	(2) Rule was exempt from the Minnesota Administrative Procedure Act.
27	☐	(3) Did not realize the rule was being proposed.
17	☐	(4) Not enough time to comment.
4	☐	(5) Issue was not important enough.
37	☐	(6) Other (please specify) _____

_____

7. How familiar are you with the rulemaking requirements contained in Minnesota's Administrative Procedure Act (APA)?

#	%			No response #	No response %
34	10	☐ (3)	I am very familiar with the APA requirements.	6	2
132	39	☐ (2)	I am somewhat familiar with the APA requirements.		
169	50	☐ (1)	I am not too familiar with the APA requirements.		

8. Based on your own personal experience, to what extent do you agree or disagree with the following statements? (For each statement, please check the appropriate box.)

IMPORTANT NOTE: If your organization is affected by the rules and regulations of several agencies, please check the box that best summarizes your overall perspective. You may wish to note the agencies that are exceptions to your overall rating in the space for comments at the end of this section.

				Strongly Agree		Agree		Disagree		Strongly Disagree		No Opinion /Undecided	
#	%			#	%	#	%	#	%	#	%	#	%
8	2	(A)	By the time we hear about a proposed rule, the agency has already made up its mind what it wants to do.	74	22	155	45	80	23	1	<1	23	7
8	2	(B)	There should be more uniform procedures that agencies must follow to involve interested parties in rulemaking.	67	20	150	44	59	17	2	1	55	16
7	2	(C)	Agencies provide ample opportunities for interested parties to provide input into the content of their rules.	9	3	142	42	113	33	31	9	39	11
7	2	(D)	Agencies do a good job of showing why their rules are needed and reasonable.	5	1	102	30	125	37	59	17	43	13
8	2	(E)	Agencies only consult with a few "favorite" interested parties in drafting a rule.	31	9	92	27	108	32	13	4	89	26
6	2	(F)	Agencies develop good information about the costs and economic effects of their rules.	2	1	49	14	129	38	103	30	52	15
7	2	(G)	Agencies are willing to change their proposed rules when the public comment process produces sound reasons for change.	5	1	122	36	116	34	25	7	66	19
9	3	(H)	It is easy to follow rules through the steps required by Minnesota's Administrative Procedure Act.	6	2	45	13	108	32	37	11	136	40
8	2	(I)	The rulemaking process takes too long.	29	9	122	36	94	28	17	5	71	21
7	2	(J)	State agencies are concerned about the impact of their rules upon regulated parties.	10	3	121	35	95	28	50	15	58	17
6	2	(K)	Agencies do a good job of keeping their rules up to date.	3	1	79	23	126	37	35	10	92	27
7	2	(L)	Agencies often issue informal policy "guidelines" that should have been adopted through the formal rulemaking process.	33	10	128	38	56	16	5	1	112	33

ADDITIONAL COMMENTS:

9. Does your organization subscribe to the *State Register*?

#	%		#	%		#	%		No response #	%
189	55	☐ (0) No	94	28	☐ (1) Yes (Skip to Q. 10)	52	15	☐ (9) Don't Know (Skip to Q. 10)	6	2

IF NO, please answer the following:

9a Why doesn't your organization subscribe to the *State Register*? (Check as many boxes as appropriate.)

		#
☐ (1)	It costs too much.	41
☐ (2)	Copies are accessible from other sources.	32
☐ (3)	Do not use it often enough to justify the cost.	103
☐ (4)	Other (please specify) _____	33

9b To what extent are you able to stay informed about agency rulemaking even though you don't subscribe to the *State Register*?

		#		#
☐ (1)	Most of the time	61	No response	181
☐ (2)	Sometimes	87		
☐ (3)	Not at all	12		

10. Which of the following statements *best* describes the usefulness of the *State Register* for learning about agency rules?

#	%			#	%
177	52	☐ (1)	I almost never learn about agency rules from the *State Register*.	Don't know	1 <1
68	20	☐ (2)	Occasionally I learn about agency rules from the *State Register*.	No response	37 11
49	14	☐ (3)	I usually learn about agency rules from the *State Register*.		
9	3	☐ (4)	I always learn about agency rules from the *State Register*.		

11. How would you characterize the opportunities for public participation in the rulemaking process?

#	%			#	%
141	41	☐ (1)	There are **not enough** opportunities for public participation.	No response	17 5
179	52	☐ (2)	There are **adequate** opportunities for public participation.		
4	1	☐ (3)	There are **too many** opportunities for public participation.		

12. Which of the following statements *best* describes your view on the need for public hearings on proposed rules versus the sufficiency of written comments?

#	%			#	%
125	37	☐ (1)	I think public hearings should always be held on proposed rules.	Don't know	5 1
170	50	☐ (2)	I think that public hearings should not be held unless the agency receives at least 25 requests for a hearing, as is now the case.	No response	14 4
27	8	☐ (3)	I think that state agencies should rely primarily on the written comments they receive and hold a hearing only if the agency thinks one is needed.		

13. Under current law, people who ask for a hearing on a proposed rule do not have to state their reasons for making the request. Do you think the Administrative Procedure Act should be changed to require that individuals who want a hearing state their reasons for doing so?

#	%		#	%		#	%		No response #	%
105	31	☐ (0) No	186	55	☐ (1) Yes	36	11	☐ (9) Don't Know	14	4

14. The Minnesota Administrative Procedure Act (APA) requires that state agencies allow at least 30 days for public comment from the time that a regulation is published in proposed form. Which of the following statements best indicates your view as to the appropriateness of the 30-day time frame?

#	%		
209	61	☐ (2)	Thirty days is appropriate.
118	35	☐ (1)	Thirty days is not enough time.
5	1	☐ (3)	Thirty days is too much time.

	#	%
No response	9	3

14a If you indicated that 30 days is too little or too much time, please specify how many days you think are appropriate in the blank below.

Number of days: _____

15. Please use the space below to provide any additional comments you would like to make about administrative rulemaking in Minnesota.

Recent Program Evaluations

Aid to Families with Dependent Children, January 1987	87-01
Water Quality Monitoring, February 1987	87-02
Financing County Human Services, February 1987	87-03
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Minnesota State High School League, December 1987	87-06
Metropolitan Transit Planning, January 1988	88-01
Farm Interest Buydown Program, January 1988	88-02
Workers' Compensation, February 1988	88-03
Health Plan Regulation, February 1988	88-04
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Remodeling of University of Minnesota President's House and Office, March 1988	88-06
University of Minnesota Physical Plant, August 1988	88-07
Medicaid: Prepayment and Postpayment Review - Follow-Up, August 1988	88-08
High School Education, December 1988	88-09
High School Education: Report Summary, December 1988	88-10
Statewide Cost of Living Differences, January 1989	89-01
Access to Medicaid Services, February 1989	89-02
Use of Public Assistance Programs by AFDC Recipients, February 1989	89-03
Minnesota Housing Finance Agency, March 1989	89-04
Community Residences for Adults with Mental Illness, December 1989	89-05
Lawful Gambling, January 1990	90-01
Local Government Lobbying, February 1990	90-02
School District Spending, February 1990	90-03
Local Government Spending, March 1990	90-04
Administration of Reimbursement to Community Facilities for the Mentally Retarded, December 1990	90-05
Review of Investment Contract for Workers' Compensation Assigned Risk Plan, April 1990	90-06
Pollution Control Agency, January 1991	91-01
Nursing Homes: A Financial Review, January 1991	91-02
Teacher Compensation, January 1991	91-03
Game and Fish Fund, March 1991	91-04
Greater Minnesota Corporation: Organizational Structure and Accountability, March 1991	91-05
State Investment Performance, April 1991	91-06
Sentencing and Correctional Policy, June 1991	91-07
Minnesota State High School League Update, June 1991	91-08
University of Minnesota Physical Plant Operations: A Follow-Up Review, July 1991	91-09
Truck Safety Regulation, January 1992	92-01
State Contracting for Professional/Technical Services, February 1992	92-02
Public Defender System, February 1992	92-03
Higher Education Administrative and Student Services Spending: Technical Colleges, Community Colleges, and State Universities, March 1992	92-04
Regional Transit Planning, March 1992	92-05
University of Minnesota Supercomputing Services, October 1992	92-06
Petrofund Reimbursement for Leaking Storage Tanks, January 1993	93-01
Airport Planning, February 1993	93-02
Higher Education Programs, February 1993	93-03
Administrative Rule Making, March 1993	93-04

Evaluation reports can be obtained free of charge from the Program Evaluation Division, Centennial Office Building, First Floor South, Saint Paul, Minnesota 55155, 612/296-4708. A complete list of reports issued is available upon request.