**Terminology**

 **Agency** - an administrative branch of government. Boards, commissions, divisions, and departments all were considered agencies.

 **Arizona Administrative Code (AAC)** - Arizona’s official compilation of rules that govern state agencies.

 **Arizona Revised Statutes (ARS)** - is the collection of state laws passed by Arizona’s Legislature.

 **Code of Federal Regulations (CFR)** - the United States’ official compilation of rules and regulations that govern federal agencies.

**Governor’s Regulatory Review Council (GRRC)** – established in 1981, the Council reviews Arizona regulations to ensure that they are necessary and to avoid duplication and adverse impact on the public. The Council also assesses whether Arizona regulations are beneficial, clear, consistent with legislative intent, legal and within the agency’s statutory authority.

**Discretion** - the power of free decision or latitude of choice within certain legal bounds. Agency discretion as it pertains to rulemaking is the agency’s authority to decide, using its best judgment and expertise, the inclusion and substantive content of a rule.

 **May** - a grant of permission for a particular action. An agency’s ability to decide the presence of rules in its chapters is awarded frequently with “may.”

 **Shall** - a command upon the agency. “Shall” is a directive frequently used within statutes to require agencies to make rules, enforce laws, or execute other activities.

 **United States Code (USC)** - the official compilation of federal statutes in the United States.

**Rule Inventory Methodology**

Each rule in the Arizona Administrative Code (AAC) was counted and categorized into a baseline database. Repealed, expired, renumbered, or recodified rules were not counted. The database was organized by title and chapter.

Rules were categorized by derivation of authority. The four categories were: Agency Discretion; State Statute; Federal Statute or Regulation; and Definitions or Applicability. If the rule fell within the agency’s broad statutory authority but was not required, the rule was categorized as agency discretion. As a note, this report does not imply that rules categorized as agency discretion are arbitrary or unnecessary. Rules explicitly required within the applicable statute were categorized as state statute. If the rule was required by or substantially bound to a federal statute, then the rule was categorized as federal statute. Any rules that defined technical/agency specific terms or stated the persons regulated by the chapter were categorized as definitions or applicability.

**Agency Discretion (1)**

As stated above, rules that were within broad statutory authority but not explicitly required were categorized as agency discretion. Rules clearly within this category are rules authorized under the statutory clause “agency may adopt rules…” Example 1 illustrates this example.

**Example 1**. ARS 32-1207(B)(3)(c):

B. The board may:

3. Adopt rules:

(c) Prescribing requirements for obtaining licenses for disabled or retired licensees, including the triennial license renewal fee.

The relevant rule, R4-11-401, titled “Retired or Disabled Licensure Renewal Fee” was thus categorized as agency discretion. The legislature explicitly gave the board the discretion to have the rule in its chapter or omit the rule.

The second situation within in this category involves rules deriving from general grants of rulemaking authority. Example 2 applies to this situation.

**Example 2**. ARS 8-453(A)(5)

A. The director shall:

5. Adopt rules to implement the purposes of the department and the duties and power of the director.

If a statute’s only rulemaking directive is a general grant of authority, any rules deriving from the statute were categorized as agency discretion. The general authority clause was included by the legislature to officially delegate the rulemaking power to the agency. In the example, the agency’s only requirement was to make rules for overall implementation of the department’s purpose, but the agency retained the discretion over certain rules. The agency complies with the statute if it adopts 10 rules or 500.

Note: “Shall adopt rules necessary” aligned with this interpretation.

Similarly, the third situation involved rules that resulted from a statutory burden placed on the agency, but were created without an explicit rulemaking requirement.

**Example 3.** ARS 8-126(2)

The division shall:

2. Provide for oversight of agencies

R21-9-211(C): Adoption Agency Administrator

C. The Administrator shall:

1. Oversee development and implementation of the adoption agency’s policy and procedures for program and fiscal operations.

Although the statute directly requires the agency to oversee adoption agencies, there is no requirement for making a rule. In this situation, the agency decided to make a rule even though it could have complied with the required activity without making an official rule. This was categorized as agency discretion.

**State Statute (2)**

Rules fell in this category if the statute used a variation of “shall adopt rules” to require the agency to execute a specific statutory requirement explicitly through rulemaking.

**Example 4.** ARS 32-1504(A)(3)

A. The board shall:

3. Adopt rules regarding the qualifications of medical assistants who assist doctors of naturopathic medicine and shall determine the qualifications of medical assistants who are not otherwise regulated.

R4-18-602. “Medical Assistant Qualification”

Rule R4-18-602 was categorized as required by state statute because the agency has no discretion over the existence of the rule in its chapter. If the statute had instead stated “shall determine the qualifications of medical assistants…” then the resulting rule would have been categorized as agency discretion. This is because agencies could conceivably “determine” qualifications of medical assistants in a substantive policy statement or on a case by case basis. This is not in consideration for 32-1504(A)(3) because the agency must use rulemaking to comply with the statute.

**Federal Statute or Regulation (3)**

For rules placed in this category, there were three common situations: rules explicitly required by federal statute, rules significantly tied to a federal grant/program/agreement, or rules incorporating a federal regulation by reference.

**Example 5**. ARS 49-425(A)

A. The director shall adopt such rules as he determines are necessary and feasible to reduce the release into the atmosphere of air contaminants originating within the territorial limits of the state or any portion thereof and shall adopt, modify, and amend reasonable standards for the quality of, and emissions into, the ambient air of the state for the prevention, control and abatement of air pollution.

Title 18 Article 2 of the AAC are the resulting rules from the directive: setting ambient air quality standards and area designations/classifications. Using a direct chain of authority, the rules in Article 2 would be categorized as state; however, there is a relevant federal statute.

42 USC 7410(a):

In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State.

Arizona is required to submit the implementation plans to the EPA, and the legislature has delegated the responsibility to Arizona Department of Environmental Quality (ADEQ). As a result, any rules deriving from the State Implementation Plan were categorized as required by federal statute.

**Example 6.** ARS 30-654(B)(12)

B. The agency shall:

12. Adopt rules applicable to the shipment of radioactive materials in conformity with and compatible with those established by the United States nuclear regulatory commission, the department of transportation, the United States treasury department and the United States postal service.

Rules from Title 12 Chapter 1 Article 15 consider transportation of radioactive material, as required by the statute. The rules were categorized as federal not only because they must be in conformity with a federal regulation on point, but also because the specific rules were required in order for Arizona to remain as an agreement state with the Nuclear Regulatory Commission (NRC). The agency assessment led to the determination that the rules were significantly tied to a federal agreement. As a result, they were placed into category three despite no federal statute explicitly requiring a state agency to adopt rules for transportation of radioactive material.

Note: This analysis was used for any rules that were as a result of federal grant conditions or other incentives.

**Example 7.** R18-4-207. Entry and Inspection of Public Water Systems

A. A Department inspection shall comply with ARS § 41-1009.

B. 40 CFR 142.34(a) is incorporated by reference as of the date specified in R18-4-102, subject to the modifications specified in this Section; this incorporation does not include any later amendments or editions. The phrase “Administrator” is changed to “Department.”

Rules that incorporated by reference a federal regulation or statute were placed in this category. Although the agency might have had discretion over the substantive context, it would be inappropriate to categorize the rule as deriving its authority from the agency because the federal regulation was deemed sufficiently extensive for the agency to adopt for the state. In other words, the agency did not decide to promulgate its own original rule.

**Definitions and Applicability (4)**

Rules titled “Definitions” were placed into this category. Rules in which the only substantive content was to identify those regulated by the title were also placed in this category. The latter situation included rules titled “Scope” or “General Provisions” that placed no additional regulatory burden upon the public.

**Example 8.** R13-3-702 Scope of Chapter.

I. This Chapter applies only to a tow truck company in the business of towing and a tow truck agent.

There is no state statute that requires the agency to restate those regulated. The rule is also titled neither definitions nor applicability. The interpretation for all the rules in category 4 was that, although not explicitly required by state statute, the rules serve enough of a practical purpose as to warrant a category separate from agency discretion. In other words, an agency with extensive rules has little choice over defining technical terms or restating the portion of the public regulated by its rules.

**Additional Methods**

1. For every rule, the presumption was that the rule was agency discretion, unless rebutted by an explicit state or federal statute requiring the rule.

2. As a general matter, if a rule contained multiple subsections, two of which arguably fit under two different categories, the rule was categorized based on its overall substantive content in regards to the relevant statutes. If at least one subsection was required by statute, the entire rule was categorized as required by state or federal statute. Example 8 illustrates this specific situation.

**Example 9.** ARS 5-104.01(A)

A. The department shall require that an annual financial audit be conducted of each permittee licensed under this chapter. The department may also require a financial audit from any concessionaire licensed under this article…The commission shall adopt rules that require each permittee to select an accounting firm approved by the auditor general to conduct the annual financial audit when a certified audit is required.

As a result, R19-2-104(R) requires the permittees to select an accounting firm. This part of the rule would be category 2. The rest of the subsections, however, are agency discretion because they relate to the overall financial audit without a specific rulemaking directive from the legislature. Hypothetically, if the rule and all its subsections were removed, the agency would no longer be in compliance with the statute because it would lack the required accounting firm disclosure from each permittee. If one or two of the discretionary subsections were removed, the agency could still be in compliance with the statute by maintaining subsection (R). R19-2-104 was thus placed in category two, because the agency must have the content of subsection (R) somewhere.

3. Any rules deriving from statutes using the phrases “in a manner prescribed by” or “shall prescribe [action]” were categorized as agency discretion. Although it is arguable that the word “prescribe” has a rulemaking connotation, there is evidence of the legislature using such phrases as “shall prescribe by rule” or “shall adopt rules prescribing.” This led to the interpretation that an agency can “prescribe” without adopting an official rule. As a result, the rules were deemed discretionary if the statute used prescribe without any mention of rulemaking.