# Chapter 2 - Request for Comments

## Introduction

The Request for Comments is the first formal step in Minnesota’s rulemaking process. This chapter discusses how to complete a Request for Comments. It is a good idea to review this entire chapter before proceeding. Under Minnesota Statutes, section 14.101, subdivision 1, an agency “shall solicit comments from the public on the subject matter of a possible rulemaking proposal under active consideration within the agency by causing notice to be published in the *State Register*.” The publication in the *State Register* is “[i]n addition to seeking information by other methods designed to reach persons or classes of persons who might be affected by the proposal.” At the end of this chapter is a checklist so you can easily note when you have completed each of the required steps.

## 2.1 Timing Requirements

There are two timing requirements[[1]](#footnote-1) related to the Request for Comments:

1. The Request for Comments must be published within 60 days of the effective date of any new or amendatory law requiring rules to be adopted, amended, or repealed.
2. The agency may not officially propose rules by publishing a Notice of Intent to Adopt or a Notice of Hearing until *at* *least* 60 days after the Request for Comments was published.

For the first timing requirement, OAH has consistently held that missing the requirement does not invalidate the rule.[[2]](#footnote-2) Because there are no stated consequences for missing this 60-day deadline, the statutory requirement is more aspirational than mandatory. Nevertheless, missing the deadline falls outside the spirit of the APA.

In other words, it is better to meet the deadline than to explain later why you missed it or to even invite a new OAH standard on missing the requirement.

## 2.2 Get Agency Approval to Publish the Request for Comments

How you get approval within your agency is as individual as your agency. Your agency may use a memo that contains a brief description of the rules and details any controversial issues or policy decisions. Some agencies have formal routing processes and sign‑off sheets to document approval by all persons in the chain of command. Other agencies are satisfied by verbal briefings.

In some agencies, it is standard practice for the agency’s assistant attorney general (AG) to review and sign off on all rule projects. An agency that is a multimember board must follow board procedures, which usually means passing a formal resolution authorizing the notice and authorizing a person to sign the notice. The board resolution form in the appendix as **BD-NTC** can be adapted for this purpose.

## 2.3 Get a Revisor’s ID Number

Both the Revisor’s Office and Governor’s Office track rule proceedings using a unique project identifier called the “Revisor’s ID number.” The ID number is in the format “R-04767.” The four digits following the “0” will be used with a two-letter prefix to identify the rule at each stage of the process. The two letters change depending on the type of draft, but the four digits always remain the same. The letters are keyed accordingly:

* RD: “Rule Draft” – the draft to be published in the *State Register*.
* AR: “Adopted Rule” – the cleaned draft of the RD version with striking and underscoring removed (“stripped”); any modifications are made on this version.
* AR/ST: - this is the stripped draft of the AR version.
* SR: “*State Register”* - this is the draft published with the Notice of Adoption; if there are modifications to the published rule, changes would be shown in this draft
* SR/ST: “*State Register* Stripped” - this is the stripped version of the SR version.





*Examples:*

At any time, you can request that the Revisor’s Office open a rule file and assign an ID number, even if your request does not also include a request to review or produce a rulemaking document for the agency. The Revisor’s Office will open the file initially as a placeholder so that the agency can include this number on all future correspondence with the Revisor’s Office, the Governor’s Office, and OAH.

Requesting an ID number should be one of the first tasks you do when starting a rulemaking proceeding. Contact the Revisor assigned to your agency; if you do not know who that is, the Staff Directory page on the Revisor’s website provides this information.

The Governor’s Office will track the project by this Revisor’s ID number (See **GOV-PLCY**). If your project does not go forward, simply notify the Revisor’s Office, and the Revisor’s Office will close the file.

## 2.4 Governor’s Office Review

When an agency has developed a rule idea, it should complete the Preliminary Proposal Form, **GOV-PRLM**, and submit it to the Governor’s Office.[[3]](#footnote-3) The form should clearly set out why you need to adopt, amend, or repeal rules and what specific priorities that you want to accomplish.

In addition to notifying the Governor, this form can serve several other very important purposes for your project. It helps the agency focus on specific, rather than general, goals. Specific goals, written early in the project, serve as a guide for the agency throughout the entire rule project and help to keep the project on track. Additionally, parts of this form may be used to develop the SONAR. The form must summarize the agency’s rulemaking authority, without which the agency cannot proceed. Most importantly, the form sets out the need for the rules, a crucial part of the SONAR. *(See Chapter 4 of this Manual for additional information on the SONAR.)*

It is highly recommended that you make the effort to craft a high-quality Governor’s form. Having the need and the goals for your project clearly in mind is necessary but having them also *clearly on paper* is highly desirable and beneficial as you move forward in your rulemaking project. Make sure to leave sufficient time to let the draft rest so you can reflect on the content and amend as needed before submitting the form.

## 2.5 Publish the Request for Comments in the *State Register*

An agency must publish a Request for Comments in the *State Register*.[[4]](#footnote-4)

### 2.5.1 Requirements for the Request for Comments in the *State Register*

The Request for Comments must:

1. include a description of the subject matter of the proposal;
2. include the types of groups and individuals likely to be affected;
3. indicate where, when, and how persons may comment on the proposal; and
4. indicate whether and how drafts of any proposal or possible rules may be obtained from the agency.[[5]](#footnote-5)

**Suggestions:**

1. If you will not have a draft for review, it is a very good idea to direct readers to the current rule parts that you plan to revise. If you are writing a new rule, identify the subjects that the rule will address.
2. You might wish to build some leeway into the scope of your subject matter by adding a general phrase such as “other things that arise as time allows” or other agency-specific criteria.
3. You might also wish to solicit comments about applicable regulatory-analysis-related topics and other information that you will need for the SONAR. It may be particularly useful to solicit comments regarding costs for compliance with the proposed rules.
4. eComments: Another possibility to consider is using the eComments system established by OAH for collecting your comments. Whether to do this depends on many agency-specific factors that you must gauge.

If you choose to use the eComments system, you must draft your Request for Comments to reflect this method. For further information on setting up eComments, see section 1.7.2.

### 2.5.2 Form for Request for Comments in the *State Register*

A form for the Request for Comments is in the appendix as **REQUEST**. This form originated from the recommended form in Minnesota Rules, part 1400.2510, and includes practice tips. The *State Register* will format the request according to its publication style and form.

### 2.5.3 Publish in the *State Register*

The *State Register* publishes on Mondays. The submission deadline is noon on the Tuesday before publication (except when the deadline is changed by a holiday). **For rules that are long (more than 20 pages) or complex (include tables, charts, pictures, etc.) contact the editor to negotiate a deadline.**

See **ST-REG** in the appendix for information on how to publish in the *State Register* and “Production Schedule” on the [Minnesota State Register website](https://mn.gov/admin/bookstore/register.jsp) for publication dates and deadlines.

### 2.5.4 Republishing the Request for Comments

The APA does not account for every rulemaking scenario. When in doubt, refer to Minnesota Statutes, section 14.001, the Statement of Purpose.

For example, if it has been two or more years since you first published a Request for Comments, it can’t hurt to republish the request. While not required to republish, doing so serves the APA’s broader purpose, which is public accountability and transparency. Going above and beyond the requirements in the APA demonstrates your good faith to both the public and OAH.

## 2.6 Additional Notice

The publication of the Request for Comments in the *State Register* is “[i]n addition to seeking information by other methods designed to reach persons or classes of persons who might be affected by the proposal.”[[6]](#footnote-6)

**Note***:* OAH views publication of the Request for Comments in the *State Register* as sufficient to meet the statutory requirement; *additional notice is optional*. Nevertheless, if your rules are potentially controversial or have a substantial impact, you may want to consider holding listening sessions, setting up an advisory group, or sending the Request for Comments to your rulemaking list or parties that may be affected by your rule.

### 2.6.1 Reach affected persons or classes of persons that might be affected

There are probably many ways for an agency to reach affected persons. To reach them, you must first identify who they are. One way is to ask agency staff who are working on the rules or who will work with regulated parties after the rules are adopted to make a list of affected persons or groups. You can also ask affected persons or organizations for the names of others who might be affected by the rules. In some cases, it may be a good idea to mail or email your Request for Comments to all persons on the agency’s rulemaking mailing list, even though the APA does not specifically require this.

Mailing to the agency’s rulemaking mailing list, however, is only a start. You should also be creative in finding other ways to reach affected persons. If it is a small group of persons, perhaps mailing (or emailing) individual letters would be effective. If it is a large group of persons where an individual mailing is too expensive or cumbersome and you don’t have email addresses, then mail to persons who have inquired or shown an interest in the subject matter. Also, you can mail trade or professional associations representing affected persons and request to have a notice published in the newsletters of those trade or professional associations. When appropriate, consider sending press releases to general circulation newspapers.

Agencies are also using online resources in creative ways to spread the word, including special email lists and their public websites. They are also developing issue-specific sites for this purpose. There are undoubtedly other reasonable ways to reach affected persons. In deciding what is reasonable, consider the cost and effort of what you might do and the likelihood that this will reach the intended persons. Finally, if your rules will potentially affect persons who do not traditionally interact with government, make an extra effort to reach these persons.

Keep notes and records of your efforts. You must keep a copy of the Request for Comments as published in the *State Register*, as this will later be submitted to OAH.

**Note:** You do not need to submit the whole *State Register* edition to OAH; you can submit just the cover plus the pages on which your notice appears.

For any mailed notice, prepare a certificate of mailing. Create a similar certificate for electronic mailings. Attach a copy of the notice to the certificate; see section 2.7.4 about whether to also attach a copy of the mailing list. Get copies of any newsletters or newspapers in which a notice is published. Detail any efforts you made to develop your mailing list or to get a notice published. You can document what you have done by using the generic certificate form that is in the appendix as **CRT-GNRC**.

When you are selecting ways to reach affected persons, you will undoubtedly include friends and supporters of the rules. You might suffer the temptation to ignore likely opponents of the rules—namely, the ones who will make the whole process difficult. **Resist it**. Not wanting to deal with people who might oppose your position is human nature. It is, however, short-sighted to ignore these people during the early stages of rule development, because they will almost certainly raise issues and oppose the rules later. In fact, these are exactly the people you want to notify of the rules as early as possible. They will give you an early insight into their arguments and concerns, which will give you a better chance to address them.

See Chapter 3 for an expanded discussion on getting input from affected persons.

### 2.6.2 Inform the Legislature

Legislative interest in rulemaking has ebbed and flowed, but do not forget the legislature.[[7]](#footnote-7) An agency must notify certain legislators at the time of formally proposing rules. The required legislators to notify include chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rules and chief House and Senate authors of the rulemaking authority (if it is within two years of the effective date of the law granting the authority).

Even though this requirement applies only when you propose your rules, you may want to notify these legislators and any other interested legislators when publishing your Request for Comments and keep them informed throughout the rulemaking process. Even though individual legislators do not have authority to adopt or dictate the content of rules, their comments should be carefully considered and given great weight, especially if they give insight into the background and development of the underlying legislation.

## 2.7 OAH Prior Approval of Additional Notice Plan (optional)

An agency may ask OAH for prior approval of its Additional Notice Plan at either one of two times: before publishing the Request for Comments or before publishing its Notice of Intent to Adopt Rules.[[8]](#footnote-8) Why do this now if it is optional?An approved Additional Notice Plan is OAH’s final determination that the Additional Notice Plan is adequate, which means that prior approval protects you from a challenge to your Additional Notice Plan at the end of the rulemaking process when it would be difficult to correct a problem without starting all over again.

Further, OAH review of your Additional Notice Plan helps ensure that the agency makes reasonable efforts to give adequate and timely notice of the rules to persons who may be significantly affected by them.

**Note:** Even if you obtain approval of your Additional Notice Plan at this stage, the plan may not be complete. As you go through the process, you may identify other affected parties that should be added to your plan.

**Frequently Asked Question:** How does an agency determine whether to seek approval of its Additional Notice Plan?

**Answer:** The answer is varied. The agency must identify and analyze the relevant factors involved with its rulemaking project. With a simple, straightforward project without many variables, in either public interest or content, the agency might prefer to develop and seek approval of an additional notice plan at the outset. Or there might be a compelling reason or a controversy that suggests getting OAH approval up front would be wise. If rule development, however, is likely to be lengthy and there are many unknowns, engaging OAH’s attention at the Request for Comments stage might be a premature, unnecessary expenditure of time and money. If you do not obtain prior approval before publishing the Request for Comments, you can still do so before publishing your Notice of Intent to Adopt Rules.

### 2.7.1 Requesting approval

To request prior approval of your Additional Notice Plan, you must file with OAH:

1. a description of the agency’s proposed Additional Notice Plan;
2. the agency’s proposed Request for Comments on the planned rule; and
3. an explanation of why the agency believes that its Additional Notice Plan complies with Minnesota Statutes, sections 14.101 and 14.14, subdivision 1a—that is, why its Additional Notice Plan constitutes reasonable efforts to notify persons or classes of persons who might be significantly affected by the rules.

OAH has five working days to review and approve or disapprove an Additional Notice Plan. A form for a cover letter to the Chief ALJ requesting prior approval of your Additional Notice Plan and submitting the necessary documents for review is in the appendix as **NP-RQUST**. This letter is designed to serve as a checklist for meeting the requirements of Minnesota Rules, part 1400.2060, to request prior approval of your Additional Notice Plan.

If you have questions about requesting prior approval of your Additional Notice Plan, you may contact William Moore at William.T.Moore@state.mn.us or (651) 361-7893. For the location of or other information about OAH, refer to **OAH-INF** in the appendix.

### 2.7.2 eFiling rule-related documents

OAH requests that agencies eFile all rule-related documents wherever possible. OAH has posted step-by-step instructions for creating an account and filing your documents on its website at [OAH Forms & Filing (https://mn.gov/oah/forms-and-filing/efiling/)](https://mn.gov/oah/forms-and-filing/efiling/). (The page also includes a link to frequently asked questions.) **See section 1.7 for explicit instructions.** Give yourself plenty of lead time the first time you use eFiling because at least one agency has run into issues with its firewall preventing access to the website eFiling system, which had to be addressed.

Always check to make sure that the system has uploaded your documents. Saving a screen shot or printing the window showing a file has uploaded is prudent. In addition, save any correspondence or documents that you receive from OAH for your own records because those items might not remain in your eFile folder.

### 2.7.3 Interpretation of “affected” by the rules

The word “affected” is used in two places in Minnesota Statutes, section 14.101, subdivision 1, governing the Request for Comments. The Request for Comments is published “[i]n addition to seeking information by other methods designed to reach [those] who might be *affected* by the proposal.” And you must include in the Request for Comments a description of “[those] likely to be *affected*.”

Everybody is affected by everything to some degree or another, so where do you draw the line in describing those who may be affected? The requirements related to giving Notice of Intent to Adopt give some insight. This notice must be given to persons or classes of persons who might be *significantly* affected.[[9]](#footnote-9) You would be safe in applying the Request for Comments requirements to those persons *significantly* affected. Basically, this includes those persons who might care enough about the rulemaking that they might want to comment or get involved. It would also include those persons who might complain about the rules after they are in effect.

### 2.7.4 Evidence of additional notice

OAH likes to see mailing lists. If you are sending notice to organizations or other individuals, email lists or copies of mailing labels are good evidence. If you are sending notice to all licensed parties, you may describe generally that “the agency will be sending notice to all 2,572 licensees.” Agencies also often maintain subscriber-based email lists of people specifically interested in their programs or rulemaking projects. Because these addresses can number in the thousands, you could describe the list generally, noting the total number of subscribers, as is recommended for licensed parties above.Detail any efforts you made to develop your mailing list.

**Note:** Traditionally, this Manual has advised you to attach mailing lists to your certificate. This remains good practice **as long as your mailing list contains public information**. If your email lists consist of subscribers to your web-delivery system, you may wish to describe your subscribers more generally. See the note in section 1.8.4 for data practices considerations.

## 2.8 Setting Up the Files for the Official Record

Now is a good time to set up or at least begin to consider putting the official rulemaking record together. While concluding the rulemaking process now seems very remote, setting up files that will keep your original documents together and in order will save you time and stress at the end, especially in a lengthy rulemaking. *See* **RECORD**.

## Checklist for Chapter 2 – Request for Comments

**Date Completed Item**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **2 – Entire chapter reviewed before proceeding**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **2.1 – Timing requirements met
-** If newly adopted or amended rule grant, publish w/in 60 days of grant’s effective date.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **2.2 – Agency approval to publish the Request for Comments**- If agency is a multi-member board that customarily gets board approval, **BD-NTC** form used.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **2.3 – Get a Revisor’s ID Number**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **2.4 – Governor’s Office Review**- **GOV-PRLM** used.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **2.5 – Request for Comments published in *State Register*- 2.5.1 – Requirements met for Request for Comments
- 2.5.2 – Request for Comments drafted
 - REQUEST** form used
**- 2.5.3 – Publish in the *State Register* - ST-REG** information sheet used
 - Deadline for publication met (See *State Register* website)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **2.6 – Additional Notice (Optional)
- 2.6.1 – Reach affected persons
 -** Keep record of efforts. **CRT-GNRC** form used.
**- 2.6.2 – Inform the Legislature**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_ **2.7 – Prior approval of Additional Notice Plan (Optional)
- NP-RQUST** letter used.
- OAH eFile account created.

1. Minn. Stat. § 14.101, subd. 1. [↑](#footnote-ref-1)
2. See, for example, OAH 21-9005-37182: “With one exception, the rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14 (2020) and Minnesota Rules, Chapter 1400 (2019). The Department’s failure to publish the Request for Comments within 60 days of the effective date of the new law requiring the rules to be amended was harmless error.” [↑](#footnote-ref-2)
3. GOV-PLCY. [↑](#footnote-ref-3)
4. Minn. Stat. § 14.101, subd. 1. [↑](#footnote-ref-4)
5. Minn. Stat. § 14.101, subd. 1. [↑](#footnote-ref-5)
6. Minn. Stat. § 14.101, subd. 1. [↑](#footnote-ref-6)
7. *See* Minn. Stat. § 14.116(b), (c) (listing when legislative notice is required). [↑](#footnote-ref-7)
8. Minn. R. 1400.2060, subp. 1. [↑](#footnote-ref-8)
9. Minn. Stat. §§ 14.14 subd. 1a, .22, subd. 1. [↑](#footnote-ref-9)