

# ADMINISTRATIVE RULES MANUAL

OFFICE OF ATTORNEY GENERAL



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The State and Local Government Division

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# UPDATES TO ADMINISTRATIVE AGENCIES PRACTICE ACT

The 66th Legislative Assembly passed four bills which affect [N.D.C.C. ch. 28-32](#), the Administrative Agencies Practice Act.

1. [House Bill No. 1275](#) amended [N.D.C.C. § 28-32-02](#), prohibiting an administrative agency from adopting a rule that prescribes a criminal penalty unless authorized by another chapter.
2. [House Bill No. 1521](#) amended [N.D.C.C. § 28-32-01](#), adding a definition of “Commission” to mean the North Dakota ethics commission which was established by [art. XIV of the North Dakota Constitution](#). This same bill also added the commission to numerous sections and subsections of [N.D.C.C. ch. 28-32](#) effectively placing the commission under the requirements of the Administrative Agencies Practice Act.
3. [Senate Bill No. 2148](#) provided for a legislative management study regarding [article XIV of the North Dakota Constitution](#), specifically including the implementation and requirements of the ethics commission.
4. [Senate Bill No. 2264](#) amended [N.D.C.C. § 28-32-01](#), exempting the Board of University and School Lands from the Administrative Agencies Practice Act with respect only to adjudicative proceeding requirements and procedures.

# GENERAL INFORMATION FOR ADMINISTRATIVE RULES

Administrative Rules fall under the Administrative Agencies Practice Act found at [N.D.C.C. ch. 28-32](#).

The Office of the Attorney General is required to review every proposed administrative rule – new and amended – and issue an opinion as to its legality before the final adoption of the rule or amended rule.

Agencies or boards are encouraged to contact their attorney before contacting Attorney General staff with administrative rules procedural questions.

Administrative agencies or boards must follow these procedures to get their rules or rule amendments adopted. These procedures are updated each biennium, at the conclusion of each legislative session, and are republished in each odd numbered year.

There are many aspects to the Administrative Agencies Practice Act not covered in this manual, including the powers and duties of the Administrative Rules Committee. Agencies or boards are encouraged to contact their attorney for matters falling outside the scope of actual rulemaking that may be covered under the Administrative Agencies Practice Act.

Any rules (new rules, amendments to rules, or repeal of rules) that are required **because of changes to statutes** must be filed with the legislative council within **nine months** of the effective date of the statutory change. [N.D.C.C. § 28-32-07](#)

# TIMELINES

The total time required for completion of administrative rules can be from **3 to 5 months**. The following timelines must be followed in order to get your administrative rules changes completed:

- |                 |  |
|-----------------|--|
| 20+ days        | <p>You must have at least 20 days between the last publication of the notice and the date of the hearing.<br/><a href="#">N.D.C.C. § 28-32-10(5)</a>.</p> <ul style="list-style-type: none"><li>• Note that a majority of the newspapers within the state are <b>weekly</b> publications and if publication is missed for whatever reason by a weekly newspaper, the delay is seven more days.</li></ul> |
| 10+ days        | <p>You must have at least 10 days <b>between</b> the hearing date and the last date you accept comments on the rules.<br/><a href="#">N.D.C.C. § 28-32-12</a></p>  |
| Agency approval | <p>You must allow time following the comment period for your agency or board head to meet, review the comments, and approve the final proposed rules before submission to the Attorney General. <b>The amount of time varies among agencies or boards.</b></p>   |
| 2 - 4 weeks     | <p>Allow a <b>minimum</b> of two weeks following submission of your final rules packet to the Attorney General's Office for issuance of the rules opinion</p>  |

## Effective Dates

N.D.C.C. §28-32-15

<b>For an effective Date of:</b>	<b>Materials must be filed with Legislative Council:</b>
January 1	August 2 - November 1
April 1	November 2 - February 1
July 1	February 2 - May 1
October 1	May 2 - August 1

# OUTLINE OF RULES PROCESS

Take the following steps to get your administrative rules adopted:

1. Prepare and finalize your amended or new administrative rules.
  - a. If emergency rules, get required approval from the Governor; and
  - b. If emergency rules, file [Full Notice](#), Rules, and Governor's declaration with the Legislative Council.
2. Schedule the hearing date.
3. Prepare the following documents as soon as possible after the hearing date is set:
  - a. [Full Notice of Intent to \[Adopt, Amend, Repeal\] Administrative Rules \(Full Notice\)](#);
  - b. [Abbreviated Notice of Intent to \[Adopt, Amend, Repeal\] Administrative Rules \(Abbreviated Notice\)](#);
  - c. [Regulatory Analysis](#);
  - d. [Takings Assessment](#);
  - e. [Small Entity Regulatory Analysis](#);
  - f. [Small Entity Economic Impact Statement](#);
  - g. [Fiscal Note](#).
4. Send the [Full Notice](#) and the agency's administrative rules/amendments to Legislative Council along with a [cover letter](#).
5. Mail/email a copy of the [Full Notice](#) and proposed rules to specific members of the legislative assembly, **if applicable**, AND to each person who has made a request to the agency for a copy of the [Full Notice](#).
6. Publish the [Abbreviated Notice](#).
7. Hold the [Public Hearing](#).
8. Prepare summary of all **oral** comments and responses to **all** comments.
9. Get final approval of the rules or amendments from your agency or board, **contingent upon the Attorney General's approval**.
10. Submit required materials to the [Attorney General's](#) Office; receive Attorney General Rules Opinion.
11. [File final documents with Legislative Council](#).
12. Attend scheduled Legislative Rules Committee meeting.

# SUBMITTING MATERIALS

## Submitting Materials to Legislative Council

During the administrative rules making process, materials are submitted to the Legislative Council **TWICE**.

1. The **first** submission to Legislative Council is done before the [Full Notice](#) is published or the hearing is held. [N.D.C.C. §28-32-10\(a\)](#) Submit:
  - a. [Full Notice](#);
  - b. Proposed rules; and,
  - c. [Letter to Legislative Council](#)
  
2. The **second** submission is after the Attorney General's Office has issued its rules opinion to the agency or board. Submit the following to [Legislative Council](#) for consideration by the Administrative Rules Committee after the Attorney General has issued its rules opinion:
  - a. A copy of each rule adopted by the agency or board;
  - b. A copy of each written comment;
  - c. A copy of the written summary of each oral comment;
  - d. A copy of each [Regulatory Analysis](#), [Small Entity Regulatory Analysis](#), [Small Entity Economic Impact Statement](#);
  - e. The Fiscal Statement; and,
  - f. The Attorney General's rules opinion.

### Emergency Rules

[Emergency Rules](#) also require the agency or board to submit the agency or board's finding of emergency rulemaking, and a brief statement of the agency or board's reasons for the finding to Legislative Council along with the emergency rules, above-listed materials, and the letter from the Governor approving emergency rulemaking. [N.D.C.C. § 28-32-03](#)

In addition, the agency or board must provide notice to the Chairman of the Administrative Rules Committee of the emergency status, the declared effective date, and the grounds for emergency status of the rules.

## Submitting Materials to Others

The agency or board must provide the [Regulatory Analysis](#) to anyone who requests a copy. [N.D.C.C. § 28-32-08\(4\)](#)

The agency or board must provide the [Full Notice](#) and proposed rules to each member of the legislative assembly who was a [sponsor](#) or co-sponsor of legislation, enacted during the most recent session, which is being implemented by the proposed rules. [N.D.C.C. §28-32-10\(2\)](#)

The agency or board must provide the [Full Notice](#) to anyone who requests a copy and may provide a copy of the [Full Notice](#) to any person who is likely to be an interested person. [N.D.C.C. § 28-32-10\(2\)](#)

## Submitting Materials to the Attorney General's Office

The following materials must be submitted to the [Attorney General's](#) Office **at least two to four weeks** before the Legislative Council's filing deadline for effective dates set out in the Timelines:

1. [Letter to Attorney General's Office](#);
2. Proposed agency or board rules;
3. [Notice of Intent to \[Adopt, Amend, Repeal\] Administrative Rules \(Full Notice\)](#);
4. [Abbreviated Notice of Intent to \[Adopt, Amend, Repeal\] Administrative Rules \(Abbreviated Notice\)](#); (This is a separate form; not a copy of the published notice from the newspaper.)
5. The Affidavit of Publication from North Dakota Newspaper Association (NDNA);
6. A copy of the statement from NDNA showing the date each notice was published in each county newspaper;
7. A copy of one of the actual published notices;
8. [Letter to Legislative Council](#) submitting the proposed rules and [full notice](#) before publication of the notice;
9. \*A copy of the letter to each legislator who [sponsored](#) or co-sponsored legislation during the most recent legislative session which is being implemented by the proposed rules;
10. \*A copy of the information about emergency rules provided to the chairman of the Administrative Rules Committee;
11. \*A copy of all written comments;
12. \*A written summary of all oral comments;
13. \*A written statement of the agency's consideration of the comments;
14. \*[Takings Assessment](#);
15. \*[Regulatory Analysis](#);
16. \*[Small Entity Economic Impact Statement](#) (SEEIC);

17. \*[Small Entity Regulatory Analysis](#) (SERA); and
18. \*[Fiscal Note](#).

- \* The [Letter to the Attorney General](#) has numerous variations, allowing the agency to tailor the letter to its specific requirements. Even if some of the above items do not apply to your rules, they MUST be mentioned in the Letter to the Attorney General.
- All materials may be submitted to the Attorney General's Office electronically at [NDAG@nd.gov](mailto:NDAG@nd.gov). We prefer electronic submissions.

# SCHEDULING THE HEARING

The total time required for completion of administrative rules can range from **three to five months**. It is very important that you schedule the hearing to allow enough time for completion of the entire process.

One of the first things to do when starting the administrative rules process is schedule the hearing. This is a matter of selecting a date far enough in advance to accommodate all the required timelines and still get your rules heard by the Administrative Rules Committee for a specific deadline, if you have one.

Any rules (new rules, amendments to rules, or repeal of rules) required **because of changes to statutes** must be filed with the [legislative council](#) within **nine months** of the effective date of the statutory change! [N.D.C.C. § 28-32-07](#)

After your rules (new/changes/repeals) are “finalized”, you need to set a time, date and place for the [public hearing](#). When setting the date, you need to allow enough time for:

- Publishing the [Notice](#): This must be done in every county newspaper in North Dakota. A large number of these newspapers are weekly, rather than daily, publications. A missed publication date may mean an extra week before the next publication. (Tip: Add an **extra week** or so to your proposed publication timeline.)
- There must be a minimum of 20 Days between the LAST date of publication and the date of the hearing.

# PUBLISHING THE NOTICE

The agency must request that the [abbreviated notice](#) be published at least once in each official county newspaper in the state. Publication must be done in a specific format. ([N.D.C.C. § 28-32-10\(1\)\(b\)](#))

The [Letter to NDNA](#) sets out the proper format for publication in each official newspaper. State law sets out specific information that must be contained in the [abbreviated notice](#).

Use of the North Dakota Newspaper Association (NDNA) is convenient but not required. If you do **not** use the NDNA, you must send publication requests to each of the state's official county newspapers.

When you have submitted your [abbreviated notice](#) for publication, you will likely be sent a proof for examination and approval. **Review the proof carefully!** You should also review the published notice as soon as it is published to make sure the information contained in the notice is accurate.

Make sure to include the "bill" from the NDNA, along with a copy of **one** of the notices that was actually published, in the packet sent to the [Attorney General](#)'s office.

- Remember: You must allow a minimum of 20 days between the date the last notice is published and the date of the hearing!

# REGULATORY ANALYSIS GUIDELINES

The full requirements and content of the [regulatory analysis](#) are found in [N.D.C.C. § 28-32-08](#)

Two factors determine if an agency or board **must** issue a [regulatory analysis](#). They are:

1. Within twenty days after the last date of the published notice of a proposed rule hearing, a written request for the analysis is filed by the governor or a member of the legislative assembly; or
2. The proposed rule is expected to have an impact on the regulated community in excess of \$50,000.

If either of these factors is met, a [regulatory analysis](#) **must** be completed.

## Required Information

The following specific information is required in the [regulatory analysis](#):

1. A description of the classes of persons who probably will be affected by the proposed rule, including who will bear the costs and who will benefit from the proposed rule;
2. A description of the probable impact, including economic impact, of the proposed rule;
3. The probable costs **to the agency** of the implementation and enforcement of the proposed rule **and any anticipated effect on state revenues**; and
4. A description of any alternative methods for achieving the purpose of the proposed rule that were considered by the agency and the reasons why the methods were rejected in favor of the proposed rule.

Each [regulatory analysis](#) must also include an explanation of the information and data assessment as well as how the amounts of impact were determined, to the extent practicable.

The agency or board shall provide a copy of the [regulatory analysis](#) to anyone who requests it.

Errors in a [regulatory analysis](#), including erroneous determinations concerning the impact of the proposed rule on the regulated community, are not grounds upon which the invalidity of a rule may be asserted or declared.

# TAKINGS ASSESSMENT GUIDELINES

The law governing the "[takings assessment](#)" is found in [N.D.C.C. § 28-32-09](#). An agency or board must complete a written assessment of the proposed rule that may limit the use of private real property.

In the analysis of the takings implications of a proposed rule, "taking" means the taking of private real property (as defined in [N.D.C.C. § 47-01-03](#)) by government action which requires compensation to the owner of that property by the fifth or fourteenth amendment to the Constitution of the United States or [section 16 of article I of the Constitution of North Dakota](#). "Regulatory taking" means a taking of real property through the exercise of the police and regulatory powers of the state which reduces the value of the real property by more than fifty percent. (However, the exercise of a police or regulatory power does not effect a taking if it substantially advances legitimate state interests, does not deny an owner economically viable use of the owner's land, or is in accordance with applicable state or federal law.)

## Requirements

The [takings assessment](#) must specifically:

1. Assess whether the proposed rule may result in a taking or regulatory taking.
2. Clearly and specifically identify the purpose of the proposed rule.
3. Explain why the proposed rule is necessary to achieve the agency or board's goals and why no alternative action is available that would achieve the same result while reducing the impact on private property owners.
4. Estimate the potential cost to the agency or board if a court determines that the proposed rule constitutes a taking.
5. Identify the source of payment within the agency's or board's budget for any compensation that may be ordered.
6. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

Any private landowner who is or may be affected by a rule that limits the use of the landowner's private real property may request, in writing, that the agency or board reconsider the application or need for the rule. Within 30 days of receiving the request, the agency or board shall consider the request and shall, in writing, inform the landowner whether the agency or board intends to keep the rule in place, modify application of the rule, or repeal the rule.

# SMALL ENTITY ECONOMIC IMPACT STATEMENT

A [small entity economic impact statement](#) examines the economic impact the proposed rule will have on small entities. Definitions, exemptions, and other detailed information may be found in [N.D.C.C. § 28-32-08.1](#).

All agencies or boards that are not specifically exempt from preparing a [small entity economic impact statement](#) are required to do so before the adoption of a proposed rule. In addition to the entities specifically listed in [N.D.C.C. § 28-32-08.1](#), agencies or boards that principally act as occupational or professional licensing agencies and boards are exempt from preparing a [small entity economic impact statement](#).

If an agency or board serves several distinct functions, it is only exempt from preparing a [small entity economic impact statement](#) **if the rules being proposed directly implement occupational or professional licensing statutes.**

A [small entity economic impact statement](#) does NOT apply to rules **required** by federal law. If the rules are **permissible** under federal law but not required, a [small entity economic impact statement](#) must be completed.

## Required Information

The [small entity economic impact statement](#) must contain the following information:

1. Which small entities may be subject to the proposed rule;
2. What administrative or other costs will be required for small entities to comply with the proposed rule;
3. What is the probable cost and benefit to private persons and consumers who may be affected by the proposed rule;
4. What is the probable effect of the proposed rule on state revenues; and
5. Whether there are any less intrusive or less costly ways of achieving the proposed rule's purpose.

The [small entity economic impact statement](#) must be provided to the administrative rules committee for its consideration, along with the proposed agency or board rules.

# SMALL ENTITY REGULATORY ANALYSIS

A [small entity regulatory analysis](#) examines how the proposed rule will affect the regulation of small entities. Definitions, exemptions, and other detailed information may be found in [N.D.C.C. § 28-32-08.1](#).

The [small entity regulatory analysis](#) is NOT the same as the [regulatory analysis](#) and is a separate requirement of the rulemaking process.

All agencies or boards that are not specifically exempt from preparing a [small entity regulatory analysis](#) are required to do so before the adoption of a proposed rule. In addition to the entities specifically listed in [N.D.C.C. § 28-32-08.1](#), agencies or boards that **principally act** as occupational or professional licensing agencies and boards are exempt from preparing a [small entity regulatory analysis](#).

If an agency or board serves several distinct functions, it is only [exempt](#) from preparing a [small entity regulatory analysis](#) **if the rules being proposed directly implement occupational or professional licensing statutes.**

A [small entity regulatory analysis](#) does not apply to rules **required** by federal law. If the rules are **permissible** under federal law but not required, a [small entity regulatory analysis](#) must be completed.

## Required Considerations

The [small entity regulatory analysis](#) must consider each of the possible ways the agency or board can enact rules that minimize the adverse impact on small entities:

1. Establishing less stringent compliance or reporting requirements;
2. Establishing less stringent schedules or deadlines for compliance or reporting requirements;
3. Consolidating or simplifying compliance or reporting requirements;
4. Establishing performance standards that replace design or operational standards required in the proposed rule; and,
5. Exempting small entities from all or part of the rule's requirements.

The [small entity regulatory analysis](#) must be provided to the administrative rules committee for its consideration, along with the proposed agency or board rules.

# EXEMPT ENTITIES

Some agencies or boards are exempt from preparing a [Small Entity Economic Impact Statement](#) or a [Small Entity Regulatory Analysis](#) through statute. Other agencies or boards are exempt because they act principally as an occupational or professional licensing authority. [N.D.C.C. § 28-32-08.1\(5\)](#)

Those agencies specified as exempt from these requirements in statute are:

- a. Council on the arts
- b. Beef commission
- c. Dairy promotion commission
- d. Dry bean council
- e. Highway patrolmen's retirement board
- f. Indian affairs commission
- g. Board for Indian scholarships
- h. State personnel board
- i. Potato council
- j. Board of public school education
- k. Real estate trust account committee
- l. Seed commission
- m. Soil conservation committee
- n. Oilseed council
- o. Wheat commission
- p. State seed arbitration board
- q. North Dakota lottery

This same exemption applies if an agency is adopting rules mandated by federal law.

# FISCAL NOTE

The requirements and content of the fiscal note are found in detail in [N.D.C.C. § 28-32-08.2](#).

When rules are presented to the administrative rules committee for consideration, the agency or board must provide a fiscal note or statement that the rules have no fiscal effect.

A fiscal note must reflect the effect of the rules changes on state revenues and expenditures, including any effect on funds controlled by the agency or board.

The fiscal note (or a statement concerning the fiscal note) must be provided to the [Attorney General](#)'s Office for review in the rules packet prior to the Attorney General's preparation of the rules opinion.

# LEGISLATION AFFECTING RULES

Sometimes the Legislature passes laws that require agencies or boards to create, amend, or repeal their administrative rules. When this happens, certain actions need to be taken within specific timeframes. ([N.D.C.C. §§ 28-32-03](#), [28-32-07](#), and [28-32-10](#).)

When legislative action requires administrative rule creation, amendment, or repeal:

1. The [Full Notice](#) must include the bill number and general subject matter of the legislation requiring the creation, amendment or repeal of the rule [N.D.C.C. § 28-32-10\(1\)\(a\)](#)
2. The [Letter to the Attorney General](#) must state that the rules are due to legislative action and include the bill number
3. ALL [sponsors](#) and co-sponsors of the bill requiring the creation, amendment or repeal of the rule must be provided the [Full Notice](#) and the proposed rule prior to the hearing [N.D.C.C. § 28-32-10\(2\)](#)
4. The created, amended or repealed rule must be adopted and filed with [Legislative Council](#) within **nine months of the effective date of the statutory change**. (This is the second submission to the [Legislative Council](#).) [N.D.C.C. § 28-32-07](#)

# EMERGENCY RULES

Emergency rules are governed by [N.D.C.C. § 28-32-03](#). Please review this statute.

All of the same requirements and procedures for creating administrative rules must be followed along with these additional requirements:

- An agency or board must first seek the approval of the Governor to obtain emergency rules. Once this approval is given, the proposed rules act as interim final rules\* as of the first date they are filed with the [Legislative Council](#) and the remaining process to adopt the rules can begin.
- Rules may only be declared as emergency rules if they meet one of the grounds listed in [N.D.C.C. § 28-32-03](#).
- In addition to the **initial** [Legislative Council](#) notification requirements, an agency or board must also notify the chairman of the Administrative Rules Committee that these are emergency rules, declare the effective date, and state the grounds for the emergency status. (The letter from the Governor approving the emergency rules is usually sent to Legislative Council to provide this information.)
- In addition to the normal required information, the [Full Notice](#) must identify the emergency status and declared effective date of the rules. [N.D.C.C. §28-32-10](#)
- When the agency is ready to send the final documents to Legislative Council, it must include the agency's finding of emergency rules, and a brief statement of the agency's or board's reasons for the finding along with the remaining documents for final approval by the Administrative Rules Committee.

After approval by the Administrative Rules Committee, the final rules are effective as of the declared effective date of the interim rules.

## Interim Final Rules

Unless adopted as final rules, interim final rules are ineffective 180 days after the declared effective date.

# HOLDING THE PUBLIC HEARING

The public hearing is held according to [N.D.C.C. ch. 28-32](#). The hearing does not require the use of a hearing officer from the Office of Administrative Hearings. The agency or board may, however, request a hearing officer if they wish.

A [Public Hearing Format](#) form is provided to assist agencies in holding the public hearing.

Agencies or boards must consider all comments received concerning the rules and make a written summary of each oral comment. A written record of the agency's or board's consideration of each comment – written and oral – must also be prepared. The written record must be included in the materials submitted to the [Attorney General's Office](#) as well as in the materials filed with the [Legislative Council](#). [N.D.C.C. § 28-32-15\(1\)](#).

# CONTRADICTIONARY RULEMAKING ACTIONS

In addition to the rule making process, there are various procedures set out in the North Dakota Century Code governing requests for reconsideration, objections, the Administrative Rules Committee's duties and powers, judicial reviews, appeals of an agency's rules, and other actions. It is advisable to contact your agency's attorney for detailed and specific instruction regarding these matters and the procedures used in the Administrative Agencies Practice Act.

Following is an overview of some of the actions that may be taken in connection with rulemaking.

## Reconsiderations

Any person substantially interested in the effect of a rule adopted by an administrative agency may petition such agency or board for reconsideration, amendment or repeal of the rule. Further details and procedures on this may be found in [N.D.C.C. § 28-32-16](#).

Any private landowner who is or may be affected by an existing rule limiting the use of their real property may request agency or board reconsideration of the application or need for the rule. This is governed by [N.D.C.C. § 28-32-09](#).

## Objections

The Administrative Rules Committee may object to all or a portion of a rule because it is deemed to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the agency. The procedures and laws governing this may be found in [N.D.C.C. § 28-32-17](#).

## Void rules

The Administrative Rules Committee may find that all or a portion of an agency's or board's rules rule void for a number of reasons. The reasons and possible remedies may be found in [N.D.C.C. § 28-32-18](#). The Administrative Rules Committee may also hold consideration of an agency's or board's rules for one subsequent meeting. If no representative of the agency appears before the Administrative Rules Committee when the rules are scheduled to be considered, the Administrative Rules Committee may void the rules.

## Judicial review

If a small entity is adversely affected by an agency or board's final rulemaking, it is entitled to seek judicial review of the agency's or board's compliance with the [small entity regulatory analysis](#) and the [small entity economic impact statement](#) requirements. Details of this may be found in [N.D.C.C. § 28-32-08.1\(4\)](#).

## **Appeals**

Any interested party who participated in the rulemaking process of an administrative agency may appeal the agency's or board's rulemaking action. Further information on this may be found in [N.D.C.C. § 28-32-42](#).

# CHECKLIST 1 - ADMINISTRATIVE RULES OVERVIEW

## Emergency Rulemaking:

[N.D.C.C. § 28-32-03](#)

- \_\_\_\_\_ Has the Governor approved the agency's or board's finding that emergency rulemaking is necessary?
- \_\_\_\_\_ Was the finding based on one or more of the four reasons found in [N.D.C.C. § 28-32-03\(2\)](#)?
- \_\_\_\_\_ Has notice of the emergency status, declared effective date, and grounds for emergency rulemaking been provided to the chairman of the Administrative Rules Committee?
- \_\_\_\_\_ Have all persons with a substantial interest in the emergency rules been provided notice under [N.D.C.C. § 28-32-03\(5\)](#)?

## Adoption of Rules by Reference:

[N.D.C.C. §§ 28-32-04, 28-32-05](#)

- \_\_\_\_\_ Has the agency or board adopted by reference any applicable existing permit or procedural rules?
- \_\_\_\_\_ Has the agency or board sought authorization from the appropriate United States agency to adopt, by reference, any applicable existing permit or procedural rules that may be adopted for use in a new or existing program when the United States agency is delegating or modifying a program?

## Contents of Full Notice:

[N.D.C.C. §§ 28-32-10\(1\)\(a\), 28-32-12](#)

- \_\_\_\_\_ Contains a short, specific explanation of both the proposed rule and the purpose of the proposed rule.
- \_\_\_\_\_ Contains a determination of whether the proposed rule is expected to have an impact on the regulated community in excess of \$50,000.
- \_\_\_\_\_ Identifies at least one location where the text of proposed rule may be reviewed.

- \_\_\_\_\_ Provides an address to which written comments may be sent.
- \_\_\_\_\_ Provides a telephone number and post office or e-mail address at which a copy of the proposed rule and [regulatory analysis](#), if issued, may be requested.
- \_\_\_\_\_ If the changes are substantive, states the time and place for oral hearing.
- \_\_\_\_\_ States the deadline for submission of written comments.
- \_\_\_\_\_ States the bill number and general subject matter of any legislation enacted during the most recent legislative session which is being implemented by the proposed rule.
- \_\_\_\_\_ Identifies the emergency status and declared effective date of any emergency rules.

**Filing of Notice and Rules:**

[N.D.C.C. §§ 28-32-03\(5\), 28-32-10](#)

- \_\_\_\_\_ File copy of the agency’s or board’s [full notice](#) with [Legislative Council](#).
- \_\_\_\_\_ File copy of proposed rules with [Legislative Council](#).
- \_\_\_\_\_ Mail a copy of the [full notice](#) and proposed rules to each person who has made a timely request for a mailed copy of the [notice](#) and proposed rules.
- \_\_\_\_\_ Notified all persons with a substantial interest in emergency rules as identified in N.D.C.C. § 28-32-03(5).
- \_\_\_\_\_ Mail or e-mail a copy of the [full notice](#) and proposed rules to each [sponsor](#) or co-sponsor of the legislation being implemented if the proposed rules are implementing legislation that was enacted during the most recent legislative session.

**Publication of Abbreviated Notice:**

[N.D.C.C. § 28-32-10\(1\)\(a\)\(b\)](#)

- \_\_\_\_\_ Identifies post office or electronic address or telephone number to use to obtain a copy of the proposed rules.

- \_\_\_\_\_ Identifies the address to use and the deadline to submit written comments.
- \_\_\_\_\_ Identifies the location, date, and time of the [public hearing](#).
- \_\_\_\_\_ Identifies the emergency status and declared effective date of any emergency rules.
- \_\_\_\_\_ Publish [abbreviated notice](#) at least once in each official county newspaper in North Dakota.
- \_\_\_\_\_ Publication in display-type format with a minimum width of one column of approximately two inches [5.08 centimeters] and between three inches [7.62 centimeters] to four inches [10.16 centimeters] in depth with a headline describing the general topic of the proposed rules.

**Timing of Public Hearing:**

[N.D.C.C. § 28-32-10\(5\)](#)

- \_\_\_\_\_ Have at least 20 days elapsed between the latest date of publication and the date of the hearing? (The date of publication is counted, but not the date of the hearing.)

**Regulatory Analysis**

N.D.C.C. § 28-32-08; also see [template](#)

- \_\_\_\_\_ Has the Governor or a member of the Legislative Assembly filed a written request for a [regulatory analysis](#)?
- \_\_\_\_\_ Is the proposed rule expected to have an impact on the regulated community in excess of \$50,000?
- \_\_\_\_\_ If a [regulatory analysis](#) is required, was it available on or before the date of public notice?
- \_\_\_\_\_ Has a copy of the [regulatory analysis](#) been mailed or delivered to any person who requested a copy?

**Takings Assessment for Rules Limiting Use of Real Property:**

[N.D.C.C. § 28-32-09](#)

- \_\_\_\_\_ Has the agency or board assessed the likelihood that the rule will result in a taking; identified the purpose of proposed rule; explained why proposed rule is necessary and why no alternative is available; estimated the cost to the government if a court determines the rule is

a taking; identified the source of such payment within the agency's or board's budget; and certified that the benefits exceed the compensation costs? (A "taking" is defined in the statute.)

**Small Entity Economic Impact Statement:**

[N.D.C.C. § 28-32-08.1](#)

- \_\_\_\_\_ Is the proposed rule mandated by federal law?
- \_\_\_\_\_ If so, did the agency or board prepare an economic impact statement?
- \_\_\_\_\_ If not, is the agency exempt from the requirement of a [small entity economic impact statement](#)?
- \_\_\_\_\_ If not, could the proposed rule have an adverse economic impact on small entities?

**Small Entity Regulatory Analysis:**

[N.D.C.C. § 28-32-08.1](#)

- \_\_\_\_\_ Is the proposed rule mandated by federal law?
- \_\_\_\_\_ If not, is the agency or board exempt from the requirement of a [small entity regulatory analysis](#)?
- \_\_\_\_\_ If not, has the agency or board prepared a [small entity regulatory analysis](#)?

**Fiscal Note:**

[N.D.C.C. § 28-32-08.2](#)

- \_\_\_\_\_ Has the agency or board provided a fiscal note reflecting the effect of the rule changes on state revenue and expenditures, including any effect on agency funds, or a statement that the rules have no fiscal effect?

**Public Comment Period:**

[N.D.C.C. §§ 28-32-11, 28-32-12](#)

- \_\_\_\_\_ Has the comment period been open at least 10 days since the conclusion of the rulemaking hearings?

\_\_\_\_\_ If no hearing was required, has the comment period been open at least 20 days since the latest date of publication?

**Written Record:**

[N.D.C.C. § 28-32-15](#)

\_\_\_\_\_ Has the agency or board made a written summary of each oral comment on the rule?

\_\_\_\_\_ Has the agency or board made a written record of its consideration of all written and oral submissions contained in the rulemaking record?

Submitting Materials to [Attorney General](#) for Rules Opinion: (See Checklist 2)

# CHECKLIST 2 - SUBMISSION TO ATTORNEY GENERAL'S OFFICE

Submit the following documents with the request for the Attorney General's Opinion as to the legality of a proposed rule:

[N.D.C.C. § 28-32-14](#)

- \_\_\_\_\_ [Letter to the Attorney General](#) requesting the opinion.
- \_\_\_\_\_ A copy of the final proposed rules.
- \_\_\_\_\_ A copy of the original proposed rules if changes were made after the [notice](#) was sent to Legislative Council **with** a notation regarding what was changed and why.
- \_\_\_\_\_ A copy of the information concerning emergency rulemaking that was provided to the chairman of the Administrative Rules Committee under [N.D.C.C. § 28-32-03\(5\)](#), **OR** a statement that these are not emergency rules.
- \_\_\_\_\_ A copy of the [full notice](#) of intent to adopt, amend, or repeal rules.
- \_\_\_\_\_ A copy of the [abbreviated notice](#) of intent to adopt, amend, or repeal rules.
- \_\_\_\_\_ A copy of the letter or affidavit stating where and when the notice was published.
- \_\_\_\_\_ A copy of the NDNA pages showing publication dates in all official county newspapers.
- \_\_\_\_\_ A copy of one of the actual notices as published.
- \_\_\_\_\_ A copy of the [initial letter to Legislative Council](#) sending the [full notice](#) and proposed rules to the Legislative Council.
- \_\_\_\_\_ A statement whether the proposed rules are implementing legislation enacted during the most recent legislative session.
- \_\_\_\_\_ A copy of the letter or e-mail providing a copy of the [full notice](#) and proposed rules to each [sponsor](#) or co-sponsor of the legislation.
- \_\_\_\_\_ A copy of all written comments.

- \_\_\_\_\_ A copy of the written summary of all oral comments **OR** a statement that there were no comments.
- \_\_\_\_\_ A copy of written record of agency's consideration of all comments.
- \_\_\_\_\_ A copy of the [regulatory analysis](#) and the date on which it was available **OR** a statement why a [regulatory analysis](#) was not required.
- \_\_\_\_\_ A copy of the [takings assessment](#) **OR** a statement why a [takings assessment](#) was not required.
- \_\_\_\_\_ A copy of the [small entity regulatory analysis](#) **OR** a statement why a [small entity regulatory analysis](#) was not required.
- \_\_\_\_\_ A copy of the [small entity economic impact statement](#) **OR** a statement why a [small entity economic impact statement](#) was not required.
- \_\_\_\_\_ A copy of the fiscal note **OR** a statement that the rules have no fiscal effect.

All materials submitted to the Attorney General's Office, including the cover [letter to the Attorney General](#), may be sent electronically by email to [NDAG@nd.gov](mailto:NDAG@nd.gov). We prefer electronic submissions.

# TEMPLATES

- [Full Notice of Intent to Adopt, Amend, or Repeal Administrative Rules](#)
- [Abbreviated Notice of Intent to Adopt, Amend, or Repeal Administrative Rules](#)
- [Initial Letter to Legislative Council](#)
- [Letter to North Dakota Newspaper Association](#)
- [Regulatory Analysis](#)
- [Takings Assessment](#)
- [Small Entity Economic Impact Statement](#)
- [Small Entity Regulatory Analysis](#)
- [Public Hearing Format](#)
- [Letter to Attorney General](#)
- [Final \(Filing\) Letter to Legislative Council](#)
- [Letter to Legislative Sponsor\(s\)](#)

## Full Notice

### FULL NOTICE OF INTENT TO [ADOPT, AMEND, REPEAL] ADMINISTRATIVE RULES

TAKE NOTICE that the [agency or board name] will hold a public hearing to address proposed [new, amendments to, repeal of] N.D. Admin. Code [title, article, chapter, section] at [time] on [day], [date], at [address where hearing(s) will be held]. The purpose of the proposed [rule, amendment, appeal] is [state purpose of proposed rule; e.g., implement statutes, comply with federal law, etc.] The proposed [rule, amendment, repeal] address(es) [specific explanation of each subject of proposed rules].

The proposed [rule, amendment, repeal] [is, is not] expected to have an impact on the regulated community in excess of \$50,000.

**OPTIONAL STATEMENT** [The proposed rulemaking implements bill number (insert bill number), enacted during the most recent legislative session, concerning (insert substance of bill as it pertains to rules).]

**(OPTIONAL STATEMENT** [These rules are emergency rules with an effective date of (date rule effective).])

The proposed rules may be reviewed at the office of [name of agency or board and address]. A copy of the proposed rules and/or a regulatory analysis may be requested by writing the above address, [e-mailing (enter email address IF available option)] or calling [telephone number]. Written or oral comments on the proposed rules sent to the above address or telephone number and received by [date comment period closes (no less than 10 days after public hearing)] will be fully considered.

If you plan to attend the public hearing and will need special facilities or assistance relating to a disability, please contact the [Agency] at the above telephone number or address at least [the amount of prior notice required] prior to the public hearing.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

[Agency Head or Representative]

(B)

## Abbreviated Notice

ABBREVIATED NOTICE OF INTENT TO [ADOPT, AMEND, REPEAL] ADMINISTRATIVE RULES RELATING TO [SHORT DESCRIPTION OF PROPOSED RULES]

TAKE NOTICE that the [agency or board name] will hold a public hearing to address proposed changes to the N.D. Admin. Code at [time] on [day], [date], at [address where hearing(s) will be held].

**(OPTIONAL STATEMENT [These rules are emergency rules with an effective dated of [date rule effective.]])**

A copy of the proposed rules may be obtained by writing the [agency/board name and address] or calling [telephone number]. Also, written comments may be submitted to [address] until [date comment period closes (no less than 10 days after hearing)]. If you plan to attend the public hearing and will need special facilities or assistance relating to a disability, please contact the [agency/board name] at the above telephone number or address at least [the number of days prior notice required] prior to the public hearing.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

**[Agency Head or Representative]**

# Initial Letter to ND Legislative Council

[DATE]

Ms. Vonette Richter  
Assistant Code Revisor  
North Dakota Legislative Council  
State Capitol  
600 East Boulevard, 2nd Floor  
Bismarck, ND 58505-0360

Dear Ms. Richter:

The Notice of Intent to [**Adopt, Amend, Repeal**] Administrative Rules and a copy of the proposed rules are enclosed as required by N.D.C.C. § 28-32-10(1).

Sincerely,

[**Individual and Board/Agency Name**]

Enclosures

# Letter to North Dakota Newspaper Association

[DATE]

North Dakota Newspaper Association  
1435 Interstate Loop  
Bismarck, ND 58503-0567

Please send the enclosed public notice to each official county newspaper for publication one time as soon as possible. Note that the publication of the notice must be in a display-type format with a minimum width of one column of approximately two inches (5.08 centimeters) and a depth of between three inches (7.62 centimeters) and four inches (10.16 centimeters). Please also note that the notice must include a headline describing the general topic of the proposed rules.

Please send the billings along with the Affidavits of Publication to **[agency/board name and address]**.

Thank you for your assistance.

Sincerely,

**[Individual and Agency/Board name]**

Enclosure

[If the agency does not use the NDNA, then publication requests such as this must be sent by the agency to each of the state's official county newspapers]

(E)

# Regulatory Analysis

1. Who are the classes of persons who will probably be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule? **[Insert answer.]**
2. What is the probable impact, including economic impact, of the proposed rule? **[Insert answer.]**
3. What is the probable costs to the agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues? **[Insert answer.]**
4. What were the alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency/board and why was each method rejected in favor of the proposed rule? **[Insert answer.]**
5. Please explain the information and data assessment as well as how the amounts of impact were determined, to the extent practicable. **[Insert answer.]**

\*\*\*\*\*

The following is informational and not a part of the template:

The analysis under this subdivision must be available on or before the first date of public notice as provided for in [N.D.C.C. § 28-32-10](#).

The agency shall mail or deliver a copy of the [regulatory analysis](#) to any person who requests a copy of the [regulatory analysis](#). The agency may charge a fee for a copy of the [regulatory analysis](#) as allowed under [N.D.C.C. § 44-04-18](#).

If required, the preparation and issuance of a [regulatory analysis](#) is a mandatory duty of the agency proposing a rule. Errors in a [regulatory analysis](#), including erroneous determinations concerning the impact of the proposed rule on the regulated community, are not a ground upon which the invalidity of a rule may be asserted or declared.

## Takings Assessment

1. Assess the likelihood that the proposed rule may result in a taking or regulatory taking. **[Insert answer.]**
2. Clearly and specifically identify the purpose of the proposed rule. **[Insert answer.]**
3. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners. **[Insert answer.]**
4. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking. **[Insert answer.]**
5. Identify the source of payment within the agency's budget for any compensation that may be ordered. **[Insert answer.]**
6. Certify that the benefits of the proposed rule exceed the estimated compensation costs. **[Insert answer.]**

## Small Entity Economic Impact Statement

1. Which small entities are subject to the proposed rule? **[Insert answer.]**
2. What are the administrative and other costs required for compliance with the proposed rule? **[Insert answer.]**
3. What is the probably cost and benefit to private persons and consumers who are affected by the proposed rule? **[Insert answer.]**
4. What is the probable effect of the proposed rule on state revenues? **[Insert answer.]**
5. Is there any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule? **[Insert answer.]**

## Small Entity Regulatory Analysis

1. Was establishment of less stringent compliance or reporting requirements for small entities considered? **[Insert answer.]** To what result? **[Insert answer.]**
2. Was establishment of less stringent schedules or deadlines for compliance or reporting requirements considered for small entities? **[Insert answer.]** To what result? **[Insert answer.]**
3. Was consolidation or simplification of compliance or reporting requirements for small entities considered? **[Insert answer.]** To what result? **[Insert answer.]**
4. Were performance standards established for small entities for replacement design or operational standards required in the proposed rule? **[Insert answer.]** To what result? **[Insert answer.]**
5. Was exemption of small entities from all or any part of the requirements in the proposed rule considered? **[Insert answer.]** To what result? **[Insert answer.]**

## **Fiscal Note/Statement**

When an agency presents rules for administrative rules committee consideration, the agency shall provide a fiscal note or a statement in its testimony that the rules have no fiscal effect.

A fiscal note must reflect the effect of the rules changes on state revenues and expenditures, including any effect on funds controlled by the agency.

The fiscal note, or a statement concerning the fiscal impact, must be provided to the Attorney General's Office for review in the rules packet prior to issuance of the rules opinion.

As there are numerous different aspects which can be incorporated into a fiscal note, there is no "form" or template. The fiscal note should be prepared in a fashion similar to a fiscal note submitted with a bill to the Legislature.

## Public Hearing - Format

(Opening)

I am \_\_\_\_\_ and I will be acting as hearing officer for this public hearing.

It is now \_\_\_\_\_ (time) on \_\_\_\_\_ (date), in the \_\_\_\_\_ (place) so at this time, I open this hearing.

This public hearing has been called for the purpose of allowing all interested individuals an opportunity to submit information concerning.

Proposed [new, amendments to, repeal of] N.D. Admin. Code  
Article \_\_\_\_\_ (number) \_\_\_\_\_ (title)  
Section \_\_\_\_\_ (number) \_\_\_\_\_ (title)

Information gathered at this hearing will be transmitted to the \_\_\_\_\_ for its deliberation and final decision. The \_\_\_\_\_ will not be responding to comments at this hearing. The comments received at this hearing will be considered with any written comments that are received and the \_\_\_\_\_ will present its consideration of all of the comments in writing. You may request a copy of the written response and one will be provided to you.

This hearing is being taped and we ask everyone to use the podium so that the tape will be of good quality for transcribing purposes. Please identify yourself for the record before you speak.

Everyone present will be given an opportunity to speak. If you have a prepared statement, a written copy of your statement is appreciated and will be helpful. A registration sheet has been placed next to the podium. I ask that everyone present please sign this sheet before they leave.

At this point, I open the hearing for comments.

(Closing)

Thank you all for coming. All of the information gathered at this hearing will be provided to the \_\_\_\_\_, which is the decision-making body. The record will be held open for written comment until \_\_\_\_\_ (date).

At this point, I will close the hearing on:

Proposed [new, amendments to or repeal of] N.D. Admin. Code  
Article \_\_\_\_\_ (number) \_\_\_\_\_ (title)  
Section \_\_\_\_\_ (number) \_\_\_\_\_ (title)

# Letter to Attorney General

[DATE]

The Honorable Wayne Stenehjem  
Attorney General  
State Capitol  
600 E Boulevard Ave Dep't 125  
Bismarck, ND 58505-0040

Dear Attorney General Stenehjem:

Enclosed please find the proposed [**new, amendments to, repeal of**] N.D. Admin. Code [**title, article, chapter, section**] by [**Agency/Board name**]. The proposed rules have been approved for adoption by [**Agency/Board name**].

In accordance with N.D.C.C. § 28-32-14, we request your examination of these rules as to their legality so they may be considered for formal adoption and publication in the North Dakota Administrative Code.

Enclosed for purposes of review are copies of or, statements regarding, the following:

1. Full Notice of Intent
2. Abbreviated Notice of Intent
3. [**Letter/e-mail**] to Legislative Council submitting the Notice and Rules for publication on their website
4. Proof of Publication
  - a. Letter/Affidavit confirming publication
  - b. A copy of the entire "billing"/publication list
  - c. A copy of ONE of the Abbreviated Notices as it was actually published
5. [**Written summary of all oral comments**] or [**No oral comments were received on these rules**]
6. [**All written comments**] or [**No written comments were received on these rules**]
7. [**Board/Agency's written consideration of each comment**] or [**No oral or written comments were received on these rules**]

(L)

8. **[Takings Assessment] or [No takings assessment was required because these rules do not limit the uses of real property]**
9. **[Regulatory Analysis] or [No regulatory analysis was required as the proposed rules are not expected to have an impact on the regulated community in excess of \$50,000, and neither the Governor nor any member of the Legislative Assembly requested a regulatory analysis]**
10. **[Small Entity Regulatory Analysis] or [No small entity regulatory analysis was required because (insert one of the following statements: This agency is exempt from the requirement to prepare a Small Entity Regulatory Analysis or The proposed rules are mandated by federal law or None of the proposed rules will have an adverse economic impact on small entities)].**
11. **[Small Entity Economic Impact Statement] or [No small entity economic impact statement was required because (insert one of the following statements: The agency is exempt from the requirement to prepare a Small Entity Economic Impact Statement or The proposed rules are mandated by federal law)].**
12. **[Fiscal Note] or [A fiscal note was not required because these rules have no fiscal effect].**
13. **[Letter/e-mail to all sponsoring Legislators. These rules implement bill number (insert for BILL NUMBER) from the most recent legislative session and the sponsors were each provided a copy of the full notice of intent and the proposed rules.] or [These rules do not implement legislation from the most recent legislative session].**
14. **[Letter from Governor granting approval for emergency rules and letter/e-mail providing the Notice to the chairman of the administrative rules committee, declaring the effective date of the rules and the grounds for emergency status of the rules.] or [These are not emergency rules].**

Sincerely,

**[Agency/Board representative, title]**

Enclosures

(M)

# Final (Filing) Letter to Legislative Council

[DATE]

Ms. Vonette Richter  
Assistant Code Revisor  
Legislative Council  
600 East Boulevard, 2nd Floor  
Bismarck, ND 58505-0360

Dear Ms. Richter:

Enclosed please find the following:

1. A copy of the **[new, amendments to, repeal of]** North Dakota Administrative Code **[title, article, chapter]** regarding **[topics of rules]**;
2. A copy of each written comment and a written summary of each oral comment on the rules **[or note that no comments were received]**;
3. A copy of the Regulatory Analysis **[or note that one was not issued]**;
4. A copy of the Small Entity Regulatory Analysis **[or note that one was not prepared and why]**;
5. A copy of the Small Entity Economic Impact Statement **[or a note that one was not prepared and why]**;
6. A copy of the fiscal note **[or note that the rules have no fiscal effect]**; and,
7. A copy of the letter dated **[date of Attorney General letter approving rules]** from the Attorney General approved the proposed rules as to their legality.

**[If applicable also include: Also included is the Letter from Governor (insert current Governor's name) declaring these amendments to be emergency rules.]**

On **[date]** the **[agency]** adopted the rules as approved, and is now submitting the rules for publication in the North Dakota Administrative Code.

Thank you for your attention to this matter.

Sincerely,

**[Name, Agency/Board]**

Enclosures

# Letter to Legislative Sponsors

[DATE]

[Sponsoring Legislator(s) name(s)  
Address(es)]

Re: Rulemaking driven by [H.B. XXXX or S.B. XXXX]

Dear [Name of legislators]:

I am writing on behalf of the [agency/board name] to thank you for introducing [number of house or senate bill] during the recent legislative session.

Enclosed is a copy of the revised rules our [board/agency] is proposing and a copy of the Full Notice indicating the date, time, and place for the hearing on these proposed rule changes.

Please do not hesitate to contact me should you have any further input or questions.

Sincerely,

[Name, Title, Agency/Board]

Enclosures