



Members Only

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An Overview of Administrative Rule-Making Procedure in Ohio

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Administrative rule making

When the subject of a statute is technically complex, the General Assembly often creates or authorizes an administrative agency to implement the statute. A classic example is public utilities legislation. Regulation of public utilities often involves technically complex matters that are better understood by an agency that deals with these matters on a frequent basis.

An important technique by which agencies are empowered to implement statutes is by rule making. That is, in enacting an agency-empowering statute, the General Assembly often directs the agency to adopt rules for particular purposes. A rule is a formal, written statement of general principles of law, as is a statute. For example, in a public utilities statute that entitles a public utility to a "fair and reasonable return on its investment," the General Assembly might direct the agency to adopt rules stating criteria by which a fair and reasonable return can be determined. The criteria are general principles of law just as is the statutory phrase under which they are adopted, but the criteria are defined, not by the General Assembly, but by the adopting agency in fulfillment of the rule-making power it has been given by the General Assembly.

This informational brief outlines how agencies undertake adopting rules. That is, it explains rule-making procedure, but does not address when rule making is appropriate or the role rules play in agency operations.

Administrative agencies often are required to adopt rules to implement statutes that have been enacted by the General Assembly. Rules are formal, written statements of general principles of law, as are the statutes under which they are adopted.



Rule-making procedure in general

An administrative rule is law only after its adopting agency has put it through a statutorily prescribed rule-making procedure. There are two rule-making procedures, one in the Ohio Administrative Procedure Act, R.C. Chapter 119., and the other in R.C. 111.15. Which procedure applies to a rule is a matter of legislative choice, and depends upon whether public input to the rule-making process is considered important.

In rule making under R.C. Chapter 119., an agency gives public notice of its intention to adopt a rule and then holds a public hearing on the proposed rule. In rule-making under R.C. 111.15, an agency neither gives public notice nor holds a public hearing.

An administrative rule can be effective as part of the law in Ohio only after its adopting agency has taken it through a statutorily prescribed rule-making procedure. While a rule is being taken through the rule-making procedure, it is called a “proposed rule.” When the rule-making procedure has been completed, and the rule is to become effective as part of the law, it is called an “adopted rule.”

There are two general statutory rule-making procedures: one in the Ohio Administrative Procedure Act, R.C. Chapter 119., and the other in R.C. 111.15. In general, if an agency is not required to follow the rule-making procedure of R.C. Chapter 119., it is required to follow the rule-making procedure of R.C. 111.15. (Compare R.C. 111.15(A)(1) and (2) with R.C. 119.01(A) and (C).) Rules subject to adoption under R.C. Chapter 119. are called “119” rules. Rules subject to adoption under R.C. 111.15 are called “111” rules.

Whether an agency is required to follow the R.C. Chapter 119. or R.C. 111.15 rule-making procedure is a matter of legislative choice. The major difference between the two rule-making procedures is that R.C. Chapter 119. requires an agency to give public notice of its intention to adopt a rule and then to conduct a public hearing on the proposed rule. R.C. 111.15 does not impose a similar public notice and hearing

requirement. Consequently, if it is thought important for an agency to consider public input in its rule making, the R.C. Chapter 119. rule-making procedure is chosen. If, however, it is not thought important for an agency to consider public input in its rule making, the R.C. 111.15 rule-making procedure may be chosen. It probably is fair to say that the majority of rules are required to be adopted under the R.C. Chapter 119. rule-making procedure.

Special rule-making procedures apply to the Auditor of State (R.C. 117.20), to the Director of Job and Family Services in adopting unemployment compensation rules (R.C. 4141.14), to the Director of Development in adopting rules for the Energy Credit Program (R.C. 5117.02), to the Tax Commissioner and Board of Tax Appeals generally (R.C. 5703.14), and to “parity rules” giving state financial institutions the same powers as federal financial institutions (R.C. 1121.05, 1121.06, 1155.18, 1163.22, and 1733.412). Because of the specialized nature of these rule-making procedures, they are not discussed in the following overview.

Rules adopted under R.C. Chapter 119.

In considering proposal of a 119 rule, an agency may appoint an advisory committee to advise the agency concerning the rule’s development, and may otherwise consult with persons representing interests that

would be affected by the rule were it actually to be proposed and adopted (R.C. 119.035).

When an agency intends to adopt a 119 rule, it proceeds as follows:

(1) The agency gives public notice of its intention to adopt the rule in the *Register of Ohio* at least 30 days before its scheduled hearing on the proposed rule (see below). The notice includes a synopsis of the proposed rule, a statement of the agency's reason or purpose for proposing the rule, and the date, time, and place of the hearing. (In addition to notice in the *Register of Ohio*, the agency also may give whatever other notice it reasonably considers necessary to ensure that all persons who will be subject to or affected by the rule will be constructively notified of its proposal.) (R.C. 119.03(A).)

(2) At least 65 days before adopting the rule, the agency files the notice, the proposed rule, and a rule summary and fiscal analysis (RSFA) of the proposed rule (see below) with the Secretary of State and the Legislative Service Commission (LSC) (R.C. 119.03(B) and 127.18). The agency also files the notice, proposed rule, and RSFA with the Joint Committee on Agency Rule Review (see below) (R.C. 119.03(H) and 127.18). Proposed 119 rules, together with their notices of intended adoption and RSFAs, are published in the *Register of Ohio*. (R.C. 119.03(A) and (B).)

(3) The agency holds a public hearing on the proposed rule not earlier

than the 31st nor later than the 40th day after its filing with the Secretary of State and LSC. At the hearing, a person affected by the proposed rule (or the person's attorney) may present the person's positions, arguments, and contentions, orally or in writing; offer and examine witnesses; and present evidence showing that the proposed rule, if adopted, will be unreasonable or unlawful. An agency also may permit a person to present positions, arguments, or contentions in writing for a reasonable period before, after, or both before and after the hearing. (R.C. 119.03(A) and (C).)

(4) Sixty-six days after filing the proposed rule, and if the time for legislative invalidation has expired (see below), the agency may adopt the proposed rule (R.C. 119.03(D)) and file it in final form (R.C. 119.04(A)(1) and (2)). An adopted rule must be consistent with the synopsis included in the public notice that pertained to the rule as proposed (R.C. 119.03(D)).

(5) Finally, the agency makes a reasonable effort to inform those affected by the rule of its adoption and to have copies of the rule available for distribution to those requesting it (R.C. 119.03(E)). An adopted 119 rule takes effect as specified by the adopting agency, but not earlier than the 10th day after being filed in final form (R.C. 119.03(D) and 119.04(A)(1)).

Adopted 119 rules are published in the *Register of Ohio*.



An agency may adopt rules on an emergency basis without complying with the normal rule-making procedure. (Emergency rules adopted under R.C. Chapter 119. require the Governor's approval.) Emergency rules take effect immediately upon being filed in final form, but remain in effect for only 90 days unless they are readopted in compliance with the normal rule-making procedure.

Emergency 119 rules

At the request of an agency, the Governor may suspend the normal 119 rule-making procedure for a particular 119 rule upon determining that an emergency exists. The agency may then immediately adopt the rule without complying with the notice, hearing, and other proposal requirements that normally apply in the adoption of 119 rules. An emergency 119 rule takes effect immediately upon being filed, but expires on the 91st day after its effective date—unless, in the meantime, the agency has readopted the rule according to the normally applicable 119 rule-making procedure. (R.C. 119.03(F).)

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

Rules adopted under R.C. 111.15

Unless exempted from this requirement by R.C. 111.15(D), an agency that intends to adopt a 111 rule files copies of the proposed rule and a rule summary and fiscal analysis (RSFA) thereof with the Secretary of State and LSC at least 65 days before adopting the rule (R.C. 111.15(D) and (E)). Agencies do not give public notice of proposed 111 rules. Nor are proposed 111 rules subject to a public hearing. Consequently, the R.C. 111.15 rule-making procedure sometimes is referred to as the “abbreviated rule-making procedure.”

If exempt from filing a 111 rule as a proposed rule, an agency may

immediately adopt the rule and file it in final form (R.C. 111.15(B)(1) and (3)).

If, however, an agency is required to file a 111 rule as a proposed rule, it may not adopt the rule and file it in final form until the time for legislative invalidation has expired (see below) or earlier than the 66th day after the rule was filed as a proposed rule (R.C. 111.15(B)(1) and (3) and (D)). An adopted 111 rule takes effect as specified by the adopting agency, but not earlier than the 10th day after being filed in final form (R.C. 111.15(B)(1) and (3)).

Proposed and adopted 111 rules, and RSFAs for proposed 111 rules, are published in the *Register of Ohio*.

Emergency 111 rules

An agency may immediately adopt an emergency 111 rule without complying with the proposal requirements that normally apply to 111 rules (R.C. 111.15(B)(2) and (3) and (D)(1)). (Unlike as is the case with emergency 119 rules, the Governor's authorization is not required.) An emergency 111 rule takes effect immediately upon being filed or on a later date and time specified by the adopting agency, but expires on the 91st day after its effective date—unless, in the meantime, the agency has readopted the rule according to the normally applicable 111 rule-making procedure (R.C. 111.15(B)(2)).

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



Rule-making process guides

Agencies that propose 119 rules publish guides to their rule-making processes to assist members of the public who participate, or who may wish to participate, in the agency's rule making. An agency's rule-making process guide includes: (1) a statement of the agency's regulatory mission, (2) a description of how the agency is organized to achieve its regulatory mission, (3) an explanation of rule making the agency is authorized or required to engage in to achieve its regulatory mission, (4) an explanation of the agency's rule-making process, (5) an indication of the points in the agency's rule-making process at which members of the public can participate, (6) an explanation of how members of the public can participate at each indicated point of participation, and (7) other information the agency reasonably concludes will assist members of the public meaningfully to participate in the agency's rule making. An agency publishes its guide both as a printed pamphlet and electronically in the *Register of Ohio*. (The agency may charge a fee for its pamphlet guide; the fee cannot exceed the agency's cost of publishing and delivering the pamphlet.) An agency's failure to conform its rule-making process to its rule-making process guide is not cause for invalidating a rule adopted by the agency. (R.C. 119.0311.)

Rule Summary and Fiscal Analysis (RSFA)

When an agency files a proposed 111 or 119 rule, or a rule for cyclical review after determining that the rule does not need amendment or rescission (see below), it also files a rule summary and fiscal analysis (RSFA) of the rule. An RSFA includes: (1) the agency's name, address, and telephone number, and the name and telephone number of an individual or office within the agency that has been designated to provide information about the rule, (2) the rule's Administrative Code rule number, (3) a brief summary of, and the legal basis for, the rule, including a citation to the statute that authorizes or requires the rule, the statute the agency intends to amplify or implement by adopting the rule, and the statute that prescribes the procedure, 111 or 119, under which the rule is being proposed or was adopted, (4) an estimate in dollars of the amount by which the rule would increase or decrease revenues or expenditures during the state's current fiscal biennium, (5) a citation identifying the appropriation that authorizes each expenditure necessitated by the rule, (6) a summary of the estimated cost to all directly affected persons of complying with the rule, (7) reasons why the rule is being proposed, (8) if the rule has a fiscal effect on school districts, counties, townships, or municipalities, an estimate in dollars

Agencies that adopt 119 rules publish rule-making process guides to assist members of the public to participate in the agency's rule making.

An agency prepares a rule summary and fiscal analysis (RSFA) to accompany certain rule filings. An RSFA explains the rule and its expected effects.



The Register of Ohio is an electronic gazette, published free on the Internet, that provides notice of and information about 111 and 119 rule making.

of the cost of local compliance or, if dollars cannot be estimated, an explanation of why not, (9) if the rule has a fiscal effect on school districts, counties, townships, or municipalities that results from a federal requirement, an explanation that the rule conforms to the scope and intent of the federal requirement or, if the rule exceeds the federal requirement, an estimate of the excess cost, including specifically the excess cost for school districts, counties, townships, or municipalities and a justification of the excess cost, (10) if the rule has a fiscal effect on school districts, counties, townships, or municipalities, a comprehensive cost estimate that explains how the costs of compliance were calculated, identifies the major cost categories, explains the agency's and the affected governments' ability to pay for the rule's requirements, and states any impact the rule will have on economic development, (11) explanations regarding the public availability of text or material the rule incorporates by reference (see below), and (12) any other information the Joint Committee on Agency Rule Review (JCARR) considers necessary to make the rule or its fiscal effect fully understandable. An agency prepares the RSFA on a form JCARR prescribes (see below). (R.C. 127.18.)

Register of Ohio

The *Register of Ohio* is an electronic gazette published free of charge by LSC on the Internet (R.C.

103.051): <http://www.registerofohio.state.oh.us>. (A "gazette" is an official publication that gives official notice and provides official information.) Statutorily required publication of rule-making and rule-related documents in only the *Register of Ohio* is legally sufficient to give notice of the content of the documents to persons who are subject to or affected by the content. Until a document that is statutorily required to be published in the *Register of Ohio* is so published, its content is not valid against a person who does not have actual knowledge of the content. (R.C. 119.037.) The several rule-making and rule-related documents that are published in the *Register of Ohio* are identified throughout this brief.

Review of proposed rules

Proposed rules, whether subject to the 111 or 119 rule-making procedure, may be subject to review as explained in the following paragraphs. If a rule is subject to such a review, copies of the rule (and, in the case of a proposed rule, copies of its rule summary and fiscal analysis (RSFA)) are filed with the reviewing agencies at the same time they are filed with the Secretary of State and LSC. In addition, the statutes that specifically apply to an agency may make that agency's proposed rules subject to review by authorities in addition to those described below—for example, by a board that oversees the agency.



Legislative review

Proposed rules are subject to legislative review and possible invalidation under the following statutes unless they are exempted from legislative review under that or another specially applicable statute:

Proposed 111 rules
R.C. 111.15(D)

Proposed 119 rules
R.C. 119.03(H)

The legislative review procedure itself is set forth in R.C. 119.03(I).

A joint legislative committee, the Joint Committee on Agency Rule Review (JCARR), is primarily responsible for reviewing proposed rules. JCARR does not, however, have authority to invalidate proposed rules. This authority is vested solely in the General Assembly. JCARR's authority is principally to recommend that the General Assembly invalidate a proposed rule. (R.C. 101.35.)

JCARR may recommend invalidation if it finds any of the following with respect to a proposed rule: (1) the agency exceeded the scope of its statutory authority in proposing the rule, (2) the proposed rule conflicts with another rule adopted by the same or a different agency, (3) the proposed rule conflicts with the legislative intent in enacting the statute under which the agency proposed the rule, (4) the agency failed to prepare a complete and accurate rule summary and fiscal analysis (RSFA) of the proposed rule as required by R.C. 121.24 or

127.18, or (5) if the proposed rule incorporates a text or other material by reference, either the agency has failed to file the incorporated text or other material with JCARR or the incorporation by reference fails to meet the standards governing incorporations by reference in rules (see below) (R.C. 119.03(I)(1)).

JCARR holds a public hearing on a proposed rule not earlier than the 41st day after the proposed rule was filed with it (R.C. 119.03(I)(1)).

JCARR has special authority with respect to proposed rules that have a fiscal effect on school districts, counties, townships, or municipalities. In lieu of making a recommendation that the General Assembly invalidate such a proposed rule because the rule-making agency failed to prepare a complete and accurate RSFA, JCARR may issue, on a one-time basis, a written order requiring the agency to revise the RSFA and refile it with the proposed rule. If JCARR issues that written order, the order takes immediate effect and the rule-making agency is prevented from instituting or continuing proceedings to adopt the proposed rule until the agency revises and refiles the RSFA along with the proposed rule. If JCARR determines that the revised RSFA is still inaccurate or incomplete, it is required to recommend that the General Assembly invalidate the proposed rule. (R.C. 119.03(I)(4).)

The General Assembly may invalidate a proposed rule not later than the 65th day after the *original* version of the proposed rule was filed

A rule is subject to invalidation by the General Assembly if: it is not accompanied by a complete and accurate rule summary and fiscal analysis; it improperly incorporates a text or other material by reference; it conflicts with another rule; it exceeds the scope of the statute that authorizes its adoption; or it conflicts with the legislative intent of the statute that authorizes its adoption.



At intervals not exceeding five years, an agency is required to review each of its adopted rules that was subject to legislative review to determine if the rule requires amendment or rescission to conform better to the General Assembly's delegation of rule-making authority; to improve local flexibility; to reduce paperwork; to eliminate duplication, overlap, or conflict with other rules; and to ensure matter has been properly incorporated by reference.

with JCARR. If, however, a revised version of a proposed rule is filed more than 35 days after the original version of the proposed rule was filed with JCARR, the General Assembly may invalidate the proposed rule not later than the 30th day after the *revised* version was filed. Moreover, if, after JCARR recommends invalidation, the Senate and House of Representatives do not, within the time remaining for legislative invalidation, hold at least five sessions at which a quorum is present, the time for invalidation is extended until both houses have held five such sessions. (R.C. 119.03(I)(1).)

An agency is prohibited from adopting a proposed rule that has been legislatively invalidated (R.C. 119.03(I)(3)) and from proposing or adopting any version of a rule that has been legislatively invalidated for the duration of the General Assembly that invalidated the rule unless such a proposal or adoption is specifically authorized by that same General Assembly through the adoption of a concurrent resolution (R.C. 119.03(I)(3)).

Cyclical review by an agency of its adopted rules at five-year intervals

An agency is required to assign a “review date” to each of its adopted rules that was subject to legislative review as a proposed rule (see above). Review dates are scheduled so that the agency cyclically reviews each of its rules at not longer than five-year intervals, and so that approx-

imately one-fifth of the agency’s rules are reviewed each year (R.C. 111.15(B)(1), 119.032(B), and 119.04(A)(1)). If an agency fails to assign a review date to a rule, or assigns a review date that exceeds a five-year interval, the review date then is five years after the rule’s effective date (R.C. 111.15(B)(1), 119.032(E)(2), and 119.04(A)(1)).

An agency’s cyclical review of a rule, commonly referred to as “five-year review” or “119.032 review,” is for the purpose of determining (1) whether the rule should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute under which the rule was adopted, (2) whether the rule needs amendment or rescission to give more flexibility at the local level, (3) whether the rule needs amendment or rescission to eliminate unnecessary paperwork, (4) if the rule incorporates a text or other material by reference, whether the incorporation by reference meets the standards governing incorporations by reference in rules and whether the incorporated text or other material has been made available to the public (see below), and (5) whether the rule duplicates, overlaps, or conflicts with other rules (R.C. 119.032(C)). In making its cyclical review, the agency is required generally to consider the continued need for the rule, any complaints or comments received concerning the rule, and any relevant factors that have changed in the

subject matter area affected by the rule (R.C. 119.032(D)).

If, as a result of its review, the agency determines that a rule needs to be amended or rescinded, it is required to file the rule as amended or rescinded on or before the rule's review date (R.C. 119.032(E)(5)). The agency is required to assign a new review date to a rule that is so amended, so that it will again be reviewed within five years (R.C. 111.15(B)(1) and 119.04(A)(1)).

If, on the other hand, as a result of its review, the agency determines that a rule does not need to be amended or rescinded, it is required, on or before the rule's review date, to file the following with JCARR, the Secretary of State, and LSC: a copy of the rule, a statement of the agency's determination, and a rule summary and fiscal analysis (RSFA) of the rule. The agency assigns a new review date to the rule so that it will again be reviewed within five years. JCARR gives public notice of the agency's determination for four consecutive weeks in the *Register of Ohio* (R.C. 119.032(E)(2)).

During the 90-day period following its receipt of notice that an agency has reviewed a rule and determined that the rule does not need amendment or rescission, but after the four-week notice period has ended, JCARR, by two-thirds vote of its members present, may recommend that the General Assembly adopt a concurrent resolution invalidating the rule if (1) the agency improperly applied the review criteria described

above in reviewing the rule and in recommending its continuance without amendment or rescission, (2) the agency failed to file proper notice with JCARR concerning its review of the rule, or (3) if the rule incorporates a text or other material by reference, the agency failed to file the incorporated text or other material with JCARR or failed to make it available to the public, or the incorporation by reference fails to meet the standards governing incorporations by reference in rules (see below) (R.C. 119.032(E)(3) and (G)). If JCARR does not make such a recommendation during the 90-day period, the rule continues in effect until its next review date (R.C. 119.032(E)(4)).

JCARR, after giving the agency an opportunity to show cause, and by majority vote of its members who are present, may recommend that the General Assembly adopt a concurrent resolution invalidating a rule if the agency fails to provide notice to JCARR as explained above or fails to take any other action required by the cyclical review law with respect to the rule (R.C. 119.032(F) and (G)).

Cyclical review does not apply to rules that are exempt from legislative review; to rules adopted by the Department of Taxation; to rules adopted by the several state institutions of higher education; or to rules that are consistent with and equivalent to the form required by, and within the minimum scope and intent of, a federal law (R.C. 111.15(A)(1), 119.032(A)(3), and 119.04(A)(1)).



LSC reviews rules to ensure they have been prepared in compliance with technical drafting requirements.

Rules that affect “individuals,” “small businesses,” and “small organizations” are subject to special, additional rule-making and review procedures.

LSC review

LSC reviews adopted rules to ensure that they have been drafted in compliance with the drafting requirements set forth in the *LSC Rule Drafting Manual* (R.C. 103.05(A), 111.15(B)(3), and 119.04(A)(2); A.C. 103-3-01 and 103-3-02). Although not required to do so, LSC also reviews proposed rules informally for the same purpose.

Small business review

Proposed rules are subject to special, additional rule-making procedures under R.C. 121.24 if they qualify as rules affecting “individuals,” “small businesses,” or “small organizations.” An agency that proposes such a rule prepares a rule summary and fiscal analysis (RSFA) of the proposed rule (R.C. 121.24(B)(1) and 127.18); files a copy of the proposed rule and RSFA with the Office of Small Business (R.C. 121.24(B)(2)); and otherwise makes available to any person, copies of the proposed rule, RSFA, and any other information in its possession relevant to the proposed rule (R.C. 121.24(E)). The chairpersons of the legislative committees of the House and Senate having jurisdiction over individuals, small businesses, and small organizations, and any other person having an interest in the proposed rule, may comment to the agency or to JCARR upon the expected effect of a proposed rule upon individuals, small businesses, or small organ-

izations. And the chairpersons of the legislative committees of the House and Senate having jurisdiction over individuals, small businesses, and small organizations may require an officer or employee of an agency to appear before the committee and answer questions and produce information concerning the expected effect of a proposed rule upon individuals, small businesses, or small organizations. (R.C. 121.24(B)(3).) The agency is required to consider and revise the proposed rule in light of any comments before adopting the proposed rule (R.C. 121.24(B)(4)).

Rules that affect individuals, small businesses, or small organizations are subject to periodic review by the adopting agency at five-year intervals. An agency reviewing such a rule determines whether the rule should be revised or rescinded so as to minimize its economic impact upon individuals, small businesses, or small organizations. This review, which applies to rules that are not otherwise subject to cyclical review as described above, appears to be cumulative to that cyclical review. In other words, if a rule being cyclically reviewed as described above affects individuals, small businesses, or small organizations, then simultaneous review for the purpose described here also is required. (R.C. 121.24(D).)

Department of Aging review

Proposed rules are subject to review and comment by the Department of Aging if they



“primarily [affect] persons sixty years of age or older.” An agency that does not revise a proposed rule in light of the Department’s comments is required to inform the Department of its decision and the reasons therefor. (R.C. 173.01(C).)

Open meetings

In addition to the above review provisions, R.C. 121.22, the Open Meetings (or “Sunshine”) Act, requires proposed rules to be deliberated upon and adopted in meetings that are open to the public unless covered by a specific exemption from the open meetings requirement.

Incorporations by Reference in Rules

Definition of “incorporation by reference”

An agency incorporates a text or other material into a rule by reference when it states in the rule that a text or other material not contained in the rule is to be treated as if it were contained in the rule (R.C. 121.72). The following are excluded from this definition and, to the extent excluded, from the special standards that govern incorporation by reference: (1) a rule that incorporates by reference a Revised Code section, an Ohio uncodified statute, or a rule in the Administrative Code (R.C. 121.76(A)), (2) an internal management rule

(R.C. 121.76(B)(1)), (3) a rule that incorporates by reference a text or other material that is necessary to obtain or to maintain authorization of a federally delegated program in Ohio or that is necessary to maintain compliance with federal requirements in order to receive federal funds for a federally funded program (R.C. 121.76(B)(2)), and (4) a rule that incorporates any of the following by reference, but only if the reference consists of a citation that will be intelligible to the persons who reasonably can be expected to be affected by the rule and that identifies the particular edition or other version of the incorporated text or other material: (a) a United States Code section, (b) an uncodified federal statute, but only if it has been appended as a legislative note to a section in the United States Code, (c) an Ohio act in the Laws of Ohio or a federal act in the Statutes at Large, (d) a regulation in the Federal Register or Code of Federal Regulations, or (e) a text or other material, including generally accepted industry standards, that is generally available to the persons who reasonably can be expected to be affected by the rule (R.C. 121.75).

Access to matter incorporated by reference

When an agency incorporates a text or other material into a rule by reference, it explains in the rule how persons who reasonably can be expected to be affected by the rule can obtain copies of the incorporated text

Rules that primarily affect persons 60 years of age or older are subject to review and comment by the Department of Aging.

Rules are deliberated upon and adopted in meetings open to the public.



An agency incorporates a text or other material into a rule by reference when it states in the rule that a text or other material not contained in the rule is to be treated as if it were contained in the rule. Subject to significant exceptions, special standards govern incorporations by reference.

JCARR reviews incorporations by reference and may recommend invalidation of a proposed rule that incorporates matter by reference under certain circumstances.

or other material (R.C. 121.72). The agency then makes the incorporated text or other material available to the public by either (1) depositing one complete and accurate copy of the incorporated text or other material in each of five depository libraries that have been designated by the State Library Board or (2) displaying a complete and accurate copy of the incorporated text or other material on a web site maintained or made available by the agency (R.C. 121.74).

JCARR review of incorporations by reference

When an agency proposes a rule that incorporates a text or other material by reference, or files a rule that incorporates a text or other material by reference for cyclical review after determining that the rule does not need amendment or rescission (see above), it files one complete and accurate copy of the incorporated text or other material in electronic form with the Joint Committee on Agency Rule Review (JCARR). (An agency may file an incorporated text or other material in print form with JCARR if filing it electronically would be infeasible. And if an agency proposes the rescission of a rule that incorporates a text or other material by reference, the agency is not required to file the incorporated text or other material with JCARR if doing so is infeasible.) (R.C. 121.73(A).) JCARR reviews incorporations by reference and, as

explained above, may recommend invalidation of the rule if the incorporated text or other material has not been filed with JCARR, the incorporation by reference fails to meet the standards for incorporation by reference, or the incorporated text or other material has not been made available to the public.

In addition to the explanations described above, the rule summary and fiscal analysis (RSFA) that accompanies a proposed rule, or that accompanies a rule that is submitted for cyclical review after a determination that its amendment or rescission is not needed, may include one or more of the following explanations if the rule incorporates a text or other material by reference: (1) if the agency claims the rule is excluded from the definition of “incorporation by reference” because a text or other material it incorporates by reference is generally available to persons who reasonably can be expected to be affected by the rule (exclusion 4(e) above), an explanation of how the incorporated text or other material is generally available to those persons (R.C. 127.18(B)(11)), (2) if it was infeasible for the agency to file an incorporated text or other material electronically, an explanation of why filing the incorporated text or other material electronically was infeasible (R.C. 127.18(B)(12)), or (3) if the rule is being rescinded and it was infeasible for the agency to file an incorporated text or other material, an explanation

of why filing the incorporated text or other material was infeasible (R.C. 127.18(B)(13)).

LSC historical file of matter incorporated by reference

Upon completing its review of a proposed rule that incorporates a text or other material by reference, or its cyclical review of a rule that incorporates a text or other material by reference, JCARR forwards the text or other material to LSC. LSC maintains a historical file of texts or other materials that are or were incorporated by reference into rules. (R.C. 121.73(B).) This file complements the agency duty to make texts and other materials that have been incorporated by reference into rules available to the public.

Filings in Electronic Form

Filings of rules and of rule-making and rule-related documents, and of responses to them, are made exclusively in electronic form (R.C. 103.0511; S.B. 11, 123rd General Assembly, § 23).

Publication of rules in the Administrative Code

A rule is a formal, written statement of the law that has been established by an agency under a

statute that authorizes the agency to adopt rules. Adopted rules are compiled and published in the Administrative Code (AC). (The AC is supplemented on a monthly basis by the Ohio Monthly Record (OMR).) The AC contains the full text of, or a reference to, every rule that has been adopted by the agencies of state government.

LSC determines whether the full text of, or merely a reference to, a rule is to be published in the AC (R.C. 103.05(A)). The great majority of rules are published in full text and, in the absence of a special exception, only internal management and “school rules” are published by reference. “Internal management rules” are rules that govern an agency’s day-to-day staff procedures and operations and that do not affect the rights of private individuals (R.C. 111.15(A)(3) and 119.01(K)). “School rules” are rules adopted by the several state institutions of higher education, including the state colleges and universities, community colleges, technical colleges, and state community colleges (R.C. 103.05(A)).

Copies of rules that have been published by reference only are available from LSC, the Secretary of State, or the agency or school. Internal management rules are published in the *Register of Ohio*. 

Rules are compiled and published, full text or by reference, in the Administrative Code.

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