# Chapter 10 - Exempt Rules Under 14.386

## Introduction

This chapter describes the process for adopting rules using the exempt rulemaking authority under Minnesota Statutes, section 14.386. An agency may adopt rules using the exempt procedure if an authorizing law specifically directs the agency to use the exempt process.

## 10.1 Determine Which Procedural Requirements Apply

There are three types of exempt rules:

### 10.1.1 Exempt under 14.386

The rulemaking authority for some rules exempts the rules from having to go through the usual rulemaking procedures of chapter 14. Most rules that are specifically exempt from the usual rulemaking procedures must still follow some procedures before the rules can take effect.[[1]](#footnote-1) The first part of this chapter describes the process for adopting 14.386 exempt rules.

### 10.1.2 Completely exempt under 14.386

Some rules are not only exempt from the usual rulemaking procedures of chapter 14 but are also specifically exempt from the procedures of section 14.386 (completely exempt):

A statute enacted after January 1, 1997, authorizing or requiring rules to be adopted but excluded from the rulemaking provisions of chapter 14 or from the definition of a rule does not excuse compliance with this section unless it makes specific reference to this section.[[2]](#footnote-2)

If this describes your rules, you may adopt your rules with only the requirements set out in your rulemaking authority. The second part of this chapter describes the process for adopting completely exempt rules.

### 10.1.3 Exempt for good cause under 14.388

Some rules are exempted from the normal rulemaking procedures for one or more “good cause” reasons (good-cause exemptions).[[3]](#footnote-3) Chapter 11 describes the process for adopting good-cause-exempt rules.

## 10.2 Draft your Rules

Draft your rules as you would any rules. **[See Chapter 3.**]Your chain of command should review and support your proposed rules before you proceed. Some agencies have their legal counsel review the proposed rule language and double-check statutory authorities. An agency that is a multi-member board must follow board procedures, which usually means passing a formal resolution authorizing the Notice and authorizing a person to sign the Notice. A form for such a board resolution is in the appendix as **BD-NTC**.

Request the Revisor’s Office to prepare a draft of the rules and advise them that your agency is adopting the rules under the exempt procedure in Minnesota Statutes, section 14.386. (**Note:** There is no “preliminary draft” in exempt rulemaking – only the “adopted” rule.) Review the draft carefully, with the help of your agency’s subject matter expert, and request changes as necessary.

# Adopting 14.386 Rules

## 10.3 Preparing your 14.386 Rules for Adoption

### 10.3.1 Notify Governor’s Office

You must notify the Governor’s Office of your exempt rulemaking per the Governor’s Office administrative rule review policy, **GOV-PLCY**. By this time, you should have had your rules reviewed and approved by your chain of command. Your next step is to submit the Preliminary Proposal Form **GOV-PRLM** signed by your director or commissioner when you are ready to move the exempt rules forward. Except for controversial rules, the agency does not have to wait for Governor’s Office approval to proceed.

If you are uncertain about moving forward without the Governor’s approval, you should discuss it with the Governor’s Policy Advisor.

**Note:** The Governor’s Office Proposed Rule and SONAR form is not used in the exempt rulemaking procedure.

### 10.3.2 Get approved draft from the Revisor

Request the Revisor’s Office to prepare rules approved (certified) as to form. The Revisor’s Office will provide you with a certificate stating that the rules are approved for publication. The certified rule is ready for publication.

**Note:** Because exempt rules are published only once in the *State Register*, the revisor draft is entitled “Adopted Exempt Rules Relating to…”. But the draft is still an RD. See section 2.3 for more information about revisor drafts. Under the APA, exempt rules are effective for only two years. But the authorizing law may allow for the rules to be permanent. In this case, the title should read “Adopted Exempt Permanent Rules Relating to…”.

### Header for a Revisor's draft of the rules showing "RD4702" in the upper right hand corner and the word "Adopted" in the title.

### 10.3.3 Draft Proposed Order Adopting Rules

After you receive the Revisor’s approved draft, draft your proposed Order Adopting Rules. See **ORD-ADPT(EX)** in the appendix. When drafting your proposed Order, you must include a citation to the rules’ statutory exemption, any argument (if necessary) to support this exemption, and any other information required by law.

Even though there is no SONAR laying out the agency’s case for exempt rules, it is still a best practice to provide background for the ALJ. Here are two ways to do that:

* Insert in the proposed Order a concise outline explaining the rules (like a rule-by-rule analysis). This alternative works well for shorter and less-complex rules.
* Prepare a supplemental memorandum as an additional exhibit. This alternative might be well suited for longer or more-complex rules.

## 10.4 Submitting your 14.386 Rules to OAH

Minnesota Rules, part 1400.2400, subpart 2, lists the documents that you must file with the OAH for official review of your adopted rules. A form for the cover letter to OAH submitting your adopted exempt rules for approval is in the appendix as **EXEMPT-LTR.**

**Note:** OAH does not require that the proposed Order be signed at this point. The recommended practice is to submit an unsigned proposed Order Adopting Rules for the ALJ to approve as to legality. Later in the process, you will have the finalized approved draft signed and then will transmit a copy of the signed Order to OAH.

### 10.4.1 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.**

### 10.4.2 Best Practices for Working Within OAH’s eFiling System.

To accommodate eFiling, it’s best to take some extra steps to organize your documents before uploading them into OAH’s system. Simply consolidating all your individual documents into one huge file will make navigating it difficult for both the ALJ’s review and your own reference. You can make a consolidated file easier to navigate with a little planning. Here are some options (and it might be advisable to confer with your assigned ALJ on more complex cases):

* Organize your documents as described in Minnesota Rules 1400.2400, subpart 2. OAH prefers that you consolidate the documents as one PDF document and bookmark them.
* If your case has a large volume of pages, consider adding a unique sequential page number through the entire set. This is often called applying a “Bates” stamp. Some photocopiers can do this and so can Adobe Pro.
* Scan the pages as a single PDF or combine saved PDF files into a single PDF. Prepare an index keyed to the unique numbers. In Adobe Pro, for example, it is simple to mark and label a bookmark at the first page of each document.
* If the filing is quite large, you may create more than one PDF. For example, a large volume of comments or a large map file may require a separate document to keep file size manageable.
* Consolidating your exhibits might simply exceed your technology’s capabilities, so you might have to solicit additional assistance within your agency or acquire more powerful software, such as Adobe Pro.
* Also, consider your timing when eFiling. After you request OAH to assign an ALJ to your rulemaking, it’s a good idea to communicate with the assigned ALJ (through William Moore) to notify the ALJ when you will file your record for review. Or you can wait to request OAH to appoint an ALJ only when the file is ready to submit. Because your submission of the rule record triggers a 14-day deadline by which the ALJ must review the record and approve the rule change, the key is to communicate clearly to OAH and any ALJ regarding the expected timing of your submission, and not to keep the ALJ waiting unnecessarily.
* If you have questions about submitting your rules file to OAH, refer to **OAH-INF** in the appendix for the location of or general information about OAH.
* Finally, always check to make sure that the system has uploaded your documents. Saving a screenshot 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.

### 10.4.4 OAH standards of review

As with any other rules, you must make certain that the proposed rules comply with standards of review before you submit them to OAH for review.[[4]](#footnote-4) Review the applicable standards of review for exempt rules in Minnesota Rules, part 1400.2100.

## 10.5 ALJ Review

The ALJ has 14 days to review and approve or disapprove your rules. If the ALJ approves the rules, OAH will send you a copy of the judge’s decision and return your filing.

## 10.6 Procedure for Resubmitting Disapproved Rules

If the ALJ does not approve your rules, you may resubmit the rules with any necessary changes, challenge the disapproval, or do neither. If you decide to do neither, note that your rules cannot take effect unless they are approved.

### 10.6.1 Resubmitting with corrections

If the ALJ disapproves your rules, the defects noted are correctable, and your agency agrees to the corrections, you can resubmit the corrected rules to OAH for review. You will need an updated Revisor’s copy for doing this. The ALJ has five working days to approve or disapprove your resubmission.

You might also want to prepare an exhibit that explains the corrections and that shows the changes in striking and underscoring. Because exempt rules don’t have an AR draft, there is no way to show any changes needed to correct defects. So as part of your exhibit, you should show the changes to allow the ALJ to easily track what you are proposing.

Additionally, you will want to update the date of your rules in your unsigned Order Adopting Rules.

**Note:** This process is different from normal rules, in which corrections and disapproval are both submitted to the Chief ALJ. As with all OAH submissions, it is a best practice to submit a cover letter explaining what you are filing.

### 10.6.2 Procedure for appealing the ALJ decision

If the ALJ disapproves your rules and the defects noted are ones that cannot be corrected or your agency is unwilling to make the changes, you may ask the Chief ALJ to review the disapproved rules. To take advantage of this avenue for appeal, the agency must make the request within five working days of receiving the ALJ’s disapproval. The Chief ALJ then has 14 days to review the request, using the same standards of review as the ALJ.

## 10.7 Adopting your Approved Exempt Rules

Once the ALJ or Chief ALJ approves your rules, you can officially adopt the rules.

### 10.7.1 Finalize the Order Adopting Rules and have it signed

If you made no changes to your proposed rules, finish the proposed Order Adopting Rules and omit the word “Proposed” from the title. This omission should be the only difference between the proposed Order and your final Order Adopting Rules.

If you made changes to your proposed rules (such as the date of the rule draft), update your Order Adopting Rules to reflect the changes. The commissioner or director (or another authorized person) must sign it.

### 10.7.2 Determine whether to further notify the Governor’s Office

If you made changes to the proposed rules or controversies have arisen, you might wish to communicate with the Governor’s Office. Per the Governor’s Office administrative rule review policy, **GOV-PLCY**:

**When the agency is adopting exempt rules or good cause exempt rules:** the agency may exercise its judgment about whether to submit a completed Final Rule Form **[GOV-FNL]** to the Office of the Governor. The nature of exempt . . . rules is that there are no policy considerations to make or controversies to address, so waiting for approval is not necessary. If either were to develop, however, the agency should notify the Office. Submitting a completed Final Rule Form is usually a wise precaution against error. When in doubt, the agency may contact the Legislative Coordinator. Agencies should note that exempt rules adopted under Minnesota Statutes, section 14.386 *are* subject to veto*. [emphasis added]*

### 10.7.3 Filing your approved exempt rules

eFile your signed Order Adopting Rules as you would your other documents.

**Note:** OAH, the Revisor’s Office, and Secretary of State’s Office accomplish the final steps electronically.

1. When the agency eFiles the signed Order Adopting Rules, OAH usually requests the Final Rules from the Revisor’s Office. With exempt rules, however, the agency has already eFiled the certified adopted rule with OAH and the Revisor’s office does not produce any additional documents. So, OAH files the Final Rules with the Secretary of State’s Office.
2. The Secretary of State’s Office serves the Final Rules on the Governor’s Office via email using a distribution list that includes the agency. This starts the 14-day veto period. The email contains no explanation and is how you will know your rule was served on the Governor’s Office, so you must watch for it. Typically, the agency rule contact is copied on the service email from the Secretary of State’s Office to the Governor’s Office. After you receive this email or some other confirmation, you should proceed with publishing the updated rule in the *State Register*. The Secretary of State’s Office will also notify the Revisor’s Office that the rule has been filed.

**Note:** While these steps can take place swiftly, that’s not always the case. Make sure to keep track of where and when the rule was forwarded and how long it has been at a specific office. Follow up with the appropriate office, as needed.

### 10.7.4 Publish in the *State Register*

Before your rules can take effect, you must publish them in the *State Register*.[[5]](#footnote-5) This is the first and only time the rules are published (there is no Notice of Adoption). See information on how to publish in the *State Register* and “Production Schedule” for publication dates and deadlines on the [Minnesota State Register website (https://mn.gov/admin/bookstore/register.jsp)](https://mn.gov/admin/bookstore/register.jsp). The rules become effective on the date of publication if a different effective date is not specified in the rule.

### 10.7.5 *State Register* lead time

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 “Production Schedule” on the [Minnesota State Register website (https://mn.gov/admin/bookstore/register.jsp)](https://mn.gov/admin/bookstore/register.jsp) for publication dates and deadlines.

### 10.7.6 Governor veto

After the Governor receives a copy of the adopted rules, the Governor may veto the rules. (**Note**: rules that are exempt under section 14.386 are subject to the Governor’s veto, unlike good-cause-exempt rules under section 14.388).To veto the rules, the Governor must submit a notice of the veto to the *State Register* within 14 days of receiving the rules from the Secretary of State. A veto is effective when the veto notice is submitted to the *State Register*.[[6]](#footnote-6) The Governor’s Office will let you know whether the rule or portions of the rule will be vetoed.

## 10.8 Notice to Affected Parties

Providing additional notice is not required when exempt rules are proposed or adopted but is considered a best practice. Notice of your new rules might not reach the affected parties if you rely solely on the *State Register* publication. Because rules are always subject to due-process considerations, you should give notice to these parties in some other way to avoid possible litigation. If you do give additional notice, include a certificate of additional notice as an exhibit in the documents that you file with OAH for approval. Remember though, that because additional notice is not required for this rulemaking, you have more flexibility in how you provide this notice (for example, you do not have to have this additional notice plan preapproved by an ALJ). For information on developing and using an additional notice plan, see Chapter 5, 6, or 7.

## 10.9 Expiration of Exempt Rules

Unless otherwise provided in the authorizing law, exempt rules expire two years from the date that the rules are published in the *State Register*. Once expired, the law authorizing exemption will also expire, so you will be unable to use the exempt process again.

## 10.10 Official Rulemaking Record

After exempt rules are adopted, you must keep an Official Rulemaking Record. The requirements for the Official Rulemaking Record are contained in Minnesota Statutes, section 14.365, clauses (1) to (11). A form for the Official Rulemaking Record is in the appendix as **RECORD**. Note that paragraphs (1) to (11) of this form are keyed to clauses (1) to (11) of section 14.365, so that this form can serve as a checklist to meet the requirements of section 14.365. In addition to the required documents, it is good practice to keep documents that show any additional justification for your rules, the date the rules took effect, evidence of official approval by your agency, and any information on how you considered giving affected parties notice.

**Note:** With eFiling, OAH will return your file as a downloadable link in an email message. Only the person who receives the email with the link can open it. Furthermore, the link will expire. Download the materials as soon as possible and save it securely according to your agency’s record retention schedule and practices. This eFile and any others not included will become your official record, which your agency must preserve as a permanent record. OAH is not responsible for preserving the permanent record and does not keep the electronic file available indefinitely.

**Best practice:** Your returned file from OAH might be labeled “official record,” but rename it something like “return of OAH submission file.” This will help you distinguish it from the official rule record that you must prepare under statute after your rulemaking concludes.

# Adopting Completely Exempt Rules under 14.386

## 10.11 Preparing Completely Exempt Rules (Exempted from Chapter 14 and Specifically Exempted from Section 14.386)

Agencies may adopt completely exempt rules without the procedural requirements for the other two types of exemptions because these types of rules have been exempted from both the regular rulemaking procedures and the exempt procedure in section 14.386. In other words, this complete exemption means that you are not required to have your drafted rules certified as to form, submitted to OAH, or have the rules published. This complete exemption also means that you do not have to submit your exempt rules to the Governor for a possible veto because the rules are not subject to any provision of the APA, and therefore are not subject to section 14.05, subdivision 6.

### 10.11.1 Practical considerations; Governor’s Office

Chapter 14 does not require that you submit completely exempt rules to the Governor’s Office. However, those of you in the executive branch who serve the Governor should note that the Governor’s Office administrative rule review policy, **GOV-PLCY,** asks agencies to submit a preliminary proposal form for exempt rules. This can be found in the appendix as **GOV-PRLM**. After you notify the Governor’s office, you may go forward without waiting for Governor’s Office approval.

### 10.11.2 Specific statutory guidelines

Make certain that you follow any specific guidelines presented in the statutory authority. For instance, the law authorizing complete exemption might also state that the rules, once drafted, must be published in the *State Register* as public notice that the rules exist.

### 10.11.3 Notice Requirements

Although you have a complete exemption from rulemaking requirements found in the APA, you should still provide some form of notice to affected parties to avoid a due process challenge. This notice should be appropriate to the rules that you seek to enforce and does not require comment.

### 10.11.4 Legal review

If the law authorizing this exemption does not give you further guidelines, you might want to do a legal review of your rules to ensure that the rules will survive potential legal challenges. Some agencies might choose to do the review in house, while other agencies might choose to consult with their AG.

### 10.11.5 Order Adopting Rules

Creating a record for this rulemaking is a good idea. An Order Adopting Rules, even though not required, serves as a record of both the effective date and the statutory authorization for these rules. A commissioner’s signature also gives proof that these rules were authorized. See **ORD-ADPT** in the appendix.

**Note:** Because these are completely exempt rules, you will not need to include in your Order any statement of need and reasonableness.

### 10.11.6 Official Rulemaking Record

While not required for completely exempt rules, your agency should maintain an official record to document how the rules have changed, who worked on the rules, dates for when the rules went into effect, evidence that the rules were adopted by the agency official authorized to adopt rules, and information on how affected parties were notified of the rules. Because you will not have to prepare a Statement of Need and Reasonableness, you might want to include a justification in an Order Adopting Rules, as discussed previously, or provide memos or correspondence to show your reasoning for the rules.

## Checklist for Chapter 10 – Exempt Rules under 14.386

**Date Completed Item**

 **10 – Entire chapter reviewed before proceeding**

 **10.1 – Determined which procedural requirements apply**- **10.1.1 – Exempt under 14.386
- 10.1.2 – Completely exempt under 14.386
- 10.1.3 – Exempt for good cause under 14.388** (See Chapter 11)

 **10.2 – Rules drafted**- Draft rules as you would any other rules (See Chapter 3)
- Request draft from Revisor; tell them the rules are exempt under 14.386
- If agency is a multi-member board, **BD-NTC** used

 **10.3 – Rules prepared for adoption**

 - **10.3.1 – Governor’s Office notified
 - GOV-PRLM** used

 **- 10.3.2 – Revisor’s Draft approved for publication obtained (with certificate signed by Revisor)**

 **- 10.3.3 – Proposed Order Adopting Rules drafted
 - ORD-ADPT(EX)** used

 **10.4 – Rules submitted to OAH**- **10.4.1 – eFile rule-related documents; EXEMPT-LTR** used

 **10.5 – ALJ review completed
-** ALJ has 14 days to review

  **10.6 – Resubmitting disapproved rules
- 10.6.1 – Resubmitting with corrections
- 10.6.2 – Appealing ALJ decision**

 **10.7 – Approved Exempt Rules adopted
- 10.7.1 – Order Adopting Rules finalized and signed** - Order signed by:

 **- 10.7.2 – Determine whether to further notify the Governor’s Office
 - GOV-FNL** used

**Checklist for Chapter 10 (Continued)**

**Date Completed Item**

 **- 10.7.3 – Signed Order Adopting Rules eFiled**- Signed order eFiled with OAH
 - Rules filed with Secretary of State
 - Notice of Adoption received from Revisor

 **10.8 – Affected parties notified (Optional)**

 **10.9 – Expiration of Exempt Rules noted**

 **10.10 – Official Rulemaking Record prepared
- RECORD** used

 **10.11 – Preparing Completely Exempt Rules (exempted from Chapter 14 and also specifically exempted from section 14.386)
- 10.11.1 – Practical considerations; Governor’s Office notified
 - GOV-PRLM** used
**- 10.11.2 – Specific statutory guidelines followed
- 10.11.3 – Notice to affected parties provided
- 10.11.4 – Legal review of rules
- 10.11.5 – Consider using ORD-ADPT
- 10.11.6 – Official Rulemaking Record created**

1. Minn. Stat. § 14.386. [↑](#footnote-ref-1)
2. Minn. Stat. § 14.386(a). [↑](#footnote-ref-2)
3. Minn. Stat. § 14.388. [↑](#footnote-ref-3)
4. Minn. R. 1400.2400, subp. 3. [↑](#footnote-ref-4)
5. Minn. Stat. § 14.386(a)(4). [↑](#footnote-ref-5)
6. Minn. Stat. § 14.05, subd. 6. [↑](#footnote-ref-6)