

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

March 23, 2018

CONCISE EXPLANATORY STATEMENT

In accordance with Section 14-4-5.8 of the State Rules Act (the “Act”), the New Mexico Office of the Attorney General (“OAG”) adopted a default procedural rule for rulemaking for use by agencies that have not adopted their own procedural rules consistent with the Act and which provide as much opportunity for public participation as is provided in these default rules, and to facilitate public engagement with the administrative rulemaking process in a transparent, organized, and fair manner. The published rule, codified at 1.24.25 NMAC, generally provides for the initiation of rulemaking, provision of notice, publication of written comment period, procedures for the public hearing, creation of rulemaking record, adoption of the rule, filing and publication of the rule and its effective date.

(1) Statutory Authority for Rule Promulgation:

State Rules Act, NMSA 1978, Section 14-4-5.8 (2017)

(2) Effective Date of Rule:

April 10, 2018

(3) Date of Adoption of Rule:

March 23, 2018

(4) Reasons for Adopting Rule:

To comport with the legislative mandate that the OAG adopt a default procedural rule for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act, Section 14-4-5.8. The State Rules Act requires that each agency in the state provide at least as much opportunity for public participation in the rulemaking process as is provided in the default rules adopted by the OAG.

The adopted rule is intended to outline a process that provides information to the public and direction to state agencies on how written and oral comment should be received during the rulemaking process. The rule provides a consistent process for public rule hearings and clarifies the date of approval, adoption, and effective date of rules. It also adds the obligation

for agencies to post public comment on the agency's website, if one is maintained, so that the public can review written public comment prior to the agency's public rule hearing.

(5) Reasons for Changes from Published Rule:

Amendments to the proposed rule fall within the scope of the current rulemaking and do not require a new proceeding. The OAG received substantive feedback and public comment during the comment period and at the public rule hearing which supported a number of amendments to the published proposed rule. The OAG further reviewed the proposed rule in context with the comments received and made non-substantive edits to further clarify the language of the rule.

To the extent that the published rule contained language taken directly from the State Rules Act, references were clarified and duplicative language was removed from the final rule and replaced with a citation to the relevant statutes. See, for example, sections related to rulemaking notice, written comment period and emergency rules. Other sections of redundant or unnecessary language was removed to create a more concise rule.

Based on written and oral comment, the section on initiation of the rulemaking process was divided into two sections in the final rule – one for initiation of rulemaking by the agency and one for initiation of rulemaking by petition of a third party.

Language related to admission of pre-filed exhibits was moved from public hearing section to rulemaking record section. Language directing the agency or hearing officer to identify and mark exhibits at the start of the hearing was included in public hearing section of the final rule.

Suggested amendments from public comment were incorporated to clarify the scope of a rulemaking in regard to amendments made from the published rule to what was adopted, and language was incorporated to provide guidance to agencies on when amendments exceed the scope of a rulemaking and might require new notice and rulemaking proceeding.

The adopted rule also adds additional criteria for the contents of the concise explanatory statement based on public comment and the OAG's own analysis. This change was to place a legal obligation for agency's to explain, in writing, more of the rational and justification for the adoption of a rule as well as the reasons why substantive public comment was not incorporated in the adopted rule.

(6) Reasons for Not Accepting Substantive Arguments from Public Comment:

Through written public comment and at the public rule hearing held on January 19, 2018, multiple persons/parties argued that any person should be able to file a petition for rulemaking and an agency should be required to consider the petition, as is contemplated under the Administrative Procedures Act, NMSA 1978, Section 12-8-7. After researching the New Mexico Statutes Annotated, the rule imposes an affirmative duty on the agency to consider third-party petitions only if required by existing law. This is because there are general and specific statutes that govern rulemakings for state agencies. Not all specific statutes governing

agency rulemaking contemplate that an agency must consider third-party petitions as does the Administrative Procedures Act, which itself is a law of limited application. Additionally, to impose an affirmative duty on all agencies to consider third-party petitions appears to be beyond the scope of the mandate to the Attorney General “to adopt default procedural rules for public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act.” See § 14-4-5.8. It is recognized that while many boards and commissions have a statutory right for the public to petition for a rulemaking, state agencies which operate under an agency head do not. Creating an affirmative right to petition any state agency could have been added to the State Rules Act by the legislature when it passed House Bill 58, but it was not. Generally, the “plain language of a statute [is] the primary indicator of legislative intent.” State v. Willie, 2009-NMSC-037, ¶ 9.

Public comment also suggested that a right to appeal to district court should be provided in the default rule. Any administrative decision may be appealed under Rule 1-075 NMRA when there is no statutory right to an appeal or other statutory right to review. While certain administrative decisions have a specific appeal process, or may be appealed as a matter of right under Rule 1-074 NMRA, the authority for such review must be granted by statute. The State Rules Act does not provide a statutory right to review, and such authority cannot be granted by an administrative rule.

Public comment was presented arguing that the default procedural rule should more closely follow the New Mexico Administrative Procedures Act, NMSA 1978, Sections 12-8-1 to -25. While the Administrative Procedures Act was used for guidance, as well as rulemaking provisions of the Uniform Licensing Act (NMSA 1978, §§ 61-1-1 to -34), the legislature did not incorporate or refer to any other statute in the directive for the Attorney General to adopt default procedural rules.

Concern was raised that the State Rules Act fails to provide enforcement provisions and that the Attorney General should have stronger enforcement authority under the default rules. Similar to the right for public to petition any agency in the state to initiate a rulemaking, providing authority to enforce a statute should be granted in statute, not through an administrative rule.