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Back to Basics: The Rules of Rulemaking

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BACK TO BASICS: THE RULES OF RULEMAKING

By Carrie Collier-Brown, John A. Riley, and Robyn Parkinson

I. Introduction

Agencies adopt rules to fill in the details of legislation, implement policy, and establish procedural requirements of the agency.¹ These are rules that affect the lives and businesses of Texans, and they have the force of law behind them.

In Texas, the Administrative Procedure Act (“APA”) governs our state’s rulemaking process.² The formal rulemaking includes public notice-and-comment procedures to adopt rules, and authorizes two judicial review procedures: declaratory judgment actions to determine the validity or applicability of rules, and administrative appeals of final orders.

In June 2018, Texas Governor Greg Abbott’s office sent a letter to all state regulatory agencies requiring that the agencies send proposed rules to the governor’s office for review before filing notice in the *Texas Register*.³ The Texas Government Code does not require the governor’s involvement in a state agency’s rulemaking process. But absent action from the Texas Legislature, nothing prohibits the governor’s assertion of power over rulemaking in the executive branch. The Texas Constitution generally confers upon the governor the obligation to “cause the laws to be faithfully executed,”⁴ and the right to “at any time, require information in writing from any and all [officers and managers of State institutions], upon any subject relating to the duties, condition, management and expenses of their respective offices and institutions.”⁵

¹ TEX. GOV’T CODE § 2001.003(6) (defining a rule as: “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.”).

² TEX. GOV’T CODE § 2001.001-.902.

³ June 22, 2018 letter signed by Luis Saenz on behalf of Governor Greg Abbott; *see also* “Gov. Greg Abbott is claiming power over state agencies that might not be constitutional,” *Dallas News*. (October 25, 2018).

⁴ TEX. CONST. art IV, § 10.

⁵ TEX. CONST. art IV, § 24.

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