

**PRESENTED AT**

The University of Texas School of Law  
2017 Advanced Texas Administrative Law Seminar

August 24-25, 2017  
Austin, TX

**Trending Issues in APA § 2001.038 Rule Challenges**

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# ***Everything you [n]ever wanted to know about APA § 2001.038 rule challenges.***

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There are two general types of rule challenges under APA § 2001.038.<sup>1</sup> A court may determine the validity or the applicability of an agency rule pursuant to an action under § 2001.038. This paper will address what types of claims are cognizable under § 2001.038 in a validity or applicability challenge, with a review of recent trends in Texas case law.

## **What is a validity challenge?**

A properly-pleaded validity challenge asks the court to declare that an agency rule is invalid. There are, naturally, a variety of grounds for such a challenge. Validity challenges can be placed in two main categories: procedural and substantive. This paper will address each, reviewing procedural invalidity claims first.

## **When a rule is a little procedurally non-compliant.**

Procedural challenges ask the court to determine that the agency has failed to comply with one or more of the requirements in APA §§ 2001.0225-.034.<sup>2</sup> Rule challenges are properly brought solely in a Travis County district court.<sup>3</sup> A court may void a rule if an agency fails to substantially comply with one or more of the requirements set out in §§ 2001.0225-.034.<sup>4</sup> Challenges alleging that a rule should be voided on procedural grounds are usually based on one of two assertions: that the agency failed to meet one of the APA procedural requirements or that the agency failed to meet *all* of them by engaging in illegal or “ad hoc” rule making.

In the first case, a plaintiff may allege that an agency has failed to comply with one or more of the myriad procedural notice requirements set out in APA either at proposal or adoption. The requirements of APA § 2001.024 applicable to the contents of notice of a proposed rule include: an explanation of the proposed rule; the text of the proposed rule; statement of statutory authority and certification by legal counsel of the agency’s

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<sup>1</sup> Tex. Gov’t Code § 2001.038.

<sup>2</sup> Tex. Gov’t Code §§ 2001.035, .038.

<sup>3</sup> Tex. Gov’t Code § 2001.038(b).

<sup>4</sup> Tex. Gov’t Code § 2001.035.

authority to adopt the rule; fiscal notes that estimate the costs or increase in revenue to state and local governments; public benefits of the rule and probable economic costs to regulated people and entities; local employment impact statement; requests for comments; and any other statement required by law.<sup>5</sup> APA §§ 2001.025-.032 impose additional requirements some of which are generally applicable and others applicable to only certain agencies or rules.<sup>6</sup> Chapter 2006 of the Government Code contains additional mandates applicable to the proposal of an agency rule that may have an adverse economic impact to small or micro-businesses and/or rural communities.<sup>7</sup> That chapter requires a small business and rural communities impact statement and a regulatory flexibility analysis that assesses options to reduce the cost of compliance for small and micro-businesses and/or rural communities.<sup>8</sup> In a 2013 opinion, the Third Court of Appeals reviewed a plaintiff pharmacy's claim that the Health and Human Services Commission failed to comply with the regulatory flexibility analysis to reduce the adverse impact of a Medicaid pharmacy benefits rule on small pharmacies.<sup>9</sup> After some discussion of the details set out in the agency's analysis, the court of appeals upheld the trial court's finding that the agency's regulatory flexibility analysis substantially complied with the APA.<sup>10</sup> The Third Court of Appeals noted that chapter 2006 does not mandate that the agency adopt a rule that is less onerous on small businesses if the agency determines that such a rule is infeasible in meeting the objective of the regulation.<sup>11</sup>

The 85th Legislature's policy movement toward greater fiscal austerity and smaller government fomented several amendments to the APA and chapter 2006. These amendments are directed at requiring agencies to undertake specific analyses to quantify the costs and breadth of executive branch regulation. The legislature passed House Bill 3433, that amends chapter 2006 to add the rural communities adverse impact statement, referenced above, and a regulatory flexibility analysis for any rule that may

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<sup>5</sup> *Id.* at 2001.024.

<sup>6</sup> *See e.g.* APA §§ 2001.029, .028, .0225.

<sup>7</sup> Tex. Gov't Code § 2006.002.

<sup>8</sup> *Id.*

<sup>9</sup> *Sw. Pharmacy Sols., Inc. v. Tex. Health & Human Servs. Comm'n*, 408 S.W.3d 549, 562 (Tex. App.—Austin 2013, pet. denied).

<sup>10</sup> *Id.* at 563.

<sup>11</sup> *Id.*

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First appeared as part of the conference materials for the  
12<sup>th</sup> Annual Advanced Texas Administrative Law Seminar session  
"Trending Issues in APA § 2001.038 Rule Challenges"