



*Notice of*

# Public Meeting

*to be held*

**January 7, 2016 at 12:15 p.m.**

**OBC Conference Room—2nd Floor, Norbert Hill Center**



## *Topic: Administrative Rulemaking*

**The Legislative Operating Committee is hosting this Public Meeting to gather feedback from the community regarding a legislative proposal for this new law that:**

- ◆ Allows Authorized Agencies to prepare their own Rules, conducting the required public meetings; receiving comments during the public comment periods, and reviewing/considering all comments received. [17.4 and 17.6]
- ◆ A Rule officially goes into effect after the LOC certifies that it was promulgated in accordance with this Law – it does not have to be adopted by OBC/GTC resolution [17.7], except that the OBC is still responsible for adopting emergency Rules before they go into effect. [17.9]
- ◆ The OBC reviews a Rule once it has been certified by the LOC. This Law sets out a detailed process for the OBC to repeal/change a Rule within a certain period of time. [17.7]
- ◆ Has standards of review – i.e. identifying when a person can appeal actions taken pursuant to a Rule, and when the Judge can reverse or modify an action taken. [17.11 and 17.12]
- ◆ Identifies requirements for seeking Judicial Review of a Rule (i.e. seeking to have the Judiciary determine whether a Rule is valid) – and enabling the Judiciary to strike down part or all of a Rule if it violates the Tribal Constitution or is otherwise unlawful, or if it exceeds the Authorized Agency's Rulemaking authority.)

**All community members are invited to attend this meeting to learn more about this proposal and/or to submit comments concerning this proposal.**

**Public Comment Period—Open until January 14, 2016**

During the Public Comment Period, all interested persons may submit written comments regarding this legislative proposal; and/or a transcript of any testimony/spoken comments made during the Public Meeting. Written comments may be submitted to the Tribal Secretary's Office or to the Legislative Reference Office in person or by U.S. mail, interoffice mail, e-mail or fax.

For more information about the public meeting process, or to obtain copies of the Public Meeting documents for this proposal, please visit [www.oneida-nsn.gov/Register/PublicMeetings](http://www.oneida-nsn.gov/Register/PublicMeetings) or contact the Legislative Reference Office, which is located on the second floor of the Norbert Hill Center, Oneida WI.

Mail: **Legislative Reference Office**  
**PO Box 365**  
**Oneida, WI 54155**

Phone: **(920) 869-4376 or (800) 236-2214**  
E-Mail: **LOC@oneidanation.org**  
Fax: **(920) 869-4040**

**Chapter 17**  
**Administrative Rulemaking**  
**Thotihá·tú lutyánłslu·níhe?**

they are the leaders, they are making the laws, policies and rules

- 17.1. Purpose and Policy
- 17.2. Adoption, Amendment, Repeal
- 17.3. Definitions
- 17.4. General
- 17.5. Preparation of Proposed Rules
- 17.6. Public Comment Period on Proposed Rules

- 17.7. Oneida Legislative Operating Committee Certification of Procedural Compliance and Business Committee Review
- 17.8. Effective Date of Rules
- 17.9. Emergency Rules
- 17.11. Judicial Review of a Rule

<i>Analysis by the Legislative Reference Office</i>					
<b>Title</b>	Administrative Rulemaking				
<b>Requester</b>	LOC (prior term)	<b>Drafter</b>	Krystal John	<b>Analyst</b>	Tani Thurner
<b>Reason for Request</b>	To ensure consistency in how Tribal boards, committees, commissions, departments and officials develop and implement rules in furtherance of the laws and policies they are delegated authority to implement/enforce.				
<b>Purpose</b>	This Law is being requested in order to develop a consistent process for promulgating Tribal Rules, which are created in order to further the goals established in a Tribal law.				
<b>Authorized/Affected Entities</b>	Legislative Operating Committee (LOC) and Legislative Reference Office (LRO) are given duties under this Law; all Tribal boards, committees, commissions, departments and officials that are delegated "Rulemaking Authority" will be affected when developing or amending rules.				
<b>Due Process</b>	Judicial Review of Rules				
<b>Related Legislation</b>	The Legislative Procedures Act (LPA) identifies a similar process for the promulgation and adoption of Tribal laws.				
<b>Enforcement</b>	Judicial Review of Rules, Rules can be challenged if they are not promulgated in accordance with this Law.				

**Overview**

1 The purpose and policy of the Administrative Rulemaking Law (the Law) are to provide  
 2 a process for adopting and amending Administrative Rules (Rules) that is efficient, effective and  
 3 democratic, and to ensure that authorized agencies act responsibly and consistently when  
 4 enacting and revising Rules. [17.1-1 and 17.1-2]

1 The Tribe currently has a law in place (the LPA) that establishes a process and  
 2 requirements for the adoption and amendment of Tribal laws. This proposed Law establishes a  
 3 process and requirements for adopting and amending Rules promulgated in furtherance of those  
 4 laws.

1 This Law does not apply to standard operating procedures, defined as "statements,  
 2 interpretations, decisions, rules, regulations, policies, procedures or other matters concerning  
 3 internal management of an agency, which do not affect the private rights or interests of  
 4 individuals outside of the agency." [17.4-1]

**The Rulemaking Process**

1 The process for developing, drafting and adopting a Rule is somewhat similar to the  
 2 process for developing and drafting a Law, with some differences:

- 1 • Instead of the LOC, each Authorized Agency is responsible for preparing its own Rules,  
 2 conducting the required public meetings; receiving comments during the public comment  
 3 periods, and reviewing/considering all comments received. [17.4 and 17.6]
- 1 • A Rule officially goes into effect after the LOC certifies that it was promulgated in

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2 accordance with this Law – it does not have to be adopted by OBC/GTC resolution. [17.7]

- 3 • The OBC does not review a Rule until after it has been certified and gone into effect. This
- 4 Law sets out a detailed process for the OBC to repeal/change a Rule within a certain period
- 5 of time. [17.7] However, there is one exception – the OBC is still responsible for adopting
- 6 emergency Rules before they go into effect. [17.9]
- 7 • This Law also provides for standards of review for actions taken pursuant to a Rule –
- 8 enabling a Tribal hearing body or the Judiciary to uphold, or reverse an action, or remand the
- 9 matter for further consideration; but also adding that Authorized Agencies are recognized as
- 10 subject matter experts in a given field, so Tribal hearing bodies are required to provide an
- 11 Authorized Agency with deference by upholding the action taken unless it meets one of the
- 12 criteria listed in this Law. [17.11 and 17.12]
- 13 • This Law also adds a section identifying requirements for seeking Judicial Review of a Rule
- 14 (i.e. seeking to have the Judiciary determine whether a Rule is valid) – and enabling the
- 15 Judiciary to strike down part or all of a Rule if it violates the Tribal Constitution or is
- 16 otherwise unlawful, or if it exceeds the Authorized Agency’s Rulemaking authority.)

#### 17 **What is a Rule?**

18 A Rule is “a set of requirements enacted by an Authorized Agency in order to implement,

19 interpret and/or enforce a law or policy of the Tribe.” [17.3-1(f)]

20 Generally, laws set out broad requirements; but more specific, detailed requirements are

21 needed to actually carry out those requirements. Various Tribal laws delegate authority to

22 specific Tribal “agencies” (which would mean boards, committees, commissions, departments or

23 officers of the Tribe) to administer and/or enforce that law; and this Law authorizes those

24 agencies to develop and adopt rules, in furtherance of those responsibilities.

25 Rules developed pursuant to this Law have the same force and effect as the law which

26 they are promulgated, and must be followed by both the general public and the Authorized

27 Agency that promulgated the Rule. [17.4-1]

#### 28 **Who can propose/request that a Rule be developed?**

29 Only Authorized Agencies may promulgate Rules; and

30 only Rules interpreting a law that the Authorized Agency has been

31 delegated authority to administer or enforce. Rules may not exceed

32 the Rule Making Authority given to the Authorized Agency by

33 that law. This Law does not confer rule making authority. [17.4-1]

#### 34 **Public Meeting/Comment Requirements for Rules**

35 This Law requires public meetings to be held before a Rule

36 can be enacted. The Authorized Agency must publish notice of a

37 public meeting in the Oneida Register and in the Kalihwisaks.

38 [17.6-2(a)] All persons attending a public meeting for a proposed Rule are required to register at

39 the meeting – not just those who provide spoken comments. [17.6-2(f) and LPA 16.8-3(b)]

40 Public Meetings must be audio recorded. [17.6-2(f)] An Authorized Agency may extend

41 a public comment period as it deems appropriate, by posting an amended Notice of Public

42 Meeting before the original comment period ends. [17.6-2(g)]

43 After a public comment period ends, the Agency must prepare a memo identifying every

44 public comment received, along with the Agency’s response to each comment. This memo

45 accompanies the proposed Rule when it is submitted to the LOC for certification, and to the

46 OBC for review. [17.10-1(c)]

**An “Authorized Agency” is any Tribal board, committee, commission, department or officer that has “Rulemaking Authority” – i.e. authority delegated in a Tribal law to implement, interpret and/or enforce a Tribal law or policy. [17.3-1(a) and (g)]**

#### 47 **Submission Materials**

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48 When a Rule is presented for public comment, LOC certification or OBC review, it is  
49 required to be accompanied by supporting materials, which are combined into one summary  
50 report, which must provide an overview of the Rule, [17.5-2] and include:

- 51 • A **statement of effect** – this is a legislative and legal analysis, prepared by the Legislative  
52 Reference Office (LRO) upon request from the Agency [17.5-2(d)]; which explains the  
53 effects the Rule would have on the Tribe. [17.2-5(h)]
- 54 • A **financial analysis** – this is prepared by the Authorized Agency, and must include a report  
55 from every entity that may be financially affected by the Rule. [17.3-1(c)] If an entity does  
56 not provide the requested information within 10 business days the financial analysis may still  
57 be submitted, noting which entities were non-responsive to their request. [17.5-2(e)(1)]
- 58 • **Public Comment Changes.** As part of the summary report, an Authorized Agency must  
59 include “a description of any changes made to the proposed Rule based on the public  
60 comment period (if applicable).” Agencies are not required to identify any changes made that  
61 were not based on the public comment period. [17.5-2.]

### 62 **Emergency Rules**

63 This Law allows for Rules to be enacted on an emergency basis. Like emergency laws, an  
64 emergency Rule can be adopted without a public comment period being held first, and is in  
65 effect to up to six months, and eligible for a one-time extension of up to six extra months. [17.9]

66 As with emergency legislation, a proposed emergency rule is first submitted to the LOC  
67 and is adopted by the OBC, but for emergency Rules, the LOC is not required to forward the  
68 proposal to the OBC - if the LOC determines there is not a valid emergency, it may decline the  
69 request.

70 This Law also specifically authorizes the OBC to make changes to a proposed emergency  
71 Rule before adopting it, and adds that if the Authorized Agency does not “support” any revisions  
72 made by the OBC, “such concerns may be addressed when the Authorized Agency begins the  
73 process for enactment of the permanent Rule.” [17.9-2]

### 74 **LOC Certification**

75 Each Authorized Agency ultimately adopts its own Rules (except emergency rules), but  
76 only after receiving certification from the LOC. Once a Rule has been completely processed and  
77 is ready for adoption, the Agency submits the proposed rule, along with the following, to the  
78 LOC:

- 79 • The Summary Report
- 80 • A memo showing the procedural timeline when the requirements of this Law were met)
- 81 • Supporting documentation, including: the draft version presented for public comment, the  
82 public meeting notice, a redline draft to the current rule (for proposed amendments), minutes  
83 from the agency’s meeting where the proposed Rule was considered as an agenda item; and  
84 any other supporting information that may be requested by the Legislative Reference Office.
- 85 • A memo identifying every public comment received and the agency’s response to each.
- 86 • The effective date for the new Rule or amendments to go into effect. [17.10-1.]

87 Then, if the Rule was promulgated in accordance with this Law, then the LOC issues a  
88 written certification stating such, and publishes the Rule on the Oneida Register. [17.7-2]

89 The effective date of a Rule is determined by the Authorized Agency, and can be any  
90 date after the Rule is certified by the LOC. [17.8]

91 If the LOC is “unable to certify” that the Agency has complied with this Law, the LOC  
92 must return the Rule to the Agency with specific feedback as to what procedural requirements

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93 were not met. [17.7-2]

### **OBC Review of Rules**

94  
95 This Law provides a process for the OBC to review a Rule after it has been certified by  
96 the LOC and enacted:

- 97 • After the LOC certifies a Rule, it must forward the Rule and supporting materials, along with  
98 the LOC’s certification, to the OBC for review.
- 99 • After review, if the OBC has any concerns or requested revisions, the Authorized Agency  
100 “shall work with” the OBC to “address any concerns.”
- 101 • The Rule already adopted by the Agency will remain in effect as adopted by the Agency  
102 unless:
  - 103 ○ The OBC deems it necessary to repeal the Rule, in which case any Rule in effect prior to  
104 the repealed Rule is immediately reinstated, or
  - 105 ○ the OBC provides the agency with written notice of intent to repeal or amend the Rule  
106 within 30 days after receiving notice of the Rule, and a revised rule is adopted within six  
107 months afterwards. 17.7-3(b).
    - 108 ▪ If the Agency and the OBC agree upon the necessary changes, the Agency must adopt  
109 the Revised Rule as agreed upon by the OBC. An agency has “discretion” to conduct  
110 an additional public comment period, but is not required to do so.
    - 111 ▪ If the Agency and OBC do not reach an agreement as to necessary changes, the OBC  
112 may adopt a Revised Rule that incorporates the amendments it deems necessary.

113 If either the OBC or Agency adopts a revised rule within that six-month period, they must  
114 provide a final version of the Rule to the LOC. The LOC must then update the Oneida Register  
115 with the Rule. 17.7-3(f)

116 If neither the OBC nor Agency adopts a revised rule within that six month period, then  
117 the OBC is precluded from repealing or amending that Rule. This would mean that if the OBC  
118 adopts an amended Rule after the six-month period, the amendments could be subject to a legal  
119 challenge.

### **Contesting a Rule**

120  
121 This Law allows for the Judiciary to render a declaratory judgment as to whether a Rule  
122 is valid, in the same way it does for laws, as provided in 150.5-2(e) of the Judiciary Law. [17.11-  
123 1]

124 There is a one-year statute of limitations for contesting a Rule by claiming that it was not  
125 promulgated in accordance with this Law. [17.11-3]

### **Standard of Review for Actions taken Pursuant to Administrative Rules**

126  
127 Any Tribal body hearing an appeal or contest of an action taken pursuant to a Rule; must  
128 uphold the action unless it finds that the action either:

- 129 • Violated the Tribal Constitution
- 130 • Exceeded the agency’s Rulemaking Authority
- 131 • Was unlawful, clearly erroneous, arbitrary or capricious, or
- 132 • Exhibited a procedural irregularity which would be considered a harmful error, that may have  
133 contributed to the final decision; and the decision would have been different otherwise.

134 If the Tribal body finds that the action did any of those, then the Tribal body must either reverse  
135 or modify the action taken; or remand the matter for further consideration, if the action was at the  
136 second level of appeal. [17.12]

### **New Responsibilities**

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- 138 • **New Entity Responsibilities:** Every Tribal board, committee, commission, department  
139 and officer that is delegated authority in a Tribal law to implement or enforce a Tribal  
140 law is now responsible for developing their own rules, and for each rule they are now  
141 responsible for: conducting public comment periods, creating a fiscal analysis, and  
142 preparing various reports; including memos identifying the procedural timeline, and  
143 identifying/responding to every public comment received. [17.5-2 and 17.10-1(a-c)]
- 144 • **New LOC Responsibilities:**
- 145 ○ Developing a form and style for Rules, to be followed by Authorized Agencies.  
146 [17.5-1]
  - 147 ○ Reviewing submitted materials and either certifying a Rule when it has been  
148 promulgated in accordance with this Law and forwarding it to the OBC, or  
149 sending a rejected Rule back to the agency with specific feedback as to which  
150 procedural requirements were not fulfilled. [17.7]
  - 151 ○ Publishing certified/final Rules on the Oneida Register. [17.7-2(a) and 17.7-3(f)]
  - 152 ○ Reviewing emergency Rules to determine whether there is a valid emergency.  
153 [17.9-1]
- 154 • **New LRO Responsibilities:**
- 155 ▪ Creating and maintaining a complete record of all proposed and adopted Rules,  
156 including requesting any supporting information. [17.10-1]
  - 157 ▪ Creating and updating administrative histories for each rule – identifying the original  
158 effective date and the effective date of amendments. [17.10-2]
  - 159 ▪ Publishing pre-existing and emergency Rules on the Register. [17.7-3 and 17.9-5]
  - 160 ▪ Preparing statements of effect for all Rules, upon request of the Agency. [17.5-2(d)]

#### 161 **Other**

162 Any Rules adopted after this Law goes into effect are valid only if adopted “in substantial  
163 compliance” with this Law. Any Rules already in effect when this Law is adopted will remain in  
164 effect unless the OBC directs that they be updated, but if they are ever amended, those  
165 amendments must follow this law’s requirements. [17.4-3]

166 It is intended that the adopting Resolution for this Law would require authorized agencies  
167 to forward any existing Rules to the Legislative Reference Office within 30 business days after  
168 this Law is adopted, and that they would be published on the Oneida Register within 30 business  
169 days after that.

170 The LPA was adopted by General Tribal Council (GTC) and can only be amended by  
171 GTC; this Law would be adopted by the Oneida Business Committee (OBC) and could only be  
172 amended or repealed by the OBC. [17.2-1 and 17.2-2]

173 This Law only requires Rules to follow the same numbering format as laws; and  
174 delegates authority to the LOC to establish additional form and style requirements. [17.5-1]

175 Rules already in effect when this Law is adopted will remain in effect unless the OBC  
176 directs that a Rule be updated “based on this Law’s requirements;” but any future amendments to  
177 existing Rules must follow the requirements of this Law. [17.4-3]

178 The Law requires Authorized Agencies to forward any Rules already in effect to the  
179 Legislative Reference Office within 30 days after this law is adopted; and the LRO will publish  
180 all such Rules on the Oneida Register within 30 days of receiving them. [17.4-3(a)]

181 A public meeting has not been held.

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### Considerations

The following are issues the LOC may want to consider:

- This Law gives authority to authorized agencies, meaning Tribal boards, committees and commissions, officers and departments. However, it is not clear if this would include OBC standing committees, because although those might be committees, they are not elected or appointed, technically. Recommend that this law clarify whether the intent is for this to apply to standing committees – to the LOC in particular, since it is delegated authority under this Law and under the LPA.
- Various existing Tribal laws set out processes or requirements for the adoption of regulations/rules, which will now be in conflict with this Law. It may be beneficial for the LOC to make a policy call determining how to address the numerous conflicting provisions that may exist if this is adopted.
- The Law is focused on the delegation of authority to administer a law, but occasionally refers to delegation of rulemaking authority under laws and policies. It may be beneficial to determine whether the intent is to allow rulemaking authority under Tribal policies, and if so, to ensure this Law consistently references both equally. For example, see 17.3-1(g) – ““Rulemaking Authority” means the delegation of authority to Authorized Agencies found in the Tribe’s **laws other than this Law** which allow Authorized Agencies to implement, interpret and/or enforce a **law or policy** of the Tribe.”
- The provisions relating to Judicial Review of a Rule (section 17.11) and Standard of Review (section 17.12) may need additional consideration and it is recommended that a legal review be obtained before this Law is adopted. Various issues include:
  - This Law does not identify whether judicial review actions are appealable.
  - 17.12-2 states that when hearing an appeal or “contest of an action” the hearing body must uphold the action unless it exhibited “a procedural irregularity which would be considered a harmful error that may have contributed to the final decision and if said irregularity were not present, the decision would have been different.” However, this appears to be mixing actions and decisions – the hearing body must uphold an action unless the action “exhibited a procedural irregularity that may have contributed to the final decision” – It may be difficult for a reader to interpret or understand how this applies.
- The provisions governing how the OBC can amend a Rule may need review:
  - An authorized agency has “discretion” to conduct an additional public comment period if the OBC requested substantial revisions, but is not required to do so. This appears to mean that the Agency is not required to follow the standard process for amending Rules.
  - The law is not clear on the process for the OBC to adopt an amended Rule [17.7-3] – this Law sets out a detailed process for Rulemaking, and if the OBC is authorized to amend a Rule after it has been adopted by an Agency, the Law may need to identify which parts of the process would be necessary.
- When the LPA is next amended, it is also recommended that the definition of the Oneida Register be revised to state that it includes agency “Rules” instead of agency regulations, to reflect this Law.
- There are various issues related to the definitions for Authorized Agency and the Rulemaking Authority, including:
  - Various laws and policies give authority to an entity to establish fee or penalty schedules – are those considered Rules?
  - How would one be able to tell if the Rule Making Authority exceeds the authority given to the Agency by law? How does one identify if a Rule delegates rulemaking authority?
  - Who exactly is delegated authority as an authorized agency – this is particularly important because some Tribal laws identify specific authorization for an entity to establish specific types of Rules relating to the Law, but not all types of Rules relating to the Law.
  - 17.4-1 says only Authorized Agencies may promulgate Rules. This could be construed as prohibiting the OBC from promulgating Rules.

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- 233           ○ The definition of Rulemaking Authority is “the delegation of authority to Authorized  
234 Agencies found in the Tribe’s laws other than this Law which allow Authorized Agencies to  
235 implement, interpret and/or enforce a law or policy of the Tribe.” [17.3-1(g)] Then, 17.5-1  
236 states: “In preparing a proposed Rule, Authorized Agencies shall substantially adhere to the  
237 form and style required by the Legislative Operating Committee.” Although this looks like it  
238 might be giving the LOC rulemaking authority, it is unclear, because that is delegating  
239 authority in this Law, not a law “other than this Law”.
- 240           ○ This Law is titled “Administrative Rulemaking” and then the term “administrative Rules” is  
241 used in the Purpose and Policy section, and once in the title for 17.4-1. The word  
242 “administrative” is not defined and is never used again – just “Rule” For clarity it may be  
243 beneficial to explain what an administrative rule is, otherwise, to delete “administrative”  
244 altogether and just use “Rule” throughout the Law.
- 245 ● It appears that emergency Rules could not be adopted as quickly as an emergency law, because a Law  
246 can be presented for emergency adoption without a fiscal impact statement, but this Law requires a  
247 summary report to be presented with a draft emergency Rule; and a fiscal analysis is part of the  
248 summary report.
    - 249 ○ For a fiscal analysis, the agency is required to include information submitted by every  
250 potentially affected entity, and entities are given ten business days to submit such information  
251 - this may hold up the process of a speedy emergency adoption.
    - 252 ○ A statement of effect is also part of the summary report which must be presented with a  
253 proposed emergency Rule. The statement of effect is prepared by the Legislative Reference  
254 Office, upon request of the Agency. This means the Agency must request the statement of  
255 effect, wait to obtain it, and then include it in the summary report which is then submitted  
256 with the Rule. This may also add to the length of time needed to adopt an emergency Rule.
  - 257 ● Under the LPA, a fiscal impact statement is not required to be provided with the materials that are  
258 presented for a public meeting for a proposed law; although it can be included if it is available. By  
259 comparison, this Law requires the full summary report (which includes the fiscal analysis) to be  
260 attached to a Rule when it is presented for public meeting. This means that the fiscal analysis must be  
261 presented with a Rule, for all public meetings. This is a policy call.
  - 262 ● 17.10-1(a)(4)When a Rule is submitted to the LOC for certification, it must include “Minutes from  
263 the agency’s meeting during which the proposed Rule was considered as an agenda item” – however,  
264 this requirement does not recognize that authorized agencies are not just Tribal boards, committees or  
265 commissions – Tribal departments and officers can also promulgate Rules, and Tribal departments, at  
266 least generally do not have minutes, meetings or agendas.
  - 267 ● 17.5-2 states that the “Authorized Agency shall prepare a summary report regarding each proposed  
268 Rule, which must be attached to the proposed Rule when presented for public comment and for  
269 approval through the [LOC] and ultimately the [OBC].” This sentence may be misleading – Rules are  
270 presented for LOC certification, not approval, and OBC approval is not required.
  - 271 ● 17.5-1 states: “In preparing a proposed Rule, Authorized Agencies shall substantially adhere to the  
272 form and style required by the Legislative Operating Committee.” It may be beneficial to require  
273 actual compliance, not substantial compliance. Otherwise, it may be helpful to identify what would be  
274 considered “substantial” compliance, since this permits some deviation.
  - 275 ● 17.6-2(b) requires the published notice to include “information for electronically accessing the  
276 summary report” - This provision only requires that the membership be told how to access materials  
277 online, which may cause problems for members without access to the internet. This is a policy call.
  - 278 ● 17-9: Emergency Rules are first submitted to the LOC, who must determine whether there is a valid  
279 emergency, and if they determine there is, then they must forward the materials to the OBC, who  
280 must then determine whether there is a valid emergency, and if so, must adopt the Rule, with or  
281 without revisions. It is not clear why the LOC must first review the Rule to determine whether there is  
282 a valid emergency, if the OBC is then going to do the same thing again. Especially when there is an

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- 283 emergency situation where a Rule must be implemented quickly.  
 284 • 17.3-1(c) The definition for a financial analysis is word-for-word the same as the LPA’s definition for  
 285 a fiscal impact statement. But it requires a different process and additional requirements which are not  
 286 also mentioned in the definition – under this Law, a financial analysis would also include a report  
 287 from all potentially affected entities, identifying how they would be affected. However, this is not  
 288 mentioned in the definition.  
 289

290 There are additional, minor, language-related issues which will be brought to the sponsor for  
 291 consideration, and which may result in additional changes to the draft.  
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293  
 294 **Chapter 17**  
 295 **Administrative Rulemaking**  
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298  
 299 **17.1. Purpose and Policy**

300 17.1-1. *Purpose.* The purpose of this Law is to provide a process for the adoption and  
 301 amendment of administrative Rules.

302 17.1-2. *Policy.* It is the policy of the Tribe to ensure:

- 303 (a) There is an efficient, effective and democratic process for enacting and revising  
 304 administrative Rules.  
 305 (b) That Authorized Agencies act in a responsible and consistent manner when enacting  
 306 and revising the administrative Rules.  
 307

308 **17.2. Adoption, Amendment, Repeal**

309 17.2-1. This Law was adopted by the Oneida Business Committee by resolution  
 310 \_\_\_\_\_.

311 17.2-2. This Law may be amended or repealed by the Oneida Business Committee pursuant to  
 312 the procedures set out in the Legislative Procedures Act.

313 17.2-3. Should a provision of this Law or the application thereof to any person or circumstances  
 314 be held as invalid, such invalidity does not affect other provisions of this Law which are  
 315 considered to have legal force without the invalid portions.

316 17.2-4. In the event of a conflict between a provision of this Law and a provision of another law,  
 317 the provisions of this Law control.

318 17.2-5. This Law is adopted under authority of the Constitution of the Oneida Tribe of Indians  
 319 of Wisconsin.  
 320

321 **17.3. Definitions**

322 17.3-1. This Section governs the definitions of words and phrases used within this Law. All  
 323 words not defined herein are to be used in their ordinary and everyday use.

324 (a) “Authorized Agency” means any board, committee, commission, department, or  
 325 officer of the Tribe that has been granted Rulemaking Authority.

326 (b) “Business Day” means Monday through Friday from 8:00 a.m. to 4:30 p.m.,  
 327 excluding holidays recognized by the Tribe.

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328 (c) “Financial Analysis” means an estimate of the total fiscal year financial effects  
 329 associated with a proposed Rule prepared by the Authorized Agency proposing the Rule.  
 330 It includes startup costs, personnel, office, documentation costs, an estimate of the  
 331 amount of time necessary for an individual or agency to comply with the Rule after  
 332 implementation.

333 (d) “Entity” means a board, committee or commission created by the General Tribal  
 334 Council or the Oneida Business Committee whose members are appointed by the Oneida  
 335 Business Committee or elected by the majority of the Tribe’s eligible voters and also any  
 336 department of the Tribe.

337 (e) “Oneida Register” means the free legal periodical published on the Tribe’s website  
 338 by the Legislative Operating Committee which contains, at a minimum, agency Rules,  
 339 proposed legislation and notices, and either the Oneida Code of Laws or directions to  
 340 obtain free access to the Oneida Code of Laws.

341 (f) “Rule” means a set of requirements enacted by an Authorized Agency in order to  
 342 implement, interpret and/or enforce a law or policy of the Tribe.

343 (g) “Rulemaking Authority” means the delegation of authority to Authorized Agencies  
 344 found in the Tribe’s laws other than this Law which allows Authorized Agencies to  
 345 implement, interpret and/or enforce a law or policy of the Tribe.

346 (h) “Statement of Effect” means a legislative and legal analysis which explains the  
 347 effects that adopting a Rule would have on the Tribe.

348 (i) “Tribe” means the Oneida Tribe of Indians of Wisconsin.  
 349

#### 350 **17.4. General**

351 17.4-1. *Administrative Rulemaking.* Only Authorized Agencies may promulgate Rules; this  
 352 Law does not confer Rulemaking Authority. Authorized Agencies shall adhere to the  
 353 Rulemaking procedures as provided in this Law. Authorized Agencies may promulgate Rules  
 354 interpreting the provisions of any law enforced or administered by it; provided that, a Rule may  
 355 not exceed the Rulemaking Authority granted under the law for which the Rule is being  
 356 promulgated.

357 (a) This Law does not apply to standard operating procedures, which for the purposes of  
 358 this section are statements, interpretations, decisions, rules, regulations, policies,  
 359 procedures or other matters concerning internal management of an agency, which do not  
 360 affect the private rights or interests of individuals outside of the agency.

361 (b) Rules developed pursuant to this Law have the same force and effect as the law  
 362 which delegated the Authorized Agency Rulemaking Authority and must be followed by  
 363 both the general public and the Authorized Agency promulgating the Rule.

364 17.4-2. *Authorized Agency Solicitation of Comment on General Subject Matter.* For the purpose  
 365 of soliciting public comment, an Authorized Agency may hold a public meeting on the general  
 366 subject matter of a possible or anticipated Rule before preparing a proposed Rule. However, a  
 367 public meeting under this subsection does not satisfy the requirements of Section 17.6 hereof  
 368 with respect to promulgation of a specific proposed Rule.

369 17.4-3. *Substantial Compliance.* Any Rule hereafter adopted is valid only if adopted in  
 370 substantial compliance with this Law, however Rules already in effect at the time of this Law’s  
 371 adoption remain in effect unless directed to be updated based on this Law’s requirements by the

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372 Oneida Business Committee. Any amendments made to Rules already in effect must follow the  
 373 requirements of this Law.

374

### 375 **17.5. Preparation of Proposed Rules**

376 17.5-1. *Form and Style.* In preparing a proposed Rule, Authorized Agencies shall substantially  
 377 adhere to the form and style required by the Legislative Operating Committee.

378 (a) At a minimum, all Rules must be numbered in the following consistent manner “1-  
 379 1(a)(1)(A)(i)” where:

380 (1) “1-1” means the first section.

381 (2) “(a)” means the first subsection.

382 (3) “(1)” means the second subsection.

383 (4) “(A)” means the third subsection.

384 (5) “(i)” means the fourth subsection.

385 (6) All other numbering after the fourth subsection must be in a logical manner.

386 17.5-2. *Summary Report.* The Authorized Agency shall prepare a summary report regarding  
 387 each proposed Rule, which must be attached to the proposed Rule when presented for public  
 388 comment and for approval through the Oneida Legislative Operating Committee and ultimately  
 389 the Oneida Business Committee. The summary report must include:

390 (a) the name of the proposed Rule;

391 (b) a reference to the law that the proposed Rule interprets, along with a list of any other  
 392 related laws, policies or rules that may be affected by the proposed Rule;

393 (c) a brief summary of the proposed Rule and any changes made to the proposed Rule  
 394 based on the public comment period required by Section 17.6 hereof, if applicable;

395 (d) a Statement of Effect for the Rule which the Legislative Reference Office shall  
 396 prepare upon request by the Authorized Agency; and

397 (e) the Financial Analysis, for which the Authorized Agency shall send a written request  
 398 to each Entity that may be affected by the proposed Rule soliciting information on how  
 399 the proposed Rule would financially affect the Entity; each Entity’s response indicating  
 400 its financial affects must be included in the Financial Analysis.

401 (1) If an Authorized Agency does not receive a response from one (1) or more  
 402 Entities regarding its request for the Entities’ financial affects of the Rule within  
 403 ten (10) business days of the date of the request, it may submit a Financial  
 404 Analysis noting which Entities were non-responsive to its request.

405

### 406 **17.6. Public Comment Period on Proposed Rules**

407 17.6-1. A proposed Rule, except a Rule promulgated under the emergency Rules exemptions  
 408 under Section 17.9, must be preceded by a public comment period, which must include a public  
 409 meeting. Nothing in this Section prohibits or restricts the holding of any other type of  
 410 community meeting which may be used to gather input on Rules.

411 17.6-2. *Public Meetings.* When a public meeting on a proposed Rule is scheduled by an  
 412 Authorized Agency, it must be held in accordance with the following requirements.

413 (a) The Authorized Agency shall set a date for the public meeting and have the notice  
 414 published in the Kalihwisaks and in the Oneida Register not less than ten (10) business  
 415 days prior to the meeting.

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- 416 (b) The notice must include:
- 417 (1) information for electronically accessing the summary report required under
- 418 Section 17.5-2;
- 419 (2) the date, time, and place of the scheduled public meeting; and
- 420 (3) the name, address, phone number, and other appropriate information to
- 421 submit written comments on the Rule and the time period during which the
- 422 Authorized Agency shall accept comments.
- 423 (c) The Authorized Agency shall hold a public meeting at the date, time and place
- 424 designated in the meeting notice.
- 425 (d) The Authorized Agency holding the public meeting shall have a representative to
- 426 preside at the meeting who shall briefly describe the Rule which is the subject of the
- 427 public meeting and the nature of the Rule's requirements, and then open the meeting for
- 428 comments. The Authorized Agency's presiding representative is not required to
- 429 comment or respond to comments at the meeting, but may, at his/her discretion, offer
- 430 clarity.
- 431 (e) *Registration.* The Authorized Agency shall create and bring to the public meeting a
- 432 sign-in sheet; persons attending the public meeting shall register at the meeting by
- 433 signing the sign-in sheet.
- 434 (f) The Authorized Agency shall audio record the public meeting and persons who
- 435 provide oral comments shall state their name for the record.
- 436 (g) The Authorized Agency shall hold the record open for the submission of written
- 437 comments for a minimum of five (5) business days following the public meeting,
- 438 provided that, the Authorized Agency may extend the comment period as it deems
- 439 appropriate by posting an amended Notice of Public Meeting based on the notice
- 440 requirements found in Section 17.6-2(b) at any time prior to the close of the original
- 441 public comment period which identifies the extended comment period ending date.
- 442 17.6-3. *Public Comments.* The Authorized Agency shall fully consider all comments received
- 443 during the public comment period and during any public meeting held regarding a proposed
- 444 Rule.
- 445

446 **17.7. Oneida Legislative Operating Committee Certification of Procedural Compliance**

447 **and Business Committee Review**

448 17.7-1. After a public meeting is held and the public comment period has expired, the

449 Authorized Agency shall submit the proposed Rule and the items it must contribute for the

450 administrative record pursuant to Section 17.10 to the Legislative Operating Committee, which is

451 responsible for certifying that promulgation of the Rule complies with the procedural

452 requirements contained in this Law.

453 17.7-2. Upon receipt of a complete submission, as required by this Section, the Legislative

454 Operating Committee shall take one (1) of the following actions:

- 455 (a) If the Legislative Operating Committee is able to certify that the Authorized Agency
- 456 has complied herewith, it shall forward items (b) and (c) of the Administrative Record
- 457 under Section 17.10 received by the Legislative Operating Committee to the Oneida
- 458 Business Committee with a written certification that the requirements of this Law have
- 459 been fulfilled, and shall publish the Rule on the Oneida Register; or

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460 (b) If the Legislative Operating Committee is not able to certify that the Authorized  
461 Agency has complied herewith, it shall return the proposed Rule to the Authorized  
462 Agency with specific feedback as to which procedural requirements were not fulfilled by  
463 the Authorized Agency.

464 17.7-3. The Oneida Business Committee shall review the proposed Rule, the summary report,  
465 the memorandum containing the public comments that were received, both orally and written,  
466 and the Authorized Agency's response to each comment, and the Legislative Operating  
467 Committee's certification of compliance. If upon review the Oneida Business Committee has  
468 any concerns and/or requested revisions to the Rule, the Authorized Agency shall work with the  
469 Oneida Business Committee to address any concerns.

470 (a) Unless the Oneida Business Committee repeals the Rule, the Rule will remain in  
471 effect while the Authorized Agency and the Oneida Business Committee jointly work to  
472 amend the existing Rule.

473 (1) Should the Oneida Business Committee repeal the Rule adopted by the  
474 Authorized Agency, the Rule that was in effect immediately previous to those  
475 repealed, if any, will be automatically reinstated and effective immediately upon  
476 the repeal of the Rule adopted by the Authorized Agency.

477 (b) If the Authorized Agency does not receive written notice from the Oneida Business  
478 Committee of intent to repeal or amend the Rule within thirty (30) days of the date the  
479 Oneida Business Committee is provided notice of the Rule, the Rule will remain in effect  
480 as submitted and certified by the Legislative Operating Committee.

481 (c) Should the Oneida Business Committee pursue amendments to the Rule, the  
482 amendments must be completed through one (1) of the following actions within six (6)  
483 months from the date the amendments are initiated by the Oneida Business Committee:

484 (1) if the Authorized Agency and the Oneida Business Committee reach an  
485 agreement as to the content of the amendments, the Authorized Agency shall  
486 adopt the revised Rule that has been discussed with and agreed upon by the  
487 Oneida Business Committee; or

488 (2) if the Authorized Agency and the Oneida Business Committee do not reach  
489 an agreement as to the content of the amendments, the Oneida Business  
490 Committee may adopt a revised Rule that incorporates the amendments it deems  
491 necessary.

492 (d) If substantial revisions are requested by the Oneida Business Committee, where the  
493 consideration of a substantial revision is in the Authorized Agency's best informed  
494 discretion, the Authorized Agency shall hold an additional public comment period, which  
495 would restart the process beginning in Section 17.6 hereof.

496 (e) If a revised Rule is not adopted by either the Authorized Agency or the Oneida  
497 Business Committee within six (6) months from the date the amendments are initiated by  
498 the Oneida Business Committee, the Rule originally adopted by the Authorized Agency  
499 will remain in effect.

500 (f) If revisions are made to the Rule by either the Authorized Agency or the Oneida  
501 Business Committee, such party making the revisions shall provide a final version of the  
502 Rule to the Legislative Operating Committee. Upon receipt, the Legislative Operating  
503 Committee shall update the Oneida Register with the final version of the Rule.

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547**17.8. Effective Date of Rules**

17.8-1. The Authorized Agency shall determine a Rule's effective date, provided that a Rule may not become effective until the Legislative Operating Committee has provided the Authorized Agency with the written certification required by Section 17.7-2(a). A failure to publish an approved Rule by its effective date does not change the effective date of the Rule.

**17.9. Emergency Rules**

17.9-1. An Authorized Agency may present the Oneida Legislative Operating Committee with a proposed emergency Rule without a public comment period being held if it finds there is an emergency situation that requires the enactment or amendment of a Rule for the immediate preservation of the public health, safety, or general welfare of the Reservation population and the enactment or amendment is required sooner than would be possible under the normal Rulemaking process. The Legislative Operating Committee shall review the proposed emergency Rule, the summary report and the reasoning suggested for the emergency situation and take one (1) of the following actions:

- (a) reject the proposed emergency Rule on the basis that there is not a valid emergency;
- or
- (b) accept that there is a valid basis for an emergency and forward the emergency Rule to the Oneida Business Committee.

17.9-2. If the proposed emergency Rule is forwarded to the Oneida Business Committee, the Oneida Business Committee shall review the proposed emergency Rule, the summary report and the reasoning suggested for the emergency situation and take one (1) of the following actions:

- (a) reject the proposed emergency Rule on the basis that there is not a valid emergency;
- or
- (b) accept that there is a valid basis for an emergency and adopt, by motion, the emergency Rule, provided that, if the Oneida Business Committee deems it necessary, it may make revisions to the emergency Rule.

- (1) If the Oneida Business Committee makes revisions to the emergency Rule that the Authorized Agency does not support, such concerns may be addressed when the Authorized Agency begins the process for enactment of the permanent Rule.

17.9-3. An emergency Rule becomes effective immediately upon its adoption by the Oneida Business Committee and remains in effect for a period of up to six (6) months, with an opportunity for a one-time emergency extension of up to six (6) months. Requests for the one-time emergency extension may be brought by the Authorized Agency directly to the Oneida Business Committee for consideration and shall become effective upon the Oneida Business Committee's approval and adoption by motion. An emergency Rule will:

- (a) expire when six (6) months have passed since the emergency Rule went into effect and an emergency Rule extension has not been approved; or
- (b) expire when six (6) months have passed since the emergency Rule extension went into effect; or
- (c) no longer be in effect when a Rule is permanently adopted in the emergency Rule's place before the emergency Rule expires under (a) or (b).

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548 17.9-4. As soon as possible after emergency adoption, and if permanent adoption is desired, the  
549 Authorized Agency shall follow the regular procedures as provided under this Law to adopt the  
550 permanent Rule.

551 17.9-5. The Legislative Operating Committee shall publish the emergency Rule in the Oneida  
552 Register.

553

### 554 **17.10. Creating and Maintaining an Administrative Record of Rules**

555 17.10-1. The Legislative Reference Office, with information the Authorized Agencies shall  
556 provide, shall create and maintain a complete record of all proposed and adopted Rules, which  
557 must include the following:

558 (a) A memorandum provided by the Authorized Agency containing the Rule's procedural  
559 timeline including the dates the requirements of this Law were fulfilled by the Authorized  
560 Agency and any supporting documentation, which includes, but is not limited to:

561 (1) Drafts of the Rule considered for the required Public Meeting;

562 (2) The Public Meeting notice;

563 (3) If the Rule is being amended, redline drafts from the currently effective Rule;

564 (4) Minutes from the agency's meeting during which the proposed Rule was  
565 considered as an agenda item; and

566 (5) Any other supporting information that may be requested by the Legislative  
567 Reference Office;

568 (b) The summary report required under Section 17.5-2 provided by the Authorized  
569 Agency;

570 (c) A memorandum provided by the Authorized Agency containing the public comments  
571 that were received, both orally and written, and the Authorized Agency's response to  
572 each comment; and

573 (d) The effective dates of the original Rules and any Rule amendments subsequently  
574 made as established by the Authorized Agency.

575 17.10-2. Prior to publishing approved Rules on the Oneida Register under either Section 17.7-  
576 3(f) or 17.9-5, the Legislative Reference Office shall create and/or update the administrative  
577 history on each Rule which must include the original effective date of the Rule and the effective  
578 date of any amendments made to the Rule.

579

### 580 **17.11. Judicial Review of a Rule**

581 17.11-1. The Judiciary may render a declaratory judgment to determine the validity of a Rule in  
582 the same manner that the Judiciary may do so for a Law; as identified in section 150.5-2(e) of the  
583 Judiciary Law. Provided that, no Rule may be contested based on non-compliance with the  
584 procedural requirements of this Law after one (1) year has elapsed from the effective date of the  
585 Rule.

586 17.11-2. Upon the Authorized Agency's receipt of notice that an appeal has been filed regarding  
587 a Rule of the said agency, the Authorized Agency that promulgated the Rule shall request the  
588 Administrative Record of the Rule created under Section 17.10 and shall submit the said record  
589 to the Oneida Judiciary.

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### 591 **17.12. Standard of Review for Actions Taken by Authorized Agencies**

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592 17.12-1. Any Tribal body hearing an appeal or contest of an action taken pursuant to Rules  
593 created under Authorized Agencies delegated authority and the requirements of this Law, upon  
594 consideration of the Rule and the circumstances regarding the action taken may take any one (1)  
595 of the following actions:

- 596 (a) Uphold the action taken;
- 597 (b) Reverse or modify the action taken;
- 598 (c) If at the second level of appeal, remand the matter for further consideration.

599 17.12-2. When hearing an appeal or contest of an action as described in this Section, the Tribal  
600 hearing body shall recognized that the Authorized Agency is accepted by the Tribe as the subject  
601 matter expert in the given field and shall provide the Authorized Agency with deference by  
602 upholding the action unless it finds that the action:

- 603 (a) Amounts to a violation of the Tribe's Constitution;
- 604 (b) Was in excess of the Authorized Agency's Rulemaking Authority or is otherwise  
605 unlawful;
- 606 (c) Was clearly erroneous in view of the entire administrative and factual records; or
- 607 (d) Was arbitrary or capricious; or
- 608 (e) Exhibited a procedural irregularity which would be considered a harmful error that  
609 may have contributed to the final decision and if said irregularity were not present, the  
610 decision would have been different.

611  
612 *End.*

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