TO: Members of the Rules Task Force

FROM: George M. McCormick, Senate Counsel (296-6200)

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SUBJ: Legislative Oversight of Agency Rules

Minnesota

Before its abolition in 1996, the joint Legislative Commission to Review Administrative Rules (LCRAR) was the body that played the main role in Minnesota's system of legislative oversight of rulemaking. Since 1996, most of its powers have been exercised by the Legislative Coordinating Commission (LCC), which may appoint a joint subcommittee to carry out that function. (An exception is the LCRAR's power to suspend rules temporarily, which was repealed in 1997. *See* **Non-statutory Veto or Suspension**, *infra*.)

Current law authorizes the LCC to require an agency to hold a hearing on commission recommendations to improve the agency's rules and to object to a rule. The latter power is based on the 1981 Model State Administrative Procedure Act. A commission objection does not invalidate a rule, but it switches the burden of proof to the agency in any subsequent legal challenge of the validity of the rule. This year, the power to object to a rule was extended to the House and Senate Governmental Operations committees. In addition, if the chief administrative law judge finds that an agency has not established the need and reasonableness of a proposed rule, and the agency decides not to accept the chief judge's recommendations for correcting defects in the proposed rule, the agency must submit the proposed rule to the LCC for its nonbinding advice and comment.

Other States

According to a 1996-1997 survey by the Council of State Governments, 27 states use legislative committees to review proposed rules, and 17 use legislative committees to review existing rules. Surveys by Professor Arthur Bonfield of the University of Iowa, in preparation for preparation and updating of his book, *State Administrative Rule Making*, indicate that at least 15 use joint committees or commissions for this purpose. In other states, standing committees of each house are used. In still others, standing committees review agency rules when the legislature is in session, and joint committees do the work when the legislature is not in session. In a few states, legislative staff members are charged with reviewing agency rules and making recommendations to committees or the full legislature. Examples are a legislative research council (South Dakota), the attorney for the legislative counsel (Wisconsin), and a legislative counsel (Oregon and Nevada). In most of these states, committees are free to select which rules they wish to review.

In at least two states, there is additional legislative involvement in the rulemaking process. In Connecticut, the Legislation Regulation Review Committee meets monthly throughout the year. State law provides that an agency rule may not take effect until it is reviewed by that committee.

In Colorado, the state APA provides that any agency rule adopted between November 1 of one year and November 1 of the subsequent year expires the next May 15, unless it is extended by law. Each year, the ten-member joint Committee on Legal Services introduces a bill containing its recommendations on which rules should be extended and which should automatically expire. Before the bill is drafted, the committee holds hearings during the interim to consider issues raised by the legislative legal services staff, which reviews all adopted (but not proposed) rules. The committee has three grounds for voting that a rule should expire: the rule is in conflict with a state or federal law or constitutional provision; the agency lacked statutory authority to adopt the rule; or the agency exceeded its statutory authority in adopting the rule.

Statutory Veto or Suspension

Agencies are authorized to adopt rules when a legislative body gives them that power by statute. It is an obvious corollary, then, that a legislature may withdraw or modify that authority by again enacting a statute, which is then subject to the veto of the governor or the overriding of a veto. That principle is embodied in the Model State APA. And, it was the basis for a 1983 U.S. Supreme Court decision overturning a law enabling one house of the Congress, by resolution, to overturn executive agency decisions made under authority delegated by law. *Chadha v. Immigration and Naturalization Service*, 462 U.S. 919 (1983). After a thorough review of the Constitution's clauses on enactment of legislation by both houses and presentment to the president for a signature or veto, the court's majority concluded that the constitutional doctrine of separation of powers demands that what was done by statute may be undone only by statute.

Reflecting the idea that legislative action may modify or undo earlier legislative action, Minnesota's APA specifically provides that, if a law authorizing rules is repealed, all rules adopted under that authority are also repealed. Increasingly, too, the Minnesota Legislature repeals rules by statute.

Non-statutory Veto or Suspension

The 1996-1997 survey by the Council of State Governments indicates that in 13 states the legislature may bar the adoption of a rule or veto a rule. In 12 states, legislative committees have that power. To the extent that veto or suspension of a rule requires statutory action, there is no problem. A few states, however, permit their legislatures to void rules by nonstatutory means, and some grant that authority to an administrative rules committee acting alone. Without some special provision in a state constitution, or in a statutory grant of rulemaking authority, this kind of legislative power would seem contrary to the principle embodied in the Model State APA and affirmed in *Chadha*. That probability is one of the factors that led to the repeal of the power of the LCRAR and, later, the LCC, to suspend rules; the separation of powers language in the Minnesota Constitution is identical to the language in the U.S. Constitution that prompted the *Chadha* court to reach its conclusion.

As noted above, a different result may follow where a state's constitution has a different provision, or where a statutory grant of rulemaking authority requires some legislative intervention. The Colorado and Connecticut APA provisions described in **Other States**, *supra*, are examples of the latter. An example of the former is the Wisconsin Constitution, which does not establish the clear separation of powers that is prescribed in the Minnesota and federal constitutions. That led the Wisconsin Supreme Court to uphold a law empowering a legislative committee to suspend a rule adopted by an agency under statutory authority. *Martinez v. Department of Industry, Labor, and Human Services*, 478 N.W.2d 582 (Wis. 1992). "This state's separation of powers is implicitly created by the constitution," the court noted. 478 N.W.2d at 585. "Thus the separation of powers doctrine allows the sharing of powers and is not inherently violated in instances when one branch exercises powers normally associated with another branch." *Id*. For that reason, "we give little weight to precedents from states that apply 'express' separation of powers provisions." 478 N.W.2d at 587. Conversely, the Wisconsin court's decision should have no prededential value in states, like Minnesota, whose constitutions contain express separation of powers clauses like that of the U.S. Constitution.

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