

# STATE OF IDAHO



## OFFICE OF THE ADMINISTRATIVE RULES COORDINATOR

### The Idaho Rule Writer's Manual

A Guide for Drafting and Promulgating  
Administrative Rules in the State of Idaho

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# ADMINISTRATIVE LAW OVERVIEW

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From a practical standpoint administrative rules have a far greater effect on people's daily lives than do the laws of the state. It is through the administrative rules that a governmental agency implements, prescribes, or interprets the statutes passed by the legislature. The promulgation and implementation of administrative rules to carry out or enforce the statutory or policy mandates imposed through law or establishing its process or procedure requirements are the primary functions of most state agencies. It is through the enforcement and application of the rules that a person's ability to engage in a specific activity or occupation or to qualify for public assistance, for example, is allowed or prevented. Protecting the public health, safety and welfare is also a primary function of government and many of these legal protections are prescribed through administrative rules. So, in most cases, whether it is a law or rule that is being imposed, it matters very little because the effect is the same.

Because administrative rules are very pervasive in our lives, agency rulemaking is a very serious undertaking. For this reason, Idaho's rulemaking process requires that proper and timely notice be given to the public and that ample opportunity be provided to the public to participate in rulemaking. This has helped make the process of implementing Idaho's statutory laws more transparent and has clarified how the practice and procedure requirements of our governmental agencies are established and put into practice.

The Idaho Administrative Procedure Act (Title 67, Chapter 52, Idaho Code), which governs rulemaking in Idaho, defines rulemaking as the process for the formulation, adoption, amendment, or repeal of a rule. This process can be driven by a number of different events but two of the most common are the enactment of a new or amended statute by our state Legislature or the enactment of a new law or regulation by the federal government. However, a citizen's petition to amend or adopt a new rule, a change in an agency's process or procedure requirements, a court order, or the need to simply update the rule or do some housekeeping can cause an agency to initiate rulemaking and set the process in motion.

A statutory or regulatory change may require an agency to adopt new administrative rules or revise existing rules to carry out statutory or regulatory provisions or other legal mandates. Through rules the agency interprets, prescribes, and implements statutory law or policy, and clarifies, standardizes, or establishes its procedure or practice requirements. This rulemaking authority is derived from statutory law and is, essentially, an agency's ability to make "*law*" under powers granted by the Legislature through statute. All rules promulgated within the authority conferred by statute, and in accordance with the Administrative Procedure Act (APA), have the full ***force and effect of law*** and must be regarded as such. However, an administrative rule does not rise to the level of statutory law and statute always takes precedent over rule if there is ever a conflict between the two.

Idaho's statutory definition of a "rule" has a slightly different meaning than that of the federal government and several other states. In Section 67-5201(19) of the Idaho Administrative Procedure Act, the concept is broadly defined:

- (19) "*Rule*" means the whole or part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, or prescribes:
- (a) *law or policy, or*
  - (b) *the procedure or practice requirements of an agency. The term includes the amendment, repeal or suspension of an existing rule, but does not*

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*include:*

- (i) statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or*
- (ii) declaratory rulings issued pursuant to Section 67-5232, Idaho Code; or*
- (iii) intra-agency memoranda; or*
- (iv) any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule.*

It is necessary to have a clear understanding of this statutory definition when determining what can and cannot be promulgated as a rule. The statutory definition is broad enough that making this determination can be difficult. In order to meet and not exceed the legislative intent of the authorizing statute, and to withstand legislative scrutiny or judicial review, the rule must fall within this definition. A rule that is not promulgated in compliance with the procedural requirements of the APA is voidable. Likewise any rule that is found to have exceeded or fails to meet the intent of the authorizing statute, or one that goes outside its substantive rulemaking authority, may be voided. Differing interpretations of a statute or the ambiguity of a law's legislative intent add to the difficulty of writing a rule that will survive the journey from inception to final adoption.

The courts have also weighed in on rulemaking and in some cases have required agencies to promulgate rules to enforce what previously may have been an agency policy or guideline. While these court decisions are generally limited in scope and affect only specific laws and rules, the courts have expanded the definition of rule in these cases to include more ambiguous regulatory practices that cannot be applied "generally" and appear to be at odds with the statutory definition. The concept of "general applicability" doesn't always work well with certain environmental or wildlife management laws, for instance, because a rule that may be needed in one area or body of water in the state cannot be applied generally or uniformly throughout the state. The courts have been careful not to redefine the statutory definition and in these cases have provided a guideline for determining that when something walks and talks like a rule, it should be a rule even though it may fall short of the stricter statutory definition.

The rule promulgation\* process in Idaho is made up of very specific legal requirements that an agency must follow, and the actions taken by the agency when conducting rulemaking must follow a specific order. Not all rulemakings are the same and they can vary slightly in each case; however, the order in which those actions are taken cannot. It is incumbent on the rule writer to be aware of what is required when entering into rulemaking and know which legal requirements apply to each specific rulemaking. In order for a rule to become final and effective and have the full force and effect of law, the process must closely adhere to the requirements outlined in the Idaho Administrative Procedure Act.

*\*Promulgation means to publicize or make public. As used in the context of Idaho rulemaking, promulgation means to make known to the public through the publication of the Administrative Bulletin and the Administrative Code all rulemaking documents that are required by law to be published and made public.*

# THE ADMINISTRATIVE PROCEDURE ACT

## Title 67, Chapter 52, Idaho Code Sections 67-5201 through 67-5292

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The Administrative Procedure Act (APA) is organized into five subject matter areas: definitions, rulemaking, contested case proceedings, judicial review, and legislative rules review.

**a. Definitions - Introductory Provisions:**

**I.C. Sections 67-5201 through 67-5207**

These sections of Idaho Code create the Office of the Administrative Rules Coordinator and delimit the authority of the Rules Coordinator. They also establish the two official administrative rules publications: the Idaho Administrative Bulletin and the Idaho Administrative Code. These provisions set fees for the promulgation, publication, and dissemination of state agency administrative rules and establish the Administrative Code fund into which all fees are paid. These sections also require rule promulgation by the Attorney General (IDAPA 04.11.01) to implement the provisions of Sections 67-5220 through 67-5232 and 67-5240 through 67-5255.

**b. Rulemaking:**

**I.C. Sections 67-5220 through 67-5232**

These sections provide the framework for agency rule promulgation and related responsibilities, public participation in rulemaking, incorporation by reference, interim legislative review of proposed rules, petition for adoption of rules, and declaratory rulings by agencies.

**c. Proceedings for Contested Cases:**

**I.C. Sections 67-5240 through 67-5255**

Establishes procedures for contest case proceedings and agency administrative hearings. Four distinct orders may result from a contested case hearing: recommended, preliminary, final, and emergency.

**d. Judicial Review:**

**I.C. Sections 67-5270 through 67-5279**

Rules, contested cases, and the agency's performance of, or failure to perform, any duty placed on it by law are subject to judicial review. The standard that the court applies depends on the nature of the proceeding.

**e. Legislative Review of Rules:**

**I. C. Section 67-5291**

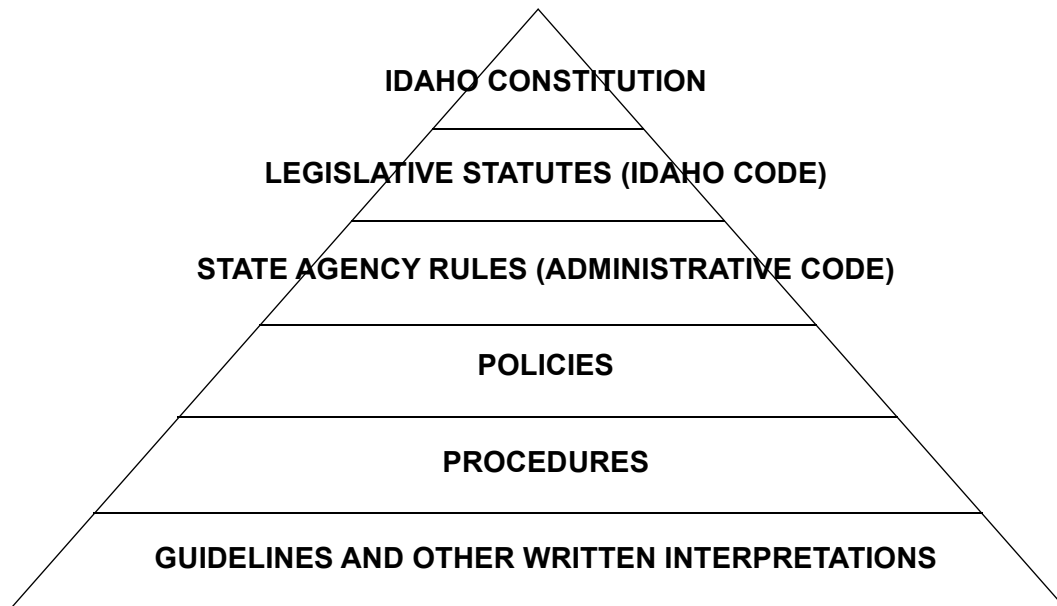
Provides for formal legislative review for final approval of agency rules by the standing germane committees of the legislature and outlines actions that can be taken on certain rules and actions that must be taken on certain rules.

**f. Expiration of Administrative Rules:**

**I.C. Section 67-5292**

Provides that all rules automatically expire on July 1 of each year unless extended by statute each year.

# HIERARCHY OF STATE DOCUMENTS



As with most organizations, a hierarchy is established to define the levels of precedent for state government documents. To illustrate these various levels, the analogy of a pyramid is useful. Each increasing level becomes smaller in size, yet greater in scope. The state Constitution creates the branches of government and establishes the legislature law-making authority. The laws create the agency and defines and restricts the agency's authority, which in turn restricts the scope of its rulemaking powers.

**Idaho Constitution:** Supreme law of the land; very difficult to change; framework of the government.

**Legislative Statutes (Idaho Code):** Legislative branch of government creates the uniform laws from which society must operate. Law usually contains: 1) a program the Legislature wants accomplished; 2) the executive branch agency it designates to carry out the program; and 3) guidelines for implementation.

**Agency Rules (Administrative Code):** The executive branch of government is broken into various subdivisions known as departments, agencies, divisions, offices, bureaus, boards and commissions. Rulemaking is the law-making power of these subdivisions and is governed by the Administrative Procedures Act. Rules carry the force and effect of law and interpret, prescribe or implement a law or policy or the procedure and practice requirements of an agency. Agencies are charged with implementing and enforcing laws the Legislature passes. Rules made under the statutory authority are general in scope and they are made to apply to all persons in a class, not to particular parties or single individuals, and must be applied equally. Because the statute normally does not contain all details, the designated agency must interpret the Legislature's intent and develop a method to implement the program. Agencies do not originate state policy, but rather, they implement state policy through their administrative rules.

**Policy:** Mission statement. A general statement with no specifics. It is a high-level, overall plan embracing the general goals, acceptable methods, actions, and conduct of an agency. Usually an internal management tool used in the day-to-day operation of the agency. Does not have the force and effect of law

**Procedure:** Step-by-step implementation of policy. Does not have the force and effect of law.

**Guidelines:** Description of procedures. Does not have the force and effect of law.

# NEGOTIATED RULEMAKING

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## What Is Negotiated Rulemaking?

In those instances when an agency has some control over the formulation of the substantive content of a rule and it has determined that it is a feasible undertaking, negotiated rulemaking must be conducted by the agency with interested persons. This requirement of the APA is intended to improve the substance of the rule through a consensus building process. The agency must engage or attempt to engage any person who may be affected by the rulemaking and those may want to provide input and participate in the formulation of the proposed rule.

Negotiated rulemaking provides an opportunity for all interested and affected persons and the agency to discuss possible changes to the rule and attempt to reach a consensus on the proposed amendments that would, ultimately, result in a proposed rule that would then be promulgated by the agency following regular (formal) rulemaking procedures.

Negotiated rulemaking is an informal part of the rulemaking process that precedes all formal rulemaking proceedings. (The publication of a proposed rule is considered the “formal” initiation of a rulemaking.) Negotiated rulemaking is considered an informal part of the process because the agency has some leeway in how it conducts the negotiated meetings. This flexibility is intended to facilitate participation by the greatest number of persons who might be affected by the possible rule changes. Constituencies vary greatly between agencies and a process that works well for one agency may not work at all for another.

Another reason for this less structured format is that the result of the “negotiations” may be that the agency does not initiate formal rulemaking procedures and the rulemaking effectively stops before it ever starts. There are no time constraints on the agency to finish negotiations, nor is there a limit on the number of meetings that can be held by the agency when conducting negotiated rulemaking. The agency proceeds as necessary and until such time that it feels it has met its statutory requirements to provide adequate and ample opportunity for participation by affected persons or when it has formulated a proposed rule that is acceptable to most participants.

## Is It Feasible?

As stated in Section 67-5220, Idaho Code, prior to initiating formal rulemaking procedures, an agency must determine if conducting negotiated rulemaking is a feasible undertaking. If the agency determines it is not feasible, it may proceed to formal rulemaking and explain in the notice of proposed rulemaking why it was not feasible to conduct negotiated rulemaking. When determining the feasibility of negotiated rulemaking, certain issues must be considered. These may include the following:

- Is there a need for temporary rulemaking?*
- What is the nature of the change(s) being proposed? Is it a simple change?*
- Are those who will be affected by the rule changes easily identifiable?*
- Are those affected likely to reach a consensus on the proposed changes?*
- Is the rulemaking being done to comply with a state or federal statute or court order?*

Answers to these and similar questions should help the agency decide if conducting negotiated



rulemaking is necessary or if it should proceed directly to proposed rulemaking.

Additionally, a rulemaking that is being done to comply with an existing state or federal law or regulation or a controlling judicial decision or court order cannot be negotiated. The agency's ability to negotiate the content of the rule is negated by these overriding mandates.

***The agency's determination of whether negotiated rulemaking is feasible is not subject to judicial review.*** However, it is subject to legislative scrutiny during the legislative rules review process. The Legislature views the use of negotiated rulemaking as an important step in the formulation of proposed rules and the agency should be prepared to explain in detail to the reviewing legislative committee why negotiated rulemaking was not conducted.

### **The "Notice of Intent to Promulgate a Rule" (Negotiated Rulemaking)**

An agency must publish a "Notice of Intent to Promulgate a Rule" in the Bulletin whenever it determines that the changes to the rule being sought meet the feasibility standard for negotiated rulemaking. This notice is an invitation from the agency to the public and interested persons to discuss the proposed changes to the rule. At a minimum the notice must provide the following:

- a) a brief description of the subject matter and purpose of the rule;*
- b) the statutory authority for the rulemaking, both state and federal;*
- c) the principal issues involved;*
- d) a reasonable amount of time to respond to the agency's invitation to participate;*
- e) an agency contact to whom comments and questions may be sent; and*
- f) the agency web address where all related rulemaking postings can be accessed.*

The agency has two options when publishing a Notice of Intent to Promulgate in the Bulletin. One option is more preemptive than the other in that the agency schedules negotiated meetings and lists the dates, times and locations for those meetings. This is similar to the scheduling of public hearings that is seen in the Notice of Proposed Rulemaking. Interested persons simply follow the guidance provided in the notice if they wish to participate.

In the second option, there are no scheduled meetings. The notice instructs those who may be interested to contact the agency if they want to take part in the negotiated process. In other words, the notice is an open invitation to the public requesting interested persons to contact the agency as instructed in the notice. Any preliminary drafts or other materials related to the rulemaking must be made available to the public by posting this information on the agency website.

The agency may also schedule meetings and invite persons to attend these scheduled meetings rather than inviting anyone who may be interested to respond. However, if meetings are not scheduled and noticed, the agency must provide notice of meetings to interested persons who respond to the "Notice of Intent to Promulgate a Rule." A notice of the meeting(s) schedule **MUST** be posted on the agency website and **may** also be published in the Bulletin.

In those instances where little or no response to the Notice of Intent to Promulgate is received within the time provided, the agency may proceed directly to formal rulemaking. At this point negotiated rulemaking is no longer feasible because of a lack of interest by stakeholders or others. A brief summary document must be posted on the agency website detailing that no meetings were held due to a lack of response to the notice and that the agency has initiated formal rulemaking procedures.

**Posting of preliminary draft by the agency is optional.** In order to give stakeholders and other interested persons a starting point for discussing possible rule changes, the agency may prepare a draft of potential amendments to the rule. This draft must be made available to anyone interested and it must be posted to the agency website for viewing or downloading. The rule writer should avoid calling these draft documents “proposed rules” because it can lead to confusion since the reason for conducting negotiated meetings is to develop a proposed rule that would then be published in the Bulletin as part of the formal rulemaking.

### **Meeting Format**

The agency is free to invite separate groups at separate times, hold several meetings to include all interested parties, invite written comments, etc. This part of the rulemaking process is intentionally **flexible** and **informal**. Meetings should be designed to “negotiate” the proposed changes or ideas with those who will be affected. There is no legal time limit on this process. The intention is that these meetings result in the formulation of a proposed rule and regular rulemaking proceedings are initiated. However, in some cases, the result of the “negotiations” may be that formal, regular rulemaking is not initiated, rulemaking activities cease, and no additional action is taken.

As in all rulemaking activities, an official rulemaking record must be prepared by the agency when initiating negotiated rulemaking. The rulemaking record must include all information required by the APA in Sections 67-5220 and 67-5225, Idaho Code.

### **What Are the Advantages to Negotiated Rulemaking?**

*\*Negotiating the substantive content of the rule text before it is published in the Administrative Bulletin can save time and money because, in many instances, the discrepancies in the amendments or potential problems can be resolved before committing additional resources to the rulemaking.*

*\*It can improve the substance of proposed rules by drawing upon shared information, expertise, and technical abilities possessed by the affected persons.*

*\*It aids in arriving at a consensus on the content of the rule.*

*\*Expedites formal rulemaking.*

*\*Lessens the likelihood that affected persons will resist enforcement or challenge the rules in court.*

*\*Public and industry constituents are generally more satisfied with the outcome if included in the process in the beginning rather than at the end, or not at all.*

*\*Negotiated rulemaking is an informal process. Public hearings on rulemakings are held only to receive testimony and comments. Negotiated rulemaking meetings allow for interactive discussions on the subject matter between the parties in an attempt to reach consensus on the content of the proposed rule.*

# PROPOSED RULEMAKING

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## What is a Proposed Rule?

A formal, written proposal by the agency to adopt a new rule or amend or repeal an existing rule in accordance with the APA is called a proposed rule. With very few exceptions, all codified rules that comprise the Administrative Code were promulgated as proposed rules and were published in the Administrative Bulletin before they became final and enforceable. Proposed rulemaking is a legal process with strict procedural requirements that must be followed before a rule has the force and effect of law. The following excerpt from the APA outlines what must take place once an agency initiates regular rulemaking proceedings and files a notice of proposed rulemaking for publication in the Administrative Bulletin.

As stated in Section 67-5221(1), Idaho Code, prior to the adoption, amendment, or repeal of a rule the agency must publish a 'Notice of Rulemaking - Proposed Rule' in the Bulletin. The notice must include the following information:

- (a) *The specific statutory authority for the rulemaking including a citation to the specific section of the Idaho Code that has occasioned the rulemaking, or the federal statute or regulation if that is the basis of authority or requirement for the rulemaking;*
- (b) *A statement in nontechnical language of the substance of the proposed rule, including a specific description of any fee or charge imposed or increased;*
- (c) *A specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year when the pending rule will become effective; provided, however, that notwithstanding section 67-5231, Idaho Code, the absence or accuracy of a fiscal impact statement provided pursuant to this subsection shall not affect the validity or the enforceability of the rule;*
- (d) *The text of the proposed rule prepared in legislative format;*
- (e) *The location, date, and time of any public hearings the agency intends to hold on the proposed rule;*
- (f) *The manner in which persons may make written comments on the proposed rule, including the name and address of a person in the agency to whom comments on the proposal may be sent;*
- (g) *The manner in which persons may request an opportunity for an oral presentation as provided in Section 67-5222, Idaho Code; and*
- (h) *The deadline for public (written) comments on the proposed rule.*
- (i) *If negotiated rulemaking was not conducted, an explanation of the agency's determination that negotiated rulemaking was not feasible.*

Each agency that has a website must make the 'Notice of Rulemaking - Proposed Rule' accessible from its website either by posting a copy of the notice on the agency website or by providing a link to the Bulletin where the notice was published so that interested persons can view it online. Linking to the Bulletin is the preferred method for accessing the notice.

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## **The Administrative Rules Request Form (ARRF) - Division of Financial Management**

Prior to initiating any rulemaking proceedings, including negotiated rulemaking, adopting a temporary rule or filing a proposed rulemaking for promulgation, the agency must complete the Administrative Rules Request Form (ARRF) from the Division of Financial Management (DFM) in the Governor's office. The Rules Coordinator will not publish a rulemaking without the approval of the Governor's office and DFM.

The ARRF provides DFM and the Governor's office with a brief synopsis of the need for the rulemaking, as well as an estimate of any costs related to the implementation of any rule changes. Once approved, DFM sends a copy of the approved ARRF to the Rules Coordinator. The agency must include the tracking number from the approved ARRF as part of the initial rulemaking filing with the Rules Coordinator prior to the publication of any notice of rulemaking in the Bulletin. All ARRF's are reviewed by the DFM financial analysts and the governor's policy analysts. Once the review is completed, the agency is notified that the request has been approved or denied. If denied, the agency cannot proceed with the rulemaking. If the analysts have questions during the review, the agency will be notified by DFM.

The ARRF is an online form that requires a password to access and download from the DFM website. This is the official request form and the only one that will be accepted by DFM. The agency may be asked to provide the draft text of the proposed rule to the analysts in some instances. If the agency has not yet drafted proposed text when filling out the request form, simply follow any instruction from DFM for later submission. [https://dfm.idaho.gov/state\\_agencies/forms/forms.html](https://dfm.idaho.gov/state_agencies/forms/forms.html)

## **Filing a Proposed Rulemaking with the Rules Coordinator for Publication in the Bulletin**

All proposed rulemaking filings (notice, text, approved ARRF tracking number, and any applicable analyses such as cost/benefit analysis, economic impact statement, incorporation by reference synopsis) must be filed electronically with the Rules Coordinator for publication in the Bulletin. ***The Rules Coordinator is responsible for filing the notices and text of all proposed rulemakings, as well as all required analyses or synopses, with the Legislative Services Office.*** The Coordinator's office no longer requires hard copy submissions of rulemaking filings from the agencies. Electronic records only are kept of all filings.

## **Fee Rules - Cost/Benefit Analysis**

The agency must include a cost/benefit analysis when filing a proposed rulemaking that would impose or change a fee or charge in the rule. This cost/benefit analysis must estimate, as reasonably as possible, the costs to the agency to implement the rule and the estimated costs to citizens or businesses in the private sector as a result of its implementation. ***This analysis is filed by the Rules Coordinator with the Director of LSO*** who then forwards it to the appropriate germane joint subcommittee that reviews the proposed rules.

## **Negotiated Rulemaking**

If the agency determines that negotiated rulemaking is not feasible, the notice of proposed rulemaking must include a statement explaining why that's the case. If negotiated rulemaking has been done as part of the rulemaking, the notice need only reference that it was conducted. For Bulletin publication purposes, a link to the Notice of Intent to Promulgate a Rule (negotiated rulemaking) is provided in the Notice of Proposed Rulemaking. This allows the reader to access the Notice of Intent and other information related to the negotiated rulemaking proceedings. (Section 67-5220(1), IC)

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### **Incorporation by Reference**

Section 67-5229(2), Idaho Code, states that if additional documents or materials are incorporated by reference into the rule, the notice of proposed rulemaking must include a brief summary detailing why it is necessary to incorporate them. This brief summary is included in the notice of proposed rulemaking and is not a separate document.

When adopting amendments to previously incorporated materials, a separate **written synopsis** of the substantive differences between the two versions must be included as part of the filing of the proposed rule. (See Section 67-5223(4), Idaho Code.) This synopsis is provided to the germane joint subcommittee that reviews the proposed rule and is made available to all the germane committee members as part of the formal review during the legislative session.

### **Can a Proposed Rule Be Enforced? When Is It of Full Force and Effect?**

A proposed rule is not an enforceable rule. It cannot be implemented or made effective. Because it has no force or effect, a proposed rule that is published in the Bulletin has no effective date. If the proposed rule is being promulgated in conjunction with a temporary rule, the agency assigns an effective date to the temporary rule only. A final effective date is added only after the rulemaking is completed, the rule has been adopted as a pending rule, and it has been approved as a final rule by the Legislature. Most pending rules become effective at the end of the legislative session.

### **Vacating a Proposed Rulemaking**

If an agency decides to stop formal rulemaking procedures after a proposed rule has been published in the Bulletin, and before the rule has been adopted as a pending rule, it may do so. To stop the rulemaking at this point in the process, the agency must “vacate” the proposed rulemaking. A “Notice of Vacation of Proposed Rulemaking” must be filed and published in the Bulletin to properly notice the public that formal rulemaking procedures have stopped. This formally ends the rulemaking and the process stops. The vacation of a proposed rule is a final agency rulemaking action. Once a proposed rulemaking is vacated, it is void and it cannot be resurrected. A new rulemaking must be initiated if the agency decides to go forward with the promulgation of another proposed rule.

### **Moratorium on Proposed Rulemaking**

A moratorium on proposed rulemaking is in place during the legislative session. It begins at the end of November and is in effect until the adjournment of the legislative session (*sine die*). Agencies filings of proposed rulemakings are not accepted by the Coordinator’s office during this time.

Please note that *the moratorium affects only proposed rulemakings* and does not affect negotiated, temporary, or pending rulemakings, all of which may be filed for publication during the moratorium and the legislative session.

### **Newspaper Legal Notice**

Coinciding with the publication of proposed rules in the Bulletin, the Rules Coordinator is required to publish a newspaper legal notice advertising the **promulgation of proposed rules** in the Bulletin.

The legal notice notifies the public of an agency’s intent to propose a new rule or to amend or repeal an existing rule. The legal notice identifies the promulgating agency, the title of the rule being proposed, the rulemaking docket number, and a brief description of the subject matter. The deadline date for the public to submit written comments is also listed along with any scheduled public hearings.

# TEMPORARY RULE

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## What is a Temporary Rule?

A temporary rule is a rule that can be made immediately effective and enforceable upon its adoption by the agency or adopting authority prior to being reviewed or approved by the legislature. If not made immediately effective upon adoption, a temporary rule becomes effective and enforceable on the date specified in the ‘Notice of Rulemaking - Adoption of Temporary Rule’ that is published in the Administrative Bulletin. However, a temporary rule can **only** be adopted and made enforceable if it meets certain criteria, as stipulated in the APA, and is approved for adoption by the Governor’s Office. It is generally used to cover contingencies that require immediate action on the part of the agency and remains in effect for a specific period of time. The following is taken from the APA and outlines the criteria for adopting a temporary rule.

### **Pursuant to Section 67-5226(1), Idaho Code, a temporary rule can be adopted only:**

- (1) *If the governor finds that:*
- (a) *protection of the public health, safety, or welfare; or*
  - (b) *compliance with deadlines in amendments to governing law or federal programs; or*
  - (c) *conferring a benefit;*
- requires a rule to become effective before it has been submitted to the legislature for review, the agency may proceed with such notice as is practicable and adopt a temporary rule. . .*

A temporary rule can be adopted **ONLY** when justified by one or more of these three criteria. The Governor’s office determines whether or not the temporary rule is justified based on the information supplied on DFM’s Administrative Rules Request Form (ARRF). The ARRF must be submitted for approval before the temporary rule is submitted for publication in the Bulletin. The notice of adoption of temporary rule must incorporate the required findings and supporting reasons for adopting the temporary rule.

A temporary rule is not subject to Section 67-5222, Idaho Code, and does not provide for public participation in the rulemaking. Unlike a proposed rule, the agency **is not required** to accept requests for public hearings or written comments regarding the temporary rule, nor is a temporary rule subject to legislative review prior to its adoption and enforcement by the agency.

### **Publication of a Temporary Rule in the Bulletin**

Pursuant to Section 67-5226(4), Idaho Code, a temporary rule must be published in the “. . . **first available issue of the Bulletin after its adoption by the agency.**” Failure to submit a temporary rule for publication in the first available Bulletin is a procedural violation of the APA. Violation of this provision of statute may result in the rule being invalidated and, once declared invalid, the rule is null, void and of no force and effect. A procedural misstep of this type may result in legal action against the agency and could have serious repercussions for both the agency and the regulated parties.

### **A Temporary Rule Imposing a Fee or Charge**

A temporary rule that imposes a fee or charge may be adopted by the agency **only if the governor finds that the fee or charge is necessary to avoid “immediate danger”** that justifies the imposition of the fee or charge. Failure to obtain approval from the Governor for temporary fee rules makes the rule voidable. If voided, the temporary rule is declared null and void and of no force and effect.

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### **How Long is a Temporary Rule Effective?**

Temporary rules that are *adopted* (not *published* but *adopted*) **BEFORE** the beginning of a legislative session are subject to legislative review; those adopted during the session are not. All temporary rules must be reviewed by the germane committees of the legislature and affirmatively approved by concurrent resolution of the legislature in order to remain in effect beyond the end of that session. Temporary rules that are adopted **DURING** a legislative session remain in effect until the next succeeding regular session of the legislature or until they expire under their own terms or other provision of law (Idaho Code, 67-5226(6)). Failure to submit the temporary rule for review and extension, or rejection of the temporary rule by the legislature, renders the rule null, void and of no force and effect. The legislature retains the right to review any and all rules that are part of the Administrative Code regardless of when the rule was promulgated.

### **Pursuant to Sections 67-5226(3) and (6), Idaho Code:**

- (3) *In no case shall a rule adopted pursuant to this section remain in effect beyond the conclusion of the next succeeding regular session of the legislature **unless** the rule is approved by concurrent resolution, in which case the rule may remain in effect until the time specified in the resolution or until the rule has been replaced by a final rule which has become effective...*
  
- (6) *Concurrently with the promulgation of a rule under this section, **or as soon as reasonably possible thereafter**, an agency shall commence the promulgation of a proposed rule in accordance with the rulemaking requirements of this chapter unless the temporary adopted by the agency will expire by its own terms or by operation of law before the proposed rule could become final.*

### **Temporary and Proposed Rulemaking - Concurrent Rulemaking and Bulletin Publication**

The APA allows for the concurrent promulgation of a temporary rule and proposed rule when the text of the two rulemakings is the same. Because the APA requires the text of both a temporary rule and a proposed rule to be published in the Bulletin, concurrent promulgation and publication of the temporary and proposed rules expedites the process since the text of each is published only once. These two rulemaking actions are considered separate, legal rulemaking actions even though they are published concurrently using a single rulemaking notice. If published individually, once a temporary rule is adopted and published in the Bulletin, the agency must begin the promulgation of a proposed rule “. . .as soon as reasonably possible thereafter.” This prevents an agency from indefinitely operating under “temporary” rules only.

### **Rescission of a Temporary Rule**

The agency’s statutory authority for rulemaking allows the agency to rescind a temporary rule that it has adopted, published in the Bulletin, and is enforcing. When the temporary rule is no longer needed, has been replaced by another temporary rule, or has been promulgated concurrently with a proposed rule that is being vacated, the agency may rescind a temporary rule.

A temporary rule that is promulgated concurrently with a proposed rule may also be rescinded without affecting the proposed rule, if that is the desired intent. It is not necessary to rescind a temporary rule that expires under terms specified in the rule or other provision of law. A temporary rule that is rescinded or expires is replaced by previously codified rule, if there is one.

In order for an agency to rescind a temporary rule, a notice of this rulemaking action (Notice of Rulemaking - Rescission of Temporary Rule) must be published in the Bulletin.

# PENDING RULE

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## What Is a Pending Rule?

Section 67-5201(14), Idaho Code, defines a pending rule as a rule that has been adopted by an agency under regular rulemaking procedures and remains subject to legislative review prior to becoming final and effective. It is, therefore, “pending” legislative review for final approval. The agency adopts the pending rule and after publication in the Bulletin, this is version of the rule that is submitted for legislature review for final approval.

## When Does a Pending Rule Become a Final Rule?

Pursuant to Section 67-5224(5) a pending rule will become “**final and effective**”...

- (a) *...upon the conclusion of the legislative session at which the rule was submitted to the legislature for review, or as provided in the rule, but no pending rule adopted by an agency shall become final and effective before the conclusion of the regular or special legislative session at which the rule was submitted for review. A rule which is final and effective may be applied retroactively, as provided in the rule.*
- (b) *When the legislature approves a pending rule pursuant to section 67-5291, Idaho Code, the rule shall become final and effective upon adoption of the concurrent resolution or such other date specified in the concurrent resolution.*
- (c) *Except as set forth in sections 67-5226 and 67-5228, Idaho Code, no pending rule or portion thereof imposing a fee or charge of any kind shall become final and effective until it has been approved by concurrent resolution.*

In those cases where the agency has specified a final effective date in the pending rule that precedes the adjournment date of the legislative session, the rule cannot be enforced until after the conclusion of the session in which the rule was approved as final. Upon adjournment of the session, the rule is then applied retroactively as a final rule, not as a pending rule. This means that a pending rule is never an enforceable rule and cannot be codified as such.

## Publication of a Notice of Rulemaking - Adoption of Pending Rule

The following information is required to be published in ‘Notice of Rulemaking - Adoption of Pending Rule’ in the Bulletin after an agency adopts a pending rule:

- (a) *a statement giving the reasons for adopting the rule;*
- (b) *a statement of any change between the text of the proposed rule and the pending rule with an explanation of the reasons for any changes;*
- (c) *the date the pending rule will become final and effective (See Section 67-5224(5), I.C.);*
- (d) *an identification of any portion of the rule imposing or increasing a fee or charge;*
- (e) *the specific statutory authority for the rulemaking including a citation to the specific section of the Idaho Code that has occasioned the rulemaking, or the federal statute or regulation if that is the basis of authority or requirement for the rulemaking;*



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- (f) *a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year when the pending rule will become effective; provided however, that notwithstanding section 67-5231, Idaho Code, the absence or accuracy of a fiscal impact statement provided pursuant to this subsection shall not affect the validity or the enforceability of the rule.*

Agencies are required to republish the affected text of the pending rule when substantive changes have been made to the proposed rule; however, it is not always necessary to republish all the text of the pending rule. It is at the discretion of the Rules Coordinator to determine how much of the pending rule must be republished. For those pending rules that are being adopted as they were initially proposed, only the “Notice of Rulemaking - Adoption of Pending Rule” must be published. It is not necessary to republish the text of the pending rule when no changes have been made.

Prior to amending or adopting the pending rule, all written and oral comments received during the proposed rule comment period must be fully considered by the agency. Additional substantive changes may be made to the pending rule prior to its adoption. The subject matter must remain the same, changes must be a “logical outgrowth” of the original proposed changes, and the notice of proposed rulemaking written in such a way as to reasonably notify members of the public that their interests may be affected by this agency action.

#### **When Fees or Charges Are Imposed**

The notice of adoption of pending rule must describe any fee or charge being imposed or increased by the adoption of a pending rule. The APA also requires that each agency provide the Rules Coordinator’s Office with a separate, written description of any pending rule or portion of it that imposes a new fee or charge or increases an existing fee or charge. This description must include a citation of the specific statute that authorizes the agency to impose or change the fee or charge. These are then provided to the legislative committees upon their request. (See Section 67-5224(6), IC)

#### **Correcting a Pending Rule Prior to Legislative Review**

If an error is found in a pending rule that has published in the Bulletin but the rule has not yet been reviewed by the legislature, a Notice of Correction to Pending Rule may be published in the Bulletin to correct the error. The corrected text of the pending rule would then be submitted to the legislature for review and approval.

#### **Making Corrections to Codified Rules**

The Idaho Administrative Procedure Act gives the Rules Coordinator the authority to make non-substantive changes to codified rules without going through formal rulemaking procedures.

Pursuant to 67-5202(2), Idaho Code:

*“The coordinator shall have the authority to make clerical revisions or to correct manifest typographical or grammatical errors to both proposed and existing rules that do not alter the sense, meaning or effect of such rules.”*

Changes of this type are not required to be published in the Bulletin. If an error of this type is found in your rules or if you question whether it can be corrected, simply contact the Rules Coordinator on how to proceed.

# FINAL RULE

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## What Is a Final Rule?

The Idaho Administrative Procedure Act defines a final rule as one that has been adopted by an agency under regular rulemaking procedures in accordance with the APA and is of full force and effect. Final rules are sometimes referred to as “permanent” rules (although no rule is ever “permanent”) and it is these rules, for the most part, that comprise the Administrative Code.

## How Does a Rule Become a Final Rule?

For a rule to become final and effective it has to be promulgated in accordance with the regular rulemaking requirements of the APA. There is a specific sequence that must be followed in rulemaking and a pending rule cannot become a final rule unless it is first promulgated as a proposed rule and published in the Bulletin. It must then be adopted as a pending rule and the notice of adoption published in the Bulletin. It is then submitted for review by the Idaho legislature during the legislative session for final approval.

Section 67-5224(5), Idaho Code, stipulates that a pending rule adopted by an agency **cannot** become final and effective before the conclusion of the regular or special legislative session at which it was submitted for review. However, a pending rule that has been approved as final by the legislature may be applied and enforced retroactively if the effective date has been specified in the pending rule. What this means is that the agency may choose the date it wants the rule to become effective and enforceable but, if the desired effective date precedes the session end date, the agency can only begin enforcing the rule retroactively after the session has ended.

Where the legislature finds that the agency rule is inconsistent with the legislative intent of the statute being implemented or prescribed by the rulemaking, a concurrent resolution may be adopted rejecting the entire rulemaking or any subpart of it deemed inconsistent. Any pending rule acted on by concurrent resolution becomes final and effective upon the adoption of that concurrent resolution by both houses of the legislature, unless a different effective date is specified in the concurrent resolution. If the legislature takes no action to reject a pending rule after reviewing it, the pending rule becomes final and effective at the conclusion of the session or on such other date as specified in the rule.

Any pending rule (or final rule) that is partially rejected by a concurrent resolution must be published in the Bulletin as a final rulemaking to show what was rejected and what the final rule is. It is the responsibility of the agency to publish this “Notice of Rulemaking - Final Rule” and the text of the final rule. The notice states the effect of the action taken by the concurrent resolution and the final effective date of the rule. Although this is an agency responsibility, the Rules Coordinator prepares and publishes these final rulemakings for the agencies. These final rulemakings are all published in the same Bulletin after the session ends along with the concurrent resolutions affecting them. This is done to ensure the timely codification of all final rules once the legislative session ends.

After the legislative session ends, the Rules Coordinator’s Office publishes a “Notice of Legislative Action” in the Bulletin (usually in May) that lists all pending, pending fee, and temporary rulemakings submitted and reviewed by the legislative committees. The notice also lists any codified final rules that have been rejected. Rulemakings are listed by docket number along with the final status of the rulemaking. The notice includes all pending rules that have become final rules and all temporary rules that have been extended and remain in effect beyond the end of the session. Also listed is the number of the concurrent resolution affecting a rulemaking, if applicable, and gives the effective dates of all rules reviewed and finalized. If the legislature does not reject a pending rule submitted for review, it becomes final and is codified into the Administrative Code. In these cases no further agency action is required. This notice serves as the notice of final rulemaking where applicable.

# LEGISLATIVE REVIEW OF RULES

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## GERMANE JOINT SUBCOMMITTEE - INTERIM REVIEW

When the Legislature is not in session, the germane joint subcommittees review **proposed rules** that have been filed with the Rules Coordinator for publication in the Bulletin. This is the only review of proposed rules done by the legislature and it differs substantially from the formal rules review process that takes place during the legislative session.

Upon submission of the notice and text of a proposed rulemaking, the Rules Coordinator's office prepares the documents for publication and then provides a copy to the Director of the Legislative Services Office. An LSO analyst then prepares a written report that discusses the major issues involved in the rulemaking. The analysis is then forwarded to the germane joint subcommittee along with the notice and text of the proposed rulemaking for review. If the proposed rulemaking is based upon a requirement of federal law or regulation, a copy of that specific federal law or regulation must accompany the submission to the director of legislative services. Generally, this can be done by simply providing a web link to these documents rather than providing a hard copy.

The APA also requires that the Director of LSO receive a statement of the substance of the intended action, however, in actual practice the descriptive summary of the notice provides the same information. So unless specifically requested by LSO, these statements are not usually required.

### ***Germane Joint Subcommittee Review***

Section 67-454, Idaho Code, limits the germane joint subcommittee's authority to act on a proposed rule. The subcommittee may request and hold a hearing with the agency on the proposed rule, if desired, and this hearing must be held within 42 days of receipt of the analysis from LSO. The subcommittee must provide notice to the Director of LSO within 14 days of receipt of the LSO analysis that it wishes to schedule a meeting with the agency. LSO then schedules the hearing and notifies the affected parties. *"Upon a finding of the same objection by a majority of the members of the subcommittee . . . an objection to the rule shall be transmitted to the agency with a concise statement of the reasons for the objection."*

The subcommittee prepares a report on all the proposed rules transmitted to it for review. Included in this report would be any findings that there is an objection to the proposed rule or that an no objection has been filed. The report will also be filed with the agency and transmitted to the membership of the germane committee. The report is also submitted to the next regular session of the legislature and becomes part of the legislative review of pending rules during the session.

Again, the subcommittees cannot take any action at this point that stops the agency from completing the rulemaking. However, when an objection to a proposed rule has been filed with the agency, the agency has been put on notice that there are concerns with the proposed rule. Heeding the subcommittee's warning and allaying their concerns is a prudent course of action. Once adopted, the pending rule must still be submitted to the germane committees for review during the legislative session. Any objections to the rule that have been filed with the germane committee will be discussed at that time.

### ***Statement of Economic Impact -- Cost/Benefit Analysis***

When a fee or charge is increased or a new fee or charge is being imposed in a proposed rulemaking, the agency must prepare a cost/benefit analysis on the potential impact of imposing a new fee or increasing an existing fee or charge. This written analysis becomes part of the proposed rulemaking "packet" that is filed with the Coordinator's office. The cost/benefit analysis must include "reasonably estimated costs" to the agency to implement the rule and the reasonably estimated costs borne by citizens or the private sector, or both. The cost/benefit analysis is included as part of the formal filing of the proposed rule analysis that is done by LSO for the germane joint subcommittee.

### ***Additional Requests***

Even though a proposed rule may not impose or increase a fee or charge, the germane joint subcommittee may request that the agency submit an economic impact statement to LSO. This request must be made in writing by the subcommittee. If requested, the agency must prepare and deliver a statement that provides an evaluation of the costs and benefits of the rule, including any health, safety, or welfare costs and benefits, and any fiscal impact, positive or negative, there may be to the general fund.

## **GERMANE COMMITTEE RULES REVIEW - LEGISLATIVE SESSION**

Section 67-5291, Idaho Code (APA), provides for legislative rules review by the standing (germane) committees of the legislature. This provision allows for the review of temporary, pending, pending fee, and final rules that have been published in the Administrative Bulletin and the Administrative Code.

### **What Is Reviewed by the Committees?**

#### ***Pending and Pending Fee Rules***

Pending and pending fee rules that have been adopted by the agency, and whose notices of proposed rulemaking and notices of adoption of pending rule have published in the Bulletin, are included in the legislative rules review books that are prepared for the germane committees. Once a pending rule has been adopted by the agency and the notice of adoption published in the Bulletin, the agency cannot withdraw that rule or otherwise prevent it from being submitted for legislative review. Once submitted for review, a pending rule must be rejected by concurrent resolution or it becomes final and effective at the conclusion of the legislative session. A committee chairman cannot indulge an agency and agree to withdraw a pending rule that has been submitted for review and assume that it dies as a result of being withdrawn. A rule is not a legislative bill and a pending rule, specifically, must be rejected, whether it is formally reviewed by committee or not, or it becomes final and effective at the end of the session.

The underlying issue here is that at this stage of the rulemaking the agency has, for all practical purposes, completed the long, legal promulgation process and has assured the general public that the pending rule is now awaiting legislative approval to become final and effective. The APA does not provide for the “unadoption” of a pending rule that would allow an agency to withdraw a pending rule it has adopted prior to legislative review. Once the notice of adoption of pending rule has published in the Bulletin, it is assured that the pending rule will be submitted for legislative review. Once submitted for review, the fate of the pending rule is in the hands of the legislature and only the legislature can stop the rule from going into effect. If, for some reason, the agency does not want the pending rule to become final and effective, the agency can request the legislature to reject the pending rule so that it does not become final and effective. The decision to do so is still up to the committee members and there is no guarantee that the rulemaking will be rejected regardless of the request.

#### ***Temporary Rules***

All temporary rules adopted prior to the beginning of a legislative session expire at the end of the next succeeding legislative session. In order for a temporary rule to remain in effect after the conclusion of the session it must be submitted for legislative review and extended by concurrent resolution. If rejected by concurrent resolution, the temporary expires at the conclusion of the legislative session. A temporary rule can be extended in whole or in part, as specified in the concurrent resolution.

### ***Final Rules***

Any codified rule that has been promulgated in compliance with the APA and approved as a final rule by the legislature and is of full force and effect is subject to legislative review. In those instances where it is determined that the rule no longer meets the legislative intent of the statute being implemented, that rule, or any subpart of it, may be rejected. A concurrent resolution adopted by both houses of the legislature is required in order to reject any part or all of a final, codified rule.

### **The Legislative Rules Review Books**

Three (3) sets of rules review books (pending, pending fee and temporary rules) are prepared for the various House and Senate committees that review agency rules. Some committees will receive 3 books while other committees may receive only one book. There is no even distribution of the rules submitted for review and some committees have many more rules to review than others. The majority of the rules being reviewed are pending rules and most committees receive at least one pending rules review book.

At the beginning of the legislative session an electronic copy of each applicable review book is prepared and filed with each House and Senate committee. The review books are electronic publications and can be accessed through the Rules Coordinator's or the Legislature's websites by anyone who is interested and can be printed if needed. The rules review hearings are typically the first business attended to by the committees and normally takes about four weeks to complete.

### ***Actions Taken by the Legislative Committees***

#### **Pending Rule**

A pending rule that is submitted for review by the Rules Coordinator to the germane committees of the legislature will go into effect at the end of the legislative session at which it is submitted for approval unless it is rejected by a concurrent resolution of the legislature. In those instances where the legislature finds that the agency's pending rule is inconsistent with the legislative intent of the statute under which the rule was made, a concurrent resolution may be adopted that rejects the rulemaking or any subpart of it. The removal of a word or words or adding new language to the pending rule, for instance, is considered a legislative amendment to the pending rule and is prohibited by state law.

When one or more parts, but not all, of a pending rulemaking has been rejected by concurrent resolution, a notice and text of the final rule must be published in the Bulletin to show what the codified final rule is. The agency will be notified that such action has occurred and a "Notice of Final Rule" is prepared by the Coordinator's office. This notice explains the result of the action taken by the Legislature, shows the text of the final rule, and includes the final effective date of that action.

#### **Pending Fee Rule**

A pending fee rule must be approved by concurrent resolution of the legislature or it is null and void and of no force and effect. Rather than adopt an individual concurrent resolution to approve each fee rule, all fee rules are included in an omnibus concurrent resolution that approves them in a single action. If a committee rejects a fee rule, or any part of it, the pending fee docket is listed as an "exception" to the approved fee rule in the concurrent resolution and the specific rejected parts are enumerated. If the entire fee rule is rejected, the resolution lists it as being rejected in its entirety.

It is important to note that it only takes one house to reject a fee rule and have it “excepted out” of the omnibus concurrent resolution. Failure of the legislature to adopt the omnibus concurrent resolution approving the fee rules means all the pending fee rules are null and void and of no force and effect.

### **Temporary Rule**

A temporary rule submitted for extension must be approved and extended by concurrent resolution or it expires at the end of the session. Like the pending fee rules, temporary rules must be approved for extension by concurrent resolution to remain in effect and are extended or rejected in a single omnibus concurrent resolution. A temporary rule that is rejected, in whole or in part, must also listed as an “exception” in this omnibus concurrent resolution or it continues to remain in effect after the conclusion of the legislative session.

### ***The Omnibus Notice of Legislative Action***

At the conclusion of the legislative session, the Rules Coordinator publishes an “Omnibus Notice of Legislative Action” in the Bulletin that lists all rulemakings and any final rules submitted for review by the legislative committees. Rulemakings are listed by docket number along with the final status of the rulemaking and whether the rule as approved or partially or entirely rejected. The notice includes all pending fee and pending rules that have become final rules, all temporary rules that have been extended or rejected, and any final rules acted on. Also listed is the number of any concurrent resolution affecting a rulemaking, if applicable, or any final rules so effected, and gives the effective dates of all rules reviewed and approved that are final and effective. If the legislature does not reject a pending rule submitted for review, it becomes final and effective at the end of the session and is codified into the Administrative Code. All pending fees rules approved by concurrent resolution are also codified. In neither case is any further agency action required. The rulemaking is now completed.

### ***Expiration of All Administrative Rules***

Section 67-5292, Idaho Code, states: “*Notwithstanding any other provision of this chapter to the contrary, every rule adopted and becoming effective after June 30, 1990, shall automatically expire on July 1 of the following year unless the rule is extended by statute. . . Thereafter, any rules which are extended shall then continue to expire annually on July 1 of each succeeding year unless extended by statute in each such succeeding year.*”

Legislation that “extends” the rules for one more year is introduced each year toward the end of the session. Failure to pass and enact this legislation each year would result in the expiration of the administrative code and there would be no enforceable administrative rules. In short, state government would be powerless to function as intended by the state constitution or it might cease to function altogether.

# INCORPORATION BY REFERENCE

## What Is Incorporation By Reference?

Often times a state agency's statutorily-authorized program is also subject to additional authority or mandates that come from outside of state government. It is not uncommon for a state agency to administer and implement a federally mandated program or law, for instance, as part of its normal duties. In order to implement a program or federal law that fully complies with all governing statutory or regulatory requirements, these additional provisions must also be implemented and enforced by the agency through an agency administrative rule. Some programs may require that the agency rule enforce a uniform standard, code, or regulation from an entity that may or may not be part of state government. The legal process for bringing these additional external materials into and making them part of an agency administrative rule is known as "incorporation by reference".

Generally, it is impractical and costly to republish all or part of the text of the incorporated material in an agency rule. In other cases the materials are proprietary in nature and copyrighted and cannot be republished. For these reasons **Section 67-5229, Idaho Code**, permits an agency to incorporate by reference certain materials *without* the republication of the text of these materials in the rule. As stated in the APA, whenever the republication of the text would be ". . . *unduly cumbersome, expensive, or otherwise inexpedient. . .*" the agency may adopt and incorporate by reference these materials into the rule and make them part of the rule.

## What Can Be Incorporated by Reference?

The Administrative Procedure Act (APA) is very specific as to what may be incorporated by reference into a state agency rule. Section 67-5229(1) states that all or any part of the following materials may be incorporated by reference:

- \* *A code, standard or rule adopted by an agency of the United States;*
- \* *A code, standard or rule adopted by any nationally recognized organization or association;*
- \* *A code or standard adopted by Idaho statute or authorized by Idaho statute for adoption by rule; or*
- \* *A final rule of a state agency; provided however, that a state agency shall not adopt a temporary rule incorporating by reference a rule of that agency that is being or has been repealed unless the rule providing for the incorporation has been reviewed and approved by the legislature.*

When promulgating a proposed rule that adopts external materials from an outside source using the incorporation by reference provision, the agency must:

- (1) *Include in the notice of proposed rulemaking a brief written statement explaining why the incorporation is needed; and*
- (2) *Note where an electronic copy can be viewed or obtained or provide an electronic link to the incorporated materials that, at a minimum, will be posted on the agency's website or included in the rule that is published in the administrative code; or*
- (3) *If otherwise unavailable, note where copyrighted or other proprietary materials can be viewed or purchased; and*
- (4) *Pursuant to Section 67-5223(4), Idaho Code, when adopting amendments to previously incorporated documents or materials, include a synopsis that identifies the substantive differences between the two versions or editions. This synopsis is filed as part of the proposed rule submission.*

In some cases only specific parts of a code or standard are incorporated by reference and the agency may "except out" certain provisions that don't apply in Idaho. In other cases, and when allowable, the agency might slightly amend certain provisions to make them applicable to Idaho conditions or needs. However, any amendments made to these codes or standards, or exemptions from them, must be promulgated into the rule. It is necessary to clearly identify those specific parts of a code or standard that are either exempt from the rule and not enforced or that are distinct from the incorporated code or standard and amended accordingly to meet Idaho needs.

## Incorporation of Materials Authorized by Idaho Code

Idaho law sometimes mandates that a state agency create and promulgate a standard or code as part of its rulemaking requirements. In many cases, these codes and standards are created as separate documents and exist apart from the actual rule itself. Generally, a statute requiring a code or standard to be established also authorizes the agency to adopt that code or standard and incorporate it by reference. This is especially important in those instances where the code or standard is voluminous making it very expensive and cumbersome to write into the rule itself. So rather than being republished in the rule, it is adopted into the rule and made part of the rule without republication.

Through the adoption of the rule, the code or standard is incorporated into and made part of the rule. It is then referred to or "referenced" in the rule.

When changes are made to these statutorily-authorized standards, they must be amended using the same legislative format that is used in regular rulemaking. Because these standards are sanctioned by state law, they are subject to legislative review and must be submitted to the legislature for final approval when amended. The amendments made to these various standards and codes are not published in the Administrative Bulletin as part of the rulemaking but, at a minimum, the agency must provide a link to the "redline" or amended version of the standards. For all intents and purposes, the standards must be promulgated with the same transparency and access as any other administrative rule being amended. These standards or codes are submitted to the germane committees of the legislature for final approval as part of the pending rule.

When amending these types of standards and codes, the agency must record the date upon which the amendments were approved or adopted by the authorizing authority and, when applicable, assign a new version or volume number to the amended and updated document. All documents incorporated by reference must be date and edition specific in order to be valid incorporations by reference.

#### **When Updating or Amending Previously Incorporated Materials - the Incorporation by Reference Synopsis**

Additionally, when preparing a proposed rulemaking for publication in the Bulletin, the promulgating agency must meet the following requirement when amending previously incorporated materials:

Section 67-5223(4):

- (4) An agency proposing to adopt amendments to materials previously incorporated by reference in a rule shall prepare for inclusion with the filing of the proposed rule change a **brief written synopsis** that details the substantive differences between the previously incorporated material and the latest revised edition or version of the incorporated material being proposed for incorporation by reference. This synopsis shall accompany the submission to the director of legislative services and shall be provided to the germane joint subcommittee created in section 67-454, Idaho Code.*

This IBR synopsis must be included as part of the proposed rulemaking filing that is filed with the Rules Coordinator for publication in the Bulletin. The synopsis is then forwarded along with the proposed rule to the Director of the Legislative Services Office whose staff performs an analysis of the proposed rule for the germane joint subcommittee that is charged with reviewing the proposed rule.

Included with the LSO analysis of the proposed rule are any cost/benefit analyses that are required when fees or charges being imposed or changed through the rulemaking (67-5223(3), I.C.), as well as any fiscal statements that are prepared by the agency and filed with the Rules Coordinator.

#### **How Do I Incorporate a Document by Reference?**

Formal rulemaking procedures must be followed when incorporating by reference. The rule writer must understand that the materials being incorporated by reference must be maintained in their original incorporated state. In other words, once a document is incorporated by reference, that document does not change. The APA requires all documents that are incorporated by reference to be date and edition specific and prohibits the incorporation of future materials. This means that if a new or amended version or edition of a previously incorporated document is available, the "new" version **is not** automatically incorporated by reference and does not become part of the rule. In order to make the newest version an enforceable part of the rule, the agency must initiate a rulemaking to incorporate the latest versions of those documents. The date of that revised documents were adopted or approved and the amended edition or volume number must be included in the rule as part of the legal incorporation.

The following is an example of an incorporation by reference that **IS NOT ALLOWED**:

*"...this rule incorporates the 2015 edition of the Uniform Commercial Code **and all future editions, as amended.**"*

The courts have invalidated prospective incorporations by reference thus disallowing any open-ended incorporation statements that do not refer to a specific edition or source. Again any agency wanting to incorporate amendments to previously incorporated material must follow formal rulemaking procedures to do so. Here is an



example of a proposed rule amendment to update previously incorporated materials:

**004. INCORPORATION BY REFERENCE.**

**01. Documents.** *Under the provisions of Section 54-1001, Idaho Code, the National Electrical Code, 2015~~6~~ Edition, (herein NEC) is hereby adopted and incorporated by reference for the state of Idaho and shall be in full force and effect on and after July 1, 2015~~6~~, with the following amendments: - ~~(3-20-14)~~(3-20-16)*

Whenever a document is incorporated by reference, the rule must provide specific information regarding the document. This includes:

- 1) *the name, edition or version number; and*
- 2) *the date on which the rule, standard or code was published, approved or became effective.*

This is important to note because a document that has been improperly incorporated by reference can be challenged and the rulemaking possibly invalidated.

**Notice of Proposed Rulemaking**

When incorporating materials by reference, the notice of proposed rulemaking must include a brief statement detailing the need to incorporate by reference.

**Required Section in Rule**

If incorporating by reference, this section of the rule must identify with specificity the code, standard, or rule and include the date when the code, standard, or rule was published, approved, or became effective.

**Accessing Documents Incorporated by Reference**

The agency must also provide information regarding access to the incorporated materials. At a minimum, and when available, the agency must provide a URL link to the documents that are available on a website or it must post this information on its own website, or both. Active links are placed into the rule that is part of the Administrative Code once the rule is enforceable. The agency is responsible for maintaining the links and making sure they are correct and live. Updates or corrections to these links can be made by the Rules Coordinator without a rulemaking.

If the materials incorporated by reference have copyright protection or are otherwise unavailable, the rule must indicate where a copy can be viewed or purchased. If not otherwise available, a copy of the incorporated material must be kept at the agency's central office.

**Legislative Review**

Codes or standards authorized by Idaho statute to be established and incorporated by reference into an agency rule are subject to legislative review for approval. Amendments made to a code or standard may be rejected in the same manner a pending rule is rejected. The changes may be rejected in whole or in part by concurrent resolution and declared null, void and of no force and effect.

Not all documents that are incorporated by reference are subject to this type of legislative veto, however. The supremacy clause of the federal government grants federal law primacy over state law and prohibits the state legislature from amending or rejecting federal laws or regulations. The same is essentially true for codes and standards produced by nationally recognized organizations (the National Electrical Code, for example) whose codes and standards are accepted by all states and used throughout the United States, or internationally in some cases.

# PUBLIC PARTICIPATION IN RULEMAKING

Our ability as citizens to access and participate in the rulemaking process is provided for in, and is a vital part of, the Administrative Procedure Act (APA), Title 67, Chapter 52, Idaho Code. One goal of the APA is to ensure that the public is aware of, and can take part in, agency rulemaking activities. Public participation in the rulemaking process is guaranteed by the requirement that agencies hold meetings, accept written comments, and requests for public hearings and otherwise interact with the public when doing rulemaking. The APA also provides that the public may petition an agency to change or repeal an existing rule or adopt new administrative rules. All such requests and comments must be submitted in accordance with the criteria specified in the APA and IDAPA 04.11.01, "Idaho Rules of Administrative Procedure of the Attorney General," and as outlined in the rulemaking notices (proposed and negotiated rulemaking) published in the Bulletin. An agency's responsibilities in dealing with such requests are also addressed in the APA.

## WRITTEN COMMENTS

Pursuant to Section 67-5222(1), Idaho Code:

- (1) Prior to the adoption, amendment, or repeal of a rule, the agency shall afford all interested persons reasonable opportunity to submit data, views, and arguments, orally or in writing. The agency shall receive comments for not less than twenty-one (21) days after the date of publication of the notice of proposed rulemaking in the bulletin.*

As stated above, the Administrative Procedure Act requires that the promulgating agency **provide a comment period of not less than twenty-one (21) days for all proposed rulemakings**. The comment period begins the day the proposed rule publishes in the Idaho Administrative Bulletin, which is the first Wednesday of each month. The comment period may exceed the required twenty-one (21) days, but cannot be less than that.

The deadline date for the submission of written comments to the agency must be included in the notice of proposed rulemaking, along with the mailing address and the agency contact to whom comments must be submitted. Agencies may allow written comments to be submitted via email or other means as a way of communicating with stakeholders, but clear instruction on how to submit comments should be included in the notice of rulemaking along with an agency email address.

All written comments that are submitted within the specified time must be accepted by the agency and made a part of the rulemaking record. The rulemaking record must be kept on file with the agency and made available for public inspection and copying. All written comments **must be considered** by the agency prior to the adoption of the pending rule. Consideration of a written comment **does not** mean that the comment will necessarily cause further amendment to the proposed rule, nor must it be incorporated into the text of the pending rule unless warranted.

All changes made to the rulemaking docket after the comment period has expired must be justified by comments received through the rulemaking process. The promulgating agency may also comment to its own rulemaking. All comments received, including any agency comments, must be included as part of the rulemaking record.

Also, it is important to note that any written comments submitted at a public hearing must be accepted by the agency and carry as much weight as a verbal comment at the hearing.

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## PUBLIC HEARINGS

Pursuant to Section 67-5222(2), Idaho Code:

- (2) *When promulgating substantive rules, the agency shall provide an opportunity for oral presentation if requested by twenty-five (25) persons, a political subdivision, or an agency. The request must be made in writing and be within fourteen (14) days of the date of publication of the notice of proposed rulemaking in the bulletin, or within fourteen (14) days prior to the end of the comment period, whichever is later. An opportunity for oral presentation **need not be provided** when the agency has no discretion as to the substantive content of a proposed rule because the proposed rule is intended solely to comply:*
- (a) with a controlling judicial decision or court order; or*
  - (b) with the provisions of a statute or federal rule that has been amended since the adoption of the agency rule.*

It is not necessary to schedule public hearings when it is unlikely that there will be any comment or controversy resulting from the rule changes or if either subpart (a) or (b) above apply to the rulemaking. If the rulemaking is intended to comply with either provision (a) or (b), the rule writer should explain in the notice of rulemaking that all requests for public hearings will be denied based on either, or both, of these statutory provisions.

However, when rule changes are being promulgated that do not meet the exceptions listed above and may result in comment or controversy, it may be prudent on the part of the agency to schedule public hearings to avoid delays in the rulemaking process.

Agencies are required to allow a minimum of fourteen (14) days for interested persons to request that the agency hold a public hearing on the proposed rule. (This means fourteen (14) days from the publication date of the Bulletin or fourteen (14) days before the end of the written comment submission period, whichever is later.) The notice of proposed rulemaking must alert the public to the deadline date for requesting a hearing and how the request must be submitted to the agency.

IDAPA 04.11.01, "Idaho Rules of Administrative Procedure of the Attorney General," states that an agency cannot conduct a hearing unless the time, place, and date of the hearing has been published in the Idaho Administrative Bulletin. Agencies that have opted out of the Attorney General's rules must still provide notice of a public hearing unless the agency has published "stated findings" as to why this rulemaking is exempt. If the agency determines that a hearing(s) is necessary and the "Notice of Rulemaking - Proposed Rule" has already been published in the Bulletin, a separate "Notice of Public Hearing" must be submitted for publication prior to the hearing being held.

In the legal notice that advertises proposed rulemakings, the Rules Coordinator places an asterisk (\*) next to the docket number to indicate that a public hearing has been scheduled for that docket. The legal notice does not provide any additional information regarding the public hearing and instead directs the reader to the Bulletin for that information. If an agency is required or feels that further notice is necessary for a public hearing than that required by the APA, it is the agency's right and responsibility to take whatever steps necessary to ensure that adequate notice is given to the public. There are no set criteria on how an agency may provide additional notice to the public of these public hearings and the agency is free to use whatever means necessary to notify the public of the hearing.

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When an agency holds a public hearing, a staff member from the agency may facilitate the hearing, or the agency may hire someone to preside over the hearing such as a hearing officer. Because a public hearing is a public meeting, the agency should keep accurate records of the proceedings. The hearing may be recorded and transcribed and this and any other information gathered at the public becomes part of the rulemaking record for that rulemaking.

### ***Public Hearing vs Negotiated Rulemaking***

It is important to understand the differences between a public hearing and a negotiated rulemaking meeting and exactly what happens at each one. A **public hearing** takes place **AFTER** the proposed rule has published in the Bulletin and is an opportunity for any interested person to make an oral presentation to the agency that is germane to the proposed rule. It is the agency's responsibility to provide the opportunity for oral comments to be made when warranted, however, it is not a forum for a public debate on the issues involved in the rulemaking and the agency is not required to interact with stakeholders beyond providing the venue and opportunity to comment to the proposed rule. Having a dialogue with the public is not the purpose for the hearing; rather it is a time reserved for the public to comment orally on the proposed rule. That being said, the agency does have the discretion to interact with stakeholders as is necessary and is encouraged to conduct the hearings in a manner that addresses, as best as possible, stakeholders concerns while balancing the agency's needs.

As part of the process of **FORMULATING a proposed rule**, and when it is feasible to do so, the agency invites stakeholders and other interested persons to provide input and ideas on the changes the agency is considering. This is an interactive forum where a dialogue is established and the agency attempts to reach a consensus on the rules being considered.

The agency is "negotiating" with the stakeholders the very provisions of the rule that they (stakeholders) will be subject to and regulated by. Ideas are exchanged and all input is considered as part of the drafting of the proposed rule. Negotiated rulemaking is flexible and is designed to meet the needs of the agency and its constituency to ensure the best possible outcome. It may take many meetings before a proposed rule is formulated and formally promulgated or the result may be that it was all naught and formal rulemaking is never initiated.

For more detailed information on the negotiated rulemaking process, please see that section of this manual.

# THE RULEMAKING RECORD

Upon initiating a rulemaking, the agency must immediately begin documenting the proceedings by establishing a rulemaking record. This rulemaking record must be maintained in the main office of the agency and be open and available for public inspection and copying. The rulemaking record is a public document and is subject to the Public Records Act (Title 74, Chapter 1, Idaho Code).

Pursuant to 67-5225, Idaho Code, the rulemaking record must contain:

- (a) copies of all documents published in the Bulletin;
- (b) all written petitions, submissions, and comments received by the agency and the agency's response to those petitions, submissions, and comments;
- (c) all written materials considered by the agency in connection with the formulation, proposal, or adoption of the rule;
- (d) a record of any oral presentations, any transcriptions of oral presentations, and any memorandum prepared by a presiding officer summarizing the contents of the presentations; and
- (e) any other materials or documents prepared in conjunction with the rulemaking.

***The rulemaking record must be maintained and available for public inspection for not less than two (2) years after the effective date of the rule.***

The rulemaking record need not constitute the exclusive basis for agency action on that rule or for judicial review thereof, unless provided for by law.

The Office of the Rules Coordinator maintains electronic records of all rulemaking documents submitted for publication in the Bulletin and Code. However, the Coordinator does not receive copies of written comments or public hearing summaries or other information submitted by stakeholders that is related to negotiated rulemaking or proposed rulemaking. This information is the responsibility of each agency and must be made part of the rulemaking record.

The original intent of the statute regarding the rulemaking record was that the record would be a paper record that could be viewed and copied at the agency headquarters. Because the statute does not specify a required format, the record may be maintained in either an electronic format or in hard copy. Either must be made available upon request as noted above. However, there is nothing that prevents the agency from making the record available to the public by posting it on the agency website as an electronic-only document.

# RULE NUMBERING AND DOCKETING SYSTEM

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## HOW TO USE THE IDAHO ADMINISTRATIVE CODE AND BULLETIN

Administrative rules and rulemaking documents published in the Idaho Administrative Code and Idaho Administrative Bulletin are organized and tracked using a specific numbering schematic. This numbering schematic begins with 3 two-digit numbers, each two-digit number is separated by a period, that identify the agency, different divisions within the agency, when applicable, and the rule chapter number itself.

Each agency has a two-digit identification code number known as the “**IDAPA**” (00.) number. Most state agencies (departments, boards, commissions) are organized by or subdivided into Divisions. Even if an agency has no divisions it is still assigned a two-digit number called a “**TITLE**” (00.) number. The final two-digit number identifies each individual rule chapter and is referred to as a “**CHAPTER**” (00.) number. The following is an example of a typical citation to a chapter of rules using the IDAPA, TITLE and Chapter number: **IDAPA 38.05.01**.

The rule text of each “chapter” is divided into **Major Sections** which may be further subdivided into **Subsections**. The breakdown of the Subsections follows an alpha/numeric schematic that alternates with each subdivision. A citation to a Subsection of a rule and its breakdown is shown in the following example. Note that each set of identifying numbers is separated by a period.

### **IDAPA 38.05.01.044.01.a.i.**

“**IDAPA**” is a term that designates all officially promulgated administrative rules in Idaho that are subject to the Administrative Procedures Act and are required by this act to be published in the Idaho Administrative Code and the Idaho Administrative Bulletin. All state agency rules follow this same numbering scheme using their own unique numbers.

“**38**” is the *IDAPA* agency code for the Idaho Department of Administration

“**05**” is the *Title* number for a Division within the Department. In this example it is the Department of Administration’s Division of Purchasing

“**01**” is the *Chapter* number 01 of Title 05, “Rules of the Division of Purchasing”

“**044**” is Major Section **044**., “Small Purchases”

“**01**” is the first level subdivision (numeric) Subsection 044.**01**.

“**a**” is the second level subdivision (alpha) Paragraph 044.01.**a**.

“**i**” is third level subdivision (numeric-lower case romanette) Subparagraph 044.01.a.**i**.

It is possible to further subdivide a rule using this alpha/numeric system, however avoiding subdividing a rule into too many subsections helps keep the rule from becoming cumbersome and difficult to follow.

# DOCKETING SYSTEM USED IN RULEMAKING

When the Rules Coordinator's Office receives a rulemaking filing from an agency for publication in the Bulletin, the rulemaking is assigned a "**DOCKET NUMBER**". This docket number is used to "track" the rulemaking as it progresses through each phase of the rulemaking process. Because there are specific procedural requirements for each rulemaking, the docket number remains the same throughout each step of the process until the rulemaking is complete.

Internally, the Bulletin is organized sequentially using the docket numbering system. The "docket number" is a series of numbers separated by a hyphen "-" (38-0501-1901). The docket numbers are published sequentially by IDAPA designation (e.g. the two-digit agency code). The following example is a breakdown of a typical rulemaking docket:

## ***"DOCKET NO. 38-0501-1901"***

**"38"** identifies the agency by IDAPA number; in this case the Department of Administration.

**"-05"** refers to the "TITLE" number of the rule being promulgated; in this case TITLE **05**, identifies an individual division within the department, the Division of Purchasing.

**"01"** refers to the "CHAPTER" number of the rule being promulgated; in this example it is the first chapter of rules of the Division of Purchasing (Chapter **01**, "Rules of the Division of Purchasing").

**"-19"** the "19" denotes the calendar year or, in this example, 2019. The calendar year reflects when the rulemaking docket is first **published** in the Bulletin.

**"01"** the "01" indicates that this is the first rulemaking done on this chapter that was submitted and published during the calendar year 2019. Any subsequent rulemakings done on this same chapter that were published in 2019 would have been numbered sequentially as follows: i.e. "-1902," "-1903," and so on. The sequential numbering also indicates the actual number of individual rulemakings that have been done on any given chapter:

Using the above example, rulemakings that were done in 1999 are numbered "38-0501-**9901**," "38-0501-**9902**," and so on. Likewise, those done in 2000 were numbered "38-0501-**0001**," "38-0501-**0002**." Those done in calendar year 2020 are numbered "38-0501-**2001**," "38-0501-**2002**," and so on.

Within each rulemaking docket, only those sections that are being amended or removed from the rule are printed. It should be noted that the entire Section is printed in a docket including all subdivisions. The individual "affected" section(s) of a docket are printed in the Bulletin sequentially (e.g. Section "100" appears before Section "200" and so on). (See Sections Affected Index in each Bulletin for a listing of these.) Whenever the sequence of the numbering is broken the following statement will appear to let the reader know this is not the entire rule chapter:

***(BREAK IN CONTINUITY OF SECTIONS)***

# RULE ORGANIZATION AND FORMATTING

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## *THE COVER SHEET*

The Cover Sheet contains information specific to each rule that is useful to the reader but is not part of the enforceable rule. The cover sheet is intended to provide the reader with a quick overview of what the rule regulates without the need to search the rule. Previously much of this information was promulgated as part of the rule's "required sections" but because these provisions are non-enforceable they have been removed from rule. Retaining this information on the cover sheet gives the reader a quick guide to the contents of the rule itself as well as agency contact information, legal citations and other pertinent details.

## *ORGANIZATION WITHIN THE CHAPTER - REQUIRED SECTIONS*

Two **MAJOR SECTIONS** are required at the beginning of each rule chapter. They are legal authority and title and scope and are organized as follows:

**000. LEGAL AUTHORITY.** *(This section provides a citation to an agency's statutory rulemaking authority found in Idaho Code, as well as any other occasioning authority, including federal law or regulation.)*

**001. TITLE AND SCOPE.** *(This section gives the complete official name of the rule chapter and gives a brief description of what the activities the rule governs and enforces.)*

Other **MAJOR SECTIONS** are only included in the rule when applicable. They follow the format used above and are numbered sequentially. These include, but are not limited to, the following:

**WRITTEN INTERPRETATIONS.** *(This section references any written statements prepared by the agency that pertain to an interpretation of the rule or the documentation for compliance with the rule. It is important to note that written interpretations are not enforceable. The agency should also indicate how the public can access these documents for inspection.)*

**ADMINISTRATIVE APPEALS.** *(If the agency has its own administrative procedure rules or unique appeals process and **is not** subject to the Idaho Rules of Administrative Procedure of the Attorney or the Administrative Procedure Act that govern administrative appeals.)*

**INCORPORATION BY REFERENCE.** *(This section must list any documents that are incorporated by reference into the rule and give specific information regarding the incorporated document, such as the date and edition of the materials, why it is necessary to incorporate these materials, and provide a web address where the incorporated documents may be accessed or, if otherwise unavailable, specify how these materials may be viewed or obtained.)*

**DEFINITIONS.** *(Identifies and defines terms of art or other language that are specific to the rule and that are used throughout the rule).*

**ABBREVIATIONS.** *(Defines any abbreviations or acronyms used in the rule.)*



## SECTION AND SUBSECTION FORMATTING

A rule is broken down into components or subdivisions that give cohesiveness and clarity to the rule and allows the rule to be organized in a logical fashion. The breakdown of the rule follows an alpha/numeric system that alternates with each subdivision. The components or subdivisions of a rule are as follows: section, subsection, paragraph, and subparagraph. A further breakdown is not recommended but, when unavoidable, is allowed. Please contact the Office of the Administrative Rules Coordinator if this situation arises and you are unsure how to proceed. The following is an explanation of each subdivision and how each is formatted within an administrative rule.

**1) MAJOR SECTION.** A major section or “**section**” is identified by a 3-digit number (000-999) that is flush left to the margin, has one tab before the section name or heading followed by a period at the end and one hard return. The section number and name are in bold text and TITLE CAPS. A section name is required to give a brief description of the section.

*Formatting Example of a Major Section:*

**122. VISION SERVICES.**

*The Department will pay for vision services and supplies in accordance with the guidelines and limitations listed below. (7-1-06)*

**2) SUBSECTION.** The first subdivision level is called a “**subsection**” and subdivides a major section. It consists of a 2-digit number and requires a “**catchline**” that gives a brief but accurate description of the subsection. The main words in the catchline are capitalized and the number and catchline are in bold text.

*Formatting Example at the First Subdivision level:*

**01. Recalculation of Client Participation.** *The client participation amount must be recalculated annually at redetermination or whenever a change in income becomes known to the Department. (7-1-06)*

Subsections are used only when multiple subdivisions follow a major section or another subsection. This should follow a standard outline format. If there is not a second subsection (02) following the first (01) subsection, the rule writer should try to make the text (01) part of the major section and not its own individual subsection. This is true for all subsequent subdivisions.

**3) PARAGRAPH.** The second subdivision level is called a “**paragraph**” and further subdivides a subsection. The paragraph is a lower case alphabetic level (a., b., c.) followed by a period. A catchline should not be used here, unless needed for clarity and is not redundant. In a long sequence where all alphabetic letters are used, double the characters (aa., bb., cc., etc.) and continue the sequence.

*Formatting Example at the Second Subdivision level:*

**a.** *The Department’s payment for ambulance services is not to exceed usual and customary charges for normal services. (7-1-06)*

**4) SUBPARAGRAPH.** The third subdivision level is called a “**subparagraph**” and is a lower-case roman numeral (romanette) level (i., ii., iii.) followed by a period. Again, a catchline

should not be used here, unless needed for clarity and is not redundant. The subparagraph romanette is in plain text format not bold text format.

**Subdivisions past the subparagraph level** (lower case roman numeral level) are allowed but should be discussed with the Rules Coordinator. The subsequent numbering repeats the basic alpha/numeric pattern using parentheses with no periods. For example: 010.01.a.i.(1)(a)

### ***RESERVED SECTIONS***

“**RESERVED**” sections are place holders that allow additional section(s) to be added to the rule when needed without causing a major reorganization or renumbering of the rule chapter. Reserved sections are only used at the **Major Section** or three-digit section level. Subdivisions below the major section level cannot be left blank or “reserved” for future use.

A single section may be reserved or sequentially-numbered multiple sections may be reserved.

***Example:***

**007. (RESERVED)      or      007. -- 009. (RESERVED)**

### ***BREAK IN CONTINUITY OF SECTIONS*** ***(Bulletin Only)***

When promulgating a rulemaking and making amendments to a rule chapter, it is not necessary to reprint the entire chapter in the Administrative Bulletin. In most cases only those sections with amendments are published. The individual sections affected are printed in the Administrative Bulletin chronologically (e.g. Section "200" appears before Section "300" and so on). Whenever the sequence of the section numbering is broken, it is formatted as follows:

**122.    *VISION SERVICES.***

*The Department will pay for vision services and supplies in accordance with the following guidelines and limitations as provided in statute.* *(10-1-91)*

#### ***(BREAK IN CONTINUITY OF SECTIONS)***

**300.    *VISION SERVICES AGREEMENT.***

*The Department will pay for vision services and supplies in accordance with the following guidelines and limitations as provided in statute.* *(10-1-91)*

When an agency submits a rulemaking for publication in the Bulletin that amends existing rule text, this statement must appear between all sections being published that are not sequential. If one or more sections of the rule are “Reserved” and fall between two sections that are being amended, the “Reserved” sections will be printed instead of the “break in continuity” language.

## **LEGISLATIVE FORMAT** *(Strike Through and Underscore)*

When making amendments to an existing rule, the rule writer edits the text using legislative format to show the changes being made. In legislative format, text that is being deleted is struck through and any new text be added is underlined. When removing and adding text, strike through the text being deleted first and then add and underline the new text, as shown in the following example. When adding text only, simply insert the text in its proper place and underline. It is important to retain existing codified text whenever possible.

### **Example:**

#### **122. VISION SERVICE**

*The Department will pay for vision services and supplies in accordance with the following guidelines and limitations listed below. All eyeglass frames and lenses provided to Medicaid recipients and paid for by the Medicaid Program will be purchased from the supplier designated by the Department. ~~(10-1-91)~~(3-25-15)*

Underscoring and striking through text in a rule is limited to marking rule text that is being amended. No other use of this type of formatting is permitted because of the obvious confusion that would result.

For purposes of the Bulletin publication, when amending rules, the **ENTIRE** major section is published even if it's a single, minor change in a subparagraph of the main section. A major section consists of the 3-digit section number followed by section heading and includes any subdivisions if the major section has been further subdivided.

## **EFFECTIVE DATES**

Generally, every section, subsection, paragraph, and subparagraph of a rule is required to have an effective date. The "effective date" is the date on which the rule is of full force and effect. There are 2 different effective dates applicable to administrative rules: final rule effective dates and temporary rule effective dates.

Currently, when a rulemaking has been promulgated and approved by the legislative, the final effective date of the approved rule is the adjournment date of the legislative session (sine die) during which the rule was reviewed and approved. The agency may also specify the final rule effective date in the notice of pending rule, if the rule must be in effect on a specific date.

When a rule being reviewed for final approval is acted on or effected by a concurrent resolution, unless the rulemaking has been rejected in its entirety and declared null and void, the final effective date of the rule is the adoption date of the concurrent resolution. A pending fee rule, for example, must be approved by concurrent resolution, so all pending fee rules become affective upon adoption of the concurrent resolution that approves them all, unless the agency has specified an effective date in the pending rule.

The only time an agency adds an effective date to a rule section or subsection is when the rule has been adopted as temporary and filed for publication in the Bulletin. The agency determines when the rule becomes effective and adds the temporary effective date to the rule. It is important to note that the agency can make the temporary rule ***“immediately effective”*** upon adoption and begin to enforce the rule prior to publication in the Bulletin. In this instance, the temporary rule is only retroactive upon publication back to the adoption date. An agency cannot make a temporary rule effective prior to the adoption of the temporary rule. The earliest effective date it can have is the day it is adopted.

Idaho’s APA states that a pending rule cannot become final and effective until after the conclusion of the legislative session at which it was submitted for review. If the agency specifies a final effective date that is prior to the adjournment date of the legislative session, the rule cannot be enforced until after the session ends. At that time, retroactive enforcement of the rule is allowed.

At the conclusion of the legislative session, the Office of the Administrative Rules Coordinator prepares an omnibus notice of legislative action pertaining to the rules submitted for review that serves as the final rulemaking for all pending rules and provides the final status of all rulemakings. The notice also indicates the final effective date of all rule approved as final rules. At the conclusion of the legislative session, final effective dates are added to the rules and the Rules Coordinator’s office publishes the updated Administrative Code.

### ***Use of Effective Dates***

\*Effective dates are **NOT** used after the **major section heading** unless the section heading is followed by text, other than a subsection, then the effective date follows the text. For example:

**010. DEFINITIONS. (NO DATE)**

**010. DEFINITIONS.**  
*The Idaho State Board of Accountancy adopts the definitions set forth in Section 54-206, Idaho Code. In addition, as used in this chapter: (eff.date)*

\*Effective dates are required for **EVERY** subsection, paragraph and subparagraph. The effective date is set flush right. For example:

**010. DEFINITIONS.**  
*The Idaho State Board of Accountancy adopts the definitions set forth in Section 54-206, Idaho Code. In addition, as used in this chapter: (eff.date)*

**01. Administering Organization.** *An entity that has met, and at all relevant times continues to meet, the standards specified by the Board for administering peer reviews. (eff.date)*

**02. Board.** *The Board or its designated representative. (eff.date)*

**a.** *The Board will be comprised of the following individuals: (eff.date)*

**i.** *Two (2) Certified Public Accountants from private sector firms; (eff.date)*

\*When amending a section, subsection, paragraph and subparagraph in a **proposed rulemaking** strike the **entire** existing effective date and underscore open parentheses. Leave eight (8) spaces between the parentheses to indicate that the rule has no final effective date yet. Here's an example:

*122. VISION SERVICES.  
The Department will pay for vision services and supplies in accordance with the following guidelines and limitations as provided in statute. ~~(10-1-91)~~( )*

\*If the rule is a **temporary rule**, the agency provides the temporary effective date, strikes the existing effective date, and adds a "T" outside the parentheses to show it's a temporary rule.

*122. VISION SERVICES.  
The Department will pay for vision services and supplies in accordance with the following guidelines and limitations listed below. ~~(10-1-91)~~(eff. date)T*

\*When adding a **new section** or **subsection**, or both, to an existing chapter, all of the new text is underscored with open parentheses for the effective date. Here is an example:

*122. VISION SERVICES.  
The Department will pay for vision services and supplies in accordance with the guidelines and limitations listed below. ( )*

\*When adding an entirely **new rule chapter**, the text is **NOT** underscored nor is the open parentheses for the effective date.

*122. VISION SERVICES.  
The Department will pay for vision services and supplies in accordance with the guidelines and limitations listed below. ( )*

\*Don't use zeros (0) in your effective date:

(1-1-16) **NOT** (01-01-16)

\*If sections or subsections are being renumbered only and no text is being amended, a new effective date is **NOT** required.

# USE OF PLAIN LANGUAGE

## What is Plain Language?

Plain Language means writing in a way that looks good, is organized logically, and is understandable the first time you read it.

## Plain language:

- \* Makes rules easier to understand and apply.
- \* Improves compliance and decreases appeals and litigation.
- \* Improves the relationship between the government and the public.
- \* Sends a clear message about what your government is doing, what it offers, and what it asks of you.
- \* Saves every taxpayer time, effort, and money.

## Some Basic Guidelines for Writing in Plain Language

### 1. Identify and speak to your audience.

- \* Who is the intended audience(s)? Why would I read this rule?
- \* Anticipate their questions: What does the reader need and want to know?
- \* If you have more than one audience (e.g., participants, providers, program specialists), group your instructions according to the audience.
- \* In each section, identify your intended reader.

### 2. Organize to serve your reader.

- \* Organize your thinking and you'll organize your document.
- \* General information to specific requirements.
- \* Major audience to minor.
- \* First step to last step in a series.
- \* Strong points before explanatory details.
- \* Most used information to least used.

### 3. Use questions and answers where appropriate.

- \* To show you're thinking about the reader, ask questions a typical reader would ask:
- \* What records must I keep?
- \* Do I need a license?
- \* Who must file an application?
- \* How will the agency handle my application?

### 5. Use the active voice, rather than the passive.

- \* Begin with the actor, not the receiver.
- \* Use action verbs, rather than forms of the verb "to be."  
(is, are, was, were, am, be, been)

#### **Example:**

*Use: "The provider must fill out the form."*

*(NOT: "It is required that the form be filled out by the provider.")*

**6. Appeal to the reader visually.**

- \* Write short sections
- \* Include only one issue in each paragraph
- \* Leave plenty of white space
- \* Use vertical lists
- \* Use lots of informative headings

**7. Use headings that inform.**

- \* Headings help separate text into manageable segments.
- \* Headings help readers find what they need quickly.
- \* Take the opportunity to highlight key points in the heading. Don't just use general, one-word headings.
- \* In some cases, questions make excellent headings.

*EXAMPLE: Use "What fees must I pay?" (NOT "Fees.")*

**8. Use Vertical Lists.**

- \* Highlight important material
- \* Identify each in a series of requirements
- \* Clarify chronological order

**9. Avoid Confusing Terms.**

- \* Use acronyms only after defining them, and only for a few important terms you repeat several times.
- \* Use common terms in common ways.
- \* Use the same term consistently to refer to the same group.

**10. Use clear, direct words, not jargon and legalese.**

<b>Instead of . . .</b>	<b>Try . . .</b>
comply with	follow
during the period	during
due to the fact that	due to, since
for the purpose of	for, to
forward	send
pursuant to the provisions of	under

**11. Omit unnecessary, useless and weak words.**

**12. Use positive statements and avoid negatives and double negatives.**

- "Excludes" is better than "does not include"
- "Different " is better than "not the same"

**13. Use strong verbs and avoid turning verbs into nouns.**

**14. Omit long, unnecessarily complex, and run-on sentences.**

# **RULE WRITING STYLE, FORMAT, AND CONTENT**

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## ***INTRODUCTION***

Before beginning to write an administrative rule, the rule writer should identify all state and federal laws that authorize or occasion the rulemaking, or both, and determine the objectives and intended results of the rulemaking. The rule writer should then develop an outline of the rule that organizes the general subject matter of the rule in a logical and understandable format.

The rule writer should always be aware that the basic purpose of a rule is to balance the statutory mandates and legislative intent of the law or policy being implemented with any constitutional or federal mandates, policies of the governor, or the agency mission.

Fully understanding the intended results of the rule is critical to its effective composition. For example, the rule writer must understand whether the intent is to restrict and regulate certain activities or if the rule is simply outlining the procedures for obtaining benefits or a state issued license. Either way the rule writer must be able to convey this information clearly through the administrative rule without ambiguity. It is extremely important that the rule is not written in a way that allows it to be interpreted in a way other than what the authorizing statute intends.

Internal organization is necessary to provide consistency to all agency rules. It is required that each chapter begin with standardized sections that provide very specific information, to include legal authority, title and scope, and if applicable, written interpretations, administrative appeals, incorporation by reference, public records act compliance, and definitions.

The textual body of the rule should be divided by specific subjects that are organized in a logical fashion. Each becomes a separate section of the rule that can be further subdivided as the rule is fleshed out. A difficult rule becomes more understandable to the reader if this consistent outline of textual organization is followed.

The basic concepts of this manual should be understood before beginning to write a rule. The following sections provide guidance to rule writers in composing, organizing, and formatting rules. They outline the style, format, and numbering requirements authorized by state law and include other standardized guidelines that are in general use, as well as some of the same standards used in drafting legislation.

## ***GENERAL RULE WRITING GUIDELINES***

A rule writer is often confronted with the problem of extracting the essence of the intent of the rule and putting it into coherent, readable text. The writing style described in this manual is intended to aid the rule writer in avoiding ambiguity. Rules written in this style should provide understandable terminology using the clearest language possible that does not leave the rule open to interpretation. This section is a review of the style to be followed for all Idaho administrative rules.



The rule writer must remember to retain as much of the codified rule text as possible when amending a codified rule. Any new text must seamlessly link with the codified text to form a consistent and clear statement of the statutory intent or other requirements of the law. To aid in this task, the rule writer should be familiar with the basic elements of style.

### ***STYLE***

As they relate to rule writing the three basic elements of style are consistency, simplicity, and clarity. Each call for the use of common, precise terminology coupled with simple phrasing. While technical terms and other “terms of art” may be used, the rule writer should remember the audience and the generality of the reader. Use precise and simple language so that every rule is easily understood. In most cases, this understanding can be enhanced with complete definitions. Conversational tones should be avoided because in conversational tones, the writer reserves the right to explain his meaning; no such right is granted to a rule writer.

Whenever possible, rules should be written to target the vast majority of readers. The goal is clearly convey the intent of the rule in a way that is easily understood by the average reader.

### ***CONSISTENCY***

The first style principle a rule writer must employ is consistency. Administrative rules should avoid unnecessary variation in sentence form and should use identical words for the expression of identical ideas, even to the point of redundancy and monotony. The same descriptive words and phrases, especially if included in a definitions section, should be used with the same meaning throughout the rule. Synonyms and synonymous expressions should be avoided in rule writing.

**Do Not Say:**

An automobile owner shall register his car...

**Say:**

A motor vehicle owner will register his motor vehicle...

However, do not use the same word to denote different meanings.

**Do Not Say:**

Each tank shall have a twenty  
(20) gallon tank for fuel.

**Say:**

Each tank will have a twenty (20)  
(20) gallon fuel container for fuel.

Sections similar in substance should be similarly arranged and outlined. Parallel structure also aids comprehension and promotes consistency. Sentences should be arranged so that parallel ideas look parallel, especially in a list.

**Do Not Say:**

- 01. Duties.** The commission will:
- a. Screen applicants;
  - b. It sets fees and other neat stuff; and
  - c. Submitting reports.

**Say:**

- 01. Duties.** The commission will:
- a. Screen applicants;
  - b. Set fees; and
  - c. Submit reports.

### ***SIMPLICITY***

The second principle of rule writing is simplicity. Use familiar words and phrases. Do not use jargon, slang, overly technical language or “legalese.” Use short words, try to keep sentences to ten words or less and use words of three syllables or less. Above all, if it is possible to omit a word and retain the desired meaning, do so. Using the principles of plain language writing will help make the rule easy to read and easy to understand.

**CLARITY**

The third principle of rule writing is clarity. When a rule is challenged and litigated, the court is generally not asked to decide questions of public policy but simply to tell the parties what the rule says. A rule writer must avoid being vague. Avoid the use of the terms “etc.,” “i.e.,” “e.g.,” “and/or,” “included, but not limited to,” or other variations of these terms.

Do not use abstract terms. Administrative rule language should be simple and concrete.

**Do Not Say:**

vehicles  
firearms  
aircraft

**If You Mean:**

automobiles  
handguns  
helicopters

Avoid “noun sandwiches.” Often, certain writing styles contains clusters of nouns. These can be avoided by using more prepositions.

**Do Not Say:**

Water resources loan plan

**If You Mean:**

A loan plan for water resources

Avoid the use of split infinitives.

**Do Not Say:**

It is necessary under this section  
to promptly reply.

**If You Mean:**

It is necessary under Section 003  
to reply promptly.

Avoid misplaced modifiers. The careless placement of a modifier may result in more than one meaning.

**Do Not Say:**

John saw Jane walking across the street.

**Say:**

John, while walking across the street, saw Jane.

**Unless You Mean:**

John saw Jane, who was walking across the street.

Avoid using indefinite pronouns as references. If a pronoun could refer to more than one person in a sentence, repeat the title of the person.

**Do Not Say:**

After the chairman appoints the director  
he will administer this rule.

**Say:**

After the chairman appoints the director,  
the director will administer this rule.

Avoid placing two or more prepositional phrases together. Word order becomes confusing when this occurs.

**Do Not Say:**

Each applicant for a license in Idaho...

**Say:**

Each license applicant from Idaho...

**Unless You Mean:**

Each applicant for a license to practice in Idaho...

## ***REPEAL, REWRITES, AND NEW CHAPTERS***

When an entire chapter of rules is no longer necessary, valid, or enforceable, it is usually in the agency's best interest to repeal the chapter. The repeal of a rule chapter is a rulemaking action that must follow the regular rulemaking procedures outlined in the APA to be valid. Although it is not necessary to publish the text of a rule that is being repealed, it is required to publish the rulemaking notice (i.e. temporary, proposed, pending, and final rulemaking notices) repealing the chapter. Only an entire chapter of rules may be "repealed." Any section, subsection, paragraph or subparagraph that is removed from the rule in a rulemaking is "deleted" from the rule, not "repealed." Removing an entire section or an individual subsection from a rule, for example, is an amendment to the rule and regular rulemaking procedures must be followed. This means the "deleted" text must be published in legislative format (~~struck through~~) in the Bulletin.

When making extensive amendments to a chapter of rules, the agency may want to consider repealing the entire chapter and rewriting it rather than showing all the amendments in legislative format. The repeal and rewrite of a chapter must be done as two separate rulemakings because each one constitutes a separate rulemaking action and each requires a rulemaking to complete that action. Thus they are executed through separate rulemaking dockets. One docket repeals the existing chapter, the second docket rewrites the new chapter. This makes sense when a chapter is repealed only and not rewritten. It is a single rulemaking action that repeals the chapter.

The use of legislative format is not necessary when repealing and rewriting a rule chapter. There is no statutory requirement that the text of a rule that is being repealed must be published in the Bulletin and, for practical purposes, it is not. Because of this, when repealing a chapter only the notice of rulemaking is published in the Bulletin and no rule text. Until the rulemaking is finalized, a chapter that is being repealed remains in the Administrative Code and is effective.

For all intents and purposes, a chapter that is repealed and subsequently rewritten is a brand new rule. This is true even when a significant amount of the text of the repealed chapter is unchanged and remains in the new rule. The repeal of the old rule wipes the slate clean, and once the repeal is final, the rule null and void. Because of this the rewritten rule, even though very similar, is considered a new rule. Therefore legislative format is not required and the text is not underscored.

The caveat here is that because the rewritten rule is a new rule, the entire rule is open to public comment and is subject to all regular rulemaking requirements. Even in those instances where some of the previous rule text is unchanged and was previously promulgated and approved by the legislature as final, it is again subject to public comment and legislative review for final approval.

In those cases where the agency, for whatever reason, does not want to reopen specific parts of a previously promulgated rule to public comment again, then the rule writer should use standard legislative format when amending the rule and not rewrite the entire rule to avoid this situation.

## ***RENUMBERING***

In most cases when making an amendment to a rule, the entire **MAJOR SECTION** containing the amendment is published regardless of where or what the change is. This can be very costly when minor changes to long sections of rules are being made. **RULE WRITERS SHOULD KEEP MAJOR SECTIONS AS SHORT AS POSSIBLE.** This can reduce future publication costs substantially. Since there are 1,000 sections (000 to 999) that can be used in each chapter, many sections can be “**RESERVED**” and interspersed throughout the chapter allowing new text to be added easily at anytime. This eliminates the future need for extensive renumbering of the entire section(s) and republication of unamended text. When numbering or renumbering major sections, the rule writer should keep related subjects within the same numerical sequence and use “**RESERVED**” sections to break up unrelated subjects.

When doing a rulemaking, a rule writer should always consider whether or not a long section can be broken up and renumbered at the same time the amendments to that section are being made. This can be very cost effective since all the text of the section will be published regardless of the number of amendments made to it. In most cases if sections and subsections are simple being renumbered and no substantive changes to the text are being made, the text is not considered to have been amended and the effective date is not changed.

## ***CONTENT - GENERAL GUIDELINES AND CONTENT RELATED ISSUES***

### ***NUMBER AND GENDER***

#### **Singular and Plural**

In administrative rules the singular number includes the plural and the plural number includes the singular. This means that phrases such as “person or persons” are unnecessary. The rule writer should not use the singular and the plural interchangeably either. To avoid ambiguity, the writer generally should use only the singular, regardless of any intent of the rule to encompass both.

In addition, a singular noun should generally be used in order to avoid the problem of whether the law applies separately to each member of a class or to the whole class.

#### **Third Person**

Always use the third person (a person, he) rather than the first person (I) or the second person (you).

#### **Gender**

In all administrative rules, inclusive gender is inferred by a reference in IDAPA 44.01.01.005. The terms and references used in the masculine include the feminine and vice versa, as appropriate. Rule writers should not include inclusive gender provisions within their chapters of rules. As a result, such phrases as “he or she” or “his/her” are unnecessary. The only settings in which a gender-based distinction is appropriate are rules requiring sex differentiation, as in certain health rules. To the extent possible, the rule writer should use gender-neutral terms and try to avoid awkward, coined, or artificial terms.

## ***PUNCTUATION***

Punctuation is an important part of rule writing. It should be used properly and uniformly. Rule writers should know the principles of punctuation as well as they know the principles of construction and rule format. All rules should be written according to generally accepted standards of punctuation.

## ***CAPITALIZATION***

### **General**

As with other punctuation, the rule writer should not overuse capitalization. The reason for this preference is historical. At one time type was set in hot lead, making it more expensive to set capital letters, and, as a result, a standard developed which minimized the use of capitalization. Since legal print is no longer set in hot lead, the reason for the “down style” has vanished, but the traditional capitalization principles are familiar and easier to read. To avoid the poor appearance of nonuniform capitalization, the rule writer should use the following standards.

### **Capitalize**

The following should be capitalized:

- all words of the major section heading;
- the first letter of the first word in a sentence;
- the first letters of the words in the first level subsection catchline;
- months and days of the week;
- the word or phrase “Idaho,” or “United States,” and words used in conjunction with them such as “United States Government”;
- names of institutions such as “Idaho State Correctional Facility,” “Idaho State Library,” and “University of Idaho”;
- full and official names of associations and organizations such as “American Dental Association” or “Idaho State Bar”;
- full name of court and other government departments, division, offices, committees, and boards;
- the word “Legislature” only when referring to the Idaho Legislature;
- the terms “Senate,” “House,” “House of Representatives,” and “Congress” only when used to indicate either the Idaho Legislature or the Federal Congress;
- names, proper derivatives of proper names (Indian, etc.), places, historic events, and holidays, as in “Coeur d’Alene Tribe,” “World War II,” and “Easter”;

- official short titles and popular names of acts, bills, codes, and statutes;
- the word “Part,” “IDAPA,” “Section,” “Subsection,” “Chapter,” “Title,” or other major subdivision designations of the administrative and statutory codes, when accompanied by the number of that subdivision, as in “IDAPA 44.01.01.100.02.b.,” and when used in conjunction with the name of another code compilation, as in “Section 14 of the Federal Social Security Act”;
- the names of programs such as “Medicare,” “Medicaid,” and “Social Security”;
- specific references to the state constitution or the codes such as “Idaho Constitution,” “Idaho Code,” or “Idaho Administrative Code,” but not when general references are used such as “this code” or “this constitution.” Proper names of amendments should also be capitalized such as “Fourteenth Amendment” or “Gateway Amendment,” but the word “amendment” used in general references such as “the equal protection amendment” or “this amendment” should not be capitalized; and
- specific funds and accounts such as the “General Fund” or the “Administrative Code Account.”

### **Do Not Capitalize**

The following should not be capitalized:

- generic political subdivisions, as in “state of Idaho,” or “county of Boise,” except when such terms follow the names of the subdivisions, as in “Boise County”;
- titles of federal, state, local, and judicial officials, as in “governor,” “president,” “commissioner,” “representative,” “director,” “attorney general,” “judge,” “justice,” “chief justice,” or “treasurer,” unless used to refer to a particular person as in “Governor Kempthorne”;
- the words “federal,” “state,” or “court” when not part of a proper name, except when “Supreme Court” refers to the Idaho Supreme Court; and
- words merely indicating geographic location such as “northern Idaho”.

## ***NUMBERS IN TEXT***

### **General Numerical Text**

When using numbers in the text of a rule, the number is spelled out, then followed by the written number in parenthesis, as set forth in the following examples:

four (4) persons or fifteen (15) cats

The expression of age can be ambiguous at times. The phrase “older than 18 years old” could mean the day after the 18th birthday or the day of the 19th birthday.

#### **Do Not Say:**

Applicants shall be more than 21 years old.

#### **Say:**

Applicants shall be twenty-one (21) years of age or older.

The term “old” and “of age” may be used interchangeably when referring to a person.

Always express money as in the following examples:

five million dollars (\$5,000,000)  
 twenty thousand dollars (\$20,000)

Use decimals only to express cents or tax-related figures such as tax rates, assessments, and valuations. In such cases decimals are preferred to fractions, although at times a fraction is the only way to express a tax rate. Writing out large fractions is not necessary if writing the fraction becomes cumbersome and confusing:

five dollars and eighty-five cents (\$5.85)  
 fifty cents (\$.50)  
 sales tax rate of five and eighty-five one-hundredths percent (5.85%)

Use commas in monetary amounts of four figures or more.

(\$15,000) **NOT** (\$15000)

Do not use zeros after a decimal unless actual cents must be expressed.

(\$5) **NOT** (\$5.00)

When listing monetary amounts in table format, however, if some of the amounts have decimals, use both decimals and zeroes for all amounts. However, it is not required to spell out the amount.

\$5.00
\$10.13
\$201.00
\$2,100.25

**Time**

Never use the phrase “o’clock.” Use “a.m.” and “p.m.” instead. Also use “12 noon” and “12 midnight,” not “12:00 a.m.” or “12:00 p.m.” Do not use a colon to express minutes unless actual minutes are to be indicated.

9 a.m., not 9:00 a.m.  
 10 p.m. not 10:00 p.m.  
 10:30 a.m. or 10:30 p.m.  
 12 noon, **not** 12 a.m.  
 12 midnight, **not** 12 p.m.

**REFERENCES TO IDAHO CODE, IDAHO ADMINISTRATIVE CODE, AND OTHER LAWS**

References to the codes and other laws are always written using arabic numerals.

- Title 67, Chapter 52, Idaho Code (when citing to a specific chapter of the Idaho Code)
- Section 67-5201, Idaho Code (when citing to a specific section of the Idaho Code)
- IDAPA 44.01.01.000
- 28 U.S.C. Section 105(a)
- 42 CFR 2.1

**ORDINAL NUMBERS - FIRST, SECOND, ETC.**

When using the words “first,” “second,” and so on, it is not necessary to use the number.

**Do Not Say:**  
first (1st)

**Say:**  
first

**SINGULAR VERB TO EXPRESS DOLLARS**

References to dollars should be used with a singular verb.

**Do Not Say:**  
a. There are appropriated \$50,000 to this division.

**Say:**  
a. There is appropriated fifty thousand dollars (\$50,000) to this division.

**FORMULAS**

Mathematical, scientific, and chemical formulas should be described in text to avoid the risk of a corrupted formula being published. Formulas may become corrupted if they include special symbols, brackets, or underlining.

If formulas are necessary, it is possible to use symbols common to all systems (parentheses, slashes, hyphens, asterisks, and text) and not use other special symbols (brackets, braces, or underlining). Both of the following are acceptable.

$$\frac{175(\text{Grams contained U-235})}{350} + \frac{50(\text{Grams U-233})}{200} + \frac{50(\text{Grams Pu})}{200} > 1$$

**OR:** (175(Grams contained U-235)/350) + (50(Grams U-233)/200) + (50(Grams Pu)/200 greater than 1

Avoid special symbols as they may be lost when text is transferred between two different computer programs or systems. If approved by the Coordinator, a camera-ready copy or computer-generated graphic file of the formula may be submitted for purposes of placing the image into the rule.



Again, the use of “underlining” is reserved solely for the purpose of showing new language in proposed rules.

## ***WORDS AND PHRASES***

### **Exceptions**

Whenever possible the rule writer should state a general principle or category directly rather than describing that principle or category by stating its exceptions.

#### **Do Not Say:**

All persons except those eighteen  
(18) years old or older shall. . .

#### **Say:**

Each person under eighteen  
(18) years old shall. . .

When exceptions are used they should be stated in simple terms. If only one or two exceptions apply, the general principle should be stated first and the exception should follow. The word “except” should be used to introduce the exception.

- a. This chapter applies to all persons except persons sixty-five (65) years or older.

### **Conditions**

When conditions are used they should also be stated in simple terms. If only one or two simple conditions apply, they should be stated first and the general principle should follow. The word “if” should be used to introduce the condition.

- a. If any person violates this rule he is subject to prosecution.

If there are many conditions or exceptions, they should be placed in an enumerated list at the end of the sentence after the general principle has been stated.

### **Limitations**

Limitations should be avoided if possible. Generally, a rearrangement of sentences and wording will accomplish the writer’s objective without the use of a limitation. However, if a limitation must be used, it should follow the general principle and be introduced with the word “but”.

- 01. Person.** An individual, corporation, firm, and partnership, but does not include...

### **Provisos**

Provisos are archaic and usually result in unintelligible phrases. Expressions such as “provided that,” “provided further that,” and similar phrases should not be used. In most cases, rearranging the sentence will eliminate the need for the proviso. If the clause modified by a proviso is a complete thought, it should always be rewritten as a complete sentence. If it is an exception or condition, the above standards should apply.

### **Enumerations**

The rule writer should enumerate or list exceptions or conditions in separate paragraphs whenever possible. This provides good access and readability. Enumerations should be preceded by introductory language stating the general principle set off with a colon. Each condition or

exception should then be followed by a semicolon. The next to last item in the enumeration may be preceded by a conjunction. If the introductory language is sufficiently clear, a conjunction is not needed. However, insertion of a conjunction in this case is optional with the writer.

- 01. Exceptions.** This rule does not apply to any of the following:
- a. Investment companies;
  - b. Securities brokers and dealers;
  - c. Insurance companies; or (*denotes option*)
  - d. Licensed attorneys.

**Official Titles**

In referring to a public officer or agency, use the official and correct title of the person or agency. For example, do not call the director of the Division of Real Estate the “commissioner” unless defined in the chapter. If defined, the title is capitalized.

**Specific Terms**

Many terms and phrases are difficult in meaning, spelling, and usage to the writer. These include archaic legal language, commonly know as “legalese”. The most important of these problem terms are described here.

Never use “and/or” as it lacks precision. The rule writer should be able to determine which term is correct. If all items in an enumeration are to be taken together, they may be joined at the last two items by the conjunction “and.” If the items are to be taken in the alternative, “or” is used. Even if terms are to be taken both together and in the alternative the “and/or” need not be used. The rule writer should use “or both” or a similar phrase or simply make the introductory language clear.

**Do Not Say:**

Each corporation and/or bank shall. . .  
 . . .red, white, and/or blue. . .

**Say:**

Each corporation, bank, or both, will. . .  
 . . .red, white, or blue, or all of them. . .

“Must” is imperative or mandatory and should be used when indicating an obligation to act.

**Do Not Say:**

a. The director shall submit a budget.

**Say:**

a. The director must submit a budget.

“May” is permissive or directory and should be used when granting a right, privilege, or power, or indication of discretion to act.

**Do Not Say:**

a. The director is authorized to issue an order.

**Say:**

a. The director may issue an order.

Whenever possible, an obligation or discretion to act should be stated positively. However, if a right, privilege, or power is abridged and the sentence contains a negative subject, “may not” or “no person may” should be used. This is preferable to “shall not” and “no person shall” since “no person shall” literally means that no one is required to act. A rule that includes this phrase negates the obligation, but not the permission to act. “No person may” also negates the permission to act and is, therefore, the stronger prohibition.

Since some courts on occasion have interpreted “shall” to mean “may” and vice versa, it is imperative that the writer give careful consideration to the context. If a problem of interpretation arises, add a sentence stating that action inconsistent with the provision is void.

Expressions such as “is authorized to,” “is empowered to,” “has the duty to,” “can,” or “the bureau intends that the officer shall” should not be used. “Must” may be used if action is intended to be a condition precedent to the accrual of some right or privilege.

- a. Notice of appeal must be filed within thirty (30) days.

Try to use “a,” “an,” “it,” “that,” “them,” “these,” “this,” or “those” instead of “said” and “same.” “Such” is not preferred but its use is sometimes necessary to modify a preceding term or phrase. “Such as” and “such a” may be used to introduce an example.

One way to avoid ambiguity in writing is to use the singular subject. The rule writer should therefore use the singular articles “a,” “an,” and “the.” Sometimes the use of these articles creates an ambiguity, and if this occurs, the writer should use the indefinite pronouns “any” and “each.” “Each” should be used if imposing an obligation to act, and “any” should be used if granting a right, privilege, or power. The term “every” should never be used.

**Do Not Say:**

The commissioner shall issue a certificate to an insurance company.

The commissioner may issue a certificate to an insurance company.

**Say:**

The commissioner will issue a certificate to each insurance company.

The commissioner may issue a certificate to any insurance company.

If the subject is plural, the articles and indefinite pronouns need not be used. The terms, “all” and “some” should not be used. The singular expression is preferred.

**Do Not Say:**

All qualified employees shall. . .

**Say:**

Qualified employees will. . .

The term “party” refers to a party in a legal action, and should not be used to denote a “person” who carries out an act or discharges a duty.

Phrases such as “pursuant to” and others like it have been used when identifying or making reference to other provisions of the law. All of the following are acceptable but the rule writer should be consistent in using them.

pursuant to  
as provided in  
prescribed in  
in accordance with

Use of the phrase “the provisions of” is unnecessary and should not be used.

The terms “that” and “which” are not interchangeable. The choice between them is determined by the type of clause that follows them. “That” is used to introduce a restrictive clause, or a clause that provides information necessary for full comprehension of the sentence.

Any funds that are not restricted shall lapse.

A restrictive clause is never set off by commas.

“Which” is used to introduce a nonrestrictive clause, or a clause that provides nonessential or parenthetical information. A nonrestrictive clause is usually set off by commas.

a. The division, which is responsible for all licenses, will provide . . .

Use “if” not “when” to express a condition. Use “when” only as a reference to time.

**Do Not Say:**

If the complaint is filed . . .

When the applicant is qualified . . .

**Say:**

When the complaint is filed . . .

If the applicant is qualified . . .

The words “compose” and “comprise” both involve the idea of containing, embracing, comprehending, or surrounding. “Compose” also means making or forming.

The board shall be composed of ten (10) members.

“Comprise” suggests including or containing. The whole comprises the parts, the parts do not comprise the whole. “Comprised of” is a wordy expression and should not be used.

The board comprises ten (10) members.

The phrase “**rules and regulations**” is redundant and the term “regulation” is not used when referring to an administrative rule of an Idaho state agency. “**Rule**” is defined in Idaho Code and is the term used in official publications. State agencies do not conduct “regulation-making” and the rule writer, when referring to rules made by Idaho agencies, should only use the term “rules” even though “regulation” means the same thing. The term “regulations” should be used in reference to federal rules.

***CITATIONS TO OTHER RULES OR CODES***

When citing another chapter of rules (external citation), use the IDAPA, Title, and Chapter number; then include the name of the rules.

**Example:** IDAPA 13.04.01, “Rules Governing Licensing,”...

When citing a section, subsection, paragraph, or subparagraph from another chapter of rules, always use the IDAPA, Title, Chapter, then include the name of the rules, and section or subsection number. A period separates each number.

**Example:** IDAPA 13.04.01, “Rules Governing Licensing,” Section 100...

In most cases, you will not want to cite further than a section number. It is very common for subsection, paragraph, or subparagraph numbers to change often. Therefore, if you cite a subsection, paragraph, or subparagraph number, every time the subdivision number is amended, you will be responsible for amending the rule to change the cite.

When citing sections, subsections, paragraphs, or subparagraphs within the same chapter of rules (internal citation), it is not necessary to use the IDAPA, Title, and Chapter.

**Example:** Section 100  
Subsection 100.01  
Paragraph 100.01.a.  
Subparagraph 100.01.a.i.

Notice that a period is used when the citation ends in an alphabetic character (100.01.a. or 100.01.a.i.). This insures that the character will be separated from the text that follows. A period is not required if the citation ends with a number (100.01). Also, the terms “**Section,**” “**Subsection,**” “**Paragraph,**” and “**Subparagraph**” are always capitalized when used in a rule.

To further clarify an internal citation, the rule writer **may** use the phrase “of these rules”.

**Example:** Paragraph 100.01.a. of these rules

# LEGAL NOTICE - NEWSPAPER PUBLICATION

The Idaho Administrative Procedure Act requires the Administrative Rules Coordinator to publish a legal notice in certain daily and weekly newspapers throughout the state. This legal notice details information relating to all *proposed rulemakings* filed for publication in the Administrative Bulletin. The Coordinator is required to publish specific information about each proposed rulemaking and it must coincide with the publication of the proposed rule in the Bulletin:

Pursuant to Section 67-5221(2), Idaho Code:

- (a) *Coinciding with each issue of the bulletin, the coordinator shall cause the publication of an abbreviated notice with a brief description of the subject matter, showing any agency's intent to propose a new or changed rule. . .*

This section of the APA also specifies exactly what information must be included in the legal notice. Specifically, the notice must include the agency name and address, rule number (docket number), subject matter of the rule being promulgated, and the comment deadline. A statement that informs citizens where they can view the Administrative Bulletin must also be published in a prominent bold typeface.

The APA states that the legal notice must be published in “. . . *at least the accepting newspaper of largest paid circulation that is published in each county in Idaho or, if no newspaper is published in the county, then in an accepting newspaper of largest paid circulation published in Idaho and circulated in the county.*” The legal notice currently publishes in approximately forty (40) newspapers in the state and is circulated in all forty-four (44) counties.

The comment deadline for submitting written comments on the proposed rules is included in the legal notice, as well as notification of any scheduled public hearings. However, information concerning the **manner** in which the public submits written comments or requests public hearings, if none are scheduled, is not included in the newspaper legal notice. This information is contained in the proposed rulemaking notice that is published in the Bulletin and the reader is directed to go to the Administrative Bulletin for the specifics on submitting written comments or requesting hearings of the agency.

As stated above, the newspaper legal notice does indicate which rule dockets have public hearings scheduled. However, the legal notice **does not** provide any hearing information; again it simply guides the reader to the Bulletin publication where information regarding the public hearing is found. When a public hearing has been scheduled by the agency on a proposed rule, the hearing information (date, time, location, teleconferencing or videoconferencing availability, etc.) is included in the Notice of Rulemaking that is published in the Bulletin.

Some rules that are also governed by federal programs may require longer comment periods or even additional public notice beyond what is required by the Idaho Administrative Procedure Act. In those cases, agencies must make their own arrangements for additional notification and publication. The Rules Coordinator's office will assist the agency, if needed, in providing additional notification, particularly if additional newspaper publications are needed.

## RULE PROMULGATION: STEP-BY-STEP PROCEDURES

STEP	PROCEDURE
1.	Inception - decision to initiate rulemaking is made and agency prepares the rulemaking record.
2.	Agency prepares the Administrative Rules Request Form (ARRF) for submittal to the Division of Financial Management (DFM - Governor's Office). (This is an electronic-only form that must be completed and approved by DFM prior to initiating a rulemaking.)
3.	Both DFM and Governor's Policy Advisors review the ARRF before either approving or denying the rulemaking request. Agency must receive DFM approval of the ARRF before filing a rulemaking with the Rules Coordinator.)
4.	If agency determines negotiated rulemakings is feasible it prepares a 'Notice of Intent to Promulgate a Rule- Negotiated Rulemaking' and files it with the Coordinator.
5.	'Notice of Intent to Promulgate a Rule - Negotiated Rulemaking' is published in the Administrative Bulletin. Agency posts required information, including notices and schedules, on its website.
6.	Negotiated rulemaking meetings are held. All information received and considered by the agency, including a summary of any unresolved issues, relating to the formulation of the proposed rule must be made available to interested persons upon request or it may be posted on the agency website, if preferred.
7.	If amending an existing rule, the agency must request a working copy (Word document) of the rule from the Coordinator's office. This is forwarded to the agency electronically.
8.	Agency prepares Rulemaking Packet that includes: the tracking number from the ARRF, the Notice of Rulemaking - (Proposed, Temporary, or Temporary/Proposed) Rule; text of rule in legislative format; and a cost/benefit analysis for any fees or charges being imposed or changed, synopsis of substantive differences for amended incorporation by reference materials.
9.	Agency files the rulemaking packet electronically (E-mail) with the Coordinator's office. Coordinator checks the filed rulemaking for all necessary documents. The notice and text are reviewed for required information, formatting, numbering, and style, a rulemaking docket number is assigned, and the docket is prepared for publication.
10.	The notice, text of the proposed and/or temporary rule, and any applicable cost/benefit analyses or incorporation by reference synopses are forward to the Legislative Services Office (LSO) by the Coordinator. At the same time a proof copy of the rulemaking docket is sent to the agency contact for its review and approval prior to publication.
11.	After reviewing the proof copy of the docket, the agency contacts the Coordinator's office to approve the proof or discuss any needed corrections.
12.	The proposed, temporary, or temporary/proposed rulemaking is published in the Bulletin. Public comment period begins on the date the Bulletin publishes; the first Wednesday of each month. Agency must post a link to the proposed rulemaking notice on its website.
13.	Public hearings are held, if scheduled or requested. (Holding a public hearing is not required unless a hearing has been scheduled by the agency or the agency receives appropriate requests within the request period. If the agency is required to hold a public hearing, it must schedule a public hearing and publish a Notice of Public Hearing in the Bulletin prior to the hearing.)
14.	The time period for the public to submit written comments ends. This is a minimum 21-day period that begins on the Bulletin publication date; it may be extended if needed. If a public hearing is held after the written comment submission period has ended, the agency may extend the comment period to coincide with the date of the public hearing if desired.

<b>STEP</b>	<b>PROCEDURE</b>
15.	Agency reviews and gives consideration to all oral and written comments that are received. Agency may then make changes, if warranted, to the proposed rule based on the comments received. Changes must be a “logical outgrowth” of the proposed rule.
16.	Agency adopts the pending rule (pending legislative review) and prepares ‘Notice of Rulemaking - Adoption of Pending Rule’. No pending rule text is published with the Notice unless changes are made to the pending rule. Any text changes must be published in legislative format.
17.	Agency submits the ‘Notice of Rulemaking - Adoption of Pending Rule’ (and text) electronically.
18.	The Coordinator reviews the notice and any rule text. The pending rule docket is prepared for publication and a proof copy is then sent to the agency for review.
19.	Agency reviews the proof copy of the pending rule docket, makes any corrections or changes, and contacts the Coordinator’s office.
20.	Pending rule docket is published in the Bulletin. The pending rule remains unenforceable until it has been reviewed and approved by the Legislature and becomes a final rule.
21.	At the beginning of the session the Coordinator submits the Rules Review Books of all pending, pending fee, and *temporary rules to the germane committees of the Legislature for review.
22.	Legislative rules review takes place during the first weeks of the session and agency presenters testify before the legislative committees on their rules that have been submitted for review.
23.	Temporary and pending rules are approved or rejected by the germane committees of the Legislature that review them. Rejection of a pending rule, or any subpart of it, requires the adoption of a concurrent resolution (both Houses). If partially rejected, a ‘Notice of Final Rule’ is prepared by the Coordinator for publication in the Bulletin.
24.	Upon adjournment of the legislative session, the Coordinator publishes a ‘Notice of Final Legislative Action’ in the Bulletin. This notice publishes in first available Bulletin after the session ends and lists all pending, pending fee, temporary rulemakings by docket number, and also includes any final rules acted on by concurrent resolution, that were submitted for review. The notice also includes the effective dates of the rules, Bulletin volume numbers, and the number of any concurrent resolution affecting a rulemaking and the action taken.
25.	Pending rules become final and effective upon the adjournment of the legislative session (sine die), or on the date specified in the pending rule, or on the date of the concurrent resolution, if any, affecting the rule. Final rules are then codified and published in the Administrative Code.

*\*All temporary rules adopted prior to the beginning of the legislative session expire at the end of the next succeeding session unless they are extended by concurrent resolution and continued in effect until the end of the next succeeding legislative session.*

*A moratorium on proposed rulemaking begins at the end of November and remains in effect until the end of the legislative session (sine die). The moratorium affects proposed rulemakings only and does not affect negotiated, temporary, or pending rulemakings which may be filed for publication in the Bulletin.*



# CONTACT LIST

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FAX: (208) 334-2125

[www.legislature.idaho.gov/](http://www.legislature.idaho.gov/)

# USEFUL WEBSITES

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## **Office of the Administrative Rules Coordinator**

[adminrules.idaho.gov](http://adminrules.idaho.gov)

### **Rulemaking Notice Templates and Forms**

[http://adminrules.idaho.gov/rulemaking\\_templates/index.html](http://adminrules.idaho.gov/rulemaking_templates/index.html)

## **Division of Financial Management (DFM)**

[dfm.idaho.gov](http://dfm.idaho.gov)

### **DFM's Administrative Rules Request Form (ARRF)**

[https://dfm.idaho.gov/state\\_agencies/forms/forms.html](https://dfm.idaho.gov/state_agencies/forms/forms.html)

## **Idaho State Legislature**

[www.legislature.idaho.gov](http://www.legislature.idaho.gov)

### **Idaho Code**

<https://legislature.idaho.gov/statutesrules/idstat/>

### **Idaho Administrative Procedure Act**

Title 67, Chapter 52, Idaho Code

<https://legislature.idaho.gov/statutesrules/idstat/Title67/T67CH52/>

## **Links to Administrative Rules**

### **Idaho Rules of Administrative Procedure of the Attorney General - IDAPA 04.11.01**

<http://adminrules.idaho.gov/rules/current/04/index.html>