Idaho Rulemaking: Twists and Turns

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Those Were the Days...

Last “Normal” Rulemaking Year in Idaho?

2018.
Since 2019 –
Two (2) major things have affected Rulemaking in Idaho:

• Executive Orders
• Actions and inactions of the Idaho Legislature
January 2019 – Governor issued:

**E.O. 2019-02** – *Red Tape Reduction Act*

- *Reduce amount of regulatory language*
- *Reduce “regulatory burden”*
“Regulatory Burden” is quantified by counting the occurrence of:

- shall
- must
- may not
- prohibited
- required
Failure to REAUTHORIZE Admin Code

• 2019 Legislature did not reauthorize *Idaho Administrative Code*

• First time in history...

• Without reauthorization, all *Admin Code* expires
Executive Response...

- *Idaho Administrative Code* republished as **Temporary** rules

- H&W rules published in 2 GIANT **Omnibus** docket:
  - Fee chapters – 401 pages
  - Non-Fee chapters – 1,071 pages
  - *Administrative Bulletin* – 6,744 pages
Windfall for the Executive Branch...

• All chapters of *Admin Code* open!

• Easy to:
  • Trim words
  • Delete whole chapters
  • Rewrite chapters
• Massive deregulation achieved - Red Tape Reduced!

• The public could see additions to rules
• The public couldn’t see deleted text
• Easier reading, but...
Low-Hanging fruit picked; fat trimmed—all done? Nope.

January 1, 2020 – Governor issued:

E.O. 2020-01 – Zero-Based Regulation

• Moratorium on “regular” rulemaking
• Rewrite all of Admin Code chapters
• Five Year Project
During the next five (5) years:

- Rewrite ~13 rewritten chapters a year
- Only emergency “ad hoc” rulemakings
- Project to finish 2026
Strategy - Creating a Rewrite Schedule

Health & Welfare 5-Year Rewrite Schedule

• 63 Chapters
• 8 Divisions
• No dedicated policy staff for rulemaking

• How do we balance the chapters in the schedule to distribute the work across the Divisions as evenly as possible over the 5 years?
1. **When was the last rewrite?**
   - Chapters recently rewritten were scheduled towards the end of 5-year schedule
   - Chapters that have not been rewritten for many years, were scheduled earlier

2. **How big is the chapter?**
   - We balanced the mix of small, medium, and large chapters across the 5-year schedule

3. **How many chapters does each Division have?**
   - We evenly spread each Division’s chapters across the 5-year schedule.
   - We ensured that the same program would not have more than 1 chapter rewrite a year

4. **What chapters need to be rewritten together?**
   - We scheduled chapters together that frequently work in concert with other chapters

5. **Which chapters have multiple division’s content?**
   - We considered this along with the # of chapters in a Division.
## Rewrite Schedule – End Result

### All Divisions - Schedule for Chapter Rewrites 2021-2025

<table>
<thead>
<tr>
<th>Chapters</th>
<th>2021 (To Leg. 2022)</th>
<th>2022 (To Leg. 2023)</th>
<th>2023 (To Leg. 2024)</th>
<th>2024 (To Leg. 2025)</th>
<th>2025 (To Leg. 2026)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>16.03.23 (2008-RW)</td>
<td>16.03.24 (2011New)</td>
<td>16.03.05 (1999-RW)</td>
<td>16.03.19 (2018-RW)</td>
<td>16.03.22 (2019-RW)</td>
</tr>
<tr>
<td>10</td>
<td>16.05.07 (2007New)</td>
<td>16.05.06 (2008-RW)</td>
<td>16.03.08 (1997New)</td>
<td>16.06.01 (1999-RW)</td>
<td>16.04.17 (2017-RW)</td>
</tr>
<tr>
<td>11</td>
<td>16.06.13 (2004-RW)</td>
<td>16.06.02 (2001-RW)</td>
<td>16.03.18 (2012-RW)</td>
<td>16.06.05 (1990New)</td>
<td>16.06.05 (1990New)</td>
</tr>
</tbody>
</table>

- **Blue** = large chapters, > 15,000 words
- **Purple** = medium chapters, 5,000 – 14,999 words
- **Green** = small chapters, < 4,999 words

*Chapter for 2 divisions (FACS/L&C and L&C/Welfare)

RW = Last Rewrite;

New = Chapter had no significant rewrites since its introduction.
They approved the 2 Omnibus dockets from 2019 (Fee and Non-Fee)

But they...
• Didn’t reauthorize the Admin Code – again...
• Didn’t pass the concurrent resolutions required for Pending Fee rules to become Final rules

So – where did that leave our rules...?
After the dust settled, and effective Sine Die, 2020:

- **Non-fee** chapters were codified as **Final Rules**
- **Fee** chapters went into effect as **Temporary Rules**
There were complications...

• Errors in the Code had to be corrected
  (some changes weren’t effective until July 1st, not Sine Die)

• COVID-19! Temporary Covid amendments had to be made...

• We had “Frankenstein” Code
  (half Final codified rule/half Temporary)
What if the 2021 Legislature does the same as 2020? (i.e., doesn’t reauthorize Code/no concurrent resolutions)

• The codified non-fee rules would expire July 1st
• The Temporary fee rules would expire at Sine Die of the 2021 session

Solution: Pre-emptive Omnibus dockets for 2021...
The 2021 Legislature...

• It DIDN’T reauthorize the Admin Code – 3rd time...
• It DIDN’T pass the concurrent resolutions required for Pending Fee rules to become Final rules
• It DIDN’T even go Sine Die – for the 1st time in Idaho history

**Outcome:** *Zombie* Temporary rules!
Legislature didn’t recess until May 12\textsuperscript{th}...a record.

- Senate adjourned \textit{Sine Die}
- House recessed at the call of the Speaker – no later than December 31\textsuperscript{st}

**Result:** 2021 Legislature is still in session *sigh*

- Can reassemble any time until end of 2021; and
- Can take legislative action as long as they have a quorum
What to do, what to do…

• Kill the zombies
• Make sure all rules remain in effect without interruption

**Actions taken** – Effective July 1st – Simultaneously:

• Rescind all the Temporary rules (all Admin Code)
• Repromulgate entire Code as a **NEW** set of Temporary rules – Currently our rules are Temporary
**The Good News** – all rules went into effect July 1\textsuperscript{st} – with no break in continuity

**The Bad News** – rules didn’t publish until July 21\textsuperscript{st} in a Special Edition of the *Bulletin*
Total Reset!

**Functionally** – a reset of entire *Admin Code*

**Upside:**
- Easy to make updates (i.e., due to legislation)
- Easy to make corrections/fixes
- Covid changes were extended

**Downside:**
- All previous publication history lost in *Code*
- No published record of changes since all text is “new” text
Here’s Where We are Now...

• We only have 2 dockets this year – the new Omnibus dockets.

• All changes to our rule chapters are being done in these dockets – no Ad Hoc dockets.

• All REWRITES are done in these dockets as Proposed Rules publishing in a Special Edition of the Bulletin in late October.
The 2022 Legislature will have no Idaho Administrative Code to reauthorize/extend – since there currently isn’t one...only Temporary rules
If no concurrent resolution passes (again):

• Fee chapters will expire at Sine Die, 2022
• We will have to repromulgate them again as Temporary with an effective date of Sine Die, 2022
• Non-fee chapters will become Final at Sine Die, 2022 and continue in effect past July 1, 2022 – like what happened in 2020.
If the legislature doesn’t go Sine Die (again):

• We will again have zombie Temporary rules, except next year it will be all our rules – both fee and non-fee.

• We will need to simultaneously rescind the 2021 omnibus dockets and adopt new 2022 omnibus dockets, thus maintaining our Administrative Code in effect as Temporary rules (again).
Will we ever have regularly codified *Idaho Administrative Code* again?

- Good question...not likely

Why has the legislature chosen not to act on the *Code* and rulemaking?

- We don’t know – but likely not random
- Is it a long-term strategy to aggregate power to the Legislative Branch? Maybe.
- *Stay tuned...*
2019 Starting Word Count Totals:
- 89 IDAPA Chapters
- 862,178 words
- 12,071 restrictive words

2020 Word Count Reductions:
- 69 IDAPA chapters (- 20 chapters or 22.5%)
- 694,369 words (-167,809 words or 19.5%)
- 8,708 restrictive words (-3,363 restrictions or 27.9%)
2021 Starting Word Count Totals:

- 69 IDAPA Chapters
- 694,369 words
- 8,708 restrictive words

Word Count Reductions ≥ rewriting 13 chapters:

- 61 IDAPA chapters (- 8 chapters repealed or 11.6%)
- 675,516 words (- 18,853 words or ~3%)
- 8,378 restrictive words (- 330 restrictions or ~4%)
Conclusion

In the last 3 years:

• Our focus has changed from writing and maintaining existing rules to reducing word counts & regulatory burden

• The actions and inactions of the legislature have pushed us to employ creative strategies to keep our rules:
  • functionally in place
  • properly updated, and
  • with no breaks in effect
A BIG “Thank You!” to the Office of Idaho Administrative Rules with Brad Hunt and his staff, Logan Medel. You guys rock!

Q & A