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## **Rulemaking Update**

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# Rulemaking Update

## The Courts and the Legislature Continue to Provide Interesting Issues

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## Introduction

Rulemaking issues and challenges to rules have been with us well before adoption of the APA (then APTRA) in 1975. While there were some specific statutes imposing some specific requirements pre-APTRA, the focus of this paper is on APA initial requirements and thereafter.

The legislature has over time imposed additional requirements on agencies when proposing and adopting agency rules.

APA 2001.038 allows declaratory judgment actions to challenge the validity or applicability of a rule if it is alleged the rule or its threatened application interferes or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff. Legislative action has given challengers additional bases for challenges.

## What Is A Rule?

The definition of “Rule” in 2001.003(6) of the APA is open to interpretation and argument.

“Rule”:

- (A) means a state agency statement of general applicability that:
  - (i) implements, interprets, or prescribes law or policy; or
  - (ii) describes the procedure or practice requirements of a state agency;
- (B) includes the amendment or repeal of a prior rule; and
- (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

Whether a particular agency statement is a rule has been addressed in several cases.

In *Teladoc, Inc. v. Texas Medical Board*, 453 SW 3d 606, Tex. App. – Austin 2014, pet. denied) the agency sent a letter to the primary statewide association representing the population regulated by the agency warning that certain practices violated agency rules and would lead to disciplinary action. The letter was held to be a rule within 2001.003. The definition of “rule” includes “the amendment or repeal of a prior rule.” See also *El Paso Hosp. Dist. v. Texas Health*

and Human Services Comm'n., 247 SW 3d 709 (Tex. 2008) and *Combs v. Entertainment Publ'ns, Inc.*, 292 SW 3d 712 (Tex. App. – Austin 2009 no pet.).

Several articles discuss agency actions held to be, or not be, rules as defined in the APA. UT Advanced Texas Administrative Law Seminars of 2011 (Tab 4), 2013 (Tab 8), 2015 (Tab 23) and 2016 (Tab 10). The question is discussed thoroughly in *LMV-AL-Ventures, LLC v. Tex. Dept of Aging & Disability Servs.*, 520 SW3d 113 (Tex. App. – Austin 2017, pet. denied), *infra*.

### Petition for Adoption of Rules

Section 2001.021 allows an “interested person” to request the adoption of a rule. The agency is, by rule, to prescribe the form for the petition and the procedure for its submission, consideration, and disposition. Within 60 days of submission, the agency shall:

- (1) deny the petition in writing, stating the reasons for the denial; or
- (2) initiate a rulemaking proceeding.

What if the agency denies your petition? *Texas Commission on Environmental Quality v. Bonsen-Fain*, 438 SW 3d 887 (Tex. App. – Austin 2014, no pet.) held there was no right to judicial review of the denial. A different approach was tried in *Devvy Kidd, et al v. P.U.C. et al*, No. 03-14-00661 (Tex. App. – Austin 2015), in which the appellants requested, to no avail, a public hearing at which they could present arguments and evidence to justify the rules they sought.

### Notice of Proposed Rules

When adopted in 1975, Sec. 5(a) of APTRA provided that notice of a proposed rule was to be published in the Texas Register and was to provide:

- (1) a brief explanation of the proposed rule;

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