

Administrative Procedure Act – Promulgating Emergency Rules after Act 211

Brandi R. Cannon
Senior Attorney, Louisiana State Senate
Senate Committee on Health and Welfare
Honorable Fred H. Mills, Jr., Chairman
Phone: 225-342-4293
Email: cannonb@legis.la.gov

I. What Is an Emergency Rule and Why Would an Agency Need an Emergency Rule?

R.S. 49:953.1 provides that, in extraordinary circumstances, a state agency may adopt an emergency rule as an alternative to the rulemaking provisions provided for in law.

An emergency rule may be adopted by an agency without prior notice or a public hearing for any of the following reasons:

- To prevent imminent peril to the public health, safety, or welfare.
- To avoid sanctions or penalties from the United States.
- To avoid a budget deficit in the case of the medical assistance.
- To secure new or enhanced federal funding.
- To effectively administer provisions of law related to the imposition, collection, or administration of taxes when required due to time constraints related to congressional, legislative, or judicial action.

II. Why Were the Emergency Rule Provisions Updates Proposed?

Emergency rules do not require the same prior notice or public hearing as an administrative rule adopted pursuant to the regular process to become effective or be enforced. This can raise concerns regarding transparency and protecting the due process rights of the public.

A survey of the cumulative indices of the Louisiana Register for December 2010, 2015, and 2019 provides the following data regarding the use of emergency rules by state agencies:

Year	Non-DWF Emergency Rules	DWF Emergency Rules	Total
2010	372	70	442
2015	285	26	311
2019	81	26	107
2020	157	31	188

There was a reduction of 78% for regular emergency rule adoptions and 63% for emergency rule adoptions by the Department of Wildlife and Fisheries between 2010 and 2019, with an overall reduction of 76% over the ten-year period. It should be noted that the year 2020 is not taken into account because many emergency rules related to COVID-19 policies and procedures were required due to the on-going public health emergency.

Much credit is due to the Office of the State Register which began emergency rule training at the end of 2008 and continued throughout 2009 in response to legislative concern of the possible overuse of emergency rulemaking. The division of administration, office of general counsel assisted in the training exercises to affirm the necessity of agencies adhering to APA protocol. This training has had a positive result in achieving a reduction in the promulgation of emergency rules and instruction concerning the use of emergency rulemaking is now a part of the Office of the State Register's regular training program.

However, there were still 107 emergency rules promulgated during 2019.

Legislative oversight committees were receiving reports from state agencies for emergency rules being repeatedly extended or repromulgated with no action by the state agency to promulgate the same provisions through the regular rulemaking process. In some cases, the legislative committees were seeing emergency rules that were continuously re-issued with no change for many years.

III. Summary of Act 211 of the 2021 Regular Session

Senator Fred Mills originally filed Senate Bill 68 during the 2020 Regular Session but declined to advance his bill due to the COVID-19 public health emergency. For the 2021 Regular Session, Senator Mills then filed Senate Bill 136 which successfully passed both chambers with no opposition and was signed by the governor to become Act No. 211.

- The majority of Act 211 transfers current law provisions on emergency rules to a separate newly created section of law so it is easier for state agencies to follow and the public to understand the process.
- There is new language on Page 9, lines 7 - 12, to further clarify what will be considered an emergency based on past legislative committee experiences in dealing with agency rulemaking.
- In addition, Senator Fred Mills and Senate staff worked with the Office of the State Register to update the timing provisions so that an emergency rule will be effective for 180 days with a limit of two adoptions for the same emergency rule. This allows an emergency rule to last for up to a year.

IV. Comparison Between Old Law and New Law

	Pre-Act 211 (Prior to August 1, 2021)	After Act 211 (Effective August 1, 2021)
Conditions for Adopting an Emergency Rule	<p>(1) To prevent imminent peril to the public health, safety, or welfare.</p> <p>(2) To avoid sanctions or penalties from the United States.</p> <p>(3) To avoid a budget deficit in the case of the medical assistance program.</p> <p>(4) To secure new or enhanced federal funding in the medical assistance program.</p>	<p>(1) To prevent imminent peril to the public health, safety, or welfare.</p> <p>(2) To avoid sanctions or penalties from the United States.</p> <p>(3) To avoid a budget deficit in the case of the medical assistance program.</p> <p>(4) To secure new or enhanced federal funding.</p> <p>(5) To effectively administer the law relating to the imposition, collection, or administration of taxes when required due to time constraints related to congressional, legislative, or judicial actions.</p>
Conditions Not Appropriate for Adopting an Emergency Rule	N/A	It shall not be considered an emergency if the agency is acting in the normal course and scope of fulfilling its mission, failed to take necessary steps in the administration of the agency to avoid an emergency, is promulgating rules to implement an Act of the legislature unless the Act specifically directed the agency to proceed with emergency rulemaking, or is continually republishing existing emergency rules.
Effective Date of an Emergency Rule	An emergency rule shall become effective on the date of its adoption, or on a date specified by the agency to be not more than 60 days from the date of its adoption.	NO CHANGE – Just Relocated to the New Section of Law.

<p>Length of Effectiveness of an Emergency Rule</p>	<p>An emergency rule shall not remain in effect beyond the publication date of the Louisiana Register published in the month following the month in which the emergency rule is adopted, unless the emergency rule and the reasons for adoption are published in that issue.</p> <p>An emergency rule shall not be effective for a period longer than 120 days.</p>	<p>An emergency rule shall not remain in effect beyond the publication date of the Louisiana Register published in the month following the month in which the emergency rule is adopted, unless the emergency rule and the reasons for adoption are published in that issue.</p> <p>An emergency rule shall not be effective for a period longer than 180 days.</p>
<p>Maximum Number of Times an Emergency Rule may be Adopted</p>	<p>The agency may concurrently proceed with the adoption of an identical rule pursuant to the procedure provided for in R.S. 49:953(A).</p>	<p>No emergency rule shall be adopted by an agency more than two consecutive times unless the agency is operating under a state or federal declaration of disaster, a state or federal public health emergency, or an ongoing emergency as authorized by the legislature, governor, or other provision of law. However, the agency may concurrently proceed with the adoption of an identical rule pursuant to the procedure provided for in R.S. 49:953(A).</p>
<p>Notice of Adoption Required</p>	<p>No later than five days after the adoption of an emergency rule, the agency shall provide notice in writing of its emergency action, along with a copy of the emergency rule transmitted to the governor, the attorney general, the speaker of the House of Representatives, the president of the Senate, and the Office of the State Register. Notice shall also be made to persons who made a request for notice of rule changes.</p>	<p>NO CHANGE – Just Relocated to the New Section of Law.</p>

<p>Content of Notice</p>	<p>Agency statement of reasons for finding it necessary to adopt an emergency rule and specific reasons why the failure to adopt the rule on an emergency basis would result in imminent peril to the public health, safety, or welfare, or specific reasons why the emergency rule meets other criteria provided in law for adoption of an emergency rule.</p>	<p>(1) A preamble which states the specific provision or provisions of law the agency is citing as cause for emergency rulemaking and the specific facts and detailed reasoning for emergency rulemaking in order to satisfy the criteria for an emergency rule.</p> <p>(2) The name of the person within the agency who has the responsibility for responding to inquiries about the action.</p> <p>(3) A statement that the intended action complies with the statutory law administered by the agency, including a citation of the enabling legislation.</p>
<p>Method of Providing Notice</p>	<p>Electronic transmission if available, certified mail with return receipt requested, or by messenger with receipt for signature.</p>	<p>In accordance with each receiving entity's transmittal policy.</p>
<p>Determination of validity by judicial proceeding</p>	<p>Validity of an emergency rule to be determined in an action for declaratory judgment in the district court of the parish in which the agency is located.</p>	<p>NO CHANGE – Just Relocated to the New Section of Law.</p>
<p>Legislative Oversight Hearings</p>	<p>Within 60 days of receipt, the appropriate oversight committee may conduct a hearing to review the emergency rule and make a determination of whether the emergency rule:</p> <p>(1) Meets the criteria for an emergency rule.</p> <p>(2) Is in conformity with the intent and scope of the enabling legislation purporting to authorize the emergency rule.</p> <p>(3) Is in conformity with and not contrary to all applicable provisions of law and of the constitution.</p> <p>(4) Is advisable or has relative merit.</p> <p>(5) Is acceptable or unacceptable to the oversight subcommittee.</p>	<p>NO CHANGE – Just Relocated to the New Section of Law.</p>

<p>Prohibition Against Promulgating a Substantially Similar Rule</p>	<p>If an oversight subcommittee issues a written report determining an emergency rule is unacceptable, the agency is prohibited from proposing the same or similar emergency rule within four months, nor more than once during the interim between regular sessions of the legislature.</p>	<p>NO CHANGE – Just Relocated to the New Section of Law.</p>
<p>Governor's Oversight Authority</p>	<p>Within 60 days after adoption of an emergency rule, the governor may review the emergency rule and make a determination whether the emergency rule is acceptable.</p>	<p>NO CHANGE – Just Relocated to the New Section of Law.</p>
<p>Nullity of Proposed Rule</p>	<p>Upon receipt by the agency of a report that the legislative oversight subcommittee or the governor has determined the emergency rule is unacceptable, the emergency rule will be nullified and shall be without effect.</p>	<p>NO CHANGE – Just Relocated to the New Section of Law.</p>