



**STATE of NEW MEXICO**  
**OFFICE of the ATTORNEY GENERAL**  
**OPEN GOVERNMENT DIVISION**

**RECORD OF HEARING – January 19, 2018**  
**Proposed Default Procedural Rule for Rulemaking, 1.24.25 NMAC**

**INDEX**

<b><u>Exhibit No.</u></b>	<b><u>Description</u></b>	<b><u>Date</u></b>
<b>1</b>	Office of the Attorney General Open Government Division (OAG OGD) Proposed Default Procedural Rule for Rulemaking, 1.24.25 NMAC	10/30/17
<b>2</b>	OAG OGD Notice of Rulemaking: Sunshine Portal, New Mexico Register, Albuquerque Journal, Email Legislative Council Service, OAG Website and posted for public viewing at the OAG Albuquerque, Las Cruces, Santa Fe Offices	10/31/17
<b>2A</b>	OAG OGD Notice of Termination of Rulemaking and Notice of Rulemaking: Albuquerque Journal	12/4/17
<b>3</b>	OAG OGD Notice of Termination of Rulemaking and Notice of Rulemaking: New Mexico Register	12/14/17
<b>4</b>	OAG OGD Notice of Termination of Rulemaking and Notice of Rulemaking: Sunshine Portal	12/4/17
<b>5</b>	OAG OGD Notice of Termination of Rulemaking and Notice of Rulemaking: OAG Website	12/4/17
<b>6</b>	OAG OGD Notice of Termination of Rulemaking and Notice of Rulemaking: Posted for public viewing at the OAG Albuquerque, Las Cruces, Santa Fe Offices	12/4/17
<b>7</b>	OAG OGD Notice of Termination of Rulemaking and Notice of Rulemaking: Email to Legislative Council Service	12/4/17
<b>8</b>	Chris Mechels Public Comment	11/6/17
<b>9</b>	New Mexico Regulation and Licensing Department Public Comment Submitted by Sally Galanter, CID/ MHD Counsel	11/22/17
<b>10</b>	New Mexico Association of Commerce and Industry Public Comment Submitted by Jason Espinoza, President/CEO	11/29/17
<b>11</b>	New Mexico Educational Retirement Board Public Comment Submitted by Roderick Ventura, General Counsel	1/3/18
<b>12</b>	Chris Mechels Public Comment	1/15/18
<b>13</b>	Chris Mechels Public Comment	1/16/18
<b>14</b>	New Mexico Center on Law and Poverty Public Comment Submitted by Lindsay Cutler, Staff Attorney	1/18/18
<b>15</b>	New Mexico Association of Commerce and Industry Public Comment Submitted by Jason Espinoza, President/CEO	1/18/18
<b>16</b>	Energy, Minerals and Natural Resources Department Public Comment	1/18/18
<b>17</b>	OAG OGD Public Comment Sign-in Sheet	1/19/18
<b>18</b>	Egolf, Ferlic, Harwood Attorneys at Law Public Comment Submitted by Kate Ferlic, Esq.	1/19/18

**TITLE 1            GENERAL GOVERNMENT ADMINISTRATION**  
**CHAPTER 24      RULES**  
**PART 25            DEFAULT PROCEDURAL RULE FOR RULEMAKING**

**1.24.25.1            ISSUING AGENCY:** New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501.  
[1.24.25.1 NMAC - N, 01/01/2018]

**1.24.25.2            SCOPE:** State agencies that have not adopted their own procedural rules consistent with the State Rules Act and agencies that have expressly incorporated this rule by reference.  
[1.24.25.2 NMAC - N, 01/01/2018]

**1.24.25.3            STATUTORY AUTHORITY:** Section 14-4-5.8 NMSA 1978.  
[1.24.25.3 NMAC - N, 01/01/2018]

**1.24.25.4            DURATION:** Permanent.  
[1.24.25.4 NMAC - N, 01/01/2018]

**1.24.25.5            EFFECTIVE DATE:** January 1, 2018 unless a later date is cited at the end of a section.  
[1.24.25.5 NMAC - N, 01/01/2018]

**1.24.25.6            OBJECTIVE:** To provide default procedural rules for rulemaking and public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act, and to facilitate public engagement with the administrative rulemaking process in a transparent, organized, and fair manner.  
[1.24.25.6 NMAC - N, 01/01/2018]

**1.24.25.7            DEFINITIONS:** This rule adopts the definitions found in Section 14-4-2 NMSA 1978.  
[1.24.25.7 NMAC - N, 01/01/2018]

**1.24.25.8            AGENCY ADOPTION OF PROCEDURAL RULES:**  
**A.** Agencies that have not adopted their own procedural rules consistent with the State Rules Act shall apply these default rules, until such time as they have adopted their own rules.  
**B.** Agencies may adopt these default rules, in whole or in part as their own, or continue to use their existing rules, so long as those rules satisfy the requirements of the State Rules Act.  
**C.** Agencies that adopt their own rules must submit a copy to the office of the attorney general within 30 calendar days of adoption, and post a copy of those rules on the agency's website, if one is maintained by the agency.  
[1.24.25.15 NMAC - N, 01/01/2018]

**1.24.25.9            INITIATION OF THE RULEMAKING PROCESS; PETITIONS:**  
**A.** The rulemaking process for purposes of this rule may be initiated by either of the following:  
**(1)** when a notice for a rule hearing is publicly posted pursuant to this rule; or  
**(2)** if authorized by law or practice of the agency, a petition for rulemaking is filed with the agency.  
**B.** A petition for rulemaking may be filed by the agency or, if authorized by law of the agency, by a third party outside of the agency. This rule does not require an agency to accept third party petitions for rule making.  
**C.** A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.  
**D.** If a petition is initiated internally, the agency shall consider whether to grant the petition and proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing.  
**E.** If a petition is filed by a third party, and such practice is authorized by the agency, the agency shall, within 120 calendar days of receipt, consider the petition and make a determination whether to grant or deny



the petition. The agency's decision to deny the petition is not subject to judicial review unless otherwise provided by law.

**F.** If the agency is a public body subject to the Open Meetings Act, the decision to grant a petition, or the decision to initiate the rulemaking process by posting a notice for rule hearing, must be an action taken by vote of the public body in open session.

**G.** Once the agency initiates the rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.

[1.24.25.8 NMAC - N, 01/01/2018]

#### **1.24.25.10 RULEMAKING NOTICE:**

**A.** The agency shall provide to the public notice of the proposed rulemaking at least 30 calendar days before a public hearing by:

- (1) posting it on the agency website, if one is maintained by the agency;
- (2) posting it on the sunshine portal;
- (3) making it available by posting it in a publicly visible location in the agency's district, field and regional offices, if any;
- (4) sending it by electronic mail to persons who have made a request for notice from the agency of rulemaking proceedings and who have provided an electronic mail address to the agency;
- (5) sending it by electronic mail to persons who have participated in the rulemaking, by petition or other act, and who have provided an electronic mail address to the agency;
- (6) sending it by mail to persons who have made a written request for mailed notice from the agency of rulemaking proceedings and who have provided a postal address to the agency;
- (7) providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees; and
- (8) publish the notice in the New Mexico Register and in a newspaper of general circulation in the state.

**B.** The notice shall include:

- (1) a concise summary of the full text of the proposed rule;
- (2) a short explanation of the purpose of the proposed rule;
- (3) a citation to the specific legal authority authorizing the adoption of the proposed rule;
- (4) information on how and where a copy of the full text of the proposed rule may be obtained;
- (5) an internet link or web address providing free access to the full text of the proposed rule;
- (6) information on how a person may comment on the proposed rule, where written comments will be received, and when comments are due;
- (7) information on where and when a public rule hearing will be held and how a person may participate in the hearing and provide public comment; and
- (8) a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.

**C.** If the agency changes the date of the public rule hearing or shortens the deadline for submitting comments as stated in the notice, the agency shall provide notice to the public of the change as provided above. [1.24.25.9 NMAC - N, 01/01/2018]

#### **1.24.25.11 WRITTEN COMMENT PERIOD:**

**A.** The public comment period must be at least 30 calendar days and shall commence upon publication of the rulemaking notice in the New Mexico register, unless a later date is specified in the notice. The agency shall not adopt a proposed rule or hold a rulemaking hearing before the end of the public comment period.

**B.** A person may submit, by mail or electronic form, written comments on a proposed rule, and those comments shall be made part of the record. Written comments may be submitted through the end of the public comment period.

**C.** The agency may decide before, during, or after the public rule hearing to extend the comment period by providing public notice, to include:

- (1) posting it on the agency website, if one is maintained by the agency;
- (2) making it available by posting notice in a publicly visible location in the agency's district, field and region offices, if any;

(3) sending notice by electronic mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceedings and provided an electronic mail address to the agency; and

(4) sending notice by regular mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceeding and provided a postal address and specifically requested notice by regular mail;

D. The agency shall post all written comments on its website, if one is maintained by the agency, as soon as practicable upon receipt, but no less than 7 calendar days prior to the rule hearing to allow for public review. All written comments received by the agency shall be available for public inspection.

[1.24.25.10 NMAC - N, 01/01/2018]

#### **1.24.25.12 PUBLIC HEARING:**

A. Prior to adopting a proposed rule, the agency must hold a public rule hearing. The purpose of the hearing is to provide all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule. The agency, at its sole discretion, may determine whether more than one hearing is necessary.

B. The agency may act as the hearing officer or designate a representative or hearing officer to preside over the public rule hearing. The agency representative or hearing officer may ask questions and provide comments for clarification purposes only, and should refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented.

C. At the start of the hearing, any pre-filed exhibits should be introduced and admitted into the rulemaking record. Pre-filed exhibits should include the petition, if filed; copies of the public notices of the rulemaking, including any lists of individuals to whom notice was mailed or sent electronically; copies of the proposed rule in underline and strikethrough format; and copies of any written comment submitted during the comment period prior to the rule hearing. The agency representative or hearing officer will allow the petitioner or agency representative an opportunity to present the petition, if applicable. Any written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.

D. Individuals wishing to provide public comment or submit information at the rule hearing must state their name and any relevant affiliation for the record and be recognized before presenting by the agency representative or hearing officer. Public comment shall not be taken under oath unless required by separate rule of the agency. Any individual who provides information or public comment at the hearing may be questioned by the agency representative or hearing officer, or by other interested persons at the hearing.

E. The rule hearing shall be conducted in a fair and equitable manner. The agency representative or hearing officer may determine the format in which the hearing is conducted (e.g. introduction of each part or section one at a time for comment), but the hearing should be conducted in a simple and organized manner that facilitates public comment and a clear rulemaking record. The rules of evidence do not apply to public rule hearings and the agency representative or hearing officer may, in the interest of efficiency, exclude or limit comment that is deemed irrelevant, redundant, or unduly repetitious.

F. The agency must hold the hearing in a venue that reasonably accommodates all interested persons who wish to participate or observe, and appropriate audio equipment should be secured to ensure all in attendance can hear the proceeding and be heard when presenting comment. Reasonable efforts shall be made to accommodate the use of audio and video recording devices. Public rule hearings shall be open to the public, but are not subject to the New Mexico Open Meetings Act, Section 10-15-1 NMSA 1978, unless the hearing is conducted by a quorum of a public body.

[1.24.25.11 NMAC - N, 01/01/2018]

#### **1.24.25.13 RULEMAKING RECORD AND ADOPTION OF RULE**

A. The agency shall maintain a record of the rulemaking proceeding as required in Section 14-4-5.4 NMSA 1978, and any written comment, document, or other exhibit entered into the record during the rule hearing shall be labeled clearly.

B. If the rule hearing is conducted by an agency representative or hearing officer, the complete rulemaking record, including any memoranda summarizing the contents of the hearing, if written, shall be compiled and forwarded to the agency head or members of the board or commission with sufficient time to review. The agency head or members of the board or commission shall thoroughly familiarize themselves with the rulemaking record before rendering a decision on the proposed rule.

C. The agency may adopt, amend or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking. Amendments that exceed the scope of the noticed rulemaking may require a new rulemaking process with a rulemaking notice, comment period, and public rule hearing so that the public has an adequate opportunity to review and comment on the changes.

D. In instances where the agency is a board or commission, the consideration and adoption of the proposed rule shall occur during a public meeting. The adoption date of the proposed rule shall be the date of the public meeting at which the vote occurred, unless the board or commission directs that a written order be issued, in which case the adoption date shall be the date the written order is signed. The board or commission may provide reasoning for the adopted rule through comments or discussion during its meeting, or by providing a statement of reasons in a written order.

E. In instances where the agency is a department or any of its divisions, the adoption of the proposed rule shall occur through the issuance of a written order by the department head, which shall include a statement of reasons. The adoption date of the proposed rule shall be the date the written order is signed.

F. The agency shall provide a concise explanatory statement that contains the date of adoption; the specific legal authority authorizing the rule; and any findings required by law for adoption of the rule. The explanatory statement may be included in an order adopting the rule or provided separately. The explanatory statement shall be posted on the agency website, if one is maintained by the agency, and sent to any persons entitled to notice of the rulemaking within 15 calendar days after the date of adoption.

[1.24.25.12 NMAC - N, 01/01/2018]

**1.24.25.14 FILING AND PUBLICATION; EFFECTIVE DATE:**

A. Within 15 calendar days after the date of adoption of a rule, the agency shall file the adopted rule with the state records center and shall provide to the public the adopted rule. The agency shall post the adopted rule on its website, if one is maintained by the agency, and send the adopted rule to any persons entitled to notice of the rulemaking.

B. Unless provided for by law, no rule shall be valid or enforceable until it is filed with the state records center and published in the New Mexico register. Unless another date is provided in the written order, the effective date of the rule shall be the date of publication in the New Mexico register.

[1.24.25.13 NMAC - N, 01/01/2018]

**1.24.25.15 EMERGENCY RULES:**

A. The agency shall comply with the rulemaking procedures herein and the State Rules Act, unless the agency finds that the time required to complete the procedures would:

- (1) cause an imminent peril to the public health, safety or welfare;
- (2) cause the unanticipated loss of funding for the agency program; or
- (3) place the agency in violation of federal law.

B. The agency shall provide to the public a record of any finding pursuant to Subsection A of this Section and a detailed justification for that finding before issuing an emergency rule. The record shall include a statement that the emergency rule is temporary. After such record has been provided to the public, the agency may issue the emergency rule immediately without a public rule hearing or with any abbreviated notice and hearing that it finds practicable. If the agency is a board or commission, the adoption must occur during a public meeting pursuant to the requirements of the Open Meetings Act.

C. The emergency rule shall be published with the New Mexico register within 30 calendar days of the rule becoming effective.

D. When the agency makes a finding pursuant to Subsection A of this Section, the agency shall follow the provisions of this section in addition to any more specific requirements in statute that pertain to the agency regarding promulgating emergency or interim rules.

E. Emergency rules may take effect immediately upon filing with the state records administrator or the administrator's designee or at a later date specified in the emergency rule. Emergency rules shall be published in the New Mexico register.

F. No emergency rule shall permanently amend or repeal an existing rule. An emergency rule shall remain in effect until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted within 180 calendar days from the effective date of the emergency rule, the emergency rule shall expire and may not be readopted as an emergency rule. If an expired emergency rule temporarily amended or repealed an existing rule, the rule shall revert to what it would have been had the emergency rule not been issued. [1.24.25.14 NMAC - N, 01/01/2018]

**HISTORY OF 1.24.25 NMAC: [RESERVED]**

## NOTICE OF RULEMAKING<sup>1</sup>

The Office of the Attorney General is proposing to adopt a new rule, 1.24.25 NMAC, Default Procedural Rule for Rulemaking, in accordance with Section 14-4-5.8 NMSA 1978 of the State Rules Act, that directs the Attorney General to adopt default procedural rules for public rules hearings for use by agencies that have not adopted their own procedural rules. The proposed rule is intended to comport with House Bill 58 (Laws 2017, Chapter 137), and addresses the initiation of and public participation in the rulemaking process, as well as the conduct and record of the public hearing. Copies of the new rule (printed below) are available at the New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501 and on the website at, <http://www.nmag.gov/>.

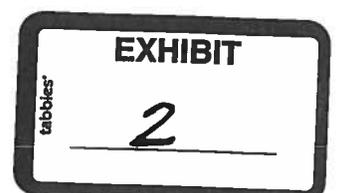
The Open Government Division of the Office of the Attorney General currently is accepting public comment on the proposed new rule. Please submit written comments on the proposed changes to Renee K. Romero via email at [romero@nmag.gov](mailto:romero@nmag.gov) or regular mail at P. O. Drawer 1508, Santa Fe, NM 87504-1508 by November 30, 2017.

The Office of the Attorney General will hear public comment and consider adoption of the proposed new rule at a rule hearing on Monday, December 4, 2017, at 9:30 a. m., Toney Anaya Building, Rio Grande Conference Room, 2<sup>nd</sup> Floor, 2550 Cerrillos Road, Santa Fe, New Mexico.

If you are an individual with a disability who is in need of reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact: Renee K. Romero at [romero@nmag.gov](mailto:romero@nmag.gov) or 505-490-4861.

---

<sup>1</sup> Previously posted October 31, 2017 on Sunshine Portal, Public Notices: <http://www.publicnoticeads.com/NM/>;  
[http://www.publicnoticeads.com/NM/search/results.asp?T=PN&CurrentPage=5](http://www.publicnoticeads.com/NM/search/results.asp?T=PN&CurrentPage=5;);  
[http://www.publicnoticeads.com/NM/search/view.asp?T=PN&id=3099/10312017\\_24417620.htm](http://www.publicnoticeads.com/NM/search/view.asp?T=PN&id=3099/10312017_24417620.htm)



**New Mexico Register / Volume XXVIII, Issue 20 / October 31, 2017****NOTICE OF RULEMAKING**

The Office of the Attorney General is proposing to adopt a new rule, 1.24.25 NMAC, Default Procedural Rule for Rulemaking, in accordance with Section 14-4-5.8 NMSA 1978 of the State Rules Act, that directs the Attorney General to adopt default procedural rules for public rules hearings for use by agencies that have not adopted their own procedural rules. The proposed rule is intended to comport with House Bill 58 (Laws 2017, Chapter 137), and addresses the initiation of and public participation in the rulemaking process, as well as the conduct and record of the public hearing. Copies of the new rule are available at the New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501 and on the website at, <http://www.nmag.gov/>.

The Open Government Division of the Office of the Attorney General currently is accepting public comment on the proposed new rule. Please submit written comments on the proposed changes to Renee K. Romero via email at [rromero@nmag.gov](mailto:rromero@nmag.gov) or regular mail at P. O. Drawer 1508, Santa Fe, NM 87504-1508 by November 30, 2017.

The Office of the Attorney General will hear public comment and consider adoption of the proposed new rule at a rule hearing on Monday, December 4, 2017, at 9:30 a. m., Toney Anaya Building, Rio Grande Conference Room, 2<sup>nd</sup> Floor, 2550 Cerrillos Road, Santa Fe, New Mexico.

If you are an individual with a disability who is in need of reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact: Renee K. Romero at [rromero@nmag.gov](mailto:rromero@nmag.gov) or 505-490-4861.



# Albuquerque Journal

**Published in the Albuquerque Journal on Tuesday October 31, 2017**

**NOTICE OF RULEMAKING** The Office of the Attorney General is proposing to adopt a new rule, 1.24.25 NMAC, Procedural Rule for Public Rule Hearings, in accordance with Section 14-4-5.8 NMSA 1978 of the State Rules Act, that directs the Attorney General to adopt default procedural rules for public rules hearings for use by agencies that have not adopted their own procedural rules. The proposed rule is intended to comport with House Bill 58 (Laws 2017, Chapter 137), and addresses the initiation of and public participation in the rulemaking process, as well as the conduct and record of the public hearing. Copies of the new rule are available at the New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501 and on the website at <http://www.nmag.gov/> The Open Government Division of the Office of the Attorney General currently is accepting public comment on the proposed new rule. Please submit written comments on the proposed changes to Renee K. Romero via email at [rromero@nmag.gov](mailto:rromero@nmag.gov) or regular mail at P. O. Drawer 1508, Santa Fe, NM 87504-1508 by November 30, 2017. The Office of the Attorney General will hear public comment and consider adoption of the proposed new rule at a rule hearing on Monday, December 4, 2017, at 9:30 a. m., Toney Anaya Building, Rio Grande Conference Room, 2nd Floor, 2550 Cerrillos Road, Santa Fe, New Mexico. If you are an individual with a disability who is in need of reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact: Renee K. Romero at [rromero@nmag.gov](mailto:rromero@nmag.gov) or 505-490-4861. Journal: October 31, 2017

TO: LCS@NMLEGIS.GOV 10.31.17

**Romero, Renee** <rromero@nmag.gov>

In accordance with the State Rules Act, effective July 1, 2017, attached please find the notice for the Office of the Attorney General proposed new rule, 1.24.25 NMAC - Default Procedural Rule for Rulemaking.

Thank you,

*Renee K. Romero, Legal Assistant  
Office of the Attorney General  
Open Government Division  
408 Galisteo Street  
Santa Fe, NM 87501  
505-490-4861*

Attachments area

Preview attachment OAG Notice of Proposed Rule.pdf



OAG Notice of Proposed Rule.pdf

[Reply](#) [Forward](#)

**Yaeger, John** <John.Yaeger@nmlegis.gov>

to  
me

Received, thanks.



STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL

## Protecting Families



ATTORNEY GENERAL

**HECTOR  
BALDERAS**

Fighting the Opioid Crisis in New Mexico

Equifax Data Breach Consumer Information

House Bill 58 - Proposed Default Procedural Rule for Rulemaking

**TITLE 1            GENERAL GOVERNMENT ADMINISTRATION**  
**CHAPTER 24        RULES**  
**PART 25            DEFAULT PROCEDURAL RULE FOR RULEMAKING**

**1.24.25.1            ISSUING AGENCY:** New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501.  
[1.24.25.1 NMAC - N, 01/01/2018]

**1.24.25.2            SCOPE:** State agencies that have not adopted their own procedural rules consistent with the State Rules Act and agencies that have expressly incorporated this rule by reference.  
[1.24.25.2 NMAC - N, 01/01/2018]

**1.24.25.3            STATUTORY AUTHORITY:** Section 14-4-5.8 NMSA 1978.  
[1.24.25.3 NMAC - N, 01/01/2018]

**1.24.25.4            DURATION:** Permanent.  
[1.24.25.4 NMAC - N, 01/01/2018]

**1.24.25.5            EFFECTIVE DATE:** January 1, 2018 unless a later date is cited at the end of a section.  
[1.24.25.5 NMAC - N, 01/01/2018]

**1.24.25.6            OBJECTIVE:** To provide default procedural rules for rulemaking and public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act, and to facilitate public engagement with the administrative rulemaking process in a transparent, organized, and fair manner.  
[1.24.25.6 NMAC - N, 01/01/2018]

**1.24.25.7            DEFINITIONS:** This rule adopts the definitions found in Section 14-4-2 NMSA 1978.  
[1.24.25.7 NMAC - N, 01/01/2018]

**1.24.25.8            AGENCY ADOPTION OF PROCEDURAL RULES:**

- A.** Agencies that have not adopted their own procedural rules consistent with the State Rules Act shall apply these default rules, until such time as they have adopted their own rules.
  - B.** Agencies may adopt these default rules, in whole or in part as their own, or continue to use their existing rules, so long as those rules satisfy the requirements of the State Rules Act.
  - C.** Agencies that adopt their own rules must submit a copy to the office of the attorney general within 30 calendar days of adoption, and post a copy of those rules on the agency's website, if one is maintained by the agency.
- [1.24.25.15 NMAC - N, 01/01/2018]

**1.24.25.9            INITIATION OF THE RULEMAKING PROCESS; PETITIONS:**

- A.** The rulemaking process for purposes of this rule may be initiated by either of the following:
  - (1) when a notice for a rule hearing is publicly posted pursuant to this rule; or
  - (2) if authorized by law or practice of the agency, a petition for rulemaking is filed with the agency.
- B.** A petition for rulemaking may be filed by the agency or, if authorized by law of the agency, by a third party outside of the agency. This rule does not require an agency to accept third party petitions for rule making.
- C.** A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.
- D.** If a petition is initiated internally, the agency shall consider whether to grant the petition and proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing.
- E.** If a petition is filed by a third party, and such practice is authorized by the agency, the agency shall, within 120 calendar days of receipt, consider the petition and make a determination whether to grant or deny

the petition. The agency's decision to deny the petition is not subject to judicial review unless otherwise provided by law.

F. If the agency is a public body subject to the Open Meetings Act, the decision to grant a petition, or the decision to initiate the rulemaking process by posting a notice for rule hearing, must be an action taken by vote of the public body in open session.

G. Once the agency initiates the rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.

[1.24.25.8 NMAC - N, 01/01/2018]

#### **1.24.25.10 RULEMAKING NOTICE:**

A. The agency shall provide to the public notice of the proposed rulemaking at least 30 calendar days before a public hearing by:

- (1) posting it on the agency website, if one is maintained by the agency;
- (2) posting it on the sunshine portal;
- (3) making it available by posting it in a publicly visible location in the agency's district, field and regional offices, if any;
- (4) sending it by electronic mail to persons who have made a request for notice from the agency of rulemaking proceedings and who have provided an electronic mail address to the agency;
- (5) sending it by electronic mail to persons who have participated in the rulemaking, by petition or other act, and who have provided an electronic mail address to the agency;
- (6) sending it by mail to persons who have made a written request for mailed notice from the agency of rulemaking proceedings and who have provided a postal address to the agency;
- (7) providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees; and
- (8) publish the notice in the New Mexico Register and in a newspaper of general circulation in the state.

B. The notice shall include:

- (1) a concise summary of the full text of the proposed rule;
- (2) a short explanation of the purpose of the proposed rule;
- (3) a citation to the specific legal authority authorizing the adoption of the proposed rule;
- (4) information on how and where a copy of the full text of the proposed rule may be obtained;
- (5) an internet link or web address providing free access to the full text of the proposed rule;
- (6) information on how a person may comment on the proposed rule, where written comments will be received, and when comments are due;
- (7) information on where and when a public rule hearing will be held and how a person may participate in the hearing and provide public comment; and
- (8) a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.

C. If the agency changes the date of the public rule hearing or shortens the deadline for submitting comments as stated in the notice, the agency shall provide notice to the public of the change as provided above. [1.24.25.9 NMAC - N, 01/01/2018]

#### **1.24.25.11 WRITTEN COMMENT PERIOD:**

A. The public comment period must be at least 30 calendar days and shall commence upon publication of the rulemaking notice in the New Mexico register, unless a later date is specified in the notice. The agency shall not adopt a proposed rule or hold a rulemaking hearing before the end of the public comment period.

B. A person may submit, by mail or electronic form, written comments on a proposed rule, and those comments shall be made part of the record. Written comments may be submitted through the end of the public comment period.

C. The agency may decide before, during, or after the public rule hearing to extend the comment period by providing public notice, to include:

- (1) posting it on the agency website, if one is maintained by the agency;
- (2) making it available by posting notice in a publicly visible location in the agency's district, field and region offices, if any;

(3) sending notice by electronic mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceedings and provided an electronic mail address to the agency; and

(4) sending notice by regular mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceeding and provided a postal address and specifically requested notice by regular mail;

D. The agency shall post all written comments on its website, if one is maintained by the agency, as soon as practicable upon receipt, but no less than 7 calendar days prior to the rule hearing to allow for public review. All written comments received by the agency shall be available for public inspection.  
[1.24.25.10 NMAC - N, 01/01/2018]

#### **1.24.25.12 PUBLIC HEARING:**

A. Prior to adopting a proposed rule, the agency must hold a public rule hearing. The purpose of the hearing is to provide all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule. The agency, at its sole discretion, may determine whether more than one hearing is necessary.

B. The agency may act as the hearing officer or designate a representative or hearing officer to preside over the public rule hearing. The agency representative or hearing officer may ask questions and provide comments for clarification purposes only, and should refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented.

C. At the start of the hearing, any pre-filed exhibits should be introduced and admitted into the rulemaking record. Pre-filed exhibits should include the petition, if filed; copies of the public notices of the rulemaking, including any lists of individuals to whom notice was mailed or sent electronically; copies of the proposed rule in underline and strikethrough format; and copies of any written comment submitted during the comment period prior to the rule hearing. The agency representative or hearing officer will allow the petitioner or agency representative an opportunity to present the petition, if applicable. Any written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.

D. Individuals wishing to provide public comment or submit information at the rule hearing must state their name and any relevant affiliation for the record and be recognized before presenting by the agency representative or hearing officer. Public comment shall not be taken under oath unless required by separate rule of the agency. Any individual who provides information or public comment at the hearing may be questioned by the agency representative or hearing officer, or by other interested persons at the hearing.

E. The rule hearing shall be conducted in a fair and equitable manner. The agency representative or hearing officer may determine the format in which the hearing is conducted (e.g. introduction of each part or section one at a time for comment), but the hearing should be conducted in a simple and organized manner that facilitates public comment and a clear rulemaking record. The rules of evidence do not apply to public rule hearings and the agency representative or hearing officer may, in the interest of efficiency, exclude or limit comment that is deemed irrelevant, redundant, or unduly repetitious.

F. The agency must hold the hearing in a venue that reasonably accommodates all interested persons who wish to participate or observe, and appropriate audio equipment should be secured to ensure all in attendance can hear the proceeding and be heard when presenting comment. Reasonable efforts shall be made to accommodate the use of audio and video recording devices. Public rule hearings shall be open to the public, but are not subject to the New Mexico Open Meetings Act, Section 10-15-1 NMSA 1978, unless the hearing is conducted by a quorum of a public body.

[1.24.25.11 NMAC - N, 01/01/2018]

#### **1.24.25.13 RULEMAKING RECORD AND ADOPTION OF RULE**

A. The agency shall maintain a record of the rulemaking proceeding as required in Section 14-4-5.4 NMSA 1978, and any written comment, document, or other exhibit entered into the record during the rule hearing shall be labeled clearly.

B. If the rule hearing is conducted by an agency representative or hearing officer, the complete rulemaking record, including any memoranda summarizing the contents of the hearing, if written, shall be compiled and forwarded to the agency head or members of the board or commission with sufficient time to review. The agency head or members of the board or commission shall thoroughly familiarize themselves with the rulemaking record before rendering a decision on the proposed rule.

C. The agency may adopt, amend or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking. Amendments that exceed the scope of the noticed rulemaking may require a new rulemaking process with a rulemaking notice, comment period, and public rule hearing so that the public has an adequate opportunity to review and comment on the changes.

D. In instances where the agency is a board or commission, the consideration and adoption of the proposed rule shall occur during a public meeting. The adoption date of the proposed rule shall be the date of the public meeting at which the vote occurred, unless the board or commission directs that a written order be issued, in which case the adoption date shall be the date the written order is signed. The board or commission may provide reasoning for the adopted rule through comments or discussion during its meeting, or by providing a statement of reasons in a written order.

E. In instances where the agency is a department or any of its divisions, the adoption of the proposed rule shall occur through the issuance of a written order by the department head, which shall include a statement of reasons. The adoption date of the proposed rule shall be the date the written order is signed.

F. The agency shall provide a concise explanatory statement that contains the date of adoption; the specific legal authority authorizing the rule; and any findings required by law for adoption of the rule. The explanatory statement may be included in an order adopting the rule or provided separately. The explanatory statement shall be posted on the agency website, if one is maintained by the agency, and sent to any persons entitled to notice of the rulemaking within 15 calendar days after the date of adoption.

[1.24.25.12 NMAC - N, 01/01/2018]

#### **1.24.25.14 FILING AND PUBLICATION; EFFECTIVE DATE:**

A. Within 15 calendar days after the date of adoption of a rule, the agency shall file the adopted rule with the state records center and shall provide to the public the adopted rule. The agency shall post the adopted rule on its website, if one is maintained by the agency, and send the adopted rule to any persons entitled to notice of the rulemaking.

B. Unless provided for by law, no rule shall be valid or enforceable until it is filed with the state records center and published in the New Mexico register. Unless another date is provided in the written order, the effective date of the rule shall be the date of publication in the New Mexico register.

[1.24.25.13 NMAC - N, 01/01/2018]

#### **1.24.25.15 EMERGENCY RULES:**

A. The agency shall comply with the rulemaking procedures herein and the State Rules Act, unless the agency finds that the time required to complete the procedures would:

- (1) cause an imminent peril to the public health, safety or welfare;
- (2) cause the unanticipated loss of funding for the agency program; or
- (3) place the agency in violation of federal law.

B. The agency shall provide to the public a record of any finding pursuant to Subsection A of this Section and a detailed justification for that finding before issuing an emergency rule. The record shall include a statement that the emergency rule is temporary. After such record has been provided to the public, the agency may issue the emergency rule immediately without a public rule hearing or with any abbreviated notice and hearing that it finds practicable. If the agency is a board or commission, the adoption must occur during a public meeting pursuant to the requirements of the Open Meetings Act.

C. The emergency rule shall be published with the New Mexico register within 30 calendar days of the rule becoming effective.

D. When the agency makes a finding pursuant to Subsection A of this Section, the agency shall follow the provisions of this section in addition to any more specific requirements in statute that pertain to the agency regarding promulgating emergency or interim rules.

E. Emergency rules may take effect immediately upon filing with the state records administrator or the administrator's designee or at a later date specified in the emergency rule. Emergency rules shall be published in the New Mexico register.

F. No emergency rule shall permanently amend or repeal an existing rule. An emergency rule shall remain in effect until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted within 180 calendar days from the effective date of the emergency rule, the emergency rule shall expire and may not be readopted as an emergency rule. If an expired emergency rule temporarily amended or repealed an existing rule, the rule shall revert to what it would have been had the emergency rule not been issued. [1.24.25.14 NMAC - N, 01/01/2018]

**HISTORY OF 1.24.25 NMAC: [RESERVED]**

## **NOTICE OF RULEMAKING**

The Office of the Attorney General is proposing to adopt a new rule,

### **1.24.25 NMAC, Default Procedural Rule for Rulemaking,**

in accordance with Section 14-4-5.8 NMSA 1978 of the State Rules Act, that directs the Attorney General to adopt default procedural rules for public rules hearings for use by agencies that have not adopted their own procedural rules. The proposed rule is intended to comport with House Bill 58 (Laws 2017, Chapter 137), and addresses the initiation of and public participation in the rulemaking process, as well as the conduct and record of the public hearing. Copies of the new rule are available on the website at, <http://www.nmag.gov/> and at the New Mexico Offices of the Attorney General:

408 Galisteo Street, Santa Fe, NM 87501  
201 3<sup>rd</sup> Street, N.W., Suite 300, Albuquerque, NM 87103  
201 N. Church Street, Suite 315, Las Cruces, NM 88001

The Open Government Division of the Office of the Attorney General currently is accepting public comment on the proposed new rule. **Please submit written comments on the proposed changes to Renee K. Romero via email at [rromero@nmag.gov](mailto:rromero@nmag.gov) or regular mail at P. O. Drawer 1508, Santa Fe, NM 87504-1508 by NOVEMBER 30, 2017.**

The Office of the Attorney General will hear public comment and consider adoption of the proposed new rule at a rule hearing on:

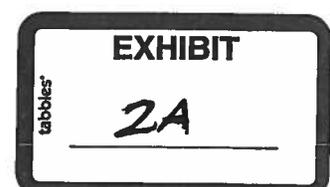
**MONDAY, DECEMBER 4, 2017 at 9:30 a. m.  
Toney Anaya Building, Rio Grande Conference Room, 2<sup>nd</sup> Floor  
2550 Cerrillos Road, Santa Fe, New Mexico.**

If you are an individual with a disability who is in need of reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact: Renee K. Romero at [rromero@nmag.gov](mailto:rromero@nmag.gov) or 505-490-4861.

# Albuquerque Journal

**Published in the Albuquerque Journal on Monday December 04, 2017**

**NOTICE OF TERMINATION OF RULEMAKING** The New Mexico Office of the Attorney General (OAG) is providing notice to terminate the public rule hearing scheduled on Monday, December 4, 2017 at 9:30 a.m., in accordance with Subsection C of Section 14-4-5 NMSA 1978. The proposed new rule, 1.24.25 NMAC is being terminated. **NOTICE OF RULEMAKING** The New Mexico Office of the Attorney General is proposing to adopt a new rule, 1.24.25 NMAC, Default Procedural Rule for Rulemaking, in accordance with Section 14-4-5.8 NMSA 1978 of the State Rules Act, that directs the Attorney General to adopt default procedural rules for public rules hearings for use by agencies that have not adopted their own procedural rules. The proposed rule is intended to comport with House Bill 58 (Laws 2017, Chapter 137), and addresses the initiation of and public participation in the rulemaking process, as well as the conduct and record of the public hearing. Copies of the new rule are available at the New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501 and on the website at <http://www.nmag.gov/> The Open Government Division of the Office of the Attorney General currently is accepting public comment on the proposed new rule. Please submit written comments on the proposed changes to P. O. Drawer 1508, Santa Fe, NM 87504-1508 or Renee K. Romero via email at [rromero@nmag.gov](mailto:rromero@nmag.gov) by January 18, 2018. The Office of the Attorney General will hear public comment and consider adoption of the proposed new rule at a rule hearing on Friday, January 19, 2018, at 9:00 a. m., Toney Anaya Building, Rio Grande Conference Room, 2nd Floor, 2550 Cerrillos Road, Santa Fe, New Mexico. If you are an individual with a disability who is in need of reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact: Renee K. Romero at [rromero@nmag.gov](mailto:rromero@nmag.gov) or 505-490-4861. Journal: December 4, 2017



New Mexico Register / Volume XXVIII, Issue 23 / December 12, 2017

**NOTICE OF RULEMAKING**

The New Mexico Office of the Attorney General is proposing to adopt a new rule, 1.24.25 NMAC, Default Procedural Rule for Rulemaking, in accordance with Section 14-4-5.8 NMSA 1978 of the State Rules Act, that directs the Attorney General to adopt default procedural rules for public rules hearings for use by agencies that have not adopted their own procedural rules. The proposed rule is intended to comport with House Bill 58 (Laws 2017, Chapter 137), and addresses the initiation of and public participation in the rulemaking process, as well as the conduct and record of the public hearing. Copies of the new rule are available at the New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501 and on the website at, <http://www.nmag.gov/>.

The Open Government Division of the Office of the Attorney General currently is accepting public comment on the proposed new rule. Please submit written comments on the proposed changes to P. O. Drawer 1508, Santa Fe, NM 87504-1508 or Renee K. Romero via email at [rromero@nmag.gov](mailto:rromero@nmag.gov) by January 18, 2018.

The Office of the Attorney General will hear public comment and consider adoption of the proposed new rule at a rule hearing on Friday, January 19, 2018, at 9:00 a. m., Toney Anaya Building, Rio Grande Conference Room, 2<sup>nd</sup> Floor, 2550 Cerrillos Road, Santa Fe, New Mexico.

If you are an individual with a disability who is in need of reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact: Renee K. Romero at [rromero@nmag.gov](mailto:rromero@nmag.gov) or 505-490-4861.



**New Mexico Register / Volume XXVIII, Issue 23 / December 12, 2017****NOTICE OF TERMINATION OF RULEMAKING**

The New Mexico Office of the Attorney General (OAG) is providing notice to terminate the public rule hearing scheduled on Monday, December 4, 2017 at 9:30 a.m., in accordance with Subsection C of Section 14-4-5 NMSA 1978. The proposed new rule, 1.24.25 NMAC is being terminated.



### What is the Sunshine Portal?

The Sunshine Portal is the official transparency and accountability portal for New Mexico state government. This is your window into government spending, budgets, revenues, employees, contracts and more. Come back often to see new reports, enhanced features, and fresh data!

### How do I use the Sunshine Portal?

To jump-start your search, click on any of the icons below, or use the menu at the top of the page.



### » About the Sunshine Portal:

The information presented on the transparency portal comes from numerous data sources, including the Statewide Human Resource, Accounting and Management Reporting (SHARE) system, the State Land Office, the Department of Finance and Administration, and the State Investment Council. SHARE is the state of New Mexico's financial and human resource computer system. All agencies except the New Mexico State Fair use SHARE to account for all financial transactions. Human resource transactions for all state agencies are recorded in SHARE. Agencies that use subsidiary systems to capture more granular information on agency-specific data post financial transactions to SHARE using a journal entry. That granular information may be obtained from the agency that owns the data and the system in which it resides so long as it is public information and not protected by privacy or confidentiality laws. All payments for goods and services are reported in SHARE. Signed official copies of contracts for goods and services can be obtained directly from the agency contracting for the service. Payments for investment-type services are required to be made directly to the investment companies and can no longer be paid out of the revenue earned before the revenue is transferred to the state.

### » Participating Agencies:

- » Governor's office
- » Lt. Governor's office
- » Department of Information Technology
- » Department of Finance and Administration
- » General Services Department
- » Department of Taxation and Revenue
- » Legislative Finance Committee
- » State Land Office
- » State Investment Council

### » Public Notices:

The New Mexico Press Association compiles legal notices that appear in newspapers throughout New Mexico. **Click here** to search for and view these legal notices.

### » Portal Requirements:

The Sunshine Portal requires Adobe Flash Player. If you are unable to view the transparency portal, please visit <http://get.adobe.com/flashplayer> and download a free copy.

The Sunshine Portal is optimized for screen

### » Contact Us:

- General Media Inquiries**  
 Wyndhan Kemsley  
 New Mexico Department of Information Technology  
 Public Information Officer  
 715 Alta Vista Street  
 Santa Fe, NM 87502-0110  
 Phone: (505) 795-0994  
 Wyndham.kemsley@state.nm.us
- Local Education Providers Media Inquiries**  
 Robert McEntyre  
 Public Information Officer  
 300 Don Gaspar  
 Santa Fe, NM 87501  
 (505) 470-2620 (m)  
 (505) 827-6714 (o)  
 Robert.McEntyre2@state.nm.us





Like 2K

Tweet

Citizen Business Visitor Government

Are you looking for something in New Mexico?

FIND IT NOW

# GOVERNMENT

Government Home Page

Residents

State Employee Resources

A to Z Directory

Open Meetings

Public Notices

State Employee Listing

Elected Officials

## New Mexico Rulemaking Requirements

Pursuant to NMSA 14-4-5.4, documentation regarding rule making shall be posted to the New Mexico Sunshine Portal

November 30, 2017

### Worker's Compensation Administration

Replacement - 11.4.4 NMAC, Workers' Compensation – Claims Resolution

November 30, 2017

### New Mexico Human Services Department

Supplemental Nutrition Assistance Program (SNAP) - Standards and Adjustments

November 30, 2017

### Office of the Attorney General

Default Procedural Rule for Rulemaking

November 28, 2017

### New Mexico General Services Department

1.4.9 NMAC ELECTRONIC SIGNATURES Proposed Rule

November 14, 2017

### New Mexico Office of the State Auditor

Notice of Proposed Rulemaking and Public Hearing for 2.2.2.1 NMAC "The Audit Rule"

November 14, 2017

### New Mexico State Game Commission

19.31.22 NMAC Landowner Certification of Non-Navigable Water

November 09, 2017

### New Mexico State Land Office

Rulemaking Record for 19.2.23 NMAC, State Trust Lands Restoration and Remediation Fund.

November 08, 2017

### New Mexico General Services Department

Proposed Replacement Rule - 1.4.1.9 - CHIEF PROCUREMENT OFFICER REGISTRATION, CERTIFICATION AND RECERTIFICATION PROGRAM

November 08, 2017

### New Mexico Human Services Department

Nonsubstantive Correction - 8.308.14 NMAC, Co-Payments

November 08, 2017

### New Mexico Department of Transportation

Repeal 18.31.4NMAC, Litter Control and Beautification Requirements

Did you find this information helpful? Share it with a friend:

1

Search this Page:

Type the phrase you wish to locate on this page in the box below:



### **NOTICE OF TERMINATION OF RULEMAKING**

The New Mexico Office of the Attorney General (OAG) is providing notice to terminate the public rule hearing scheduled on Monday, December 4, 2017 at 9:30 a.m., in accordance with Subsection C of Section 14-4-5 NMSA 1978. The proposed new rule, 1.24.25 NMAC is being terminated.

## NOTICE OF RULEMAKING

The New Mexico Office of the Attorney General is proposing to adopt a new rule, 1.24.25 NMAC, Default Procedural Rule for Rulemaking, in accordance with Section 14-4-5.8 NMSA 1978 of the State Rules Act, that directs the Attorney General to adopt default procedural rules for public rules hearings for use by agencies that have not adopted their own procedural rules. The proposed rule is intended to comport with House Bill 58 (Laws 2017, Chapter 137), and addresses the initiation of and public participation in the rulemaking process, as well as the conduct and record of the public hearing. Copies of the new rule are available at the New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501 and on the website at, <http://www.nmag.gov/>.

The Open Government Division of the Office of the Attorney General currently is accepting public comment on the proposed new rule. Please submit written comments on the proposed changes to P. O. Drawer 1508, Santa Fe, NM 87504-1508 or Renee K. Romero via email at [rromero@nmag.gov](mailto:rromero@nmag.gov) by January 18, 2018.

The Office of the Attorney General will hear public comment and consider adoption of the proposed new rule at a rule hearing on Friday, January 19, 2018, at 9:00 a. m., Toney Anaya Building, Rio Grande Conference Room, 2<sup>nd</sup> Floor, 2550 Cerrillos Road, Santa Fe, New Mexico.

If you are an individual with a disability who is in need of reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact: Renee K. Romero at [rromero@nmag.gov](mailto:rromero@nmag.gov) or 505-490-4861.



STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL

# Protecting Families



ATTORNEY GENERAL

**HECTOR  
BALDERAS**

Fighting the Opioid Crisis in New Mexico

Equifax Data Breach Consumer Information

House Bill 58 - Proposed Default Procedural Rule for Rulemaking



## NOTICE OF TERMINATION OF RULEMAKING

The New Mexico Office of the Attorney General (OAG) is providing notice to terminate the public rule hearing scheduled on Monday, December 4, 2017 at 9:30 a.m., in accordance with Subsection C of Section 14-4-5 NMSA 1978. The proposed new rule, 1.24.25 NMAC is being terminated.

## NOTICE OF RULEMAKING

The New Mexico Office of the Attorney General is proposing to adopt a new rule, 1.24.25 NMAC, Default Procedural Rule for Rulemaking, in accordance with Section 14-4-5.8 NMSA 1978 of the State Rules Act, that directs the Attorney General to adopt default procedural rules for public rules hearings for use by agencies that have not adopted their own procedural rules. The proposed rule is intended to comport with House Bill 58 (Laws 2017, Chapter 137), and addresses the initiation of and public participation in the rulemaking process, as well as the conduct and record of the public hearing. Copies of the new rule (printed below) are available at the New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501 and on the website at, <http://www.nmag.gov/>.

The Open Government Division of the Office of the Attorney General currently is accepting public comment on the proposed new rule. Please submit written comments on the proposed changes to P. O. Drawer 1508, Santa Fe, NM 87504-1508 or Renee K. Romero via email at [rromero@nmag.gov](mailto:rromero@nmag.gov) by January 18, 2018.

The Office of the Attorney General will hear public comment and consider adoption of the proposed new rule at a rule hearing on Friday, January 19, 2018, at 9:00 a. m., Toney Anaya Building, Rio Grande Conference Room, 2<sup>nd</sup> Floor, 2550 Cerrillos Road, Santa Fe, New Mexico.

If you are an individual with a disability who is in need of reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact: Renee K. Romero at [rromero@nmag.gov](mailto:rromero@nmag.gov) or 505-490-4861.

**TITLE 1            GENERAL GOVERNMENT ADMINISTRATION**  
**CHAPTER 24      RULES**  
**PART 25          DEFAULT PROCEDURAL RULE FOR RULEMAKING**

**1.24.25.1            ISSUING AGENCY:** New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501.  
[1.24.25.1 NMAC - N, 01/01/2018]

**1.24.25.2            SCOPE:** State agencies that have not adopted their own procedural rules consistent with the State Rules Act and agencies that have expressly incorporated this rule by reference.  
[1.24.25.2 NMAC - N, 01/01/2018]

**1.24.25.3            STATUTORY AUTHORITY:** Section 14-4-5.8 NMSA 1978.  
[1.24.25.3 NMAC - N, 01/01/2018]

**1.24.25.4            DURATION:** Permanent.  
[1.24.25.4 NMAC - N, 01/01/2018]

**1.24.25.5            EFFECTIVE DATE:** January 1, 2018 unless a later date is cited at the end of a section.  
[1.24.25.5 NMAC - N, 01/01/2018]

**1.24.25.6            OBJECTIVE:** To provide default procedural rules for rulemaking and public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act, and to facilitate public engagement with the administrative rulemaking process in a transparent, organized, and fair manner.  
[1.24.25.6 NMAC - N, 01/01/2018]

**1.24.25.7 DEFINITIONS:** This rule adopts the definitions found in Section 14-4-2 NMSA 1978.  
[1.24.25.7 NMAC - N, 01/01/2018]

**1.24.25.8 AGENCY ADOPTION OF PROCEDURAL RULES:**

**A.** Agencies that have not adopted their own procedural rules consistent with the State Rules Act shall apply these default rules, until such time as they have adopted their own rules.

**B.** Agencies may adopt these default rules, in whole or in part as their own, or continue to use their existing rules, so long as those rules satisfy the requirements of the State Rules Act.

**C.** Agencies that adopt their own rules must submit a copy to the office of the attorney general within 30 calendar days of adoption, and post a copy of those rules on the agency's website, if one is maintained by the agency.

[1.24.25.15 NMAC - N, 01/01/2018]

**1.24.25.9 INITIATION OF THE RULEMAKING PROCESS; PETITIONS:**

**A.** The rulemaking process for purposes of this rule may be initiated by either of the following:

(1) when a notice for a rule hearing is publicly posted pursuant to this rule; or

(2) if authorized by law or practice of the agency, a petition for rulemaking is filed with the

agency.

**B.** A petition for rulemaking may be filed by the agency or, if authorized by law of the agency, by a third party outside of the agency. This rule does not require an agency to accept third party petitions for rule making.

**C.** A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.

**D.** If a petition is initiated internally, the agency shall consider whether to grant the petition and proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing.

**E.** If a petition is filed by a third party, and such practice is authorized by the agency, the agency shall, within 120 calendar days of receipt, consider the petition and make a determination whether to grant or deny the petition. The agency's decision to deny the petition is not subject to judicial review unless otherwise provided by law.

**F.** If the agency is a public body subject to the Open Meetings Act, the decision to grant a petition, or the decision to initiate the rulemaking process by posting a notice for rule hearing, must be an action taken by vote of the public body in open session.

**G.** Once the agency initiates the rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.

[1.24.25.8 NMAC - N, 01/01/2018]

**1.24.25.10 RULEMAKING NOTICE:**

**A.** The agency shall provide to the public notice of the proposed rulemaking at least 30 calendar days before a public hearing by:

(1) posting it on the agency website, if one is maintained by the agency;

(2) posting it on the sunshine portal;

(3) making it available by posting it in a publicly visible location in the agency's district, field and regional offices, if any;

(4) sending it by electronic mail to persons who have made a request for notice from the agency of rulemaking proceedings and who have provided an electronic mail address to the agency;

(5) sending it by electronic mail to persons who have participated in the rulemaking, by petition or other act, and who have provided an electronic mail address to the agency;

(6) sending it by mail to persons who have made a written request for mailed notice from the agency of rulemaking proceedings and who have provided a postal address to the agency;

(7) providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees; and

(8) publish the notice in the New Mexico Register and in a newspaper of general circulation in the state.

- B.** The notice shall include:
- (1) a concise summary of the full text of the proposed rule;
  - (2) a short explanation of the purpose of the proposed rule;
  - (3) a citation to the specific legal authority authorizing the adoption of the proposed rule;
  - (4) information on how and where a copy of the full text of the proposed rule may be obtained;
  - (5) an internet link or web address providing free access to the full text of the proposed rule;
  - (6) information on how a person may comment on the proposed rule, where written comments will be received, and when comments are due;
  - (7) information on where and when a public rule hearing will be held and how a person may participate in the hearing and provide public comment; and
  - (8) a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.
- C.** If the agency changes the date of the public rule hearing or shortens the deadline for submitting comments as stated in the notice, the agency shall provide notice to the public of the change as provided above.  
[1.24.25.9 NMAC - N, 01/01/2018]

**1.24.25.11 WRITTEN COMMENT PERIOD:**

- A.** The public comment period must be at least 30 calendar days and shall commence upon publication of the rulemaking notice in the New Mexico register, unless a later date is specified in the notice. The agency shall not adopt a proposed rule or hold a rulemaking hearing before the end of the public comment period.
- B.** A person may submit, by mail or electronic form, written comments on a proposed rule, and those comments shall be made part of the record. Written comments may be submitted through the end of the public comment period.
- C.** The agency may decide before, during, or after the public rule hearing to extend the comment period by providing public notice, to include:
- (1) posting it on the agency website, if one is maintained by the agency;
  - (2) making it available by posting notice in a publicly visible location in the agency's district, field and region offices, if any;
  - (3) sending notice by electronic mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceedings and provided an electronic mail address to the agency; and
  - (4) sending notice by regular mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceeding and provided a postal address and specifically requested notice by regular mail;
- D.** The agency shall post all written comments on its website, if one is maintained by the agency, as soon as practicable upon receipt, but no less than 7 calendar days prior to the rule hearing to allow for public review. All written comments received by the agency shall be available for public inspection.  
[1.24.25.10 NMAC - N, 01/01/2018]

**1.24.25.12 PUBLIC HEARING:**

- A.** Prior to adopting a proposed rule, the agency must hold a public rule hearing. The purpose of the hearing is to provide all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule. The agency, at its sole discretion, may determine whether more than one hearing is necessary.
- B.** The agency may act as the hearing officer or designate a representative or hearing officer to preside over the public rule hearing. The agency representative or hearing officer may ask questions and provide comments for clarification purposes only, and should refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented.
- C.** At the start of the hearing, any pre-filed exhibits should be introduced and admitted into the rulemaking record. Pre-filed exhibits should include the petition, if filed; copies of the public notices of the rulemaking, including any lists of individuals to whom notice was mailed or sent electronically; copies of the proposed rule in underline and strikethrough format; and copies of any written comment submitted during the comment period prior to the rule hearing. The agency representative or hearing officer will allow the petitioner or agency representative an opportunity to present the petition, if applicable. Any written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.

**D.** Individuals wishing to provide public comment or submit information at the rule hearing must state their name and any relevant affiliation for the record and be recognized before presenting by the agency representative or hearing officer. Public comment shall not be taken under oath unless required by separate rule of the agency. Any individual who provides information or public comment at the hearing may be questioned by the agency representative or hearing officer, or by other interested persons at the hearing.

**E.** The rule hearing shall be conducted in a fair and equitable manner. The agency representative or hearing officer may determine the format in which the hearing is conducted (e.g. introduction of each part or section one at a time for comment), but the hearing should be conducted in a simple and organized manner that facilitates public comment and a clear rulemaking record. The rules of evidence do not apply to public rule hearings and the agency representative or hearing officer may, in the interest of efficiency, exclude or limit comment that is deemed irrelevant, redundant, or unduly repetitious.

**F.** The agency must hold the hearing in a venue that reasonably accommodates all interested persons who wish to participate or observe, and appropriate audio equipment should be secured to ensure all in attendance can hear the proceeding and be heard when presenting comment. Reasonable efforts shall be made to accommodate the use of audio and video recording devices. Public rule hearings shall be open to the public, but are not subject to the New Mexico Open Meetings Act, Section 10-15-1 NMSA 1978, unless the hearing is conducted by a quorum of a public body.

[1.24.25.11 NMAC - N, 01/01/2018]

#### **1.24.25.13 RULEMAKING RECORD AND ADOPTION OF RULE**

**A.** The agency shall maintain a record of the rulemaking proceeding as required in Section 14-4-5.4 NMSA 1978, and any written comment, document, or other exhibit entered into the record during the rule hearing shall be labeled clearly.

**B.** If the rule hearing is conducted by an agency representative or hearing officer, the complete rulemaking record, including any memoranda summarizing the contents of the hearing, if written, shall be compiled and forwarded to the agency head or members of the board or commission with sufficient time to review. The agency head or members of the board or commission shall thoroughly familiarize themselves with the rulemaking record before rendering a decision on the proposed rule.

**C.** The agency may adopt, amend or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking. Amendments that exceed the scope of the noticed rulemaking may require a new rulemaking process with a rulemaking notice, comment period, and public rule hearing so that the public has an adequate opportunity to review and comment on the changes.

**D.** In instances where the agency is a board or commission, the consideration and adoption of the proposed rule shall occur during a public meeting. The adoption date of the proposed rule shall be the date of the public meeting at which the vote occurred, unless the board or commission directs that a written order be issued, in which case the adoption date shall be the date the written order is signed. The board or commission may provide reasoning for the adopted rule through comments or discussion during its meeting, or by providing a statement of reasons in a written order.

**E.** In instances where the agency is a department or any of its divisions, the adoption of the proposed rule shall occur through the issuance of a written order by the department head, which shall include a statement of reasons. The adoption date of the proposed rule shall be the date the written order is signed.

**F.** The agency shall provide a concise explanatory statement that contains the date of adoption; the specific legal authority authorizing the rule; and any findings required by law for adoption of the rule. The explanatory statement may be included in an order adopting the rule or provided separately. The explanatory statement shall be posted on the agency website, if one is maintained by the agency, and sent to any persons entitled to notice of the rulemaking within 15 calendar days after the date of adoption.

[1.24.25.12 NMAC - N, 01/01/2018]

#### **1.24.25.14 FILING AND PUBLICATION; EFFECTIVE DATE:**

**A.** Within 15 calendar days after the date of adoption of a rule, the agency shall file the adopted rule with the state records center and shall provide to the public the adopted rule. The agency shall post the adopted rule on its website, if one is maintained by the agency, and send the adopted rule to any persons entitled to notice of the rulemaking.

**B.** Unless provided for by law, no rule shall be valid or enforceable until it is filed with the state records center and published in the New Mexico register. Unless another date is provided in the written order, the effective date of the rule shall be the date of publication in the New Mexico register.

[1.24.25.13 NMAC - N, 01/01/2018]

**1.24.25.15 EMERGENCY RULES:**

**A.** The agency shall comply with the rulemaking procedures herein and the State Rules Act, unless the agency finds that the time required to complete the procedures would:

- (1) cause an imminent peril to the public health, safety or welfare;
- (2) cause the unanticipated loss of funding for the agency program; or
- (3) place the agency in violation of federal law.

**B.** The agency shall provide to the public a record of any finding pursuant to Subsection A of this Section and a detailed justification for that finding before issuing an emergency rule. The record shall include a statement that the emergency rule is temporary. After such record has been provided to the public, the agency may issue the emergency rule immediately without a public rule hearing or with any abbreviated notice and hearing that it finds practicable. If the agency is a board or commission, the adoption must occur during a public meeting pursuant to the requirements of the Open Meetings Act.

**C.** The emergency rule shall be published with the New Mexico register within 30 calendar days of the rule becoming effective.

**D.** When the agency makes a finding pursuant to Subsection A of this Section, the agency shall follow the provisions of this section in addition to any more specific requirements in statute that pertain to the agency regarding promulgating emergency or interim rules.

**E.** Emergency rules may take effect immediately upon filing with the state records administrator or the administrator's designee or at a later date specified in the emergency rule. Emergency rules shall be published in the New Mexico register.

**F.** No emergency rule shall permanently amend or repeal an existing rule. An emergency rule shall remain in effect until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted within 180 calendar days from the effective date of the emergency rule, the emergency rule shall expire and may not be readopted as an emergency rule. If an expired emergency rule temporarily amended or repealed an existing rule, the rule shall revert to what it would have been had the emergency rule not been issued. [1.24.25.14 NMAC - N, 01/01/2018]

**HISTORY OF 1.24.25 NMAC: [RESERVED]**

## NOTICE OF RULEMAKING

(This notice replaces Notice of Rulemaking previously posted)

The Office of the Attorney General (OAG) is proposing to adopt a new rule,

### **1.24.25 NMAC, Default Procedural Rule for Rulemaking,**

in accordance with Section 14-4-5.8 NMSA 1978 of the State Rules Act, that directs the Attorney General to adopt default procedural rules for public rules hearings for use by agencies that have not adopted their own procedural rules. The proposed rule is intended to comport with House Bill 58 (Laws 2017, Chapter 137), and addresses the initiation of and public participation in the rulemaking process, as well as the conduct and record of the public hearing. Copies of the new rule are available on the website at, <http://www.nmag.gov/> and at the New Mexico Offices of the Attorney General:

408 Galisteo Street, Santa Fe, NM 87501  
201 3<sup>rd</sup> Street, N.W., Suite 300, Albuquerque, NM 87103  
201 N. Church Street, Suite 315, Las Cruces, NM 88001

The Open Government Division of the Office of the Attorney General currently is accepting public comment on the proposed new rule. **Please submit written comments on the proposed changes to P. O. Drawer 1508, Santa Fe, NM 87504-1508 or Renee K. Romero via email at [rromero@nmag.gov](mailto:rromero@nmag.gov) by January 18, 2018.**

The Monday, December 4, 2017 rule hearing is vacated. The OAG will hear public comment and consider adoption of the proposed new rule at a rule hearing on:

**FRIDAY, JANUARY 19, 2018 at 9:00 a. m.  
Toney Anaya Building, Rio Grande Conference Room, 2<sup>nd</sup> Floor  
2550 Cerrillos Road, Santa Fe, New Mexico.**

If you are an individual with a disability who is in need of reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact: Renee K. Romero at [rromero@nmag.gov](mailto:rromero@nmag.gov) or 505-490-4861.

EXHIBIT

tabbles

6

Romero, Renee <rromero@nmag.gov>

Nov 29 (5 days ago)

to lcs, Sally, Joseph

Please find attached a Notice of Termination of Rulemaking and Notice of Rulemaking from the New Mexico Office of the Attorney General.

Thank you,

*Renee K. Romero, Legal Assistant  
Office of the Attorney General  
Open Government Division  
408 Galisteo Street  
Santa Fe, NM 87501  
[rromero@nmag.gov](mailto:rromero@nmag.gov)  
[505-490-4861](tel:505-490-4861)*

**Preview attachment Notice of Termination of Rulemaking.pdf**



Notice of Termination of Rulemaking.pdf

**Preview attachment Notice of Rulemaking.pdf**



Notice of Rulemaking.pdf

Canepa, Laurie

Nov 29 (5 days ago)

**Thanks**



**Chris Mechels**

Nov 6

Dear Renee,

Please provide a copy of the hearing procedure to be used for the 4 December hearing.

Necessary to properly prepare for my testimony.

Thanks,

Chris Mechels

**Romero, Renee** <rromero@nmag.gov>

Nov 6

Good Afternoon,

Per your request, attached is a copy of the proposed new rule, 1.24.25 Default Procedural Rule for Rulemaking.

Thank you,

Renee K. Romero

--

*Renee K. Romero, Legal Assistant  
Office of the Attorney General  
Open Government Division  
408 Galisteo Street  
Santa Fe, NM 87501  
505-490-4861*

Attachments area

Preview attachment 1.24.25 Proposed New Rule 10.30.17.pdf



1.24.25 Proposed New Rule 10.30.17.pdf

**Chris Mechels**

Nov 6

Renee,

Thanks, but not what I requested.

I requested the hearing procedure which will govern the hearing on 4 December. It will not be 1.24.25 which does not yet exist.

Perhaps you can check with counsel?

Thanks,

Chris Mechels

EXHIBIT

8

tabbles

---

From: "Renee Romero" <rromero@nmag.gov>  
To: "Chris Mechels"  
Sent: Monday, November 6, 2017 2:11:44 PM  
Subject: Re: HB58 Rule Making

Romero, Renee <rromero@nmag.gov>

Nov 6

My apologies. I will do that and get back with you.

Romero, Renee <rromero@nmag.gov>

Nov 6

Mr. Mechels,

I have conferred with counsel. In the absence of a rule governing hearing procedures, the Office of the Attorney General will follow the hearing procedures set out in the proposed rule.

Thank you,

*Renee K. Romero, Legal Assistant  
Office of the Attorney General  
Open Government Division  
408 Galisteo Street  
Santa Fe, NM 87501  
505-490-4861*

Chris Mechels

Nov 8

Renee,

**It seems that following the proposed hearing procedure will not work, as 1.24.25.13.D&E makes no provision for agencies other than Boards/Commissions and Departments.**

**This suggests that we use a different hearing procedure. How about the one used for the recent Rule Making by the SOS?  
Even without the aforementioned difficulty, using a hearing procedure which is, itself, subject to the hearing, seems a bit odd.**

Thanks for your assistance.

Regards,

Chris Mechels

**Chris Mechels**

Nov 14

Renee,

Any progress on firming up the procedure? It is an important issue.

Also, can you please send me the name of the Hearing Officer for the 4 December hearing.

Thanks,

Chris Mechels

**Chris Mechels**

Nov 28 (6 days ago)

Renee,

Can I please get a response on this matter?

Thx,

Chris Mechels

---

From: "Chris Mechels"  
To: "Renee Romero" <[rromero@nmag.gov](mailto:rromero@nmag.gov)>  
Sent: Tuesday, November 14, 2017 12:59:27 PM  
Subject: Fwd: Proposed Rule

**Romero, Renee** <[rromero@nmag.gov](mailto:rromero@nmag.gov)>

Nov 28 (6 days ago)

Mr. Mechels,

Regarding 1.24.25.13(D) and (E), it is defined broadly in the State Rules Act. We are looking into this and welcome your comments in writing or verbally at the public hearing.

In reference to SOS procedures, we are following all requirements of the State Rules Act.

A decision has not been made in regard to the hearing officer; however, it will be an OAG staff person or attorney.

If you wish to send comments, please do so at [rromero@nmag.gov](mailto:rromero@nmag.gov), or you may want to call me at 505-490-4861.

Thank you,

**Renee K. Romero**

*Renee K. Romero, Legal Assistant  
Office of the Attorney General  
Open Government Division  
408 Galisteo Street  
Santa Fe, NM 87501  
[rromero@nmag.gov](mailto:rromero@nmag.gov)  
505-490-4861*

**Chris Mechels**

Nov 29 (5 days ago)

Renee,

**I must disagree with your first sentence.**

**1.24.25.13(D) and (E) are NOT "defined broadly". The term "agency" is defined broadly.**

**"Board or Commission" has a well defined meaning. "Department" also.**

**I would agree that 1.24.25.13(F) does apply to the current situation, as it refers to "agency". However, this raises the question of why a "statement of reasons" is required of (D) or (E), but not (F). Equity would seem to call for equal process.**

**You are most assuredly NOT following all requirements of the State Rules Act, as you failed to post the required materials on the Sunshine Portal (14.4.2.E), and failed to provide the required materials (14.4.5.2.A.(1&2) in your web site posting.**

**These issues will be raised at the Hearing and beyond.**

Regards,

Chris Mechels 

**Malave, Sally**

Nov 27 (7 days ago)

FYI Public comment received last week. I acknowledged receipt and let Sally Galanter know that December 4 hearing date has been pushed to **January 19**. Thanks.

----- Forwarded message -----

From: Galanter, Sally, RLD <[Sally.Galanter@state.nm.us](mailto:Sally.Galanter@state.nm.us)>

Date: Wed, Nov 22, 2017 at 4:06 PM

Subject: suggestions for rule making

To: "[smalave@nmag.gov](mailto:smalave@nmag.gov)" <[smalave@nmag.gov](mailto:smalave@nmag.gov)>

Sally:

I appreciate the opportunity to review your proposal for rule making requirements. I understand that the desire is that each agency will create their own. Recognizing that and the inability to do all the work they assign I was wondering if you would consider these suggestions. Your proposal is excellent. Thank you and have a nice Thanksgiving and **FOUR** days off.

Comment re: AG proposed rulemaking NMAC

1.24.25.12 B "The agency may act as...over the public hearing, **or as otherwise provided by statute.**"

Comment – some statutes specifically designate who can be hearing officer.

1.24.25.13 D "In instances where the agency...shall be the date of the public meeting at which the vote occurred **or as otherwise provided by statute**, unless the board or commission..."

Comment – some statutes specifically provide. Have to consider not only specific act, ULA but also Superintendent's Act.

1.24.25.13 E In instances where the agency is a department or any of its divisions...written order by the department head, **or as otherwise provided by statute**, which shall include a statement of reasons.

Comment – the Superintendent's Act specifically states, his approval unless otherwise indicated by statute. The CID Act specifically gives that authority to the Commission.

1.24.25.14 B "Unless provided by...Unless another date is provided in the written order **or by statute**, the effective date of the rule shall be..."

Comment – 61-1-29 indicates 30 days after filing under state rules act.

Sally Galanter

CID/MHD Counsel

[5500 San Antonio NE – Suite F](#)

[Albuquerque New Mexico 87109](#)

[\(505\) 476-4699](tel:(505)476-4699)

EXHIBIT

9

tabbles



November 29, 2017

VIA ELECTRONIC MAIL

Renee K. Romero  
Open Government Division  
Office of the Attorney General  
P.O. Drawer 1508  
Santa Fe, NM 87504-1508  
rromero@nmag.gov

RE: Comments on Proposed 1.24.25 NMAC, Default Procedural Rules for Rulemaking

Dear Ms. Romero:

The Association of Commerce and Industry (“ACI”) is a non-profit organization, comprised of hundreds of New Mexico businesses, which employ many more thousands of New Mexicans in the manufacturing, agriculture, mining, oil and gas, electric generation, and tourism industries. ACI is the voice of New Mexico business, representing businesses of all industries, of all sizes, and of all regions in the state. ACI believes that no advocate can speak better on the needs of the private sector than the private sector itself. ACI marshals the advocates, resources, and policies that enable businesses to thrive and families to prosper. ACI and its members have been involved in regulatory issues at the federal, state, and local levels.

For at least a decade, ACI has advocated for uniform and consistent regulatory procedures that apply to all agencies in New Mexico, as the lack of such procedures has been a problem for businesses across the state and an impediment to economic development. Finally, in 2017, the New Mexico Legislature passed, and Governor Susana Martinez signed House Bill 58 (Laws 2017, Chapter 137), which implements landmark changes in the way that agencies promulgate rules.

The last step in the implementation of House Bill 58 is for the Attorney General to promulgate default procedural rules. Accordingly, on behalf of ACI, I hereby submit the attached comments in accordance with the Notice of Rulemaking regarding the proposal to adopt a new rule, 1.24.25 NMAC, called the “Default Procedural Rule for Rulemaking.”

ACI respectfully requests that you seriously consider the proposed changes to the default procedural rules and associated comments as set forth the attachment. A rulemaking process is most effective when it provides for robust public participation in all phases of the rulemaking process.

Respectfully submitted,

Jason Espinoza  
President and CEO



**TITLE 1  
CHAPTER 24  
PART 25**

**GENERAL GOVERNMENT ADMINISTRATION  
RULES  
DEFAULT PROCEDURAL RULE FOR RULEMAKING**

**1.24.25.1 ISSUING AGENCY:** New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501.  
[1.24.25.1 NMAC - N, 01/01/2018]

**1.24.25.2 SCOPE:** ~~State agencies~~ The scope of this rule applies to agencies that have not adopted their own procedural rules consistent with the State Rules Act and agencies that have expressly incorporated this rule by reference. In addition, if an agency adopts its own procedural rules or continues in effect existing rules, then such rules shall provide at least as much opportunity for participation by parties and members of the public as is provided in these default procedural rules.  
[1.24.25.2 NMAC - N, 01/01/2018]

***Comment:** Section 14-4-5.8 NMSA 1978 sets forth the scope of these default procedural rules, and it clearly states that these default procedural rules apply in two instances: (1) when agencies have not adopted their own rules consistent with the State Rules Act, and (2) if an agency adopts its own procedural rules or continues in effect existing rules, then such rules shall provide at least as much opportunity for participation by parties and members of the public as is provided in these rules. The proposed rule only accounts for one of the two instances where these default procedural rules apply; therefore, the proposed changes by the Association of Commerce and Industry (hereinafter, "ACI") are necessary in order to fully comply with Section 14-4-5.8 NMSA 1978.*

**1.24.25.3 STATUTORY AUTHORITY:** Section 14-4-5.8 NMSA 1978.  
[1.24.25.3 NMAC - N, 01/01/2018]

**1.24.25.4 DURATION:** Permanent.  
[1.24.25.4 NMAC - N, 01/01/2018]

**1.24.25.5 EFFECTIVE DATE:** January 1, 2018 unless a later date is cited at the end of a section.  
[1.24.25.5 NMAC - N, 01/01/2018]

**1.24.25.6 OBJECTIVE:** To provide default procedural rules for rulemaking and public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act, and to facilitate public engagement with the administrative rulemaking process in a transparent, organized, and fair manner. [1.24.25.6 NMAC - N, 01/01/2018]

**1.24.25.7 DEFINITIONS:** This rule adopts the definitions found in Section 14-4-2 NMSA 1978. [1.24.25.7 NMAC - N, 01/01/2018]

***Comment:** Although ACI is proposing no specific changes, ACI notes that inclusion of the definitions in the rules, rather than by reference to the statute, would be more user-friendly and make administration easier in certain instances.*

**1.24.25.8 AGENCY ADOPTION OF PROCEDURAL RULES:**

**A.** Agencies that have not adopted their own procedural rules consistent with the State Rules Act shall apply these default rules, until such time as they have adopted their own rules.

**B.** Agencies may adopt these default rules, in whole or in part as their own, or continue to use their existing rules, so long as those rules satisfy the requirements of the State Rules Act.

**C.** Agencies that adopt their own rules must submit a copy to the office of the attorney general within 30 calendar days of adoption, and post a copy of those rules on the agency's website, if one is maintained by the agency.

[1.24.25.458 NMAC - N, 01/01/2018]

#### **1.24.25.9 INITIATION OF THE RULEMAKING PROCESS BY AN AGENCY; PETITIONS:**

**A.** The rulemaking process ~~for purposes of this rule~~ may be initiated by an agency either of the following:

~~(1) — when a notice for a rule hearing is publicly posted pursuant to this rule; or~~

~~(2) — if authorized by law or practice of the agency, a petition for rulemaking is filed with the agency.~~

~~**B.** — A petition for rulemaking may be filed by the agency or, if authorized by law of the agency, by a third party outside the agency. This rule does not require an agency to accept third party petitions for rule making.~~

~~**C.** — A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.~~

~~**DB.** If a petition is initiated internally, the agency shall consider whether to grant the petition and proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing.~~

~~**E.** — If a petition is filed by a third party, and such practice is authorized by the agency, the agency shall, within 120 calendar days of receipt, consider the petition and make a determination whether to grant or deny the petition. The agency's decision to deny the petition is not subject to judicial review unless otherwise provided by law.~~

~~**FC.** If the agency is a public body subject to the Open Meetings Act, the decision to grant a petition, or the decision to initiate the rulemaking process by posting a notice for rule hearing, must be an action taken by vote of the public body in open session.~~

~~**GD.** Once the agency initiates the rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.~~

[1.24.25.89 NMAC - N, 01/01/2018]

***Comment:** This proposed rule provision appears to contain a process whereby an agency petitions itself to initiate a rulemaking. For example, subsections (B) through (D) of the proposed rule appear to contain an internal petition process that agencies follow to institute a rulemaking. Subsection B provides "a petition for rulemaking may be filed by the agency." Similarly, Subsection D specifically references internal agency petitions. Leaving aside obvious questions about how, where, and to whom agencies internally file petitions, internal petition processes create unnecessary bureaucratic steps and waste. Agencies already have authority to initiate rulemakings absent an internal petition process. Instead, agencies that have statutory authority to promulgate rules should simply be required to comply with the notice and participation requirements under the State Rules Act (hereinafter, "SRA"). Indeed, the SRA already requires rulemaking notices to contain the very same information Subsection C of the proposed rule would require of internal agency petitions. The petition process should be reserved for, and utilized by, interested persons outside the agency. See Section 12-8-2(F) NMSA 1978 (defining "person" as individuals, business entities, political subdivisions, and public and private organizations other than agencies), Section 12-8-7 NMSA 1978 (allowing any interested "person" to petition an agency to adopt, amend, or repeal a regulation), and Section 14-4-2(B) NMSA*

1978 (defining "person," under the SRA, as individuals, business entities, and political subdivisions).

#### **1.24.25.10 INITIATION OF THE RULEMAKING PROCESS BY A PERSON**

**A.** Any person has the right to petition an agency head to adopt, amend, or repeal a rule.

**B.** A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.

**C.** The agency to which the petition is made shall, within 60 calendar days of receipt, initiate the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing, or deny the petition in writing and state its reasons for the denial.

**D.** If the agency initiates a rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.

[1.24.25.10 NMAC – N. 01/01/2018]

**Comment:** Subsections (A) and (B) as proposed in 1.24.25.9 NMAC leave the decision on whether or not to accommodate a petition process to agency discretion. The default procedural rules should not leave that decision to agency discretion. There should be consistency and uniformity among New Mexico's agencies when it comes to rulemaking procedures; therefore, ACI proposes a new rule provision set forth above that allows any person to petition an agency head to adopt, amend, or repeal a rule.

*In New Mexico, there has been a general lack of agency consensus or consistency for administrative procedure rules. While the state has enacted the Administrative Procedures Act (hereinafter, "APA"), Section 12-8-1 NMSA 1978, few agencies have adopted it because Section 12-8-23 NMSA 1978 left it up to each agency to decide whether the agency wanted to make the APA applicable to it. As a result of this opt in provision, there has been little, if any, consistency between agencies regarding administrative procedures for decades. Not only has this deficiency made it extremely difficult for the public to participate in agency actions, but it also has made it a time-consuming and confusing process. However, this situation changed, in part, in 2017 when the New Mexico Legislature passed and Governor Martinez signed into law House Bill 58 (hereinafter, "HB 58").*

*In particular, HB 58 established for the first time a consistent set of rulemaking processes for all agencies to follow when promulgating rules. Without question, the legislative intent was to create consistency and uniformity in administrative procedures for rulemakings among the agencies in the state. In fact, much of the language in HB 58 is taken from the Revised Model State Administrative Procedure Act developed by the Uniform Law Commission, and this model act was developed because state administrative law in the 50 states is not uniform but needs to be. See [www.uniformlaws.org](http://www.uniformlaws.org). Unfortunately, the proposed default rules deviate from the goal of creating a consistent and uniform set of rulemaking procedures because they return to the opt in approach (as set forth in the antiquated state APA) and sanction agencies with the discretion to decide whether or not they want to allow the public to participate in rulemakings via a petition process.*

*Section 318 of the Revised Model State Administrative Procedure Act contains a petition process that allows any person to petition an agency to adopt a rule. A majority of states provide a petition process allowing members of the public an*

*opportunity to request an agency to adopt a rule. New Mexico should not be an outlier and, instead, adopt a petition process to provide maximum public participation when it comes to the development of rules.*

*A petition process allows stakeholders to assist in identifying critical issues. In doing so, it can promote a more efficient government by reducing disputes, averting litigation, and clarifying gray areas in the law. Many New Mexico statutes need further clarification or more developed procedures. Additionally, the current New Mexico Administrative Code lacks clarity in certain areas, contains outdated information, or outright conflicts with statute.*

*For example, it is unclear whether the definition of "Headquarters Operation" in the Corporate Income and Franchise Tax Act, Section 7-4-10(E)(1)(a) NMSA 1978, is a conjunctive test requiring all five elements to be satisfied, or a disjunctive test, requiring only one element to be satisfied. While statutory elements joined by "and" typically connote a conjunctive test, the last element in this definition appears to be a subset of earlier elements. Similarly, it is unknown whether the elements in statute are viewed differently if a taxpayer files on a separate corporate entity basis (the default filing method) or a combined or consolidated basis (elective filing methods). This statute was designed to attract corporate headquarters to New Mexico and diversify the state economy. Interpretive clarity, through a petition process, can help serve those objectives and avoid unintended consequences for the both the state and businesses.*

*A petition process also can help remove outdated or inoperative regulations. For example, 3.3.6.13 NMAC directly conflicts with Section 7-37.5.4 NMSA 1978, which was enacted in 2015 to resolve a conflict between that regulation and a 2008 Attorney General Opinion. The Attorney General opined that the disabled veterans' property tax exemption extended to special benefit assessments, such as conservation districts, public improvement districts, and tax increment development districts. 3.3.6.13 NMAC takes the opposite position. The inconsistent positions led to confusion among county assessors requiring legislative action. Nonetheless, 3.3.6.13 NMAC is still on the books.*

*Simply put, allowing any person to petition an agency for a rulemaking constitutes a best practice that should be adopted in New Mexico. Section 14-4-5.8 NMSA 1978 is a broad grant of rulemaking authority to the Attorney General to fill in the gaps in the State Rules Act. Whether or not a person can petition the government for a rulemaking is not addressed in the State Rules Act, but it a critical concept that needs be addressed by the default procedural rules. Although some agencies have a petition process and some agencies do not, the Attorney General should seize this opportunity to promote good government by establishing a uniform petition process that encourages members of the public to be active participants in development of rules.*

#### **1.24.25.1011 RULEMAKING NOTICE:**

**A.** The agency shall provide to the public notice of the proposed rulemaking at least 30 calendar days before a public hearing by:

- (1)** posting it on the agency website, if one is maintained by the agency;
- (2)** posting it on the sunshine portal;
- (3)** making it available by posting it in a publicly visible location in the agency's district, field and regional offices, if any;
- (4)** sending it by electronic mail to persons who have made a request for notice from the agency of rulemaking proceedings and who have provided an electronic mail address to the agency;

(5) sending it by electronic mail to persons who have participated in the rulemaking, by petition or other act, and who have provided an electronic mail address to the agency;

(6) sending it by mail to persons who have made a written request for mailed notice from the agency of rulemaking proceedings and who have provided a postal address to the agency;

(7) providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees; and

(8) publish the notice in the New Mexico Register ~~and in a newspaper of general circulation in the state.~~

B. The notice shall include:

(1) a concise summary of the full text of the proposed rule;

(2) a short explanation of the purpose of the proposed rule;

(3) a citation to the specific legal authority authorizing the adoption of the proposed rule;

(4) information on how and where a copy of the full text of the proposed rule may be obtained;

(5) an internet link or web address providing free access to the full text of the proposed rule;

(6) information on how a person may comment on the proposed rule, where written comments will be received, and when comments are due;

(7) information on where and when a public rule hearing will be held and how a person may participate in the hearing and provide public comment; and

(8) a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.

C. If the agency changes the date of the public rule hearing or shortens the deadline for submitting comments as stated in the notice, the agency shall provide notice to the public of the change as provided above.

[1.24.25.911 NMAC - N, 01/01/2018]

*Comment: Based on a review of the State Rules Act, there is no requirement that public notice of a proposed rulemaking must be published in a newspaper of general circulation, as set forth in paragraph 8 of subsection A. ACI questions the utility of publishing notice in a newspaper of general circulation, which for most areas of the state is limited to the Albuquerque Journal.*

#### **1.24.25.112 WRITTEN COMMENT PERIOD:**

A. The public comment period must be at least 30 calendar days and shall commence upon publication of the rulemaking notice in the New Mexico register, unless a later date is specified in the notice. The agency shall not adopt a proposed rule ~~or hold a rulemaking hearing~~ before the end of the public comment period.

B. A person may submit, by mail or electronic form, written comments on a proposed rule, and those comments shall be made part of the record. Written comments may be submitted through the end of the public comment period.

C. The agency may decide before, during, or after the public rule hearing to extend the comment period by providing public notice, to include:

(1) posting it on the agency website, if one is maintained by the agency;

(2) making it available by posting notice in a publicly visible location in the agency's district, field and region offices, if any;

(3) sending notice by electronic mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceedings and provided an electronic mail address to the agency; and

(4) sending notice by regular mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceeding and provided a postal address and specifically requested notice by regular mail;

D. The agency shall post all written comments on its website, if one is maintained by the agency, as soon as practicable upon receipt, ~~but no less than 7 calendar days prior to the rule hearing~~ to allow for public review. All written comments received by the agency shall be available for public inspection.

[1.24.25.~~40~~12 NMAC - N, 01/01/2018]

*Comment: ACI questions the need to delay a public hearing on a proposed rule until after the public comment period has closed. As ACI understands it, the public hearing is part of the public comment period and that written comments will be given equal weight as oral comments at a hearing. There is not benefit for commenters at the hearing to have access to written comments.*

**1.24.25.~~12~~13 PUBLIC HEARING:**

A. Prior to adopting a proposed rule, the agency must hold a public rule hearing. The purpose of the hearing is to provide all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule. The agency, at its sole discretion, may determine whether more than one hearing is necessary.

B. The agency may act as the hearing officer or designate a representative or hearing officer to preside over the public rule hearing. The agency representative or hearing officer may ask questions and provide comments for clarification purposes only, and should refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented.

C. ~~At the start of the hearing, any pre-filed exhibits should be introduced and admitted into the rulemaking record. Pre-filed exhibits should include the petition, if filed; copies of the public notices of the rulemaking, including any lists of individuals to whom notice was mailed or sent electronically; copies of the proposed rule in underline and strikethrough format; and copies of any written comment submitted during the comment period prior to the rule hearing. The agency representative or hearing officer will allow the petitioner or agency representative an opportunity to present the petition, if applicable.~~ Any written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.

D. Individuals wishing to provide public comment or submit information at the rule hearing must state their name and any relevant affiliation for the record and be recognized before presenting by the agency representative or hearing officer. Public comment shall not be taken under oath unless required by separate rule of the agency. Any individual who provides information or public comment at the hearing may be questioned by the agency representative or hearing officer, ~~or by other interested persons at the hearing.~~

E. The rule hearing shall be conducted in a fair and equitable manner. The agency representative or hearing officer may determine the format in which the hearing is conducted (e.g. introduction of each part or section one at a time for comment), but the hearing should be conducted in a simple and organized manner that facilitates public comment and a clear rulemaking record. The rules of evidence do not apply to public rule hearings and the agency representative or hearing officer may, in the interest of efficiency, exclude or limit comment that is deemed irrelevant, redundant, or unduly repetitious.

F. The agency must hold the hearing in a venue that reasonably accommodates all interested persons who wish to participate or observe, and appropriate audio equipment should be secured to ensure all in attendance can hear the proceeding and be heard when presenting comment. Reasonable efforts shall be made to accommodate the use of audio and video recording devices. Public rule hearings shall be open to the public, but are not subject to the New Mexico Open Meetings Act, Section 10-15-1 NMSA 1978, unless the hearing is conducted by a quorum of a public body.

[1.24.25.~~11~~13 NMAC - N, 01/01/2018]

*Comment: ACI proposes to delete the need for certain documents to be admitted into the hearing record and the option for "interested persons" to question witnesses at the public hearing. Any document submitted to the agency should be*

*part of the rulemaking record without the need for formal admission at the rulemaking hearing. Further, ACI's experience with rulemaking proceedings that allow such questioning has not been positive. Questioning from interested persons has tended to delay hearing and not been beneficial to decision makers. In some cases, it has been an impediment to public participation in rulemaking processes.*

#### **1.24.25.1314 RULEMAKING RECORD AND ADOPTION OF RULE**

A. The agency shall maintain a record of the rulemaking proceeding as required in Section 14-4-5.4 NMSA 1978, and any written comment, document, or other exhibit entered into the record during the rule hearing shall be labeled clearly. Any pre-filed exhibits are part of the rulemaking record without the need for formal admissions. Pre-filed exhibits include the petition; copies of the public notices of the rulemaking, including any lists of individuals to whom notice was mailed or sent electronically; copies of the proposed rule in underline and strikethrough format; and copies of any written comments submitted during the comment period. Any written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.

B. If the rule hearing is conducted by an agency representative or hearing officer, the complete rulemaking record, including any memoranda summarizing the contents of the hearing, if written, shall be compiled and forwarded to the agency head or members of the board or commission with sufficient time to review. The agency head or members of the board or commission shall thoroughly familiarize themselves with the rulemaking record before rendering a decision on the proposed rule.

C. The agency may adopt, amend or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking. Amendments that exceed the scope of the noticed rulemaking may require a new rulemaking process with a rulemaking notice, comment period, and public rule hearing so that the public has an adequate opportunity to review and comment on the changes.

D. In instances where the agency is a board or commission, the consideration and adoption of the proposed rule shall occur during a public meeting. The adoption date of the proposed rule shall be the date of the public meeting at which the vote occurred, unless the board or commission directs that a written order be issued, in which case the adoption date shall be the date the written order is signed. The board or commission may provide reasoning for the adopted rule through comments or discussion during its meeting, or by providing a statement of reasons in a written order.

E. In instances where the agency is a department or any of its divisions, the adoption of the proposed rule shall occur through the issuance of a written order by the department head, which shall include a statement of reasons. The adoption date of the proposed rule shall be the date the written order is signed.

F. The agency shall provide a concise explanatory statement that contains the date of adoption; the specific legal authority authorizing the rule; and any findings required by law for adoption of the rule. The explanatory statement may be included in an order adopting the rule or provided separately. The explanatory statement shall be posted on the agency website, if one is maintained by the agency, and sent to any persons entitled to notice of the rulemaking within 15 calendar days after the date of adoption.

[1.24.25.1214 NMAC - N, 01/01/2018]

***Comment:** ACI's proposed change makes pre-filed documents a part of the rulemaking record without the need for formal admission at the public hearing. This change is necessary with the proposed deletion of the admission process at the hearing.*

#### **1.24.25.1415 FILING AND PUBLICATION; EFFECTIVE DATE:**

A. Within 15 calendar days after the date of adoption of a rule, the agency shall file the adopted rule with the state records ~~center~~ administrator and shall provide to the public the adopted rule. The agency shall post the adopted rule on its website, if one is maintained by the agency, and send the adopted rule to any persons entitled to notice of the rulemaking.

B. Unless provided for by law, no rule shall be valid or enforceable until it is filed with the state records ~~center~~administrator and published in the New Mexico register. Unless another date is provided in the written order, the effective date of the rule shall be the date of publication in the New Mexico register.

[1.24.25.1315 NMAC - N, 01/01/2018]

*Comment: ACI proposes to change "center" to administrator in order to be consistent with Section 14-4-3 NMSA 1978.*

**1.24.25.1516 EMERGENCY RULES:**

A. The agency shall comply with the rulemaking procedures herein and the State Rules Act, unless the agency finds that the time required to complete the procedures would:

- (1) cause an imminent peril to the public health, safety or welfare;
- (2) cause the unanticipated loss of funding for the agency program; or
- (3) place the agency in violation of federal law.

B. The agency shall provide to the public a record of any finding pursuant to Subsection A of this Section and a detailed justification for that finding before issuing an emergency rule. The record shall include a statement that the emergency rule is temporary. After such record has been provided to the public, the agency may issue the emergency rule immediately without a public rule hearing or with any abbreviated notice and hearing that it finds practicable. If the agency is a board or commission, the adoption must occur during a public meeting pursuant to the requirements of the Open Meetings Act.

C. The emergency rule shall be published with the New Mexico register within 30 calendar days of the rule becoming effective.

D. When the agency makes a finding pursuant to Subsection A of this Section, the agency shall follow the provisions of this section in addition to any more specific requirements in statute that pertain to the agency regarding promulgating emergency or interim rules.

E. Emergency rules may take effect immediately upon filing with the state records administrator or the administrator's designee or at a later date specified in the emergency rule. Emergency rules shall be published in the New Mexico register.

F. No emergency rule shall permanently amend or repeal an existing rule. An emergency rule shall remain in effect until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted within 180 calendar days from the effective date of the emergency rule, the emergency rule shall expire and may not be readopted as an emergency rule. If an expired emergency rule temporarily amended or repealed an existing rule, the rule shall revert to what it would have been had the emergency rule not been issued.

[1.24.25.1416 NMAC - N, 01/01/2018]

**HISTORY OF 1.24.25 NMAC: [RESERVED]**



STATE OF NEW MEXICO  
*Educational Retirement Board*

701 CAMINO DE LOS MARQUEZ  
P.O. Box 26129  
SANTA FE, NEW MEXICO 87502-0129  
PHONE: (505) 827-8030  
FAX: (505) 827-1855

January 3, 2018

Renee K. Romero  
New Mexico office of Attorney General  
Via: e-mail: [romero@nmag.gov](mailto:romero@nmag.gov)

Dear Ms. Romero:

Thank you for the opportunity to comment regarding the proposed rulemaking for new rule 1.24.25 NMAC, Default Procedural Rule for Rulemaking.

Proposed subsection E of section 1.24.25.12 allows for the agency representative or hearing officer at a rule hearing to limit public comment that is deemed irrelevant, redundant or unduly repetitious. NMERB suggests that the last sentence in subsection E of 1.24.25.12 be modified to include the ability to limit the questioning of individuals who make public comment if the line of questioning is found irrelevant, redundant or unduly repetitious. NMERB proposes the following, or similar language for the last sentence of subsection E of section 1.24.25.12:

The rules of evidence do not apply to public rule hearings and the agency representative or hearing officer may, in the interest of efficiency, exclude or limit comment or questioning of individuals that is deemed irrelevant, redundant, or unduly repetitious.

NMERB's concern is that proposed subsection D of 1.24.25.12 allows for the questioning of individuals who make public comment not only by the agency representative or hearing officer, but also by other interested persons at the hearing. Rulemaking hearings may have parties from opposite sides of an issue appearing to make comment. NMERB's concern is that aggressive questioning of individuals by other individuals who attend the rulemaking hearing may dampen the incentive for some members of the public to attend and comment. Aggressive questioning without the ability to limit irrelevant, redundant, or repetitious questioning could also lead to inefficient rulemakings that become argumentative forums rather than a process where reasoned decisions can be made. NMERB also believes that an efficient hearing process is to the benefit of the general public in that it will assure the public that rulemakings do not waste the time or resources of agencies or those members of the public who attend the rulemaking hearings.

Sincerely,

Roderick Ventura  
General Counsel



Ms. Romero,

This email, with attached files, is to prepare for the 19 January hearing, where I plan to present extensive comments.

There are 3 major shortcomings with the AG's proposal, which directly undermine the intent of HB58;

- 1) The failure to provide a uniform right to petition for Rules Changes. No explanation is provided as to why "some" agencies have the right, others do not. The HB58 intent was to establish uniform standards. As a simple matter of equity, and public access, this should be corrected.
- 2) The failure to provide a consistent hearing process. Instead, three different paths are proposed, with no explanation, as to why "Boards/Commissions" have a different requirement to explain their decision than "Departments" or other Agencies. Again, simple equity seems to require the same standard for all, and elimination of the multiple paths. Troubling that the AG proposal would have HIM, the AG, not required to provide an explanation, which required of other Agencies. This, from an AG who frequently comments on his commitment to Openness? Sad, and possibly illegal...
- 3) The failure to provide adequate explanation of the final decision; which should explain both WHY some features were chosen and others WERE NOT. This is a chronic problem at the LEA Board and other agencies, which leads to frustration of involved parties, and an occasional lawsuit. Coupled with the failure to explain the proposed change when presented, as the AG proposal fails to do, it directly undermines HB58, with no explanation provided.

The Martinez file is provided as background, which shows the long process, and effort, put into much needed reforms to the Rules Act, culminating in HB58. It is essential that the proposed hearing procedure support those reforms. The proposed procedure most certainly DOES NOT support HB58, but undermines it. leading me to question the commitment of the Attorney General to improving public access to the Rules Making, the focus of HB58.

The markup file is a bit rough, as I have a very old version of Word, which creates formatting problems, for newer software, so I also include a pdf file, which at least will be readable on all platforms. Clarifying comments are provided at the end of this email.

I am very familiar with the Rules Act issues, as I have struggled with those issues at the LEA Board. They seem determined to shut out public input on police training. I am equally determined that they must allow public input, as I found that the police killing of Jeanette Anaya, in November 2013, was due to illegal policies and training. It is a fact that the December 2013 curriculum was not in NMAC, thus was not valid, and this continued until November 2016. Three years of an invalid curriculum, despite my repeated protests. They finally "woke up" after my OMA suit, and put their illegal curriculum back in the NMAC. Now the content is



still illegal, but the process is legal. Can you imagine this in the Public Schools?? There is no effective oversight of the LEA Academy, and its just crazy.

The current Rules Hearing procedure in use at the LEA (NMAC 10.29.1.8.F) exist only because of my OMA lawsuit. Before that, they had no procedure in NMAC, although it is legally required. The basis of the procedure is the ULA, where AG Counsel Joseph Dworak got the language. That LEA procedure is now the basis of the AG proposal for the HB58 default procedure, and the proposed language would allow the LEA to continue as they are. It would also allow the spread of that LEA procedure, which is used to prevent public input, not encourage it.

As I hope is clear, my suggestions, in the markup, are intended to promote consistent language, and practice, across the state agencies, where a good bit of chaos exists today. We have an opportunity to allow public input at roughly the level of the Chapter 61 statute, with improved explanatory requirements similar to the APA language.

I welcome any questions, and look forward to your comments.

Regards,

Chris Mechels  
Retired LANL Staff Member

As for notes to my suggested changes, I simply start at the top, and comment whenever there's a change bar.

NMAC 1.24.25.8

B. The added language is specified in HB58, and is essential, as establishing a new standard for public involvement across all agencies.

C. Deleted redundant text. Obviously one can't post on the website if it doesn't exist. Clutter.

NMAC 1.24.25.9

A.2 Establishes the right to petition as default, unlike the AG version which defaults to NOT having that right. There is NO reason why one Board should not allow petitions while another does. Time to end that confusion. The AG language serves to protect the LEA Board from petitions.

B. Establishes a uniform process for the agencies and individuals to petition. The EIB process works that way.

C. The proposed, simple, language is consistent with current practice in APA (Ch 12) and ULA (Ch 61) of statutes. The AG proposal is a barrier to laymen, and serves no purpose. The technical jargon can always be added by the agency.

E. Eliminates the time requirement as that is specified in statute already. The "concise written statement" is from ULA.

F. Deleted. If the agency is subject to OMA, the requirement exists via OMA. This language is therefore redundant, and simply serves to confuse.

#### 1.24.25.10

This whole section is redundant, as it is specified in the Rules Act. Even worse, the wording differs from the Rules Act. Consistent with HB58, Section 9.

#### 1.24.25.11

C&D. Deleted. See comment for 1.24.25.10. Same reason. If the information is necessary, it should reference the Rules Act. Consistent with HB58, Section 9.

The 7 day requirement has no support in statutes.

#### 1.24.25.12

A. The deleted language adds nothing, and is not required by any statute.

B. Changes from "should" which is not binding, to "shall", which is, constraining unseemly commentary by the hearing officer.

C. There is no such language in current rule making procedures. The source of this is recent LEA Board practice, intended to limit public participation. Other than limiting the public, it serves no purpose. Establishes consistent process for ALL petitioners.

D. Deleted redundant language.

F. Deleted redundant language. This is all covered by OMA.

#### 1.24.25.13

B. Deleted redundant language. "Sufficient time" has no definition, is just nonsense.

D&E Deleted the separate paths for Board/Commissions and Departments. Also, addressed the problem of NO PATH for agencies not B/C or Departments. All agencies get treated the same, and have the same obligation to explain their action. The AG proposal has different requirements for explanation placed upon B/C and Department with no reason given. The "real reason" is that the B/C (lesser) requirement is LEA Board language, which the AG is trying to preserve.

The change imposes a uniform requirement upon all agencies, even the LEA. Uniform practice eliminates confusion, for the agencies and the public.

F. Defines a more adequate explanatory statement. This supports public involvement and transparency, as they can see their voice has been heard, not just ignored.

1.24.25.15

Deleted the whole section, as HB58 covers this subject. Even worse the AG wording conflicts with the statute. If this text is needed, it should be referenced in the Rules Act. Consistent with HB58, Section 9.

Overall, this tries to pull together, and make consistent, current practice in the state government, from three main sources; APA (Chap 12), ULA (Chap 61), and the ERA (Chap 9, specifically NMSA 9.1.5.E)

Current state practice is chaotic, with many agencies, including the Attorney General, not even having a Rules Making Procedure, even though the law required it, at NMAC

1.24.10.11.C. Our state agencies have been non-compliant with this law, for decades.

This default procedure is therefore important, very important, for pulling all these agencies into legal compliance with the Rules Act, and establishing uniform practice, which is essential for open, transparent, government.

What the AG proposes would install perhaps the WORST current procedure, that used by the LEA Board, as the default for state agencies. A step back, not forward, as it blocks public participation, and lowers the bar for explaining the hearing decision.

Chris Mechels

**TITLE 1 GENERAL GOVERNMENT ADMINISTRATION**

**CHAPTER 24 RULES**

**PART 25 DEFAULT PROCEDURAL RULE FOR RULEMAKING**

**1.24.25.1 ISSUING AGENCY:** New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501.

[1.24.25.1 NMAC - N, 01/01/2018]

**1.24.25.2 SCOPE:** State agencies that have not adopted their own procedural rules consistent with the State Rules Act and agencies that have expressly incorporated this rule by reference.

[1.24.25.2 NMAC - N, 01/01/2018]

**1.24.25.3 STATUTORY AUTHORITY:** Section 14-4-5.8 NMSA 1978.

[1.24.25.3 NMAC - N, 01/01/2018]

**1.24.25.4 DURATION:** Permanent.

[1.24.25.4 NMAC - N, 01/01/2018]

**1.24.25.5 EFFECTIVE DATE:** January 1, 2018 unless a later date is cited at the end of a section.

[1.24.25.5 NMAC - N, 01/01/2018]

**1.24.25.6 OBJECTIVE:** To provide default procedural rules for rulemaking and public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act, and to facilitate public engagement with the administrative rulemaking process in a transparent, organized, and fair manner.

[1.24.25.6 NMAC - N, 01/01/2018]

**1.24.25.7 DEFINITIONS:** This rule adopts the definitions found in Section 14-4-2 NMSA 1978.

[1.24.25.7 NMAC - N, 01/01/2018]

**1.24.25.8 AGENCY ADOPTION OF PROCEDURAL RULES:**

A. Agencies that have not adopted their own procedural rules consistent with the State Rules Act shall apply these default rules, until such time as they have adopted their own rules.

B. Agencies may adopt these default rules, ~~in whole or in part as their own~~, or continue to use their existing rules *which shall provide at least as much opportunity for participation by parties and members of the public as these default rules*. ~~so long as those rules satisfy the requirements of the State Rules Act.~~

C. Agencies that adopt their own rules must submit a copy to the office of the attorney general within 30 calendar days of adoption, and post a copy of those rules on the agency' website, ~~if one is maintained by the agency.~~

[1.24.25.15 NMAC - N, 01/01/2018]

**1.24.25.9 INITIATION OF THE RULEMAKING PROCESS; PETITIONS:**

A. The rulemaking process for purposes of this rule may be initiated by either of the following:

(1) when a notice for a rule hearing is publicly posted pursuant to this rule; or

(2) ~~if authorized by law or practice of the agency~~, a *A* petition for rulemaking is filed with the agency.

B. A petition for rulemaking may be filed by the agency or, ~~if authorized by law of the agency~~, by a third party outside of the agency. ~~This rule does not require an agency to accept third party petitions for rule making.~~

C. A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. ~~A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.~~

D. If a petition is initiated internally, the agency shall consider whether to grant the petition and proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing.

E. If a petition is filed by a third party, ~~and such practice is authorized by the agency~~, the agency shall, ~~within 120 calendar days of receipt~~, consider the petition and make a determination whether to grant or deny, *with a concise written statement of its reason for denial*, the petition. The agency' decision to deny the petition is not subject to judicial review unless otherwise provided by law.

F. ~~If the agency is a public body subject to the Open Meetings Act, the decision to grant a petition, or the decision to initiate the rulemaking process by posting a notice for rule hearing, must be an action taken by vote~~

of the public body in open session:

G. Once the agency initiates the rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.

[1.24.25.8 NMAC - N, 01/01/2018]

**1.24.25.10 RULEMAKING NOTICE:**

A. The agency shall provide to the public notice of the proposed rulemaking at least 30 calendar days before a public hearing by:

- (1) posting it on the agency website, if one is maintained by the agency;
- (2) posting it on the sunshine portal;
- (3) making it available by posting it in a publicly visible location in the agency's district, field and regional offices, if any;
- (4) sending it by electronic mail to persons who have made a request for notice from the agency of rulemaking proceedings and who have provided an electronic mail address to the agency;
- (5) sending it by electronic mail to persons who have participated in the rulemaking, by petition or other act, and who have provided an electronic mail address to the agency;
- (6) sending it by mail to persons who have made a written request for mailed notice from the agency of rulemaking proceedings and who have provided a postal address to the agency;
- (7) providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees; and
- (8) publish the notice in the New Mexico Register and in a newspaper of general circulation in the state.

B. The notice shall include:

- (1) a concise summary of the full text of the proposed rule;
- (2) a short explanation of the purpose of the proposed rule;
- (3) a citation to the specific legal authority authorizing the adoption of the proposed rule;
- (4) information on how and where a copy of the full text of the proposed rule may be obtained;
- (5) an internet link or web address providing free access to the full text of the proposed rule;
- (6) information on how a person may comment on the proposed rule, where written comments will be received, and when comments are due;
- (7) information on where and when a public rule hearing will be held and how a person may participate in the hearing and provide public comment; and
- (8) a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.

C. If the agency changes the date of the public rule hearing or shortens the deadline for submitting comments as stated in the notice, the agency shall provide notice to the public of the change as provided above.

[1.24.25.9 NMAC - N, 01/01/2018]

**1.24.25.11 WRITTEN COMMENT PERIOD:**

A. The public comment period must be at least 30 calendar days and shall commence upon publication of the rulemaking notice in the New Mexico register, unless a later date is specified in the notice. The agency shall not adopt a proposed rule or hold a rulemaking hearing before the end of the public comment period.

B. A person may submit, by mail or electronic form, written comments on a proposed rule, and those comments shall be made part of the record. Written comments may be submitted through the end of the public comment period.

C. The agency may decide before, during, or after the public rule hearing to extend the comment period by providing public notice, to include:

- (1) posting it on the agency website, if one is maintained by the agency;
- (2) making it available by posting notice in a publicly visible location in the agency' district, field and region offices, if any;
- (3) sending notice by electronic mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceedings and provided an electronic mail address to the agency; and
- (4) sending notice by regular mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceeding and provided a postal address and specifically

requested notice by regular mail;

~~D. The agency shall post all written comments on its website, if one is maintained by the agency, as soon as practicable upon receipt, but no less than 7 calendar days prior to the rule hearing to allow for public review. All written comments received by the agency shall be available for public inspection.~~

[1.24.25.10 NMAC - N, 01/01/2018]

#### **1.24.25.12 PUBLIC HEARING:**

A. Prior to adopting a proposed rule, the agency must hold a public rule hearing. The purpose of the hearing is to provide all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule. ~~The agency, at its sole discretion, may determine whether more than one hearing is necessary.~~

B. The agency may act as the hearing officer or designate a representative or hearing officer to preside over the public rule hearing. The agency representative or hearing officer may ask questions and provide comments for clarification purposes only, and *shall* ~~should~~ refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented.

~~C. At the start of the hearing, any pre-filed exhibits should be introduced and admitted into the rulemaking record. Pre-filed exhibits should include the petition, if filed; copies of the public notices of the rulemaking, including any lists of individuals to whom notice was mailed or sent electronically; copies of the proposed rule in underline and strikethrough format; and copies of any written comment submitted during the comment period prior to the rule hearing. The agency representative or hearing officer will allow the petitioner or agency representative an opportunity to present the petition, if applicable. Any written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.~~

D. Individuals wishing to provide public comment or submit information at the rule hearing must state their name and any relevant affiliation for the record and be recognized before presenting by the agency representative or hearing officer. Public comment shall not be taken under oath unless required by separate rule of the agency. Any individual who provides information or public comment at the hearing may be questioned by the agency representative or hearing officer, or by other interested persons at the hearing.

E. The rule hearing shall be conducted in a fair and equitable manner. The agency representative or hearing officer may determine the format in which the hearing is conducted (e.g. introduction of each part or section one at a time for comment), but the hearing should be conducted in a simple and organized manner that facilitates public comment and a clear rulemaking record. The rules of evidence do not apply to public rule hearings and the agency representative or hearing officer may, in the interest of efficiency, exclude or limit comment that is deemed irrelevant, redundant, or unduly repetitious.

F. The agency must hold the hearing in a venue that reasonably accommodates all interested persons who wish to participate or observe, and appropriate audio equipment should be secured to ensure all in attendance can hear the proceeding and be heard when presenting comment. Reasonable efforts shall be made to accommodate the use of audio and video recording devices. ~~Public rule hearings shall be open to the public, but are not subject to the New Mexico Open Meetings Act, Section 10-15-1 NMSA 1978, unless the hearing is conducted by a quorum of a public body.~~

[1.24.25.11 NMAC - N, 01/01/2018]

#### **1.24.25.13 RULEMAKING RECORD AND ADOPTION OF RULE**

A. The agency shall maintain a record of the rulemaking proceeding as required in Section 14-4-5.4 NMSA 1978, and any written comment, document, or other exhibit entered into the record during the rule hearing shall be labeled clearly.

B. If the rule hearing is conducted by an agency representative or hearing officer, the complete rulemaking record, including any memoranda summarizing the contents of the hearing, if written, shall be compiled and forwarded to the agency head or members of the board or commission ~~with sufficient time to review~~. The agency head or members of the board or commission shall thoroughly familiarize themselves with the rulemaking record before rendering a decision on the proposed rule.

C. The agency may adopt, amend or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking. Amendments that exceed the scope of the noticed rulemaking may require a new rulemaking process with a rulemaking notice, comment period, and public rule hearing so that the public has an adequate opportunity to review and comment on the changes.

~~D. In instances where the agency is a board or commission, the consideration and adoption of the proposed rule shall occur during a public meeting. The adoption date of the proposed rule shall be the date of the public meeting at which the vote occurred, unless the board or commission directs that a written order be issued, in~~

which case the adoption date shall be the date the written order is signed. The board or commission may provide reasoning for the adopted rule through comments or discussion during its meeting, or by providing a statement of reasons in a written order.

E. In instances where the agency is a department or any of its divisions, the adoption of the proposed rule shall occur through the issuance of a written order by the department head, which shall include a statement of reasons. The adoption date of the proposed rule shall be the date the written order is signed.

F. The agency shall provide *to the public* a concise explanatory statement that *includes*

*A. the date the agency adopted the rule;*

*B. a reference to the specific statutory or other authority authorizing the rule;*

*C. any findings required by a provision of law for adoption of the rule;*

*D. the agency's reasons for adopting the proposed rule, including the agency's reasons for not accepting substantial arguments made in testimony and comments; and*

*E. the reasons for any substantive change between the text of the proposed rule at the time of the notice of proposed rulemaking and the text of the rule as adopted."*

contains the date of adoption; the specific legal authority authorizing the rule; and any findings required by law for adoption of the rule. The explanatory statement may be included in an order adopting the rule or provided separately. The explanatory statement shall be posted on the agency website, if one is maintained by the agency, and sent to any persons entitled to notice of the rulemaking within 15 calendar days after the date of adoption.

[1.24.25.12 NMAC - N, 01/01/2018]

#### **1.24.25.14 FILING AND PUBLICATION; EFFECTIVE DATE:**

A. Within 15 calendar days after the date of adoption of a rule, the agency shall file the adopted rule with the state records center and shall provide to the public the adopted rule. The agency shall post the adopted rule on its website, if one is maintained by the agency, and send the adopted rule to any persons entitled to notice of the rulemaking.

B. Unless provided for by law, no rule shall be valid or enforceable until it is filed with the state records center and published in the New Mexico register. Unless another date is provided in the written order, the effective date of the rule shall be the date of publication in the New Mexico register.

[1.24.25.13 NMAC - N, 01/01/2018]

#### **1.24.25.15 EMERGENCY RULES:**

A. The agency shall comply with the rulemaking procedures herein and the State Rules Act, unless the agency finds that the time required to complete the procedures would:

- (1) cause an imminent peril to the public health, safety or welfare;
- (2) cause the unanticipated loss of funding for the agency program; or
- (3) place the agency in violation of federal law.

B. The agency shall provide to the public a record of any finding pursuant to Subsection A of this Section and a detailed justification for that finding before issuing an emergency rule. The record shall include a statement that the emergency rule is temporary. After such record has been provided to the public, the agency may issue the emergency rule immediately without a public rule hearing or with any abbreviated notice and hearing that it finds practicable. If the agency is a board or commission, the adoption must occur during a public meeting pursuant to the requirements of the Open Meetings Act.

C. The emergency rule shall be published with the New Mexico register within 30 calendar days of the rule becoming effective.

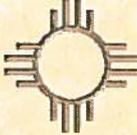
D. When the agency makes a finding pursuant to Subsection A of this Section, the agency shall follow the provisions of this section in addition to any more specific requirements in statute that pertain to the agency regarding promulgating emergency or interim rules.

E. Emergency rules may take effect immediately upon filing with the state records administrator or the administrator's designee or at a later date specified in the emergency rule. Emergency rules shall be published in the New Mexico register.

~~F. No emergency rule shall permanently amend or repeal an existing rule. An emergency rule shall remain in effect until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted within 180 calendar days from the effective date of the emergency rule, the emergency rule shall expire and may not be readopted as an emergency rule. If an expired emergency rule temporarily amended or repealed an existing rule, the rule shall revert to what it would have been had the emergency rule not been issued. [1.24.25.14 NMAC - N, 01/01/2018]~~

~~HISTORY OF 1.24.25 NMAC: [RESERVED]~~

New Mexico State Rules Act:  
A Different Kind of APA



John H. Martinez  
Director, Administrative Law Division  
New Mexico Commission of Public Records  
State Records Center and Archives

---

---

---

---

---

---

---

---



Purpose

- Explain the efforts to make Administrative Procedures in New Mexico more uniform

---

---

---

---

---

---

---

---



NM Administrative Procedures Act - 1969

- Based on the 1961 Model State Administrative Procedure Act
- Sets out the basics for rulemaking and adjudication in New Mexico
- State agencies are exempt from the provisions of the APA
- Has never really been in effect

---

---

---

---

---

---

---

---



### State Rules Act - 1967

- The State Rules Act establishes the basic requirements for the rulemaking process
- It covers filing, publication and compilation requirements for rules
- It does not cover all steps necessary for rulemaking
- It does not cover adjudication

---

---

---

---

---

---

---

---



### Additional Requirements

Agencies have additional rulemaking requirements from:

- Other statutes
  - Uniform Licensing Act
  - Executive Reorganization Act
  - Specific Organic Acts [Enabling Statutes]
- Rules
  - Rules on rules
  - Agency's own rules

---

---

---

---

---

---

---

---



### No Uniform Statutes

In New Mexico, there are no uniform statutes that cover all agencies regarding:

- Adjudication
- Office of administrative hearings
- Legislative review

---

---

---

---

---

---

---

---



### Unifying Rulemaking Laws

- 1970s – New APA by Legislature, but vetoed
- 1980s – Multiple attempts, NM Register
- 1990s – NM Administrative Code
- 2000s – Regulatory Justice / Reform
- 2010s – APA Task Force

---

---

---

---

---

---

---

---



### Senate Joint Memorial 7

- 2010 legislative session
- SJM 7 to create a task force to study administrative procedures
- Varied interests represented on task force
- Support from all sides
- Died in last days of session

---

---

---

---

---

---

---

---



### Lt. Governor's Task Force

- Lt. Governor formed a task force based on SJM 7
- Similar composition
- Same objectives

---

---

---

---

---

---

---

---



### APA Task Force

- 2 State Representatives
- 2 State Senators
- Superintendent of Regulation and Licensing
- Secretary of Taxation and Revenue
- Secretary of Economic Development
- Secretary of Environment
- Secretary of Energy, Minerals and Natural Resources
- 2 representatives from New Mexico boards or commissions
- Attorney General
- Member of the State Bar of New Mexico
- Member from the faculty of the University of New Mexico School of Law
- Member representing the interests of the judicial branch
- 2 Members representing the interests of different industries affected by regulatory proceedings
- 2 Members representing public advocacy groups
- State Records Administrator

---

---

---

---

---

---

---

---



### The Work

- APA Task Force began meeting in May 2010
- Met at least once every 3 week through the beginning of December 2010
- Initially discussed administrative procedures in general
- Eventually got more detailed
- Finally wrote proposed statutory text

---

---

---

---

---

---

---

---



### Rulemaking Only

- Early on it was decided to focus on rulemaking only
- Adjudication was too big an issue to include
- More consensus on rulemaking – also more existing uniform statutes
- Hope to cover adjudication later

---

---

---

---

---

---

---

---



### Dream Process

- Began by designing the “dream process” for rulemaking
- Charted out the process on huge pieces of paper
- Added a new step at the start to encourage public participation in the drafting of the rule text
- More concise explanation of the steps

---

---

---

---

---

---

---



### Amend State Rules Act

- Decided to amend the State Rules Act instead of repealing and replacing with a new act
- The State Rules Act has functioned fairly well for 43 years and there was concern about doing away with it for something untested

---

---

---

---

---

---

---



### Fill in the Gaps

- Compared the “dream process” with the State Rules Act
- Noted where there were gaps in the State Rules Act
- Used the Feb 2010 version of the MSAPA for ideas and verbiage to fill in the gaps

---

---

---

---

---

---

---



### Draft Amendment

- Drafting took more time than anticipated
- Specific members were assigned sections of the MSAPA to redraft for New Mexico
- Submitted to task force before meeting
- Went through each section, word by word, in meeting
- Had a “reporter” to make changes to the text

---

---

---

---

---

---

---

---



### Administrative Hearings

- Also drafted a new act, independent of the State Rules Act, to establish an Office of Administrative Hearings
- Based heavily on MSAPA
- Some debate on how many agencies should be required initially to use OAH

---

---

---

---

---

---

---

---



### Regulatory Process Subcommittee

- Interim Subcommittee of the Legislature
- 18 members from 3 Interim Committees
  - Revenue Stabilization and Tax Policy
  - Economic and Rural Development
  - Courts, Corrections and Justice
- Met August 2 & 3, 2010 and October 27, 2010
- Potential overlap with the work from the APA Task Force

---

---

---

---

---

---

---

---



### Subcommittee Work Plan

- Review the impact of rulemaking
- Review the MSAPA
- Review state agencies' interpretation of legislation and their rulemaking authority and adjudicatory functions
- Determine any necessary legislative action on regulatory process
- Prepare a subcommittee report

---

---

---

---

---

---

---

---



### Final Review

- May through July constructing “dream process”
- August through November drafting text
- Legislative Subcommittee review in October
- Interim Committee endorsement in December

---

---

---

---

---

---

---

---



### Bills Introduced – State Rules

- Senate Bill 30
  - Introduced on the first day of the session but has not been heard by first committee yet
- House Bill 360
  - Introduced this week (near the middle of the session)

---

---

---

---

---

---

---

---



### Bills Introduced - OAH

- SB 67
  - Introduced on the first day of the session but has not been heard by first committee yet
- SB 104
  - A bill not made by the APA Task Force but almost identical to SB 67. Difference on where the OAH resides

---

---

---

---

---

---

---

---



### Questions?

---

---

---

---

---

---

---

---

Chris Mechels

January 16, 2018

Ms. Romero,

This email is to comment on both the HB58 content, and the process of the hearing. It raises legal issues, which should be taken up with Counsel.

First; I repeat my request that you identify the Hearing Officer. It is outrageous that was not provided when requested in November, or that it is even an issue.

Second; my concerns, expressed in the 29 November email, for the hearing process have not been addressed. I have checked with attorneys, and been advised that using the "proposed" hearing process for this hearing is very questionable, especially as that process creates an "out" for the Attorney General, with no requirement to explain his decision, as other agencies are required to do.

I repeat my suggestion of November, that an existing hearing procedure be used for this hearing, and suggest either the APA or ULA procedure. This would seem on sounder legal ground.

Third; I maintain that you have NOT COMPLIED with the Rules Act as you failed to provide the required materials (14.4.5.2.A.(1&2)) in your web site posting. By this failure, you have failed to inform us of the reasons which support many questionable decisions, especially in Sections 9 concerning petitions, and Section 13 concerning Rule Adoption. In both of these sections you propose different "rights" for different agencies with no explanation provided. As the whole purpose of HB58 was to eliminate such disparate practices, some explanation seems required.

Fourth; The unstated reason that the 4 December hearing was cancelled was that the notice requirement, namely publishing in the Sunshine Portal, was not met. This failure was finally accepted, after prolonged consideration by the AG, as reason to cancel. This was an opportunity to also address the failure to provide the required materials noted above, but that was not addressed. The AG only addressed the notice failure, did not address the other legal issues, which continue to concern the upcoming hearing.

I suggest therefore, that the hearing be, once again, canceled, until these legal issues are addressed.

While we could allow the hearing to go forward, and hope that the AG would address these concerns in his decision, that prospect seems dim, as he has chosen to use a procedure which does not require an explanation of his decision. All of this shows an utter lack of regard of the public involvement and of the Legislative intent in passing HB58 unanimously.



**We can not expect the legal difficulties to be addressed by the AG, who also Chairs the LEA Board, as his history does not support such expectations. The attached file from the August 2016 LEAB Rule Hearing, shows that two very obvious OMA violations, and a Rules Act notice violation, were ignored by the AG, and the AG supplied Board Counsel, Mr. Dworak. None of the legal problems were noted when the LEA Board approved the new Rules at their September meeting. Furthermore, no record of the August 2016 hearing exists on the LEA website. Perhaps because of the legal problems, which still exist concerning this hearing.**

**We must hope, if our system of governance is to function, that our Attorney General will, at minimum, follow our laws. This hope was dashed by his 2016 actions at the LEAB. We must hope that he will seek to openly inform the public of his actions and support his decisions. The current hearing failures, concerning the Rules Act failures, and his choice of hearing process, also dash that hope.**

**I again encourage you to cancel this hearing, lest you go forward under a legal cloud, as the August 2016 hearing did.**

**Regards,**

**Chris Mechels**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**NEW MEXICO LAW ENFORCEMENT ACADEMY  
PUBLIC RULES HEARING  
August 23, 2016  
10:10 a.m.  
Law Enforcement Academy  
4491 Cerrillos Road  
Santa Fe, New Mexico 87507**

**BEFORE: ELISABETH MILLER, Ph.D., Hearing Officer  
JOSEPH M. DWORAK, ESQ.**

**REPORTED BY: Jan A. Williams, RPR, NM CCR 14**

1 DR. MILLER: But we need you to state your  
 2 name and your affiliation for the record.  
 3 MR. DWORAK: And I am going to answer those  
 4 questions. If we can clarify those questions from a  
 5 procedural process, I will answer them. If not, your  
 6 questions or concerns can be noted in the record so  
 7 they're preserved with any arguments or concerns that  
 8 you have just for the interest of transparency. But  
 9 if I can clarify anything, I certainly will.  
 10 MR. MECHELS: Okay. Fine. For the court  
 11 reporter, I'm Chris Mechels, C-h-r-i-s M-e-c-h-e-l-s,  
 12 retired from Los Alamos.  
 13 The question I would have concerning one of  
 14 the exhibits he offered was -- one of the exhibits was  
 15 concerning notice. Specifically the notice that he  
 16 stated I believe correctly was sent to the Albuquerque  
 17 Journal on 7/31.  
 18 His claim was that this notice is not  
 19 required by law. I wish to take issue with that. I  
 20 think it is very specifically required by law within  
 21 your NMACs.  
 22 You've got two sections that specifically  
 23 address that notice requirement is 30 days and that  
 24 the notice requirement is met by publishing it in a  
 25 newspaper.

1 But because of the Open Meetings Act  
 2 violation for this specific meeting, I believe that  
 3 you should not be holding this meeting because you  
 4 have committed a notice violation, which I have made  
 5 you aware of I believe on the 8th of August. Thank  
 6 you.  
 7 MR. DWORAK: I just want to make one  
 8 statement for the record. This is not a meeting, it  
 9 is a hearing. We are not under any jurisdiction of  
 10 the New Mexico Open Meetings Act. And that's just all  
 11 I'm going to say for that, because we're not as a  
 12 quorum of any public body.  
 13 So I guess, unless there are any other  
 14 questions to the exhibits, the hearing officer will  
 15 rule on the admissibility of them.  
 16 MR. MECHELS: If I might, your NMACs  
 17 specifically have a 30-day notice for public hearings.  
 18 MR. DWORAK: Okay.  
 19 DR. MILLER: Okay. So do we have any more  
 20 comments on the exhibits as they are prepared to be  
 21 entered into the record? Okay.  
 22 Given that there are no further comments,  
 23 this is all the exhibits, spoken and written comments,  
 24 to date. In that case Exhibits 1 through 9 are hereby  
 25 admitted into the record.

1 Publishing it in the register does not meet  
 2 that notice requirement. Publishing it on your  
 3 website specifically does not meet that notice  
 4 requirement as clearly stated in Section 14 of the  
 5 statutes.  
 6 MR. DWORAK: Do you have a citation?  
 7 MR. MECHELS: No. But you can easily find  
 8 it. Specifically in the statutes under Section 14,  
 9 they have a noticing area.  
 10 And it says specifically that putting a  
 11 notice -- they encourage you to put forth an  
 12 electronic notice. But it specifically says that that  
 13 electronic notice on your website does not satisfy  
 14 notice requirements.  
 15 So I say so you must legally notice in the  
 16 newspapers. And you did notice in the Journal. But  
 17 your notice was tardy. 7/31, you've got a 24-day lead  
 18 time. And this is a 30-day notice required by your  
 19 own NMACs. So I suggest this meeting is not legal.  
 20 The other notice issue that comes up is your  
 21 last Board meeting in Farmington was not noticed at  
 22 all. The Board meeting prior to that in March was not  
 23 noticed at all. Both of those violated notice  
 24 requirements. So I would say that all three of those  
 25 are Open Meetings Act violations.

1 (Exhibit Nos. 1 through 9 admitted.)  
 2 DR. MILLER: If there are no other  
 3 preliminary matters, we will proceed with the  
 4 introduction of the proposed rules.  
 5 MR. DWORAK: Madam Hearing Officer, just for  
 6 clarification, for the audience, our court reporter  
 7 will be holding the original copies of the exhibits  
 8 that are admitted. If anyone would like to look at  
 9 them, they can certainly look at the originals.  
 10 We also have a spare set of copies of the  
 11 originals that aren't altered, if anyone would like to  
 12 look at those. There are copies of all four sets of  
 13 the proposed rule changes. Excuse me. Three sets,  
 14 not four. And they're available at the table by the  
 15 front door, if anyone needs a copy.  
 16 MR. MECHELS: A question, if I might. I have  
 17 individual exhibits for the separate parts, but I also  
 18 have a general exhibit. Would you prefer I introduce  
 19 that now or with Part 1?  
 20 DR. MILLER: You have an exhibit to enter per  
 21 each exhibit that we are going to go through or per  
 22 each section we're going to go through?  
 23 MR. MECHELS: And I have a separate general  
 24 exhibit which is commenting overall and on the  
 25 process.

January 18, 2018

Renee K. Romero  
Open Government Division, Office of the Attorney General  
P.O. Drawer 1508  
Santa Fe, NM 87504-1508

VIA ELECTRONIC SUBMISSION to: rromero@nmag.gov

**RE: Proposed Default Procedural Rule for Rulemaking**

Dear Ms. Romero,

The undersigned parties submit the following comments in response to the New Mexico Office of the Attorney General's proposed default procedural rules for public rule hearings. We commend the Open Government Division for proposing these comprehensive and necessary rules. We urge the Division to adopt the following additional recommendations. These recommendations represent the combined individual comments of the undersigned, and include several specific examples of the importance of meaningful public participation in the administrative rulemaking process.

**I. 1.24.25.2 Scope**

**Consistency in Public Participation in the Rulemaking Process Across State Agencies.**

The state rules act establishes minimum requirements for state rulemaking procedures. The statute requires that an agency that elects to adopt or continue its existing procedural rules "shall provide at least as much opportunity for participation by parties and members of the public as is provided in the procedural rules adopted by the attorney general." 14-4-5.8 NMSA 1978. The proposed text at NMAC 1.24.25.2 indicates that the requirements only apply to agencies that have not adopted their own rulemaking process. To comply with the statute, the scope of the rules must include all state agencies, not just those that do not have their own rulemaking process. Please see the attachment for the language that we recommend adopting in the scope of the rule.

**II. 1.24.25.9 Initiation of Rulemaking Process; Petitions**

**Include a Separate Section on 3rd Party Petitions for Rulemaking.**

We recommend that the Office of the Attorney General separate Section 1.24.25.9 into two distinct sections: Section 1.24.25.9 NMAC "Agency Initiation of the Rulemaking Process" and Section 1.24.25.10 NMAC "Petitions for Rulemaking." As the rule currently reads, it appears to grant an agency the authority to petition itself, which will create a complicated and unwieldy procedure for state agencies to follow. When the State Rules Act was unanimously amended in the 2017 Legislative Session, the legislature emphasized the importance of standardization in the rulemaking process in order to avoid confusion and delay in the rulemaking process. The process by which the public can initiate rulemaking



varies across state agencies, and does not exist at all for some agencies. However, the minimum requirements for agency rulemaking apply to every state agency.

#### **A. Petitions for Rulemaking.**

Please see suggested language in Sections 1.24.25.9 and 1.24.25.10 of the attachment. We emphasize the importance of establishing a clear timeline by which the agency must respond to a rulemaking petition in order to ensure transparency in the process. We recommend that an agency initiate rulemaking within 60 days of receipt of the petition if it decides to grant the petition or state in writing the reasons for a denial of the petition for rulemaking.

We also recommend removing the provision in the proposed Section 1.24.25.9(E) exempting the decision to deny a petition from judicial review. This provision is inconsistent with federal case law that provides an agency's decision to deny a rulemaking petition can be judicially reviewable.<sup>1</sup> Moreover, whether a party may appeal an agency's decision to deny a rulemaking is governed by New Mexico statutes and case law that cannot be amended by a regulation.

#### **B. Agency Must State the Reasons for Denying a Petition.**

We recommend the regulations be amended to state that when an agency denies a petition for rulemaking, the agency must include its reasons for the denial in a written statement to the petitioner. This encourages transparency in the rulemaking process, as well as meaningful public participation in the rulemaking process. This is because it requires agencies to seriously consider and be accountable to the public for the rulemaking petitions that they receive. Furthermore, a statement of the reasons for denying the petition is consistent with the State Administrative Procedures Act, Section 12-8-7 NMSA 1978, which provides that "Within thirty days after the submission of a petition, the agency either shall deny the petition in writing, stating its reasons for the denial, or shall initiate rulemaking proceedings." Such a provision is also consistent with New Mexico case law that indicates that agencies must provide reasons for their decisions. See, e.g., Akel v. Human Services Department, 1987-NMCA-154, 106 N.M. 741, *cert denied sub nom. New Mexico Human Services Department v. Akel*, 107 N.M. 74, 752 P.2d 789 (N.M. 1988).

See attachment for the language we recommend the Division adopt for an additional Section 1.24.25.10 NMAC Petitions for Rulemaking.

### **III. 1.24.25.10 Rulemaking Notice**

We are pleased with the language in the proposed Section 1.24.25.10 NMAC and strongly urge the Division to include all the enumerated methods of public notice in the final rule. These methods of public notice are necessary to ensure the public participation intended by the State Rules Act.

We recommend subsection 1.24.25.10(B)(7) be amended to state that rulemaking notice should include information on where and when *the* public rule hearing will be held, rather than information on where

---

<sup>1</sup> See *Mass. v. EPA*, 549 U.S. 497 (2007) (holding that the Environmental Protection Agency's decision to avoid taking regulatory action under the Clean Air Act was subject to judicial review).

and when a public rule hearing should be held so as to eliminate any ambiguity as to whether a public rule hearing is optional. See NMSA Section 14-4-5.3 "At the public rule hearing, members of the public shall be given a reasonable opportunity to submit data, views or arguments orally or in writing."

#### **IV. 1.24.25.11 Written Comment Period**

##### **Require Agencies to Make All Written Comments Available within a Defined Time Period of Receipt and Prior to the Public Rule Hearing.**

We commend the Division for including the proposed text at Section 1.24.25.11(D) NMAC, requiring state agencies to post all written comments that they receive on a proposed rulemaking on their websites 7 days prior to the public rule hearing. Requiring that comments be posted prior to the public rule hearing encourages transparency throughout the rulemaking process. This provision grants members of the public the important opportunity to respond to comments at the public rule hearing, facilitating a more informed, and therefore effective public rule hearing. Several state agencies have similar posting requirements. However, we recommend that the rule require written comments be posted farther in advance than 7 days of the hearing. A party or member of the public who receives a technical comment 7 days prior to the hearing will not have adequate time to review and prepare a response to the comment. We therefore recommend that the rule provide that comments must be posted a minimum of 30 days prior to the hearing.

We recommend that the Open Government Division revise the provision of Section 1.24.25.11(D) NMAC requiring the agency to post all written comments to its website "as soon as practicable upon receipt." This standard should be clarified to eliminate any vagueness or confusion as the meaning of "as soon as practicable." We emphasize the necessity of a deadline, and recommend that comments be posted within 7 days as a reasonable deadline.

See the attachment at Section 1.23.25.11 NMAC for our recommended language.

#### **V. 1.24.25.12 Public Hearing**

##### **Meaningful Public Participation in the Public Rule Hearing.**

###### **A. Emphasize the importance of hearing officers to remaining neutral at the public rule hearing.**

Section 1.24.25.12(B) NMAC requires that the agency representative or hearing officer presiding over the public rule hearing "refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented." We emphasize the importance of this provision requiring the neutrality of the hearing officer in the public rule hearing. In order for all members of the public to present their comments in a meaningful way, the hearing officer must only ask clarifying questions, and decline to independently opine, as this degrades the integrity of the public rule hearing, and chills public participation.

###### **B. Include a provision extending the scope of what can be considered a pre-filed exhibit.**

In Section I.24.25.12(C), we recommend adding the phrase “including, but not limited to” to the list of pre-filed exhibits that should be introduced and admitted into the rulemaking record. Including this language broadens the scope of pre-filed exhibits to include all relevant materials. Please see the attachment for the language we suggest including in this subsection.

**C. Parties attending the public rule hearing have the opportunity to ask questions.**

Any individual involved in a public rule hearing must be able to inquire into the testimony and comments offered by other parties and members of the public. We recommend changing “interested persons” to “attendees” to make clear that all participants in a public rule hearing have the opportunity to ask questions and prevent any arbitrary or inconsistent restrictions as to who different agencies may or may not consider “interested persons.”

**D. Require that the recording of the hearing be made available to the public by posting on the sunshine portal within 15 days of the public rule hearing.**

In section I.24.25.12, we recommend that the Office of the Attorney General include language stating the timeline by which it will make available a recording of the public rule hearing. The comments made at a public rule hearing are required to be made available by Section 14-4-5.4 NMSA 1978 of the State Rules Act. We suggest creating a new subsection (G) to ensure that the comments made at the public rule hearing are accessible to the public within a reasonable time frame of fifteen days following the hearing. See the attachment for the language we recommend for a new subsection (G).

**VI. I.24.25.13 Rulemaking Record and Adoption of Rule**

**Define Scope of the Amendments to Proposed Regulations and Provide Greater Guidance on the Concise Explanatory Statement and Rulemaking Record.**

**A. Define what regulatory changes “within in the scope” of the proposed rulemaking.**

We strongly urge the Office of the Attorney General to provide greater clarity on the scope of amendments that an agency may make to a proposed rule. Section 318 of the Revised Model State Administrative Procedure Act<sup>2</sup> provides a clear test, developed from federal case law,<sup>3</sup> on the

---

<sup>2</sup> See REVISED MODEL STATE ADMIN. PROC. ACT (Nat’l Conf. of Commissioners on Uniform State Laws, 2010) [http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf).

<sup>3</sup> See *Long Island Care at Home v. Coke*, 551 U.S. 158 (2007) (holding that, in order for public notice to be proper, a final rule promulgated by the Department of Labor must be a logical outgrowth of the rule initially proposed by the agency). See also *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986); *First Am. Discount Corp. v. Commodity Futures Trading Comm’n*, 222 F.3d 1008, 1015 (D.C.Cir.2000); *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C.Cir.2000); *American Water Works Ass’n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994); *Trustees for Alaska v. Dept. Nat. Resources*, 795 P.2d 805 (1990); *Sullivan v. Evergreen Health Care*, 678 N.E.2d 129 (Ind. App. 1997); *Iowa Citizen Energy Coalition v. Iowa St. Commerce Comm.*, 335 N.W.2d 178 (1983); *Motor Veh. Mfrs. Ass’n v. Jorling*, 152 Misc.2d 405, 577 N.Y.S.2d 346 (N.Y.Sup.,1991); *Tennessee Envir. Coun. v. Solid Waste Control Bd.*, 852 S.W.2d 893 (Tenn. App. 1992); *Workers’ Comp. Comm. v. Patients Advocate*, 47 Tex. 607, 136

permissible variance between a proposed and final rule. We recommend that the Open Government Division adopt the following three part test for determining when a final rule is within the scope of the proposed rule:

- (1) Any person affected by the adopted rule could not have reasonably expected that the change from the published proposed rule would affect the person's interest;
- (2) The subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published rule proposed to be adopted; and
- (3) The effect of the adopted rule differs from the effect of the rule proposed to be adopted or amended.

It is vital that these default rules offer guidance on the variance between a proposed and final rule to prevent inconsistent interpretations by state agencies. For example, in June of 2017, the NM Human Services Department issued a notice of proposed rulemaking that proposed to spell out an acronym in NMAC concerning immigrant eligibility for Medicaid.<sup>4</sup> The final rule issued by the Department on September 29, 2017, drastically modified that section and eliminated categories of eligibility for many immigrants.<sup>5</sup> The NM Center on Law and Poverty had to repeatedly threaten litigation to get the Department to reverse the illegal changes through an emergency rule. Clear guidance in regulations would prevent these types of errors, preserve resources and ensure public participation in the rulemaking process.

#### **B. Follow the Procedure for the Promulgation of a Rule Set Forth in the Rules Act.**

Subsections 1.24.25.13 (D) and (E) create different procedures for the adoption of a rule depending on the form of the state agency. We recommend removing these two subsections because they contradict the legislature's intended purpose in amending the Rules Act. Rather than promote uniformity, these subsections propose different standards for boards, commissions, departments, and divisions. Furthermore, Section 14-4-5 NMSA 1978 provides "Except in the case of any emergency rule, no rule shall be valid or enforceable until it is published in the New Mexico register as provided by the State

---

S.W.3d 643 (2004); Dept. Of Pub. Svc. re Small Power Projects, 161 Vt. 97, 632 A.2d 13 73 (1993); Amer. Bankers Life Ins. Co. v. Div. of Consumer Counsel, 220 Va. 773, 263 S.E.2d 867 (1980).

<sup>4</sup> See NMHSD Register 12, Vol. 40, Section NMAC 8.200.410.11, available at <http://www.hsd.state.nm.us/uploads/files/Looking%20For%20Information/General%20Information/Registers%20-%20Rule%20Changes/MAD%20-%20Registers/Proposed%20Registers/2017%20Proposed%20Registers/PR%2012.pdf> and <http://www.hsd.state.nm.us/uploads/files/Looking%20For%20Information/General%20Information/Registers%20-%20Rule%20Changes/MAD%20-%20Registers/Proposed%20Registers/2017%20Proposed%20Registers/General%20Requirements.pdf>

<sup>5</sup> See NMHSD Register 12, Vol., Section NMAC 8.200.410.11, available at <http://www.hsd.state.nm.us/uploads/files/Looking%20For%20Information/General%20Information/Registers%20-%20Rule%20Changes/MAD%20-%20Registers/Final%20Registers/2017%20Final%20Register/Register%2012.pdf> and [http://www.hsd.state.nm.us/uploads/files/Looking%20For%20Information/General%20Information/Registers%20-%20Rule%20Changes/MAD%20-%20Registers/Final%20Registers/2017%20Final%20Register/Rule%208\\_200\\_410\(2\).pdf](http://www.hsd.state.nm.us/uploads/files/Looking%20For%20Information/General%20Information/Registers%20-%20Rule%20Changes/MAD%20-%20Registers/Final%20Registers/2017%20Final%20Register/Rule%208_200_410(2).pdf)

Rules Act.” Providing different standards of adoption of a rule by a state agency when the Rules Act creates a uniform method of publishing a final rule creates unnecessary confusion.

Please see the attachment at 1.25.24.13 NMAC for our recommendations regarding these subsections.

**C. Provide Minimum Requirements for the Concise Explanatory Statement.**

The Rules Act requires the provision of a concise explanatory statement at the time that the agency adopts a final rule. Section 14-4-5.5 NMSA 1978 states that the concise explanatory statement should include the date the agency adopts the rule, a reference to the statutory authority authorizing the rule, and any findings required by law for the adoption of a rule.

We recommend amending Section 1.24.25.13(F) NMAC to require the following findings to be included in the concise explanatory statement:

- (1) the reasons for adopting the rule, including the reasons for not accepting substantial arguments made at the public rule hearing or in written comment;
- (2) the agency’s reasons for any change between the proposed and the final rule; and
- (3) a summary of any independent analysis done by the agency.

These requirements are drawn from the Uniform Law Commission’s Revised Model State Administrative Procedure Act. Including these additional findings in the concise explanatory statement, pursuant to Section 14-4-5.5(C) NMSA 1978, encourages agency consideration of all substantial arguments in the rulemaking process and helps provide transparency in the rulemaking process. These additional requirements are not overly burdensome to state administrative agencies, and are key to determining if the final rule is within the scope of the proposed rulemaking. See attachment for the language that we urge the Division to adopt regarding clarifying the concise explanatory statement.

**D. Include an additional subsection requiring any other information the agency receives be incorporated into the record.**

We recommend that an additional subsection (G) be included in Section 1.24.25.13 NMAC to require an agency to include in the rulemaking record any additional information that it receives during the rulemaking period. This subsection will help provide a more complete rulemaking record and will increase transparency in the rulemaking process, while giving agencies the opportunity to solicit expertise in the course of the rulemaking. Further, this subsection will give parties and members of the public who are participating in the rulemaking proceeding an opportunity to address any information that the agency considers in promulgating its final rule, but that was not provided in the way of testimony or comment during the public hearing. In the absence of such a requirement, parties and members of the public may be unable to respond to information that the agency uses to justify its decision to adopt a rule.

We recommended language in the proposed subsection (G), which is drawn from Section 306 of the Model State Administrative Procedure Act, and is included in the attachment.

**VII. Request for the Attorney General to Issue an Opinion Letter on State Agency Actions that Meet the Definition of a Rule.**

Lastly, we ask that the Office of the Attorney General closely monitor state agency compliance with the State Rules Act and issue an opinion letter to address a common illegal practice of state agencies that serve low income New Mexicans. The Rules Act defines a rule as “any rule, regulation or standard . . . issued or promulgated by an agency or purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members of the agency, including affecting persons served by the agency.” 14-4-2(F) NMSA 1978. State agencies frequently adopt standards and de facto rules that impact individuals served by the agencies without following the rulemaking process in state law. As a result, agency policy impacting the public is promulgated behind closed doors, without public knowledge or participation. Below are recent examples of state agency violations of the Rules Act, some of which are ongoing.

1. Children Youth and Families Department (CYFD) has internal eligibility standards for child care assistance eligibility and client co-payment levels that have not been promulgated into regulations. These internal standards, which the agency applies to all applicants for childcare assistance, establish the income levels at which families qualify for state funded assistance with child care and how much assistance the state provides. These were established without public notice or comment. Thousands of New Mexico families rely on child care assistance and have a legal right to know the standard the agency uses to determine the amount of assistance they are entitled to receive, and to have input in this agency decision through notice and comment.
2. The New Mexico Human Services Department (HSD) has adopted policies in Department memoranda that establish client rights to receive active food aid cards at local aid offices instead of by mail. These policies establish the standard to receive immediate food assistance, yet HSD refuses to put these standards into regulations and has changed the standard without public input or notice several times over the past four years.
3. The Financial Institutions Division (FID) of the Regulation and Licensing Department (RLD) is responsible for licensing and regulating all small lenders operating in the state of New Mexico pursuant to the New Mexico Small Loan Act of 1955, 58-15-1 NMSA 1978. All lenders are required by the Small Loan Act to demonstrate appropriate financial responsibility, character and general fitness as to command the confidence of the public and warrant belief that the business will be operated lawfully, honestly, fairly and efficiently. The standards by which the FID determined that lenders demonstrate appropriate financial responsibility, character and general fitness are in standards that directly affect the public, but have not been promulgated as rules through the procedures required by the Rules Act. Additionally, the FID maintains standards for lending and marketing websites operated by the small loan companies that it licenses. Members of the public routinely interact with these websites, which are engaged in both the marketing and making of small loans, however, the standards under which the agency requires websites to operate has not been promulgated in a rule.
4. For many years, the Labor Relations Division of the Department of Workforce Solutions (LRD), which is charged with enforcement of our state’s wage payment laws, applied illegal internal policies to deny workers the right to file wage claims. These policies, which the agency applied to all wage claims even though they were never formally promulgated under the State Rules Act, included 1) a policy not investigating or taking any enforcement action on wage claims worth more than \$10,000; 2) a policy of not investigating or taking any enforcement action on wage claims that extended beyond one year from the date a claimant filed a claim, 3) a policy of not applying the statutory damages set forth in Section 50-4-26 NMSA 1978 to any wage claim at

the administrative enforcement phase, 4) Standard Operating Procedures for processing wage claims, and 5) a policy of requiring limited English proficient wage claimants to communicate with the agency in English. After several organizations sued LRD over the legality of these policies,<sup>6</sup> LRD and the plaintiffs reached a settlement that required LRD to rescind these illegal internal policies and adopt regulations lawfully under the State Rules Act.

5. The bureaus and offices of the New Mexico Environment Department occasionally issue guidance documents that set standards and enact de facto rules that directly impact the public. These guidance documents are not issued through the formal rulemaking process required by the State Rules Act, despite the fact that the guidance documents set standards which meet the definition of a rule.

The NM Center on Law and Poverty would welcome an opportunity to meet with the Open Government Division to discuss the importance of monitoring and enforcing these rulemaking processes.

We have attached an amended version of these rules, consistent with our recommendations herein, to this comment.

Thank you for your consideration of these comments. If you have questions, please contact us by phone at (505) 255-2840 or email at [lindsay@nmpovertylaw.org](mailto:lindsay@nmpovertylaw.org).

Sincerely,

/s/

New Mexico Center on Law and Poverty

New Mexico Center Environmental Law Center

Somos Un Pueblo Unido

OLÉ – Organizers in the Land of Enchantment

WARBA, LLP

Prosperity Works

Common Ground Community Trust

New Mexico Voices for Children

---

<sup>6</sup> The case is *Olivas v. Bussey*, D-101-CV-2017-00139 (2017).

Disability Rights New Mexico

El CENTRO de Igualdad y Derechos

Mary Sue Barnum

Michael Barrio

Kenneth Bobroff

A Blair Dunn

Richard Feferman

Edwina Hewett

Chris Mechels

Douglas Meiklejohn

Lynn Pickard

Veronica Rosales

Cathy Sullivan

**NOTICE OF TERMINATION OF RULEMAKING** The New Mexico Office of the Attorney General (OAG) is providing notice to terminate the public rule hearing scheduled on Monday, December 4, 2017 at 9:30 a.m., in accordance with Subsection C of Section 14-4-5 NMSA 1978. The proposed new rule, 1.24.25 NMAC is being terminated.

**NOTICE OF RULEMAKING** The New Mexico Office of the Attorney General is proposing to adopt a new rule, 1.24.25 NMAC, Default Procedural Rule for Rulemaking, in accordance with Section 14-4-5.8 NMSA 1978 of the State Rules Act, that directs the Attorney General to adopt default procedural rules for public rules hearings for use by agencies that have not adopted their own procedural rules. The proposed rule is intended to comport with House Bill 58 (Laws 2017, Chapter 137), and addresses the initiation of and public participation in the rulemaking process, as well as the conduct and record of the public hearing. Copies of the new rule (printed below) are available at the New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501 and on the website at, <http://www.nmag.gov/>.

The Open Government Division of the Office of the Attorney General currently is accepting public comment on the proposed new rule. Please submit written comments on the proposed changes to P. O. Drawer 1508, Santa Fe, NM 87504-1508 or Renee K. Romero via email at [rromero@nmag.gov](mailto:rromero@nmag.gov) by January 18, 2018.

The Office of the Attorney General will hear public comment and consider adoption of the proposed new rule at a rule hearing on Friday, January 19, 2018, at 9:00 a. m., Toney Anaya Building, Rio Grande Conference Room, 2nd Floor, 2550 Cerrillos Road, Santa Fe, New Mexico.

If you are an individual with a disability who is in need of reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact: Renee K. Romero at [rromero@nmag.gov](mailto:rromero@nmag.gov) or 505-490-4861.

## TITLE 1 GENERAL GOVERNMENT ADMINISTRATION

### CHAPTER 24

RULES PART 25 DEFAULT PROCEDURAL RULE FOR RULEMAKING 1.24.25.1 ISSUING AGENCY: New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501. [1.24.25.1 NMAC - N, 01/01/2018]

**1.24.25.2 SCOPE:** State agencies that have not adopted their own procedural rules consistent with the State Rules Act and agencies that have expressly incorporated this rule by reference are covered by the scope of this rule. If an agency has adopted its own procedural rules in accordance with Section 14-4-5.8 NMSA 1978, those rules shall provide at minimum the opportunities for public participation in the rulemaking process as included in these default rules. [1.24.25.2 NMAC - N, 01/01/2018]

**1.24.25.3 STATUTORY AUTHORITY:** Section 14-4-5.8 NMSA 1978. [1.24.25.3 NMAC - N, 01/01/2018]

**1.24.25.4 DURATION:** Permanent. [1.24.25.4 NMAC - N, 01/01/2018]

**1.24.25.5 EFFECTIVE DATE:** January 1, 2018 unless a later date is cited at the end of a section. [1.24.25.5 NMAC - N, 01/01/2018]

**1.24.25.6 OBJECTIVE:** To provide default procedural rules for rulemaking and public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act, and to facilitate public engagement with the administrative rulemaking process in a transparent, organized, and fair manner. [1.24.25.6 NMAC - N, 01/01/2018]

**1.24.25.7 DEFINITIONS:** This rule adopts the definitions found in Section 14-4-2 NMSA 1978. [1.24.25.7 NMAC - N, 01/01/2018]

**1.24.25.8 AGENCY ADOPTION OF PROCEDURAL RULES:**

A. Agencies that have not adopted their own procedural rules consistent with the State Rules Act shall apply these default rules, until such time as they have adopted their own rules.

B. Agencies may adopt these default rules, in whole or in part as their own, or continue to use their existing rules, so long as those rules satisfy the requirements of the State Rules Act.

C. Agencies that adopt their own rules must submit a copy to the office of the attorney general within 30 calendar days of adoption, and post a copy of those rules on the agency's website, if one is maintained by the agency. [1.24.25.15 NMAC - N, 01/01/2018]

**1.24.25.9 AGENCY INITIATION OF THE RULEMAKING PROCESS; PETITIONS:**

A. The rulemaking ~~process for purposes of this rule~~ may be initiated by either of the following:

- (1) when a notice for a rule hearing is publicly posted pursuant to this rule; or
- (2) ~~if authorized by law or practice of the agency,~~ a petition for rulemaking is filed with the agency.

B. The agency shall proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing.

C. If the agency is a public body subject to the Open Meetings Act, the decision to initiate the rulemaking process by posting a notice for rule hearing must be an action taken by vote of the public body in open session.

D. Once the agency initiates the rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.

~~C. A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A~~

~~petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.~~

~~D. If a petition is initiated internally, the agency shall consider whether to grant the petition and proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing.~~

~~E. If a petition is filed by a third party, and such practice is authorized by the agency, the agency shall, within 120-60 calendar days of receipt, consider the petition and make a determination whether to grant or deny the petition. The agency's decision to deny the petition is not subject to judicial review unless otherwise provided by law.~~

~~F. If the agency is a public body subject to the Open Meetings Act, the decision to grant a petition, or the decision to initiate the rulemaking process by posting a notice for rule hearing, must be an action taken by vote of the public body in open session.~~

~~G. Once the agency initiates the rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978. [1.24.25.8 NMAC – N, 01/01/2018]~~

#### **1.24.25.10 PETITIONS FOR RULEMAKING**

A. Any person has the right to petition an agency head to adopt, amend, or repeal a rule.

B. A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.

C. The agency to which the petition is made shall, within 60 calendar days of receipt, consider the petition and make a determination whether to grant or deny the petition. If the agency determines that it will grant the petition, it shall initiate the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing, consistent with the requirements of these rules. If the agency declines to initiate a rulemaking, it must deny the petition in writing to the petitioner and state its reasons for the denial.

D. If the agency initiates a rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978. The petition for rulemaking, including the explanation of the purpose of statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule shall be published as part of the public record for the rulemaking. [1.24.25.10 NMAC – N, 01/01/2018]

#### **1.24.25.110-RULEMAKING NOTICE:**

A. The agency shall provide to the public notice of the proposed rulemaking at least 30 calendar days before a public hearing by:

- (1) posting it on the agency website, if one is maintained by the agency;
- (2) posting it on the sunshine portal;
- (3) making it available by posting it in a publicly visible location in the agency's district, field and regional offices, if any;
- (4) sending it by electronic mail to persons who have made a request for notice from the agency of rulemaking proceedings and who have provided an electronic mail address to the agency;
- (5) sending it by electronic mail to persons who have participated in the rulemaking, by petition or other act, and who have provided an electronic mail address to the agency;
- (6) sending it by mail to persons who have made a written request for mailed notice from the agency of rulemaking proceedings and who have provided a postal address to the agency;
- (7) providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees; and
- (8) publish the notice in the New Mexico Register and in a newspaper of general circulation in the state.

B. The notice shall include:

- (1) a concise summary of the full text of the proposed rule;
- (2) a short explanation of the purpose of the proposed rule;
- (3) a citation to the specific legal authority authorizing the adoption of the proposed rule;
- (4) information on how and where a copy of the full text of the proposed rule may be obtained;
- (5) an internet link or web address providing free access to the full text of the proposed rule;
- (6) information on how a person may comment on the proposed rule, where written comments will be received, and when comments are due;
- (7) information on where and when ~~the~~ a public rule hearing will be held and how a person may participate in the hearing and provide public comment; and
- (8) a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.

C. If the agency changes the date of the public rule hearing or shortens the deadline for submitting comments as stated in the notice, the agency shall provide notice to the public of the change as provided above. [1.24.25.9 NMAC - N, 01/01/2018]

**1.24.25.1211 WRITTEN COMMENT PERIOD:**

A. The public comment period must be at least 30 calendar days and shall commence upon publication of the rulemaking notice in the New Mexico register, unless a later date is specified in the notice. The agency shall not adopt a proposed rule or hold a rulemaking hearing before the end of the public comment period.

B. A person may submit, by mail or electronic form, written comments on a proposed rule, and those comments shall be made part of the record. Written comments may be submitted through the end of the public comment period.

C. The agency may decide before, during, or after the public rule hearing to extend the comment period by providing public notice, to include:

(1) posting it on the agency website, if one is maintained by the agency;

(2) making it available by posting notice in a publicly visible location in the agency's district, field and region offices, if any;

(3) sending notice by electronic mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceedings and provided an electronic mail address to the agency; and

(4) sending notice by regular mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceeding and provided a postal address and specifically requested notice by regular mail;

D. The agency shall post all written comments on its website, if one is maintained by the agency, ~~as soon as practicable upon~~ within 7 days of receipt, but and no less than 7 30 calendar days prior to the rule hearing to allow for public review. All written comments received by the agency shall be available for public inspection. [1.24.25.10 NMAC - N, 01/01/2018]

**1.24.25.1312 PUBLIC HEARING:**

A. Prior to adopting a proposed rule, the agency must hold a public rule hearing. The purpose of the hearing is to provide all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule. The agency, at its sole discretion, may determine whether more than one hearing is necessary.

B. The agency may act as the hearing officer or designate a representative or hearing officer to preside over the public rule hearing. The agency representative or hearing officer may ask questions and provide

comments for clarification purposes only, and should refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented.

C. At the start of the hearing, any pre-filed exhibits should be introduced and admitted into the rulemaking record. Pre-filed exhibits should include the petition, if filed; copies of the public notices of the rulemaking, including, but not limited to, any lists of individuals to whom notice was mailed or sent electronically; copies of the proposed rule in underline and strikethrough format; and copies of any written comment submitted during the comment period prior to the rule hearing. The agency representative or hearing officer will allow the petitioner or agency representative an opportunity to present the petition, if applicable. Any written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.

D. Individuals wishing to provide public comment or submit information at the rule hearing must state their name and any relevant affiliation for the record and be recognized before presenting by the agency representative or hearing officer. Public comment shall not be taken under oath unless required by separate rule of the agency. Any individual who provides information or public comment at the hearing may be questioned by the agency representative or hearing officer, or by other ~~interested persons~~ attendees at the hearing.

E. The rule hearing shall be conducted in a fair and equitable manner. The agency representative or hearing officer may determine the format in which the hearing is conducted (e.g. introduction of each part or section one at a time for comment), but the hearing should be conducted in a simple and organized manner that facilitates public comment and a clear rulemaking record. The rules of evidence do not apply to public rule hearings and the agency representative or hearing officer may, in the interest of efficiency, exclude or limit comment that is deemed irrelevant, redundant, or unduly repetitious.

F. The agency must hold the hearing in a venue that reasonably accommodates all interested persons who wish to participate or observe, and appropriate audio equipment should be secured to ensure all in attendance can hear the proceeding and be heard when presenting comment. Reasonable efforts shall be made to accommodate the use of audio and video recording devices. Public rule hearings shall be open to the public, but are not subject to the New Mexico Open Meetings Act, Section 10-15-1 NMSA 1978, unless the hearing is conducted by a quorum of a public body. [1.24.25.11 NMAC - N, 01/01/2018]

G. A recording of the public rule hearing shall be incorporated in the rulemaking record and be made available to the public by posting it on the sunshine portal and the state agency's website within 15 days of the public rule hearing.

#### **1.24.25.1413 RULEMAKING RECORD AND ADOPTION OF RULE**

A. The agency shall maintain a record of the rulemaking proceeding as required in Section 14-4-5.4 NMSA 1978, and any written comment, document, or other exhibit entered into the record during the rule hearing shall be labeled clearly.

B. If the rule hearing is conducted by an agency representative or hearing officer, the complete rulemaking record, including any memoranda summarizing the contents of the hearing, if written, shall be compiled and forwarded to the agency head or members of the board or commission with sufficient time to review. The agency head or members of the board or commission shall thoroughly familiarize themselves with the rulemaking record before rendering a decision on the proposed rule.

C. The agency may adopt, amend or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking. Amendments that exceed the scope of the noticed rulemaking may require a new rulemaking process with a rulemaking notice, comment period, and public rule hearing so that the public has an adequate opportunity to review and comment on the changes.

i. Amendments to a proposed rule that fall within the scope of the currently rulemaking shall be defined by a three factor test:

(1) Any person affected by the adopted rule could not have reasonably expected that the change from the published proposed rule would affect the person's interest;

(2) The subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published rule proposed to be adopted; and

(3) The effect of the adopted rule differs from the effect of the rule proposed to be adopted or amended.

~~D. In instances where the agency is a board or commission, the consideration and adoption of the proposed rule shall occur during a public meeting. The adoption date of the proposed rule shall be the date of the public meeting at which the vote occurred, unless the board or commission directs that a written order be issued, in which case the adoption date shall be the date the written order is signed. The board or commission may provide reasoning for the adopted rule through comments or discussion during its meeting, or by providing a statement of reasons in a written order.~~

~~E. In instances where the agency is a department or any of its divisions, the adoption of the proposed rule shall occur through the issuance of a written order by the department head, which shall include a statement of reasons. The adoption date of the proposed rule shall be the date the written order is signed.~~

F. The agency shall provide a concise explanatory statement that contains the date of adoption; the specific legal authority authorizing the rule; and any findings required by law for adoption of the rule. The explanatory statement may be included in an order adopting the rule or provided separately. The explanatory statement shall be posted on the agency website, if one is maintained by the agency, and sent to any persons entitled to notice of the rulemaking within 15 calendar days after the date of adoption. [1.24.25.12 NMAC - N, 01/01/2018]

(1) The agency's concise explicatory statement shall include, but not be limited to, the following:

a. An agency's reasons for adopting the rules, including the reasons for not accepting substantial arguments made at the public rule hearing and in testimony and in written comments;

b. The agency's reasons for any change between the test of the proposed rule and the final rule; and

c. A summary of any independent analysis done by the agency.

G. An agency may consider any other information it receives concerning a proposed rule during the rulemaking period. Any information considered by the agency must be incorporated into the record. This information need not be submitted in an electronic or written format.

**1.24.25.1514 FILING AND PUBLICATION; EFFECTIVE DATE:**

A. Within 15 calendar days after the date of adoption of a rule, the agency shall file the adopted rule with the state records center and shall provide to the public the adopted rule. The agency shall post the adopted rule on its website, if one is maintained by the agency, and send the adopted rule to any persons entitled to notice of the rulemaking.

B. Unless provided for by law, no rule shall be valid or enforceable until it is filed with the state records center and published in the New Mexico register. Unless another date is provided in the written order, the effective date of the rule shall be the date of publication in the New Mexico register. [1.24.25.13 NMAC - N, 01/01/2018]

**1.24.25.1615 EMERGENCY RULES:**

A. The agency shall comply with the rulemaking procedures herein and the State Rules Act, unless the agency finds that the time required to complete the procedures would: (1) cause an imminent peril to the public health, safety or welfare; (2) cause the unanticipated loss of funding for the agency program; or (3) place the agency in violation of federal law.

B. The agency shall provide to the public a record of any finding pursuant to Subsection A of this Section and a detailed justification for that finding before issuing an emergency rule. The record shall include a statement that the emergency rule is temporary. After such record has been provided to the public, the agency may issue the emergency rule immediately without a public rule hearing or with any abbreviated notice and hearing that it finds practicable. If the agency is a board or commission, the adoption must occur during a public meeting pursuant to the requirements of the Open Meetings Act.

C. The emergency rule shall be published with the New Mexico register within 30 calendar days of the rule becoming effective.

D. When the agency makes a finding pursuant to Subsection A of this Section, the agency shall follow the provisions of this section in addition to any more specific requirements in statute that pertain to the agency regarding promulgating emergency or interim rules.

E. Emergency rules may take effect immediately upon filing with the state records administrator or the administrator's designee or at a later date specified in the emergency rule. Emergency rules shall be published in the New Mexico register.

F. No emergency rule shall permanently amend or repeal an existing rule. An emergency rule shall remain in effect until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted within 180 calendar days from the effective date of the emergency rule, the emergency rule shall expire and may not be readopted as an emergency rule. If an expired emergency rule temporarily amended or repealed an existing rule, the rule shall revert to what it would have been had the emergency rule not been issued. [1.24.25.14 NMAC - N, 01/01/2018] HISTORY OF 1.24.25 NMAC: [RESERVED]

January 18, 2018

VIA ELECTRONIC MAIL

Renee K. Romero  
Open Government Division  
Office of the Attorney General  
P.O. Drawer 1508  
Santa Fe, NM 87504-1508  
rromero@nmag.gov

RE: Comments on Proposed 1.24.25 NMAC, Default Procedural Rules for Rulemaking

Dear Ms. Romero:

The Association of Commerce and Industry ("ACI") is a non-profit organization, comprised of hundreds of New Mexico businesses, which employ many more thousands of New Mexicans in the manufacturing, agriculture, mining, oil and gas, electric generation, and tourism industries. ACI is the voice of New Mexico business, representing businesses of all industries, of all sizes, and of all regions in the state. ACI believes that New Mexico's near-term prosperity and long-term growth depend on a vibrant private sector. ACI further believes that no advocate can speak better on the needs of the private sector than the private sector itself. ACI marshals the advocates, resources, and policies that enable businesses to thrive and families to prosper. ACI and its members have been involved in regulatory issues at the federal, state, and local levels.

For at least a decade, ACI has advocated for uniform and consistent regulatory procedures that apply to all agencies in New Mexico, as the lack of such procedures has been a problem for businesses across the state and an impediment to economic development. Finally, in 2017, the New Mexico Legislature passed and Governor Susana Martinez signed House Bill 58 (Laws 2017, Chapter 137), which implements landmark changes in the way that agencies promulgate rules.

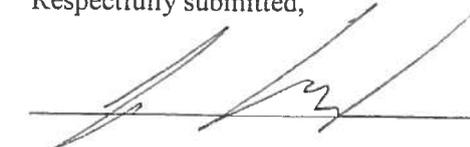
The last step in the implementation of House Bill 58 is for the Attorney General to promulgate default procedural rules. Accordingly, on behalf of ACI, I hereby submit the attached comments in accordance with the Notice of Rulemaking regarding the proposal to adopt a new rule, 1.24.25 NMAC, called the "Default Procedural Rule for Rulemaking."

ACI respectfully requests that you seriously consider the proposed changes to the default procedural rules and associated comments as set forth the attachment. A rulemaking process is



most effective when it provides for robust public participation in all phases of the rulemaking process.

Respectfully submitted,

A handwritten signature in black ink, consisting of several sharp, diagonal strokes and a small loop, positioned above a horizontal line.

Jason Espinoza  
President & CEO of ACI

**TITLE 1  
CHAPTER 24  
PART 25**

**GENERAL GOVERNMENT ADMINISTRATION  
RULES  
DEFAULT PROCEDURAL RULE FOR RULEMAKING**

**1.24.25.1 ISSUING AGENCY:** New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501.  
[1.24.25.1 NMAC - N, 01/01/2018]

**1.24.25.2 SCOPE:** ~~State agencies~~ The scope of this rule applies to agencies that have not adopted their own procedural rules consistent with the State Rules Act and agencies that have expressly incorporated this rule by reference. In addition, if an agency adopts its own procedural rules or continues in effect existing rules, then such rules shall provide at least as much opportunity for participation by parties and members of the public as is provided in these default procedural rules.  
[1.24.25.2 NMAC - N, 01/01/2018]

***Comment:** Section 14-4-5.8 NMSA 1978 sets forth the scope of these default procedural rules, and it clearly states that these default procedural rules apply in two instances: (1) when agencies have not adopted their own rules consistent with the State Rules Act, and (2) if an agency adopts its own procedural rules or continues in effect existing rules, then such rules shall provide at least as much opportunity for participation by parties and members of the public as is provided in these rules. The proposed rule only accounts for one of the two instances where these default procedural rules apply; therefore, the proposed changes by the Association of Commerce and Industry (hereinafter, "ACI") are necessary in order to fully comply with Section 14-4-5.8 NMSA 1978.*

**1.24.25.3 STATUTORY AUTHORITY:** Section 14-4-5.8 NMSA 1978.  
[1.24.25.3 NMAC - N, 01/01/2018]

**1.24.25.4 DURATION:** Permanent.  
[1.24.25.4 NMAC - N, 01/01/2018]

**1.24.25.5 EFFECTIVE DATE:** January 1, 2018 unless a later date is cited at the end of a section.  
[1.24.25.5 NMAC - N, 01/01/2018]

**1.24.25.6 OBJECTIVE:** To provide default procedural rules for rulemaking and public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act, and to facilitate public engagement with the administrative rulemaking process in a transparent, organized, and fair manner. [1.24.25.6 NMAC - N, 01/01/2018]

**1.24.25.7 DEFINITIONS:** This rule adopts the definitions found in Section 14-4-2 NMSA 1978. [1.24.25.7 NMAC - N, 01/01/2018]

***Comment:** Although ACI is proposing no specific changes, ACI notes that inclusion of the definitions in the rules, rather than by reference to the statute, would be more user-friendly and make administration easier in certain instances.*

**1.24.25.8 AGENCY ADOPTION OF PROCEDURAL RULES:**  
A. Agencies that have not adopted their own procedural rules consistent with the State Rules Act shall apply these default rules, until such time as they have adopted their own rules.

**B.** Agencies may adopt these default rules, in whole or in part as their own, or continue to use their existing rules, so long as those rules satisfy the requirements of the State Rules Act.

**C.** Agencies that adopt their own rules must submit a copy to the office of the attorney general within 30 calendar days of adoption, and post a copy of those rules on the agency's website, if one is maintained by the agency.  
[1.24.25.158 NMAC - N, 01/01/2018]

#### **1.24.25.9 INITIATION OF THE RULEMAKING PROCESS BY AN AGENCY; PETITIONS:**

**A.** The rulemaking process for purposes of this rule may be initiated by an agency either of the following:

(1) when a notice for a rule hearing is publicly posted pursuant to this rule; or

(2) if authorized by law or practice of the agency, a petition for rulemaking is filed with the agency.

**B.** A petition for rulemaking may be filed by the agency or, if authorized by law of the agency, by a third party outside the agency. This rule does not require an agency to accept third party petitions for rule making.

**C.** A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.

**DB.** If a petition is initiated internally, the agency shall consider whether to grant the petition and proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing.

**E.** If a petition is filed by a third party, and such practice is authorized by the agency, the agency shall, within 120 calendar days of receipt, consider the petition and make a determination whether to grant or deny the petition. The agency's decision to deny the petition is not subject to judicial review unless otherwise provided by law.

**FC.** If the agency is a public body subject to the Open Meetings Act, the decision to grant a petition, or the decision to initiate the rulemaking process by posting a notice for rule hearing, must be an action taken by vote of the public body in open session.

**GD.** Once the agency initiates the rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.  
[1.24.25.89 NMAC - N, 01/01/2018]

*Comment: This proposed rule provision appears to contain a process whereby an agency petitions itself to initiate a rulemaking. For example, subsections (B) through (D) of the proposed rule appear to contain an internal petition process that agencies follow to institute a rulemaking. Subsection B provides "a petition for rulemaking may be filed by the agency." Similarly, Subsection D specifically references internal agency petitions. Leaving aside obvious questions about how, where, and to whom agencies internally file petitions, internal petition processes create unnecessary bureaucratic steps and waste. Agencies already have authority to initiate rulemakings absent an internal petition process. Instead, agencies that have statutory authority to promulgate rules should simply be required to comply with the notice and participation requirements under the State Rules Act (hereinafter, "SRA"). Indeed, the SRA already requires rulemaking notices to contain the very same information Subsection C of the proposed rule would require of internal agency petitions. The petition process should be reserved for, and utilized by, interested persons outside the agency. See Section 12-8-2(F) NMSA 1978 (defining "person" as individuals, business entities, political subdivisions, and public and private organizations other than agencies), Section 12-8-7 NMSA 1978 (allowing any interested "person" to petition an agency to adopt, amend, or repeal a regulation), and Section 14-4-2(B) NMSA*

1978 (defining "person," under the SRA, as individuals, business entities, and political subdivisions).

#### **1.24.25.10 INITIATION OF THE RULEMAKING PROCESS BY A PERSON**

**A.** Any person has the right to petition an agency head to adopt, amend, or repeal a rule.

**B.** A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.

**C.** The agency to which the petition is made shall, within 60 calendar days of receipt, initiate the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing, or deny the petition in writing and state its reasons for the denial.

**D.** If the agency initiates a rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.

[1.24.25.10 NMAC – N, 01/01/2018]

***Comment:** Subsections (A) and (B) as proposed in 1.24.25.9 NMAC leave the decision on whether or not to accommodate a petition process to agency discretion. The default procedural rules should not leave that decision to agency discretion. There should be consistency and uniformity among New Mexico's agencies when it comes to rulemaking procedures; therefore, ACI proposes a new rule provision set forth above that allows any person to petition an agency head to adopt, amend, or repeal a rule.*

*In New Mexico, there has been a general lack of agency consensus or consistency for administrative procedure rules. While the state has enacted the Administrative Procedures Act (hereinafter, "APA"), Section 12-8-1 NMSA 1978, few agencies have adopted it because Section 12-8-23 NMSA 1978 left it up to each agency to decide whether the agency wanted to make the APA applicable to it. As a result of this opt in provision, there has been little, if any, consistency between agencies regarding administrative procedures for decades. Not only has this deficiency made it extremely difficult for the public to participate in agency actions, but it also has made it a time-consuming and confusing process. However, this situation changed, in part, in 2017 when the New Mexico Legislature passed and Governor Martinez signed into law House Bill 58 (hereinafter, "HB 58").*

*In particular, HB 58 established for the first time a consistent set of rulemaking processes for all agencies to follow when promulgating rules. Without question, the legislative intent was to create consistency and uniformity in administrative procedures for rulemakings among the agencies in the state. In fact, much of the language in HB 58 is taken from the Revised Model State Administrative Procedure Act developed by the Uniform Law Commission, and this model act was developed because state administrative law in the 50 states is not uniform but needs to be. See [www.uniformlaws.org](http://www.uniformlaws.org). Unfortunately, the proposed default rules deviate from the goal of creating a consistent and uniform set of rulemaking procedures because they return to the opt in approach (as set forth in the antiquated state APA) and sanction agencies with the discretion to decide whether or not they want to allow the public to participate in rulemakings via a petition process.*

*Section 318 of the Revised Model State Administrative Procedure Act contains a petition process that allows any person to petition an agency to adopt a rule. A majority of states provide a petition process allowing members of the public an*

opportunity to request an agency to adopt a rule. New Mexico should not be an outlier and, instead, adopt a petition process to provide maximum public participation when it comes to the development of rules.

A petition process allows stakeholders to assist in identifying critical issues. In doing so, it can promote a more efficient government by reducing disputes, averting litigation, and clarifying gray areas in the law. Many New Mexico statutes need further clarification or more developed procedures. Additionally, the current New Mexico Administrative Code lacks clarity in certain areas, contains outdated information, or outright conflicts with statute.

For example, it is unclear whether the definition of "Headquarters Operation" in the Corporate Income and Franchise Tax Act, Section 7-4-10(E)(1)(a) NMSA 1978, is a conjunctive test requiring all five elements to be satisfied, or a disjunctive test, requiring only one element to be satisfied. While statutory elements joined by "and" typically connote a conjunctive test, the last element in this definition appears to be a subset of earlier elements. Similarly, it is unknown whether the elements in statute are viewed differently if a taxpayer files on a separate corporate entity basis (the default filing method) or a combined or consolidated basis (elective filing methods). This statute was designed to attract corporate headquarters to New Mexico and diversify the state economy. Interpretive clarity, through a petition process, can help serve those objectives and avoid unintended consequences for the both the state and businesses.

A petition process also can help remove outdated or inoperative regulations. For example, 3.3.6.13 NMAC directly conflicts with Section 7-37.5.4 NMSA 1978, which was enacted in 2015 to resolve a conflict between that regulation and a 2008 Attorney General Opinion. The Attorney General opined that the disabled veterans' property tax exemption extended to special benefit assessments, such as conservation districts, public improvement districts, and tax increment development districts. 3.3.6.13 NMAC takes the opposite position. The inconsistent positions led to confusion among county assessors requiring legislative action. Nonetheless, 3.3.6.13 NMAC is still on the books.

Simply put, allowing any person to petition an agency for a rulemaking constitutes a best practice that should be adopted in New Mexico. Section 14-4-5.8 NMSA 1978 is a broad grant of rulemaking authority to the Attorney General to fill in the gaps in the State Rules Act. Whether or not a person can petition the government for a rulemaking is not addressed in the State Rules Act, but it a critical concept that needs be addressed by the default procedural rules. Although some agencies have a petition process and some agencies do not, the Attorney General should seize this opportunity to promote good government by establishing a uniform petition process that encourages members of the public to be active participants in development of rules.

#### **1.24.25.1011 RULEMAKING NOTICE:**

**A.** The agency shall provide to the public notice of the proposed rulemaking at least 30 calendar days before a public hearing by:

- (1) posting it on the agency website, if one is maintained by the agency;
- (2) posting it on the sunshine portal;
- (3) making it available by posting it in a publicly visible location in the agency's district, field and regional offices, if any;
- (4) sending it by electronic mail to persons who have made a request for notice from the agency of rulemaking proceedings and who have provided an electronic mail address to the agency;

- (5) sending it by electronic mail to persons who have participated in the rulemaking, by petition or other act, and who have provided an electronic mail address to the agency;
- (6) sending it by mail to persons who have made a written request for mailed notice from the agency of rulemaking proceedings and who have provided a postal address to the agency;
- (7) providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees; and
- (8) publish the notice in the New Mexico Register and in a newspaper of general circulation in the state.

**B.** The notice shall include:

- (1) a concise summary of the full text of the proposed rule;
- (2) a short explanation of the purpose of the proposed rule;
- (3) a citation to the specific legal authority authorizing the adoption of the proposed rule;
- (4) information on how and where a copy of the full text of the proposed rule may be obtained;
- (5) an internet link or web address providing free access to the full text of the proposed rule;
- (6) information on how a person may comment on the proposed rule, where written comments will be received, and when comments are due;
- (7) information on where and when a public rule hearing will be held and how a person may participate in the hearing and provide public comment; and
- (8) a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.

**C.** If the agency changes the date of the public rule hearing or shortens the deadline for submitting comments as stated in the notice, the agency shall provide notice to the public of the change as provided above.

[1.24.25.911 NMAC - N, 01/01/2018]

***Comment:** Based on a review of the State Rules Act, there is no requirement that public notice of a proposed rulemaking must be published in a newspaper of general circulation, as set forth in paragraph 8 of subsection A. ACI questions the utility of publishing notice in a newspaper of general circulation, which for most areas of the state is limited to the Albuquerque Journal.*

**1.24.25.1112 WRITTEN COMMENT PERIOD:**

**A.** The public comment period must be at least 30 calendar days and shall commence upon publication of the rulemaking notice in the New Mexico register, unless a later date is specified in the notice. The agency shall not adopt a proposed rule or hold a rulemaking hearing before the end of the public comment period.

**B.** A person may submit, by mail or electronic form, written comments on a proposed rule, and those comments shall be made part of the record. Written comments may be submitted through the end of the public comment period.

**C.** The agency may decide before, during, or after the public rule hearing to extend the comment period by providing public notice, to include:

- (1) posting it on the agency website, if one is maintained by the agency;
- (2) making it available by posting notice in a publicly visible location in the agency's district, field and region offices, if any;
- (3) sending notice by electronic mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceedings and provided an electronic mail address to the agency; and
- (4) sending notice by regular mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceeding and provided a postal address and specifically requested notice by regular mail;

D. The agency shall post all written comments on its website, if one is maintained by the agency, as soon as practicable upon receipt, but no less than 7 calendar days prior to the rule hearing to allow for public review. All written comments received by the agency shall be available for public inspection.

[1.24.25.4012 NMAC - N, 01/01/2018]

*Comment:* ACI questions the need to delay a public hearing on a proposed rule until after the public comment period has closed. As ACI understands it, the public hearing is part of the public comment period and that written comments will be given equal weight as oral comments at a hearing. There is not benefit for commenters at the hearing to have access to written comments.

**1.24.25.4213 PUBLIC HEARING:**

A. Prior to adopting a proposed rule, the agency must hold a public rule hearing. The purpose of the hearing is to provide all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule. The agency, at its sole discretion, may determine whether more than one hearing is necessary.

B. The agency may act as the hearing officer or designate a representative or hearing officer to preside over the public rule hearing. The agency representative or hearing officer may ask questions and provide comments for clarification purposes only, and should refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented.

C. ~~At the start of the hearing, any pre-filed exhibits should be introduced and admitted into the rulemaking record. Pre-filed exhibits should include the petition, if filed; copies of the public notices of the rulemaking, including any lists of individuals to whom notice was mailed or sent electronically; copies of the proposed rule in underline and strikethrough format; and copies of any written comment submitted during the comment period prior to the rule hearing. The agency representative or hearing officer will allow the petitioner or agency representative an opportunity to present the petition, if applicable. Any written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.~~

D. Individuals wishing to provide public comment or submit information at the rule hearing must state their name and any relevant affiliation for the record and be recognized before presenting by the agency representative or hearing officer. Public comment shall not be taken under oath unless required by separate rule of the agency. Any individual who provides information or public comment at the hearing may be questioned by the agency representative or hearing officer, or by other interested persons at the hearing.

E. The rule hearing shall be conducted in a fair and equitable manner. The agency representative or hearing officer may determine the format in which the hearing is conducted (e.g. introduction of each part or section one at a time for comment), but the hearing should be conducted in a simple and organized manner that facilitates public comment and a clear rulemaking record. The rules of evidence do not apply to public rule hearings and the agency representative or hearing officer may, in the interest of efficiency, exclude or limit comment that is deemed irrelevant, redundant, or unduly repetitious.

F. The agency must hold the hearing in a venue that reasonably accommodates all interested persons who wish to participate or observe, and appropriate audio equipment should be secured to ensure all in attendance can hear the proceeding and be heard when presenting comment. Reasonable efforts shall be made to accommodate the use of audio and video recording devices. Public rule hearings shall be open to the public, but are not subject to the New Mexico Open Meetings Act, Section 10-15-1 NMSA 1978, unless the hearing is conducted by a quorum of a public body.

[1.24.25.4413 NMAC - N, 01/01/2018]

*Comment:* ACI proposes to delete the need for certain documents to be admitted into the hearing record and the option for "interested persons" to question witnesses at the public hearing. Any document submitted to the agency should be

*part of the rulemaking record without the need for formal admission at the rulemaking hearing. Further, ACI's experience with rulemaking proceedings that allow such questioning has not been positive. Questioning from interested persons has tended to delay hearing and not been beneficial to decision makers. In some cases, it has been an impediment to public participation in rulemaking processes.*

**1.24.25.1314 RULEMAKING RECORD AND ADOPTION OF RULE**

**A.** The agency shall maintain a record of the rulemaking proceeding as required in Section 14-4-5.4 NMSA 1978, and any written comment, document, or other exhibit entered into the record during the rule hearing shall be labeled clearly. Any pre-filed exhibits are part of the rulemaking record without the need for formal admissions. Pre-filed exhibits include the petition; copies of the public notices of the rulemaking, including any lists of individuals to whom notice was mailed or sent electronically; copies of the proposed rule in underline and strikethrough format; and copies of any written comments submitted during the comment period. Any written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.

**B.** If the rule hearing is conducted by an agency representative or hearing officer, the complete rulemaking record, including any memoranda summarizing the contents of the hearing, if written, shall be compiled and forwarded to the agency head or members of the board or commission with sufficient time to review. The agency head or members of the board or commission shall thoroughly familiarize themselves with the rulemaking record before rendering a decision on the proposed rule.

**C.** The agency may adopt, amend or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking. Amendments that exceed the scope of the noticed rulemaking may require a new rulemaking process with a rulemaking notice, comment period, and public rule hearing so that the public has an adequate opportunity to review and comment on the changes.

**D.** In instances where the agency is a board or commission, the consideration and adoption of the proposed rule shall occur during a public meeting. The adoption date of the proposed rule shall be the date of the public meeting at which the vote occurred, unless the board or commission directs that a written order be issued, in which case the adoption date shall be the date the written order is signed. The board or commission may provide reasoning for the adopted rule through comments or discussion during its meeting, or by providing a statement of reasons in a written order.

**E.** In instances where the agency is a department or any of its divisions, the adoption of the proposed rule shall occur during the issuance of a written order by the department head, which shall include a statement of reasons. The adoption date of the proposed rule shall be the date the written order is signed.

**F.** The agency shall provide a concise explanatory statement that contains the date of adoption; the specific legal authority authorizing the rule; and any findings required by law for adoption of the rule. The explanatory statement may be included in an order adopting the rule or provided separately. The explanatory statement shall be posted on the agency website, if one is maintained by the agency, and sent to any persons entitled to notice of the rulemaking within 15 calendar days after the date of adoption.

[1.24.25.1214 NMAC - N, 01/01/2018]

***Comment:** ACI's proposed change makes pre-filed documents a part of the rulemaking record without the need for formal admission at the public hearing. This change is necessary with the proposed deletion of the admission process at the hearing.*

**1.24.25.1415 FILING AND PUBLICATION; EFFECTIVE DATE:**

**A.** Within 15 calendar days after the date of adoption of a rule, the agency shall file the adopted rule with the state records center ~~center~~ administrator and shall provide to the public the adopted rule. The agency shall post the adopted rule on its website, if one is maintained by the agency, and send the adopted rule to any persons entitled to notice of the rulemaking.

B. Unless provided for by law, no rule shall be valid or enforceable until it is filed with the state records center~~center~~administrator and published in the New Mexico register. Unless another date is provided in the written order, the effective date of the rule shall be the date of publication in the New Mexico register.

[1.24.25.43~~15~~ NMAC - N, 01/01/2018]

*Comment: ACI proposes to change "center" to administrator in order to be consistent with Section 14-4-3 NMSA 1978.*

**1.24.25.45~~16~~ EMERGENCY RULES:**

A. The agency shall comply with the rulemaking procedures herein and the State Rules Act, unless the agency finds that the time required to complete the procedures would:

- (1) cause an imminent peril to the public health, safety or welfare;
- (2) cause the unanticipated loss of funding for the agency program; or
- (3) place the agency in violation of federal law.

B. The agency shall provide to the public a record of any finding pursuant to Subsection A of this Section and a detailed justification for that finding before issuing an emergency rule. The record shall include a statement that the emergency rule is temporary. After such record has been provided to the public, the agency may issue the emergency rule immediately without a public rule hearing or with any abbreviated notice and hearing that it finds practicable. If the agency is a board or commission, the adoption must occur during a public meeting pursuant to the requirements of the Open Meetings Act.

C. The emergency rule shall be published with the New Mexico register within 30 calendar days of the rule becoming effective.

D. When the agency makes a finding pursuant to Subsection A of this Section, the agency shall follow the provisions of this section in addition to any more specific requirements in statute that pertain to the agency regarding promulgating emergency or interim rules.

E. Emergency rules may take effect immediately upon filing with the state records administrator or the administrator's designee or at a later date specified in the emergency rule. Emergency rules shall be published in the New Mexico register.

F. No emergency rule shall permanently amend or repeal an existing rule. An emergency rule shall remain in effect until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted within 180 calendar days from the effective date of the emergency rule, the emergency rule shall expire and may not be readopted as an emergency rule. If an expired emergency rule temporarily amended or repealed an existing rule, the rule shall revert to what it would have been had the emergency rule not been issued.

[1.24.25.44~~16~~ NMAC - N, 01/01/2018]

**HISTORY OF 1.24.25 NMAC: [RESERVED]**

State of New Mexico  
Energy, Minerals and Natural Resources Department

---

**Susana Martinez**  
Governor

**Ken McQueen**  
Cabinet Secretary

**Matthias Sayer**  
Deputy Cabinet Secretary

**MEMORANDUM**

**TO:** Open Government Division of the Office of the Attorney General

**FROM:** Energy, Minerals and Natural Resources Department

**DATE:** January 18, 2018

**SUBJECT:** Proposed Rule, 1.24.25 NMAC, Default Procedural Rule for Rulemaking

---

The Open Government Division of the Office of the Attorney General has scheduled a public hearing for Friday, January 19, 2018 regarding its proposed rule, 1.24.25 NMAC, Default Procedural Rule for Rulemaking. The Energy, Minerals and Natural Resources Department (EMNRD) has reviewed the proposed rule and offers the following comments.

EMNRD, and its divisions and attached boards and commissions, promulgate rules under numerous statutes. Two commissions, the Mining Commission and the Oil Conservation Commission, have either adopted or are in the process of adopting procedural rules to govern rulemaking under the revised State Rules Act. The remainder of the agency's rulemaking proceedings will be subject to the proposed Attorney General's Office rules. These include rules adopted by the EMNRD Secretary for the State Parks, Forestry, and Energy Conservation and Management Divisions and rules adopted by the Coal Surface Mining Commission.

EMNRD is generally supportive of the Attorney General's proposal. EMNRD offers specific comments on two sections: 1.24.25.11(D) NMAC, Written Comment Period, and 1.24.25.12(D) NMAC, Public Hearing.

**1.24.25.11(D) NMAC**

The proposed Subsection D of 1.24.25.11 NMAC requires that an agency post all written comments on its website no less than seven days before the hearing. To achieve this goal, the agency would need to end its written comment period at least seven days prior to the hearing. Since NMSA 1978, § 14-4-5.3(A) requires a minimum comment period of at least 30 days after publication in the New Mexico Register, that publication would now need to be at least 37 days before the public hearing. To avoid this issue, we propose modifying this subsection to require that the posting of comments begin, rather than be completed, at least seven days before the hearing. This would allow the 30-day comment period to extend up to the day of the hearing.



**Proposed Amendment:**

D. The agency shall post all written comments on its website, if one is maintained by the agency, as soon as practicable upon receipt [~~but~~] beginning no less than 7 calendar days prior to the rule hearing to allow for public review. All written comments received by the agency shall be available for public inspection.

**1.24.25.12(D) NMAC**

The proposed Subsection D of 1.24.25.12 NMAC adds a new requirement to allow any person who provides information or public comment at the hearing to be questioned by any other interested person at the hearing. This requirement is not present in HB 58: "At the public rule hearing, members of the public shall be given a reasonable opportunity to submit data, views or arguments orally or in writing." NMSA 1978, § 14-4-5.3(B) (2017). No right of cross-examination is provided.

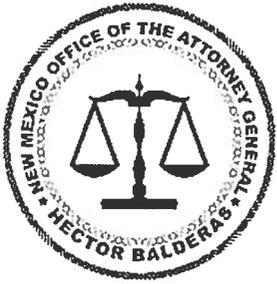
Allowing cross examination at a rule hearing can transform an information gathering exercise into a more trial-type proceeding. While some existing statutes do provide for the right to examine witnesses, others do not. Under the statutes that authorize EMNRD rulemakings, only the Mining Act and Surface Mining Act allow "interested persons" the right to examine witnesses testifying at the hearing. NMSA 1978, §§ 69-25A-6(C) and 69-36-8(D). Other statutes that authorize rules for state parks, forestry, geothermal resources, and abandoned mines do not provide for cross examination. NMSA 1978, §§ 16-2-7, 68-2-16, 69-25B-10(B), and 71-9-6. More importantly, the Executive Reorganization Act, which authorizes rulemaking by all cabinet secretaries, does not provide for cross examination. NMSA 1978, §9-1-5(E) (1977).

As a result, EMNRD rulemaking hearings for state parks, forestry, and other areas whose rules are promulgated by the EMNRD Secretary do not provide for questioning of witnesses by other hearing participants. These hearings are governed by agency guidelines and proceed as information gathering sessions that assist the Secretary in reaching a decision on a proposed rule. The proposed rules from the AG's Office would change the nature of those hearings.

We propose to delete the provision allowing any interested person at a hearing to examine any other person who provides information or comment at the hearing. An alternative would to maintain that provision but condition it "if allowed by any specific statute".

**Proposed Amendment**

D. Individuals wishing to provide public comment or submit information at the rule hearing must state their name and any relevant affiliation for the record and be recognized before presenting by the agency representative or hearing officer. Public comment shall not be taken under oath unless required by separate rule of the agency. Any individual who provides information or public comment at the hearing may be questioned by the agency representative or hearing officer [~~or by other interested persons at the hearing~~].



NEW MEXICO OFFICE OF THE ATTORNEY GENERAL

1.24.25 NMAC – DEFAULT PROCEDURAL RULE FOR RULEMAKING

JANUARY 19, 2018 – PUBLIC COMMENT SIGN-IN

<u>NAME</u>	<u>AGENCY/ENTITY</u>	<u>EMAIL ADDRESS</u>
Matt Ortiz Ortiz mecheles MATT ORTIZ	Retired CPR	omechels@Q.com matt.ortiz@state.nm.us
Anthony J. Trujillo Katelyn Hart	ACI/GHK/NM Mng Assn G+K	ajt@gknet.com katelyn.hart@gknet.com
David Black	Public Regulation Comm'n.	david.black@state.nm.us
Peter St. Cyr	NM FOG	Peter@nmfog.org
Lindsay Cutler	NM Center on Law & Poverty	lindsay@nmpovertylaw.org
A. Blair Dunn, Esq CHARLES ARASIM	WARBA, LLP Public	abdunn@ablairdunn-esq.com chararasim@gmail.com



EGOLF + FERLIC + HARWOOD  
ATTORNEYS AT LAW

January 18, 2017

**VIA ELECTRONIC MAIL ONLY**

Renee K. Romero  
Open Government Division  
Office of the Attorney General  
P.O. Drawer 1508  
Santa Fe, NM 87504-1508  
rromero@nmag.gov

RE: Comments on Proposed 1.24.25 NMAC, Default Procedural Rules for Rulemaking

Dear Ms. Romero:

New Mexico Top Organics, Ultrahealth – Inc. (hereinafter “Ultrahealth”) is a licensed non-profit producer of medical cannabis. Ultrahealth serves thousands of patients throughout New Mexico with 9 dispensary locations. Based on its experience, Ultrahealth is an advocate for consistent regulatory processes and procedures so businesses have predictability in dealing with the state.

Ultrahealth hopes its comments are well-taken and requests you consider the proposed changes to default procedures for rulemaking as set forth in the attachments.

Respectfully submitted,

Kate Ferlic, Esq.  
on behalf of Leigh Jenke  
Chairman and President of New Mexico Top  
Organics, Ultrahealth – Inc.



**TITLE 1  
CHAPTER 24  
PART 25**

**GENERAL GOVERNMENT ADMINISTRATION  
RULES  
DEFAULT PROCEDURAL RULE FOR RULEMAKING**

**1.24.25.1 ISSUING AGENCY:** New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501.  
[1.24.25.1 NMAC - N, 01/01/2018]

**1.24.25.2 SCOPE:** State agencies that have not adopted their own procedural rules consistent with the State Rules Act. However, if an agency adopts its own procedural rules or continues in effect existing rules, then such rules shall provide at least as much opportunity for participation by parties and members of the public as is provided in these rules. -and agencies that have expressly incorporated this rule by reference.

Comment: This additional language is directly quoted from Section 14-4-5.8 where the statute expressly provides for 2 instances where the default rules apply. The proposed rule only address one of the two instances and thus, the addition is necessary for compliance with statute.

[1.24.25.2 NMAC - N, 01/01/2018]

**1.24.25.3 STATUTORY AUTHORITY:** Section 14-4-5.8 NMSA 1978.  
[1.24.25.3 NMAC - N, 01/01/2018]

**1.24.25.4 DURATION:** Permanent.  
[1.24.25.4 NMAC - N, 01/01/2018]

**1.24.25.5 EFFECTIVE DATE:** January 1, 2018 unless a later date is cited at the end of a section.  
[1.24.25.5 NMAC - N, 01/01/2018]

**1.24.25.6 OBJECTIVE:** To provide default procedural rules for rulemaking and public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act, and to facilitate public engagement with the administrative rulemaking process in a transparent, organized, and fair manner. [1.24.25.6 NMAC - N, 01/01/2018]

**1.24.25.7 DEFINITIONS:** This rule adopts the definitions found in Section 14-4-2 NMSA 1978. [1.24.25.7 NMAC - N, 01/01/2018]

**1.24.25.8 AGENCY ADOPTION OF PROCEDURAL RULES:**

**A.** Agencies that have not adopted their own procedural rules consistent with the State Rules Act shall apply these default rules, until such time as they have adopted their own rules.

**B.** Agencies may adopt these default rules, in whole or in part as their own, or continue to use their existing rules, so long as those rules satisfy the requirements of the State Rules Act.

C. If agencies have existing rules, those rules shall provide at least as much opportunity for participation by parties and members of the public in these default rules.

Comment: This additional language is directly quoted from Section 14-4-5.8 where the statute expressly provides for 2 instances where the default rules apply. The proposed rule only address one of the two instances and thus, the addition is necessary for compliance with statute.

**DC.** Agencies that adopt their own rules must submit a copy to the office of the attorney general within 30 calendar days of adoption, and post a copy of those rules on the agency's website, if one is maintained by the agency.  
[1.24.25.15 NMAC - N, 01/01/2018]

**1.24.25.9 INITIATION OF THE RULEMAKING PROCESS; PETITIONS:**

**A.** The rulemaking process for purposes of this rule may be initiated ~~by either of the following:~~

~~(1) — when a notice for a rule hearing is publicly posted pursuant to this rule,~~

~~;~~ ~~or~~

~~(2) — if authorized by law or practice of the agency, a petition for rulemaking is filed with the agency.~~

~~B. — A petition for rulemaking may be filed by the agency or, if authorized by law of the agency, by a third party outside the agency. This rule does not require an agency to accept third party petitions for rule making.~~

~~C. — A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.~~

~~D. — If a petition is initiated internally, the agency shall consider whether to grant the petition and proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing.~~

**B. The agency shall proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment and setting a public rule hearing.**

~~E. — If a petition is filed by a third party, and such practice is authorized by the agency, the agency shall, within 120 calendar days of receipt, consider the petition and make a determination whether to grant or deny the petition. The agency's decision to deny the petition is not subject to judicial review unless otherwise provided by law.~~

**CF.** If the agency is a public body subject to the Open Meetings Act, the decision to ~~grant a petition, or the decision to initiate the rulemaking process by posting a notice for rule hearing,~~ must be an action taken by vote of the public body in open session.

**DG.** Once the agency initiates the rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.  
[1.24.25.8 NMAC - N, 01/01/2018]

Comment: ~~Subsection D was deleted as redundant. The law does not require an internal petition process for agencies and this adds an additional step for government without purpose.~~

**1.24.25.10 INITIATION OF THE RULEMAKING PROCESS BY A PERSON**

**A.** Any person has the right to petition an agency to adopt, amend, or repeal a rule.

**B.** A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.

C. The agency to which the petition is made shall, within 60 days of receipt, initiate the rulemaking process by posting public notice, publishing the proposed rule for comment and setting a public rule hearing, or deny the petition in writing and state its reasons for the denial. If the agency fails to act within the prescribed time period, a rulemaking shall be initiated.

D. If the agency initiates a rulemaking process or issues a denial, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.

*Comment:* The language proposed in 1.24.25.9 NMAC regarding third-party petitions for a rule making undermines public participation in that it says an agency can act on a petition but can also ignore it for all time without recourse to the participant. The proposed changes in newly created 1.24.25.10 creates uniform procedures with knowledge that a decision will be made in a reasonable time (60 days). Prior to HB 58 (2017), agencies action and inaction varies considerably, which creates a hardship on persons wanting to engage in a public process or improve the way the state does business. It is not the action of agency that makes New Mexico unfriendly to business, it is the lack of predictability on how and whether an agency will act. HB 58 prescribes consistency and predictability and these changes comply with that directive. The proposed rules deviate substantially from the goal of creating a consistent set of procedures for rulemaking.

**1.24.25.110 RULEMAKING NOTICE:**

**A.** The agency shall provide to the public notice of the proposed rulemaking at least 30 calendar days before a public hearing by:

- (1) posting it on the agency website, if one is maintained by the agency;
- (2) posting it on the sunshine portal;
- (3) making it available by posting it in a publicly visible location in the agency's district, field and regional offices, if any;
- (4) sending it by electronic mail to persons who have made a request for notice from the agency of rulemaking proceedings and who have provided an electronic mail address to the agency;
- (5) sending it by electronic mail to persons who have participated in the rulemaking, by petition or other act, and who have provided an electronic mail address to the agency;
- (6) sending it by mail to persons who have made a written request for mailed notice from the agency of rulemaking proceedings and who have provided a postal address to the agency;
- (7) providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees; and
- (8) publish the notice in the New Mexico Register, ~~and in a newspaper of general circulation in the state.~~

*Comment:* There is no statutory requirement for publication in a newspaper of general circulation. This provision is irrelevant and will quickly become outdated (if it isn't already).

**B.** The notice shall include:

- (1) a concise summary of the full text of the proposed rule;
- (2) a short explanation of the purpose of the proposed rule;
- (3) a citation to the specific legal authority authorizing the adoption of the proposed rule;

- (4) information on how and where a copy of the full text of the proposed rule may be obtained;
  - (5) an internet link or web address providing free access to the full text of the proposed rule;
  - (6) information on how a person may comment on the proposed rule, where written comments will be received, and when comments are due;
  - (7) information on where and when a public rule hearing will be held and how a person may participate in the hearing and provide public comment; and
  - (8) a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.
- C. If the agency changes the date of the public rule hearing or shortens the deadline for submitting comments as stated in the notice, the agency shall provide notice to the public of the change as provided above.

[1.24.25.9 NMAC - N, 01/01/2018]

**1.24.25.12~~1~~ WRITTEN COMMENT PERIOD:**

A. The public comment period must be at least 30 calendar days and shall commence upon publication of the rulemaking notice in the New Mexico register, unless a later date is specified in the notice. The agency shall not adopt a proposed rule ~~or hold a rulemaking hearing~~ before the end of the public comment period.

*Comment:* A rulemaking hearing is part of the public comment period.

B. A person may submit, by mail or electronic form, written comments on a proposed rule, and those comments shall be made part of the record. Written comments may be submitted through the end of the public comment period.

C. The agency may decide before, during, or after the public rule hearing to extend the comment period by providing public notice, to include:

- (1) posting it on the agency website, if one is maintained by the agency;
- (2) making it available by posting notice in a publicly visible location in the agency's district, field and region offices, if any;
- (3) sending notice by electronic mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceedings and provided an electronic mail address to the agency; and
- (4) sending notice by regular mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceeding and provided a postal address and specifically requested notice by regular mail;

D. The agency shall post all written comments on its website, if one is maintained by the agency, as soon as practicable upon receipt, but no less than 7 calendar days prior to the rule hearing to allow for public review. All written comments received by the agency shall be available for public inspection.

[1.24.25.10 NMAC - N, 01/01/2018]

**1.24.25.13~~2~~ PUBLIC HEARING:**

A. Prior to adopting a proposed rule, the agency must hold a public rule hearing. The purpose of the hearing is to provide all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule. The agency, at its sole discretion, may determine whether more than one hearing is necessary.

B. The agency may act as the hearing officer or designate a representative or hearing officer to preside over the public rule hearing. The agency representative or hearing officer may ask questions and provide comments for clarification purposes only, and should refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented.

~~C. At the start of the hearing, any pre-filed exhibits should be introduced and admitted into the rulemaking record. Pre-filed exhibits should include the petition, if filed; copies of the public notices of the rulemaking, including any lists of individuals to whom notice was~~

~~mailed or sent electronically; copies of the proposed rule in underline and strikethrough format; and copies of any written comment submitted during the comment period prior to the rule hearing. The agency representative or hearing officer will allow the petitioner or agency representative an opportunity to present the petition, if applicable.~~ Any written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.

D. Individuals wishing to provide public comment or submit information at the rule hearing must state their name and any relevant affiliation for the record and be recognized before presenting by the agency representative or hearing officer. Public comment shall not be taken under oath unless required by separate rule of the agency. Any individual who provides information or public comment at the hearing may be questioned by the agency representative or hearing officer, or within a specific and cumulative time allotted by the agency in its discretion, by other interested persons at the hearing.

E. The rule hearing shall be conducted in a fair and equitable manner. The agency representative or hearing officer may determine the format in which the hearing is conducted (e.g. introduction of each part or section one at a time for comment), but the hearing should be conducted in a simple and organized manner that facilitates public comment and a clear rulemaking record. The rules of evidence do not apply to public rule hearings and the agency representative or hearing officer may, in the interest of efficiency, exclude or limit comment that is deemed irrelevant, redundant, or unduly repetitious.

F. The agency must hold the hearing in a venue that reasonably accommodates all interested persons who wish to participate or observe, and appropriate audio equipment should be secured to ensure all in attendance can hear the proceeding and be heard when presenting comment. Reasonable efforts shall be made to accommodate the use of audio and video recording devices. Public rule hearings shall be open to the public, but are not subject to the New Mexico Open Meetings Act, Section 10-15-1 NMSA 1978, unless the hearing is conducted by a quorum of a public body.

[1.24.25.11 NMAC - N, 01/01/2018]

Comment: Ultrahealth proposes moving much of Subsection C to Rulemaking Record and Adoption of Rule (1.24.25.14). Ultrahealth supports public questioning but with some limitation on time to allow for public questioning but discourages its use as a delay tactic.

#### **1.24.25.143 RULEMAKING RECORD AND ADOPTION OF RULE**

A. The agency shall maintain a record of the rulemaking proceeding as required in Section 14-4-5.4 NMSA 1978, and any written comment, document, or other exhibit entered into the record during the rule hearing shall be labeled clearly. Pre-filed exhibits are part of the rulemaking record without the need for formal admissions. Pre-filed exhibits include the petition; copies of public notices of the rulemaking, including any lists of individuals to whom notice was mailed or sent electronically; copies of the proposed rule in underline and strikethrough format; and copies of any written comments submitted during the comment period. Any written comments or other documents introduced during the hearing should be admitted into the records after being marked as an exhibit.

B. If the rule hearing is conducted by an agency representative or hearing officer, the complete rulemaking record, including any memoranda summarizing the contents of the hearing, if written, shall be compiled and forwarded to the agency head or members of the board or commission with sufficient time to review. The agency head or members of the board or commission shall thoroughly familiarize themselves with the rulemaking record before rendering a decision on the proposed rule.

C. The agency may adopt, amend or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking. Amendments that exceed the scope of the noticed rulemaking may require a new rulemaking process with a rulemaking notice, comment period, and public rule hearing so that the public has an adequate opportunity to review and comment on the changes.

D. In instances where the agency is a board or commission, the consideration and adoption of the proposed rule shall occur during a public meeting. The adoption date of the

proposed rule shall be the date of the public meeting at which the vote occurred, unless the board or commission directs that a written order be issued, in which case the adoption date shall be the date the written order is signed. The board or commission may provide reasoning for the adopted rule through comments or discussion during its meeting, or by providing a statement of reasons in a written order.

**E.** In instances where the agency is a department or any of its divisions, the adoption of the proposed rule shall occur through the issuance of a written order by the department head, which shall include a statement of reasons. The adoption date of the proposed rule shall be the date the written order is signed.

**F.** The agency shall provide a concise explanatory statement that contains the date of adoption; the specific legal authority authorizing the rule; and any findings required by law for adoption of the rule. The explanatory statement may be included in an order adopting the rule or provided separately. The explanatory statement shall be posted on the agency website, if one is maintained by the agency, and sent to any persons entitled to notice of the rulemaking within 15 calendar days after the date of adoption.

[1.24.25.12 NMAC - N, 01/01/2018]

**1.24.25.154 FILING AND PUBLICATION; EFFECTIVE DATE:**

**A.** Within 15 calendar days after the date of adoption of a rule, the agency shall file the adopted rule with the state records center and shall provide to the public the adopted rule. The agency shall post the adopted rule on its website, if one is maintained by the agency, and send the adopted rule to any persons entitled to notice of the rulemaking.

**B.** Unless provided for by law, no rule shall be valid or enforceable until it is filed with the state records center and published in the New Mexico register. Unless another date is provided in the written order, the effective date of the rule shall be the date of publication in the New Mexico register.

[1.24.25.13 NMAC - N, 01/01/2018]

**1.24.25.165 EMERGENCY RULES:**

**A.** The agency shall comply with the rulemaking procedures herein and the State Rules Act, unless the agency finds that the time required to complete the procedures would:

- (1) cause an imminent peril to the public health, safety or welfare;
- (2) cause the unanticipated loss of funding for the agency program; or
- (3) place the agency in violation of federal law.

**B.** The agency shall provide to the public a record of any finding pursuant to Subsection A of this Section and a detailed justification for that finding before issuing an emergency rule. The record shall include a statement that the emergency rule is temporary. After such record has been provided to the public, the agency may issue the emergency rule immediately without a public rule hearing or with any abbreviated notice and hearing that it finds practicable. If the agency is a board or commission, the adoption must occur during a public meeting pursuant to the requirements of the Open Meetings Act.

**C.** The emergency rule shall be published with the New Mexico register within 30 calendar days of the rule becoming effective.

**D.** When the agency makes a finding pursuant to Subsection A of this Section, the agency shall follow the provisions of this section in addition to any more specific requirements in statute that pertain to the agency regarding promulgating emergency or interim rules.

**E.** Emergency rules may take effect immediately upon filing with the state records administrator or the administrator's designee or at a later date specified in the emergency rule. Emergency rules shall be published in the New Mexico register.

**F.** No emergency rule shall permanently amend or repeal an existing rule. An emergency rule shall remain in effect until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted within 180 calendar days from the effective date of the emergency rule, the emergency rule shall expire and may not be readopted as an emergency rule. If an expired emergency rule temporarily amended or repealed an existing rule, the rule shall revert to what it would have been had the emergency rule not been issued.

[1.24.25.14 NMAC - N, 01/01/2018]

**HISTORY OF 1.24.25 NMAC: [RESERVED]**