

# STATE OF NEW HAMPSHIRE

## Inter-Department Communication

DATE: August 28, 2023

FROM: Michael Morrell  
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AT (OFFICE): Legislative Services

SUBJECT: RSA 541-A Amendments in the 2023 Legislative Session

To: All State Agencies

### NOTICE OF AMENDMENTS TO RSA 541-A IN THE 2023 SESSION

Four pieces of legislation were adopted in the 2023 legislative session that amend RSA 541-A as follows:

- HB 409-FN (Chapter 235), Section 25, effective 7-15-23, amends RSA 541-A:29-a, I relative to failure of an agency to act and changes a statutory reference which affects only boards, councils, or commissions subject to administration by the Office of Professional Licensure and Certification;
- HB 285 (Chapter 33), Section 1, effective 7-16-23, amends RSA 541-A:21, V relative to an exemption from RSA 541-A to allow the *New Hampshire Equalization Manual* as approved by the Assessing Standards Board to be incorporated by reference in rules of the Department of Revenue Administration;
- HB 266 (Chapter 125), effective 8-29-23, amends the regular rulemaking and expedited repeal processes in RSA 541-A to specifically authorize virtual and hybrid rulemaking hearings by agencies if consistent with RSA 91-A; and
- HB 358 (Chapter 191), Sections 1 through 18, effective 10-3-23, amends the definition of a “form” in RSA 541-A, amends the rulemaking processes for regular rules and interim rules including the required filing of forms, amends the expedited revisions to forms process in RSA 541-A:19-c to require that a rule also be filed, and amends the publication and certification requirements for adopted rules.

Proposed amendments to the *Drafting and Procedure Manual (Manual)* to address legislation in the 2017 through 2023 legislative sessions will be submitted for review and approval by the Joint Legislative Committee on Administrative Rules (JLCAR) pursuant to RSA 541-A:8. Agencies should call the Office of Legislative Services, Administrative Rules (OLS) at 271-3680 if they have any questions, although OLS cannot provide legal advice.

In the meantime, memos summarizing the changes are linked on the OLS website main page at <http://gencourt.state.nh.us/rules/default.htm>. ***Effective amendments to RSA 541-A supersede any contrary statements in the Manual.*** Additions to RSA 541-A are shown below by ***bold italic*** and deletions by brackets and strike-through.

**HB 409 (Chapter 235), Section 25. Effective 7-15-23.**

## TIME LIMITS FOR PROCESSING LICENSE APPLICATIONS

**235:2 Administrative Procedure Act; Failure of Agency to Act. Amends RSA 541-A:29-a, I to read as follows:**

I. If an agency fails to take any required action on an application, petition, or request within the time limits prescribed by RSA 541-A:29 or any other provisions of law, the application, petition, or request shall be deemed approved and any permit, approval or other item requested shall be deemed granted to or received by the applicant, petitioner, or requestor, except as provided in RSA ~~[310-A:1-d, V]~~ 310.

**NOTE:**

The amendment to RSA 541-A:29-a, I in ***bold italic*** updates a citation for an exception as provided in RSA 310 to the automatic approval and issuance of a license when an agency subject to RSA 541-A fails to act upon the license application within the time limits under RSA 541-A:29. The exception applies only to license applications made to a board, commission, or council subject to the administration of the Office of Professional Licensure and Certification under RSA 310.

**HB 285 (Chapter 33), Section 1. Effective 7-16-23.**

## NEW HAMPSHIRE EQUALIZATION MANUAL

**33:1 Administrative Procedure Act; Exceptions. Amends RSA 541-A:21, V to read as follows:**

V.(a) Requirements on forms as specified in RSA 21-J:13-a shall be exempt from RSA 541-A.

***(b) The New Hampshire equalization manual, as approved by the New Hampshire assessing standards board, which was established pursuant to RSA 21-J:14-a, may be incorporated by reference into the rules adopted pursuant to RSA 21-J:13, IX.***

**NOTE:**

The amendment adds a new exception in RSA 541-A:21, V from RSA 541-A to allow the incorporation by reference, in rules of the Department of Revenue Administration, of the *New Hampshire Equalization Manual*, as approved by the Assessing Standards Board. The exception however appears to apply only to the provision in RSA 541-A:12, III that states that, “No agency shall incorporate by reference any document or Internet content prepared by or on behalf of the agency, provided that documents prepared by a group or association of which the agency is a member may be incorporated by reference.” Other provisions in RSA 541-A:12, III-VII on incorporation by reference would still apply.

**HB 266 (Chapter 125). Effective 8-29-23.**

**DEFINITIONS OF HYBRID AND VIRTUAL RULEMAKING HEARINGS**

**125:1 New Paragraph; Administrative Procedure Act; Definitions; Hybrid Hearings. Amends RSA 541-A:1 by inserting after paragraph VII-b the following new paragraph:**

VII-c. “Hybrid hearing” means an agency public comment hearing for rulemaking held in a physical location but with the option for participation by the public by electronic means pursuant to RSA 541-A:11 and RSA 541-A:19-a.

**125:2 New Paragraph; Administrative Procedure Act; Definitions; Virtual Hearings. Amends RSA 541-A:1 by inserting after paragraph XVI the following new paragraph:**

XVII. “Virtual hearing” means an agency public comment hearing for rulemaking held only electronically and which provides public access to participate by electronic means pursuant to RSA 541-A:11 and RSA 541-A:19-a.

**NOTE:**

Sections 1 and 2 add definitions of a “hybrid hearing” and a “virtual hearing”. Both are rulemaking hearings for regular rulemaking under RSA 541-A:11 or an expedited repeal under RSA 541-A:19-a. The “hybrid hearing” is held not only in a physical location but also, at the option of the agency, with access for public participation electronically. In contrast, a “virtual hearing” is held only electronically.

Hybrid or virtual rulemaking hearings are not required by RSA 541-A in place of an in-person only hearing, but if they are held, they must comply with RSA 541-A:11, I-V-a in Section 4 (see below) including compliance with RSA 91-A. At this time, a virtual hearing by an agency that is a “public body” as defined in RSA 91-A:1-a, IV, such as a state board or commission, is still not permissible, but may be held by agencies such as departments where rulemaking authority is held by the agency head.

Although the State of Emergency for COVID-19 ended in June, 2021, hybrid hearings have occasionally been offered by some departments. HB 266 does not change this, but instead facilitates their use by providing specific statutory authorization and requirements governing how such hearings are held.

**AMENDMENTS TO REGULAR RULEMAKING NOTICE**

**125:3 Amendment; Administrative Procedure Act; Notice of Rulemaking Proceedings. Amend RSA 541-A:6, I to read as follows:**

I. The agency shall give at least 20 days' notice of its intent to hold a public hearing and shall also give notice of the cut-off date for the submission of written testimony pursuant to RSA 541-A:11, I, on any proposed adoption, [~~amendment,~~] readoption, readoption with amendment, or repeal of a rule. The notice periods shall begin on the day after the date of publication in the rulemaking register. The notice shall be in such form as the director of legislative services shall prescribe and shall include:

- (a) The name and address of the agency.
- (b) The statutory authority for the rule.
- (c) Whether the intended action is an adoption, [~~amendment,~~] repeal, readoption, or readoption with amendment.
- (d) The rule number and title.

(e) The date, *time, and physical location, if applicable*, of the first agency public hearing, ~~and~~ the cut-off date for the submission of written materials to the agency~~[-]~~ *and, if practicable for the agency, the format for submitting materials electronically*.

(f) If existing rules are being ~~amended,~~ readopted, or readopted with amendment, a concise summary of the existing rules and any proposed amendments, and if the proposed rules are being adopted, a concise summary of the proposed rules.

(g) A listing of people, enterprises, and government agencies affected by the rule.

(h) The name, *mailing* address, ~~and~~ telephone number, *and e-mail address* of an individual in the agency able to answer questions on the proposed rule.

(i) The fiscal impact statement completed by the legislative budget assistant.

(j) A statement, with adequate details and supporting data, that the proposed rule does not violate the New Hampshire constitution, part I, article 28-a.

*(k) If the agency provides for a virtual or hybrid hearing consistent with RSA 91-A and RSA 541-A:11, I(d), the necessary information for accessing the meeting electronically, and a mechanism for the public to alert the agency during the hearing if there are problems with access.*

**NOTE:**

Section 3 amends what is required on the “Rulemaking Notice Form” in Appendix II-C of the *Manual* for regular rulemaking. Aside from clarifying existing provisions of the form, the amendments require that not only the physical location of the hearing be provided in the notice but also, if applicable, the electronic access information pursuant to RSA 541-A:11, I(d) in Section 4 (see below) for the virtual or hybrid hearing. The access information must include a mechanism for the public to notify the agency if they have a problem with access. This is consistent with recent notices published in the *Rulemaking Register* where some agencies have scheduled a hybrid hearing by providing the electronic access information on the notice form below the physical location of the hearing. See, for example, Initial Proposal 2023-157 from the Department of Environmental Services in the July 6, 2023 *Rulemaking Register*. An amended “Rulemaking Notice Form” will be made available to make this clear.

**AGENCY FORMS AVAILABLE; PUBLIC HEARING AND COMMENT IN VIRTUAL AND HYBRID HEARINGS**

**125:4 Administrative Procedure Act; Public Hearing and Comment. Amends RSA 541-A:11, I-V to read as follows:**

I.(a) Each agency shall hold at least one public hearing on all proposed rules filed pursuant to RSA 541-A:3 and shall afford all interested persons reasonable opportunity to testify and to submit data, views, or arguments in writing or, if practicable for the agency, in electronic format, in accordance with the terms of the notice filed pursuant to RSA 541-A:3, I and the provisions of this section. The office of legislative services shall provide oral or written comments on potential bases for committee objection under RSA 541-A:13, IV in a form and manner determined by the director of the office of legislative services. Each agency shall require all materials submitted in writing to be signed by the person who submits them, and the agency shall transfer to hard copy, if practicable for the agency, all materials submitted as diskette, electronic mail, or other electronic format. Copies of the proposed rule *and of any draft, new, or amended form, or screenshot, mock-up, or prototype of an electronic-only form, which the rule*

*incorporates by reference or whose requirements are set forth in the rule pursuant to RSA 541-A:19-b,* shall be available to the public under RSA 91-A and at least 5 days prior to the date of the hearing.

(b) For rules proposed by a board or commission, a period of at least 5 business days after the hearing shall be provided for the submission of materials in writing or in electronic format, unless a shorter period is specified in the notice. If a shorter period is specified in the notice, the deadline for the submission of such materials shall not be earlier than the scheduled conclusion of the public hearing. For rules proposed by an agency official, a period of at least 5 business days after the hearing shall be provided in all instances. If a hearing is continued or postponed as provided in paragraph III or IV of this section, the period for the submission of materials in writing or in electronic format shall be extended unless the previously-established deadline meets the applicable requirement specified above.

(c) An agency may hold a public hearing or otherwise solicit public comment on a draft final proposed rule prior to filing the final proposed rule pursuant to RSA 541-A:3, V. Notice of such hearing or comment period shall be provided by such means as are deemed appropriate to reach interested persons, which may include publishing a notice in the rulemaking register.

*(d) If consistent with RSA 91-A and the provisions of this section, the agency under subparagraph I(a) may hold a virtual or hybrid hearing, provided that the public may participate by telephone, with additional access possibilities by video or other electronic means in accordance with the terms of the notice filed pursuant to RSA 541-A:3, I, including a mechanism for the public to alert the agency during the hearing if there are problems with access. Each participant in a virtual hearing or hybrid hearing shall be able to simultaneously hear and speak to the other agency and public participants and be audible or otherwise discernable to the public in attendance, whether attendance is in-person or by electronic means.*

II. For rules proposed by a board or commission, each hearing shall be attended by a quorum of its members. For rules proposed by an agency official, each hearing shall be held by the official having the rulemaking authority, or designee, who shall be knowledgeable in the particular subject area of the proposed rules.

III. To provide reasonable opportunity for public comment, the agency may continue a public hearing past the scheduled time or to another date, or may extend the deadline for submission of written comment. If the agency continues the hearing or extends the deadline, it shall notify the public by any means it deems appropriate, including notice in the rulemaking register whenever practicable *or by posting on the agency's website.*

IV. A public comment hearing [~~may~~] **shall** be postponed in the event of any of the following:

(a) Inclement weather **that would not allow for a reasonable opportunity for the public to participate.**

~~[(b) Illness or unavoidable absence of the official with rulemaking authority.]~~

~~[(c)]~~ (b) Lack of a quorum due to illness or unavoidable absence **for rules proposed by a board or commission.**

*(c) Inability by the public during a virtual or hybrid hearing to access the hearing electronically consistent with RSA 541-A:11, I(b), in which case the agency shall adjourn and reschedule the hearing pursuant to this section.*

(d) Determination by the agency that postponement of the public comment hearing shall facilitate greater participation by the public. If a public comment hearing is postponed, the agency shall provide notice in the rulemaking register at least 5 days before such postponed public comment hearing, and may also provide notice by any other means it deems appropriate.

***IV-a. A public comment hearing may be postponed in the event of illness or unavoidable absence of the official with rulemaking authority for rules proposed by an agency official.***

V. A public comment hearing may be moved to another location if the agency determines for any reason that the original location is not able to accommodate the public. If changing the location does not also necessitate a change in the date of the public comment hearing, the agency shall post notice of the new location at the originally scheduled facility. If changing the location necessitates a change in the date of the public comment hearing, the agency shall provide notice as required by paragraph IV.

***V-a. If the public comment hearing is a virtual or hybrid hearing, the agency may change the electronic access possibilities provided in the notice to better afford all interested persons reasonable opportunity to testify and submit material by electronic means. It shall notify the public of the changes by any means it deems appropriate, including notice in the rulemaking register whenever practicable or by posting the changes on the agency's website.***

**NOTE:**

Section 4 does two things:

(1) It requires in RSA 541-A:11, I(a) that agency forms, which the rule(s) in a proposal either incorporate by reference or set forth the requirements of the form, must be available to the public in the same time frame as the rule itself—at least 5 days prior to the rulemaking hearing. This includes any draft, new, or amended form. If the form is an electronic-only form, then a printed screenshot, mockup, or prototype of the form must be available. The filing of forms with OLS is addressed in more detail in HB 358 below; and

(2) It amends RSA 541-A:11, I-V on the rulemaking hearing and comment deadline to clarify existing requirements regarding postponements or continuances of the hearing and extensions of comment deadlines and to address the new option of virtual or hybrid hearings in a similar way as in-person hearings, including in new paragraph V-a.

The new subparagraph RSA 541-A:11, I(d) contains the requirements on whether a virtual or hybrid hearing may be held and, if the agency chooses to have one, how it shall be held. These requirements are based on the protocols of the Department of Justice used during the State of Emergency, except that now the hearing must be consistent with RSA 91-A. The requirements are also consistent with current practice of agencies which have held hybrid hearings since the end of the State of Emergency. Please be aware that RSA 91-A currently does not allow for virtual hearings for public bodies like state boards or commissions, and sets limits on participation electronically by board or commission members in otherwise in-person hearings. See RSA 91-A:2, III and RSA 91-A:2, IV pursuant to 2023, 188:1, effective 10-3-23.

Hearings of any kind will now have to be postponed if inclement weather would “not allow for a reasonable opportunity for the public to participate.” The lack of a quorum requiring postponement will now clearly apply only to boards or commissions. For agencies with rulemaking authority held by a specific official, like department heads, the statute is clarified that hearings may be—but do not have to be—postponed if the official is absent from the hearing.

Pursuant to the new RSA 541-A:11, V-a, if an agency which scheduled a virtual or hybrid hearing changes the electronic access possibilities in the notice, the public shall be notified in the same manner as for continuance of an in-person hearing or an extension of a public comment deadline, i.e. by “any means it deems appropriate”, including notice in the *Rulemaking Register* whenever practicable or by posting on the agency’s website. A new form Appendix II-D4 will be made available for this purpose.

**125:5 Amendment; Administrative Procedure Act; Expedited Repeal of Rules. Amends RSA 541-A:19-a, II to read as follows:**

II. Notice of an agency's intent to repeal a rule shall include:

- (a) The name and address of the agency.
- (b) The statutory rulemaking authority for the rule.
- (c) The rule number and title.
- (d) An explanation of the reason for the proposed repeal.
- (e) The name, address, electronic address, and telephone number of an individual in the agency able to answer questions about the proposed repeal and to arrange for reasonable accommodation for persons with disabilities wishing to attend the public comment hearing.
- (f) The date, time, and *physical* location, *if applicable*, of the public comment hearing.
- (g) If the agency provides for a virtual or hybrid hearing consistent with RSA 91-A, the necessary information for accessing the hearing electronically, and a mechanism for the public to alert the agency during the hearing if there are problems with access.*

**125:6 New Paragraph; Administrative Procedure Act; Expedited Repeal of Rules. Amends RSA 541-A:19-a by inserting after paragraph V the following new paragraph:**

V-a. If consistent with RSA 91-A, the agency may hold a virtual or hybrid hearing, provided that the public may participate by telephone, with additional access possibilities by video or other electronic means in accordance with the terms of the notice, including a mechanism for the public to alert the agency during the hearing if there are problems with access. Each participant in a virtual or hybrid hearing shall be able to simultaneously hear and speak to the other agency and public participants and be audible or otherwise discernable to the public in attendance, whether attendance is in-person or by electronic means.

**NOTE:**

Sections 5 and 6 amend RSA 541-A:19-a on the notice and hearing for the expedited repeal process relative to virtual or hybrid rulemaking hearings in the same manner as for Sections 3 and 4 for the regular rulemaking process, although without reference to postponements or changes in electronic access possibilities. As in regular rulemaking, however, the use of hybrid or virtual hearings must be consistent with RSA 91-A or otherwise they shall not be held.

**HB 358 (Chapter 191). Effective 10-3-23.**

**NOTE:** HB 358, although effective 10-3-23, has a transition clause in 191:18 and does not impact rulemaking proceedings which are already underway. See “Note” for Section 18 below.

**DEFINITION OF “FORM”**

**191:1 Administrative Procedure Act; Definition of Form.** Amends RSA 541-A:1, VII-a to read as follows:

VII-a. "Form" means a document, ~~[that establishes a requirement for]~~ *whether hardcopy or electronic, with blank spaces for insertion of required or optional information, which must be submitted to the agency by persons outside the agency, [to provide information to an agency and the format in which such information must be submitted. The term does not include any document, regardless of what the document is called, that (a) is provided by an agency to facilitate the submission of information that is required to be submitted to the agency by federal or state statute, regulation, or rule and does not add to or modify such requirement or (b) that is used only by the agency to provide information to persons outside the agency] *such as, but not limited to, licensing applications, petitions, or requests. The term does not include a document that is called a form by the agency but which does not have blank spaces for insertion of information by persons outside the agency.**

**NOTE:**

Section 1 replaces the current, ambiguous definition of “form” with the JLCAR’s commonly understood view of a form, that is, a document with blank spaces which must be filled out by persons outside the agency and submitted to it. The new definition specifically excludes documents which an agency may call a “form” but which do not contain blank spaces for insertion of information by persons outside the agency. This therefore may exclude agency documents even if called “forms”, such as checklists or informational bulletins. However, these agency documents must still not contain rules unless the rules are adopted and filed pursuant to RSA 541-A.

**AMENDED FISCAL IMPACT STATEMENT**

**191:2 Fiscal Impact Statements.** Amends RSA 541-A:5, VI to read as follows:

VI. Agencies shall also obtain an amended fiscal impact statement from the legislative budget assistant ~~[only]~~ if as a result of notice and hearing a change has been made which affects the original fiscal impact statement *or to correct an error in the original fiscal impact statement.* Agencies shall file the amended fiscal impact statement as part of the final proposal pursuant to RSA 541-A:12, II.

**NOTE:**

Section 2 allows for an amended fiscal impact statement (FIS), which is submitted with the final proposal in regular rulemaking, to be obtained to correct an error in the original FIS, even if the agency has made no change to the initial proposal. Errors could include not only RSA citation errors or rule numbering errors but errors in the original fiscal analysis. Previously there was no opportunity under RSA 541-A to address such errors unless the agency withdrew the proposal and started over with a new FIS or the final proposal made a change from the initial proposal which affected the original FIS.

**191:3 New Paragraph; Rulemaking Register. Amends RSA 541-A:9 by inserting after paragraph II the following new paragraph:**

III. The rulemaking register shall be sent by email to all members of the general court.

**NOTE:**

Section 3 requires the Office of Legislative Services (OLS) to send a copy of the *Rulemaking Register* to each N. H. legislator, but that is already being done.

**REQUIRED FILING OF FORMS WITH FINAL PROPOSALS**

**191:4 New Paragraph; Filing of Final Proposal. Amend RSA 541-A:12 by inserting after paragraph II the following new paragraph:**

II-a. The agency shall file with the final proposal a copy of any draft, new, or amended form, or screenshot, mock-up, or prototype of an electronic-only form, which has been incorporated by reference in the final proposed rule or whose requirements are set forth in the final proposed rule pursuant to RSA 541-A:19-b.

**NOTE:**

Section 4 requires for the first time that an agency form be filed with the final proposal in regular rulemaking if the rule incorporates the form by reference or sets forth the requirements of the form. If the form exists only in draft format, it must still be filed. Electronic-only forms must be filed as screen shots, as a mock-up, or as a prototype.

Section 4 describes the form with the same language used in Chapter 125:4 which amended RSA 541-A:11, I(a), effective 8-29-23, to require that a copy of the form be available to the public at least 5 days before the rulemaking hearing. At the request of the OLS, many agencies already file forms with the initial proposal, but now it will be required with the final proposal. The OLS form in the *Manual* Appendix II-G “Cover Sheet for Final Proposal” will be amended to include a reminder about filing the agency forms.

Because a form under RSA 541-A:12, II-a must be filed “with” the final proposal but is not listed under RSA 541-A:12, II as being included as part of the final proposal, the absence of the form(s) will be considered like the absence of an Incorporation by Reference Statement under RSA 541-A:12, III. The absence does not prevent placement of the final proposal on the JLCAR agenda pursuant to RSA 541-A:12, I, and the JLCAR’s 60-day review period for the final proposal under RSA 541-A:13, I is not stayed. But a missing form may lead to a postponement of the final proposal by the JLCAR as the lack of a form otherwise could lead to an incomplete JLCAR staff review and would be a potential basis for JLCAR objection due to a violation of RSA 541-A:12, II-a.

**JLCAR OBJECTION AND INCONSISTENCY BETWEEN A RULE AND ITS FORM**

**191:5 Review by the Joint Legislative Committee on Administrative Rules; Basis for Objection. Amend RSA 541-A:13, IV(c) to read as follows:**

(c) Determined not to be in the public interest; *including the existence of substantive inconsistencies between a form and the rule where the form is incorporated by reference or which sets forth the requirements of the form, pursuant to RSA 541-A:19-b;* or

**NOTE:**

Section 5 makes explicit in RSA 541-A:13, IV on potential bases for JLCAR objection that a substantive inconsistency between a rule and the form it incorporates by reference, or which sets forth the requirements of the form, may be a potential basis for potential JLCAR objection to the rule on the ground that the rule is contrary to the public interest.

In other words, it will be irrelevant to creating a potential basis for objection if the source of the inconsistency is the form or the rule. In either case the rule may be deemed by JLCAR to be contrary to the public interest by at least being unclear, or not capable of uniform application, because an agency shall not set one requirement on the public in the rule, and a different or conflicting requirement in the form. In responding to a preliminary objection pursuant to RSA 541-A:13, V(c) the agency may amend the rule, the form, or both in order to remove the inconsistency.

### REQUIRED FILING OF FORMS WITH ADOPTED RULES

**191:6 Final Adoption. Amend RSA 541-A:14, III to read as follows:**

III. The agency shall file [~~all adopted rules~~] with the director of legislative services *all adopted rules and any related new or amended form, or screenshot, mock-up, or prototype of an electronic-only form, which the rules incorporate by reference or whose requirements are set forth in the rules pursuant to RSA 541-A:19-b.*

#### NOTE:

Section 6 is the counterpart for adopted rules to Section 4 for final proposals. An agency form **must** be filed with the adopted rule if the rule incorporates the form by reference or sets forth the requirements of the form. Unlike with final proposals, however, the adopted rule will **not** be recorded as filed unless or until the relevant form(s) are filed to make the filing complete. If the absence of a form is not discovered until after the adopted rule is recorded as filed, the recording of an effective rule will be voided, and no effective date will be assigned until the form(s) are filed. Filing of the form is required even if the form exists only in draft format or is available in screenshot, mock-up, or prototype as an electronic-only form.

### CERTIFICATION OF ADOPTED RULES

**191:7 Publication of Rules. Amends RSA 541-A:15, I and I-a to read as follows:**

I. The director of legislative services shall compile, index, and publish~~[, or require agencies to publish,]~~ all effective rules adopted by each agency. The text of an adopted rule as filed with the director and which is effective shall *then* be the official version of the rule~~[.]~~ *The director shall publish the adopted rule text online in a format as determined by the director. The agency shall be notified when the text is published. The agency shall then have 120 days to certify that the published rule is accurate. If [unless or until a version prepared for publication, which may have] editorial changes not affecting the substance of the rule[is certified by the agency as the same in substance as originally filed.] are needed, or an error in the publishing process is identified, then the agency shall notify the director, and such changes shall be made by the director and certified by the agency that it is the same in substance as originally filed. If the agency does not notify the director within the 120-day deadline, then it will be presumed that the agency has reviewed the published language and agreed that it is the certified version and shall be published online by the director in a format as determined by the director.* The certified version shall *then* be the official version. Both the adopted rule as-filed and as-certified may be an electronic document and still be the official version if in compliance with RSA 541-A:1, V-a and VI and the drafting and procedure manual for administrative rules under RSA 541-A:8. The official version of the rule shall be available to the public by the agency and the director pursuant to RSA 541-A:14, IV *as described in the drafting and procedure manual under RSA 541-A:8.*

I-a. ~~[The director shall send the text of a rule to be certified to the agency adopting the rule. The agency shall certify the rule under paragraph I within 120 days of receiving the first edited text.]~~ The 120-day deadline *in paragraph I* shall not apply to interim rules or emergency rules. A copy of each rule as filed and each as certified shall be sent by the director to the state library and the New Hampshire law library at the supreme court.

**NOTE:**

Section 7 amends RSA 541-A:15, I and RSA 541-A:15, I-a relative to the certification process for an adopted rule. Agencies will no longer be required to publish their own rules. Instead, the OLS must publish the adopted rule as filed and as certified, that is, “in a format as determined by the [OLS] director,” and will notify the agency when each publication occurs. The as-filed version shall be the official version until the rule is certified. Although RSA 541-A:15, I as amended is ambiguous, the OLS has concluded that it must prepare the formatted version for the agency from the as-filed version and publish it. The agency must then review that formatted version and make comments within 120 days of receiving it from OLS.

As under the prior law, “If editorial changes not affecting the substance of the rule are needed, or an error in the publishing process is identified, then the agency shall notify the director, and such changes shall be made by the director and certified by the agency that it is the same in substance as originally filed.” However, if the agency does not notify the OLS Director within the 120-day deadline, then it will be presumed that the agency has reviewed the formatted version, and it will automatically become the certified version. Whether certification is done by the agency’s action or inaction, the formatted version will then replace the as-filed version as the official version of the rule.

### WHEN RULES BECOME EFFECTIVE

**191:8 Rules; Filing Required. Amends RSA 541-A:16, III to read as follows:**

III. A rule shall become effective as of 12:01 a.m. on the day after the filing of the adopted rule or as of 12:01 a.m. on the date specified by the agency pursuant to RSA 541-A:14, IV, RSA 541-A:14-a, III, or RSA 541-A:19, X, or such other *later* date ~~[and time]~~ as specified, provided that filing occurs before such effective date ~~[and time]~~. Except as provided in RSA 541-A:14-a, a rule adopted under RSA 541-A:14, IV shall expire after the last day of the tenth year following its becoming effective, unless sooner amended, readopted, or repealed.

**NOTE:**

Section 8 amends the prior process whereby an agency could choose not only the date when an adopted rule the agency had filed would become effective, but also the time of day, provided the filing occurred before such effective date and time. The agency will no longer be able to specify that a rule become effective upon filing; only that it become effective on a specific date. The rule in that case would become effective at 12:01 a.m. on the date the agency chooses. This amendment eliminates the possibility that rules other than emergency rules filed pursuant to RSA 541-A:18 could become effective upon filing.

### PROPOSED INTERIM RULES AND FORMS

**191:9 New Paragraph; Interim Rules. Amends RSA 541-A:19 by inserting after paragraph IV the following new paragraph:**

IV-a. The agency shall file with the proposed interim rule a copy of any related new or amended form, or screen shots, mock-up, or prototype of an electronic-only form, which has been incorporated by reference in the proposed interim rule or whose requirements are set forth in the proposed interim rule pursuant to RSA 541-A:19-b.

**191:10 Interim Rules; Basis for Objection. Amends RSA 541-A:19, VII(c) to read as follows:**

(c) Determined not to be in the public interest, *including the existence of substantive inconsistencies between a form and the rule where the form is incorporated by reference or which sets forth the requirements of the form, pursuant to RSA 541-A:19-b*; or

**NOTE:**

Sections 9 and 10 are the proposed interim rule counterparts, respectively, for Sections 4 and 5 for final proposals. Under Section 9 an agency form must be filed “with” the proposed interim rule if the rule incorporates the form by reference or sets forth the requirements of the form. If the form exists only in draft format, it must still be filed. Electronic-only forms must be filed as screen shots, as a mock-up, or as a prototype. The OLS form in the *Manual Appendix II-I “Cover Sheet for Proposed Interim Rule”* will be amended to include a reminder about filing agency forms.

Under Section 10, a substantive inconsistency between a proposed interim rule and the form it incorporates by reference, or between the form and the rule which sets forth the requirements of the form, may be a potential basis for JLCAR objection to the proposed interim rule on the ground that the rule is contrary to the public interest.

**CONDITIONAL APPROVAL OF PROPOSED INTERIM RULES**

**191:11 Interim Rules; Response to Conditional Approval. Amends RSA 541-A:19, VIII(b) to read as follows:**

(b) If the committee objects to the proposed interim rule as filed, it shall so inform the agency. In lieu of an objection, and with or without a written request under subparagraph (a), the committee may vote to conditionally approve the rule with an amendment, provided that the committee specified in its conditional approval the language of the amendment to address the basis for a preliminary objection. The committee shall notify the agency in writing of its conditional approval. Within 14 days of the meeting, *or in the case of a board or commission, 7 days following its regularly scheduled meeting*, the agency shall submit a written explanation to the committee in the form of a letter and an annotated text of the final proposed rule detailing how the rule has been amended in accordance with the conditional approval. The written explanation shall be signed by the individual holding rulemaking authority, or, if a body of individuals holds rulemaking authority, by a voting member of that body, provided that a quorum of the body has approved. Failure to submit a written explanation in accordance with the conditional approval and this paragraph shall cause the conditional approval to be deemed a committee vote to make a preliminary objection on the date of the conditional approval. If the committee legal counsel determines that the agency has amended the rule in accordance with the conditional approval and this paragraph, the committee legal counsel shall promptly send written confirmation of compliance to the agency. The agency may then adopt the rule as amended.

**NOTE:**

Section 11 amends the process for conditional approval of a proposed interim rule. Its intent is to make the time frame for a board or commission to respond to a JLCAR conditional approval the same as for final proposals under RSA 541-A:13, V(a), that is, within 7 days following the (next) scheduled meeting of the board or commission after the conditional approval, instead of 14 days following the conditional approval.

**FILING ADOPTED INTERIM RULES**

**191:12 Interim Rules. Amend RSA 541-A:19, X to read as follows:**

X. No proposed interim rule shall be adopted unless the committee has voted to approve the proposed interim rule or conditionally approve the proposed interim rule, provided that the committee legal counsel has sent written confirmation to the agency pursuant to RSA 541-A:19, VIII(b). An adopted interim rule ***and any new or amended form, or screenshot, mock-up, or prototype of an electronic-only form, which the rule incorporates by reference or the requirements for which are set forth in the rule pursuant to RSA 541-A:19***, shall be filed with the director of legislative services no later than 30 days following committee approval or conditional approval ***or in the case of a board or commission, 7 days following its next regularly scheduled meeting after committee approval or conditional approval***. An interim rule shall be effective under RSA 541-A:16, III on the day after filing with the director of legislative services, or at a later date, provided the agency so specifies in a letter to the director of legislative services and the effective date is within 30 days following committee approval or conditional approval. Interim rules shall be effective for a period not to exceed 180 days. During the time an interim rule shall be in effect, the agency may propose a permanent rule to replace the interim rule once it expires, but it shall not adopt another interim rule to replace the expiring interim rule.

**NOTE:**

Section 12 does two things relative to filing an adopted interim rule: (1) it amends RSA 541-A:19, X to require the filing of a form with the adopted interim rule as with an adopted regular rule in RSA 541-A:14, III as amended by Section 6; and (2) it changes the deadline to file an adopted interim rule for a board or commission from 30 days following JLCAR approval or conditional approval to 7 days after the next regularly scheduled meeting of the board or commission following approval or conditional approval.

Please note that for a board or commission this makes the deadline to adopt and file a proposed interim rule which has been conditionally approved the same as the deadline for responding to the conditional approval under Section 11. This makes adoption and filing of the interim rule an urgent matter for the agency. Once the board or commission receives confirmation from OLS of the conditional approval response pursuant to RSA 541-A:19, VIII(b), it should adopt and file quickly. This may mean that the board or commission should vote to respond to a conditional approval, send the response to OLS, and not adjourn its meeting until the OLS's confirmation is sent, so that the agency could adopt in the same meeting. Otherwise, the agency may have to request a waiver of the deadline pursuant to RSA 541-A:40, IV.

## ADOPTION OF FORMS

### **191:13 Adoption of Forms. Amends RSA 541-A:19-b to read as follows:**

541-A:19-b Adoption of Forms. An agency may adopt a form as defined in RSA 541-A:1, VII-a, ***either*** by incorporating the actual form by reference ***in a rule***, or by setting forth the requirements of the form in rules, adopted according to the procedures in this chapter ***and in compliance with the drafting and procedure manual pursuant to RSA 541-A:8***. ***No new or amended form shall be effective and enforceable pursuant to RSA 541-A:22, I unless the form has been adopted in accordance with this chapter.***

**NOTE:**

Section 13 clarifies the existing requirement regarding adoption of a form. For a form to be adopted, the form must be incorporated by reference in a rule or its requirements have to be set forth in a rule. Since a form is defined as a "rule" under RSA 541-A:1, XV, no new or amended form is otherwise effective or enforceable.

## AMENDMENTS TO THE EXPEDITED REVISIONS TO FORM PROCESS

**191:14 Revisions to Forms; Expedited Procedure. Amends RSA 541-A:19-c to read as follows:**

541-A:19-c Revisions to Forms; Expedited Procedure.

I. An agency may make editorial changes to a previously adopted form without following the procedures required in RSA 541-A:19-b, in this section, or in RSA 541-A:3, **but shall notify the office of legislative services of any proposed editorial changes in accordance with the drafting and procedure manual pursuant to RSA 541-A:8.**

II. An agency may revise [~~a form as defined in RSA 541-A:1, VII a without meeting the requirements of RSA 541-A:5-7~~] **substantively the requirements on a previously adopted form as defined in RSA 541-A:1, VII-a, and amend the relevant provisions in the rule which set forth the requirements of the form or incorporate the form by reference pursuant to RSA 541-A:19-b, without meeting the requirements of RSA 541-A:5, RSA 541-A:6 and RSA 541-A:9-14 [either in accordance with RSA 541-A:19-b or]** by providing notice and adopting the **amended** form in accordance with paragraphs III through VII.

III. Notice of an agency's intent to [~~adopt a form or amendment to a form~~] **amend a form and amend the relevant, affected rule** shall include:

(a) The name and address of the agency.

(b) The statutory authority for the form.

(c) **The rule number and title of the affected rule to be amended, and whether the action is an amendment or readoption with amendment of the rule as described in the drafting and procedure manual pursuant to RSA 541-A:8.**

(d) An explanation of the reason for the proposed [~~adoption or~~] amendment of a form **a summary of the existing, affected rule and the proposed amendment to the form and the rule.**

[~~(e)~~] (e) The name, address, electronic address, and telephone number of an individual in the agency able to answer questions about the proposed form.

[~~(f)~~] (f) The deadline for receipt by the agency of written or electronic public comment, which shall be no sooner than the 7th calendar day after the date of publication of the notice in the rulemaking register.

**III-a. The amended rule to be filed shall include only those relevant provisions of the rule, as described in the drafting and procedure manual, pursuant to paragraph II, and neither the amended form nor the amended rule shall have a fiscal impact which would otherwise require a fiscal impact statement pursuant to RSA 541-A:5.**

IV. The **agency shall file a copy of the amended form, the amended rule including an appendix pursuant to RSA 541-A:3-a, and the notice required by paragraph III [shall be filed]** with the director of legislative services, [~~for publication~~] **who shall publish the notice** in the rulemaking register. [~~A copy of the form to be adopted shall be filed with the notice.~~]

V. If on the basis of public comment the official or the group of individuals with rulemaking authority determines that the form should not be [~~adopted~~] **amended**, the agency shall so notify the director of legislative services and the form shall not be [~~adopted~~] **amended**.

VI. The proposed form **as amended and amended rule** shall be placed on the agenda of the committee for review at the first regularly scheduled or special meeting at least 5 calendar days after the close of the period for written or electronic comment described in subparagraph III(e). The committee may approve

or object to the form. The committee may object to the adoption of the form *as amended and the affected rule* if the form is:

- (a) Beyond the authority of the agency;
- (b) Contrary to the intent of the legislature; [✗]
- (c) *Deemed not to be in the public interest, including the existence of substantive inconsistencies between the form and the rule whose provisions incorporate the form by reference or set forth the requirements of the form pursuant to RSA 541-A:19-b; or*
- (d) Deemed by the committee not to meet the requirements of this section, *including existence of a fiscal impact contrary to paragraph III-a.*

VII. Subsequent review and adoption of the form *as amended and the affected rule* shall be as provided in RSA 541-A:13 for final proposed rules.

**NOTE:**

Section 14 amends the expedited revisions to form (EXRF) process under RSA 541-A:19-c, which allows agencies to make substantive changes to existing agency forms other than through regular rulemaking. Section 14 does several things:

- (1) It clarifies that an agency may make editorial changes to forms outside of processes under RSA 541-A, but must notify the OLS beforehand, as addressed currently in Section 2.8 of Chapter 5 of the *Manual*. In this way the OLS can confirm whether the changes are actually editorial or are substantive and will require rulemaking;
- (2) It amends the EXRF process to require that the relevant provisions of the rule which incorporate the form by reference, or which set forth the requirements of the form, must be filed with the amended form at the start of the process and when the amended form is adopted and filed. In this way both the amended form and the rule amendment will be effective for 10 years;
- (3) It amends the EXRF notice requirements currently in the *Manual*'s Appendix II-N "Notice for Expedited Revisions to Agency Forms", which will be updated and made available to agencies;
- (4) It makes explicit that neither the amended form nor the amended rule in the EXRF process shall have a fiscal impact, or otherwise the JLCAR may object, and regular rulemaking would have to be undertaken to make the amendments because that process requires a fiscal impact statement; and
- (5) It allows the JLCAR to object to the form and the rule if the JLCAR determines that the form is not in the public interest because of substantive inconsistencies between the form and the rule. This makes an EXRF objection consistent with Section 5 for final proposals under RSA 541-A:13, IV(d) and with Section 10 for proposed interim rules under RSA 541-A:19, VII(c).

Section 14 replaces the current EXRF process where the edition date of the form incorporated in the rule would be changed editorially by OLS after the amended form is adopted and filed, and therefore without giving the rule a new effective date. This also allows the expedited process to be conveniently used where forms have their requirements written out in a rule.

The rule to be filed in the amended EXRF process will be similar to the rule filed in the process under RSA 541-A:19-d for an expedited amendment to incorporation by reference (EXIR). Pursuant to RSA 541-A:19-c, III-a, the rule filed in the EXRF process may be an amendment to a rule section, or it may be a readoption with amendment of the entire section if necessary. But only the "relevant provisions" of the rule may be filed because the EXRF process is an expedited process without a public hearing, and yet will become effective for another 10 years. After the amended form and rule are adopted and filed, the rule will be processed for certification as with regular rulemaking.

**191:15 Validity of Rules. Amends RSA 541-A:22, I to read as follows:**

I. No agency rule, *including a form*, is valid or effective against any person or party, nor may it be enforced by the state for any purpose, until it has been filed as required in this chapter and has not expired.

**NOTE:**

Section 15 clarifies that, in order to be valid and effective like a rule, and be enforceable, a form must be filed pursuant to RSA 541-A. In other words, new forms shall not be adopted, and existing forms shall not be substantively amended, unless they are taken through the rulemaking process.

**AGENCY REPORT ON PUBLIC COMMENTS**

**191:16 New Subparagraph; Filing Final Proposal. Amend RSA 541-A:12, II by inserting after subparagraph (d) the following new subparagraph:**

[II. The final proposal shall include:]

(e) A report of public comments received on the rule and an explanation of how they were addressed in the final rule.

**NOTE:**

Section 16 adds to the elements required in RSA 541-A:12, II as part of a final proposal. An agency must include a report on the public comments it received and how it addressed them. However, unlike a failure to file forms “with” the final proposal as described in Section 4, the failure to file this report will mean that the final proposal will not be deemed filed until the report is received. This failure could cause the final proposal to exceed the 21-day deadline for placement on the agenda of the JLCAR meeting pursuant to RSA 541-A:12, I. The OLS form in the *Manual* Appendix II-G “Cover Sheet for Final Proposal” will be amended to include a reminder about filing the agency report.

**TIME FRAME FOR ADOPTING REGULAR RULES**

**191:17 Final Adoption. Amend RSA 541-A:14, I(a) to read as follows:**

(a) The passage of [~~45~~] **60** days from filing of a final proposal under RSA 541-A:12, I, or 60 days from filing under RSA 541-A:12, I-a, without receiving notice of objection from the committee;

**NOTE:**

Section 17 was an attempt to address an inconsistency between the 45-day time frame for adopting a rule under RSA 541-A:14, I(a) without receiving notice of JLCAR objection and the JLCAR’s 60-day review period for final proposals in RSA 541-A:13, I, as amended by 2020, 37:74, effective 9-27-20. Section 17 however did not remove the phrase “or 60 days from filing under RSA 541-A:12, I-a” which remains inoperative in any case because RSA 541-A:12, I-a was deleted by 2020, 37:73, effective 9-27-20.

**TRANSITION FOR IMPLEMENTING HB 358**

**191:18 Transition; Application.** The provisions of this act shall govern the following on or after the effective date of this act:

I. All rulemaking initiated by filing a notice of rulemaking under RSA 541-A:6.

- II. All interim rules initiated by filing a proposed interim rule under RSA 541-A:19, II.
- III. All expedited revisions to forms initiated by filing a notice of rulemaking under RSA 541-A:19-c, III.
- IV. All notices submitted to the director of legislative services for publication in the rulemaking register.

**NOTE:**

Section 18 is a transition clause and indicates that the amendments to RSA 541-A in HB 358 do **not** apply to rulemaking proceedings which are already underway when the legislation becomes effective on 10-3-23.

Specifically, the provisions of HB 358 shall apply to the proceedings for regular rulemaking and EXRF rulemaking **if** the rulemaking notices are filed on or after 10-3-23. The provisions of HB 358 shall also apply to interim rulemaking if the proposed interim **rule** is filed on or after 10-3-23, because proposed interim rules may still use notice in a newspaper pursuant to RSA 541-A:19, II(a) instead of notice in the *Rulemaking Register*. Finally, the provisions of HB 358 shall apply to “all notices” submitted to OLS on or after 10-3-23.