

# I. Introduction to the Rulemaking Process in RSA 541-A

**NOTE:** This material and any attachments are for informational purposes only and are not intended as legal advice.

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# A. Five Rulemaking Procedures under RSA 541-A



# OLS Has Two Functions under RSA 541-A

- **Administrative.**
- **Staff support to Joint Legislative Committee on Administrative Rules (JLCAR). RSA 541-A:2.**
- *See New Hampshire Drafting and Procedure Manual for Administrative Rules (Manual) at:*  
**<http://gencourt.state.nh.us/rules/manual/amendedmanualeffective2-20-12.pdf>**. See also memo of 7-5-12 in Attachment III.B with changes not yet reflected in *Manual*.
- **See RSA 541-A at:**  
**<http://www.gencourt.state.nh.us/rsa/html/LV/541-A/541-A-mrg.htm>**.

# Joint Legislative Committee on Administrative Rules

RSA 541-A:2

- **Established 1983 to oversee agency rulemaking.**
- **Not a policy committee.**
- **10-Member joint House and Senate committee (plus 10 alternates); 60%-40% each party; 6-member quorum.**
- **Elects its own Chair and Vice-Chair which rotate between House and Senate members every 2 years.**
- **Adopts its own rules, Appendix IV of *Manual*.**
- **Must meet in a regular meeting at least once per month.**
- **No authority to veto rules, but rulemaking as interim rules and expedited repeals require its approval.**

# Regular Rulemaking

- **RSA 541-A:5 through RSA 541-A:14.**
- **Most common and formal type of rulemaking.**
- **Public notice, agency public hearing (s), and comment.**
- **JLCAR review, but approval not required.**
- **Rules effective for 8 years if notices filed prior to 9-11-11, or 10 years if notices were filed later. Exceptions are organizational rules (Chapter 100) and most rules of practice and procedure (Chapter 200), and rules extended pursuant to RSA 541-A:14-a.**

# Interim Rulemaking

- **RSA 541-A:19.**
- **Five limited grounds.**
- **Public notice, but no public comment.**
- **JLCAR review and approval required.**
- **180-day rules.**

# Emergency Rulemaking

- **RSA 541-A:18.**
- **“Imminent peril to public health or safety” or “substantial fiscal harm” requiring rules sooner than through regular rulemaking.**
- **Effective upon filing.**
- **No public comment or JLCAR approval; JLCAR may petition for repeal if not a genuine emergency.**
- **180-day rules.**

# Expedited Repeals

- **RSA 541-A:19-a.**
- **Limited grounds.**
- **Notice, agency public hearing, and comment in shorter time frame than regular rulemaking.**
- **JLCAR review; approval required.**
- **Effective forever.**



# Expedited Revisions to Agency Forms

- **RSA 541-A:19-c.**
- **Revisions to existing forms.**
- **Notice and public comment in shorter time frame than regular rulemaking; no agency public hearing.**
- **JLCAR review, but approval not required.**
- **10-year forms (rules).**

## B. Regular Rulemaking Part One: Notice, Hearing, Comment, and Final Proposal



# Agency Filing of the Rulemaking Notice and Initial Proposed Rule; Publication in the *Rulemaking Register*

- The agency individual, or group, with rulemaking authority approves the Initial Proposal.
- Agency requests and receives a fiscal impact statement (FIS) from the Office of Legislative Budget Assistant (LBA).
- Agency files notice with FIS and proposed rule by the Friday filing deadline.
- After OLS administrative review for completeness and corrections, notice is published in the *Rulemaking Register* online and in paper the following Thursday. See §2.5 of Chapter 3 of *Manual*.

# OLS Initial Administrative Review

- See §2.5 of Chapter 3 of *Manual*.
- OLS notifies agency of incompleteness or inaccuracies.
- Notice may be refused for publication only for “significant noncompliance”. RSA 541-A:6, II.
- Rule may be refused for filing under RSA 541-A:8 for noncompliance with rule numbering and drafting requirements, but these must be major as described in the *Manual* .
- OLS may make only editorial changes to the notice. RSA 541-A:9, I-a.

# Extensions to the Effective Life of a Rule under RSA 541-A:14-a

- See §1.11 of Chapter 3 of *Manual*.
- Applies to an existing regular rule for which a rulemaking notice with proposed rule is filed to readopt or readopt with amendments that rule, and the rule would otherwise expire before the completion of readoption of the rule.
- Notice with proposed rule must be filed before the rule expires.
- The extension applies during the rulemaking proceeding, subject to deadlines under RSA 541-A, unless waived.
- Extension may be checked through OLS website at <http://www.gencourt.state.nh.us/nholsrulesdbsearch/>.

# Electronic Filing

- Available to agencies if approved by OLS Director in compliance with the *Manual*. RSA 541-A:1, VI and V-a.
- See §1.10 and Part 7 of Chapter 3 of the *Manual*.
- Currently used by Department of Health and Human Services, Department of Environmental Services, and the Department of Safety.

# Contents of *Register* Rulemaking Notice

## RSA 541-A:6

- **Agency name and address.**
- **Rulemaking authority and rulemaking action.**
- **Short but descriptive title.**
- **Summary of rule and any amendments, but proposed text is not published.**
- **Cross-reference table with RSAs implemented (“substantive authority”).**
- **Hearing date(s) and public comment deadline.**
- **FIS.**
- **Part 1, Article 28-a Statement.**

## Scheduling the Hearing: RSA 541-A:11

- **The first hearing must be scheduled no sooner than 3 weeks after notice publication (usually Thursdays).**
- **Agency must provide “reasonable opportunity to testify.”**
- **More than one hearing may be scheduled.**
- **Hearings must be attended by a quorum of the agency if the agency is a group, such as a board or commission.**
- **Public comment must not be cut off prior to the end of a hearing if rulemaking authority is granted to a group, or 5 business days after the hearing if rulemaking authority is granted to an individual.**
- **Hearing may be postponed, relocated, or otherwise rescheduled, and public comment deadline extended by the agency. See §2.8 of Chapter 3 of *Manual*.**



## Providing Copies of Proposed Rules

- **OLS provides copies on paper or PDF. RSA 91-A:4, IV. Not online.**
- **Agency must:**
  - **“[P]romptly provide a copy of any rule as filed with the director at any stage of the rulemaking process”. RSA 541-A:11, VI.**
  - **Mail copies no later than 3 working days after a request, faster than 5 business days under RSA 91-A:4, IV.**
  - **Make copies of an Initial Proposal available to public at least 5 calendar days prior to the hearing. RSA 541-A:11, I.**

# Public Notice Beyond the *Rulemaking Register*

- See §2.6 of Chapter 3 of *Manual*.
- RSA 541-A:6, III: To legislative officials upon request, persons who made “timely request”, and occupational licensees.
- RSA 541-A:10, I: To chairpersons of relevant policy committees, or House Speaker or Senate President, for the first time a new rule or amendment implements “newly-enacted state authority” adopted on or after 7-30-11.
- RSA 541-A:39: To a municipality if “any [agency] action within its boundaries directly affects the municipality”.

# Withdrawals

- **May be made by agency at any time during a rulemaking proceeding.**
- **Agency sends a written statement to OLS, Administrative Rules; withdrawal after JLCAR preliminary or revised objection governed by .**
- **Agency may withdraw only a portion of a rule by amending the text in the Final Proposed Rule or through other substantive changes allowed under RSA 541-A.**

# Waiver of Deadlines and Extension of Time Periods under RSA 541-A

- See §1.9 of Chapter 3 of *Manual*.
- May be made by OLS Director upon request for “good cause” shown, after consultation with JLCAR Chair and Vice-Chair.
- Waivers or extensions do not apply to:
  - Public notice periods or public comment periods extended by the agency; or
  - Extension to the life of a rule, governed by RSA 541-A:14-a.

## JLCAR Legal Staff Review: RSA 541-A:11, I

- **See §2.9 of Chapter 3 of *Manual*— “What Committee Legal Staff Looks for”, RSA 541-A:13, IV, and Chapter 400 of the JLCAR’s rules on bases for JLCAR objection:**
  - **Beyond the authority of the agency. JLCAR Rule 401.**
  - **Contrary to legislative intent. JLCAR Rule 402.**
  - **Determined not to be in the public interest. JLCAR Rule 403.**
  - **Substantial economic impact not recognized in the FIS. JLCAR Rule 404.**

## Steps in JLCAR Legal Staff Review

- **Comments are made as annotations in Word® to the rule.**
- **Comments may be “substantive” or marked as “editorial”, but are neither legal advice nor JLCAR objections.**
- **Staff does not examine whether a proposed rule is a good or bad policy.**
- **If there are no substantive JLCAR legal staff comments, the Initial Proposal is marked “Consent” or “Consent, edit”.**
- **The Initial Proposal with comments is scanned in PDF and sent by e-mail to the agency, with copy to the AG’s Office.**
- **Draft final proposals are reviewed if time allows.**

## Editorial vs. Substantive JLCAR Legal Staff Comments

- **“Editorial comment”** is where a change to the rule to address the comment would be editorial in nature—that is, not change the meaning of the rule. See §2.2 of Chapter 5 of the *Manual*.
- **“Substantive comments”**, if left unaddressed in the Final Proposal, would need a JLCAR conditional approval or preliminary objection in order to be addressed by amending the rule.

# Establishing and Filing the Final Proposal

- See §§ 2.11-2.14 in Chapter 3 of the *Manual*.
- Final Proposals must be:
  - Established by the individual, or group of individuals, with rulemaking authority after “fully considering” comment;
  - Not established or filed by the agency until after the public comment period. RSA 541-A:10, II; and
  - Established and filed within 150 days of the notice publication, unless waived. RSA 541-A:12, I.
- Final Proposals filed within 14 days before a regular JLCAR meeting are placed by law on the agenda for the next month’s meeting, absent a waiver of the 14-day period. JLCAR then has 45 days to act, or auto approval. RSA 541-A:12, I and RSA 541-A:13, I and II(e).



# OLS Review of Final Proposal

- **OLS administrative review checks for completeness and accuracy of the Final Proposal package, including “fixed text” and associated documents. RSA 541-A:12, II-VII.**
- **JLCAR legal staff will review Final Proposals, and send comments to the agency, in the same manner as for Initial Proposals.**
- **Final Proposals without substantive comments on bases for potential JLCAR objection, and no expected public or JLCAR comment, will be placed on the JLCAR “consent agenda” for approval.**
- **See §2.13 of Chapter 3 of *Manual* for more details.**

# Agency Request for Conditional Approvals or Objections.

- **Substantive changes to a Final Proposal are possible only through a JLCAR conditional approval or objection, unless Amended Final Proposal filed. See §§2.13-2.15 of Chapter 3 of *Manual*.**
- **Agency may request conditional approval orally or in writing with an amended text.**
- **JLCAR legal staff will review a written request for conditional approval in the same manner as for the Final Proposal.**
- **Conditional approval requests without substantive JLCAR staff comments, and no expected public or JLCAR comment, will be placed on the JLCAR's "consent agenda" for conditional approval.**

# C. Regular Rulemaking Part Two: JLCAR Meeting and Actions, Agency Adoption and Filing, and Certification



## Regular vs. Continued Meeting or “Special Meeting”

- **JLCAR meets in a “regularly scheduled meeting” at least once a month, normally 3<sup>rd</sup> Friday in January-June, and 3<sup>rd</sup> Thursday in July-December.**
- **Placement of Final Proposals in a “regularly scheduled meeting” is determined by RSA 541-A:12, I.**
- **“Continued meetings” are continuations of a recessed regular meeting to address postponed items or other issues.**
- **“Special meetings”, called by the Chairperson or JLCAR, are very rare, e.g. to review interim rules, expedited repeals, or expedited revisions to forms other than in a regular or continued meeting.**

## Tentative Agenda—“Consent” Agenda vs. “Regular”

- See §§2.13 and 2.15 of Chapter 3 of *Manual*.
- Final Proposals are placed on agenda of regular meeting by RSA 541-A:12, I, but the order of review and times are tentative and subject to approval by Chairperson.  
<http://www.gencourt.state.nh.us/rules/JLCAR/agendas.htm>
- “Consent agenda” is intended to speed up JLCAR action without further discussion:
  - Final Proposals, Proposed Interim Rules, Conditional Approvals, and Objection Responses for approval.
  - Final Proposals for preliminary or revised objection.
- “Regular agenda” contains discussion items.

# JLCAR Meeting Process and Actions

- **RSA 541-A:13.**
- **See §§2.13 and 2.15-2.19 of Chapter 3 of *Manual*.**
- **JLCAR is not a policy committee and cannot object on policy grounds.**
- **Meeting is conducted as legislative-type hearing.**
- **JLCAR may approve, conditionally approve, or preliminarily object to a Final Proposal.**
- **Only a JLCAR conditional approval or a preliminary objection can authorize a substantive change to the Final Proposal at this stage.**
- **OLS sends written notification or letters to agencies of JLCAR actions.**

# JLCAR Approval

- Upon approval, the Final Proposal may be adopted at any time, unless existing rules were subject to extension under RSA 541-A:14-a, in which case:
  - The rule must be adopted within 30 days of the approval, unless deadline waived, and filed promptly; and
  - Effective date must be not more than 60 days from filing date, unless deadline waived.

# JLCAR Conditional Approval and Agency Response: RSA 541-A:13, V(a)

- JLCAR votes on a specific, amended text of the rule, in lieu of an objection. See §2.15 of Chapter 3 of *Manual*.
- The individual, or group of individuals, with rulemaking authority, approves a response and submits an annotated copy of the entire final proposed rule. See §2.16 of Chapter 3 of *Manual*.
- Failure to respond by the deadline and/or with the properly amended rule converts the conditional approval into a preliminary objection.
- Agency may not adopt until OLS confirms; but if RSA 541-A:14-a applies, then adopt within 30 days and file.



## JLCAR Objections—Preliminary and Revised: RSA 541-A:13, V(a)-(e)

- **JLCAR votes based on the grounds under RSA 541-A:13, IV. See §2.15 of Chapter 3 of *Manual*.**
- **An amended text may be recommended but is not required in the vote.**
- **Agency—the individual or group with rulemaking authority--responds by amending the final proposed rule, withdrawing the Final Proposal entirely, or making no change, and reporting that response in writing within 45 days. See §2.17 of Chapter 3 of *Manual*.**
- **JLCAR reviews the response in another meeting. See §§2.18 and 2.19 of *Manual*.**

## JLCAR Final Objection

- Final objection may be made at any time after an objection response is filed. See §2.19 of Chapter 3 of *Manual*.
- Not a veto. Rule may still be adopted, but timing of adoption and filing may be subject to RSA 541-A:14-a.
- Rule is no longer *prima facie* lawful and reasonable.
- Final objection shifts the burden of proof onto the agency relative to the basis for objection if the rule is enforced or challenged in court.
- Subsequent rulemaking will remove the effect of the final objection if the rule is then approved.

# JLCAR Vote to Sponsor Joint Resolution and Restrictions on Agency Adoption

- **Strongest action JLCAR may take. See §2.19 of Chapter 3 of *Manual*.**
- **Must be taken within 50 days of the agency's objection response deadline.**
- **Rule may not be adopted until JLCAR takes action in lieu of a vote to sponsor, or the 50 days passes, whichever comes first.**
- **Vote to sponsor prevents adoption, for the time specified in RSA 541-A:13, VII(c), only of those provisions of the rule which were subject to the vote.**
- **Legislature has opportunity to act upon the resolution, which may stop adoption permanently.**

# Adoption and Filing

- **RSA 541-A:14.**
- **See §§2.20 and 2.21 of Chapter 3 of *Manual*.**
- **Rule must be adopted by the individual, or group of individuals, with rulemaking authority.**
- **The rule becomes effective the day after filing, unless another date and time are specified in the letter, so long as it is not sooner than filing.**
- **Public has up to 30 days after adoption to request an explanation of the principal reasons for and against adoption and why contrary arguments were overruled.  
RSA 541-A:11, VII.**

## OLS Acceptance or Refusal

- See §2.21 of Chapter 3 of *Manual*.
- Receipt is sent upon acceptance, with a five-digit document number assigned to the filing.
- Rules go into effect or not as a matter of law, not by sending a receipt.
- Limited grounds to refuse a rule. RSA 541-A:8 & 14, II.
- Upon acceptance of the adopted rule, the OLS's online agency filing history will be updated to show the document number of the adopted rule filing and effective date.
- OLS will send a copy of the as-filed adopted rule to the State Library and the N. H. Law Library at the Supreme Court.

## “Voiding” a Document Number

- See §2.21 of Chapter 3 of *Manual*.
- Record-keeping action after a receipt has been issued.
- Very rare and due to errors discovered in the rulemaking process which would have caused refusal of the rule for filing if known at time of filing.
- Action to void a document number does not change a valid, effective rule into an ineffective rule.
- Action by OLS Director removes the rule from the records of OLS as an effective rule, but filing records are retained.

# Certification Process

- See Chapter 5 of *Manual*.
- Rule as filed remains the “official version” of the rule unless replaced by the certified rule. See RSA 541-A:15, I.
- OLS performs editorial work not affecting the meaning of the rule, e.g. annotations called source notes or revision notes, and creation of tables of contents.
- Agency certifies that the edited rule is the same in substance as the filed rule.
- Then certified rule is placed on the OLS web site.
- Certification is noted by an asterisk (\*) next to the document number of the OLS online agency filing history.
- Copy of certified rule is sent by OLS to State Library and N. H. Law Library at the Supreme Court.

## Changes after Certification; Re-Certification

- **Editorial changes are changes that do not affect the meaning of the rule.**
- **Allowed after certification. See §§2.2 and 2.8 of Chapter 5 of *Manual*.**
- **Changes to text require re-certification by agency.**
- **Substantive errors introduced in the original certification process can be corrected and the rule certified again.**



# D. Judicial Review of Rules and Rulemaking



# Judicial Review of Rules

- **RSA 541-A:24.**
- **Action for declaratory judgment in Merrimack County Superior Court.**
- **“The rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.”**
- **Rule does not need to have been adopted as a rule to be subject to challenge. See *Asmussen v. Commissioner, N. H. Department of Safety*, 145 N.H. 578, 766 A.2d 678 (2000).**

# Judicial Review of Rulemaking

- **RSA 541-A:23.**
- **Certain failures by an agency in the RSA 541-A process prevent a rule from taking effect, e.g. failure to file with OLS.**
- **Merrimack County Superior Court may fashion appropriate relief for other violations of RSA 541-A, but an action to contest validity for noncompliance must commence within one year of the rule's effective date.**