

State Government

Administrative Law

The fraying of consistency in administrative procedures continued in 2001, with numerous bills providing special approaches to temporary rulemaking authority. This proliferation of special approaches is a direct consequence of the increased time required to implement permanent rules as a result of the 1995 changes to the Administrative Procedures Act (APA). Examples of special approaches for temporary rules include S.L. 2001-418 (H 189), which in five of six paragraphs of substantive law provides rulemaking authority that expressly differs from the APA; S.L. 2001-361 (H 612), which provides an alternative approach to the final effectiveness of a rule; and S.L. 2001-113 (H 609), which alters the duration of a temporary rule. There are two lessons to be drawn from these developments. First, the APA is no longer meeting its objective of providing a consistent approach to agency rulemaking. Second, anyone interested in the procedures by which an agency makes rules must now check both the APA and any laws that provide underlying agency authority.

The state's Chief Information Officer received a more direct exemption from APA temporary rulemaking limitations in S.L. 2001-487 (H 338), the Technical Corrections Act. Section 21(g) of that bill sets up temporary rulemaking procedures analogous to, but outside of, the APA scheme, and Section 21(h) adds the Chief Information Officer to the agencies with contested case hearing powers (under Article 3A of the APA) outside the "normal" structure of the Office of Administrative Hearings.

On the other hand, the State Building Code was added to the list of items covered by the APA rulemaking provisions by S.L. 2001-141 (S 1036), and contested cases over the building code were added to the list of cases governed by Article 3A of the APA. At the same time, the bill exempts the Building Code Council from the normal publication requirements for rules under the APA, so the problem of increased inconsistency still applies.

Finally, the legislature acted in S.L. 2001-427 (H 232), the fee bill, to increase its oversight of agency setting and raising of fees. The law now requires an agency that wishes to establish or increase any fee to have either express authorization from the General Assembly for the amount of the fee or general authorization and to consult with the Joint Legislative Commission on Government Operations prior to putting the new fee into effect.

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