

Selected Statutory Provisions for Emergency Rulemaking

Virginia

§ 2.2-4006. Exemptions from requirements of this article.

4. Regulations that are:

- a. Necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved;
- b. Required by order of any state or federal court of competent jurisdiction where no agency discretion is involved; or
- c. Necessary to meet the requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation, and the Registrar has so determined in writing. Notice of the proposed adoption of these regulations and the Registrar's determination shall be published in the Virginia Register not less than 30 days prior to the effective date of the regulation.

B. Whenever regulations are adopted under this section, the agency shall state as part thereof that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision. The effective date of regulations adopted under this subsection shall be in accordance with the provisions of § 2.2-4015, except in the case of emergency regulations, which shall become effective as provided in subsection B of § 2.2-4012.

C. A regulation for which an exemption is claimed under this section or § 2.2-4002, or 2.2-4011 and that is placed before a board or commission for consideration shall be provided at least two days in advance of the board or commission meeting to members of the public that request a copy of that regulation. A copy of that regulation shall be made available to the public attending such meeting.

§ 2.2-4011. **Emergency regulations; publication; exceptions.**

A. Regulations that an agency finds are necessitated by an emergency situation may be adopted by an agency upon consultation with the Attorney General, which approval shall be granted only after the agency has submitted a request stating in writing the nature of the emergency, and the necessity for such action shall be at the sole discretion of the Governor.

B. Agencies may also adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006. In such cases, the agency shall state in writing the nature of the emergency and of the necessity for such action and may adopt the regulations. Pursuant to § 2.2-4012, such regulations shall become effective upon approval by the Governor and filing with the Registrar of Regulations.

C. All emergency regulations shall be limited to no more than twelve months in duration. During the twelve-month period, an agency may issue additional emergency regulations as needed addressing the subject matter of the initial emergency regulation, but any such additional emergency regulations shall not be effective beyond the twelve-month period from the effective date of the initial emergency regulation. If the agency wishes to continue regulating the subject matter governed by the emergency regulation beyond the twelve-month limitation, a regulation to replace the emergency regulation shall be promulgated in

accordance with this article. The Notice of Intended Regulatory Action to promulgate a replacement regulation shall be filed with the Registrar within sixty days of the effective date of the emergency regulation and published as soon as practicable, and the proposed replacement regulation shall be filed with the Registrar within 180 days after the effective date of the emergency regulation and published as soon as practicable.

D. In the event that an agency concludes that despite its best efforts, a replacement regulation cannot be adopted before expiration of the 12-month period described in subsection C, it may seek the prior written approval of the Governor to extend the duration of the emergency regulation for a period of not more than six additional months. Any such request must be submitted to the Governor at least 30 days prior to the scheduled expiration of the emergency regulation and shall include a description of the agency's efforts to adopt a replacement regulation together with the reasons that a replacement regulation cannot be adopted before the expiration of the emergency regulation. Upon approval of the Governor, the duration of the emergency regulation shall be extended for a period of no more than six months. Such approval shall be in the sole discretion of the Governor and shall not be subject to judicial review. Agencies shall notify the Registrar of Regulations of the new expiration date of the emergency regulation as soon as practicable.

E. Emergency regulations shall be published as soon as practicable in the Register.

F. The Regulations of the Marine Resources Commission shall be excluded from the provisions of this section.

*See <http://www.townhall.state.va.us/UM/emergency.cfm> for summary of process.

California

11342.545. "Emergency" means a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

11346.1. (a) (1) The adoption, amendment, or repeal of an emergency regulation is not subject to any provision of this article or Article 6 (commencing with Section 11349), except this section and Sections 11349.5 and 11349.6.

(2) At least five working days before submitting an emergency regulation to the office, the adopting agency shall, except as provided in paragraph (3), send a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. The notice shall include both of the following:

(A) The specific language proposed to be adopted.

(B) The finding of emergency required by subdivision (b).

(3) An agency is not required to provide notice pursuant to paragraph (2) if the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest.

(b) (1) Except as provided in subdivision (c), if a state agency makes a finding that the adoption of a regulation or order of repeal is necessary to address an emergency, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal.

(2) Any finding of an emergency shall include a written statement that contains the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of Section 11346.5 and a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need

for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency. The finding of emergency shall also identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies. The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action.

A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency. If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations adopted in accordance with the provisions of Article 5 (commencing with Section 11346), the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations.

(3) The statement and the regulation or order of repeal shall be filed immediately with the office.

(c) Notwithstanding any other provision of law, no emergency regulation that is a building standard shall be filed, nor shall the building standard be effective, unless the building standard is submitted to the California Building Standards Commission, and is approved and filed pursuant to Sections 18937 and 18938 of the Health and Safety Code.

(d) The emergency regulation or order of repeal shall become effective upon filing or upon any later date specified by the state agency in a written instrument filed with, or as a part of, the regulation or order of repeal.

(e) No regulation, amendment, or order of repeal initially adopted as an emergency regulatory action shall remain in effect more than 180 days unless the adopting agency has complied with Sections 11346.2 to 11347.3, inclusive, either before adopting an emergency regulation or within the 180-day period. The adopting agency, prior to the expiration of the 180-day period, shall transmit to the office for filing with the Secretary of State the adopted regulation, amendment, or order of repeal, the rulemaking file, and a certification that Sections 11346.2 to 11347.3, inclusive, were complied with either before the emergency regulation was adopted or within the 180-day period.

(f) If an emergency amendment or order of repeal is filed and the adopting agency fails to comply with subdivision (e), the regulation as it existed prior to the emergency amendment or order of repeal shall thereupon become effective and after notice to the adopting agency by the office shall be reprinted in the California Code of Regulations.

(g) If a regulation is originally adopted and filed as an emergency and the adopting agency fails to comply with subdivision (e), this failure shall constitute a repeal of the regulation and after notice to the adopting agency by the office, shall be deleted.

(h) The office may approve not more than two readoptions, each for a period not to exceed 90 days, of an emergency regulation that is the same as or substantially equivalent to an emergency regulation previously adopted by that agency. Readoption shall be permitted only if the agency has made substantial progress and proceeded with diligence to comply with subdivision (e).

11349.6. (a) If the adopting agency has complied with Sections 11346.2 to 11347.3, inclusive, prior to the adoption of the regulation as an emergency, the office shall approve or disapprove the regulation in accordance with this article.

(b) Emergency regulations adopted pursuant to subdivision (b) of Section 11346.1 shall be reviewed by the office within 10 calendar days after their submittal to the office. After posting a notice of the filing of a proposed emergency regulation on its Internet Web site, the office shall allow interested persons five calendar days to submit comments on the proposed emergency regulations unless the emergency situation clearly poses such an immediate serious harm that delaying action to allow public comment would be inconsistent with the public interest. The office shall disapprove the emergency regulations if it determines that the situation addressed by the regulations is not an emergency, or if it determines that the regulation fails to meet the standards set forth in Section 11349.1, or if it determines the agency failed to comply with Section 11346.1.

(c) If the office considers any information not submitted to it by the rulemaking agency when determining whether to file emergency regulations, the office shall provide the rulemaking agency with an opportunity to rebut or comment upon that information.

(d) Within 30 working days of the filing of a certificate of compliance, the office shall review the regulation and hearing record and approve or order the repeal of an emergency regulation if it determines that the regulation fails to meet the standards set forth in Section 11349.1, or if it determines that the agency failed to comply with this chapter.

*Cal. legislature revised this section of the state APA in 2006. Rules implementing the statutory revision have been proposed, see http://www.oal.ca.gov/proposed_rulemaking.htm.

Florida

120.54 Rulemaking.--

(4) EMERGENCY RULES.--

(a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger. The agency may adopt a rule by any procedure which is fair under the circumstances if:

1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.
2. The agency takes only that action necessary to protect the public interest under the emergency procedure.
3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one or a part of one county, including the full text of the rules, shall be published in the first available issue of the Florida Administrative Weekly and provided to the committee. **The agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.**

(b) Rules pertaining to the public health, safety, or welfare shall include rules pertaining to perishable agricultural commodities or rules pertaining to the interpretation and implementation of the requirements of chapters 97-102 and chapter 105 of the Election Code.

(c) An emergency rule adopted under this subsection shall not be effective for a period longer than 90 days and shall not be renewable, except during the pendency of a challenge to proposed rules addressing the subject of the emergency rule. However, the agency may take identical action by the rulemaking procedures specified in this chapter.

(d) Subject to applicable constitutional and statutory provisions, an emergency rule becomes effective immediately on filing, or on a date less than 20 days thereafter if specified in the rule, if the adopting agency finds that such effective date is necessary because of immediate danger to the public health, safety, or welfare.

120.56 Challenges to rules.--

(5) CHALLENGING EMERGENCY RULES; SPECIAL PROVISIONS.--Challenges to the validity of an emergency rule shall be subject to the following time schedules in lieu of those established by paragraphs (1)(c) and (d). Within 7 days after receiving the petition, the division director shall, if the petition complies with paragraph (1)(b), assign an administrative law judge, who shall conduct a hearing within 14 days, unless the petition is withdrawn. The administrative law judge shall render a decision within 14 days after the hearing.

Maryland

§10-111.

(a) (1) Except as provided in subsection (b) of this section, a unit may not adopt a proposed regulation until:

(i) after submission of the proposed regulation to the Committee for preliminary review under § 10-110 of this subtitle; and

(ii) at least 45 days after its first publication in the Register.

(2) (i) If the Committee determines that an appropriate review cannot reasonably be conducted within 45 days and that an additional period of review is required, it may delay the adoption of the regulation by so notifying the promulgating unit and the Division of State Documents, in writing, prior to the expiration of the 45-day period.

(ii) If notice is provided to the promulgating unit pursuant to subparagraph (i) of this paragraph, the promulgating unit may not adopt the regulation until it notifies the Committee, in writing, of its intention to adopt the regulation and provides the Committee with a further period of review of the regulation that terminates not earlier than the later of the following:

1. the 30th day following the notice provided by the promulgating unit under this subparagraph; or

2. the 105th day following the initial publication of the regulation in the Register.

(3) The promulgating unit shall permit public comment for at least 30 days of the 45-day period under paragraph (1)(ii) of this subsection.

(b) (1) The unit may adopt a proposed regulation immediately if the unit:

(i) declares that the emergency adoption is necessary;

(ii) submits the proposed regulation to the Committee and the Department of Legislative Services, together with the fiscal impact statement required under subsection (c) of this section; and

(iii) has the approval of the Committee for the emergency adoption.

(2) (i) Subject to subparagraphs (ii), (iii), and (iv) of this paragraph, the approval of the Committee may be given:

1. by a majority of its members who are present and voting at a public hearing or meeting of the Committee; or

2. if staff of the Committee tries but is unable to contact a majority of the members of the Committee in a timely manner and immediate adoption is necessary to protect the public health or safety, by its presiding Chairman or, if its presiding Chairman is unavailable, by its co-chairman.

- (ii) If a member of the Committee requests a public hearing on the emergency adoption of a regulation, the Committee shall hold a public hearing.
- (iii) 1. If a public hearing is held on the emergency adoption of a regulation, the Committee may not approve the emergency adoption except by a majority vote of the members present and voting at the hearing or at a meeting of the Committee subsequent to the hearing.
- 2. If a vote on the emergency regulation is not taken at the public hearing or immediately thereafter, the Committee members shall be provided at least 1 week's notice of the scheduling of any subsequent meeting to vote on the regulation.
- (iv) Unless the Governor declares that immediate adoption is necessary to protect the public health or safety, the Committee may not approve the emergency adoption of a regulation earlier than 10 business days after receipt of the regulation by the Committee and the Department of Legislative Services.
- (3) If there is no request for a public hearing, the staff of the Committee may poll, in person, by telephone, or in writing:
 - (i) the members of the Committee; or
 - (ii) if staff of the Committee tries but is unable to contact a majority of the members of the Committee in a timely manner and immediate adoption is necessary to protect the public health or safety, the presiding Chairman or the co-chairman.
- (4) (i) The Committee may impose, as part of its approval, any condition.
- (ii) The Committee shall impose, as part of its approval, a time limit not to exceed 180 days on each request for emergency status.
- (iii) If the unit does not adopt the regulation finally before the time limit expires, the status of the regulation reverts to its status before the emergency adoption.
- (5) The Committee may rescind its approval by a majority of its members present and voting at a public hearing or meeting of the Committee.
- (c) (1) The fiscal impact statement, prepared by the unit and submitted under subsection (b) of this section, shall state:
 - (i) an estimate of the impact of the emergency regulation on the revenues and expenditures of the State;
 - (ii) whether the State budget for the fiscal year in which the regulation will become effective contains an appropriation of the funds necessary for the implementation of the emergency regulation;
 - (iii) if an appropriation is not contained in the State budget, the source of the funds necessary for the implementation of the emergency regulation; and
 - (iv) whether the emergency regulation imposes a mandate on a local government unit.
- (2) If the emergency regulation imposes a mandate on a local government unit, the fiscal impact statement shall:
 - (i) indicate whether the regulation is required to comply with a federal statutory or regulatory mandate;
 - (ii) if the information may be practicably obtained given the emergency circumstances of the regulations, include an estimate of the impact of the emergency regulation on the revenues and expenditures of local government units; and
 - (iii) if applicable, and if the required data is available, include the estimated effect on local property tax rates.

§10-111.2.

- (a) (1) The website of the General Assembly shall include a list of all emergency regulations the Committee has received but has not approved.
- (2) For each regulation, the list shall include:
 - (i) the date the Committee received the regulation;
 - (ii) whether a member of the Committee has requested a public hearing;
 - (iii) the date of any public hearing scheduled;

- (iv) the date and a summary of any action the Committee has taken; and
- (v) the name and telephone number of a member of the Committee's staff who can provide further information.
- (3) A regulation shall be added to the list within 3 business days after receipt of the regulation by the Committee and the Department of Legislative Services.
- (b) (1) The Department of Legislative Services shall maintain a list of members of the public who have requested to receive notice when the Department of Legislative Services receives proposed regulations for which the promulgating unit has requested emergency adoption.
- (2) A member of the public who requests notice under this subsection shall specify:
 - (i) whether the individual wants to receive notice by United States mail or electronic mail; and
 - (ii) which agencies' regulations the individual wants to receive notice of receipt.
- (3) Within 2 business days of receipt of a proposed regulation, the Department of Legislative Services shall provide notice to members of the public who have requested notice, as specified in paragraph (2) of this subsection.
- (4) The Department of Legislative Services:
 - (i) may impose a reasonable fee for sending notice under this subsection by United States mail; and
 - (ii) may not impose a fee for sending notice under this subsection by electronic mail.
- (5) Upon request, a promulgating unit shall provide copies of emergency regulations to members of the public.

North Carolina

§ 150B-21.1A. Adoption of an emergency rule.

- (a) **Adoption.** – An agency may adopt an emergency rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be contrary to the public interest and that the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety. When an agency adopts an emergency rule, it must simultaneously commence the process for adopting a temporary rule by submitting the rule to the Codifier of Rules for publication on the Internet in accordance with G.S. 150B-21.1(a3). The Department of Health and Human Services or the appropriate rule-making agency within the Department may adopt emergency rules in accordance with this section when a recent act of the General Assembly or the United States Congress or a recent change in federal regulations authorizes new or increased services or benefits for children and families and the emergency rule is necessary to implement the change in State or federal law.
- (b) **Review.** – An agency must prepare a written statement of its findings of need for an emergency rule. The statement must be signed by the head of the agency adopting the rule. When an agency adopts an emergency rule, it must submit the rule and the agency's written statement of its findings of the need for the rule to the Codifier of Rules. Within two business days after an agency submits an emergency rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria in subsection (a) of this section. In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code on the sixth business day following approval by the Codifier of Rules.

If the Codifier of Rules finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) **Standing.** – A person aggrieved by an emergency rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) **Effective Date and Expiration.** – An emergency rule becomes effective on the date specified in G.S. 150B-21.3. An emergency rule expires on the earliest of the following dates:

- (1) The date specified in the rule.
- (2) The effective date of the temporary rule adopted to replace the emergency rule, if the Commission approves the temporary rule.
- (3) The date the Commission returns to an agency a temporary rule the agency adopted to replace the emergency rule.
- (4) Sixty days from the date the emergency rule was published in the North Carolina Register, unless the temporary rule adopted to replace the emergency rule has been submitted to the Commission.

(e) **Publication.** – When the Codifier of Rules enters an emergency rule in the North Carolina Administrative Code, the Codifier of Rules must publish the rule in the North Carolina Register. (2003-229, s. 3.)

§ 150B-21.3. Effective date of rules.

(a) **Temporary and Emergency Rules.** – A temporary rule or an emergency rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.

(NCOAH web site summary) Under emergency conditions, agencies may adopt emergency rules pursuant to G.S. 150B-21.1A. Within 48 hours of submission to OAH, the Codifier of Rules must review the agency's written statement of findings of need for the emergency rule. If the Codifier determines that the findings meet the criteria in G.S. 150B-21.1A, the rule is entered into the NCAC on the 6th business day following approval. If the Codifier determines that the findings do not meet the criteria, the rule is returned to the agency. The agency may supplement

its findings and resubmit the emergency rule for an additional review or the agency may decide that it will remain with its initial position. The Codifier, thereafter, will enter the rule into the NCAC on the 6th business day following notification from the agency. An agency adopting an emergency rule must begin rulemaking procedures on a temporary rule at the same time the emergency rule is filed with Codifier. The emergency rule expires on the earliest of the following dates: the date specified in the rule; the effective date of the temporary rule adopted to replace the emergency rule, if the Commission approves the temporary rule; the date the Commission returns to an agency a temporary rule the agency adopted to replace the emergency rule; or 60 days from the date the emergency rule was published in the *North Carolina Register*, unless the temporary rule adopted to replace the emergency rule has been submitted to the Commission.

See also <http://www.ncoah.com/rules/flowchart-emer.pdf>.

South Carolina

SECTION 1-23-130. Emergency regulations.

(A) If an agency finds that an imminent peril to public health, safety, or welfare requires immediate promulgation of an emergency regulation before compliance with the procedures prescribed in this article or if a natural resources related agency finds that abnormal or unusual conditions, immediate need, or the state's best interest requires immediate promulgation of emergency regulations to protect or manage natural resources, the agency may file the regulation with the Legislative Council and a statement of the situation requiring immediate promulgation. The regulation becomes effective as of the time of filing.

(B) An emergency regulation filed under this section which has a substantial economic impact may not be refiled unless accompanied by the summary of the final assessment report prepared by the division pursuant to Section 1-23-115 and a statement of need and reasonableness is prepared by the agency pursuant to Section 1-23-111.

(C) If emergency regulations are either filed or expire while the General Assembly is in session, the emergency regulations remain in effect for ninety days only and may not be refiled; but if emergency regulations are both filed and expire during a time when the General Assembly is not in session they may be refiled for an additional ninety days.

(D) Emergency regulations and the agency statement as to the need for and reasonableness of immediate promulgation must be published in the next issue of the State Register following the date of filing. The summary of the final assessment report required for refiling emergency regulations pursuant to subsection (B) must also be published in the next issue of the State Register.

(E) An emergency regulation promulgated pursuant to this section may be permanently promulgated by complying with the requirements of this article.

West Virginia

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

(a) Any agency with authority to propose legislative rules may, without hearing, find that an emergency exists requiring that emergency rules be promulgated and promulgate the same in accordance with this section. Such emergency rules, together with a statement of the facts and circumstances constituting the emergency, shall be filed with the secretary of

state, and a notice of such filing shall be published in the state register. Such emergency rules shall become effective upon the approval of the secretary of state in accordance with section fifteen-a of this article or upon the approval of the attorney general in accordance with section fifteen-b or upon the forty-second day following such filing, whichever occurs first. Such emergency rules may adopt, amend or repeal any legislative rule, but the circumstances constituting the emergency requiring such adoption, amendment or repeal shall be stated with particularity and be subject to de novo review by any court having original jurisdiction of an action challenging their validity. Fourteen copies of the rules and of the required statement shall be filed immediately with the secretary of state and one copy shall be filed immediately with the legislative rule-making review committee.

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

(1) The secretary of state, acting under the authority provided for in section fifteen-a of this article, or the attorney general, acting under the authority provided for in section fifteen-b of this article, disapproves the emergency rule because: (A) The emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; (B) an emergency does not exist justifying the promulgation of the emergency rule; or (C) the emergency rule was not promulgated in compliance with the provisions of this section. **An emergency rule may not be disapproved pursuant to the authority granted by paragraphs (A) or (B) of this subdivision on the basis that the secretary of state or the attorney general disagrees with the underlying public policy established by the Legislature in enacting the supporting legislation.** An emergency rule which would otherwise be approved as being necessary to comply with a time limitation established by this code or by a federal statute or regulation may not be disapproved pursuant to the authority granted by paragraphs (A) or (B) of this subdivision on the basis that the agency has failed to file the emergency rule prior to the date fixed by such time limitation. When the supporting statute specifically directs an agency to promulgate an emergency rule, or specifically finds that an emergency exists and directs the promulgation of an emergency rule, the emergency rule may not be disapproved pursuant to the authority granted by paragraph (B) of this subdivision. An emergency rule may not be disapproved on the basis that the Legislature has not specifically directed an agency to promulgate the emergency rule, or has not specifically found that an emergency exists and directed the promulgation of an emergency rule,

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

(3) The agency has not previously filed and fails to file the proposed rule with the legislative rule-making review committee within ninety days of the date the proposed rule was filed as an emergency rule; in which case the emergency rule expires on the ninety-first day.

(4) The Legislature has authorized or directed promulgation of an authorized legislative rule dealing with substantially the same subject matter since such emergency rule was first promulgated, and in which case the emergency rule expires on the date the authorized rule is made effective.

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

(b) Any amendment to an emergency rule made by the agency shall be filed in the state register and does not constitute a new emergency rule for the purpose of acquiring additional time or avoiding the expiration dates in subdivision (2), (3), (4) or (5), subsection (a) of this section: Provided, That such emergency amendment shall become effective upon the approval of the secretary of state in accordance with section fifteen-a of this article or upon approval of the attorney general in accordance with section fifteen-b of this article or upon the forty-second day following such filing, whichever occurs first.

(c) Once an emergency rule expires due to the conclusion of fifteen months or due to the

effect of subdivision (2), (3), (4) or (5), subsection (a) of this section, the agency may not refile the same or similar rule as an emergency rule.

(d) The provision of this section shall not be used to avoid or evade any provision of this article or any other provisions of this code, including any provisions for legislative review and approval of proposed rules. Any emergency rule promulgated for any such purpose may be contested in a judicial proceeding before a court of competent jurisdiction.

(e) The legislative rule-making review committee may review any emergency rule to determine (1) whether the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; (2) whether there exists an emergency justifying the promulgation of such emergency rule; and (3) whether the emergency rule was promulgated in compliance with the requirements and prohibitions contained in this section. The committee may recommend to the agency, the Legislature, or the secretary of state such action as it may deem proper.

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

§29A-3-15a. Disapproval of emergency rules and amendments to emergency rules by the secretary of state; judicial review.

(a) Upon the filing of an emergency rule or filing of an amendment to an emergency rule by an agency, under the provisions of section fifteen of this article, by any agency, except for the secretary of state, the secretary of state shall review such rule or such amendment and, within forty-two days of such filing, shall issue a decision as to whether or not such emergency rule or such amendment to an emergency rule should be disapproved. An emergency rule filed by the secretary of state shall be reviewed by the attorney general as provided for in section fifteen-b of this article.

(b) The secretary of state shall disapprove an emergency rule or an amendment to an emergency rule if he determines:

- (1) That the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; or
- (2) That an emergency does not exist justifying the promulgation of the emergency rule or the filing of an amendment to the emergency rule; or
- (3) That the emergency rule or an amendment to the emergency rule was not promulgated in compliance with the provisions of section fifteen of this article.

(c) If the secretary of state determines, based upon the contents of the rule or the supporting information filed by the agency, that the emergency rule should be disapproved, he may disapprove such rule without further investigation, notice or hearing. If, however, the secretary of state concludes that the information submitted by the agency is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, he may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

(d) If the secretary of state determines, based upon the contents of the amendment to an emergency rule or the supporting information filed by the agency, that the amendment to the emergency rule should be disapproved, he may disapprove such amendment without further investigation, notice or hearing. If, however, the secretary of state concludes that the information submitted by the agency is insufficient to allow a proper determination to be made as to whether the amendment should be disapproved, he may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time and place for the taking

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

(e) The determination of the secretary of state shall be reviewable by the supreme court of appeals under its original jurisdiction, based upon a petition for a writ of mandamus, prohibition or certiorari, as appropriate. Such proceeding may be instituted by:

- (1) The agency which promulgated the emergency rule;
- (2) A member of the Legislature; or
- (3) Any person whose personal property interests will be significantly affected by the approval or disapproval of the emergency rule by the secretary of state.

§29A-3-15b. Disapproval of emergency rules and amendments to emergency rules by the attorney general; judicial review.

(a) Upon the filing of an emergency rule or filing of an amendment to an emergency rule by the secretary of state under the provisions of section fifteen of this article, the attorney general shall review such rule or such amendment and, within forty-two days of such filing, shall issue a decision as to whether or not such emergency rule or such amendment to an emergency rule should be disapproved.

(b) The attorney general shall disapprove an emergency rule or an amendment to an emergency rule if he determines:

- (1) That the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; or
- (2) That an emergency does not exist justifying the promulgation of the emergency rule or the filing of an amendment to the emergency rule; or
- (3) That the emergency rule or an amendment to the emergency rule was not promulgated in compliance with the provisions of section fifteen of this article.

(c) If the attorney general determines, based upon the contents of the rule or the supporting information filed by the secretary of state, that the emergency rule should be disapproved, he may disapprove such rule without further investigation, notice or hearing. If, however, the attorney general concludes that the information submitted by the secretary of state is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, he may make further investigation, including, but not limited to, requiring the secretary of state or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

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

(e) The determination of the attorney general shall be reviewable by the supreme court of appeals under its original jurisdiction, based upon a petition for a writ of mandamus, prohibition or certiorari, as appropriate. Such proceeding may be instituted by:

- (1) The secretary of state;
- (2) A member of the Legislature; or
- (3) Any person whose personal property interests will be significantly affected by the approval or disapproval of the emergency rule by the attorney general.

(Similar sections 29A-3A & 29A-3B for Higher Education Rulemaking and State Bd. of Education Rulemaking.)

See also <http://www.wvsos.com/adlaw/rulemaking/stepproceduresemergency.htm> for summary of process. Example of ER at <http://www.wvsos.com/adlaw/emergency/47-02er.pdf>.

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- (b) Except when notice or hearing is required by statute, this subsection does not apply—
- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
 - (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
- (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—
- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
 - (2) interpretative rules and statements of policy; or
 - (3) as otherwise provided by the agency for good cause found and published with the rule.

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§ 3-108. [General Exemption from Public Rule-making Procedures].

- (a) To the extent an agency for good cause finds that any requirements of Sections 3-103 through 3-107 are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, those requirements do not apply. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subsection.
- (b) In an action contesting a rule adopted under subsection (a), the burden is upon the agency to demonstrate that any omitted requirements of Sections 3-103 through 3-107 were impracticable, unnecessary, or contrary to the public interest in the particular circumstances involved.
- (c) Within [2] years after the effective date of a rule adopted under subsection (a), the [administrative rules review committee or the governor] may request the agency to hold a rule-making proceeding thereon according to the requirements of Sections 3-103 through 3-107. The request must be in writing and filed in the office of the [secretary of state]. The [secretary of state] shall immediately forward to the agency and to the [administrative rules editor] a certified copy of the request. Notice of the filing of the request must be published in the next issue of the [administrative bulletin]. The rule in question ceases to be effective [180] days after the request is filed. However, an agency, after the filing of the request, may subsequently adopt an identical rule in a rule-making proceeding conducted pursuant to the requirements of Sections 3-103 through 3-107.