



State of New Mexico

Michelle Lujan Grisham
Governor

MEMORANDUM

Date: May 22, 2020
From: Matthew L. Garcia, Chief General Counsel to the Governor
To: All executive agencies and departments
Re: Public hearings for agency rulemaking during COVID-19

This memorandum advises all executive agencies on how to conduct agency rulemaking consistent with public health concerns and in compliance with the requirements of the State Rules Act, NMSA 1978, §§ 14-4-1 to -11. All agencies should strive to conduct rulemaking in a manner that minimizes person-to-person contact to the greatest extent possible while also ensuring that members of the public are able to attend public rule hearings and to participate if they wish.

The State Rules Act requires agencies to conduct public rule hearings “in a fair and equitable manner”, § 14-4-5.3(C), that allows for members of the public to be afforded “a reasonable opportunity to submit data, views or arguments orally or in writing.” § 14-4-5.3(B). In fulfilling these obligations, each agency must determine, “in accordance with governing statutory and case law, the manner in which parties to the proceeding and members of the public will be able to participate in public hearings”. *Id.* The default procedural rules for agency rulemaking adopted by the Attorney General add an additional regulation that requires public rule hearings be held “in a venue that reasonably accommodates all persons who wish to participate or observe, and appropriate audio equipment should be secured to ensure all in attendance can hear the proceeding and be heard when presenting comment.” 1.24.25.13(G) NMAC. In all instances, a public rule hearing must “be open to the public and be recorded.” § 14-4-5.3(C).

With these directives in mind, State agencies should facilitate public participation in rule hearings while ensuring that appropriate safeguards are implemented. To that end, during the pendency of the existing health emergency due to the COVID-19 pandemic, State agencies should adopt the following guidelines when conducting rule hearings:

- Allow for written and oral comments to be submitted remotely prior to the hearing by electronic mail or regular mail;
- Station an agency representative at a designated physical venue on the day of the public hearing to receive written comments and to also convey them to the agency;



- Limit public attendance at rule hearings to remote participation through livestreaming, teleconferencing, or other similar technologies that allow members of the public to hear the proceedings; and
- Limit oral participation by members of the public to those comments and discussion through audiovisual means. Agency must ensure that public comments are recorded and archived.
- The methods of public participation must be described in the public notice made available to the public as provided in the Rules Act, including maintaining the information on the agency website for the entire public comment period.

The Office of the Governor recognizes that each agency will need to make individualized determinations about additional hearing procedures that ensure the level public accessibility to rulemaking that is required under the State Rules Act while minimizing risks from person-to-person contact to the greatest extent possible. However, all agencies, including those holding public hearings under the Administrative Procedures Act, NMSA 1978, §§ 12-8-1 to -25, are strongly advised to follow the guidance stated herein.

We are happy to have additional discussions with individual agencies about unique requirements or circumstances that affect the public hearing that your agency would need to hold as part of a rulemaking process.