

STATE OF NEW HAMPSHIRE



OFFICE OF LEGISLATIVE SERVICES

STATE HOUSE
107 NORTH MAIN STREET, ROOM 109
CONCORD, NEW HAMPSHIRE 03301-4951

January 28, 2026

RE: HB 1683 relative to the modification of administrative rules by the JLCAR

Dear Chairwoman Layon and Members of the Committee,

I am writing to point out **concerns with HB 1683**, relative to the modification of administrative rules by the Joint Legislative Committee on Administrative Rules.

I. Requirements in Section 1 are redundant and potentially unconstitutional.

Section 1 of HB 1683, as proposed, introduces a new section to RSA 541-A, the Administrative Procedure Act (APA), RSA 541-A:3-c, Limitation on Current Statutes. The new section essentially does two things: first, limit rulemaking to only specific authority contained in the Revised Statutes Annotated, i.e., state law; second, require an agency to demonstrate that authority in writing.

Under current law, an agency seeking to adopt an administrative rule must derive their authority from either the RSAs, federal statutes in the United States Code, or the Code of Federal Regulations (CFRs). An agency must demonstrate their rulemaking authority and the state or federal statutes or CFRs the rule is implementing in their rulemaking notices and in the text of the rule itself.

One concern is the ambiguity of the terms “based upon” and “directly supported” in proposed RSA 541-A:3-c, I. Is the intent to limit rulemaking to *only* requirements in the RSAs? It is unclear, for example, if an agency with rulemaking authority granted in an RSA would have the authority to implement a requirement in a CFR based on a federal statute (perhaps a Medicaid requirement, or a requirement established by the EPA). If not, the limitation could hinder the State, as an administrative rule is sometimes utilized to implement federal requirements. Worst case scenario, the limitation could run afoul of Article 6, Section 2 of the United States Constitution, commonly referred to as the Supremacy Clause, as the state may be prohibited from meeting a federal requirement until legislative action is taken, or the proposed language is rendered meaningless. Further analysis is required.

II. The biannual audit and removal of rule language is redundant and expensive.

Section 2 of HB 1683 introduces two new sections to the APA. The first is RSA 541-A:22-a, Biannual Audit of Rules for Constitutionality and Statutory Authority. The second is RSA 541-A:22-b, Ongoing Removal of Noncompliant Rules. Essentially, the first requires a biannual audit and report on rules no longer supported by statute, and the second is concerned with the removal of said rules.

The General Court already has the tools in place to accomplish what HB 1683 sets out to accomplish as far as ensuring administrative rules have the backing of statutory or regulatory authority, and to repeal or amend rules for which the statutory authority has been removed or amended. Please consider the following:

- Most rules have a 10-year expiration date. This ensures agencies must regularly revisit their rules, yet isn't overly burdensome by requiring constant rulemaking (as compared to the time limits of the past, which had agencies entering a six-month rulemaking process every two years (1981), six years (1983), and eight years (1994)).
- Organizational and administrative rules do not expire, but there is a requirement in the APA to amend the rules if a change in statute ever renders the rules "inaccurate".
- If the statutory authority to promulgate a rule is removed, the rules themselves become invalid and unenforceable.
- The Division of Administrative Rules reviews all proposed rules to ensure the agency proposing the rule has the statutory authority to do so, as well as ensure compliance with all state and federal statutes and CFRs implemented by the rule.
- Administrative rules undergo review by the JLCAR to ensure compliance with statutory and regulatory authority.
- Agencies have an obligation to stay abreast of changes in the law and must act accordingly.
- Anyone in the state, including members of the General Court and members of the public, may petition an agency to enter rulemaking for any reason, including the belief that an agency no longer has statutory or regulatory authority to enforce a rule.
- The General Court may modify the authority of an agency to promulgate rules as it sees fit, both in scope and content.
- Members of the General Court may already contact the Governor, the Governor and Council, the presiding officers of the House and Senate, and the Office of the Attorney General, if they feel an agency is enforcing a rule without proper authority.

In addition to having the above systems already in place, the proposed biannual audit would be expensive to implement, as reflected in the fiscal note. The Division of Administrative Rules would require additional staff, office space, and office equipment, to essentially re-review the work already performed pursuant to the APA. OLS estimates a need for at least \$500,000 to get this project off the ground.

Further, the requirement of proposed RSA 541-A:22-b, II(a), to repeal or amend a "flagged" rule within 90 days is unachievable in many instances under the current systems in place.

There are other concerns with the language. For example, what “under supervision” of the JLCAR entails in RSA 541-A:22-a, I; how an agency can be “ordered” to amend their rules in less than 90 days under RSA 541-A:22-b, II(a); or the meaning of “or through any other lawful review” in RSA 541-A:22-b, implying there may be an unlawful review of administrative rules.

Ultimately, however, the concerns with HB 1683 are as described above. Namely, sections of the proposed language are already covered under existing law, the audit will be expensive to implement, and one of the proposed remedies is not compatible with existing processes.

Attached, with his approval, is an internal memo drafted by former Director of the Division of Administrative Rules, Scott Eaton, for his take on HB 1683. We share many of the same concerns with the language as proposed, though Dir. Eaton provides more specific statutory references than I.

Thank you for your consideration of this matter.

Very truly yours,



Douglas J. Osterhoudt, Esq., Director
Division of Administrative Rules
Office of Legislative Services

STATE OF NEW HAMPSHIRE

Inter-Department Communication

DATE: January 27, 2026

FROM: Scott F. Eaton
Committee Attorney

AT (OFFICE): Legislative Services

SUBJECT: Comments on HB 1683-FN

To: Douglas Osterhoudt
Administrative Rules Director

In reference to the Teams meeting January 20, 2026, here are my comments on HB 1683-FN for House ED&A. There are 2 main issues with HB 1683 in its current form:

- **Its concerns are addressed by existing law.** HB 1683 requires that proposed or existing rules be based on statutory authority, and prohibits the adoption, readoption, or amendment of a rule unless the agency can demonstrate in writing the specific statutory section authorizing the rule. To accomplish this goal, a biannual audit process by the Joint Legislative Committee on Administrative Rules (JLCAR) is established for all effective rules to ensure that each rule is supported by statute and is constitutional. But such a legislative review of proposed rules and effective emergency rules is already being done by JLCAR through the rules review processes mandated under RSA 541-A, and so a separate audit procedure would not be necessary; and
- **HB 1683 as proposed is not workable.** The proposed audit of all existing rules on a biannual schedule could not be done within the existing staff and funding, as indicated in the fiscal note. Moreover, the proposed amendment or repeal of noncompliant rules by an agency within 90 days or less of receiving notice from JLCAR of noncompliance could not necessarily be accomplished under the existing processes of RSA 541-A. See below.

CONCERNS ADDRESSED UNDER EXISTING LAW

Review for authority and constitutionality for proposed rules is already covered by the JLCAR rules review process for bases for potential objection on lack of authority and being contrary to legislative intent pursuant to RSA 541-A:13, IV and V [regular rules]; RSA 541-A:19, VII and VIII [interim rules]; RSA 541-A:19-a, VII and VIII [expedited repeals (EXP)]; RSA 541-A:19-c, VI and VII [expedited revisions to forms (EXRF)]; and RSA 541-A:19-d, VII and VIII [expedited amendment to incorporation by reference (EXIR)]. Authority for effective emergency rules can be addressed through the JLCAR review and petition process under RSA 541-A:18, IV and RSA 541-A:4.

The JLCAR also has authority pursuant to RSA 541-A:2, III to review previously adopted rules on its own initiative, including review pursuant to RSA 541-A:2, IV(b) of statutory passages granting rulemaking authority and make recommendations before each legislative session to eliminate confusing, inefficient, or unnecessary statutory language.

The agency demonstration required by HB 1683 in writing of statutory authority is already made both through the various required rulemaking notices or cover sheets for proposed rules and also through the requirement for agencies to file appendices pursuant to RSA 541-A:3-a for proposed and adopted rules, indicating the specific state or federal statutes which the rules implement.

RSA 541-A:22-b, III in HB 1683 requires that all rules flagged for repeal or amendment, and the agencies' justification for them, must be posted within 10 days. However, the notices and appendix information described above are already posted online in the weekly *Rulemaking Register*, and cover sheets are posted in the monthly JLCAR meeting packets. Moreover, the JLCAR attorneys' review under RSA 541-A of proposed rules, in the form of annotated comments on such issues of authority or constitutionality, are also posted as part of the meeting packets, along with agency reports of public comments received and the meeting minutes. Transcripts of JLCAR meetings can also be made available.

WORKABILITY

As indicated in the fiscal note for HB 1683, this audit would require a massive and expensive administrative undertaking to meet the required 2-year audit schedule for effective rules, which may have only recently been reviewed by JLCAR and adopted. In contrast, most rules expire in 10 years, and interim and emergency rules in 180 days. Therefore, effective rules have to be reviewed anyway through the readoption process as regular rules within those time frames to remain effective.

In RSA 541-A:22-a, II, the agency's repeal or amendment process for the noncompliant rule has to be completed within 90 days of being identified by JLCAR for repeal in the audit process "or any other lawful review", "unless a shorter time frame is ordered." It is unclear what is "other lawful review" or who may order a shorter time frame, and on what grounds. In any case, the 90-day time frame for completion of the repeal or amendment of a rule is simply too short to complete most regular rulemaking under RSA 541-A. That would leave the expedited procedures under RSA 541-A to repeal or amend a rule—interim rules, emergency rules, EXP's, EXRF's, and EXIR's. But they may not be available because they have either required grounds (i.e. for interim rules or emergency rules) or preconditions of no fiscal impact (i.e. EXP's, EXRF's, and EXIRs) which the repeal or amendment could not meet. So a new process under RSA 541-A may be necessary to amend or repeal the noncompliant rule.