

STATE OF NEW HAMPSHIRE

Inter-Department Communication

DATE: March 22, 2021

FROM: Scott F. Eaton
Administrative Rules Director

AT (OFFICE): Legislative Services

SUBJECT: RSA 541-A Amendments in 2017-2020 Legislative Sessions

To: File

The online *Drafting and Procedure Manual for Administrative Rules*, as amended effective August 1, 2019, has not been amended yet in Chapters 1 through 5 to address amendments to RSA 541-A due to legislation in the 2017-2020 legislative sessions. However, the online Appendices, including notice forms in Appendix II, RSA 541-A in Appendix III, and the rules of the Joint Legislative Committee on Administrative Rules (JLCAR) in Appendix IV, have been updated.

Amendments to Chapters 1 through 5 will be submitted for review by the Joint Legislative Committee on Administrative Rules (JLCAR) and approval pursuant to RSA 541-A:8. Agencies should contact the Administrative Rules Director in the Office of Legislative Services, Administrative Rules (OLS) at scott.eaton@leg.state.nh.us if they have any questions, although OLS cannot provide legal advice. **In the meantime, effective amendments to RSA 541-A supersede any contrary statements in the Manual. Those amendments are summarized below. The updated RSA 541-A may be viewed at <http://gencourt.state.nh.us/rules/manual/amendedmanualeffective5-1-16amended8-1-19.pdf>.**

AMENDMENTS TO RSA 541-A IN THE 2017 SESSION

Three pieces of legislation were adopted in the 2017 legislative session that amended RSA 541-A, and the changes are summarized below. The first 2 pieces of legislation to go into effect impacted all agencies, and the third only one agency, as follows:

- HB 517 (Chapter 156), Section 207, effective 7-1-17, amended RSA 541-A:10, I to remove the requirement of special notice to standing policy committees when a rule is proposed for the first time to implement newly enacted state authority. This is currently covered in §2.6 of Chapter 3 of the *Drafting and Procedure Manual for Administrative Rules (Manual)*. and in the instructions of Appendix II-C “Rulemaking Notice Form” and referenced in Appendix II-G “Cover Sheet for Final Proposal.” **The JLCAR subsequently approved amendments to the forms and instructions for Appendix II-C “Rulemaking Notice Form” and references in Appendix II-G “Cover Sheet for Final Proposal.”**
- HB 373 (Chapter 101), Sections 2 and 3, effective 8-7-17, amended RSA 541-A:23, IV and RSA 541-A:24 on judicial review of a rule due to challenges in court to the rule; and

- SB 13 (Chapter 206), Section 21, effective 9-8-17, amended a reference in RSA 541-A:21, I(s) which affected only an exemption from RSA 541-A for certain rules of the Police Standards and Training Council.

Additions to RSA 541-A are shown below by ***bold italic***, and deletions by strike-through.

HB 517 (Chapter 156), Section 207. Effective 7-1-17.

REMOVAL OF SPECIAL NOTICE REQUIREMENT

156:207. Amended RSA 541-A:10, I Filing of Proposed Rule Text.

- Amended RSA 541-A:10, I to read as follows:

I. At the same time the notice required by RSA 541-A:6, I is filed, the agency shall file the text of the proposed rule with the director of legislative services. [~~The first time a rule is proposed under RSA 541-A:3 to implement newly enacted state authority, the agency shall send an electronic copy of the notice and proposed rule to the chair of each house and senate standing policy committee, as defined in RSA 541-A:1, XVI, for distribution to the members of such standing policy committees. "Newly enacted state authority" means a state statute or session law adopted or amended after July 30, 2011. If the newly enacted state authority was not referred originally to a standing policy committee, the agency shall send an electronic copy of the notice and proposed rule to the speaker of the house and senate president for appropriate distribution. The members of the standing policy committees receiving proposed rules may review the proposed rules to determine whether the proposed rule is consistent with the intent of the authorizing legislation. If a standing policy committee concludes that the proposed rule is not consistent with the intent of the authorizing legislation, the standing policy committee shall send written notice to the agency, with a copy to the director of legislative services, identifying the provision or provisions the committee believes to be inconsistent with legislative intent. Such written notice may be sent to the agency via e-mail and shall be delivered so as to be received by the agency no later than the deadline for public comment specified in the rulemaking notice. If the agency does not receive notice from any standing policy committee by the end of the public comment period, the agency may proceed on the basis that the rule is consistent with the intent of the authorizing legislation.~~] The text of the proposed rules as filed by the agency pursuant to RSA 541-A:3, III shall not be changed prior to the hearing held pursuant to RSA 541-A:11, I(a).

NOTE:

This amendment removed the requirement of special notice for standing policy committees when a rule is proposed for the first time to implement "newly enacted state authority" adopted or amended after July 30, 2011. Note that the requirement for agency special notice **upon request** to "chairpersons of the legislative committees having jurisdiction over the subject" under RSA 541-A:6, III **still remains**. But RSA 541-A:10, I was further amended by 2020, 37:72, effective September 27, 2020. See page 11 of this memo.

HB 373 (Chapter 101), Sections 2 and 3. Effective 8-7-17.

FILING OF NOTICE OF JUDICIAL REVIEW AND COURT JUDGMENT

101:2. Amended RSA 541-A:23, IV Remedies for Procedural Failures.

- Amended RSA 541-A:23, IV to read as follows:

IV. An action to contest the validity of a rule for noncompliance with any of the provisions of this chapter other than those listed in paragraph I shall be commenced within one year after the effective date of the rule. Such actions shall be brought in the Merrimack county superior court. ***The plaintiff shall give notice***

of the action to the office of legislative services, division of administrative rules, at the time of filing. Upon receiving a judgment on the merits, the respondent agency or department shall also file a copy of that judgment with the office of legislative services, division of administrative rules.

NOTE:

These amendments added requirements (1) that notice be filed **by a plaintiff** with the Administrative Rules office of the Office of Legislative Services (OLS) when a plaintiff challenges the validity of an agency's rule in Merrimack County Superior Court on grounds that the rulemaking requirements of RSA 541-A, other than failure to file the rule, were violated, and (2) that a copy of the Court's judgment be filed **by the agency** with OLS after the Court renders judgment. There is currently no required format for the plaintiff's notice to the Administrative Rules office of OLS but that will be subject to JLCAR review and approval in the *Manual*. There are no deadlines for these filings, but the presumption is that the filing of the notice be made when the plaintiff files documents with the Court and that the filing of the copy of the Court's judgment be made as soon as it is available to the agency.

101:3 Amended RSA 541-A:24 Declaratory Judgment on Validity or Applicability of Rules.

- Amended RSA 541-A:24 to read as follows:

541-A:24 Declaratory Judgment on Validity or Applicability of Rules. The validity or applicability of a rule may be determined in an action for declaratory judgment in the Merrimack county superior court if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. *The plaintiff shall give notice of the action to the office of legislative services, division of administrative rules, at the time of filing.* A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question. *Upon receiving a declaratory judgment, the respondent agency or department shall also file a copy of that judgment with the office of legislative services, division of administrative rules.*

NOTE:

This amendment to RSA 541-A:24 mirrored that of the amendment to RSA 541-A:23, IV, but in this case the challenge in court is to the rule's validity **or** its applicability on the grounds that the rule "impairs, or threatens to impair, the legal rights or privileges of the plaintiff." Experience has shown that RSA 541-A:24 has been the more common route for challenging a rule than alleging procedural failures under RSA 541-A:23, IV. However, as with the amendment to RSA 541-A:23, IV, the amendment to RSA 541-A:24 requires that the plaintiff file notice of the action with the Administrative Rules Office of OLS and that the agency file a copy of the Court's judgment with the same office.

SB 13 (Chapter 206), Section 21. Effective 9-8-17.

206:21. Amended RSA 541-A:21, I(s) re: Exceptions.

- Amended RSA 541-A:21, I(s) to read as follows:

I(s) [~~RSA 188-F:26, V~~] **RSA 106-L:5, VI**, relative to educational, training, and evidentiary standards and curriculum requirements for police and corrections personnel and courses and tuition students at such courses.

NOTICE OF AMENDMENTS TO RSA 541-A IN THE 2018 SESSION

Four pieces of legislation were adopted in the 2018 legislative session that amended RSA 541-A, and the changes are summarized below. The first 2 pieces of legislation which went into effect impacted only 2 agencies, but the other 2 have provisions that potentially affected all agencies, as follows:

- SB 537 (Chapter 331), Section 15, effective 6-25-18, amended RSA 541-A:21, I to add an exemption from RSA 541-A for the Business Finance Authority relative to extraterritorial financing powers under a new statute RSA 162-S;
- HB 1281 (Chapter 28), Sections 2 and 3, effective 7-14-18, amended RSA 541-A:9, I(c) and RSA 541-A:28 to eliminate the filing in the Office of Legislative Services (OLS) by the Secretary of State of the Governor's executive orders and their subsequent publication in the *Rulemaking Register*;
- SB 369-FN (Chapter 217), Section 2, effective 7-14-18, amended RSA 541-A:9 to make the same amendment to RSA 541-A:9, I(c) as HB 1281 does; to remove all references to the *Register* as a paper document and make it an online-only document; and to authorize the Director of OLS to specify the electronic file format for all documents provided by state agencies for inclusion in the *Register*; and
- HB 1104-FN (Chapter 279), Sections 6 and 9, effective 1-1-19, amended RSA 541-A:29 on applications, petitions, and requests to reduce the maximum amount of time agencies have to review and act upon the applications, petitions, or requests, and adopted RSA 541-A:29-a relative to failure of an agency to act within the time limits prescribed by RSA 541-A:29. The legislation also granted exemptions to certain agencies from these provisions under certain circumstances.

Additions to RSA 541-A are shown below by ***bold italic***, and deletions by strike-through.

SB 537 (Chapter 331), Section 15. Effective 6-25-18.

BUSINESS FINANCE AUTHORITY POWERS UNDER RSA 162-S

331:15. Amends RSA 541-A:21, I re: Exceptions to RSA 541-A by inserting after subparagraph (ii) the following new subparagraph:

(jj) RSA 162-S, relative to the extraterritorial financing powers of the business finance authority.

NOTE:

This amendment added a new exemption to RSA 541-A for the Business Finance Authority for rules implementing a new statute, RSA 162-S relative to financing out-of-state businesses.

HB 1281 (Chapter 28), Sections 2 and 3. Effective 7-14-18.

ELIMINATION OF THE FILING AND PUBLICATION OF EXECUTIVE ORDERS IN THE *RULEMAKING REGISTER*

28:2. Amended RSA 541-A:9, I(c) Rulemaking Register to read as follows:

(c) ~~[Executive orders and]~~ Nonconfidential opinions of the attorney general under RSA 541-A:28.

28:3. Amended RSA 541-A:28 Executive Orders and Opinions of the Attorney General to read as follows:

541-A:28 ~~[Executive Orders and]~~ **Opinions of the Attorney General.** ~~[The secretary of state shall transmit each executive order received from the governor to the director of legislative services, who shall publish the text of the executive order in the rulemaking register.]~~ The attorney general shall transmit a copy of every nonconfidential opinion relative to rulemaking or rulemaking authority issued by the attorney general or in the attorney general's name to the director of legislative services. The director shall publish such opinions in the rulemaking register.

NOTE:

These amendments eliminated the filing by the Secretary of State of the Governor's executive orders in OLS under RSA 541-A:28, and their subsequent publication pursuant to RSA 541-A:9, I(c) in the *Rulemaking Register*. Section 1 of HB 1281 required that the orders instead be posted on the Governor's website in what would be called the Executive Order Registry but are now viewable at <https://www.governor.nh.gov/news-and-media/emergency-orders-2020>.

SB 369-FN (Chapter 217), Section 2. Effective 7-14-18.

RULEMAKING REGISTER BECOMES AN ONLINE-ONLY DOCUMENT

217:2. Amended RSA 541-A:9 Rulemaking Register to read as follows:

541-A:9 Rulemaking Register.

I. The director of legislative services shall publish *directly online a* weekly [a] rulemaking register which shall contain:

- (a) Notice of intended rulemaking actions.
- (b) Notice of rules adopted under RSA 541-A:14, RSA 541-A:18, and RSA 541-A:19.
- (c) Nonconfidential opinions of the attorney general under RSA 541-A:28.
- (d) Final objections under RSA 541-A:13, V.
- (e) Notices of continued or postponed public comment hearings under RSA 541-A:11.
- (f) Notices of declaratory rulings issued pursuant to rules adopted under RSA 541-A:16, I(d).
- (g) Notice for the submission of comments on possible rulemaking under RSA 541-A:11, VIII.
- (h) Publication of notice of the list of regulated toxic air pollutants and classifications by the department of environmental services under RSA 125-I:4.
- (i) At the request of any agency, any other notices or documents related to rulemaking, at the discretion of the director.
- (j) A list of proposals filed under RSA 541-A:12, I and proposed interim rules filed under RSA 541-A:19, II, and placed on the agenda for committee review at a regularly scheduled or special committee meeting.

I-a. Prior to publication and with prior notice to the agency, the director of legislative services may correct typographical, spelling, and punctuation errors, as well as unintentional errors in references and citations in a submission, provided the corrections do not affect the substance of the notice.

I-b. The date of publication of the rulemaking register shall be the date on which the register is available to the public on the general court information services web site.

I-c. The director of legislative services may prescribe the specific electronic file format for all documents provided by state agencies for inclusion in the register.

~~II. The rulemaking register shall be made available [upon request to agencies and officials of this state] free of charge. [The director of legislative services shall send a paper or electronic copy of the rulemaking register upon request to the clerk of each municipality in the state and upon request to any member of the general court free of charge. Municipalities and members of the general court shall be deemed to have requested an electronic copy unless a paper copy is specifically requested. Paper copies of the register which are sent to municipalities and to members of the general court shall be sent by first class mail.]~~

~~[III. Paper copies of the register shall also be made available upon request to other persons at prices fixed by the director of legislative services to cover mailing and publication costs.]~~

NOTE:

These amendments continued the amendment by HB 1281 of RSA 541-A:9, I(c) by removing the requirement that the *Rulemaking Register (Register)* contain executive orders of the Governor; remove all references to the *Register* as a paper document and makes it an online-only document; and authorize the Director of OLS to prescribe the specific electronic file format for all documents provided by state agencies for inclusion in the *Register*. The July 12, 2018 issue was the last paper *Register*. The *Register* remains available free for downloading from the OLS website or as a PDF document from the OLS subscriber e-mail list.

The authorization for the Director to specify the electronic file format for all documents provided by agencies for inclusion in the *Register* was intended to allow the Director, if necessary, to mandate the type of electronic format (Microsoft Word® or Adobe Acrobat®, for example) so that notices would eventually be compiled in the *Register* on a computer, whether the agency filed in paper or electronically. Filing in paper was eliminated due to COVID-19 when the Administrative Rules office began operating remotely after March 17, 2020. See http://gencourt.state.nh.us/rules/notices/Notice_1_-_Admin_Rules_Filing_Notice_031720.pdf and http://gencourt.state.nh.us/rules/notices/Notice_2_-_Admin_Rules_Filing_Notice_Second_Notice_031720.pdf.

RSA 541-A:9, I-a was further amended by 2020, 37:71, effective September 27, 2020. See page 10.

HB 1104 (Chapter 279), Sections 6 and 9. Effective 1-1-19.

REDUCTION OF THE MAXIMUM AMOUNT OF TIME FOR AGENCIES TO ACT ON APPLICATIONS, PETITIONS, AND REQUESTS

279:6 Amends RSA 541-A:29 Agency Action on Application, Petitions, and Requests to read as follows:

541-A:29 Agency Action on Applications, Petitions and Requests. In processing an application, petition, or request, in any matter other than rulemaking or a declaratory ruling, in which a response is specifically addressed to the applicant, petitioner, or requester, the agency shall:

I. Within ~~[60]~~ **30** days of receipt, examine the application, petition, or request, notify the applicant of any apparent errors or omissions, request any additional information that the agency is permitted by law to require, and notify the applicant of the name, official title, address, and telephone number of an agency official or employee who may be contacted regarding the application.

II. Within a reasonable time, not to exceed ~~[+20]~~ **60** days, after receipt of the application, petition or request, or of the response to a timely request made by the agency pursuant to paragraph I, the agency shall:

(a) Approve or deny the application, in whole or in part, on the basis of nonadjudicative processes, if disposition of the application by the use of these processes is not precluded by any provision of law; or

(b) Commence an adjudicative proceeding in accordance with this chapter.

III. If the time limits prescribed by this section conflict with specific time limits provided for by other provisions of law, the specific time limits provided for by such other provisions shall control.

IV. An agency may extend the time periods for review provided for in this section or in any other provision of law upon written agreement of the applicant.

279:9 Adopts new Section RSA 541-A:29-a Failure of Agency to Act to read as follows:

541-A:29-a Failure of Agency to Act.

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.

II. If a permit, approval, or other item has been granted under paragraph I, the applicant may request written confirmation of such grant from an agency. The agency shall provide an applicant written confirmation of such an approval within 14 days of the applicant's request.

III. A permit, approval, or other item shall not be granted by default if an applicant has agreed in writing to extend an agency's time for review pursuant to RSA 541-A:29, IV or any other provision of law.

IV. A grant of a permit, approval, or other item under this section shall not relieve the applicant, petitioner, or requestor from the obligation to comply with all federal, state, and local requirements applicable to activities authorized by the permit, approval, or other item.

NOTE:

These amendments were not effective until 1-1-19. Section 6 reduced the maximum amount of time agencies have to review and act upon the applications, petitions, or requests, and Section 9 adopted RSA 541-A:29-a relative to failure of an agency to act on an application, petition, or request within the time limits prescribed by RSA 541-A:29. But the legislation also granted exemptions to certain agencies from these provisions under their own statutes governing certain programs. Otherwise, these amendments may necessitate rulemaking by agencies to amend their rules which specify deadlines for agency action if those rules are not yet consistent with the proposed deadlines under the amended RSA 541-A:29.

NOTICE OF AMENDMENTS TO RSA 541-A IN THE 2019 SESSION

Two pieces of legislation were adopted in the 2019 legislative session that amended RSA 541-A, and the changes are explained below. They address exemptions from RSA 541-A and effect only the agencies indicated:

- SB 31 (Chapter 299), Section 2, effective 7-29-19, amends RSA 541-A:21, I to insert an exemption from RSA 541-A for rules of the Community Development Finance Authority.
- HB 4-FN-A-L (Chapter 346), Section 239, effective 7-1-19, amends RSA 541-A:21 to insert an exemption from RSA 541-A relative to the budget adjustment factor affecting rules of the Department of Health and Human Services.

SB 31 (Chapter 299), Section 2. Effective 7-29-19.

299:2. Amends RSA 541-A:21, I re: Exceptions.

- Amends RSA 541-A:21, I by inserting after subparagraph (jj) the following new subparagraph:

(kk) RSA 162-L, relative to the community development finance authority.

HB 4-FN-A-L (Chapter 346), Section 217. Effective 7-1-19.

346:217. Amends RSA 541-A:21, I re: Exceptions.

- Amends RSA 541-A:21 by inserting after paragraph III the following new subparagraph:

III-a. Rules adopted relative to the budget adjustment factor contained within the Medicaid rate of reimbursement methodology for nursing facilities shall be exempt from the provisions of 541-A:5 through RSA 541-A:14 provided that the budget adjustment factor applied to the reimbursement methodology is equal to or less than 28.76 percent. If the budget adjustment factor to be applied to the reimbursement methodology is greater than 28.76 percent, the provisions of 541-A shall apply.

NOTICE OF AMENDMENTS TO RSA 541-A IN THE 2020 SESSION

HB 1245 (Chapter 37)—a House omnibus bill—was adopted in the 2020 legislative session that included sections 69-78 amending the rulemaking process in RSA 541-A relative to filing, effective September 27, 2020. These sections are quoted below but also explained in “Notes.” These provisions originally began as SB 544 at the start of the session.

Additions to RSA 541-A by HB 1245 are shown below by *bold italic*, and deletions by strike-through. Please note that HB 1245 did not have a transition clause regarding ongoing rulemaking proceedings. So the legislation impacted a regular or interim rulemaking proceeding which was already underway, depending on the stage of the proceeding when the legislation became effective on September 27, 2020. The applicability of waivers of filing deadlines is discussed in the Notes.

Section 69

AMENDED DEFINITIONS OF “ELECTRONIC DOCUMENT” AND “FILE”; FILING REQUIREMENTS TO BE SET BY THE OLS DIRECTOR

37:69. Definitions of Electronic Document and File. Amends RSA 541-A:1, V-a and VI to read as follows:

V-a. "Electronic document" means a document which complies with requirements *prescribed by the director for filing under paragraph VI and* established in the drafting and [~~procedures~~] *procedure* manual under RSA 541-A:8. For electronic documents, a requirement during the rulemaking process for a signature accompanying the filing of an electronic document shall be met if such signature complies with the requirements of RSA 294-E.

VI. "File" means the actual receipt, by the director of legislative services, of a [~~paper or electronic~~] document required to be submitted during a rulemaking process established by this chapter, *under the terms and in the format prescribed by the director*. The term "file" shall also apply to any other response, submission, or written explanation required during a rulemaking process established by this chapter.

NOTE:

Section 69 did 2 things: (1) amended the definition of “file” in RSA 541-A:1, VI to allow for the replacement of paper filing entirely by electronic filing and to set the terms and format for filing; and (2) amended the definition of “electronic document” in RSA 541-A:1, V-a to be consistent with that change.

The amendment to the definition of “file” is modeled after the Director’s authority for a rulemaking notice under RSA 541-A:6, I—“the notice shall be in such form as the director of legislative services shall prescribe.” Currently, filings with the OLS are by electronic means due to the circumstances of the COVID-19 pandemic as described in the Director’s announcements of March 17, 2020 and Part 8 of Chapter 3 of the *Drafting and Procedure Manual for Administrative Rules (Manual)*. By deleting the words “paper or electronic”, the amendment allows the Director to phase out the option of paper filings permanently, and have filings become entirely electronic even after the pandemic is over. By setting the terms of all filings, the Director could also choose to set the time of day when documents must be received to be considered filed electronically on that day.

Although the amended definition of “file” does not refer to compliance with the *Manual* like the definition of “electronic document” does, any of the Director’s terms and format requirements for filings will be repeated in the *Manual* like the current requirements on “electronic document” and the format requirements for notices prescribed by the Director under RSA 541-A:6, I. **At this time there are no changes from the *Manual*’s current terms and format requirements for electronic filing.**

Sections 70 and 71

OLS REVIEW AND EDITING OF RULEMAKING NOTICES FOR THE *RULEMAKING REGISTER*

37:70. Notice of Rulemaking Proceedings. Amends RSA 541-A:6, II to read as follows:

II. The director of legislative services may refuse to publish a notice if the director determines that ~~[there is significant noncompliance with the requirements of paragraph I. In this paragraph, "significant noncompliance" means one or more errors of such magnitude that a reasonable person would not be able to discern what rules are the subject of the rulemaking proceeding and/or what the agency is proposing to do. The term includes the absence of elements required by paragraph I]~~ ***the notice does not conform to the requirements of the drafting and procedure manual under RSA 541-A:8.***

37:71. Rulemaking Register. Amends RSA 541-A:9, I-a to read as follows:

I-a. Prior to publication ~~[and with prior notice to the agency]~~, the director of legislative services may correct ***clarity, formatting***, typographical, spelling, and punctuation errors, as well as unintentional errors in references and citations in a submission~~[- provided the corrections do not affect the substance of the notice].~~ ***Consistent with RSA 541-A:6, II, the director shall notify the agency prior to publication of the notice of any amendments made to the notice and may set a deadline for agency comment on the amendments.***

NOTE:

Sections 70 and 71 allow the Director of Legislative Services to have greater editorial control over the production of agency rulemaking notices published by OLS in the *Rulemaking Register*.

The term “significant noncompliance” and its definition in the former RSA 541-A:6, II specified an extremely low bar for publication of a rulemaking notice. The amendment in Section 70 allows the Director to refuse a notice by the standards set by the Director and JLCAR in the *Manual*, as is currently the case for rules under RSA 541-A:8.

In practice the “significant noncompliance” standard for refusal of a notice had rarely been met by an agency notice, and even then was due to the filer’s inexperience or misunderstanding of the requirements. Whether noncompliance was minor or major, the OLS made editorial and clarity comments and waited for an agency to make corrections to the rulemaking notice before publication. Compliance by agencies had been very good, but waiting for agencies to make even simple corrections had been time-consuming. The “significant noncompliance” standard for refusal meant that OLS had to wait for agency corrections, delaying compilation of the *Register*, or otherwise publish rulemaking notices with ambiguous or unclear statements because the issues were not so severe as to amount to significant noncompliance.

Coupled with the amendment to RSA 541-A:9, I-a above, the OLS is now able, if necessary, to amend notices directly to correct clarity problems but with notification to the agency of the changes made. The Director may set a deadline for agency feedback so that publication is not delayed.

Section 72

PROPOSED REGULAR RULES MUST BE AT LEAST A FULL RULES SECTION, NOT JUST A SUBDIVISION LIKE A PARAGRAPH

37:72. Filing of Proposed Rule Text. Amends RSA 541-A:10, I to read as follows:

I. At the same time the notice required by RSA 541-A:6, I is filed, the agency shall file the text of the proposed rule with the director of legislative services. *The text of each proposed rule filed shall encompass at least a full rules section.* The text of the proposed rules as filed by the agency pursuant to RSA 541-A:3, III shall not be changed prior to the hearing held pursuant to RSA 541-A:11, I(a).

NOTE:

Under Section 72 agencies now have to file at least a full rules section—the rule with a decimal point in the number—when they file an initial proposal amending a **regular** rule on or after September 27, 2020. This means that paragraphs or smaller provisions of a section in regular rulemaking shall not be filed alone. But Section 72 does **not** apply to other rulemaking proceedings such as interim or emergency rules. The “Rulemaking Notice Form”, Appendix II-C in the *Manual*, and its instructions were amended to address this, with “9/20” in the footer of the form to denote the updated form.

Formerly, agencies could amend an existing regular rule section by filing only individual paragraphs or subparagraphs to the rule—or individual entries in a table. For example, a hypothetical rulemaking action could be “Amend Abc 301.02(d)... to read as follows”, and only Abc 301.02(d) would be filed. The result after adoption has been that different provisions within the same rule section expire at different times, making it impossible to create a software program which can track and calculate expiration dates for all of an agency’s rules down to the subparagraph level. Under Section 72 the hypothetical rulemaking action would have to be “Readopt with amendment Abc 301.02... to read as follows:” and include the entire section of the rule in the rulemaking proposal.

Most agencies do not keep records or have a database of the pending expiration dates of their rules, or of the differing expiration dates of paragraphs or subparagraphs. Many rule provisions have expired without agencies being aware of it, leaving rule sections either entirely or partially out of effect. This result has been a great concern of the JLCAR because, pursuant to RSA 541-A:22, I, expired rules are invalid and shall not be enforced.

The amendment in Section 72 will eliminate the need to track expiration dates down to a subparagraph level and help the creation of an OLS automatic notification system to alert agencies when their rules are expiring, by focusing on the effective date, which appears in the certified rule section’s “source note”. A source note identifies by document number and effective date each filing affecting that section. If the filing contained only an amended provision of the rule, the words “amd by” precede the document number. If a filing contains the entire section, the words “ss by”, for “superseded by”, precede the document number. Pursuant to RSA 541-A:16, III, most regular rules adopted and filed since late in 2011 have been effective for 10 years. Before that they were effective for 8 years. The re-adoption cycle for the oldest 10-year rules will need to begin soon. Section 72 should allow agencies and OLS to calculate electronically the expiration date of an entire section by adding 10 years to the last effective date for that section in the source note.

Section 73

FINAL PROPOSAL FILING DEADLINE EXTENDED FROM 150 TO 180 DAYS AFTER NOTICE PUBLICATION; DEADLINE TO FILE A FINAL PROPOSAL FOR JLCAR AGENDA MOVED BACK FROM 14 DAYS TO 21 DAYS BEFORE THE REGULAR MEETING; OPTION TO REQUEST DELAYED JLCAR REVIEW IS DELETED

37:73. Filing the Final Proposal. Amends RSA 541-A:12, I and I-a to read as follows:

I. After fully considering public comment and any committee comments or comments by the office of the legislative services received pursuant to RSA 541-A:11, and any other relevant information, a quorum of the members of the agency or the agency official having rulemaking authority shall establish the text of the final proposed rule. After the text of the final proposed rule has been established, the agency shall file the final proposal no earlier than 21 days and no later than ~~[150]~~ **180** days after the date of publication of the notice in the rulemaking register. ~~[If an agency is required to rewrite a rule in accordance with RSA 541-A:8, the agency shall have up to 180 days after the date of publication of the notice in the rulemaking register to file the final proposal.]~~ The agency shall file the final proposal with the director of legislative services. Final proposals filed no later than ~~[14]~~ **21** days before a regularly scheduled committee meeting shall be placed on the agenda for that meeting. Final proposals filed fewer than ~~[14]~~ **21** days before a regularly scheduled committee meeting shall be placed on the agenda of the following regularly scheduled committee meeting.

~~[I a. If an agency chooses to receive and respond to comments before the committee meeting as specified in RSA 541-A:13, II(a) and (b), the agency shall file the final proposal with a request that the final proposal be reviewed by the office of legislative services and placed on the agenda for the next regularly scheduled committee meeting or special meeting that is at least 28 days but no more than 60 days after the date that the final proposal is filed. The final proposal and request shall be filed at least 14 days prior to the first regularly scheduled committee meeting at which the request may be considered. The committee shall notify the agency in writing of its approval or denial of the request.]~~

NOTE:

Section 73 did 4 things: (1) extended the agency's deadline to file a final proposal from 150 days after publication of the rulemaking notice to 180 days, in order to lessen the need for waivers; (2) removed the automatic 30-day extension to file a rule subject to a re-write order under RSA 541-A:8, because the waiver procedure under RSA 541-A:40, IV has superseded that in practice; (3) changed the deadline for filing a final proposal for a JLCAR meeting from 14 days prior to the meeting to 21 days, but the deadline remains subject to waiver from the Director of Legislative Services pursuant to RSA 541-A:40, IV; and (4) removed the option to request delayed JLCAR review in order to file an amended final proposal, since that has been superseded in practice by the option for an agency to request a conditional approval, which is made explicit in Section 74. The "Cover Sheet for Final Proposal", Appendix II-G in the *Manual*, was amended to reflect these changes, with "9/20" in the footer of the form to denote the updated form.

Section 74

JLCAR REVIEW DEADLINE EXTENDED FROM 45 TO 60 DAYS AFTER FINAL PROPOSAL IS FILED; OPTION OF FILING AN AMENDED FINAL PROPOSAL IS REPLACED BY THE CONDITIONAL APPROVAL REQUEST PROCESS

37:74. Review by the JLCAR. Amends RSA 541-A:13, I-V(a) to read as follows:

I. The committee shall either approve the rule or enter a conditional approval or objection under paragraph V within ~~[45]~~ **60** days of the filing of a final proposal under RSA 541-A:12, I, unless the deadline is waived for good cause pursuant to RSA 541-A:40. ~~[The committee shall either approve the rule or enter a conditional approval or objection under paragraph V within 60 days of the filing of a final proposal under RSA 541-A:12, I a, unless the deadline is waived for good cause pursuant to RSA 541-A:40.]~~ Objections to a rule may be made only once. ***The committee may not add or amend grounds for objection after a preliminary objection is made under paragraph V unless the agency's response to the objection creates the grounds or the agency requests a revised objection which includes them.***

II.(a) If an agency has filed a final proposal ~~[and the committee has granted the agency's request, pursuant to RSA 541-A:12, I a]~~, the director of legislative services shall notify the agency of any potential bases for committee objection identified by the office of legislative services by forwarding a copy of the final proposal with the counsel's comments noted thereon ~~[at least 14 days prior to the committee meeting at which the proposal will be considered].~~

(b) In response to the comments, ***or for other reasons in lieu of requesting a preliminary objection***, an agency may then file a ~~[proposed amended final proposal]~~ ***request for conditional approval*** with the director for review by the committee and request that the committee ***conditionally*** approve the rule ~~[as amended]~~ ***with an amendment***. Both the request and the amendment shall be in writing and shall be filed at least 7 days prior to the regularly scheduled meeting or special meeting for which the final proposal has been placed on the agenda. ***An agency may request a waiver pursuant to RSA 541-A:40, IV of the 7-day deadline for good cause as established in the drafting and procedure manual under RSA 541-A:8, but the committee may for compelling reasons under the committee's rules pursuant to RSA 541-A:2, II accept a request for a conditional approval in the meeting under paragraph V.***

(c) The committee may:

- (1) Approve the rule as originally filed; ***or***
- (2) ~~[Approve the rule with amendment; or~~
- ~~(3)]~~ Act under paragraph V.

(d) If the committee approves the rule as filed pursuant to RSA 541-A:12, ~~[or with amendment,]~~ it shall notify the agency in writing of its approval.

(e) Failure to give notice of either approval, conditional approval, or objection at the end of the ~~[45-day or]~~ 60-day period under paragraph I shall be deemed approval.

III. If the rule is approved under subparagraph II(c) or (e), the agency may adopt the rule.

IV. The committee may object to a proposed rule if the rule is:

- (a) Beyond the authority of the agency;
- (b) Contrary to the intent of the legislature;
- (c) Determined not to be in the public interest; or
- (d) Deemed by the committee to have a substantial economic impact not recognized in the fiscal impact statement.

V. The following procedures shall govern committee objections ***and conditional approvals***:

(a) If the committee objects to the final proposal as filed ~~[or as amended pursuant to paragraph II]~~, it shall so inform the agency. In lieu of a preliminary objection, ***and with or without a written request under subparagraph II(a) [sic]***, the committee may vote to conditionally approve the rule with an amendment, provided that the committee specifies 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 30 days of the meeting, or in the case of a board or commission, 7 days following its next 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 office of legislative services determines that the agency has amended the rule in accordance with the conditional approval and this paragraph, the office of legislative services shall promptly send written confirmation of compliance to the agency. The agency may then adopt the rule as amended.

NOTE:

Section 74 did 3 things: (1) extended the JLCAR’s review period for a final proposal from 45 days to 60 days after the agency files with OLS; (2) removed the references to an amended final proposal and replaced it with an explicit option for an agency to request a conditional approval as is commonly done now, but with a deadline which may be waived, while JLCAR retained the option to conditionally approve even if the deadline is exceeded or there is no request; and (3) clarified in RSA 541-A:13, I what is meant that objections “may be made only once.”

Section 74 should lessen the need for a JLCAR waiver of its final proposal review deadline. Together with Section 73, it should also give JLCAR staff more time to review, and agencies more time to file, conditional approval requests.

Section 75

“OFFICIAL VERSION” OF AN ADOPTED RULE MAY BE ELECTRONIC

37:75 Publication of Rules. Amends RSA 541-A:15, I 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 be the official version of the rule, 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. The certified version shall 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.

NOTE:

Section 75 allowed an electronic copy of a rule, whether as-filed or as-certified, to be the official version of a rule, provided that it complies with the *Manual*. For example, a Word or PDF document could be considered the “official version”, not only an 8 ½ x 11-inch paper copy as is currently the case under the *Manual*. An agency’s obligation to publish a rule could be satisfied with electronic publishing if that complies with the *Manual*.

Section 76

PROPOSED INTERIM RULE FILING DEADLINE TO IMPLEMENT NEW LAWS EXTENDED FROM 120 DAYS TO 180 DAYS AFTER EFFECTIVE DATE OF THE NEW LAW

37:76 Interim Rules. Amends RSA 541-A:19, I(a) to read as follows:

I.(a) Conform with a new or amended codified state statute or chaptered session law, provided, however, that an agency shall not publish notice of a proposed interim rule more than ~~[120]~~ **180** days after the effective date of the new or amended codified state statute or chaptered session law;

NOTE:

Section 76 extended the amount of time for an agency to file a proposed interim rule that is designed to implement a new or amended statute or new session law, from 120 days after the effective date of the new statute or session law to 180 days after the effective date. As a result, the need for a waiver should be lessened, while also expanding the opportunity for an agency to have an interim rule in effect while regular rulemaking is underway.

Section 77

DEADLINE TO FILE A PROPOSED INTERIM RULE FOR JLCAR AGENDA MOVED BACK FROM 14 DAYS TO 21 DAYS BEFORE THE REGULAR MEETING; NOTICE PUBLICATION DEADLINE MOVED BACK FROM 7 DAYS TO 14 DAYS BEFORE THE MEETING; OPTION OF FILING AN AMENDED PROPOSED INTERIM RULE IS REPLACED BY A CONDITIONAL APPROVAL REQUEST PROCESS

37:77 Interim Rules. Amends RSA 541-A:19, V-VIII to read as follows:

V. A proposed interim rule filed under paragraph II no less than ~~[14]~~ **21** days before a regularly scheduled committee meeting shall be placed on the committee's agenda for review for that meeting. Publication of notice shall occur no less than ~~[7]~~ **14** days before a regularly scheduled meeting. If the agency has published notice in a newspaper, pursuant to subparagraph II(a), the agency shall file a copy of the notice as it was published no later than 3 days after the date of publication. Proposed interim rules filed less than ~~[14]~~ **21** days before a regularly scheduled committee meeting shall be placed on the agenda for review at the following regularly scheduled committee meeting or at a special meeting, as determined by the committee.

VI. The committee shall vote to approve *or conditionally approve* the rule or object under paragraph VII. Objections to a proposed interim rule may be made only once.

VII. The committee may object to a proposed interim rule if the rule is:

- (a) Beyond the authority of the agency;
- (b) Contrary to the intent of the legislature;
- (c) Determined not to be in the public interest; or
- (d) Deemed by the committee not to meet the requirements of paragraph I.

VIII. The following procedures shall govern committee review of interim rules:

(a) The director of legislative services shall notify the agency of any potential bases for committee objection by forwarding a copy of the proposed interim rule with comments noted thereon to the agency at least 7 days prior to the committee meeting at which the rule will be considered. Following receipt of the comments an agency may ~~[amend]~~ **file a request for conditional approval of its interim rule with an amendment** to address the noted potential bases for objection, **or for other reasons in lieu of requesting an objection. Both the request for conditional approval and the amendment shall be in writing and shall be filed at least 3 days prior to the meeting for which the proposed interim rule has been placed on the agenda. An agency may request a waiver pursuant to RSA 541-A:40, IV of the 3-day deadline for good cause as established in the drafting and procedure manual under RSA 541-A:8, but the**

committee may for compelling reasons under the committee's rules pursuant RSA 541-A:2, II accept a request for a conditional approval in the meeting. [~~The agency may present the amended proposal to the committee for approval at the committee meeting.~~] The committee may approve the rule as originally proposed or [~~as amended~~] ***conditionally approve the rule under subparagraph (b).***

(b) If the committee objects to the proposed interim rule as filed [~~or as amended~~], 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, 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.

(c) If the committee objects to the proposed interim rule as filed [~~or as amended~~] pursuant to subparagraph VIII(a), the committee shall send the agency a written objection stating the basis for the objection. An objection or a conditional approval shall require the assent of a majority of the votes cast, a quorum being present.

(d) If the committee makes an objection to the proposed interim rule pursuant to subparagraph VIII(c), the agency may cure the defect or withdraw the interim rule. The agency shall respond to a committee objection only once, and shall report its response in writing to the committee prior to its next regularly scheduled meeting. Failure to respond to the committee in accordance with this subparagraph shall mean the rulemaking procedure for that proposed interim rule is invalid; however, the agency is not precluded from initiating the process over again for a similar rule, provided the conditions in paragraph I are met.

(e) The committee shall review the response and vote to approve the response or continue the objection.

(f) The committee's objection shall not preclude the agency from adopting the substance of an interim rule by meeting the requirements of RSA 541-A:3.

NOTE:

Section 77 generally amended RSA 541-A for proposed interim rules in a similar fashion as Sections 73 and 74 did for final proposals. Section 77 did 3 things: (1) changed the 14-day filing deadline to a 21-day filing deadline prior to a JLCAR meeting to conform with the similar amendment above to RSA 541-A:12, I; (2) changed the 7-day rulemaking notice period prior to the JLCAR regular meeting to 14 days; and (3) removed the option to file an amended, proposed interim rule in favor of a specific provision for requesting a conditional approval, with a deadline that may be waived, although the JLCAR may conditionally approve even if the deadline is exceeded or there is no request. In practice, the option to file an amended, proposed interim rule has been superseded by the option for an agency to request a conditional approval.

Section 78

REPEAL OF OUT-OF-DATE ELECTRONIC FILING PILOT PROGRAM

37:78. Repeal of Pilot Program. RSA 541-A:2, IV(g), relative to the pilot program for electronic filing, is repealed as follows:

IV. In addition to its ongoing review of proposed and adopted rules, the committee shall:

~~(g) Establish, in consultation with the director of the office of legislative services, a pilot program authorizing procedures for electronic filing by agencies. Notwithstanding RSA 541-A:1, VI, the committee shall permit electronic filing or submissions by selected agencies pursuant to criteria established in the pilot program.~~

NOTE:

Section 78 removed out-of-date language regarding the pilot program for electronic filing established by 2010, 123:3, effective June 9, 2010, that resulted in the Ipswitch® software filing system, which was discontinued in 2019.