

1 **H. B. 4261**

2
3 (By Delegates Fleischauer, Miley, Brown, Caputo,
4 Hunt Pino, Overington, Sobonya)

5 [Introduced January 23, 2012; referred to the
6 Committee on the Judiciary.]

**Interim
Bill**

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10 A BILL to amend and reenact §29A-1-2 and §29A-1-3 of the Code of
11 West Virginia, 1931, as amended; to amend and reenact §29A-3-
12 1a, §29A-3-4, §29A-3-6, §29A-3-8, §29A-3-15, §29A-3-15a and
13 §29A-3-15b of said code; and to amend said code by adding
14 three new sections, designated §29A-3-1c, §29A-3-1d and §29A-
15 3-9a, all relating to review of state administrative agency
16 rule-making; defining terms; altering designation of types of
17 rules that have not been approved by the Legislature and that
18 are exempt from legislative review; establishing deadline for
19 action by agency action for certain proposed rules before the
20 rule is deemed withdrawn; requiring agency response to public
21 comments; requiring all sections of a rule be filed when
22 agency proposing rule amendment; providing for methodology for
23 repeal of rules; establishing new publishing and rule-making

1 requirements for certain Department of Health and Human
2 Services policy manuals; providing new process for review and
3 approval of legislative rules incorporating federal mandated
4 requirements; revising emergency rule-making process to allow
5 for public comment, more information, and extended comment
6 period; providing new process for provisional legislative
7 rules; and altering certain agency filing requirements.

8 *Be it enacted by the Legislature of West Virginia:*

9 That §29A-1-2 and §29A-1-3 of the Code of West Virginia, 1931,
10 as amended, be amended and reenacted; that §29A-3-1a, §29A-3-4,
11 §29A-3-6, §29A-3-8, §29A-3-15, §29A-3-15a and §29A-3-15b of said
12 code be amended and reenacted; and that said code be amended by
13 adding three new sections, designated §29A-3-1c, §29A-3-1d and
14 §29A-3-9a, all to read as follows:

15 **ARTICLE 1. DEFINITIONS AND APPLICATION OF CHAPTER**

16 **§29A-1-2. Definitions of terms used in this chapter.**

17 For the purposes of this chapter:

18 (a) "Agency" means any state board, commission, department,
19 office or officer authorized by law to make rules or adjudicate
20 contested cases, except those in the legislative or judicial
21 branches;

22 (b) "Contested case" means a proceeding before an agency in
23 which the legal rights, duties, interests or privileges of specific

1 parties are required by law or constitutional right to be
2 determined after an agency hearing, but does not include cases in
3 which an agency issues a license, permit or certificate after an
4 examination to test the knowledge or ability of the applicant where
5 the controversy concerns whether the examination was fair or
6 whether the applicant passed the examination and shall not include
7 rule making;

8 © "Agency-promulgated rule" means any rule an agency is
9 authorized by the Legislature to promulgate that meets all
10 requirements of being considered a legislative rule except for the
11 authority granted by the Legislature to the agency expressly allows
12 the agency to proceed with final adoption of the rule without prior
13 specific authorization by Legislature rule enactment pursuant to
14 section nine, article three of this chapter. An agency-promulgated
15 rule to be lawfully promulgated shall comport to all other
16 requirements of this article and shall have the same force and
17 effect as a legislative rule.

18 ~~(e) (d)~~ "Interpretive rule" means every rule, ~~as defined in~~
19 ~~subsection (I) of this section,~~ adopted by an agency independently
20 of any delegation of legislative power which is intended by the
21 agency to provide information or guidance to the public regarding
22 the agency's interpretations, policy or opinions upon the law
23 enforced or administered by it and which is not intended by the

1 agency to be determinative of any issue affecting private rights,
2 privileges or interests. An interpretive rule may not be relied
3 upon to impose a civil or criminal sanction nor to regulate private
4 conduct or the exercise of private rights or privileges nor to
5 confer any right or privilege provided by law and is not admissible
6 in any administrative or judicial proceeding for such purpose,
7 except where the interpretive rule established the conditions for
8 the exercise of discretionary power as herein provided. However, an
9 interpretive rule is admissible for the purpose of showing that the
10 prior conduct of a person was based on good faith reliance on such
11 rule. The admission of such rule in no way affects any legislative
12 or judicial determination regarding the prospective effect of such
13 rule. Where any provision of this code lawfully commits any
14 decision or determination of fact or judgment to the sole
15 discretion of any agency or any executive officer or employee, the
16 conditions for the exercise of that discretion, to the extent that
17 such conditions are not prescribed by statute or by legislative
18 rule, may be established by an interpretive rule and such rule is
19 admissible in any administrative or judicial proceeding to prove
20 such conditions.

21 ~~(d)~~ (e) "Legislative rule" means every rule, ~~as defined in~~
22 ~~subsection (I) of this section~~ proposed or promulgated by an agency
23 pursuant to this chapter. Legislative rule includes every rule

1 which, when promulgated after or pursuant to authorization of the
2 Legislature, has: (1) The force of law; or (2) supplies a basis for
3 the imposition of civil or criminal liability; or (3) grants or
4 denies a specific benefit. Every rule which, when effective, is
5 determinative on any issue affecting private rights, privileges or
6 interests is a legislative rule. Unless lawfully promulgated as an
7 emergency rule, a legislative rule is only a proposal by the agency
8 and has no legal force or effect until promulgated by specific
9 authorization of the Legislature. Except where otherwise
10 specifically provided in this code, legislative rule does not
11 include: (A) findings or determinations of fact made or reported by
12 an agency, including any such findings and determinations as are
13 required to be made by any agency as a condition precedent to
14 proposal of a rule to the Legislature; (B) declaratory rulings
15 issued by an agency pursuant to the provisions of section one,
16 article four of this chapter; © orders, as defined in ~~subdivision~~
17 ~~(e)~~ of this section; or (D) executive orders or proclamations by
18 the Governor issued solely in the exercise of executive power,
19 including executive orders issued in the event of a public disaster
20 or emergency;

21 ~~(e)~~ (f) "Order" means the whole or any part of the final
22 disposition (whether affirmative, negative, injunctive or
23 declaratory in form) by any agency of any matter other than rule

1 making;

2 ~~(f)~~ (g) "Person" includes individuals, partnerships,
3 corporations, associations or public or private organizations of
4 any character;

5 ~~(g)~~ (h) "Procedural rule" means every rule, ~~as defined in~~
6 ~~subsection (I) of this section,~~ which fixes rules of procedure,
7 practice or evidence for dealings with or proceedings before an
8 agency, including forms prescribed by the agency;

9 ~~(h)~~ (I) "Proposed rule" is a legislative rule, interpretive
10 rule, or a procedural rule which has not become effective pursuant
11 to the provisions of this chapter or law authorizing its
12 promulgation;

13 (j) "Provisional legislative rule" means a legislative rule
14 that the agency has been directed by law to propose, to be
15 effective for a limited time as a legislative rule prior to
16 legislative authorization for promulgation as a legislative rule,
17 pursuant to this chapter.

18 ~~(I)~~ (k) "Rule" includes every regulation, standard or
19 statement of policy or interpretation of general application and
20 future effect, including the amendment or repeal thereof, affecting
21 private rights, privileges or interests, or the procedures
22 available to the public, adopted by an agency to implement, extend,
23 apply, interpret or make specific the law enforced or administered

1 by it or to govern its organization or procedure, but does not
2 include regulations relating solely to the internal management of
3 the agency, nor regulations of which notice is customarily given to
4 the public by markers or signs, nor mere instructions. Every rule
5 shall be classified as "legislative rule," "interpretive rule" or
6 "procedural rule," all as defined in this section, and shall be
7 effective only as provided in this chapter;

8 ~~(j)~~ (1) "Rule making" means the process for the formulation,
9 amendment or repeal of a rule as provided in this chapter.

10 **§29A-1-3. Application of chapter; limitations.**

11 (a) The provisions of this chapter do not apply in any respect
12 whatever to executive orders of the Governor, which orders to the
13 extent otherwise lawful shall be effective according to their
14 terms: *Provided*, That the executive orders shall be admitted to
15 record in the State Register when and to the extent the Governor
16 ~~deems~~ considers suitable and shall be included therein by the
17 Secretary of State when tendered by the Governor.

18 (b) Except as to requirements for filing in the State
19 Register, and with the Legislature or its rule-making review
20 committee, provided in this chapter or other law, the provisions of
21 this chapter do not apply in any respect ~~whatever~~ to the West
22 Virginia Board of Probation and Parole, the Public Service
23 Commission, the board of Public Works sitting as such and the

1 Secondary Schools Activities Commission. ~~Provided, That~~ The rules
2 of such agencies shall be filed in the State Register in the form
3 prescribed by this chapter and be effective no sooner than sixty
4 consecutive days after being so filed ~~Provided, however, That~~ The
5 rules promulgated by the state colleges and universities shall only
6 be filed with the higher education governing boards. ~~Provided~~
7 ~~further, That~~ Such agencies may promulgate emergency rules in
8 conformity with section fifteen, article three of this chapter.
9 Rules or amendments thereto authorized by this subsection shall be
10 considered by the agency for adoption not later than six months
11 after the close of public comment. A notice of adoption or
12 withdrawal by the agency shall be filed in the State Register
13 within that period. Failure to file such notice shall constitute
14 withdrawal. The Secretary of State shall note such withdrawal in
15 the State Register immediately upon the expiration of the six-
16 month period.

17 © The provisions of this chapter do not apply to rules
18 relating to or contested cases involving the conduct of inmates or
19 other persons admitted to public institutions, the open seasons and
20 the bag, creel, size, age, weight and sex limits with respect to
21 the wildlife in this state, or the conduct of persons in military
22 service. ~~or the receipt of public assistance.~~ Such These rules
23 shall be filed in the State Register in the form prescribed by this

1 chapter and be effective upon filing.

2 (d) Nothing herein shall be construed to affect, limit or
3 expand any express and specific exemption from this chapter
4 contained in any other statute relating to a specific agency, but
5 such exemptions shall be construed and applied in accordance with
6 the provisions of this chapter to effectuate any limitations on
7 such exemptions contained in any such other statute.

8 **ARTICLE 3. RULE MAKING.**

9 **§29A-3-1a. Filing proposed amendments to an existing rule.**

10 (a) ~~Rules promulgated to amend existing rules may be filed on~~
11 ~~a section by section basis without having to refile in the state~~
12 ~~register all of the other sections of an existing series numbered~~
13 ~~rule: *Provided, That such filing shall list, by proper citation,*~~
14 ~~those sections, not amended, which are directly affected by those~~
15 ~~sections amended: *Provided, however, That amendments so filed* When~~
16 ~~amending an existing rule or proposing a new rule, agencies shall~~
17 ~~file all sections of the proposed rule. Each amendment filed to an~~
18 ~~existing rule shall be accompanied by note of explanation as to the~~
19 effect of such amendment and its relation to the existing rules.

20 (b) ~~Rules promulgated to amend existing rules and filed as an~~
21 ~~emergency rule may be filed on a section by section basis without~~
22 ~~having to refile in the state register all of the other sections of~~
23 ~~an existing series numbered rule: *Provided, That such filing shall*~~

1 ~~list, by proper citation, those sections not amended, which are~~
2 ~~directly affected by those sections amended.~~

3 (b) Any rule being repealed shall be filed in its entirety
4 with the rule series provisions stricken. A rule may not be
5 repealed by reference in another rule.

6 **§29A-3-1c. Rules of the Department of Health and Human Services.**

7 (a) The Secretary of the Department of Health and Human
8 Services as authorized by this section, other statute or
9 legislative rule, may publish manuals that provide policy guidance
10 for the implementation and administration of agency programs.
11 Manuals are considered agency-promulgated rules as defined pursuant
12 to this article.

13 (b) Notwithstanding the provisions of section eight, article
14 two of this chapter, the Secretary of the Department of Health and
15 Human Services may make manuals available to the public in an
16 electronic format. Upon the effective date of the manual or any
17 amendment thereto, the secretary shall provide an electronic copy
18 of policy manual to the Secretary of State at no cost. Each
19 manual will be considered addendums to the Code of State Rules, and
20 electronically published as part of the State Register. This
21 manual shall be noticed in the State Register pursuant to article
22 two of this chapter and subject to thirty day public notice and
23 comment period pursuant to section five of this article.

1 © The following Department of Health and Human Services
2 manuals are agency-promulgated rules, and subject to the provisions
3 of this section: Bureau for Child Support Enforcement Policy
4 Manual; Income Maintenance Manual; West Virginia Medicaid Provider
5 Manuals; Medicaid State Plan Manual; and the Social Services
6 Manual.

7 **§29A-3-1d. Proposal of federally mandated rules.**

8 (a) Notwithstanding the provisions of section nine of this
9 article, when a legislative rule or amendment to an existing
10 legislative rule is being proposed by an agency to adopt by
11 reference or otherwise comport the rule to a federal counterpart
12 regulation for the purposes of meeting minimum federal requirements
13 for a state administered program in which the state has assumed
14 regulatory responsibility, the agency may promulgate the rule as an
15 agency-promulgated rule without legislative approval upon meeting
16 the requirements of this section.

17 (b) To qualify for agency-promulgated rule status, the rule or
18 amendment to the existing rule shall contain only provisions
19 necessary to fulfill the state's duties associated with
20 administering and complying with the federally delegated program,
21 and may not exceed minimum federal requirements, and to the extent
22 the rule does, it is in violation of this section and shall be
23 severed from the rule and be null and void.

1 © The agency shall fulfill all filing, hearing and notice
2 requirements otherwise required pursuant to this article. The
3 agency shall as part of rule filing, provide an explanation of the
4 purpose of the rule and a statement and finding specifically
5 detailing the reasons the rule is eligible for agency-promulgated
6 rule status.

7 (d) The federal regulation or statute shall be electronically
8 attached or otherwise electronically available and be available for
9 inspection at the Secretary of State's office.

10 (e) The rule is effective thirty days following close of
11 public comment period. Rules are to be filed with the Legislative
12 Rule-making and Review Committee as provided in section eleven of
13 this article. The Legislature may disapprove or amend an agency-
14 promulgated rule without limitation.

15 **§29A-3-4. Filing of proposed procedural rules and interpretive**
16 **rules.**

17 (a) When an agency proposes ~~a~~ an agency-promulgated rule,
18 procedural rule or an interpretive rule, the agency shall file in
19 the State Register a notice of its action, including the text of
20 the rule as proposed.

21 (b) All proposed rules filed under subsection (a) of this
22 section shall have a fiscal note attached itemizing the cost of
23 implementing the rules as they relate to this state and to persons

1 affected by the rules. ~~and regulations.~~ Such fiscal note shall
2 include all information included in a fiscal note for either house
3 of the Legislature and a statement of the economic impact of the
4 rule on the state or its residents. The objectives of the rules
5 shall be clearly and separately stated in the fiscal note by the
6 agency issuing the proposed rules. No agency-promulgated rule, -
7 procedural or interpretive rule shall be void or voidable by virtue
8 of noncompliance with this subsection.

9 **§29A-3-6. Filing findings and determinations for rules in state**
10 **register; evidence deemed public record.**

11 (a) Incident to fixing a date for public comment on a proposed
12 rule, the agency shall promulgate the findings and determinations
13 required as a condition precedent thereto, and state fully and
14 succinctly the reasons therefor and file such findings and
15 determinations in the State Register. If the agency amends the
16 proposed rule as a result of the evidence or comment presented
17 pursuant to section five, such amendment shall be filed with a
18 description of any changes and a statement listing the reasons for
19 the amendment. The agency shall also provide an analysis of the
20 comments received and the reasons for adoption or rejection of any
21 suggested revisions submitted as comments to the proposed rule.

22 (b) The statement of reasons and a transcript of all evidence
23 and public comment received pursuant to notice are public records

1 and shall be carefully preserved by the agency and be open for
2 public inspection and copying for a period of not less than five
3 years from the date of the hearing.

4 **§29A-3-8. Adoption of procedural and interpretive rules.**

5 ~~A~~ An agency-promulgated, procedural and interpretive rule,
6 shall be considered by the agency for adoption not later than six
7 months after the close of public comment and a notice of withdrawal
8 or adoption shall be filed in the State Register within that
9 period. Failure to file such notice shall constitute withdrawal
10 and the Secretary of State shall note such failure in the State
11 Register immediately upon the expiration of the six- month period.

12 ~~A~~ An agency-promulgated, procedural or interpretive rule may
13 be amended by the agency prior to final adoption without further
14 hearing or public comment. No such amendment may change the main
15 purpose of the rule. If the fiscal implications have changed
16 since the rule was proposed, a new fiscal note shall be attached to
17 the notice of filing. Upon adoption of the rule, ~~(including any~~
18 ~~such amendment,~~) the agency shall file the text of the adopted
19 agency-promulgated, procedural or interpretive rule with its notice
20 of adoption in the State Register and the same shall be effective
21 on the date specified in the rule or thirty days after such filing,
22 whichever is later.

23 **§29A-3-9a. Proposal and promulgation of provisional legislative**

1 **rules.**

2 (a) Unless otherwise specified in the implementing statute,
3 whenever the Legislature enacts a law mandating an agency to
4 propose a legislative rule, and further directs the agency to
5 promulgate a provisional legislative rule, the agency shall within
6 sixty days of the effective date of the statute, file the rule for
7 public notice as provided in section five of this article and also
8 submit the rule as a legislative rule as provided pursuant to the
9 requirements of this article. The provisional legislative rule
10 shall be filed by the agency as provided in section six of this
11 article no later than thirty days following the close of public
12 comment. The rule is effective upon final filing by the agency.
13 The provisional legislative rule shall remain effective for fifteen
14 months or until the legislative rule is acted upon by enactment of
15 the Legislature pursuant to section thirteen of this article,
16 whichever occurs first. Any amendment by the agency to the
17 provisional legislative rule is subject to the same notice and
18 effective date requirements. Amendments to the provisional
19 legislative rule do not alter the initial fifteen month effective
20 period for the provisional legislative rule. If the provisional
21 legislative rule expires due to the failure of legislative
22 authorization pursuant to section thirteen of this article, the
23 agency may not refile the same or similar rule as an emergency rule

1 or a provisional legislative rule.

2 (b) A provisional legislative rule may be disapproved by the
 3 Secretary of State, acting under the authority provided in section
 4 fifteen-a of this article, or the Attorney General, acting under
 5 the authority provided in section fifteen-b of this article.

6 **§29A-3-15. Emergency legislative rules; procedure for**
 7 **promulgation; definition.**

8 (a) Any agency with authority to propose legislative rules
 9 ~~may, without hearing,~~ find that an emergency exists requiring that
 10 emergency rules be promulgated and promulgate the same in
 11 accordance with this section. Such emergency rules, together with
 12 a statement of the facts and circumstances constituting the
 13 emergency, and a listing of state agencies, professions, businesses
 14 and other identifiable interest groups affected by the proposed
 15 emergency rule shall be filed with the Secretary of State, and a
 16 notice of such filing shall be published in the State Register:
 17 Provided, That failure to list all known state agencies,
 18 professions, businesses and other identifiable interest groups may
 19 not be the basis for disapproval of the rule or subject the rule to
 20 judicial review. The agency shall have a thirty day public
 21 comment period for a proposed emergency rule, beginning the day of
 22 filing. Upon closure of the public hearing, the ~~Such~~ emergency
 23 ~~rules~~ rule shall become effective upon the approval of the

1 Secretary of State in accordance with section fifteen-a of this
2 article or upon the approval of the Attorney General in accordance
3 with section fifteen-b or upon the ~~forty-second~~ forty-fifth day
4 following such filing, whichever occurs first: Provided, that upon
5 a finding that the emergent circumstances existing pursuant to
6 subsection (f) of this section require immediate authorization of
7 the emergency rule, the Secretary of State, acting under the
8 authority provided in section fifteen-a of this article, or the
9 Attorney General, acting under the authority provided in section
10 fifteen-b of this article, may immediately approve the emergency
11 rule for the remainder of the forty-five day comment and review
12 period, at which time that approval of the emergency rule will
13 expire. Any time following the close of public hearing, the final
14 determination on the existence of an emergency may be made by the
15 Secretary of State, acting under the authority provided in section
16 fifteen-a of this article, or the Attorney General, acting under
17 the authority provided in section fifteen-b of this article. Such
18 Emergency rules may adopt, amend or repeal any legislative rule,
19 but the circumstances constituting the emergency requiring such
20 adoption, amendment or repeal shall be stated with particularity
21 and be subject to de novo review by any court having original
22 jurisdiction of an action challenging their validity. ~~Fourteen~~ Two
23 paper copies and an electronic version of the rules and of the

1 required statement shall be filed immediately with the Secretary of
2 State and one paper copy and an electronic copy shall be filed
3 immediately with the Legislative Rule-Making Review Committee.

4 An emergency rule shall be effective for not more than fifteen
5 months and shall expire earlier if any of the following occurs:

6 (1) The Secretary of State, acting under the authority
7 provided for in section fifteen-a of this article, or the Attorney
8 General, acting under the authority provided in section fifteen-b
9 of this article, disapproves the emergency rule because: (A) The
10 emergency rule or an amendment to the emergency rule exceeds the
11 scope of the law authorizing or directing the promulgation thereof;
12 (B) an emergency does not exist justifying the promulgation of the
13 emergency rule; or © the emergency rule was not promulgated in
14 compliance with the provisions of this section. An emergency rule
15 may not be disapproved pursuant to the authority granted by
16 paragraphs (A) or (B) of this subdivision on the basis that the
17 Secretary of State or the Attorney General disagrees with the
18 underlying public policy established by the Legislature in enacting
19 the supporting legislation. An emergency rule which would
20 otherwise be approved as being necessary to comply with a time
21 limitation established by this code or by a federal statute or
22 regulation may not be disapproved pursuant to the authority granted
23 by paragraphs (A) or (B) of this subdivision on the basis that the

1 agency has failed to file the emergency rule prior to the date
2 fixed by such time limitation. ~~When the supporting statute~~
3 ~~specifically directs an agency to promulgate an emergency rule, or~~
4 ~~specifically finds that an emergency exists and directs the~~
5 ~~promulgation of an emergency rule, the emergency rule may not be~~
6 ~~disapproved pursuant to the authority granted by paragraph (B) of~~
7 ~~this subdivision.~~ An emergency rule may not be disapproved on the
8 basis that the Legislature has not specifically directed an agency
9 to promulgate the emergency rule, or has not specifically found
10 that an emergency exists and directed the promulgation of an
11 emergency rule.

12 (2) The agency has not previously filed and fails to file a
13 notice of public hearing on the proposed rule within thirty days of
14 the date the proposed rule was filed as an emergency rule; in which
15 case the emergency rule expires on the thirty-first day.

16 (3) The agency has not previously filed and fails to file the
17 proposed rule with the Legislative Rule-Making Review Committee
18 within ninety days of the date the proposed rule was filed as an
19 emergency rule; in which case the emergency rule expires on the
20 ninety-first day.

21 (4) The Legislature has authorized or directed promulgation of
22 an authorized legislative rule dealing with substantially the same
23 subject matter since such emergency rule was first promulgated, and

1 in which case the emergency rule expires on the date the authorized
2 rule is made effective.

3 (5) The Legislature has, by law, disapproved of such emergency
4 rule; in which case the emergency rule expires on the date the law
5 becomes effective.

6 (b) Any amendment to an emergency rule made by the agency
7 shall be filed in the State Register and does not constitute a new
8 emergency rule for the purpose of acquiring additional time or
9 avoiding the expiration dates in subdivision (2), (3), (4) or (5),
10 subsection (a) of this section: *Provided*, That such emergency
11 amendment shall become effective upon the approval of the Secretary
12 of State in accordance with section fifteen-a of this article or
13 upon approval of the Attorney General in accordance with section
14 fifteen-b of this article or upon the ~~forty-second~~ forty-fifth day
15 following such filing, whichever occurs first.

16 © Once an emergency rule expires due to the conclusion of
17 fifteen months or due to the effect of subdivision (2), (3), (4) or
18 (5), subsection (a) of this section, the agency may not refile the
19 same or similar rule as an emergency rule.

20 (d) The provision of this section shall not be used to avoid
21 or evade any provision of this article or any other provisions of
22 this code, including any provisions for legislative review and
23 approval of proposed rules. Any emergency rule promulgated for any

1 such purpose may be contested in a judicial proceeding before a
2 court of competent jurisdiction.

3 (e) The Legislative Rule-Making Review Committee may review
4 any emergency rule to determine: (1) Whether the emergency rule or
5 an amendment to the emergency rule exceeds the scope of the law
6 authorizing or directing the promulgation thereof; (2) whether
7 there exists an emergency justifying the promulgation of such
8 emergency rule; and (3) whether the emergency rule was promulgated
9 in compliance with the requirements and prohibitions contained in
10 this section. The committee may recommend to the agency, the
11 Legislature, or the Secretary of State such action as it may ~~deem~~
12 consider proper.

13 (f) For the purposes of this section, an emergency exists when
14 the promulgation of an emergency rule is necessary: (1) For the
15 immediate preservation of the public peace, health, safety or
16 welfare; (2) to comply with a time limitation established by this
17 code or by a federal statute or regulation; or (3) to prevent
18 substantial harm to the public interest.

19 **§29A-3-15a. Disapproval of emergency and provisional legislative**
20 **rules by the Secretary of State; judicial review.**

21 (a) Upon the filing of an emergency rule or filing of an
22 amendment to an emergency rule by an agency, under the provisions
23 of section fifteen of this article, by any agency, except for the

1 Secretary of State, the Secretary of State shall review such rule
2 or such amendment and, within ~~forty-two~~ forty-five days of such
3 filing, shall issue a decision as to whether or not such emergency
4 rule or such amendment to an emergency rule should be disapproved.
5 An emergency rule filed by the Secretary of State shall be reviewed
6 by the Attorney General as provided in section fifteen-b of this
7 article.

8 (b) The Secretary of State shall disapprove an emergency rule
9 or an amendment to an emergency rule if he or she determines:

10 (1) That the emergency rule or an amendment to the emergency
11 rule exceeds the scope of the law authorizing or directing the
12 promulgation thereof; or

13 (2) That an emergency does not exist justifying the
14 promulgation of the emergency rule or the filing of an amendment to
15 the emergency rule; or

16 (3) That the emergency rule or an amendment to the emergency
17 rule was not promulgated in compliance with the provisions of
18 section fifteen of this article.

19 © If the Secretary of State determines, based upon the
20 contents of the rule or the supporting information filed by the
21 agency, that the emergency rule should be disapproved, he or she
22 may disapprove such rule without further investigation, notice or
23 hearing. If, however, the Secretary of State concludes that the

1 information submitted by the agency is insufficient to allow a
2 proper determination to be made as to whether the emergency rule
3 should be disapproved, he or she may make further investigation,
4 including, but not limited to, requiring the agency or other
5 interested parties to submit additional information or comment or
6 fixing a date, time and place for the taking of evidence on the
7 issues involved in making a determination under the provisions of
8 this section.

9 (d) If the Secretary of State determines, based upon the
10 contents of the amendment to an emergency rule or the supporting
11 information filed by the agency, that the amendment to the
12 emergency rule should be disapproved, he or she may disapprove such
13 amendment without further investigation, notice or hearing. If,
14 however, the Secretary of State concludes that the information
15 submitted by the agency is insufficient to allow a proper
16 determination to be made as to whether the amendment should be
17 disapproved, he or she may make further investigation, including,
18 but not limited to, requiring the agency or other interested
19 parties to submit additional information or comment or fixing a
20 date, time and place for the taking of evidence on the issues
21 involved in making a determination under the provisions of this
22 section.

23 (e) The Secretary of State shall disapprove a provisional

1 legislative rule upon a finding that the rule was unlawfully
2 promulgated or that the provisional legislative rule or an
3 amendment thereto exceeds the scope of the law authorizing the
4 rule's promulgation.

5 ~~(e)~~ (f) The determination of the Secretary of State shall be
6 reviewable by the Supreme Court of Appeals under its original
7 jurisdiction, based upon a petition for a writ of mandamus,
8 prohibition or certiorari, as appropriate. Such proceeding may be
9 instituted by:

10 (1) The agency which promulgated the emergency rule;

11 (2) A member of the Legislature; or

12 (3) Any person whose personal property interests will be
13 significantly affected by the approval or disapproval of the
14 emergency rule by the Secretary of State.

15 **§29A-3-15b. Disapproval of emergency rules and provisional**
16 **legislative rules by the Attorney General;**
17 **judicial review.**

18 (a) Upon the filing of an emergency rule or filing of an
19 amendment to an emergency rule by the Secretary of State under the
20 provisions of section fifteen of this article, the Attorney General
21 shall review such rule or such amendment and, within ~~forty-two~~
22 forty-five days of such filing, shall issue a decision as to
23 whether or not such emergency rule or such amendment to an

1 emergency rule should be disapproved.

2 (b) The Attorney General shall disapprove an emergency rule or
3 an amendment to an emergency rule if he or she determines:

4 (1) That the emergency rule or an amendment to the emergency
5 rule exceeds the scope of the law authorizing or directing the
6 promulgation thereof; or

7 (2) That an emergency does not exist justifying the
8 promulgation of the emergency rule or the filing of an amendment to
9 the emergency rule; or

10 (3) That the emergency rule or an amendment to the emergency
11 rule was not promulgated in compliance with the provisions of
12 section fifteen of this article.

13 © If the Attorney General determines, based upon the contents
14 of the rule or the supporting information filed by the Secretary of
15 State, that the emergency rule should be disapproved, he or she may
16 disapprove such rule without further investigation, notice or
17 hearing. If, however, the Attorney General concludes that the
18 information submitted by the Secretary of State is insufficient to
19 allow a proper determination to be made as to whether the emergency
20 rule should be disapproved, he or she may make further
21 investigation, including, but not limited to, requiring the
22 Secretary of State or other interested parties to submit additional
23 information or comment or fixing a date, time and place for the

1 taking of evidence on the issues involved in making a determination
2 under the provisions of this section.

3 (d) If the Attorney General determines, based upon the
4 contents of the amendment to an emergency rule or the supporting
5 information filed by the agency, that the amendment to the
6 emergency rule should be disapproved, he or she may disapprove such
7 amendment without further investigation, notice or hearing. If,
8 however, the Attorney General concludes that the information
9 submitted by the agency is insufficient to allow a proper
10 determination to be made as to whether the amendment should be
11 disapproved, he or she may make further investigation, including,
12 but not limited to, requiring the agency or other interested
13 parties to submit additional information or comment or fixing a
14 date, time and place for the taking of evidence on the issues
15 involved in making a determination under the provisions of this
16 section.

17 (e) The Attorney General shall disapprove a provisional
18 legislative rule upon a finding that the rule was unlawfully
19 promulgated or that the provisional legislative rule or an
20 amendment thereto exceeds the scope of the law authorizing the
21 rule's promulgation.

22 ~~(e)~~ (f) The determination of the Attorney General shall be
23 reviewable by the Supreme Court of Appeals under its original

1 jurisdiction, based upon a petition for a writ of mandamus,
2 prohibition or certiorari, as appropriate. Such proceeding may be
3 instituted by:

4 (1) The Secretary of State;

5 (2) A member of the Legislature; or

6 (3) Any person whose personal property interests will be
7 significantly affected by the approval or disapproval of the
8 emergency rule by the Attorney General.

NOTE: The purpose of this bill is to make several revisions to the existing process for enacting legislative rules; establishes two classes of rules to replace existing designations; requires agency response to all public comments; provides process for publishing Department of Health and Human Services policy manuals; allows for rules adopting federal mandates to have expedited process, and revises emergency rule making process to allow for a public comment period.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

§29A-3-1c, §29A-3-1d and §29A-3-9a are new; therefore, it has been completely underscored.

This bill was recommended for introduction and enactment by the Joint Judiciary Committee.