



# **Idaho Rulemaking: Twists and Turns**

**August 15, 2021**

***Trinette Middlebrook***

***Frank Powell***



IDAHO DEPARTMENT OF  
HEALTH & WELFARE



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



- 2019 Legislature did not reauthorize *Idaho Administrative Code*
- First time in history...
- Without reauthorization, all *Admin Code* expires



- *Idaho Administrative Code* republished as **Temporary** rules
- H&W rules published in 2 **GIANT Omnibus** dockets:
  - Fee chapters – 401 pages
  - Non-Fee chapters – 1,071 pages
  - *Administrative Bulletin* – 6,744 pages



- 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



## 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

14



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

Chapters	2021 (To Leg. 2022)	2022 (To Leg. 2023)	2023 (To Leg. 2024)	2024 (To Leg. 2025)	2025 (To Leg. 2026)
1	<sup>1</sup> 16.01.05 (2015New)	<sup>1</sup> 16.01.06 (2016New)	<sup>1</sup> 16.01.03 (2013New)	<sup>1</sup> 16.01.07 (2011New)	<sup>1</sup> 16.01.02 (2013New)
2	<sup>2</sup> 16.02.08 (1983-RW)	<sup>1</sup> 16.02.01 (2014New)	<sup>1</sup> 16.02.02 (2007New)		<sup>1</sup> 16.01.12 (2011New)
3	<sup>2</sup> 16.02.25 (2010-RW)	<sup>2</sup> 16.02.19 (2016-RW)	<sup>2</sup> 16.02.06 (2011-RW)	<sup>2</sup> 16.02.13 (2011-RW)	<sup>2</sup> 16.02.10 (2008-RW)
4	<sup>2</sup> 16.02.26 (2009-RW)	<sup>2</sup> 16.02.12 (2010-RW)	<sup>2</sup> 16.02.11 (2011-RW)	<sup>2</sup> 16.02.23 (2005-RW)	<sup>2</sup> 16.02.14 (2019-RW)
5	<sup>3</sup> 16.03.06 (2008-RW)	<sup>*5</sup> 16.03.02 (1988-RW)	<sup>2</sup> 16.02.15 (2019-RW)	<sup>3</sup> 16.03.01 (2013-RW)	<sup>2</sup> 16.02.27 (2014-RW)
6	<sup>5</sup> 16.03.14 (1988New)	<sup>5</sup> 16.03.11 (2014-RW)	<sup>2</sup> 16.02.24 (2006New)	<sup>4</sup> 16.03.09 (2007-RW)	<sup>3</sup> 16.03.03 (1998-RW)
7	<sup>5</sup> 16.03.21 (2011New)	<sup>4</sup> 16.03.17 (2008New)	<sup>3</sup> 16.03.04 (1994New)	<sup>4</sup> 16.03.13 (2007New)	<sup>4</sup> 16.03.10 (2007-RW)
8	<sup>4</sup> 16.03.23 (2008-RW)	<sup>3</sup> 16.03.24 (2011New)	<sup>3</sup> 16.03.05 (1999-RW)	<sup>5</sup> 16.03.19 (2018-RW)	<sup>5</sup> 16.03.22 (2019-RW)
9	<sup>4</sup> 16.03.25 (2012New)	<sup>3</sup> 16.04.14 (2012-RW)	<sup>5</sup> 16.03.07 (1993-RW)	<sup>7</sup> 16.05.04 (2019-RW)	<sup>8</sup> 16.04.07 (2019-RW)
10	<sup>6</sup> 16.05.07 (2007New)	<sup>6</sup> 16.05.06 (2008-RW)	<sup>3</sup> 16.03.08 (1997New)	<sup>7</sup> 16.06.01 (1999-RW)	<sup>5</sup> 16.04.17 (2017-RW)
11	<sup>7</sup> 16.06.13 (2004-RW)	<sup>*7</sup> 16.06.02 (2001-RW)	<sup>4</sup> 16.03.18 (2012-RW)	<sup>7</sup> 16.06.05 (1990New)	
12	<sup>8</sup> 16.07.17 (2016-RW)	<sup>8</sup> 16.07.33 (2014-RW)	<sup>6</sup> 16.05.03 (2018-RW)	<sup>3</sup> 16.06.12 (2008-RW)	<sup>6</sup> 16.05.01 (2004-RW)
13	<sup>8</sup> 16.07.39 (2010-RW)	<sup>8</sup> 16.07.37 (2009New)	<sup>8</sup> 16.07.19 (2016New)	<sup>8</sup> 16.07.25 (2009New)	<sup>8</sup> 16.07.01 (2009-RW)

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**





- Errors in the *Code* had to be corrected  
(some changes weren't effective until July 1<sup>st</sup>, 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 1<sup>st</sup>
- The Temporary fee rules would expire at *Sine Die* of the 2021 session

**Solution:** Pre-emptive Omnibus dockets for 2021...



- It DIDN'T reauthorize the *Admin Code* – 3<sup>rd</sup> 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 1<sup>st</sup> time in Idaho history

*Outcome: **Zombie** Temporary rules!*



**Legislature didn't recess until May 12<sup>th</sup>...a record.**

- Senate adjourned *Sine Die*
- House recessed at the call of the Speaker – no later than December 31<sup>st</sup>

**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



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

**Actions taken** – Effective July 1<sup>st</sup> – 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<sup>st</sup> – with no break in continuity

***The Bad News*** – rules didn't publish until July 21<sup>st</sup> in a Special Edition of the *Bulletin*



*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



- 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 $\geq$ 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%)



## 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