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# **Minnesota Administrative Rules Status System (MARSS) Working Group**

Report to the Legislature

As required by 2017 Minnesota Laws, First Special Session, Chapter 4,  
Article 2, Section 60

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## For more information:

Kerstin Forsythe Hahn, J.D.

Chair of MARSS Working Group and Interagency Rules Committee (IRC) Representative

(651) 582-8583

[kerstin.forsythe@state.mn.us](mailto:kerstin.forsythe@state.mn.us)

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## Legislative Charge

The 2017 Minnesota Legislature established the Minnesota Administrative Rules Status System (MARSS) Working Group with the following directive<sup>1</sup>.

Sec. 60. MINNESOTA ADMINISTRATIVE RULES STATUS SYSTEM (MARSS) WORKING GROUP.

Subdivision 1. Creation. The MARSS working group consists of the following nine members:

- (1) the chief judge of the Office of Administrative Hearings, or a designee;
- (2) the secretary of state, or a designee;
- (3) a representative from the Interagency Rules Committee (IRC) appointed by the committee;
- (4) a representative from each of the following agencies with rulemaking experience appointed by the appropriate commissioner:
  - (i) the Department of Health;
  - (ii) the Minnesota Pollution Control Agency;
  - (iii) the Department of Transportation; and
  - (iv) the Department of Labor and Industry;
- (5) as designated by the IRC, a representative from a health-related board; and
- (6) as designated by the IRC, a representative from a non-health-related board.

Subd. 2. MARSS description. The Minnesota Administrative Rules Status System (MARSS) is a concept for a new software application. The application would be built and maintained by the Revisor's Office. Executive branch agencies and others would upload official rulemaking record documents to the system. The goal is to improve public access, security, preservation, and transparency of state agencies' official rulemaking records through the creation of a single online records system. The system would serve as a single Internet location for the public to track rulemaking progress and access the official rulemaking record. Agencies would fulfill their requirement to maintain and preserve the official rulemaking record by submitting required documents to the revisor for inclusion in the online records system.

Subd. 3. Duties. The working group must report by February 1, 2018, to the chairs and ranking minority members of the committees in the house of representatives and senate with jurisdiction over policy and finance for the legislature. The report must identify the functional and nonfunctional requirements of the MARSS system. The working group must define a funding mechanism to share the cost to build and maintain the MARSS system among state agencies and departments.

Subd. 4. Administration provisions. (a) The revisor of statutes or the revisor's designee must convene the initial meeting of the working group by August 1, 2017. Upon request of the working group, the revisor must provide meeting space and administrative services for the group.

(b) The working group must elect a chair from among its members at the first meeting.

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<sup>1</sup> 2017 Minn. Laws, First Special Session, Ch. 4, Art. 2, Sect. 60.

(c) Members serve without compensation and without reimbursement for expenses.

(d) The working group expires on February 1, 2018, or upon submission of documents fulfilling its duties, whichever is earlier.

Subd. 5. Deadline for appointments and designations. The appointments and designations authorized by this section must be completed by July 1, 2017.

## Executive Summary

This report summarizes and builds upon the history of the existing Minnesota Administrative Rules Status System (MARSS Beta System) project and details the work of the 2017 MARSS working group and the proposed MARSS system.<sup>2</sup> The MARSS Beta System is a product of decades of work and effort by the Revisor's Office and state agency representatives, all focused on public access to and the better preservation of historic rulemaking records. The MARSS Beta System has been operational in a beta mode since 2012. As detailed in the MARSS Pilot Project report filed with the Legislature in January 2017, the MARSS Beta System could be further developed. The proposed MARSS system incorporates possible future developments to the MARSS Beta System. The goals of the proposed MARSS system are to improve public access, security, preservation, and transparency of state agencies' official rulemaking records through the creation of a single online records system. This system would be a database of post-adoption rulemaking data and records that would also serve as a single internet location for the public to track rulemaking process and to access all agencies' official rulemaking records. The proposed MARSS system would allow state agencies to more cohesively fulfill their statutory requirements to maintain and preserve official rulemaking records.

The 2017 Legislature established the MARSS working group to propose a new software application to update the existing MARSS Beta System. As directed by the Legislature, the MARSS working group identified the functional and nonfunctional requirements of the proposed MARSS system. This report describes those requirements. The estimated cost of the proposed MARSS system is \$1.3 million to build in-house and \$372,000 annually for maintenance. The MARSS working group also identified and addressed the viability of several options to finance the initial build and/or annual maintenance of the proposed MARSS system, including those that spread the costs among state agencies. The working group found that the proposed MARSS system initial build costs and annual maintenance costs could be supported in whole or in part by four possible funding mechanisms: 1) Odyssey Funds if deemed eligible following legislative changes; 2) Legacy Funding if funds were awarded; 3) Direct Appropriation from the Minnesota Legislature; and/or 4) a small per-use fee for a portion of the annual maintenance costs.

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<sup>2</sup> This report will refer to the existing MARSS Beta System as the "MARSS Beta System." The MARSS pilot project that took place in 2015-2016, prior to the establishment of the MARSS working group, will be referred to as the "MARSS pilot project" or the "pilot project." The proposed MARSS project discussed in this report will be referred to as the "proposed MARSS project or system."

## Administrative Rulemaking

Administrative rulemaking is the process that executive branch agencies use to adopt or change administrative rules, which have the force and effect of law. As required by state law in Minnesota Statutes, chapter 14, rulemaking requires various public notice efforts, can involve a public hearing, and results in the creation of various documents. As many as 11 different types of documents constitute the official rulemaking record in each rulemaking proceeding.<sup>3</sup> Rulemaking agencies must make documents in the record available for public inspection and preserve the documents permanently, in accordance with applicable law.

Most rulemaking proceedings involve an approval process conducted by operation of law by administrative law judges at the Office of Administrative Hearings (OAH). Administrative law judges review rule filings, including public notice plans, conduct public hearings when required by law, and issue written orders approving or disapproving various rule provisions based on the criteria stated in Minnesota law.

In January 2015, the OAH implemented an electronic filing system. Since 2015, all state agency rulemaking documents submitted to the OAH for review have been eFiled and temporarily maintained in digital form until the conclusion of the rulemaking. These digital filings are only available to the public during the time that the public can file comments on the proposed rules. Upon completion of its review the OAH returns the digital file to the submitting agency for permanent retention. Once a rulemaking is completed the OAH currently maintains only a digital record of Orders issued by administrative law judges related to rulemaking proceedings in its Administrative Law Archives available on its main webpage. The OAH maintains a digital record of all rulemaking filings in its internal case management system in compliance with applicable data retention policies.

The promulgating agency maintains post-adoption rulemaking records in a variety of forms, including on paper and in digital content. Historically, it has been difficult for the public to access comprehensive rulemaking records due to the agencies' variations in preservation methods and the lack of completeness of rulemaking records from decades past. Currently and on average, state agencies commence a total of 66 new rulemaking proceedings annually.<sup>4</sup>

## History of MARSS System

Since 1980, the Revisor's Office has collected rulemaking documents and data to help with historical maintenance and research related to rulemaking records in Minnesota. These rulemaking records and data have been gathered in various formats, including paper and digital; and have come from various sources, including the State Archives, state agencies, and other entities that have worked on rulemaking matters.

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<sup>3</sup> Minn. Stat. § 14.365 sets forth the requirements of the official rulemaking record.

<sup>4</sup> See Appendix E for rulemaking statistics.

## A. Existing MARSS Beta System

During the 2012 legislative session the Revisor's Office received an appropriation of \$35,000 from the Arts and Cultural Heritage fund, part of the Legacy Funding available through the state, to design and implement a website to provide public, online, searchable access to historical documents relating to state agency rulemaking.<sup>5</sup> The Revisor's Office matched this appropriation with carry-forward funds and used these combined funds to design and implement the existing MARSS Beta System. The Revisor's Office scanned and uploaded to the MARSS system all paper rulemaking documents that it had collected or received from state agencies. Later in 2012, the Revisor's Office unveiled the existing MARSS Beta System that allows public access to and searching of these documents.<sup>6</sup>

The MARSS Beta System still operates today and rulemaking professionals and the public use it regularly. This use demonstrates the need for access to public rulemaking records.<sup>7</sup> However, the existing MARSS Beta System does have certain limitations.

The Beta System is not a database containing *all* of the documents to which it provides access. Rather, the Beta System database only contains the documents that the Revisor's Office comes across while performing its drafting role in the rulemaking process. Most of the rulemaking documents, however, come from other websites, to which the Beta System provides a link. The Revisor's Office links to rulemaking documents from the OAH, the Legislative Reference Library, and the State Register. These linked documents include the administrative law judge orders, the statements of need and reasonableness (SONARs), and the public notices. These links can change over time which often leads to difficulty finding rulemaking documents. Because the Revisor does not possess any of these linked documents in a database, the Revisor's Office cannot preserve these records and guarantee their future availability. This is in contrast to the proposed system in which all rulemaking documents would be uploaded to one, centralized database containing the documents, which could be preserved long-term.

Next, the Beta System does not provide access to all rulemaking documents; rather, the Beta System only provides access to a subset of rulemaking documents. Many documents that agencies are required to preserve in the official rulemaking record are not available in the Beta System. These include public comments in

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<sup>5</sup> 2012 Minn. Laws, Ch. 4, Art 5, Sect. 7.

<sup>6</sup> Because the MARSS system was being "beta" tested at the time of release, the system was called the "Rule Status Beta System" or "Beta System." The system has not progressed beyond this stage so is still referred to as the MARSS Beta System.

<sup>7</sup> In total, the MARSS Beta System either contains or provides access to almost 10,000 documents. The most recent data from the Revisor's office includes the following breakdown of documents in the MARSS Beta System: links to 1,215 SONARs from the Legislative Reference Library; links to 1,104 documents from the Office of Administrative Hearings; links to an uncounted number of notice publications in the State Register; and in its database, 2,803 documents related to adopted rules, 3,386 certificates, 1,066 Rule drafts from the Revisor's Office, and 4 documents from the Attorney General's Office. See MARSS Rule Status System main webpage, available at [https://www.revisor.mn.gov/rules/rule\\_search.php](https://www.revisor.mn.gov/rules/rule_search.php).

response to published notices and rule drafts and agency orders adopting rules.<sup>8</sup> If a citizen or stakeholder desires copies of all of the documents in an official rulemaking record, it must first search for the documents on the agency's website or rulemaking docket to see whether the agency has chosen to make the documents digitally available. If not, the individual must make a written data practices request to the agency, and the agency must retrieve and make the documents available through inspection or copying. This process is inefficient for both the stakeholder and the agency.

Other limitations of the Beta System are that the Revisor's Office cannot authenticate documents, as it currently does for statutes; and the search capabilities are limited. Finally, the Beta System is at risk of being discontinued at any time. There is no statutory mandate or direct funding source for the Revisor's Office to continue supporting the current Beta System. As a result, the existing system may not have the support it needs in the future due to competing, high-priority demands on the Revisor's Office resources.

## **B. MARSS Pilot Project**

The Revisor's Office secured funds from the Legislature in 2015 to conduct a pilot project between July 2016 and January 2017 on possible future improvements to the MARSS Beta System.<sup>9</sup> The objective of the pilot project was to aid in the development of a new software application that would address and resolve the limitations of the existing MARSS Beta System.

The pilot project identified the system requirements for a new software application that could provide a single, centralized, official State rulemaking record storage and retrieval system. This evolved system would serve as a single internet location for the public to access official rulemaking records for adopted rules. At the option of State agencies, it could also be used to provide access to documents in real time during rule promulgation.<sup>10</sup> Agencies could fulfill their statutory requirement to maintain and permanently preserve official rulemaking records by submitting the required documents to the Revisor's Office for inclusion in the MARSS system. Ideally, the MARSS system would permanently preserve and maintain the records and data with security on par with the Revisor's Office security for statutes and rules. It would also provide meaningful search capabilities. The MARSS system would measurably enhance transparency in Minnesota government by providing the public with immediate access to all official rulemaking records, without having to contact each agency and make a data practices request. While the current MARSS Beta System adds accessibility to roughly 300 or so new rulemaking

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<sup>8</sup> It is estimated that the Minnesota rulemaking process generates roughly 1,000 documents annually for all agencies, combined. In contrast, the Beta System collects roughly 300 documents annually (based on an average of the past five years).

<sup>9</sup> 2015 Minn. Laws, Ch. 77, Art. 1, Sec. 2.

<sup>10</sup> An agency could elect to upload rulemaking documents during rule promulgation, rather than after a rule is adopted, and point the public to the MARSS system to gain access during rule promulgation. Any such option would not replace the fully functional and successful filing system in which agencies formally submit records for required review by the administrative law judges at OAH.



documents each year, the proposed MARSS system would collect all rulemaking documents and provide access to an additional thousand documents or more per year.

The pilot project team researched applicable technologies, contacted states with similar systems and built a prototype using two different commercial products. The pilot project team weighed the pros and cons of a buy versus in-house-build approach system. The team determined that an in-house-build approach would best meet the needs of Minnesota. Minnesota's rulemaking procedures do not fit well with most commercial products available for purchase. The team recommended that the improved system be built entirely in-house by the Revisor's Office because no complete, out-of-the-box, commercial product covered all the desired requirements and using in-house staff would allow the team to benefit from the extensive rulemaking process knowledge already amassed within the state. Vendors contracted for assisting with the project would work closely with the Revisor's Office to create software built to meet specified requirements. The work of and knowledge derived from the pilot project was captured in its January 31, 2017 report.<sup>11</sup> The new software application proposed in the MARSS pilot project was not funded following the submission of its report to the Legislature.

## MARSS Working Group

Following the completion of the MARSS pilot project in January of 2017, the Legislature established the MARSS working group. The MARSS working group had three clear duties<sup>12</sup>: 1) to submit a legislative report by February 1, 2018; 2) to identify the functional and nonfunctional requirements of the proposed MARSS system; and 3) to define a funding mechanism to share the cost to build and maintain the MARSS system among state agencies and departments. The MARSS working group members were set forth in the enabling legislation. The list of MARSS working group members is provided in Appendix H.

The MARSS Working group met 11 times, approximately every three weeks, between July 2017, and January 2018. Materials from the MARSS working group meetings are available online at the Revisor's Office webpage.<sup>13</sup> A subgroup of the MARSS working group met weekly for four weeks in August and September 2017. This subgroup focused on reviewing the current rulemaking process in Minnesota and making recommendations about what system requirements were necessary compared to less important improvements to the existing MARSS Beta System.<sup>14</sup> This subgroup worked to define the system requirements that became the functional and nonfunctional requirements of the proposed MARSS system. The MARSS working group reviewed these requirements, discussed them, and approved them.<sup>15</sup> The MARSS working group discussed and created a scope

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<sup>11</sup> *Minnesota Administrative Rules Status System (MARSS) Pilot Project Report*, Prepared for the Office of the Revisor of Statutes, Minnesota Legislature, Prepared by Janice Kuschner, Project Consulting Group (January 31, 2017), available at <https://www.revisor.mn.gov/office/meetings/>.

<sup>12</sup> See full legislative language included *supra* at p. 4 in the Legislative Charge section of this report.

<sup>13</sup> See the 'Meetings' webpage on the Revisor's main website available at: <https://www.revisor.mn.gov/office/meetings/>.

<sup>14</sup> See Appendix F-Small Sub Group Requirements Recommendations.

<sup>15</sup> See Appendices B and F.

document, based on the enabling legislation, to help guide and focus its work.<sup>16</sup> The MARSS working group also considered and discussed multiple possible funding mechanisms. The funding mechanism options are stated below.

## Proposed MARSS System

The MARSS working group began its work by reviewing Revisor's Office materials about the history of the MARSS project. The working group relied on the recommendations shared by Revisor's Office technology staff at working group meetings, including statements in the pilot project report that a build versus buy approach was the recommended pathway for the proposed MARSS system. Knowing whether a build versus buy approach was recommended for the proposed MARSS system was necessary for the MARSS working group to identify the appropriate functional and nonfunctional requirements of the proposed MARSS system.<sup>17</sup> Consequently, the proposed MARSS system requirements are based on a system built in-house using existing Revisor IT resources, supplemented by hiring additional external resources and purchasing some software and hardware components. The proposed MARSS system would support public policy goals of improving public access to and increase efficiency and consistency in the rulemaking process by providing the level of robustness and security appropriate for the official permanent repository of rulemaking records in the state.

### A. Functional and Nonfunctional Requirements of the Proposed MARSS System

To determine the functional and nonfunctional requirements of the MARSS system, the working group took a similar approach as the pilot project team. The smaller subgroup worked closely with Revisor's Office staff to understand how the current rulemaking process and workflow fit well into a technical database context. The system requirements in the MARSS pilot project were divided into two phases, Phase 1 and Phase 2. The MARSS working group went through these requirements and determined that several requirements in Phase 2 were unnecessary. Therefore, it folded other Phase 2 requirements into Phase 1 due to their importance. The MARSS working group ultimately decided to remove the references to Phase 1 and Phase 2 that related to the requirements in the initial build of the proposed MARSS system. The requirements in Appendix B describe the functionality of the initial build of the system. These requirements correspond to the cost estimates outlined in Appendix D. The proposed MARSS system would be built in-house with the flexibility to add additional features in the future as a need for those capabilities arises.

The subgroup met frequently over several weeks to determine a list of requirements for the proposed MARSS system. The group broke these requirements into three groups: 1) needed; 2) options for future capabilities or

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<sup>16</sup> See Appendix A-Scope Document.

<sup>17</sup> A buy approach would have resulted in different functional and nonfunctional requirements than a build approach, hence why the working group needed to know what recommended pathway would direct its work regarding system requirements.

sophistication the working group wanted to preserve; and 3) not needed. Appendixes B and F set out these system priorities in more detail.

The capabilities to be supported in the initial proposed MARSS software system are described below in narrative language to show how the capabilities are linked to the goals of the proposed MARSS system. More technical detail is provided via the functional and nonfunctional requirements document in Appendix B, written as software requirements specifications for the technical team that would ultimately build the proposed system.

### *Transparency in the Rulemaking Process and Access to Rulemaking Information*

The proposed MARSS system would provide increased transparency and access to rulemaking information post-adoption of proposed rules. Agencies engaged in rulemaking would be responsible for submitting rulemaking information to the proposed MARSS system. The agencies would receive support from the proposed MARSS system in their aim to provide process transparency and information access. This aim would be easier to achieve after the official post-adoption rulemaking records are maintained in one place, rather than being held at each of the more than 70 agencies with rulemaking authority.

The proposed MARSS system would also provide internet and mobile access to post-adoption rulemaking information to the public as well as to legislative staff, officials, and committees. The proposed MARSS system would provide robust search options to promote greater access to relevant rulemaking information. This information would include adopted rules, active rulemaking proceedings status, and abandoned and historical rules that precede the MARSS Beta System, to the extent possible. Because the rulemaking information posted by agencies would be stored permanently in the proposed MARSS system, the resulting historical rulemaking records could be easily accessed in the future.<sup>18</sup>

### *Proactive Engagement through the Provision of Relevant Rule Information*

The proposed MARSS system could notify relevant parties, including legislative staff and committees associated with rulemaking proceedings of pertinent rulemaking events. The proposed MARSS system could also notify agencies of important developments, such as statutory, rule, or law changes that could affect the rules.

The proposed MARSS system would include only public information. All interested members of the public would be able to see a timeline displayed with current rulemaking activity and status. The proposed MARSS system would also allow agencies to swiftly release rulemaking information to the public via the MARSS system as soon

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<sup>18</sup> For an example of an existing publicly accessible rulemaking database system with high-level functionality see the State of Connecticut's "State Agency eRegulations System." This system can be found at <https://eregulations.ct.gov/eRegsPortal/>. This web site contains "Quick Links" to "Final Approved Regulations" and "Regulations in Process." The front page also contains live links to all "Regulations Open for Comment." It also contains "Regulations Process 101." This system makes its regulations accessible and transparent and would be a helpful model to examine if additional information about an existing system is needed.

as it is ready for public review. After rule adoption, the entire official rulemaking record would be publicly accessible through the proposed MARSS system and permanently maintained.

### *1. Efficiency and Consistency*

Improved efficiencies and consistency would be achieved from all agencies using a deliberately designed, uniform shared system. Agencies would have greater support for their rulemaking activities and documentation. For instance, agencies would have process support through a personal dashboard for tracking their rulemaking, reports, and topics of interest.

### *2. System Robustness*

The proposed MARSS system would be built as a robust, secure, reliable system appropriate for permanently preserving official rulemaking records. The proposed MARSS system would also be built with flexibility to accommodate capabilities needed or wanted in the future. Some capabilities to enhance the proposed MARSS system in the future have been identified and are described below.

## *Future Capabilities*

### *1. Assigned Reviews*

A future capability of the proposed MARSS system could be to facilitate support for statutory reviews that authorized reviewers must complete, such as the Minnesota Management and Budget Office, and the Governor's Office. These entities could be authorized reviewers and given specific access to items in the proposed MARSS system that are not yet available to the public. Internet or mobile device access could provide the necessary avenue for completing these reviews.

### *2. Expanded Proactive Engagement and Advanced Notifications*

A second possible future capability is the support for agency users through a system-generated personal dashboard for tracking relevant rulemakings, reports, and topics. This option might also be extended to legislative staff and committees, other officials, and the public.

A third possible future capability is enhancing the public's access to rulemaking information through publicly available rule-topic or rule event-based subscription services. Anyone would be able to subscribe to specific rulemaking information through a self-help interface. This capability could also replace the requirement that agencies maintain lists that identify interested and affected persons or entities or notifying them when relevant rule information is available.

Last, the future system capabilities could be expanded to include workflow support, such as alerting an assigned reviewer of an upcoming review deadline. While the proposed MARSS system would support public information only, the system would be designed with flexibility to accommodate future security needs.

## **B. Cost and Funding Mechanism Options**

The proposed system as described above would cost approximately \$1.3 million to build, and \$372,000 annually for maintenance.<sup>19</sup> This takes into account the functional components described above, with the flexibility to add future enhancements if ever desired.

To carry out the legislative directive to define a funding mechanism to share the cost to build and maintain the proposed MARSS system among state agencies and departments, the MARSS working group examined several options.

This section briefly describes all options that the working group discussed that could be pursued in the future as possible funding mechanisms to support the proposed MARSS system. The MARSS working group rejected some options as not viable and identified others that might be pursued in the future. This report contains all options the working group considered. The Pay Per Use, Private Funding, and Ad Revenue options were determined to be not viable. The Odyssey Fund, Legacy Fund, and Appropriation options, as well as a small per-use fee, could be pursued as possible funding mechanism in the future.

### **Appropriation Option**

A direct appropriation from the Legislature (distinct from the below-mentioned Arts and Cultural Heritage Fund appropriation option) is the most direct funding mechanism option considered by the MARSS working group. The proposed MARSS system could be entirely or partially supported by a direct appropriation for the initial build costs and annual maintenance costs. These costs are expected to be spread out over a five-year period of development and maintenance as described in Appendix D, which details the initial build and maintenance costs of the proposed MARSS system. The Legislature has provided appropriations for the MARSS system in the past, establishing that an appropriation is a viable funding option.

### **Odyssey Funding Option**

The MARSS working group consulted with MN.IT staff and legal counsel about using Odyssey Funding for funding the proposed MARSS project.<sup>20</sup> Odyssey Fund accounts are a way to preserve state-agency's unused funds that have been previously appropriated to an agency and then are dedicated for agency IT purposes. This funding option is only available when executive agencies have unexpended funds available and subsequently approve the use of unexpended funds for this purpose. Specifically, the MARSS working group considered whether state agencies could use unexpended funds with approval after these funds were transferred to MN.IT to fund an Odyssey account, which the Revisor would use to support the initial build or maintenance of the proposed MARSS system.

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<sup>19</sup> See Appendix D for more detailed cost information.

<sup>20</sup> Overview documents of the Odyssey Funding purpose and process provided to the MARSS working group by MN.IT staff are available in Appendix G.

Minnesota Statutes, section 16E.21, subdivision. 2, outlines the Odyssey Fund Account's purpose and the permitted use of funds as follows:

Subd. 2. Charges. Upon agreement of the participating agency, the Office of MN.IT Services may collect a charge or receive a fund transfer under section 16E.0466 for purchases of information and telecommunications technology systems and services by *state agencies and other governmental entities* through state contracts for purposes described in subdivision 1 (emphasis added).

Minnesota Statutes section 16E.0466, subdivision 1, states the following:

16E.0466 STATE AGENCY TECHNOLOGY PROJECTS.

Subdivision 1. Consultation required. (a) Every *state agency* with an information or telecommunications project must consult with the Office of MN.IT Services to determine the information technology cost of the project. Upon agreement between the commissioner of a particular *agency* and the chief information officer, the *agency* must transfer the information technology cost portion of the project to the Office of MN.IT Services. Service level agreements must document all project-related transfers under this section. Those agencies specified in section 16E.016, paragraph (d), are exempt from the requirements of this section (emphasis added).

MN.IT's executive team and legal staff advised the MARSS working group that the current statutory authority does not allow Odyssey Fund money to support a project that is managed or built by the Revisor's Office, rather than an executive branch agency. The MARSS working group asked MN.IT if the Revisor's Office might be able to access these funds as an "other governmental entity" under Minnesota Statutes, section 16E.21, subdivision 2. MN.IT's position was that because the Revisor's Office, a non-executive state agency, would be the entity building and maintaining the proposed MARSS system, the Revisor's Office would not fall within the scope of an "other governmental entity" under the statute which could appropriately receive Odyssey funding to support a technology project.

MN.IT staff pointed to the use of the term "state agency" in Minnesota Statutes, section 16E.0466, subdivision 1, in support of its position. In addition, MN.IT legal counsel noted that both Minnesota Statutes, sections 16E.21 and 16E.0366, provide that the cost of a project supported by Odyssey Funding must be transferred to MN.IT, and in the case of the proposed MARSS system, the money would not be transferred to be spent by MN.IT. Instead, the money would be transferred to and spent by the Revisor's Office. MN.IT legal counsel noted further that Minnesota Statutes, section 16E.0466, discusses MN.IT and the *agency* entering into a service level agreement for the technology project, and in the case of the proposed MARSS system MN.IT would not be leading the project so the proposed arrangement would not fit into the statutory language that requires the fund transfer and the service level agreement for MN.IT to lead the project.

The working group respects MN.IT's interpretation of the current statutory language. However, this funding option could be reconsidered if the Legislature amended the Odyssey Fund statutes to make the funds available

for use by the Revisor's Office and clarified which "other governmental entities" would be appropriate recipients of Odyssey Funding.

### **Legacy Fund-Arts and Cultural Heritage Fund (ACHF) Option**

The MARSS working group considered a grant from the "Legacy Fund" as a funding option. On November 4, 2008, Minnesota voters approved the Clean Water, Land and Legacy Amendment, which amended the Minnesota Constitution to create a new 3/8 cent sales tax. The Legacy Amendment created four funds, one of which is the Arts and Cultural Heritage Fund (ACHF). Nineteen and one-half percent of the total Legacy Fund proceeds are dedicated to the ACHF. The Legacy Amendment mandates that a portion of the ACHF be used "to preserve Minnesota's history and cultural heritage."<sup>21</sup> This money funds the Minnesota Historical and Cultural Heritage Grands Program.

For each biennium during the 25-year life of the tax, the Legislature appropriates funds from the ACHF to the Minnesota Historical Society for this grant program. As required by law, the Minnesota Historical Society appointed a volunteer citizen panel to guide decisions for the grants. Following a competitive award process, the panel makes recommendations to the Minnesota Historical Society's governing board. The governing board makes the final approval of any grants.

The grant program provides funding to projects in the state of Minnesota focused on preserving Minnesota's history and cultural heritage. State and local governments are among the entities eligible for a grant, including state agencies. Grants are awarded based on a review of detailed information in the grant application, including project need and rationale, responsible persons, budget and time and impacts.

An alternative avenue to receive funding from the ACHF is a direct appropriation. Under Minnesota Statutes, section 129D.17, subdivision 2(d), the Legislature may make a direct appropriation from the fund to a state agency or other recipient consistent with fund goals.

Part of the long-term vision for ACHF use is "providing every Minnesotan lifelong access to programs and activities that engage him or her as ... historian... and creator of Minnesota's future."<sup>22</sup> One type of project that is consistent with this theme of engaging a citizen as a historian and participant in government is preserving documents that show the development of law in Minnesota. Preserving these important records permits Minnesotans to research past policy trends and more knowledgeably participate in the future development of State policy. As explained below, a review of past expenditures of fund resources shows that preserving these types of legal records is an appropriate use of grant funds.

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<sup>21</sup> Minnesota Constitution, Article XI, Sec. 15.

<sup>22</sup> Minnesota State of Innovation: A Twenty-Five Year Vision, Framework, Guiding Principles, and Ten-Year Goals for the Minnesota [ACHF], (January 15, 2010), *available at* <http://legacy.leg.mn/sites/default/files/resources/ACHFFinal.pdf>.

Several years ago, the Minnesota Historical Society approved a grant from the Cultural Heritage Grants Program to the Revisor's Office to digitally preserve and archive State statutes. Records of statutes dating back to the earliest territorial days were housed in the few remaining copies of old, physically deteriorating books. Preservation of these records saved one of the best sources of history about the development of public policy in Minnesota.

As stated earlier in this report, in 2012, the Legislature made a direct appropriation of program funds under ACHF to the Revisor's Office for \$35,000 for creation of the existing MARSS system. The appropriation required using Revisor's Office matching funds, for a total funding source of \$70,000.<sup>23</sup>

Most recently, however, the Revisor's Office applied for an ACHF grant to fund the MARSS system. That application was denied.

The MARSS working group considered the option of applying for a grant from the Cultural Heritage Grants Program to fund the initial build of the MARSS system. Because the most recent grant application for MARSS funding was turned down, the working group concluded that a grant is not a likely source of significant funding for the proposed MARSS system. One option is for the Legislature to make a direct appropriation of funds under Minnesota Statutes, section 129D.17, subdivision 2(d), as it did in 2012 for the existing MARSS system. For the reasons described above, an appropriation under this section would be consistent with the goals of the historical preservation fund.

Consistent with the MARSS working group's charge to find a funding mechanism that shares system costs among agencies, another option would be for several interested agencies to jointly submit another grant application seeking Legacy funds to support the proposed MARSS project in full or in part.

## **Direct Agency Funding**

The MARSS working group considered agencies' funding the initial development of the proposed MARSS system by charging agencies or other entities engaged in rulemaking for each use of the system. The Revisor's Office provided the number of rulemakings opened each year by state agencies for the five years before the working group convened. This data is available in Appendix E.<sup>24</sup>

If the cost of building the proposed MARSS system were assessed using the average number of rulemakings opened in one year, the cost per use would be nearly \$20,000.<sup>25</sup> No agency could absorb this additional rulemaking cost.

The proposed MARSS system plan assumes the cost of the system would be amortized over five years. If the initial cost of the system were assessed using the total number of rulemakings in the last five years, the cost per

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<sup>23</sup> Minnesota Laws 2012, Chapter 264, Article 5, Section 7.

<sup>24</sup> See Appendix E, Rulemaking Statistics.

<sup>25</sup> This figure was derived from dividing the estimated cost of the initial build of the proposed MARSS system by the average number of rulemaking proceedings open per year, 66.



use would be approximately \$4,000. The MARSS working group determined that no small agency or board could absorb this additional cost. Plus, even larger agencies would find it difficult to pay this additional amount, particularly if the agency needed to adopt or revise multiple rules.

The MARSS working group also noted that some agencies are required to pursue more rulemakings than other agencies. Under a fee-per-use funding system, these agencies would bear the majority of the cost of the proposed system. If emergency and expedited rulemakings were excluded from the per-use calculation, the already prohibitive per-use cost would be even higher.

The MARSS working group examined whether the proposed MARSS system would generate substantial savings for agency users that could offset the system's costs. The group discovered that, in general, such cost savings would not be substantial. Although most agencies anticipated using the proposed MARSS system to fulfill their statutory obligation to permanently store their rulemaking records, other agencies deemed it necessary to continue maintaining their own storage systems. Considering the low cost of electronic storage, the anticipated savings from using the proposed MARSS system to store rulemaking records would be minimal. This analysis does not take into account, though, the costs associated with stakeholders needing to make a data practices act request to access a complete rulemaking record, and agency costs to retrieve and produce the documents. Not all agencies have the resources to store rulemaking records digitally, and the cost of producing documents is higher for those agencies because paper records must be collected from archives and either produced for inspection or copied.

The MARSS working group also explored dividing the proposed MARSS system on-going maintenance costs among all agencies on a full time equivalent basis. The workgroup rejected this option because large agencies would bear most of the cost even if they did little rulemaking. In addition, small agencies and boards would have had difficulty absorbing this additional cost.

The projected annual maintenance cost of the proposed MARSS system is \$372,000 per year. If this annual cost were divided by the average number of rulemakings filed per year, the fee for annual maintenance would be approximately \$5,700 per rulemaking. Again, even large agencies would find it difficult to absorb this cost. The MARSS working group however, believed that a small per-use fee could be an option to offset some of the proposed MARSS system's annual maintenance costs.

### **Private Funding Source Option**

The MARSS working group considered the possibility of a private-sector entity being interested in developing the proposed MARSS system as a business opportunity but ultimately rejected this idea. The proposed MARSS system is not a likely prospect for generating revenue. Private enterprises would typically require either profit or some other recompense for their contributions, thus increasing costs to taxpayers, an unacceptable waste of public funds.

## Ad Revenue Option

The MARSS working group considered advertising revenue as another possible funding mechanism to support the initial building and the maintenance of the proposed MARSS system. This option would involve generating revenue for advertisements placed on the web pages of the proposed MARSS system website. Ad revenue can be generated either by static or dynamic advertisements. Static ads are display ads, similar to what one might see in a publication such as a newspaper or magazine. Dynamic ads would solicit a user to click through to another website, presumably that of the advertiser. Both types of ads are ubiquitous in the commercial realm, but very uncommon to non-existent on, state government websites.

An inquiry was sent to all 50 states and the District of Columbia through the list-serv of the International Association of Commercial Administrators, (registries of business filings and secured financing liens) asking:

“Do any of you have, or do any of your jurisdictions have, paid advertising on your official websites?”

Most jurisdictions did not respond. The following states did respond: Arizona, Florida, Hawaii, Indiana, Kansas, Louisiana, Nevada, North Carolina, Ohio, Pennsylvania, Texas, Utah, Washington, West Virginia, and Wyoming. The District of Columbia also responded. Of all the jurisdictions that responded, not one was using website advertising. Arizona prohibits the practice. Kansas expressed concerns about equal access to this advertising. Utah thought there was a potential conflict of interest in advertising. While most states did not respond, the question was stated in the positive, meaning that a nonresponse is more likely to mean that the jurisdiction did not have advertising on their sites.

In discussion with technical staff, it was also determined that there might be security concerns; one expert stated:

“In the past, I have run across situations where ad feeds from third parties have been infected with malware. These situations pose risks to users of the systems, whose machines are probed and scanned behind the scenes by malware in the ad feeds. We had this happen a while back where some state users picked up malware from ad feeds on the Star Tribune site.”

In addition, it was unclear whether any substantial amount of revenue could be raised from this method, as rates are relatively low for click-throughs as well as banner ads. After considering the information gathered about this funding mechanism option, the MARSS working group determined that the ad revenue option was not a viable funding mechanism to pursue.

## Summary of Working Group Funding Mechanism Option Findings

The majority of the MARSS working group found that the MARSS system initial build costs and annual maintenance costs could be supported in whole or in part by four possible funding mechanisms: 1) Odyssey Funds, if deemed eligible following legislative changes; 2) Legacy Funding; 3) Direct Appropriation from the Minnesota Legislature; and/or 4) a small per-use fee for a portion of the annual maintenance costs. The

proposed MARSS system could be funded by one of these options entirely or by a combination of two or three of all four options.

The MARSS working group has worked to provide the Minnesota Legislature with the most current information on the requirements of the proposed MARSS system and on options to fund the proposed MARSS system.

There were two dissenting members of the MARSS working group: Denise Collins, on behalf of Chief Judge Tammy Pust of the OAH, and Bert Black, on behalf of the Secretary of State Steve Simon. Dissent was based on the perceived lack of demand or need for the system at the present time as well as concerns over funding and cost issues in this time of budget shortfall.

## Conclusion

The existing MARSS Beta System is the product of decades of effort to improve public access to and the preservation of executive branch rulemaking records in Minnesota. The proposed MARSS system would greatly enhance the MARSS Beta System and support the primary benefits of government transparency and public access to rulemaking information. In addition, the system would put proactive engagement methods in place to provide timely relevant rule information to all, including legislative staff and committees, and elected officials. The system could be built with future needs and expansion in mind. Several funding mechanism options are available to pursue spreading the initial cost of building and maintaining the proposed MARSS system among state agencies and boards over several years.

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*Minnesota Administrative Procedure*, Edited By George A. Beck & Mehemet Konar-Steenberg, 3<sup>rd</sup> Ed., Revised 2014, available at <https://mitchellhamline.edu/minnesota-administrative-procedure/18-4-editing-compiling-publishing-and-preserving/>.

*Minnesota Administrative Rules Status System (MARSS) Pilot Project Report*, Prepared for the Office of the Revisor of Statutes, Minnesota Legislature, Prepared by Janice Kuschner, Project Consulting Group (January 31, 2017), available at: <https://www.revisor.mn.gov/office/meetings/>.

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All documents utilized at and prepared for the MARSS working group meetings are posted on the Revisor's Office webpage and available online at: <https://www.revisor.mn.gov/office/meetings/>.

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Appendix B-Functional and Nonfunctional Requirements

Appendix C-Build vs. Buy

Appendix D-In-House Build Plan

Appendix E-Rulemaking Statistics

Appendix F-Subgroup Recommendations for Proposed MARSS System

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## Appendix H-MARSS Working Group Members