UNIFORM LAW COMMISSIONERS'
MODEL STATE ADMINISTRATIVE
PROCEDURE ACT (1981)

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ARTICLE I

GENERAL PROVISIONS
§ 1-101. [Short Title].

This Act may be cited as the [state] Administrative Procedure Act.

§ 1-102. [Definitions].

As used in this Act:

(1) "Agency" means a board, commission, department, officer, or other administrative unit of this State, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head. The term does not include the [legislature] or the courts [, or the governor] [, or the governor in the exercise of powers derived directly and exclusively from the constitution of this State]. The term does not include a political subdivision of the state or any of the administrative units of a political subdivision, but it does include a board, commission, department, officer, or other administrative unit created or appointed by joint or concerted action of an agency and one or more political subdivisions of the state or any of their units. To the extent it purports to exercise authority subject to any provision of this Act, an administrative unit otherwise qualifying as an "agency" must be treated as a separate agency even if the unit is located within or subordinate to another agency.

(2) "Agency action" means:

(i) the whole or a part of a rule or an order;

(ii) the failure to issue a rule or an order; or

(iii) an agency's performance of, or failure to perform, any other duty, function, or activity, discretionary or otherwise.

(3) "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law.

(4) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.

(5) "Order" means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons. [The term does not include an "executive order" issued by the governor pursuant to Section 1-104 or 3-202.]

(6) "Party to agency proceedings," or "party" in context so indicating, means:

(i) a person to whom the agency action is specifically directed; or

(ii) a person named as a party to an agency proceeding or allowed to intervene or participate as a party in the proceeding.
(7) "Party to judicial review or civil enforcement proceedings," or "party" in context so indicating, means:

(i) a person who files a petition for judicial review or civil enforcement or

(ii) a person named as a party in a proceeding for judicial review or civil enforcement or allowed to participate as a party in the proceeding.

(8) "Person" means an individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.

(9) "Provision of law" means the whole or a part of the federal or state constitution, or of any federal or state (i) statute, (ii) rule of court, (iii) executive order, or (iv) rule of an administrative agency.

(10) "Rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes (i) law or policy, or (ii) the organization, procedure, or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule.

(11) "Rule making" means the process for formulation and adoption of a rule.

COMMENT

The definition of "agency" in paragraph (1) is a substantial revision of 1961 Revised Model Act, Section 1(1). See generally Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 759-771 (1975), hereinafter cited as Bonfield, IAPA. It omits the requirement that the agency be "authorized by law to make rules or to determine contested cases" in the interest of subjecting as many state governmental units as possible to the provisions of the administrative procedure act. The definition explicitly includes the agency head and those others who act for an agency, and joint state and local bodies, so as to effect the broadest coverage possible. See generally Bonfield, IAPA at 768-770.

Express exclusions listed in the definition of "agency" are the legislature, the courts, and political subdivisions of the state and their offices and units. The 1961 Revised Model Act only impliedly excluded political subdivisions. While a model act to govern the administrative procedure of such subdivisions and their agencies is desirable, a separate statute is necessary for that purpose because of the very different circumstances of local government units when compared to state agencies. The 1961 Revised Model Act also excluded, as does this definition, the legislature and the courts. Note that it is only "the legislature" and "the courts" that are excluded, and not "the legislative branch" and "the judicial branch," and that exemptions from the Act are to be construed narrowly. See generally Bonfield, IAPA at 763-766.

Although the 1961 Revised Model Act did not exclude "the governor" from the definition of "agency," the bracketed language included in paragraph (1) would also exclude "the governor" either entirely, or in the alternative only in the exercise of powers derived directly and exclusively from the state constitution. Some states may think such an exemption desirable because of the direct and clear political accountability of the governor and because the need for such procedures as found in this Act to bind him personally may be less than the need for them to bind other administrative units of state government. In addition, there may be doubts as to the state
constitutionality of a statute seeking to impose procedural requirements on the governor with respect to the exercise of powers "derived directly and exclusively from the [state] constitution." In any case note that in the bracketed language only "the governor" is excluded, and not the "office of the governor," and that exemptions from the Act are to be construed narrowly. See generally, Bonfield, IAPA at 764-766.

The last sentence of paragraph (1) is in part derived from Federal Act, Section 551(1), treating as an "agency" "each authority of the Government of the United States, whether or not it is within or subject to review by another agency. . . ." A similar provision is desirable here to avoid difficulties in ascertaining which is "the agency" in any situation where an administrative unit is within or subject to the jurisdiction of another such body. See Bonfield, IAPA at 768-769.

The term "agency action" defined in paragraph (2) expressly includes a "rule" and an "order" defined in paragraphs (10) and (5) and an agency's failure to issue a "rule" or an "order." It goes much further, however. Subparagraph (iii) makes clear that "agency action" includes everything and anything else that an agency does or does not do, whether its action or inaction is discretionary or otherwise. There are no exclusions from that all encompassing definition. As a consequence, there is a category of "agency action" that is neither an "order" nor a "rule" because it neither establishes the legal rights of any particular person nor establishes law or policy of general applicability. The principal effect of the very broad definition of "agency action" is that everything an agency does or does not do is subject to judicial review. See Section 5-101. Success on the merits in such cases, however, is another thing. In this statute, the limited scope of review utilized by the courts in judicial review proceedings, see Section 5-116, is relied on to discourage frivolous litigation, rather than the preclusion of judicial review entirely in whole classes of potential cases. Iowa Act, Section 17A.2(10) contains a definition of "agency action" that is similar in scope to paragraph (2).

The definition of "agency head" is included in paragraph (3) to differentiate for some purposes between the agency as an organic entity that includes all of its employees, and those particular individuals in whom the final legal authority over its operations is vested. See generally, Bonfield, IAPA at 770.

The paragraph (4) definition of "license" is a revised form of 1961 Revised Model Act, Section 1(3).

The definition of "order" in paragraph (5) makes clear that it includes only legal determinations made by an agency that are of particular applicability because they are addressed to named or specified persons. In other words, an "order" includes every "agency action" that determines any of the legal rights, duties, privileges, or immunities of a particular identified individual or individuals. This is to be compared to the paragraph (10) definition stating that a "rule" is an agency statement establishing law or policy of general applicability, that is, applicable to all members of a described class. The primary operative effect of the definition of "order" is in Article IV, governing adjudicative proceedings.

Consistent with the paragraph (5) definition, rate making and licensing determinations of particular applicability, addressed to named or specified parties such as a certain utility company or a certain licensee, are "orders" subject to the adjudication provisions of this statute. In that respect, this Act follows 1961 Revised Model Act, Section 1(2), which treated "ratemaking, [price fixing], and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing" as "contested cases," that is, as adjudications. See also People ex rel. Central Park, N. and E. R.R. Co. v. Wilcox, 87 N.E. 517 (N.Y.1909). Cf. Federal Act, Section 551(4), defining all rate making as rule making. On the other
hand, rate making and licensing actions of general applicability, addressed to all members of a described class of providers or licensees, are "rules" under this statute, subject to its rule making provisions. See the Comments on paragraph (10) of this section.

The bracketed language in paragraph (5), expressly excluding from the definition of "order" an "executive order" issued by the governor under the provisions of this Act, is included to avoid confusion. Although such an "executive order" is in the nature of a "rule" rather than an "order," the term contains the word "order." This could be misleading unless an "executive order" issued under this Act is expressly excluded from the definition of "order."

The definition of "party to agency proceedings" in paragraph (6) differs from the 1961 Revised Model Act, which defined "party" in its Section 1(5) to include "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." The last clause, "properly seeking and entitled . . .," was intended to confer upon would-be intervenors the right to seek judicial review if their petitions for intervention were denied. This act omits the clause, "properly seeking and entitled," for a number of reasons. First, the present draft contains one definition of "party" in connection with agency proceedings, in paragraph (6), and another definition of "party" in connection with judicial review or civil enforcement proceedings, in paragraph (7). Accordingly, the definition of "party to agency proceedings" in paragraph (6) is not intended to address the question whether a person is entitled to judicial review. Second, as a related matter, this Act deals with standing to seek judicial review, in Section 5-106, more thoroughly than did the 1961 Revised Model Act. Third, in Section 4-209, this Act deals with intervention in agency proceedings, a topic not addressed at all in the 1961 Revised Model Act except by means of the implication in its 1961 definition of "party." Finally, the 1961 Revised Model Act's concept of persons "properly seeking and entitled . . ." could lead to awkward consequences, if included in the definition of "party." For example, it could compel a person serving copies of pleadings to ascertain whether each potential recipient of service, known or unknown, is "properly seeking and entitled . . . ."

The definition of "person" in paragraph (8) is a modified form of Tennessee Act, Section 4-5-102(6). This definition is broader than the 1961 Revised Model Act definition in Section 1(6) because it includes an "agency" other than the agency against whom rights under this Act are asserted by the "person." Inclusion of such agencies and units of government insures, therefore, that other agencies or other governmental bodies can, for example, petition an agency for the adoption of a rule, and will be accorded all the other rights that a "person" will have under the Act. A number of states include other agencies in the definition of "person." See, for example, New York Act, Section 102(6) and Wisconsin Act, Section 227.01(8).

References are made, in numerous parts of this Act, to external sources of authority. In order to express differing meanings to reflect the drafters' intent, various terms are used to denote the external sources of authority intended—some references are to "statute," others are to "statute or rule," and still others are to "provision of law." As indicated by the definition in paragraph (9), the term "provision of law" is intended to have a uniform meaning whenever used in the Act. Its meaning is not intended to include either the common law decisions of courts in non-statutory settings, or the adjudicative decisional precedents of administrative agencies. It does, however, include controlling case law constructions of the expressly enumerated species of law. "Provision of law," therefore, is not as broad a term as "law;" so, "required by law" is intended in this Act to include all species of law, while "provision of law" is more limited.
The definition of "rule" in paragraph (10) is a modified form of 1961 Revised Model Act, Section 1(7). For a discussion of this definition which includes all agency statements of general applicability that implement, interpret, or prescribe law or policy, without regard to the terminology used by the issuing agency to describe them, see Bonfield, IAPA at 826-832. The 1961 Revised Model Act and other state statutes exclude specified statements from the definition of "rule" as a drafting technique with which to exempt those statements from the procedural and publication requirements applicable to rules. In Section 3-116 this Act instead expressly exempts specified statements from those requirements. The contents of a rule when initially adopted are specified in Section 3-111(a).

Consistent with the definition in paragraph (10), rate making and licensing determinations of general applicability, that is, addressed to all members of a class by description, are "rules" subject to the rule-making provisions of this statute. Note also that the statement in the Comment to 1961 Revised Model Act, Section 1(7), with respect to the definition of "rule," is also normally applicable here: "Attention should be called to the fact that rules, like statutory provisions, may be of general applicability even though they may be of immediate concern to only a single person or corporation, provided the form is general and others who may qualify in the future will fall within its provisions."

The definition of "rule making" in paragraph (11) is a modified form of Federal Act, Section 551(5).

§ 1-103. [Applicability and Relation to Other Law].

(a) This Act applies to all agencies and all proceedings not expressly exempted.

(b) This Act creates only procedural rights and imposes only procedural duties. They are in addition to those created and imposed by other statutes. To the extent that any other statute would diminish a right created or duty imposed by this Act, the other statute is superseded by this Act, unless the other statute expressly provides otherwise.

(c) An agency may grant procedural rights to persons in addition to those conferred by this Act so long as rights conferred upon other persons by any provision of law are not substantially prejudiced.

COMMENT

This section is a substantial revision of Iowa Act, Sections 17A.1 and 17A.23. The 1961 Revised Model Act did not contain analogous provisions. However, the explicit enumeration of these rules for construction of the Act will help assure that the Act is interpreted to accomplish its objectives. See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 755-759 (1975), hereinafter cited as Bonfield, IAPA, for a full discussion of the much more extended Iowa Act provisions.

Subsection (b) explicitly assures that where there is a direct conflict between the requirements of another statute and this Act, this Act will prevail unless there is a wholly unambiguous contrary legislative decision. It only provides a rule of construction, therefore, and is consistent with this philosophy: the burden should be on those seeking any exemption from the Act to demonstrate their entitlement thereto in unmistakable statutory language indicating that the legislature has actually considered the question of an exemption and determined that
an exemption is warranted. See Bonfield, IAPA at 756. Some other statutes explicitly adopting this notion are Federal Act, Section 559 and Minnesota Act, Section 15.14. Adopting states should examine all of their existing statutory provisions governing the procedures to be followed by particular agencies to determine if any of those provisions should be excepted from the operation of this section.

§ 1-104. [Suspension of Act's Provisions When Necessary to Avoid Loss of Federal Funds or Services].

(a) To the extent necessary to avoid a denial of funds or services from the United States which would otherwise be available to the state, the [governor by executive order] [attorney general by rule] [may] [shall] suspend, in whole or in part, one or more provisions of this Act. The [governor by executive order] [attorney general by rule] shall declare the termination of a suspension as soon as it is no longer necessary to prevent the loss of funds or services from the United States.

[ (b) An executive order issued under subsection (a) is subject to the requirements applicable to the adoption and effectiveness of a rule.]

(c) If any provision of this Act is suspended pursuant to this section, the [governor] [attorney general] shall promptly report the suspension to the [legislature]. The report must include recommendations concerning any desirable legislation that may be necessary to conform this Act to federal law.]

COMMENT

This section is a modified version of Iowa Act, Section 17A.21. The 1961 Revised Model Act did not contain a similar provision. The provisions of this section permit specific functions of agencies to be exempted from applicable provisions of the Act only to the extent that is necessary to prevent the denial of federal funds or a loss of federal services. The test to be met is simply whether, as a matter of fact, there will actually be a loss of federal funds or a loss of federal services if there is no suspension. And the suspension is effective only so long as and to the extent necessary to, avoid the contemplated loss. See generally Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 771-776 (1975), hereinafter cited as Bonfield, IAPA. Section 1-104 is in brackets because some state legislatures may not want to delegate this suspensive authority to any executive official, reserving it instead for ad hoc decision by the entire legislative process.

If this provision is enacted, the enacting state must decide whether the governor or the attorney general should make the suspension determination. The issuance of such a suspension determination is a rule so all usual rule-making requirements will be applicable thereto when that determination is issued by the attorney general. In states authorizing the governor to issue the suspension determination, bracketed subsection (b) should be included to make clear that such an executive order is subject to rule-making requirements even if the governor is entirely excluded from the definition of "agency."

The governor or attorney general is not required to issue a suspension determination merely upon the receipt of a federal agency certification that a suspension is necessary. The suspension must be actually necessary. That is, the governor or attorney general must first decide that the federal agency is correct in its assertion that federal funds may lawfully be withheld from the state agency if that agency complies with certain
provisions of this Act, and that the federal agency intends to exercise its authority to withhold those funds if certain provisions of this Act are followed. However, if these two requirements are met, the governor or attorney general "shall" suspend the provision if that bracketed alternative is chosen. A permissive "may" is also included in brackets for those states desiring to give them discretion on this matter. See Bonfield, IAPA at 772-773.

§ 1-105. [Waiver].

Except to the extent precluded by another provision of law, a person may waive any right conferred upon that person by this Act.

COMMENT

This section embodies the standard notion of waiver. Rights under this statute should be subject to waiver in the same way that rights under any other civil statute are normally subject to waiver.

§ 1-106. [Informal Settlements].

Except to the extent precluded by another provision of law, informal settlement of matters that may make unnecessary more elaborate proceedings under this Act is encouraged. Agencies shall establish by rule specific procedures to facilitate informal settlement of matters. This section does not require any party or other person to settle a matter pursuant to informal procedures.

COMMENT

This section expressly encourages informal settlements of controversies that would otherwise end in more formal proceedings. Obviously, economy and efficiency in government commends such a policy except as it is otherwise precluded by law. A requirement that each agency issue rules providing for informal settlement procedures assures that everyone is on notice as to the availability and utility of such procedures. When accepted by an agency an offer of settlement becomes an "order" because it fits the Section 1-102(5) definition of that term.

§ 1-107. [Conversion of Proceedings].

(a) At any point in an agency proceeding the presiding officer or other agency official responsible for the proceeding:

(1) may convert the proceeding to another type of agency proceeding provided for by this Act if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of any party; and

(2) if required by any provision of law, shall convert the proceeding to another type of agency proceeding provided for by this Act.

(b) A conversion of a proceeding of one type to a proceeding of another type may be effected only upon notice to all parties to the original proceeding.
(c) If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, that officer or official, in accordance with agency rules, shall secure the appointment of a successor to preside over or be responsible for the new proceeding.

(d) To the extent feasible and consistent with the rights of parties and the requirements of this Act pertaining to the new proceeding, the record of the original agency proceeding must be used in the new agency proceeding.

(e) After a proceeding is converted from one type to another, the presiding officer or other agency official responsible for the new proceeding shall:

1. give such additional notice to parties or other persons as is necessary to satisfy the requirements of this Act pertaining to those proceedings;

2. dispose of the matters involved without further proceedings if sufficient proceedings have already been held to satisfy the requirements of this Act pertaining to the new proceedings; and

3. conduct or cause to be conducted any additional proceedings necessary to satisfy the requirements of this Act pertaining to those proceedings.

(f) Each agency shall adopt rules to govern the conversion of one type of proceeding to another. Those rules must include an enumeration of the factors to be considered in determining whether and under what circumstances one type of proceeding will be converted to another.

COMMENT

Subsection (a)(1) authorizes agencies to convert one type of agency proceeding to another type of agency proceeding, so long as three standards are met: the conversion must be "appropriate," "in the public interest," and must not "substantially prejudice the rights of any party." The courts will have to decide on a case-by-case basis what constitutes substantial prejudice in this context. And, of course, even if the rights of a particular party are substantially prejudiced by such a conversion, the party may voluntarily waive them. It should also be noted that the substantial prejudice to the rights of any party limitation on discretionary conversions of agency proceedings from one type to another is not intended to disturb an existing body of law. In certain situations agencies may lawfully deny particular individuals adjudicatory hearings to which they otherwise would be entitled by conducting a rule-making proceeding that determines for an entire class issues that otherwise would be the subject of necessary adjudicatory hearings. See Note, "The Use of Agency Rule-making to Deny Adjudications Apparently Required by Statute," 54 Iowa L.Rev. 1086 (1969). Similarly, the substantial prejudice limitation is not intended to disturb the existing body of law allowing agencies, in certain situations, to make determinations through adjudicatory procedures that have the effect of denying persons opportunities they might otherwise be afforded if rule-making procedures were used instead. See e.g. Young Plumbing and Heating Co. v. Iowa N.R.C., 276 N.W.2d 377 (Iowa 1979). And as subsection (a)(2) makes clear, an agency must convert a proceeding of one type to a proceeding of another type when "required by any provision of law," even if a nonconsenting party is greatly prejudiced thereby. According to subsection (b), however, both discretionary and mandatory conversions must be accompanied by notice to all parties to the original proceeding so that they will have a fully adequate
opportunity to protect their interests.

Within the limits just noted, agencies should be authorized to use those procedures in a proceeding that are most likely to be effective and efficient under the particular circumstances. Subsection (a)(1) allows agencies that desirable flexibility. For example, an agency that wants to convert a formal adjudicatory hearing into a conference hearing or summary proceeding, or a conference hearing or summary proceeding into a formal adjudicatory hearing, may do so under this provision if such a conversion is appropriate, in the public interest, adequate notice is given, and the rights of no party are substantially prejudiced. Similarly, an agency called upon to explore a new area of law in a declaratory order proceeding may prefer to do so by rule making. That is, the agency may decide to have full public participation in developing its policy in the area and to declare law of general applicability instead of issuing a determination of only particular applicability at the behest of a specific party in a more limited proceeding. So long as all of the standards set forth in subsections (a)(1) and (b) are met, this provision would authorize such a conversion from one type of agency proceeding to another. While it is unlikely that a conversion consistent with all of these statutory standards could occur more than once in the course of a proceeding, the possibility of multiple conversions in the course of a particular proceeding is left open by the statutory language. In adjudications, the prehearing conference could be used to choose the most appropriate form of proceeding at the outset, thereby diminishing the likelihood of any later conversion or conversions.

Subsection (c) deals with the mechanics of transition from one type of proceeding to another. The individual in charge of the original proceeding must, according to this provision, secure the appointment of a successor if that first official is disqualified to preside over the new proceeding.

Subsection (d) seeks to avoid unnecessary duplication of proceedings by requiring the use of as much of the agency record in the first proceeding as is possible in the second proceeding, consistent with the rights of the parties and the requirements of this Act.

Subsection (e) prescribes the duties of the official in charge of the new proceeding after a conversion is effected.

Subsection (f) requires agencies to adopt rules to effect such conversions of one type of proceeding to another, provide for the transition from one type to another, and specify the conditions under which such conversions will be effected.

§ 1-108. [Effective Date].

This Act takes effect on [date] and does not govern proceedings pending on that date. This Act governs all agency proceedings, and all proceedings for judicial review or civil enforcement of agency action, commenced after that date. This Act also governs agency proceedings conducted on a remand from a court or another agency after the effective date of this Act.

COMMENT

The effective date provision in this section is a very substantially revised 1961 Revised Model Act, Section 19 and Iowa Act Section 23. See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 758
§ 1-109. [Severability].

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are severable.

COMMENT

The severability provision is the standard provision of the National Conference.

ARTICLE II

PUBLIC ACCESS TO AGENCY LAW AND POLICY

COMMENT

Article II does not purport to be a general public records act. The Commissioners have adopted such a statute. See 1980 Uniform State Information Practices Code. Rather, Article II is only meant to provide easy access to the law and policy relevant to the rights of persons subject to the administrative process. This Article must, therefore, be viewed as a supplement to a more general public records act and not as a substitute therefor.


(a) There is created, within the executive branch, an [administrative rules editor]. The governor shall appoint the [administrative rules editor] who shall serve at the pleasure of the governor.

(b) Subject to the provisions of this Act, the [administrative rules editor] shall prescribe a uniform numbering system, form, and style for all proposed and adopted rules caused to be published by that office [, and shall have the same editing authority with respect to the publication of rules as the [reviser of statutes] has with respect to the publication of statutes].

(c) The [administrative rules editor] shall cause the [administrative bulletin] to be published in pamphlet form [once each week]. For purposes of calculating adherence to time requirements imposed by this Act, an issue of the [administrative bulletin] is deemed published on the later of the date indicated in that issue or the date of its mailing. The [administrative bulletin] must contain:

(1) notices of proposed rule adoption prepared so that the text of the proposed rule shows the text of any existing rule proposed to be changed and the change proposed;

(2) newly filed adopted rules prepared so that the text of the newly filed adopted rule shows the text of any existing rule being changed and the change being made;
(3) any other notices and materials designated by [law] [the administrative rules editor] for publication therein; and

(4) an index to its contents by subject.

(d) The [administrative rules editor] shall cause the [administrative code] to be compiled, indexed by subject, and published [in loose-leaf form]. All of the effective rules of each agency must be published and indexed in that publication. The [administrative rules editor] shall also cause [loose-leaf] supplements to the [administrative code] to be published at least every [3 months]. [The loose-leaf supplements must be in a form suitable for insertion in the appropriate places in the permanent [administrative code] compilation.]

(e) The [administrative rules editor] may omit from the [administrative bulletin or code] any proposed or filed adopted rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if:

(1) knowledge of the rule is likely to be important to only a small class of persons;

(2) on application to the issuing agency, the proposed or adopted rule in printed or processed form is made available at no more than its cost of reproduction; and

(3) the [administrative bulletin or code] contains a notice stating in detail the specific subject matter of the omitted proposed or adopted rule and how a copy of the omitted material may be obtained.

(f) The [administrative bulletin and administrative code] must be furnished to [designated officials] without charge and to all subscribers at a cost to be determined by the [administrative rules editor]. Each agency shall also make available for public inspection and copying those portions of the [administrative bulletin and administrative code] containing all rules adopted or used by the agency in the discharge of its functions, and the index to those rules.

(g) Except as otherwise required by a provision of law, subsections (c) through (f) do not apply to rules governed by Section 3-116, and the following provisions apply instead:

(1) Each agency shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its rules within the scope of Section 3-116. Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. Except for those portions containing rules governed by Section 3-116(2), the compilation must be made available for public inspection and copying. Certified copies of the full compilation must also be furnished to the [secretary of state, the administrative rules counsel, and members of the administrative rules review committee], and be kept current by the agency at least every [30] days.

(2) A rule subject to the requirements of this subsection may not be relied on by an agency to the detriment of any person who does not have actual, timely knowledge of the contents of the rule until the requirements of paragraph (1) are satisfied. The burden of proving that knowledge is on the agency. This provision is also inapplicable to the extent necessary to avoid imminent
peril to the public health, safety, or welfare.

COMMENT

This section is a substantially modified and extended form of 1961 Revised Model Act, Section 5, and Iowa Act, Section 17A.6. See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 877-883 (1975), hereinafter cited as Bonfield, IAPA.

The "administrative rules editor" is bracketed throughout the section because the particular official designated to perform the functions assigned to that office by this Act may vary depending upon the needs and traditions of the enacting state. Since the official designated is charged with publishing executive branch law, appointment by and direct responsibility to the governor is desirable although, in some states, appointment by and direct responsibility to the secretary of state might be an appropriate alternative. The editing authority vested in the "administrative rules editor" is similar to that found in a number of states. See e.g. Alaska Statutes, Section 44.62.125(b)(6). It is bracketed because some states do not vest editing authority in a reviser of statutes or in any other official.

"As a result of a new survey conducted in early 1979, it is possible to report that thirty-eight of the fifty states have now either published [administrative] codes or are preparing to do so." See Tseng and Pedersen, "Commentary: Acquisition of State Administrative Rules and Regulations-Update 1979," 31 Admin.L.Rev. 405 at 405-406 (1979). Although most states publish their compilations of administrative agency rules in loose-leaf form, the requirement that the compilation be published in that form is bracketed so that each state may consider the precise form of publication in light of its own particular needs and traditions.

In considering the frequency of publication for the administrative bulletin and code supplement, each state should consult the other timing provisions of this Act to ensure that its purposes are not frustrated by too infrequent publication of those periodicals.

The newly filed adopted rule that must be published in the "administrative bulletin" according to Section 2-101(c)(2) includes all of the contents specified in Section 3-111(a). When included in the "administrative code" compilation required by Section 2-101(d), however, only the body of the rule, that is, only its operative portions, will be included, in the same way as a session law of the legislature is transformed when it is later included in the state statutory code compilation.

There was no provision equivalent to paragraph (1) of subsection (g) in the 1961 Revised Model Act. This minimum requirement that each agency maintain a current, indexed compilation of some sort, containing all of its law of general applicability that is exempt from usual rule publication requirements by this subsection as it specifically incorporates Section 3-116, seems entirely reasonable. See Comments to that section for the explanation of this exemption from formal publication requirements for rules within Section 3-116. Such a compilation can simply be a typed loose-leaf notebook that is the agency's official rulebook for these exempted rules.

The compilation required by this subsection must be made available for public inspection and copying except for those particular portions containing rules within Section 3-116(2). Because secret law is wholly
inconsistent with normal concepts of fair play, this exemption from the right of public access to agency rules is of very limited scope, and is justified only because of compelling practical reasons. See Bonfield, IAPA at 785-791. Note that, according to paragraph (2), discussed next, persons with actual timely notice of rules required to be included in this compilation are subject to them for all purposes even if they are not included therein. This should add to the practicality and reasonableness of the requirements of this subsection.

Paragraph (2) of subsection (g) states that rules subject to this subsection are not invocable to the detriment of any person until the enumerated very minimal and easy to meet requirements of paragraph (1) of the subsection are fully satisfied. The actual timely knowledge exception is based on 1961 Revised Model Act, Sections 2(a)(3) and 2(b), and Iowa Act, Sections 17A.3(1)(c) and 3(2). See Bonfield, IAPA at 785-790 and 799-804 for a full discussion of their rationale. See also Section 2-102(b) of this Act and the Comments thereto for another similar provision. The emergency exception to the main rule of paragraph (2) contains the same standard as that found in Section 3-115(b)(2)(iv). See the Comments on that provision. Note that paragraph (2), like the rest of subsection (g), only applies to rules subject to Section 3-116. The provisions of this paragraph need not apply to other rules. All other rules are subject to several similar requirements contained in Sections 3-114 and 3-115 that assure easy and timely public access to them. See also the additional duty imposed on an agency in subsection (f) of this section to make a copy of the published, indexed, and otherwise widely available formal rule compilations, as they pertain to that agency, available for public inspection at its own offices.

§ 2-102. [Public Inspection and Indexing of Agency Orders].

(a) In addition to other requirements imposed by any provision of law, each agency shall make all written final orders available for public inspection and copying and index them by name and subject. An agency shall delete from those orders identifying details to the extent required by any provision of law [or necessary to prevent a clearly unwarranted invasion of privacy or release of trade secrets]. In each case the justification for the deletion must be explained in writing and attached to the order.

(b) A written final order may not be relied on as precedent by an agency to the detriment of any person until it has been made available for public inspection and indexed in the manner described in subsection (a). This provision is inapplicable to any person who has actual timely knowledge of the order. The burden of proving that knowledge is on the agency.

COMMENT

This section is a substantially modified version of 1961 Revised Model Act, Sections 2(a)(4) and 2(b), and the additions thereto found in Iowa Act, Sections 17A.3(1)(d) and 3(2). The section is dedicated to the elimination of secret law. See generally Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 791-804 (1975) for a full discussion of all its various provisions and the manner of their operation.

Subsection (a) requires that all written final orders rendered in adjudications, including declaratory orders, be indexed in two ways and be made available for public inspection. Note that as drafted, the indexing and public inspection requirement applies to such orders issued before the effective date of the Act as well as thereafter. The theory is that all of the precedents on which agencies rely as binding law should be readily available to the public regardless of the date of their creation. After all, the injury to affected persons unable to ascertain the precedents
on which an agency relies is not dependent on the age of those precedents. The bracketed language should be enacted only if a state does not already have a privacy act or similar statute dealing with that subject matter.

Subsection (b) provides a remedy for violation of this section. It states that conformance with all of the requirements of subsection (a) is normally necessary before an order may be relied on by an agency as precedent in another case, to the detriment of any of the parties thereto. Of course, this remedy may be difficult to use effectively in situations where an agency relying upon an unindexed or unavailable precedent successfully conceals that fact, purporting instead to adjudicate wholly de novo in the case at hand the principle embedded in the earlier concealed precedent. On the preconditions to the direct effectiveness of an agency order against parties or other persons, rather than the preconditions to its use only as precedent in later cases, see Section 4-220.

§ 2-103. [Declaratory Orders].

(a) Any person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency. An agency shall issue a declaratory order in response to a petition for that order unless the agency determines that issuance of the order under the circumstances would be contrary to a rule adopted in accordance with subsection (b). However, an agency may not issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

(b) Each agency shall issue rules that provide for: (i) the form, contents, and filing of petitions for declaratory orders; (ii) the procedural rights of persons in relation to the petitions and (iii) the disposition of the petitions. Those rules must describe the classes of circumstances in which the agency will not issue a declaratory order and must be consistent with the public interest and with the general policy of this Act to facilitate and encourage agency issuance of reliable advice.

(c) Within [15] days after receipt of a petition for a declaratory order, an agency shall give notice of the petition to all persons to whom notice is required by any provision of law and may give notice to any other persons.

(d) Persons who qualify under Section 4-209(a)(2) and (3) and file timely petitions for intervention according to agency rules may intervene in proceedings for declaratory orders. Other provisions of Article IV apply to agency proceedings for declaratory orders only to the extent an agency so provides by rule or order.

(e) Within [30] days after receipt of a petition for a declaratory order an agency, in writing, shall:

(1) issue an order declaring the applicability of the statute, rule, or order in question to the specified circumstances;

(2) set the matter for specified proceedings;

(3) agree to issue a declaratory order by a specified time; or

(4) decline to issue a declaratory order, stating the reasons for its action.
(f) A copy of all orders issued in response to a petition for a declaratory order must be mailed promptly to petitioner and any other parties.

(g) A declaratory order has the same status and binding effect as any other order issued in an agency adjudicative proceeding. A declaratory order must contain the names of all parties to the proceeding on which it is based, the particular facts on which it is based, and the reasons for its conclusion.

(h) If an agency has not issued a declaratory order within [60] days after receipt of a petition therefor, the petition is deemed to have been denied.

COMMENT

This section is an expanded and substantially modified version of 1961 Revised Model Act, Section 8. It creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory order" proceeding. The purpose of that proceeding is to provide an inexpensive and generally available means by which persons may obtain fully reliable information as to the applicability of agency administered law to their particular circumstances. See generally Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 805-824 (1975), hereinafter cited as Bonfield, IAPA. Subsection (a) does, however, prohibit an agency from issuing a declaratory order that would substantially prejudice the rights of any persons who would be indispensable—that is "necessary"-parties, and who do not consent to the determination of the matter by a declaratory order proceeding. Such persons may refuse to give that consent because in a declaratory order proceeding they might not have all of the same procedural rights they would have in another type of adjudicatory proceeding to which they would be entitled.

As subsection (b) indicates, each agency is required to issue rules specifying all of the details surrounding the declaratory order process including a specification of the precise form and contents of the petition; when, how, and where such petitions are to be filed; whether petitioners have rights to oral arguments in relation thereto; the circumstances in which the agency will not issue such an order; and the like. Agency rules on this subject will be valid so long as the requirements they impose are reasonable and are within the scope of agency discretion. To be valid these rules must also be consistent with the public interest—which includes the efficient and effective accomplishment of the agency’s mission—and the express general policy of this Act to facilitate and encourage the issuance of reliable agency advice. Within these general limits, therefore, an agency may include in its rules reasonable standing, ripeness, and other requirements for obtaining a declaratory order. But as subsection (a) makes clear, an agency must issue a declaratory order upon receipt of a proper petition therefor unless it determines that under the particular circumstances its issuance would either (1) be contrary to a rule issued in accordance with subsection (b), or (2) would substantially prejudice the rights of any persons who would be indispensable parties to the proceeding and do not consent to determination of the matter by a declaratory order.

Subsection (c) requires an agency to give timely notice of a petition for a declaratory order to such persons as is required by law, and also authorizes the agency to give notice of a petition on an ad hoc basis to other persons it thinks desirable.

Subsection (d) makes clear that an agency must allow persons to intervene in a declaratory order
proceeding to the same extent it must allow such intervention in other adjudicatory proceedings under the provisions of this Act. It also makes clear that all the other specific procedural requirements for adjudications imposed by this Act on agencies when they conduct such proceedings are inapplicable to proceedings for declaratory orders unless an agency elects to make some or all of them applicable. As subsection (b) indicates, each agency is to specify the precise procedures available in such proceedings by rule. In particular cases, it may grant additional procedural rights by order. The reason for exempting declaratory orders from usual procedural requirements for adjudications provided in Article IV is to encourage agencies to issue such orders by eliminating any requirements in relation thereto that they might deem onerous. Note that there are no contested issues of fact in declaratory order proceedings because their function is to declare the applicability of the law in question to unproven facts furnished by petitioner. The actual existence of the facts upon which such an order is based will usually become an issue only in a later proceeding in which a party to the declaratory order proceeding seeks to use the order as a justification for that party's conduct. Note also that the party requesting a declaratory order has the choice of refraining from filing such a petition and awaiting the ordinary agency adjudicative process governed by Article IV. Declaratory orders are, of course, subject to the provisions of this Act for judicial review of agency orders and for public inspection and indexing of agency orders.

The requirement in subsection (e) that an agency dispose of a petition within 30 days defines the outer limits of "prompt disposition," which was the time period used in 1961 Revised Model Act, Section 8. This assures timely agency responses to declaratory ruling petitions, thereby facilitating planning by affected parties.

Subsection (f) requires that the agency communicate to the petitioner and to any other parties all orders it issues in response to a petition for a declaratory order. This includes each of the types of orders listed in subsection (e)(1)-(4). According to subsection (e)(4), when the agency declines to issue a declaratory order it must also include therein a statement of the precise grounds for that disposition. This statement of reasons will help to assure that the propriety of the denial of such a declaratory order in the circumstances will be carefully considered by the agency. Since an agency's refusal to issue a declaratory order is "agency action" which is judicially reviewable under Article V, the required statement of reasons for an agency's refusal to issue such an order will also assure that the courts will have an opportunity for meaningful review of all negative agency responses to such a petition. If the agency improperly refuses to issue a declaratory order because it acts beyond the scope of authority granted it, or abuses its discretion, the reviewing court must remand to the agency with directions to issue such an order. The court may not render a declaratory judgment determining the applicability of law within the agency's primary jurisdiction to the facts contained in the petition. See P.E.R.B. v. Stohr, 279 N.W.2d 286 (Iowa 1979).

Subsection (g) is a revised and expanded version of 1961 Revised Model Act, Section 8. It makes clear that declaratory rulings issued by an agency are judicially reviewable; are binding on the petitioner, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and that they have the same precedential effect as other agency adjudications. See Bonfield, IAPA at 822-824. Note that a declaratory order, like other orders, only determines the legal rights of the particular parties to the proceeding in which it was issued. Note also that the requirement in subsection (g) that each declaratory order issued contain the facts on which it is based and the reasons for its conclusion will facilitate any subsequent judicial review of the order's legality; it also assures a clear record of what occurred for the parties and other persons interested in the order because of its possible precedential effect.

Subsection (h) is based on Iowa Act, Section 17A.19(1). It eliminates the uncertainty as to when an
agency's failure to issue a declaratory order in response to a petition therefor is final for purposes of seeking judicial review. Sixty days seems reasonable for this purpose since an agency should be allowed sufficient time to hold any proceedings it desires on such a petition before petitioner can file proceedings for judicial review. Of course, petitioner may seek judicial review of an agency's failure to issue a declaratory order prior to 60 days from the date of the petition if, at an earlier time, the agency expressly declines to issue such an order.

§ 2-104. [Required Rule Making].

In addition to other rule-making requirements imposed by law, each agency shall:

(1) adopt as a rule a description of the organization of the agency which states the general course and method of its operations and where and how the public may obtain information or make submissions or requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available to the public, including a description of all forms and instructions that are to be used by the public in dealing with the agency; [and]

(3) as soon as feasible and to the extent practicable, adopt rules, in addition to those otherwise required by this Act, embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers [; and] [.] [ (4) as soon as feasible and to the extent practicable, adopt rules to supersede principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases.]

COMMENT

Paragraph (1) is modified 1961 Revised Model Act, Section 2(a)(1). See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 781-784 (1975), hereinafter cited as Bonfield, IAPA.

Paragraph (2) is modified 1961 Revised Model Act, Section 2(a)(2). See Bonfield, IAPA at 784-785.

Paragraph (3) is an effort to force agencies, "as soon as feasible and to the extent practicable," to further structure their procedural and substantive discretion so as to minimize arbitrary action and give fair notice to the public. See Holmes v. N.Y. Housing Authority, 398 F.2d 262 (2nd Cir. 1968); Davis, "A New Approach to Delegation," 36 Univ. Chicago L.Rev. 713 (1969); 1 K. Davis, Administrative Law Treatise, Section 3:15 (2d ed. 1978). Of course, the issuance of rules is not the only means by which to accomplish this goal. But several reasons favoring policy making by rule rather than by ad hoc order are noted in the later portion of the Comments explaining paragraph (4). Among them is the fact there is greater ease of public access to law embodied in widely disseminated published rules as compared to law embodied in unpublished orders which are only available in the agency's office for public inspection. In addition, it should be stressed that policy making by rule is prospective, thereby giving affected persons advance warning, while policy making by adjudication is inherently retrospective, thereby denying parties advance warning. See NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). These factors suggest that to the extent an agency can feasibly and practicably further structure its discretion by rule to avoid
arbitrary action, and to give fair advance notice to the public of the precise content of the law it administers, the agency should be required to do so.

Illinois Act, Section 1004.02, is somewhat similar to paragraph (3). That provision states: "Each rule which implements a discretionary power to be exercised by an agency shall include the standards by which the agency shall exercise the power. Such standards shall be stated as precisely and clearly as practicable under the conditions, to inform fully those persons affected." For a somewhat different requirement read into an agency's enabling act to accomplish objectives similar to those sought by paragraph (3)-the agency must initially particularize the statutory standards it applies by rule rather than by order-See Megdal v. Oregon St. Bd. of Dental Examiners, 605 P.2d 273 (Oregon 1980) and Elizondo v. Dept. of Revenue, 570 P.2d 518 (Colo.1977).

Bracketed paragraph (4) is a very substantially modified and mandatory form of Wisconsin Act, Section 227.014(2)(c), which states: "Each agency which is authorized by law to exercise discretion in deciding individual cases is authorized to formalize the general policies which may evolve from such decisions by adopting such policies as rules which the agency will follow until they are amended or repealed." Agencies would usually seem to have that discretionary authority in any event. See, e.g., National Petroleum Refiners Assn. v. FTC, 482 F.2d 672 (D.C.Cir.1973), certiorari denied, 415 U.S. 951 (1974).

A number of reasons favor a requirement that agencies displace or supersede law and policy made in the course of adjudications with rules, "as soon as feasible and to the extent practicable." As noted above, law and policy expressed in rules is more readily available to affected members of the public than case precedent and is known in advance to affected parties; therefore, law and policy expressed in rules gives them fairer notice than case precedent. In addition, the general public has an opportunity to participate in law or policy made by rule, while its opportunity to do so with respect to policy made on a case-by-case basis is much more limited. Law or policy expressed in rules is also frequently more easily understandable to laymen than case precedent, and is almost always more highly visible to those who monitor the performance of agencies. That is, neither the legislative committee charged with oversight of agency rules nor the governor may effectively monitor policy made by an agency on a case-by-case basis because the documents in which such policy is declared are much less easily accessible than are rules which are published and widely distributed; nor may the legislative committee use its objection power created in Section 3-204(d) or the governor his veto power created in Section 3-202(a) on agency policy created wholly on a case-by-case basis. When agencies realize that creation of policy on a precedential case-by-case basis can enable them to avoid the publicity and public participatory hurdles of the rule-making requirements, and the possibility of effective legislative and gubernatorial review of that policy, they are likely to increase policy making in that manner to the extent their enabling acts permit them to do so. Only by the enactment of a statutory provision of the type recommended here, therefore, can agencies be forced to codify in rules principles of law or policy they may lawfully declare in decisions in particular cases, and may lawfully rely on as precedent. Without such a provision they will be free, in many situations, to make their most controversial policies on a case-by-case basis in adjudications, and thereby avoid on a permanent basis rule-making procedures and legislative and gubernatorial review.

Consequently, insofar as "feasible," and to the extent "practicable," agencies should be required to embody in rules specified principles of law or policy developed in their case precedent that in practice and in effect have become of general applicability. Of course, the rules an agency makes to satisfy its paragraph (4) obligation need not be wholly congruent with the displaced or superseded principles of law or policy lawfully declared by the agency in particular cases as the basis for those decisions. So long as they are both substantively and procedurally
within the authority delegated to the agency, paragraph (4) rules may codify, or be broader or narrower than, the case law they displace. The validity of a rule adopted pursuant to paragraph (4), therefore, will not depend upon whether it is an accurate codification in all respects of the replaced preexisting agency case law.

If an agency breaches, in particular circumstances, its duty which is based on a rule of reason-"as soon as feasible and to the extent practicable"-to issue such a rule displacing a line of its precedent, the agency may not subsequently rely on that line of precedent. Instead, it would have to readjudicate wholly de novo, and free of prior precedent, whatever principles of law might apply to those circumstances. Of course, this remedy may not be particularly effective since even in such a wholly de novo adjudication the agency would probably readjudicate the same principle of law embedded in the prior precedent upon which it could no longer lawfully rely because its paragraph (4) duty had been breached. See e.g., the result in N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969), on slightly different facts.

As an alternative to bracketed paragraph (4), states might consider this possibility. Add a subsection to Section 3-118 that would require an agency, only after a petition requesting the adoption of a rule superseding one or more specified principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases, to adopt such a rule as soon as feasible and to the extent practicable. A provision of this type might state:

If a person petitions an agency requesting the adoption of a rule superseding specified principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases, the agency shall adopt such a rule as soon as feasible and to the extent practicable, and in accordance with the requirements of this Chapter.

§ 2-105. [Model Rules of Procedure].

In accordance with the rule-making requirements of this Act, the [attorney general] shall adopt model rules of procedure appropriate for use by as many agencies as possible. The model rules must deal with all general functions and duties performed in common by several agencies. Each agency shall adopt as much of the model rules as is practicable under its circumstances. To the extent an agency adopts the model rules, it shall do so in accordance with the rule-making requirements of this Act. Any agency adopting a rule of procedure that differs from the model rules shall include in the rule a finding stating the reasons why the relevant portions of the model rules were impracticable under the circumstances.

COMMENT

This section is a combination of modified Montana Act, Section 82-4203(3), and modified Utah Act, Section 63-46-11. Obviously, it is desirable to secure as much uniformity among the procedural rules of the several agencies as "is practicable" in light of their differing circumstances. Such uniformity as is feasible will ease the burden on the public of familiarizing itself with agency procedures. It will also eliminate the additional agency costs involved in the independent formulation by each agency of procedural rules with unnecessary differences. The existence of model rules of procedure will be especially helpful to smaller agencies that lack sufficient resources to draft adequately on their own comprehensive rules of this type.

ARTICLE III
RULE MAKING

COMMENT

The rule-making procedures provided in Article III seek to accomplish three principal objectives. First, the procedures provided seek to facilitate the making of rules that are as technically sound as is possible under the circumstances of everyday government operation. To that end, they are geared to elicit and to place in proper perspective for agencies all of the information and opinion necessary to make fully informed and technically correct rule-making determinations. It is assumed that a combination of the self interest of persons affected by proposed rules, an effective opportunity for them to communicate to an agency all material relevant to its proposed rules, and a process to ensure that the agency actually considers such communications and other relevant information before it adopts rules, will facilitate rule-making determinations that are technically sound.

Second, the procedures provided seek to assure that rule-making determinations made by agencies are lawful in all respects. That is, the process is geared to keep the rule making of agencies within the bounds of their legislative authorizations. For this purpose, the requirements imposed on agencies by Article III include provisions geared to assure full agency consideration and articulation of its authority to act in each instance of rule adoption, and the creation of an official agency record that will facilitate effective judicial review of the agency's legal authority to act in each such instance of rule making. In addition, this Article provides optional legislative and gubernatorial checks geared to assure that each instance of agency rule making is lawful.

Third, the procedures provided seek to assure that rule-making determinations are democratic as well as technocratic—that the body politic may effectively thwart the adoption of rules, no matter how technically sound and lawful, that are politically unacceptable to the community. This is a clear recognition that agencies work for the people and that the views of the community at large rather than the views of technocrats should ultimately prevail. The procedures specified in this statute for rule adoption, therefore, intentionally provide a number of practical opportunities for concerned members of the public to organize and effectively direct at agencies community political pressures against the adoption of rules they find unacceptable. The theory of those procedures is that if agencies making rules are subject to the same kinds of political pressures as are focused on the legislature when it enacts statutes, the agencies will find themselves practically unable to adopt rules that the legislature would not have adopted because of similar considerations. And, as a final check, the rule-making process provides an optional means by which affected persons may obtain the aid of the politically responsible governor to veto lawful agency rule-making actions that are unacceptable to the wider community.

There is an urgent need for effective procedures especially formulated to assure that agency rule making is both within the scope of its delegated authority and also politically acceptable to the community at large. These objectives could, of course, be accomplished by the imposition of substantive law limitations on agencies rather than by the imposition of procedural constraints on them. In enacting statutes delegating rule-making authority to agencies the legislature could be very detailed and specific. Statutory language of that sort, coupled with the aid of the courts, would usually assure that the rule making of agencies stays within the scope of their clearly delineated substantive authority. It would also tend to assure that agencies adopt rules that are substantively similar to statutes the politically responsive legislature would have adopted had it attempted itself to solve the problems at which the agency rules are directed. However, this means of popular control over the rule-making process has largely failed. Legislatures across the country have repeatedly delegated rule-making authority to agencies without providing detailed and specific substantive statutory standards to guide them in the exercise of
that authority.

Many of the reasons for the increasing breadth and vagueness of legislative delegations of rule-making authority to administrative agencies are obvious; and they are not likely to change very soon. Inadequate time and an excessive work load, lack of technical expertise coupled with thin support staffing, an inability to foresee or to agree upon the specific details of agency rule-making authority, and/or a positive conviction that broad, vague rule-making delegations are necessary to accomplish their ultimate objectives, all cause legislators to acquiesce in statutes vesting such practically uncabined authority in agencies. And despite earlier law to the contrary, there is a growing tendency today for state supreme courts to uphold the vesting of such broad rule-making authority in state agencies, so long, that is, as the delegation is at least surrounded by general standards and by adequate procedural safeguards. See e.g. 1 K. Davis, Administrative Law Treatise, Section 3:14-3:15 (2d ed. 1978); B. Schwartz, Administrative Law, Section 23 (1976).

All of this highlights the importance of rule-making procedures that not only facilitate agency policy making that is technically sound, but also assure that such agency policy making is both within the scope of agency authority and politically acceptable to the community at large. The procedures that follow seek to accomplish these three principal objectives and several other subsidiary objectives, such as assuring affected members of the public adequate notice of, and time to adjust to, the requirements of new rules before they take effect. These procedures are proposed as a fair balance between the need for effective, efficient, and economical rule making on the one hand, and the accomplishment of the specified objectives on the other.

CHAPTER I

ADOPTION AND EFFECTIVENESS OF RULES

§ 3-101. [Advise on Possible Rules before Notice of Proposed Rule Adoption].

(a) In addition to seeking information by other methods, an agency, before publication of a notice of proposed rule adoption under Section 3-103, may solicit comments from the public on a subject matter of possible rule making under active consideration within the agency by causing notice to be published in the [administrative bulletin] of the subject matter and indicating where, when, and how persons may comment.

(b) Each agency may also appoint committees to comment, before publication of a notice of proposed rule adoption under Section 3-103, on the subject matter of a possible rule making under active consideration within the agency. The membership of those committees must be published at least [annually] in the [administrative bulletin].

COMMENT

A voluntary prerule-making notice publication of the type authorized by subsection (a) will often save time in the long run for an agency. Such a notice will alert the agency very early in the rule-making process to problems which might later cause the agency to rewrite drastically the terms of a rule it has formally proposed by publication according to the requirements of Section 3-103, or to regret that it had been formally proposed in the first place. A prerule-making notice publication will also facilitate public access to the rule-making process
before the agency commits itself psychologically to a specific text. See Auerbach, "Administrative Rulemaking in Minnesota," 63 Minn.L.Rev. 151 at 171-174 (1979).

The committee consultation concept authorized by subsection (b) is a modified and extended form of Wisconsin Act, Section 227.018(1).

This section does not, of course, preclude an agency, prior to the publication of a notice of proposed rule adoption, from seeking information from the public by other methods with respect to a subject matter of possible rule making.

§ 3-102. [Public Rule-making Docket].

(a) Each agency shall maintain a current, public rule-making docket.

(b) The rule-making docket [must] [may] contain a listing of the precise subject matter of each possible rule currently under active consideration within the agency for proposal under Section 3-103, the name and address of agency personnel with whom persons may communicate with respect to the matter, and an indication of the present status within the agency of that possible rule.

(c) The rule-making docket must list each pending rule-making proceeding. A rule-making proceeding is pending from the time it is commenced, by publication of a notice of proposed rule adoption, to the time it is terminated, by publication of a notice of termination or the rule becoming effective. For each rule-making proceeding, the docket must indicate:

   (1) the subject matter of the proposed rule;

   (2) a citation to all published notices relating to the proceeding;

   (3) where written submissions on the proposed rule may be inspected;

   (4) the time during which written submissions may be made;

   (5) the names of persons who have made written requests for an opportunity to make oral presentations on the proposed rule, where those requests may be inspected, and where and when oral presentations may be made;

   (6) whether a written request for the issuance of a regulatory analysis of the proposed rule has been filed, whether that analysis has been issued, and where the written request and analysis may be inspected;

   (7) the current status of the proposed rule and any agency determinations with respect thereto;

   (8) any known timetable for agency decisions or other action in the proceeding;
(9) the date of the rule's adoption;

(10) the date of the rule's filing, indexing, and publication; and

(11) when the rule will become effective.

COMMENT

This provision is calculated to assure that members of the public can easily, and in one place, ascertain the full current rule-making agenda of an agency, and all pertinent information in relation thereto.

§ 3-103. [Notice of Proposed Rule Adoption].

(a) At least [30] days before the adoption of a rule an agency shall cause notice of its contemplated action to be published in the [administrative bulletin]. The notice of proposed rule adoption must include:

(1) a short explanation of the purpose of the proposed rule;

(2) the specific legal authority authorizing the proposed rule;

(3) subject to Section 2-101(e), the text of the proposed rule;

(4) where, when, and how persons may present their views on the proposed rule; and

(5) where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

(b) Within [3] days after its publication in the [administrative bulletin], the agency shall cause a copy of the notice of proposed rule adoption to be mailed to each person who has made a timely request to the agency for a mailed copy of the notice. An agency may charge persons for the actual cost of providing them with mailed copies.

COMMENT

This section is substantially modified 1961 Revised Model Act, Section 3(a)(1). See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 848-852 (1975). Unlike that Act, however, this section requires the entire text of the proposed rule, rather than just a summary, to be incorporated in the published notice. Subject only to authority conferred by Section 3-107, this provision will assure that affected parties have fully adequate warning of the precise terms of the contemplated rule before the rule is finally adopted. The availability to agencies of more general prerule-making notice publications under Section 3-101 should remove most objections to this requirement that the full text of a proposed rule be published at the time of the notice of proposed rule adoption. Of course, the text of such a proposed rule may itself incorporate certain matters by reference. See Section 3-111(b). In addition to publishing the required Section 3-103 notice of proposed rule adoption, each agency should also exercise its discretion to give such other notice of its proposed action to
affected members of the public as may be appropriate under the particular circumstances, considering the significance of the rule, the situation of the persons affected by it, and the likelihood that publication in the administrative bulletin would not in fact provide those persons actual notice.

Unlike the 1961 Revised Model Act, this section also requires the initial notice of proposed rule adoption to indicate expressly the right of persons to demand an oral proceeding pursuant to Section 3-104.

§ 3-104. [Public Participation].

(a) For at least [30] days after publication of the notice of proposed rule adoption, an agency shall afford persons the opportunity to submit in writing, argument, data, and views on the proposed rule.

(b)(1) An agency shall schedule an oral proceeding on a proposed rule if, within [20] days after the published notice of proposed rule adoption, a written request for an oral proceeding is submitted by [the administrative rules review committee,] [the administrative rules counsel,] a political subdivision, an agency, or [25] persons. At that proceeding, persons may present oral argument, data, and views on the proposed rule.

(2) An oral proceeding on a proposed rule, if required, may not be held earlier than [20] days after notice of its location and time is published in the [administrative bulletin].

(3) The agency, a member of the agency, or another presiding officer designated by the agency, shall preside at a required oral proceeding on a proposed rule. If the agency does not preside, the presiding official shall prepare a memorandum for consideration by the agency summarizing the contents of the presentations made at the oral proceeding. Oral proceedings must be open to the public and be recorded by stenographic or other means.

(4) Each agency shall issue rules for the conduct of oral rule-making proceedings. Those rules may include provisions calculated to prevent undue repetition in the oral proceedings.

COMMENT

Subsections (a) and (b)(1) are modified and extended versions of 1961 Revised Model Act, Section 3(a)(2). Significant changes include a specification of a number of days within which persons have a right to submit written comments; use of the terms "oral proceeding" and "oral argument" for the more ambiguous and troublemaking word "hearing," see U.S. v. Florida East Coast R. Co., 410 U.S. 224 (1973); and the addition of a legislative committee and the administrative rules counsel to those who may induce such an oral proceeding. The terms "oral proceeding" and "oral argument" make it clear that there is no right under this statute to a trial-type hearing before an agency in the making of rules. For an explanation of the undesirability of any requirement for trial-type hearings on most rules of general applicability, see Hamilton, "Procedure for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rule making," 60 Calif.L.Rev. 1276 (1972); 2 Recommendations and Reports of the Administrative Conference of the U.S. 66 (1970-1972), Recommendation 72-5. See also Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 852-856 (1975). As drafted, therefore, the statute only contemplates that in specified situations some sort of an "oral proceeding" must be made available in rule making, and that in most cases the proceeding
will be legislative rather than adjudicative in form. Of course, these provisions do not preclude an agency from exercising its discretion to allow a legislative-type of oral proceeding on the adoption of a rule in situations where it is not required by this section; nor do they preclude an agency from allowing a trial-type proceeding on the desirability of adopting a rule if the agency chooses to do so. To the extent another statute expressly requires a particular class of rule making to be conducted pursuant to the adjudicative procedures provided in Article IV, Section 4-101(b) makes them applicable. See Comment to that section for additional discussion on this point.

If all of the suggestions for those who may trigger a required oral rulemaking proceeding are enacted, it will obviously be very easy for persons who are upset about a proposed rule to invoke this requirement. But it seems unwise to require an oral proceeding in all cases of rule making. The costs imposed by such a universal requirement would seem to outweigh any potential benefits.

Subsection (b)(2) adds to the 1961 Revised Model Act provision a requirement that notice of the time and place of any oral proceeding be published a specified time before it is held. Note that an agency may substantially compress the period necessary for adoption of a rule by including in the original notice of proposed rule adoption an indication of the place and time of an oral argument-style proceeding thereon, rather than waiting for a request that would make such a proceeding mandatory and then publishing advance notice of the proceeding's place and time.

Subsection (b)(3)-(4) adds to the 1961 Revised Model Act provision an explicit designation of the persons who may preside at oral rule-making proceedings; a requirement that a written report on those oral proceedings be prepared by the presiding officer if the agency did not preside; a requirement for the making of a record of required oral presentations; and a clear authorization for agencies to keep control over the oral proceedings by reasonable rules issued for that purpose. Nothing in the subsection requires the agency to transcribe the record, although any member of the public may do so at his or her own expense.

Like Section 3-101, this provision does not preclude an agency from seeking information from the public on a formally proposed rule by means that are in addition to those specified herein.

§ 3-105. [Regulatory Analysis].

(a) An agency shall issue a regulatory analysis of a proposed rule if, within [20] days after the published notice of proposed rule adoption, a written request for the analysis is filed in the office of the [secretary of state] by [the administrative rules review committee, the governor, a political subdivision, an agency, or] [300] persons signing the request. The [secretary of state] shall immediately forward to the agency a certified copy of the filed request.

(b) Except to the extent that the written request expressly waives one or more of the following, the regulatory analysis must contain:

(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(2) a description of the probable quantitative and qualitative impact of the proposed rule,
economic or otherwise, upon affected classes of persons;

(3) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

(4) a comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction;

(5) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule; and

(6) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

(c) Each regulatory analysis must include quantification of the data to the extent practicable and must take account of both short-term and long-term consequences.

(d) A concise summary of the regulatory analysis must be published in the [administrative bulletin] at least [10] days before the earliest of:

(1) the end of the period during which persons may make written submissions on the proposed rule;

(2) the end of the period during which an oral proceeding may be requested; or

(3) the date of any required oral proceeding on the proposed rule.

(e) The published summary of the regulatory analysis must also indicate where persons may obtain copies of the full text of the regulatory analysis and where, when, and how persons may present their views on the proposed rule and demand an oral proceeding thereon if one is not already provided.

(f) If the agency has made a good faith effort to comply with the requirements of subsections (a) through (c), the rule may not be invalidated on the ground that the contents of the regulatory analysis are insufficient or inaccurate.

COMMENT

This section is a very substantially modified and extended Florida Act, Section 120.54(2)(a). See also Iowa Act, Section 17A.4(1)(c). The preparation of such a regulatory analysis is clearly very burdensome. It is also hazardous because of the large potential for disagreement about the accuracy of its contents. Furthermore, the right to require the issuance of such a regulatory analysis in particular instances of rule making could be subject to great abuse. In light of this, states may want to require its issuance only upon demand by directly elected officials with general responsibility for state government. The governor and/or a legislative committee specially charged with administrative agency oversight are the most obvious examples of politically responsible
state officials of this type. In subsection (a) the directly politically responsible state officials entitled to make the requirement operative in a given case of rule making are bracketed so that each state may determine independently how it wants to solve that problem. Some states may also wish to permit members of the public and/or other agencies or political subdivisions to invoke this requirement even though there is a danger that such a power in the hands of those persons might be abused. For these states, other bracketed alternatives are included. In states desiring to permit members of the public to invoke this requirement, consideration might also be given to authorizing a waiver of the requirement in particular cases by the administrative rules review committee or the governor once it has been invoked by members of the public. A waiver device of this kind might act as an effective check on invocation of the regulatory analysis requirement by members of the public seeking only to delay issuance of a clearly justifiable rule or to harass the issuing agency.

The regulatory analysis is, however, an important device with which to assure sound agency consideration of the desirability of a rule. It is also a useful device to help assure public support for, or opposition to, a rule, to the extent either is warranted, based upon a fully public description of its potential costs and benefits.

The regulatory analysis will not be helpful if, by the time it is issued, the period for public participation on the rule has already passed. To assure full utility for the analysis, therefore, subsection (d) establishes a minimum period between publication of a concise summary of the analysis and the time when the public may make written comments on the rule, demand an oral proceeding thereon, or participate in such an oral proceeding if one is held on that rule. If the demand for the regulatory analysis comes at the end of the 20 day period provided for in subsection (a), this provision will have the effect of extending the time when the conditions specified in subsections (d)(1)-(3) may occur according to other provisions of this Act. Note, however, that an agency desiring to avoid delays in a rule-making proceeding because of the requirements of subsection (d) may voluntarily issue such an analysis at the time it publishes the notice of proposed rule adoption and include the summary thereof as part of the original notice, rather than waiting for a subsequent written request for such an analysis.

Obviously, predictions of the type required by this section cannot be executed with any guaranteed precision. As a result, subsection (f) generally removes the sufficiency and accuracy of the contents of such a required regulatory analysis from the judicial review process relying, instead, on the political muscle of the administrative rules review committee and the governor to assure adequate compliance with this requirement when either of them makes it applicable to the proceeding in question. If judicial review of the adequacy of the contents of the regulatory analysis were permitted as a basis upon which to attack the validity of a rule, it could be used as a means of harassing agencies and unduly delaying their rule-making efforts. But note that if the agency fails to make a "good faith" effort to comply with the requirements of subsections (a)-(c), or fails to live up to the requirements regarding the analysis imposed by subsections (d)-(e), that may be grounds for judicial invalidation of the rule. Since subsection (f) provides that a "good faith effort to comply with the requirements of subsections (a)-(c)" entirely precludes invalidation of the rule "on the ground that the contents of the regulatory analysis are insufficient or inaccurate," "good faith" must be ascertained for this purpose without any judicial evaluation of the actual sufficiency or accuracy of the contents of that regulatory analysis. To ascertain "good faith" for this purpose, therefore, a court should only determine if the analysis was actually issued, and if on its face it actually addresses in some manner all of the points specified in subsections (b)-(c). If so, the sufficiency or accuracy of its contents are not subject to judicial review.

§ 3-106. [Time and Manner of Rule Adoption].
(a) An agency may not adopt a rule until the period for making written submissions and oral presentations has expired.

(b) Within [180] days after the later of (i) the publication of the notice of proposed rule adoption, or (ii) the end of oral proceedings thereon, an agency shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the [administrative bulletin].

(c) Before the adoption of a rule, an agency shall consider the written submissions, oral submissions or any memorandum summarizing oral submissions, and any regulatory analysis, provided for by this Chapter.

(d) Within the scope of its delegated authority, an agency may use its own experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

COMMENT

Subsection (a) makes explicit that which provisions of the 1961 Revised Model Act and other provisions of this Act only imply.

Subsection (b) is a modified form of Iowa Act, Section 17A.4(1)(b). On occasion, an agency has published notice of proposed adoption of a rule, encountered a furor which prevented further action at that time on the proposed rule, waited a year or two until people forgot about the proposed rule because they assumed it was dead, and then suddenly adopted the proposed rule. This subsection assures that an agency may not use undue delay between publication of a notice of proposed rule adoption and actual adoption of a rule pursuant thereto as a means of defusing or circumventing widespread public opposition to its action. See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 857-858 (1975).

Subsection (c) is a modified form of 1961 Revised Model Act, Section 3(a)(2), dropping the words "fully all" after the word "consider" on the ground that they are redundant.

Subsection (d) is a modified form of 1961 Revised Model Act, Section 10(4), which was applicable only to an agency's findings of fact in formal adjudicatory proceedings. There is no reason that the same explicit deference to agency experience, technical competence, specialized knowledge, and judgment should not also be applicable explicitly to its formulation of policies of general applicability "within the scope of its delegated authority."

§ 3-107. [Variance between Adopted Rule and Published Notice of Proposed Rule Adoption].

(a) An agency may not adopt a rule that is substantially different from the proposed rule contained in the published notice of proposed rule adoption. However, an agency may terminate a rule-making proceeding and commence a new rule-making proceeding for the purpose of adopting a substantially different rule.

(b) In determining whether an adopted rule is substantially different from the published proposed rule upon which it is required to be based, the following must be considered:
(1) the extent to which all persons affected by the adopted rule should have understood that the published proposed rule would affect their interests;

(2) the extent to which the subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule; and

(3) the extent to which the effects of the adopted rule differ from the effects of the published proposed rule had it been adopted instead.

COMMENT

Subsection (a) draws upon Minnesota Act, Section 15.052(4), for the "substantially different" language. Subsection (b) does not eliminate all ambiguity as to the meaning of "substantially different"; but it does create a more specific functional test relating the acceptability of any changes in the proposed rule as compared to the adopted rule to the extent to which affected parties have received fair notice by the proposed rule publication. See Auerbach, "Administrative Rulemaking in Minnesota," 63 Minn.L.Rev. 151 at 197-203 (1979). See also Alaska Act, Section 44.62.200(b) stating that an adopted rule may vary in content from the previously published advance notice of rule making "if the subject matter of the regulation remains the same and the original notice was written so as to assure that members of the public are reasonably notified of the proposed subject of agency action in order for them to determine whether their interest could be affected by agency action on that subject."

§ 3-108. [General Exemption from Public Rule-making Procedures].

(a) To the extent an agency for good cause finds that any requirements of Sections 3-103 through 3-107 are unnecessary, impracticable, or contrary to the public interest in the process of adopting a particular rule, those requirements do not apply. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subsection.

(b) In an action contesting a rule adopted under subsection (a), the burden is upon the agency to demonstrate that any omitted requirements of Sections 3-103 through 3-107 were impracticable, unnecessary, or contrary to the public interest in the particular circumstances involved.

(c) Within [2] years after the effective date of a rule adopted under subsection (a), the [administrative rules review committee or the governor] may request the agency to hold a rule-making proceeding thereon according to the requirements of Sections 3-103 through 3-107. The request must be in writing and filed in the office of the [secretary of state]. The [secretary of state] shall immediately forward to the agency and to the [administrative rules editor] a certified copy of the request. Notice of the filing of the request must be published in the next issue of the [administrative bulletin]. The rule in question ceases to be effective [180] days after the request is filed. However, an agency, after the filing of the request, may subsequently adopt an identical rule in a rule-making proceeding conducted pursuant to the requirements of Sections 3-103 through 3-107.

COMMENT

Subsection (a) is a modified form of Iowa Act, Section 17A.4(2), and Federal Act, Section 553(b)(B).
It is more flexible and, therefore, superior to the "imminent peril to the public health, safety, or welfare" standard found in 1961 Revised Model Act, Section 3(b). See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 860-873 (1975), hereinafter cited as Bonfield, IAPA. See also cases interpreting "unnecessary, impracticable, and contrary to the public interest" in Annot., 45 A.L.R. Fed. 12 at 74-97 (1979).

Subsection (b) is a modified form of Iowa Act, Section 17A.4(2). It dispenses with the usual presumption of administrative procedural propriety in a case where an agency relies upon the subsection (a) exemption. This shifted burden of persuasion will hopefully make abuse of this exemptive provision infrequent because the consequences facing an agency if it guesses incorrectly are too serious to justify the risk of using the exemption in close or unclear cases. See Bonfield, IAPA at 870-871. The Federal Act does not employ this shifted burden of persuasion concept when a federal agency resorts to the "impracticable, unnecessary, or contrary to the public interest" exemption.

Subsection (c) is a modified form of Iowa Act, Section 17A.4(2). It seems wiser than limiting all rules issued under the subsection (a) exemption to a specified short effectiveness period. For some rules, usual procedures will be "impracticable, unnecessary, or contrary to the public interest" at the time they are initially issued and also at all times thereafter. The approach of subsection (c), therefore, is to allow an agency properly using subsection (a) to issue permanent rules thereunder, except where there is a formal objection to that procedure in a particular instance. Such an objection by a politically responsive body or official would turn the permanent rules issued under this general exemption into rules of very limited duration, forcing the agency to conduct a usual rulemaking proceeding on those rules if the agency wishes them to remain effective for a longer period.

The identity of the politically responsible officials with the authority to turn a permanent rule properly issued under subsection (a) into a temporary rule, if a proper request is made within 2 years of the rule's effective date, is bracketed because each state should independently consider who should be designated for this purpose. Although arguable, such a power vested in a legislative committee or the governor or other persons is unlikely to be considered an undue delegation of legislative authority or a violation of separation of powers. Note in this regard the very limited effect of such a filed objection. The objection only forces the agency to engage in a standard rule-making proceeding. It does not prevent an agency from adopting such a rule of unlimited duration by usual procedures. Note also that the 2 year period within which such a request must be filed if it is to be effective is similar to the 2 year period contained in Section 3-113(b) during which a rule may be contested on the grounds of its noncompliance with any of the provisions of this Chapter.

§ 3-109. [Exemption for Certain Rules].

(a) An agency need not follow the provisions of Sections 3-103 through 3-108 in the adoption of a rule that only defines the meaning of a statute or other provision of law or precedent if the agency does not possess delegated authority to bind the courts to any extent with its definition. A rule adopted under this subsection must include a statement that it was adopted under this subsection when it is published in the [administrative bulletin], and there must be an indication to that effect adjacent to the rule when it is published in the [administrative code].

(b) A reviewing court shall determine wholly de novo the validity of a rule within the scope of subsection (a) that is adopted without complying with the provisions of Sections 3-103 through 3-108.
COMMENT

Subsection (a) describes the type of rule usually referred to as an "interpretative rule." The definition of such a rule contained in that subsection is standard. See 2 K. Davis, Administrative Law Treatise, Sections 7:8-7:14 (2d ed. 1978); Bonfield, "Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.," 23 Admin.L.Rev. 101 at 108 (1971). Because the legislature did not delegate to the agency authority to bind courts to any extent with interpretations embodied in interpretative rules, a court is free, if it chooses, to review those rules wholly de novo, completely substituting its judgment for that of the agency as to the correctness of the interpretation embodied in such a rule. That is, since the legislature did not delegate to the agency authority to issue such interpretations that have the binding force of law, the reviewing court is not required to give any deference whatsoever to the agency interpretation. Under the subsection (a) definition, a rule embodying only the understanding of an agency as to the applicability to specified factual situations of a provision of law subject to the primary jurisdiction of that agency is normally not an interpretative rule. Legislatures typically delegate to agencies a degree of discretion with respect to applicability judgments, requiring reviewing courts to give at least some deference to agency judgments of that type. See Gray v. Powell, 314 U.S. 402 (1941); N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944).

Subsection (a) exempts interpretative rules only from the mandatory advance published notice and public participation requirements for rules. It does not exempt them from publication or other requirements applicable to rules. The concept embodied in subsection (a) is found in Federal Act, Section 553(d)(2). There are a number of justifications for this exemptive provision. The practical effectiveness of any available remedy for a procedurally improper agency issuance of an interpretative rule is in doubt. For even if a court voided an improperly issued interpretative rule, the agency could still ad hoc construe the law interpreted by the void rule and apply that ad hoc construction of the law to the particular case at hand. Furthermore, courts may, although they do not in practice always choose to do so, judicially review an interpretative rule wholly de novo, that is, without any deference to the adopting agency. See 2 K. Davis, Administrative Law Treatise, Section 7:13 (2d ed. 1978); Cooper, State Administrative Law, 787-788 (1965); West Des Moines Ed. Assn. v. P.E.R.B., 266 N.W.2d 118 (Iowa 1978). So, the adverse consequences of such a rule on the affected persons are normally less than the consequences of a legislative rule. In addition, agencies should be encouraged to issue as many interpretative rules as possible in order to give the public full and fair notice of the specific content of the laws they administer. But requiring agencies to follow usual procedures for interpretative rules will discourage rather than encourage their issuance. Lastly, the large burden of following usual procedures for all interpretative rules may not be worth the cost in any event. See Bonfield, "Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.," 23 Admin.L.Rev. 101 (1971); Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 858-860 (1975); Auerbach, "Administrative Rulemaking in Minnesota," 63 Minn.L.Rev. 151 at 158-160 (1979). To the extent practicable, of course, each agency should voluntarily follow the procedures provided in Sections 3-103 through 3-108 in the process of adopting such interpretative rules. Section 3-109 only makes it clear that agencies are not required to do so.

It should be noted, however, that all of Section 3-109 is bracketed. There are two reasons for this. First, although the agencies in almost all states act in their daily practice as if interpretative rules are entirely exempt from the rule-making requirements of their state administrative procedure acts, the 1961 Revised Model Act and
most state acts do not contain such an exemption for interpretative rules. Second, one scholar has recently questioned the soundness of entirely excluding from any right of public comment all interpretative rules because some of them may have a substantial impact on the public even though courts are free to review them entirely de novo. See Asimow, "Public Participation in the Adoption of Interpretative Rules and Policy Statements," 75 Mich.L.Rev. 520 (1977).

Subsection (b) seeks to balance the dangers of any exemption of interpretative rules from usual rule-making procedures with a provision for mandatory close judicial scrutiny of the correctness of such interpretative rules when an agency bypasses usual rulemaking procedures in their issuance. That is, in all cases involving the validity of interpretative rules issued without benefit of public participation, this provision requires the courts to review the agency's interpretation of the law construed by the rule wholly de novo, with no deference of any sort to the agency construction. An agency issuing an interpretative rule without following usual rule-making procedures must, according to subsection (a), indicate that fact in the adopted rule when it is published in the "administrative bulletin." That fact must also be noted adjacent to the rule when it is published in the "administrative code." This published notice is important because it will alert affected persons that if they challenge the rule in a suit, the court will determine its validity wholly de novo as subsection (b) provides.

§ 3-110. [Concise Explanatory Statement].

(a) At the time it adopts a rule, an agency shall issue a concise explanatory statement containing:

(1) its reasons for adopting the rule; and

(2) an indication of any change between the text of the proposed rule contained in the published notice of proposed rule adoption and the text of the rule as finally adopted, with the reasons for any change.

(b) Only the reasons contained in the concise explanatory statement may be used by any party as justifications for the adoption of the rule in any proceeding in which its validity is at issue.

COMMENT

Subsection (a) is a substantially reduced version of 1961 Revised Model Act, Section 3(a)(2). It makes mandatory a requirement that is operative only on demand by an "interested person" under that Act. In requiring a statement of reasons, paragraph (1) forces an agency to clearly articulate all of its factual, legal, and policy reasons for adopting the rule. The National Conference did not include in this section the additional portion of Section 3(a)(2) of the 1961 Revised Model Act that required an agency to enumerate in the concise explanatory statement the principal arguments against the rule that it considered during the course of the rule-making proceeding, and the agency's reasons for rejecting those arguments when it adopted the rule. Paragraph (2) is a modified form of Missouri Act, Section 536.021(5)(3). It assures an explanation for any changes made by the agency in the proposed rule when it is finally adopted.

Subsection (b) explicitly establishes in the rule-making context the existing principle that agencies are bound by the contemporaneous reasons they formally assign for their action, and may not later seek to justify their action on the basis of different reasons. There are several reasons why agencies and other parties seeking to
justify agency action should not be permitted to use post hoc reasons to rescue agency action which was unsupportable on the basis of the specific formal reasons given when it was originally taken. If agencies had the right to rely on post hoc reasons they would be encouraged to offer at a later time false, but convenient, rationalizations for their earlier otherwise unsupportable action. Such a right would also allow agencies to make rules in a way that would entirely remove from the scrutiny of the rule-making process those later justifications which ultimately become the basis for upholding the rule. In addition, it would undesirably protect agencies from any adverse consequences for their improper failure to consider carefully, prior to the time they take rule-making action, all of the reasons why they should or should not take that action. See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 856-857 (1975); Rodway v. U.S. Dept. of Agriculture, 514 F.2d 809 (D.C.Cir.1975); SEC v. Chenery Corp., 318 U.S. 80 (1943), 332 U.S. 194 (1947); Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, Inc., 435 U.S. 519 at 549 (1978); and 1 K. Davis, Administrative Law Treatise, Section 6:12 (2d ed. 1978). Even absent a statutory requirement, some courts are demanding an equivalent statement by agencies in rule making, and holding the agencies to its contents, as a means of facilitating meaningful judicial review of rules. See Tri-State Generation and Transmission Assn. v. Environmental Quality Council, 590 P.2d 1324 (Wyoming 1979). Compare Section 3-112(c) of this Act and its Comments regarding the nonexclusivity of the agency rule-making record with the requirement in subsection (b) of this section of the exclusivity of an agency's contemporaneous formal reasons for a rule. The cumulative effect of these two provisions is as follows. In a proceeding in which the validity of a rule is at issue, the agency may rely only on the particular factual, legal, and policy reasons for its adoption contained in the concise explanatory statement. In that proceeding, however, the agency may supplement the agency rule-making record with further evidence and argument to justify or to demonstrate the propriety of those particular reasons contained in the concise explanatory statement.

§ 3-111. [Contents, Style, and Form of Rule].

(a) Each rule adopted by an agency must contain the text of the rule and:

(1) the date the agency adopted the rule;

(2) a concise statement of the purpose of the rule;

(3) a reference to all rules repealed, amended, or suspended by the rule;

(4) a reference to the specific statutory or other authority authorizing adoption of the rule;

(5) any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule; and

(6) the effective date of the rule if other than that specified in Section 3-115(a).

[ (b) To the extent feasible, each rule should be written in clear and concise language understandable to persons who may be affected by it.]

(c) An agency may incorporate, by reference in its rules and without publishing the incorporated matter
in full, all or any part of a code, standard, rule, or regulation that has been adopted by an agency of the United States or of this state, another state, or by a nationally recognized organization or association, if incorporation of its text in agency rules would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the agency rules must fully identify the incorporated matter by location, date, and otherwise, [and must state that the rule does not include any later amendments or editions of the incorporated matter]. An agency may incorporate by reference such matter in its rules only if the agency, organization, or association originally issuing that matter makes copies of it readily available to the public. The rules must state where copies of the incorporated matter are available at cost from the agency issuing the rule, and where copies are available from the agency of the United States, this State, another state, or the organization or association originally issuing that matter.

(d) In preparing its rules pursuant to this Chapter, each agency shall follow the uniform numbering system, form, and style prescribed by the [administrative rules editor].

COMMENT

Subsection (a) standardizes the contents of an adopted rule by requiring all pertinent information to be included therein. An initially adopted rule is, therefore, like a session law of the legislature because it contains information other than the operative text of the rule. As noted in the Comments to Section 2-101, when a rule is first published in the "administrative bulletin" it contains all of the contents indicated in subsection (a) of this section; but when it is later put in the "administrative code" rules compilation, only the operative text of the rule is published.

Subsection (b) is bracketed. Each state will, therefore, have to decide independently whether this exhortation to write rules in clear language should be included in its statute or left to less formal pressures.

Subsection (c) is modified North Carolina Act, Section 150A-14. Adoption by reference of later amendments to or editions of the matter incorporated by reference is prohibited by the bracketed language in this subsection because in many states such an incorporation of later amendments or editions would present a serious undue delegation problem. See Annot., 133 A.L.R. 401 (1941); People v. DeSilva, 189 N.W.2d 362 (C.A.Mich.1971); Wallace v. Comm., 184 N.W.2d 588 (Minn.1971). If a state does not adopt the bracketed language, this Act would not prohibit an agency from incorporating by reference in its rules later amendments to or editions of the matter incorporated.

Subsection (d) is a substantially modified form of Iowa Code, Section 7.17. See also South Dakota Act, Sections 1-26-6.2, 1-26-6.3.

§ 3-112. [Agency Rule-making Record].

(a) An agency shall maintain an official rule-making record for each rule it (i) proposes by publication in the [administrative bulletin] of a notice of proposed rule adoption, or (ii) adopts. The record and materials incorporated by reference must be available for public inspection.

(b) The agency rule-making record must contain:

(1) copies of all publications in the [administrative bulletin] with respect to the rule or the
(a) The agency shall include the following in the official agency rule-making record:

(1) copies of any portions of the agency's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

(2) copies of any portions of the agency's public rule-making docket containing entries relating to the rule or the proceeding upon which the rule is based;

(3) all written petitions, requests, submissions, and comments received by the agency and all other written materials considered by the agency in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based;

(4) any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, any tape recording or stenographic record of those presentations, and any memorandum prepared by a presiding official summarizing the contents of those presentations;

(5) a copy of any regulatory analysis prepared for the proceeding upon which the rule is based;

(6) a copy of the rule and explanatory statement filed in the office of the [secretary of state];

(7) all petitions for exceptions to, amendments of, or repeal or suspension of, the rule;

(8) a copy of any request filed pursuant to Section 3-108(c);

[ (9) a copy of any objection to the rule filed by the [administrative rules review committee] pursuant to Section 3-204(d) and the agency's response;] and

(10) a copy of any filed executive order with respect to the rule.

(c) Upon judicial review, the record required by this section constitutes the official agency rule-making record with respect to a rule. Except as provided in Section 3-110(b) or otherwise required by a provision of law, the agency rule-making record need not constitute the exclusive basis for agency action on that rule or for judicial review thereof.

COMMENT

In requiring an official agency rule-making record, subsection (a) should facilitate a more structured and rational agency and public consideration of proposed rules, and the process of judicial review of the validity of rules. The requirement of an official agency rule-making record has recently been suggested for the Federal Act in S. 1291, the "Administrative Practice and Regulatory Control Act of 1979," title I, Section 102(d), [5 U.S.C. 553(d) ], 96 Cong.Rec. S7126 at S7129 (daily ed. Jun. 6, 1979) (Sen. Kennedy).

Subsection (b) requires all written submissions made to an agency and all written materials considered by an agency in connection with a rule-making proceeding to be included in the record. It also requires a copy of any existing record of oral presentations made in the proceeding to be included in the rule-making record. In
certain instances Section 3-104(b)(3) assures a record of oral presentations in a rule-making proceeding. But subsection (b) does not require other oral communications relating to a rule-making proceeding, whether or not \textit{ex parte}, to be electronically recorded or reduced to writing and to be included in the official agency rule-making record. It would be undesirable to require all oral communications pertinent to every rule-making proceeding to be electronically recorded or reduced to writing and to be included in the rule-making record. See Scalia, "Two Wrongs Make a Right," \textit{Regulation} 38 (July-August 1977); Administrative Conference of the U.S., Recommendation no. 77-3, 42 Federal Register 54253 (1977). Cf. Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C.Cir.1977) certiorari denied, 434 U.S. 829 (1977). See also generally, "Ex Parte Communication During Informal Rulemaking," 14 Colum. Journ. of Law and Social Prob. 269 (1979). Of course, if an agency wants to impose on itself by rule such a prohibition on \textit{ex parte} oral communications in rule making, or a requirement that all such oral communications be reduced to writing and included in the agency rule-making record, it may do so. Paragraph (9) of subsection (b) is bracketed because this paragraph is wholly dependent on subsequently bracketed Section 3-204(d).

The language of subsection (c) is a modified form of S.1291, the "Administrative Practice and Regulatory Control Act of 1979," title I, Section 102(d), [5 U.S.C. 553(d) ], which provides: "The file required by this subsection shall be available to the courts as the agency record in connection with review of the rule, but the file need not constitute the exclusive basis for judicial review or for agency action." See 96 Cong.Rec. S7126 at S7129 (daily ed. Jun. 6, 1979) (Sen. Kennedy). Although this section requires the creation and maintenance of an official agency rule-making record, subsection (c) makes clear that the requirement of such a record does not mean that the rules made must be based exclusively on the rule-making record or judicially reviewed exclusively on the basis of that rule-making record.

Conventional wisdom and substantial experience dictate that neither the making of usual rules by an agency, nor judicial review of their validity, should be required to be based wholly on any official agency rule-making record. See Hamilton, "Procedure for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking," 60 Calif.L.Rev. 1276 (1972); 2 Recommendations and Reports of the Administrative Conference of the U.S., 66 (1970-1972), Recommendation 72-5; Auerbach, "Administrative Rule-making in Minnesota," 63 Minn.L.Rev. 151 at 218-222 (1979). The burden imposed on agencies by a duty in every case to assemble their entire factual and argumentative justification for a rule prior to its adoption, and to enter that entire justification in the official agency record of the rule-making proceeding, is far too great to justify such a requirement.

In addition, a requirement that the validity of a rule, on judicial review, be based wholly on an official record made before the agency in the rule-making proceeding, could be inconsistent with the policy of Section 5-107(1). That provision states that a petitioner for judicial review of a rule "need not have participated in the rule-making proceeding on which that rule is based." It may be unfair to bind persons with an agency rule-making record as the only basis for judicial review of a rule if they did not participate in the rule-making proceeding because of Section 5-107(1), or because they did not know of the existence of that rule-making proceeding, or because at the time of that proceeding they did not know or could not know that their interests would at a future time be adversely affected by the product of that rule-making proceeding. See also Auerbach, "Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review," 72 N.W.Univ.L.Rev. 15 at 16-17 (1977), stating that an APA should distinguish "between the administrative proceedings on the basis of which an agency promulgates an informal rule and the record on the basis of which the courts determine the rule's validity. The record for judicial review should not be the product of the informal
rule-making proceedings, but a record especially made for the purpose." The reason for this is that the purpose of rule-making proceedings should be "not to try a case but to contribute to the dual objectives of informing the agency and safeguarding private interests." This statute contemplates, therefore, that in any judicial review proceeding in which the validity of an agency rule is at issue, the agency and the challenging party will have an opportunity, within certain limits, to supplement the official rule-making record required by this section with whatever materials they deem appropriate. See Sections 5-114 and 5-115. Those supplemental submissions and the official rule-making record may be considered by the court, however, only as they are relevant to the specific standards specified for judicial review of agency action in Section 5-116. And, as provided in Section 3-110(b), the agency is limited to the particular reasons of fact, law, or policy for its adoption of the rule stated in the concise explanatory statement, but it may supplement the agency rule-making record on judicial review with further evidence and argument to justify or to demonstrate the propriety of those particular reasons.

Of course, to the extent another provision of law expressly requires a particular class of rules to be made by the agency and, therefore, judicially reviewed, wholly on the basis of the official agency rule-making record, that other provision of law will control. This permits the legislature and the agency to make a determination from time to time, that in light of the particular circumstances, a specified class of rules should be made and judicially reviewed wholly on the basis of that official agency rule-making record. In this connection see also Section 4-101(b). It provides that another statute may expressly require a particular class of rule making to be conducted pursuant to some or all of the adjudication procedures provided in Article IV, including the requirement that the agency determination be made exclusively on the basis of the official agency record.

§ 3-113. [Invalidity of Rules Not Adopted According to Chapter; Time Limitation].

(a) A rule adopted after [date] is invalid unless adopted in substantial compliance with the provisions of Sections 3-102 through 3-108 and Sections 3-110 through 3-112. However, inadvertent failure to mail a notice of proposed rule adoption to any person as required by Section 3-103(b) does not invalidate a rule.

(b) An action to contest the validity of a rule on the grounds of its noncompliance with any provision of Sections 3-102 through 3-108 or Sections 3-110 through 3-112 must be commenced within [2] years after the effective date of the rule.

COMMENT

This section is modified 1961 Revised Model Act, Section 3(c). See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 873-875 (1975). The second sentence of subsection (a) is modified New York Act, Section 202(7).

Subsection (b) is an express exception to the general principle contained in Section 5-108(1) because that section usually permits judicial review of a rule on any ground, at any time. Note, however, that the 1961 Revised Model Act also contained an identical 2 year statute of limitations; and there have been no serious complaints about it in those many states that adopted the provisions of the 1961 Revised Model Act.

§ 3-114. [Filing of Rules].
(a) An agency shall file in the office of the [secretary of state] each rule it adopts and all rules existing on the effective date of this Act that have not previously been filed. The filing must be done as soon after adoption of the rule as is practicable. At the time of filing, each rule adopted after the effective date of this Act must have attached to it the explanatory statement required by Section 3-110. The [secretary of state] shall affix to each rule and statement a certification of the time and date of filing and keep a permanent register open to public inspection of all filed rules and attached explanatory statements. In filing a rule, each agency shall use a standard form prescribed by the [secretary of state].

(b) The [secretary of state] shall transmit to the [administrative rules editor], [administrative rules counsel], and to the members of the [administrative rules review committee] a certified copy of each filed rule as soon after its filing as is practicable.

COMMENT

Subsection (a) is a substantially modified and extended 1961 Revised Model Act, Section 4(a).

Note that according to this Act, there must be filed in the office of the secretary of state the original of all requests that may be filed under Sections 3-105(a) and 3-108(c), rules and concise explanatory statements that must be filed under this section, objections to rules that may be filed under Section 3-204(d), and executive orders that may be filed under Sections 1-104(a) and 3-202(a)-(b). Certified copies of the originals that are filed in the office of the secretary of state are then sent by that office to designated officials.

§ 3-115. [Effective Date of Rules].

(a) Except to the extent subsection (b) or (c) provides otherwise, each rule adopted after the effective date of this Act becomes effective [30] days after the later of (i) its filing in the office of the [secretary of state] or (ii) its publication and indexing in the [administrative bulletin].

(b)(1) A rule becomes effective on a date later than that established by subsection (a) if a later date is required by another statute or specified in the rule.

(2) A rule may become effective immediately upon its filing or on any subsequent date earlier than that established by subsection (a) if the agency establishes such an effective date and finds that:

(i) it is required by constitution, statute, or court order;

(ii) the rule only confers a benefit or removes a restriction on the public or some segment thereof;

(iii) the rule only delays the effective date of another rule that is not yet effective; or

(iv) the earlier effective date is necessary because of imminent peril to the public health, safety, or welfare.

(3) The finding and a brief statement of the reasons therefor required by paragraph (2) must be made a
part of the rule. In any action contesting the effective date of a rule made effective under paragraph (2), the burden is on the agency to justify its finding.

(4) Each agency shall make a reasonable effort to make known to persons who may be affected by it a rule made effective before publication and indexing under this subsection.

(c) This section does not relieve an agency from compliance with any provision of law requiring that some or all of its rules be approved by other designated officials or bodies before they become effective.

COMMENT

Subsections (a) and (b) are a very substantially modified and extended 1961 Revised Model Act, Section 4(b), and are based in part on Iowa Act, Section 17A.5(2). The principal changes from the 1961 Revised Model Act version include addition of a required publication before a rule is normally effective; addition of an exception to the usual effective date requirement for a rule only conferring a benefit or removing a restriction on the public; and the shift to an agency using the subsection (b)(2) exemption of the burden of persuasion in any suit challenging the validity of the use of that exemption in a particular case. See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 884-891 (1975).

In addition, the provision adds an exception to the usual effective date requirement for a rule that only delays the effective date of another rule that is not yet effective. This will allow an agency to issue a rule that would be effective immediately to delay the coming into effect of another rule, pending agency action to cure defects in that other rule that were brought to the attention of the agency only after the final adopted form of its text was first published in the administrative bulletin. Note that the problem to which this provision is addressed arises because, according to Section 3-107, there may be some variation between the text of an adopted rule and the text of the previously published proposed rule upon which it is based.

Subsection (c) is modified Massachusetts Act, Chapter 30A, Section 2.

Note that according to Section 3-111(a)-(b), the effective date of a rule must be stated therein. This section only specifies the time the agency may indicate in the rule for its coming into effect.

§ 3-116. [Special Provision for Certain Classes of Rules].

Except to the extent otherwise provided by any provision of law, Sections 3-102 through 3-115 are inapplicable to:

(1) a rule concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public;

(2) a rule that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if disclosure of the criteria or guidelines would:
(i) enable law violators to avoid detection;

(ii) facilitate disregard of requirements imposed by law; or

(iii) give a clearly improper advantage to persons who are in an adverse position to the state;

(3) a rule that only establishes specific prices to be charged for particular goods or services sold by an agency;

(4) a rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property;

(5) a rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property;

(6) a rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital;

(7) a form whose contents or substantive requirements are prescribed by rule or statute, and instructions for the execution or use of the form;

(8) an agency budget; [or]

(9) an opinion of the attorney general [; or] [.]

(10) [the terms of a collective bargaining agreement.]

COMMENT

The exemptions from usual rule-making procedures and publication requirements for rules specified in paragraphs (1)-(10) of this section represent an effort to strike a fair balance between the need for public participation in, and adequate publicity for, agency policymaking on the one hand, and the conflicting need for efficient, economical, and effective government on the other hand. In the case of each one of these types of rules, it was determined that subjecting the particular class of statements in question to the extensive procedures and full publication requirements applicable generally to rules was either unnecessary, unduly burdensome on the agencies, or would lead to inefficient or ineffective government. This is, for these particular types of rules, the costs of submitting them to all usual rule-making requirements was deemed not worth the benefits. See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 832-833 (1975), hereinafter cited as Bonfield, IAPA. Note that to the extent other law states that any such exempted rules must follow usual rule-making or publication requirements, they will be subject to those requirements. See Bonfield, IAPA at 844-845. The 1961 Revised Model Act and most state acts accomplish the result of this section by excluding enumerated statements from
their definition of "rule." The more overt approach of this section seems preferable.

Exclusionary paragraph (1) is a combination of 1961 Revised Model Act, Section 1(7); Iowa Act, Section 17A.2(7)(a), (c); and New York Act, Section 102(2)(b)(i). See Bonfield, IAPA at 832-836; Auerbach, "Administrative Rulemaking in Minnesota," 63 Minn.L.Rev. 151 at 241-242 (1979), hereinafter cited as Auerbach, MAPA. Exclusionary paragraph (2) is modified Iowa Act, Section 17A.2(7)(f). See Bonfield, IAPA at 787-791, 839; Auerbach, MAPA at 250. Exclusionary paragraph (3) is a modified form of Iowa Act, Section 17A.2(7)(g) and does not include license fees. See Bonfield, IAPA at 839-841; Auerbach, MAPA at 250-251. Exclusionary paragraph (4) is a modified form of Iowa Act, Section 17A.2(7)(h). See Bonfield, IAPA at 842; Auerbach, MAPA at 251. Exclusionary paragraph (5) is a modified form of Iowa Act, Section 17A.2(7)(i) and, of course, clearly includes highways. See Bonfield, IAPA at 842-843; Cf. Auerbach, MAPA at 247-248. Exclusionary paragraph (6) is a modified form of Iowa Act, Section 17A.2(7)(k). See Bonfield, IAPA at 843-844; Cf. Auerbach, MAPA at 242-245. Exclusionary paragraph (7) is a modified form of Alaska Act, Section 44.62.640(a)(2); Wisconsin Act, Section 227.01(11)(q). Exclusionary paragraph (8) is a modified form of Florida Act, Section 120.52(14)(c)(1). Exclusionary paragraph (9) is Iowa Act, Section 17A.2(7)(e). See Bonfield, IAPA at 839; Auerbach, MAPA at 248. Exclusionary paragraph (10) in brackets is meant to eliminate the problems that might arise in states having public employee collective bargaining laws if such a collective bargaining agreement between a state agency and its employees were considered a rule.

Existing acts leave wholly ungoverned agency statements of the general type categorically excluded from usual rule-making requirements by this subsection. States, however, should also give serious consideration to imposing some minimum obligations on agencies with respect to the mode by which they adopt such statements. They might consider, for instance, the addition of a subsection (b) to this section stating:

To the extent it is practicable an agency shall, before adopting a rule under this section, give advance notice in some suitable manner of the contents of the contemplated rule to persons who would be affected by it, and solicit their views thereon.

Note that agencies must maintain some sort of an official, current, dated, and indexed compilation of all Section 3-116 rules. See Section 2-101(g) and the accompanying Comments.

§ 3-117. [Petition For Adoption of Rule].

Any person may petition an agency requesting the adoption of a rule. Each agency shall prescribe by rule the form of the petition and the procedure for its submission, consideration, and disposition. Within [60] days after submission of a petition, the agency shall either (i) deny the petition in writing, stating its reasons therefor, (ii) initiate rule-making proceedings in accordance with this Chapter, or (iii) if otherwise lawful, adopt a rule.

COMMENT

This section is a substantially modified version of 1961 Revised Model Act, Section 6. See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 891-895 (1975).

CHAPTER II
REVIEW OF AGENCY RULES

§ 3-201. [Review by Agency].

At least [annually], each agency shall review all of its rules to determine whether any new rule should be adopted. In conducting that review, each agency shall prepare a written report summarizing its findings, its supporting reasons, and any proposed course of action. For each rule, the [annual] report must include, at least once every [7] years, a concise statement of:

(1) the rule's effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached;

(2) criticisms of the rule received during the previous [7] years, including a summary of any petitions for waiver of the rule tendered to the agency or granted by it; and

(3) alternative solutions to the criticisms and the reasons they were rejected or the changes made in the rule in response to those criticisms and the reasons for the changes. A copy of the [annual] report must be sent to the [administrative rules review committee and the administrative rules counsel] and be available for public inspection.

COMMENT

Sunset provisions for agency rules do not promise to be a very effective method of insuring actual periodic agency reconsideration of their rules. Nor are the benefits of sunset provisions worth the great cost of automatic termination of all agency rules after a specified period, with an accompanying required reply of full rule-making proceedings to extend their life. This section is intended as a practical substitute for the more drastic sunset proposals to assure actual periodic reconsideration by agencies of their rules.

§ 3-202. [Review by Governor; Administrative Rules Counsel].

(a) To the extent the agency itself would have authority, the governor may rescind or suspend all or a severable portion of a rule of an agency. In exercising this authority, the governor shall act by an executive order that is subject to the provisions of this Act applicable to the adoption and effectiveness of a rule.

(b) The governor may summarily terminate any pending rule-making proceeding by an executive order to that effect, stating therein the reasons for the action. The executive order must be filed in the office of the [secretary of state], which shall promptly forward a certified copy to the agency and the [administrative rules editor]. An executive order terminating a rule-making proceeding becomes effective on [the date it is filed] and must be published in the next issue of the [administrative bulletin].

(c) There is created, within the office of the governor, an [administrative rules counsel] to advise the governor in the execution of the authority vested under this Article. The governor shall appoint the [administrative rules counsel] who shall serve at the pleasure of the governor.

COMMENT
If a state wishes to centralize political responsibility in the governor over agency rules, a state should adopt this bracketed provision. It is a substantially modified Iowa Act, Section 17A.4(6). Note that in several states the governor must approve all agency rules before they may become effective. A governor's refusal to approve a rule in those states has, therefore, the same effect as a veto of the type proposed in this section. See Hawaii Act, Section 91-3(c) and Nebraska Act, Section 84-908. Indiana recently amended its statute, Section 4-22-2-5 (1979), so that if the governor does not disapprove a rule within 15 days of submittal to him, the rule is deemed to be approved.

According to the terms of this section, the directly elected governor may revoke or suspend a rule for any reason and at any time; and he may do so even with respect to independent state agencies. To some extent, at least, such a provision will facilitate ultimate coordination of all rule making, and provide a direct and easily usable political check on the rule-making process. It could be argued that a gubernatorial veto power over rules should be limited in time, as it is in some states, so that it could be exercised only within a specified period after the adoption of a rule. This Act does not, however, provide any time limit on the exercise of this authority on the theory that a rule may become unwise or politically unacceptable only in light of changed circumstances occurring long after its adoption; and the issuing agency may nevertheless refuse to repeal the rule at that later time. In situations of this kind subsection (a) assumes that an effective gubernatorial veto power is justified because this state wide, directly elected official is closer to and more representative of the people than the unelected agency. Furthermore, as noted below, a gubernatorial oversight authority that is unlimited in time is a better alternative external checking device on agency rules than a legislative veto. Nevertheless, in considering the enactment of this provision, each state should consider whether it wants to limit such an executive veto to a specified period after the adoption of a rule.

As noted above, a gubernatorial veto is a viable alternative to suggestions for a direct political check on lawful agency rules that are unacceptable to the community at large, by the vesting of a veto power over such rules in a committee, one house, or two houses of the legislature. There are also a number of reasons why gubernatorial authority of this sort may be superior to any scheme for a legislative veto of rules by means less than statutory. An authority vested in the governor of a state to veto administrative rules avoids the separation of powers problems that legislative veto schemes raise; it avoids the possible subversion of the governor's authority to veto legislative acts that may be inherent in legislative veto schemes; and it keeps effective political and administrative control of all law enforcement in the official who is, by the state constitution, the chief executive, and who is directly politically accountable to the people for the proper performance of that function. See Auerbach, "Administrative Rulemaking in Minnesota," 63 Minn.L.Rev. 151 at 236-237 (1979). See also A.B.A. Commission on Law and the Economy, Federal Regulation: Roads to Reform, 79-84 (Final Report 1979), urging enactment of a statute authorizing the President to revoke or modify rules of most agencies, including independent agencies, when the rules relate to "critical issues." Compare the arguments contra in "Delegation and Regulatory Reform: Letting the President Change the Rules," 89 Yale L.J. 561 (1980). Note that there may be a state constitutional problem in some jurisdictions as to the applicability of this section to rules issued by independent agencies expressly created by the state constitution itself.

According to the second sentence of subsection (a), an executive order revoking or suspending an agency rule is subject to all requirements of the Act applicable to the adoption and effectiveness of a rule. This provision will make clear that such an executive order is to be treated as a rule whether or not the governor is partly or entirely exempted from the definition of "agency." Rule-making procedures should be imposed upon the governor in these circumstances because the agency would have had to follow those procedures if it took similar
action. Consequently, if the agency may summarily repeal or suspend a rule under this Act, the governor may do so; if the agency may not do so, the governor may not do so, but instead will have to resort to usual rule-making procedures to accomplish that result.

This provision does **not** give the governor any affirmative authority to create a new agency rule. It only authorizes rescission or suspension of an agency rule, in whole or in severable part, on the theory that the function of the gubernatorial veto over agency rules is primarily that of a negative political check against unwise but lawful agency action. Note also that the governor may repeal or suspend a rule under this section only if the agency could itself lawfully take that action.

Subsection (b) is parallel to Section 3-106(b). Because the agency itself may summarily terminate a pending rule-making proceeding at any time, the governor is empowered to take similar action, thereby directly overruling his less politically responsible administrative subordinates.

Subsection (c) is a modified form of Iowa Code, Section 7.17.

For a discussion of a somewhat different gubernatorial checking authority with respect to rules, see "Wyoming Administrative Regulation Review Act," 14 Land and Water Review 189 (1979). In addition, California recently created a special agency within the executive branch with authority to review the proposed and adopted rules of all agencies, and with authority to veto proposed rules and under some circumstances rescind adopted rules, subject only to an override of its action by the governor. See Cal.Govt.Code, Section 11349-11349.9 (West 1980) and Starr, "California's New Office of Administrative Law and Other Amendments to the California APA: A Bureau to Curb Bureaucracy and Judicial Review Too," 32 Admin.L.Rev. 713 (1980).

§ 3-203. [Administrative Rules Review Committee].

There is created the ["administrative rules review committee"] of the [legislature]. The committee must be [bipartisan] and composed of [3] senators appointed by the [president of the senate] and [3] representatives appointed by the [speaker of the house]. Committee members must be appointed within [30] days after the convening of a regular legislative session. The term of office is [2] years while a member of the [legislature] and begins on the date of appointment to the committee. While a member of the [legislature], a member of the committee whose term has expired shall serve until a successor is appointed. A vacancy on the committee may be filled at any time by the original appointing authority for the remainder of the term. The committee shall choose a chairman from its membership for a [2]-year term and may employ staff it considers advisable.]

**COMMENT**

This section is modified Iowa Act, Section 17A.8(1), (2), (4). See Bonfield, "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 899-904 (1975). Bracketed Section 3-203 should be enacted unless a state already has an existing standing committee with adequate staff to perform the functions provided in Section 3-204.

§ 3-204. [Review by Administrative Rules Review Committee].
(a) The [administrative rules review committee] shall selectively review possible, proposed, or adopted rules and prescribe appropriate committee procedures for that purpose. The committee may receive and investigate complaints from members of the public with respect to possible, proposed, or adopted rules and hold public proceedings on those complaints.

(b) Committee meetings must be open to the public. Subject to procedures established by the committee, persons may present oral argument, data, or views at those meetings. The committee may require a representative of an agency whose possible, proposed, or adopted rule is under examination to attend a committee meeting and answer relevant questions. The committee may also communicate to the agency its comments on any possible, proposed, or adopted rule and require the agency to respond to them in writing. Unless impracticable, in advance of each committee meeting notice of the time and place of the meeting and the specific subject matter to be considered must be published in the [administrative bulletin].

(c) The committee may recommend enactment of a statute to improve the operation of an agency. The committee may also recommend that a particular rule be superseded in whole or in part by statute. The [speaker of the house and the president of the senate] shall refer those recommendations to the appropriate standing committees. This subsection does not preclude any committee of the legislature from reviewing a rule on its own motion or recommending that it be superseded in whole or in part by statute.

[ (d)(1) If the committee objects to all or some portion of a rule because the committee considers it to be beyond the procedural or substantive authority delegated to the adopting agency, the committee may file that objection in the office of the [secretary of state]. The filed objection must contain a concise statement of the committee's reasons for its action.

(2) The [secretary of state] shall affix to each objection a certification of the date and time of its filing and as soon thereafter as practicable shall transmit a certified copy thereof to the agency issuing the rule in question, the [administrative rules editor, and the administrative rules counsel]. The [secretary of state] shall also maintain a permanent register open to public inspection of all objections by the committee.

(3) The [administrative rules editor] shall publish and index an objection filed pursuant to this subsection in the next issue of the [administrative bulletin] and indicate its existence adjacent to the rule in question when that rule is published in the [administrative code]. In case of a filed objection by the committee to a rule that is subject to the requirements of Section 2-101(g), the agency shall indicate the existence of that objection adjacent to the rule in the official compilation referred to in that subsection.

(4) Within [14] days after the filing of an objection by the committee to a rule, the issuing agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

[ (5) After the filing of an objection by the committee that is not subsequently withdrawn, the burden is upon the agency in any proceeding for judicial review or for enforcement of the rule to establish that the whole or portion of the rule objected to is within the procedural and substantive authority delegated to the agency.]

(6) The failure of the [administrative rules review committee] to object to a rule is not an implied legislative authorization of its procedural or substantive validity.]
(e) The committee may recommend to an agency that it adopt a rule. [The committee may also require an agency to publish notice of the committee's recommendation as a proposed rule of the agency and to allow public participation thereon, according to the provisions of Sections 3-103 through 3-104. An agency is not required to adopt the proposed rule.]

(f) The committee shall file an annual report with the [presiding officer] of each house and the governor.

COMMENT

Subsections (a) and (b) are a combination of modified Iowa Act, Section 17A.8(6), and Nebraska Act, Sections 84-908 and 84-908.01.

Subsection (c) is an extended and substantially modified Iowa Act, Section 17A.8(8). Most importantly, it provides that a lawful rule may only be legislatively overcome or altered by statute. That is, legislative suspension or repeal of a particular agency rule, in whole or in part, should ultimately be determined only by joint legislative action subject to the veto of the governor of the state or the overriding of a veto. In many states a one house or two house veto or suspension of a particular agency rule, or a legislative committee veto or suspension of a particular agency rule, may raise serious state constitutional questions. See e.g. Taylor, "Legislative Vetoes and the Massachusetts Separation of Powers Doctrine," 13 Suffolk L.Rev. 1 (1979); State of Alaska v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980); Barker v. Manchin, 279 S.E.2d 622 (W.Va.1981); and Opinion of the Justices, 431 A.2d 783 (N.H.1981).

There are three principal arguments for the unconstitutionality under many state constitutions of a legislative veto or suspension mechanism by means other than statute. First, it would improperly impinge upon the governor's veto power. Second, it consists of legislation by an unconstitutional means. Third, it empowers a part of the legislative branch to perform an executive function. In addition, when such a veto or suspension authority is vested in a legislative committee or only one house of the legislature it is alleged to be an undue delegation of legislative power. Despite these arguments, a number of states have enacted statutes authorizing legislative vetoes or suspensions of administrative rules by means other than statute. See National Conference of State Legislatures, Restoring the Balance: Legislative Review of Administrative Regulations 31-44 (1979). A few states have even expressly done so in their constitutions, thereby avoiding any possible constitutional issue. See e.g. Michigan Const. Art. IV, Section 37 and South Dakota Const. Art. III, Section 30.

Even if there are no constitutional impediments in a particular state to the use of a one house or two house veto or suspension of a particular agency rule, or a legislative committee veto or suspension of a particular agency rule, they would seem to be undesirable in most circumstances. See generally Bruff and Gellhorn, "Congressional Control of Administrative Regulation: A Study of Legislative Vetoes," 90 Harv.L.Rev. 1369 (1977). There are many reasons why legislative vetoes or suspensions of administrative rules by means other than statute should be avoided. In the first place, schemes of this sort may unduly aggrandize the legislature's authority at the expense of the executive branch's countervailing independence. By cutting out the veto power of the governor present in the usual legislative process, such mechanisms weaken the state chief executive's bargaining power with the legislature and disable him from checking legislative action he deems unsound. They also may facilitate over-involvement of the legislative branch in the day-to-day administration of programs it creates by statute and induce an unhealthy split in perceived authority over purely administrative matters.
Furthermore, a legislative mechanism for veto or suspension of state agency rules will be useful primarily as a check against unwise rules that are otherwise clearly lawful. An effective check against most unlawful rules is provided by judicial review, particularly if it is coupled with the reversed burden of persuasion that accompanies the legislative committee objection mechanism proposed in subsection (d) of this section. Therefore, legislative veto or suspension of particular state agency rules will have its primary practical impact on lawful rules and, in effect, would constitute a pro tanto narrowing of the authorizing legislation under which they were otherwise properly issued. Such a narrowing of the authorizing legislation should be executed in the same manner as the legislation was initially adopted. Otherwise, a committee, one house, or two houses of the state legislature, would continually be in a position to subvert proper authorizing action of a more representative and authoritative lawmaking process with built-in checks and balances. A part of the usual statute-making process should not be able to nullify action of the more representative and more authoritative whole, with its built-in checks and balances, lest the very virtues of the whole process be lost. Therefore, all efforts to nullify otherwise lawful agency rules should be executed by joint legislative action, subject to the veto of the governor.

In addition, legislative committee veto or suspension of rules, or one house or two house veto or suspension of rules, may be more susceptible to undue influence by special interest groups acting contrary to the public interest than is veto or suspension by the usual legislative process of statutory enactment. This is another policy reason against veto or suspension of state agency rules by any means other than joint legislative action submitted to the governor. It should also be noted that in some cases the existence of a legislative mechanism to veto or suspend rules by a means that is easier to invoke than the usual statute-making process may have the following undesirable consequence. That mechanism may encourage people to reduce their participation in the rule-making proceeding before the agency and, instead, concentrate their efforts on the alternative legislative veto or suspension mechanism.

If a legislature wishes to vest its administrative rules review committee with more than purely recommendatory authority, it should enact bracketed subsection (d). Subsection (d) is a substantially modified Iowa Act, Section 17A.4(4)(a)-(b). This provision provides an effective legislative check, by means less than statute, on unlawful agency rules. It authorizes a legislative committee to file a formal objection to a rule on the ground that it is procedurally or substantively unlawful. That objection would detail the precise reasons why the committee believes the rule to be unlawful. Notice that such an objection has been filed would be printed adjacent to the rule wherever it is published, and the objection itself would be made available for public inspection. The formal committee objection would then shift to the particular agency the burden of establishing that the rule is procedurally and substantively lawful in any subsequent proceeding for judicial review or for enforcement of the rule. If the agency fails to meet its unusual burden of persuasion in that case, the court would invalidate the entire rule, or the relevant portion thereof.

The filing of a formal objection to a rule by the appropriate legislative committee will place the adopting agency in a dilemma. The agency can rely upon the rule as it is, thereby accepting this special burden of demonstrating that the rule is wholly lawful in a future court case, or the agency can change the rule in order to reinstate the usual presumption of validity that attaches to an agency rule. The extent to which an agency will be amenable to modifying the rule to eliminate any objection of the committee will obviously depend upon the extent to which the agency thinks it needs the challenged rule in its original form, and the agency's confidence that it can overcome its special burden of persuading the court that the rule in that form is lawful in all respects. If the rule's validity is doubtful because it is not clearly procedurally and substantively lawful, the agency will usually modify the rule: for the reversed burden of persuasion will result in the invalidation of many rules of
doubtful legality when they are challenged in court. Of course, the legislative committee's objection authority would not interfere with the operation or effectiveness of clearly valid agency rules. The committee is only authorized to alter one aspect of the procedure by which the legality of the rule will be finally determined by the courts.

As a consequence, a legislative committee with authority to object to agency rules in the manner described in subsection (d) will be a credible check on illegal agency rule making. The committee-objection mechanism proposed here may be justified, therefore, on the ground that its mere existence is likely to make agencies act more responsibly in their rule-making powers; for they will know that the shift in the burden of persuasion after a committee objection will, in close cases, make judicial invalidation of the rule much more likely than at present. Actual exercise of its objection authority by a legislative committee will also have the added benefit of inducing agencies which have issued rules of doubtful or clear illegality to withdraw them, thereby sparing the public the cost of complying with those rules or contesting them in the courts. Finally, it seems desirable to provide a means by which members of the public who are aggrieved by allegedly illegal agency rules can, in those cases where their claims are especially credible, be aided in their efforts to secure a judicial invalidation of those rules. A good way to separate the credible claims deserving such help from those that do not is by securing an evaluation of the legality of the rules in question by an independent responsible body external to the agency. And a good way to aid such aggrieved persons whenever that independent evaluation agrees with their contention is to shift the burden of persuasion in any subsequent judicial proceeding involving the validity of those rules from the assailant, who had to convince the court they were unlawful, to the agency, which is then required to convince the court that they are lawful.

It is also logical to shift to the agency the burden of demonstrating the validity of a rule in subsequent litigation when a more politically accountable and independent body objects thereto. Unlike the agency, the legislative committee members are directly accountable to the public and represent the body that created the agency and invested it with whatever authority the agency may lawfully exercise. The usual presumption of validity accorded an agency rule, therefore, may reasonably be deemed inappropriate when a legislative committee believes the rule to be unlawful. Furthermore, legislatures have always been assumed to have the authority, which they have often exercised, to allocate the burden of persuasion in court litigation, so long as they act "reasonably" when they do so. And a shift in the burden of persuasion as to the validity of a particular rule in these circumstances certainly seems "reasonable." Note also that there is a clear standard against which the committee is to operate when it objects: "beyond the procedural or substantive authority delegated to the adopting agency." And the committee must include the specific reasons for its action in the objection so that courts and others who wish to examine the specific grounds supporting an objection may easily do so.

In addition, it should be noted that the reversed burden-of-persuasion mechanism is a fair compromise between the extremes of authorizing one or two houses of the legislature or a legislative committee to veto, temporarily or permanently, rules issued by an agency, and authorizing a legislative committee merely to recommend to the legislature that it overrule such regulations by statute. The undesirability of such a one or two house or a committee veto was discussed above.

Of course, as paragraph (6) of subsection (d) states, the failure of the appropriate legislative committee to file a formal objection to a rule should not be construed by a reviewing court as an implied legislative authorization of the rule. Time constraints will often prevent the appropriate committee from carefully reviewing all agency rules; and an affected party may decide to seek judicial relief directly rather than a legislative
committee objection. Therefore, it would be unfair to imply negatively legislative authorization for any rule merely because no objection to it had been filed by the committee.

Currently, Iowa, Montana, and Vermont provide for a scheme whereby the burden of persuasion as to the validity of a rule is reversed after an objection has been filed to the rule by a legislative committee. See Iowa Act, Section 4(4), Montana Act, Section 2-4-506(3), and Vermont Act, Section 842. The constitutionality of that scheme has been impliedly upheld in Iowa. In doing so, the Iowa Supreme Court voided certain agency rules solely because the agency, after those rules were formally objected to as unlawful by the appropriate legislative committee, could not meet its burden of persuading the court that they were lawful in all respects. The court intimated that if the objection had not been filed it might have held the rules valid. See Schmitt v. Iowa Dept. of Social Services, 263 N.W.2d 739 (Iowa 1978). In another Iowa case, the court upheld an agency rule after an objection to it had been filed by the appropriate legislative committee, because the agency successfully met its burden and persuaded the court that the rule was lawful. Iowa Auto Dealers Ass’n v. Iowa Dept. Revenue, 301 N.W.2d 760 (1981).

See Bonfield,"The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process," 60 Iowa L.Rev. 731 at 905-924 (1975), for a discussion of the desirability and operation of this reversed burden-of-persuasion mechanism after an authorized legislative committee formally objects to a rule.

Though not provided for in the text of subsection (d), a state enacting it might also consider adding to that subsection a provision embodying the following notion: whenever a rule is invalidated because an agency fails to meet its legislative committee imposed special burden of persuasion under subsection (d)(5), judgment shall also be rendered against the agency for court costs, including a reasonable attorney's fee. Addition of a provision providing for reimbursement of this sort would encourage aggrieved persons to litigate the validity of rules that are tainted by a formal, legislative committee objection, and would thus remove one obstacle-financial expense-that discourages persons from seeking judicial review of unlawful agency rules. The Iowa Act has such a provision in its Section 4(4). If it is desired to add a provision of this type to Section 3-204(d)(5) it might be added at the very end and provide:

and render judgment against the agency for court costs. Court costs include a reasonable attorney's fee and are payable by the [state comptroller] from the support appropriations of the agency that adopted the rule.

Subsection (e) authorizes the administrative rules review committee to recommend to an agency that it repeal, amend, suspend, or adopt a rule. For states that wish to go further, the bracketed second sentence also empowers the committee to require an agency to publish notice of the rule change recommended by the committee as a proposed rule of the agency, and to conduct public proceedings thereon according to the provisions of Sections 3-103 through 3-104. The purpose of this provision is to assure fully informed agency decision making on the subject of a committee recommendation. If also is geared to assure increased agency accountability to the public by focusing some of the same political pressures on the agency with respect to the subject at issue as are focused on the legislative process. Authorizing this legislative committee, on its own say so, to require an agency to initiate such rule making does not seem an undue legislative encroachment on lawful agency administrative initiatives in light of the express reservation in the last sentence of ultimate authority in the agency over whether it will finally adopt a proposed rule based upon a committee recommendation.
ARTICLE IV

ADJUDICATIVE PROCEEDINGS

CHAPTER I

AVAILABILITY OF ADJUDICATIVE PROCEEDINGS; APPLICATIONS; LICENSES

§ 4-101. [Adjudicative Proceedings; When Required; Exceptions].

(a) An agency shall conduct an adjudicative proceeding as the process for formulating and issuing an order, unless the order is a decision:

(1) to issue or not to issue a complaint, summons, or similar accusation;

(2) to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court; or

(3) under Section 4-103, not to conduct an adjudicative proceeding.

(b) This Article applies to rule-making proceedings only to the extent that another statute expressly so requires.

COMMENT

This section provides the linkage between the definition of "order" in Section 1-102(5) and the various types of adjudicative proceedings described in Article IV of this Act. This section does not specify which type of adjudicative proceeding is required in any particular situation, but rather addresses the question whether an adjudicative proceeding should be conducted at all. If an adjudicative proceeding is required by this section or by the special requirements of Section 4-105 regarding the rights of licensees-the proceeding may be either the formal, conference, summary, or emergency adjudicative proceeding, in accordance with other provisions of this Act.

First, subsection (a) states the general principle that an agency shall conduct an appropriate adjudicative proceeding before issuing an order. (This does not preclude emergency action in circumstances where such action would be the appropriate adjudicative proceeding under Section 4-501.) The subsection then lists, as exceptions, the situations in which an agency may issue an order without first conducting an adjudicative proceeding. Paragraph (a)(1) enables an agency, on the basis of its investigation and other non-adjudicative processes, to decide whether to issue or not to issue a complaint, etc., without first conducting an adjudicative proceeding. Paragraph (a)(2) enables an agency to decide to initiate or not to initiate an investigation, prosecution, or other proceeding, either before the agency itself or before another agency or a court, without first conducting an adjudicative proceeding. For example, a law enforcement officer may, without first conducting an adjudicative proceeding, issue a "ticket" that will lead to a proceeding before any agency or court. Paragraph (a)(3) enables an agency to decide to dismiss or not to dismiss a matter, in accordance with Section 4-103, without first conducting an adjudicative proceeding.
According to subsection (b), if another statute expressly requires all or some designated portions of Article IV to govern a category of rule-making proceedings, the agency must use the adjudicative procedures of Article IV in rule making, but only to the extent expressly required by the other statute. However, if another statute merely requires the rule-making agency to conduct a "hearing," or to base a rule on the "record," the proceedings of Article IV are not brought into play; instead, the specific procedures of that other statute are applicable, in conjunction with the rule-making procedures of Article III of this Act, and the relationship between the two statutes is governed by Section 1-103(b). In this type of situation as in any other, the proceedings may be converted from one type to another, in accordance with the standards set forth in Section 1-107 and in agency rules elaborating upon that section.

For comparative notes on the 1961 Revised Model Act, the Federal APA, and the APAs of the states, see Comments following Section 4-102.

§ 4-102. [Adjudicative Proceedings; Commencement].

(a) An agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.

(b) An agency shall commence an adjudicative proceeding upon the application of any person, unless:

(1) the agency lacks jurisdiction of the subject matter;

(2) resolution of the matter requires the agency to exercise discretion within the scope of Section 4-101(a);

(3) a statute vests the agency with discretion to conduct or not to conduct an adjudicative proceeding before issuing an order to resolve the matter and, in the exercise of that discretion, the agency has determined not to conduct an adjudicative proceeding;

(4) resolution of the matter does not require the agency to issue an order that determines the applicant's legal rights, duties, privileges, immunities, or other legal interests;

(5) the matter was not timely submitted to the agency; or

(6) the matter was not submitted in a form substantially complying with any applicable provision of law.

(c) An application for an agency to issue an order includes an application for the agency to conduct appropriate adjudicative proceedings, whether or not the applicant expressly requests those proceedings.

(d) An adjudicative proceeding commences when the agency or a presiding officer:

(1) notifies a party that a pre-hearing conference, hearing, or other stage of an adjudicative proceeding will be conducted; or
(2) begins to take action on a matter that appropriately may be determined by an adjudicative proceeding, unless this action is:

   (i) an investigation for the purpose of determining whether an adjudicative proceeding should be conducted; or

   (ii) a decision which, under Section 4-101(a), the agency may make without conducting an adjudicative proceeding.

COMMENT

This section states when an agency may, and when an agency shall commence adjudicative proceedings.

Subsection (a) clarifies that an agency may commence adjudicative proceedings on any matter within the agency's jurisdiction. This subsection prevents any implication that subsection (b) sets forth the exclusive circumstances under which an agency may commence adjudicative proceedings.

Subsection (b) requires an agency to commence adjudicative proceedings upon the application of any person, subject to a number of exceptions. If the agency determines that any of these exceptions is applicable, the agency may dismiss the matter in accordance with Sections 4-103 and 4-101(a)(3), without conducting an adjudicative proceeding, or the agency may, in its discretion under subsection (a), conduct an adjudicative proceeding although under no compulsion to do so. In situations where none of the exceptions is applicable, this section establishes the right of a person to require an agency to commence adjudicative proceedings. This approach is markedly different from the 1961 Revised Model Act and the Federal APA, which are discussed later in this Comment.

The first exception to subsection (b) relieves the agency from the obligation to conduct an adjudicative proceeding if the subject-matter of the application is outside the agency's jurisdiction; paragraph (b)(1).

The second exception, paragraph (b)(2), relieves the agency from an obligation to conduct an adjudicative proceeding if resolution of the matter requires the agency to exercise discretion within the scope of Section 4-101(a)(1) or (2), that is, discretion to initiate or not to initiate a complaint, summons, or similar accusation, or to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency or another agency or a court. For example, a person who submits a complaint about a licensee cannot compel the licensing agency to initiate an adjudicative proceeding against the licensee; the agency may exercise prosecutorial discretion to determine whether to initiate or not to initiate an adjudicative proceeding in each case. The agency's decision whether or not to initiate an adjudicative proceeding need not, itself, be preceded by an adjudicative proceeding; see Section 4-101(a)(1) and (2).

Under paragraph (b)(3), an agency need not conduct an adjudicative proceeding upon receiving an application, if a statute vests the agency with discretion to conduct or not to conduct an adjudicative proceeding before issuing an order to resolve the matter, and in the exercise of this discretion the agency has determined not to conduct an adjudicative proceeding. This does not and could not authorize the agency to deprive any person of procedural rights guaranteed by the constitution. If a statute, purporting to authorize an agency to dispense with an adjudicative proceeding, conflicts with constitutional guarantees, the agency may exercise its discretion
under subsection (a) to conduct an adjudicative proceeding even though the statute does not require it or, if the
agency fails to conduct a constitutionally required adjudicative proceeding, a reviewing court may give
appropriate relief.

Paragraph (b)(4) closely relates to the definition of "order," in Section 1-102(5), as "agency action of
particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of
one or more specific persons." If the applicant does not request agency action that would fit within the above
definition of "order," the agency need not commence an adjudicative proceeding. For example, if a person asks
the agency to commence adjudicative proceedings for the purpose of adopting a rule, or of carrying out a
housekeeping function that affects nobody's legal rights, etc., the request would be subject to dismissal because
the requested agency action would not be an "order." The same paragraph provides that an agency need not
commence an adjudicative proceeding unless the applicant's legal rights, duties, privileges, immunities, or other
legal interests are to be determined by the requested order. Interpretation of these terms, ultimately a matter for
the courts, will clarify the range of situations in which this Act entitles a person to require an agency to commence
adjudicative proceedings. The availability of various types of adjudicative proceedings, including summary
adjudicative proceedings, may persuade courts to develop a more hospitable approach toward applicants than
would have been feasible or practicable if the only available type of administrative adjudication was a trial-type,
formal hearing.

Paragraphs (5) and (6) relieve an agency from an obligation to conduct an adjudicative proceeding if the
matter was not timely submitted or was not submitted in a form substantially complying with any applicable
provision of law.

Subsection (c) ensures that a person who requests an agency to issue an order, but does not expressly
request the agency to conduct an adjudicative proceeding, will not on that account be regarded as having waived
the right to any available adjudicative proceeding; see Section 1-105 on waiver. This assurance may be
especially important to protect unrepresented parties. In addition, this subsection clarifies that the term
"application," as used in this Article, may refer either to the request for the agency to issue an order, or to the
request for the agency to conduct an appropriate adjudicative proceeding, or both, as the context suggests.
Similarly, the term "applicant" may be used with either or both meanings.

Subsection (d) furnishes the linkage between subsection (b), which requires an agency to "commence"
an adjudicative proceeding in certain situations, and Section 4-104(a), which establishes time limits within which
the agency must "commence" adjudicative proceedings.

The 1961 Revised Model Act declared, in Sections 1(2) and 9(a), that an adjudicative hearing was
available in contested cases only if "required by law." A more specific guarantee of an adjudicative hearing was
provided only in connection with the revocation, suspension, annulment or withdrawal of a license; Section 14(c)
required the agency, before taking such action, to give the licensee "an opportunity to show compliance with all
lawful requirements for the retention of the license."

The Federal APA is essentially similar to the 1961 Revised Model Act, making a hearing available "in
every case of adjudication required by statute to be determined on the record after opportunity for agency hearing."
Federal Act, Section 554(a), and providing more specific procedural guarantees to protect licensees,
Section 558(c)(2).
A few state APAs make an adjudicative hearing available without the need to be "required by law", but only in limited situations. Some other state APAs make adjudicative hearings available in a broad category of situations, without the need to be "required by law." The wording of the APAs in these states varies considerably, as does the effective reach of the APAs themselves, some APAs being applicable only to agencies engaged in regulating licensed professions and occupations.

The preceding survey of APA provisions on the right to an adjudicative hearing must be considered in conjunction with a related issue, namely, whether the APA describes one or more types of adjudicative proceeding. The 1961 Revised Model Act, the Federal APA and the majority of state APAs describe only a single type of adjudicative proceeding, generally known as the formal adjudicative hearing. Virtually all of these acts include provision for informal settlement by agreement among the parties, but without any description of a procedure for informal settlement. The Maine APA permits the agency to "limit the issues to be heard or vary any procedure prescribed by agency rule or this subchapter if the parties and the agency agree to such limitations or variations or if no prejudice to any party will result." Maine Act, Section 9053. Four states go further, and describe at least the procedural rudiments of less-than-formal adjudication. Delaware Act, Section 6423; Florida Act, Section 120.57(2); Montana Act, Section 2-4-604; Virginia Act, Section 9-6-14:11. On the approach taken by this Act, see Section 4-201 and Comments.

§ 4-103. [Decision Not to Conduct Adjudicative Proceeding].

If an agency decides not to conduct an adjudicative proceeding in response to an application, the agency shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any available administrative review available to the applicant.

COMMENT

The combined effect of Sections 4-101(a) and 103 is that this Act imposes no procedures upon the agency when it decides not to conduct an adjudicative proceeding in response to an application, except to give a written notice of dismissal, with a brief statement of reasons and of any available administrative review. Agency decisions of this type, while not governed by the adjudicative procedures of this Act, are subject to judicial review as "final agency action" under Section 5-102.

§ 4-104. [Agency Action on Applications].

(a) Except to the extent that the time limits in this subsection are inconsistent with limits established by another statute for any stage of the proceedings, an agency shall process an application for an order, other than a declaratory order, as follows:

(1) Within [30] days after receipt of the application, the agency shall examine the application, notify the applicant of any apparent errors or omissions, request any additional information the agency wishes to obtain and is permitted by law to require, and notify the applicant of the name, official title, mailing address and telephone number of an agency member or employee who may be contacted regarding the application.

(2) Except in situations governed by paragraph (3), within [90] days after receipt of the
application or of the response to a timely request made by the agency pursuant to paragraph (1), the agency shall:

(i) approve or deny the application, in whole or in part, on the basis of emergency or summary adjudicative proceedings, if those proceedings are available under this Act for disposition of the matter;

(ii) commence a formal adjudicative hearing or a conference adjudicative hearing in accordance with this Act; or

(iii) dispose of the application in accordance with Section 4-103.

(3) If the application pertains to subject matter that is not available when the application is filed but may be available in the future, including an application for housing or employment at a time no vacancy exists, the agency may proceed to make a determination of eligibility within the time provided in paragraph (2). If the agency determines that the applicant is eligible, the agency shall maintain the application on the agency's list of eligible applicants as provided by law and, upon request, shall notify the applicant of the status of the application.

(b) If a timely and sufficient application has been made for renewal of a license with reference to any activity of a continuing nature, the existing license does not expire until the agency has taken final action upon the application for renewal or, if the agency's action is unfavorable, until the last day for seeking judicial review of the agency's action or a later date fixed by the reviewing court.

COMMENT

Subsection (a) establishes time limits and notification requirements for agency action on applications for orders, other than declaratory orders. Some of the detail is derived from the Florida Act, Section 120.60(2).

The 90-day limit imposed by subparagraph (a)(2)(i) applies only if emergency or summary adjudicative proceedings are available for "disposition" of the matter. With regard to emergency adjudicative proceedings, this provision must be read in conjunction with Section 4-501(e), which requires an agency, after taking emergency action, to following up by completing "any proceedings that would be required if the matter did not involve an immediate danger." If an agency follows up by conducting post-emergency proceedings, these will culminate in "disposition" of the matter, and must therefore be completed with the time limits of section 4-104(a). If, however, the emergency proceedings render the matter completely moot, no follow-up proceedings are required, and the emergency proceedings therefore constitute "disposition" of the application, governed by the 90-day limit.

Subsection (b) deals with the non-expiration of licenses. It is an expanded version of Section 14(b) of the 1961 Revised Model Act. While protecting licenses against expiration during the pendency of timely filed applications for renewal, this subsection does not preclude an agency from commencing or completing action against a licensee, either under Section 4-105 on revocation, suspension, etc., or under the emergency provisions of Section 4-501.
§ 4-105. [Agency Action Against Licensees].

An agency may not revoke, suspend, modify, annul, withdraw, or amend a license unless the agency first gives notice and an opportunity for an appropriate adjudicative proceeding in accordance with this Act or other statute. This section does not preclude an agency from (i) taking immediate action to protect the public interest in accordance with Section 4-501 or (ii) adopting rules, otherwise within the scope of its authority, pertaining to a class of licensees, including rules affecting the existing licenses of a class of licensees.

COMMENT

This is adapted from the 1961 Revised Model Act, Section 14(c) regarding license revocation, suspension, etc.

The final clause of this section is intended to prevent any conflict between this section and the definition of "rule" in Section 1-102(10). As indicated in the Comment to the definition, "licensing determinations of general applicability, that is, addressed to all members of a class by description, are 'rules' subject to the rule-making provisions of this statute." The approach taken here is consistent with American Airlines, Inc. v. C.A.B., 359 F.2d 624 (D.C.Cir.1966), certiorari denied 385 U.S. 843 (1966) and Air Line Pilots Ass'n Int'l v. Quesada, 276 F.2d 892 (2d Cir. 1960). While rules amending the licenses of a class of licensees are covered by the rule making provisions of this Act, conversion of the proceedings from rule making to adjudication could be considered in appropriate situations; on conversion, see Section 1-107 and Comments.

CHAPTER II

FORMAL ADJUDICATIVE HEARING

§ 4-201. [Applicability].

An adjudicative proceeding is governed by this chapter, except as otherwise provided by:

(1) a statute other than this Act;

(2) a rule that adopts the procedures for the conference adjudicative hearing or summary adjudicative proceeding in accordance with the standards provided in this Act for those proceedings;

(3) Section 4-501 pertaining to emergency adjudicative proceedings; or

(4) Section 2-103 pertaining to declaratory proceedings.

COMMENT

This section declares the formal hearing to be required in all adjudicative proceedings, except where otherwise provided by statute, agency rule pursuant to this Act, the emergency provisions of this Act, or Section 2-103 on declaratory proceedings.
This section does not preclude the waiver of any procedure, or the settlement of any case without use of all available proceedings, under the general waiver and settlement provisions of Sections 1-105 and 1-106. However, a person who requests agency action without expressly requesting the agency to conduct appropriate proceedings will not be regarded, on that account, as having waived the appropriate procedures; see Section 4-102(c) and Comment.

The 1961 Revised Model Act described a single type of adjudicative hearing—the contested case (sections 9 to 14). This is a type of proceeding that is generally described as "formal," involving the presentation of evidence, cross-examination and rebuttal in a manner similar to non-jury trials, with the requirement that the decision be based exclusively upon the evidence of record.

The 1961 Revised Model Act made passing reference to other possible types of adjudication. Section 9(d) permitted "informal disposition" of any contested case by "stipulation, agreed settlement, consent order, or default," Section 2(a)(2) required each agency to adopt rules of practice setting forth "thenature and requirements of all formal and informal procedures available." These provisions obviously did not establish any procedural framework for adjudicative proceedings of any type other than the "formal" contested case.

This Act, by contrast, establishes three procedural models for adjudication. The first, called "formal adjudicative hearing," is an elaborate but generally recognizable development of the "contested case" of the Model Act. The other two models are new. They are called, respectively, "conference adjudicative hearing" and "summary adjudicative proceedings." In addition, emergency adjudication is authorized when necessary.

The notion of establishing more than one model adjudicative procedure is found in some of the more recent state acts, including Delaware, Florida, Montana and Virginia; see Comment to Section 4-102. Bills have been introduced in Congress to amend the Federal APA by creating more than one type of adjudicative procedure. A recent example is S. 2147, Cong.Record Dec. 18, 1979 at S 19039. See also 31 Ad.L.Rev. 31, 47 (1979). A justification for providing a variety of procedures is that, without them, many agencies will either attempt to obtain enactment of statutes to establish procedures specifically designed for such agencies, or proceed "informally" in a manner not spelled out by any statute. As a consequence, wide variations in procedure will occur from one agency to another, and even within a single agency from one program to another, producing complexity for citizens, agency personnel and reviewing courts, as well as for lawyers. These results have already happened, to a considerable extent, at the federal level. The number of available procedures in the administrative procedure act should not, however, be so large as to make the act too complicated or to create uncertainty as to which type of procedure is applicable. This Act establishes three basic types of adjudicative procedure, as a proposed middle ground between the approach taken by the 1961 Revised Model Act with a formal hearing only, and other theoretical alternatives that could establish large numbers of models.

§ 4-202. [Presiding Officer, Disqualification, Substitution].

(a) The agency head, one or more members of the agency head, one or more administrative law judges assigned by the office of administrative hearings in accordance with Section 4-301 [, or, unless prohibited by law, one or more other persons designated by the agency head], in the discretion of the agency head, may be the presiding officer.

(b) Any person serving or designated to serve alone or with others as presiding officer is subject to
disqualification for bias, prejudice, interest, or any other cause provided in this Act or for which a judge is or may be disqualified.

(c) Any party may petition for the disqualification of a person promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is later.

(d) A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

(e) If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute must be appointed by:

   (1) the governor, if the disqualified or unavailable person is an elected official; or

   (2) the appointing authority, if the disqualified or unavailable person is an appointed official.

(f) Any action taken by a duly-appointed substitute for a disqualified or unavailable person is as effective as if taken by the latter.

COMMENT

Subsection (a) uses the term "presiding officer" to refer to the one or more persons who preside over a hearing. If the presiding officer is more than one person, as for example when a multi-member agency sits en banc, one of the individuals may serve as spokesperson, but all individuals collectively are regarded as the presiding officer.

If the bracketed language is not adopted, subsection (a) confers a limited amount of discretion upon the agency head, to determine who will preside; the presiding officer may be either the agency head, or one or more members of the agency head, or one or more administrative law judges assigned by the office of administrative hearings in accordance with Section 4-301. Without the bracketed language, subsection (a) resembles the law in a group of states that have created a central panel of administrative law judges, and have made the use of administrative law judges from the central panel mandatory unless the agency head or one or more members of the agency head presides. (In some of these states, however, the use of central panel administrative law judges is mandatory only in certain enumerated agencies or types of proceedings.) If, however, the bracketed language is adopted in addition, the agency head has the above options, plus one more-unless prohibited by law, the agency head may designate any one of more "other persons" to serve as presiding officer; this discretion is subject to Section 4-214, on separation of functions.

The phrase "unless prohibited by law," included in the bracketed language, prevents the use of "other persons" as presiding officers to the extent that the state's law prohibits their use. Thus, if this language is adopted by a state that has an existing central panel of administrative law judges, whose use is mandatory in enumerated types of proceedings, the agencies must continue to use the central panel for those proceedings, but may exercise their option to use "other persons" for other types of proceedings.
One consequence of determining who shall preside is provided in Sections 4-215 and 4-216. According to Section 4-215, if the agency had presides, the agency head shall issue a final order. If any other presiding officer presides, an initial order must be rendered. Section 4-216 establishes the general appealability of initial orders to the agency head, unless otherwise prescribed by a provision of law.

Section 4-202 deals also with the disqualification of individual presiding officers and the appointment of substitutes for individuals who become unavailable for any reason.

§ 4-203. [Representation].

(a) Any party may participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative.

(b) Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, if permitted by law, other representative.

COMMENT

This section provides detail not found in the 1961 Revised Model Act.

The right to "participate in person" would be satisfied either by physical presence at a single place by all participants, or by the use of telephone, television or other electronic means as provided by Sections 4-205(a) and 4-211(4).

The right of a corporation or other artificial person to participate as a party by a "duly authorized representative" is intended to permit a corporation to participate by either an attorney or a non-attorney, unless participation by a non-attorney violates state law regarding the unauthorized practice of law, in which case the non-attorney would not be a "duly authorized" representative.

Subsection (b) guarantees to each party the right to be advised and represented, at the party's expense. This subsection incorporates other laws of the state, regarding the extent if any to which nonlawyers may perform the functions of advice and representation. Thus this Act is not a source of authority for nonlawyers to advise or represent parties to agency proceedings, neither does this Act prohibit such functions by nonlawyers if other law confers permission.

§ 4-204. [Pre-hearing Conference-Availability, Notice].

The presiding officer designated to conduct the hearing may determine, subject to the agency's rules, whether a pre-hearing conference will be conducted. If the conference is conducted:

(1) The presiding officer shall promptly notify the agency of the determination that a pre-hearing conference will be conducted. The agency shall assign or request the office of administrative hearings to assign a presiding officer for the pre-hearing conference, exercising the same discretion as is provided by Section 4-202 concerning the selection of a presiding officer for a hearing.
(2) The presiding officer for the pre-hearing conference shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The agency shall give notice to other persons entitled to notice under any provision of law.

(3) The notice must include:

   (i) the names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;

   (ii) the name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the agency;

   (iii) the official file or other reference number, the name of the proceeding, and a general description of the subject matter;

   (iv) a statement of the time, place, and nature of the pre-hearing conference;

   (v) a statement of the legal authority and jurisdiction under which the pre-hearing conference and the hearing are to be held;

   (vi) the name, official title, mailing address and telephone number of the presiding officer for the pre-hearing conference;

   (vii) a statement that at the pre-hearing conference the proceeding, without further notice, may be converted into a conference adjudicative hearing or a summary adjudicative proceeding for disposition of the matter as provided by this Act; and

   (viii) a statement that a party who fails to attend or participate in a pre-hearing conference, hearing, or other state of an adjudicative proceeding may be held in default under this Act.

(4) The notice may include any other matter that the presiding officer considers desirable to expedite the proceedings.

COMMENT

This adds procedures that were not in the 1961 Revised Model Act. The elaborate notice of the pre-hearing conference, provided by paragraph (3), is designed to help the parties and the presiding officer ascertain whether the case can be settled or converted into another type of proceeding. In the event of conversion, the pre-hearing conference for the formal hearing may turn into the conference adjudicative hearing or summary adjudicative proceeding, pursuant to the general provisions on conversion in Section 1-107.
Paragraph (1), read in conjunction with Section 4-214(d), leaves the agency with discretion to determine whether the same person will preside at the pre-hearing conference and at the hearing, with two exceptions. First, the same person may not preside if disqualified. Second, if the agency requests the office of administrative hearings to assign an administrative law judge to preside at the pre-hearing conference and to preside at the hearing, the selection of the individual administrative law judge is made, for each state of the proceedings, by the director of the office of administrative hearings. In this situation the director, rather than the agency, has discretion to determine whether or not the same persons will be assigned to both stages of the same proceeding, unless the person in disqualified.

By conferring discretion upon the agency, subject to the exceptions noted above, to determine whether the same person will preside at the pre-hearing conference and the hearing, this section provides needed flexibility. If, for example, the agency head intends to preside at the hearing, the agency may need to assign some other person to preside at the pre-hearing conference. On the other hand, if the agency considers it appropriate for the same individual to preside at both the pre-hearing conference and the hearing, this section enables the agency to proceed on that basis, subject to the exceptions noted.

§ 4-205. [Pre-hearing Conference-Procedure and Pre-hearing Order].

(a) The presiding officer may conduct all or part of the pre-hearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

(b) The presiding officer shall conduct the pre-hearing conference, as may be appropriate, to deal with such matters as conversion of the proceeding to another type, exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form, and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The presiding officer shall issue a pre-hearing order incorporating the matters determined at the pre-hearing conference.

(c) If a pre-hearing conference is not held, the presiding officer for the hearing may issue a pre-hearing order, based on the pleadings, to regulate the conduct of the proceedings.

COMMENT

One procedural innovation is that the presiding officer may conduct all or part of the pre-hearing conference by telephone, television, or other electronic means.

The right to "see the entire proceeding" would be satisfied even if a party could not view all a reasonable opportunity, as the party had a reasonable opportunity, throughout the duration of the proceedings, to view an aspect of the proceedings that was significant to the viewer, such as the demeanor of an adverse witness while testifying.
While subsection (a) permits the conduct of proceedings by telephone, television or other electronic means, the presiding officer may of course conduct the proceedings in the physical presence of all participants.

§ 4-206. [Notice of Hearing].

(a) The presiding officer for the hearing shall set the time and place of the hearing and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter.

(b) The notice must include a copy of any pre-hearing order rendered in the matter.

(c) To the extent not included in a pre-hearing order accompanying it, the notice must include:

(1) the names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;

(2) the name, official title, mailing address and telephone number of any counsel or employee who has been designated to appear for the agency;

(3) the official file or other reference number, the name of the proceeding, and a general description of the subject matter;

(4) a statement of the time, place, and nature of the hearing;

(5) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(6) the name, official title, mailing address, and telephone number of the presiding officer;

(7) a statement of the issues involved and, to the extent known to the presiding officer, of the matters asserted by the parties; and

(8) a statement that a party who fails to attend or participate in a pre-hearing conference, hearing, or other stage of an adjudicative proceeding may be held in default under this Act.

(d) The notice may include any other matters the presiding officer considers desirable to expedite the proceedings.

(e) The agency shall give notice to persons entitled to notice under any provision of law who have not been given notice by the presiding officer. Notice under this subsection may include all types of information provided in subsections (a) through (d) or may consist of a brief statement indicating the subject matter, parties, time, place, and nature of the hearing, manner in which copies of the notice to the parties may be inspected and copied, and name and telephone number of the presiding officer.

COMMENT

This is an expanded version of 1961 Revised Model Act Section 9(b).
In addition to the categories of persons who are entitled to receive notice from the presiding officer according to this section, additional categories of persons may be given notice by the agency, unless prohibited by any provision of law, pertaining, for example, to privacy or trade secrets.

§ 4-207. [Pleadings, Briefs, Motions, Service].

(a) The presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, objections and offers of settlement.

(b) The presiding officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed initial or final orders.

(c) A party shall serve copies of any filed item on all parties, by mail or any other means prescribed by agency rule.

COMMENT

This section provides detail not found in the 1961 Revised Model Act. The section makes a distinction between the items that the presiding officer shall permit (subsection (a)), and those that the presiding officer may permit (subsection (b)). The discretion conferred by subsection (b) is intended to authorize the presiding officer to provide fair procedures, but without permitting any party to overburden the proceedings. The presiding officer's exercise of this discretion is, of course, subject to judicial review.

§ 4-208. [Default].

(a) If a party fails to attend or participate in a pre-hearing conference, hearing, or other stage of an adjudicative proceeding, the presiding officer may serve upon all parties written notice of a proposed default order, including a statement of the grounds.

(b) Within [7] days after service of a proposed default order, the party against whom it was issued may file a written motion requesting that the proposed default order be vacated and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of the party against whom a proposed default order was issued, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.

(c) The presiding officer shall either issue or vacate the default order promptly after expiration of the time within which the party may file a written motion under subsection (b).

(d) After issuing a default order, the presiding officer shall conduct any further proceedings necessary to complete the adjudication without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party.

COMMENT
The 1961 Revised Model Act made only a brief reference to default in Section 9(d). This Act provides detail.

§ 4-209. [Intervention].

(a) The presiding officer shall grant a petition for intervention if:

(1) the petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least [3] days before the hearing;

(2) the petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervener under any provision of law; and

(3) the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

(b) The presiding officer may grant a petition for intervention at any time, upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

(c) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervener's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

(1) limiting the intervener's participation to designated issues in which the intervener has a particular interest demonstrated by the petition;

(2) limiting the intervener's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(3) requiring 2 or more interveners to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(d) The presiding officer, at least [24 hours] before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

COMMENT

The 1961 Revised Model Act did not address the question of intervention, except for any implications that could be drawn from the definition of "party", in Section 1(5), as including "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." This Act provides
The distinction between subsections (a) and (b) deserves emphasis. If a party satisfies the standards of subsection (a), the presiding officer shall grant the petition to intervene. In situations not qualifying under subsection (a), the presiding officer may grant the petition to intervene upon making the determination described in subsection (b).

Paragraph (a)(2) confers standing upon a petitioner to intervene, as of right, upon demonstrating that the petitioner's "legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding . . ." However, paragraph (a)(3) imposes the further limitation, that the presiding officer shall grant the petition for intervention only upon determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact of the proceedings upon the legal rights, etc. of the petitioner for intervention, paragraph (a)(2), against the interests of justice and the need for orderly and prompt proceedings, paragraph (a)(3).

Subsection (c), authorizing the presiding officer to impose conditions upon the intervener's participation in the proceedings, is intended to permit the presiding officer to facilitate reasonable input by interveners, without subjecting the proceedings to unreasonably burdensome or repetitious presentations by intervenors.

By requiring advance notice of the presiding officer's order granting, denying, or modifying intervention, subsection (d) is intended to give the parties and the petitioners for intervention an opportunity to prepare for the adjudicative proceedings or, if the order was unfavorable, to seek judicial review on an expedited basis before the hearing commences.

§ 4-210. [Subpoenas, Discovery and Protective Orders].

(a) The presiding officer [at the request of any party shall, and upon the presiding officer's own motion,] may issue subpoenas, discovery orders and protective orders, in accordance with the rules of civil procedure.

(b) Subpoenas and orders issued under this section may be enforced pursuant to the provisions of this Act on civil enforcement of agency action.

COMMENT

The 1961 Revised Model Act did not address this matter.

The parties to whom this section applies include intervenors. Their participation, including their use of subpoenas and discovery, may be limited by conditions attached to the order granting intervention as provided by Section 4-209(c) and (d).

§ 4-211. [Procedure at Hearing].

At a hearing:

(1) The presiding officer shall regulate the course of the proceedings in conformity with any pre-hearing
order.

(2) To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the pre-hearing order.

(3) The presiding officer may give nonparties an opportunity to present oral or written statements. If the presiding officer proposes to consider a statement by a nonparty, the presiding officer shall give all parties an opportunity to challenge or rebut it and, on motion of any party, the presiding officer shall require the statement to be given under oath or affirmation.

(4) The presiding officer may conduct all or part of the hearing by telephone, television, or other electronic means, if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

(5) The presiding officer shall cause the hearing to be recorded at the agency's expense. The agency is not required, at its expense, to prepare a transcript, unless required to do so by a provision of law. Any party, at the party's expense, may cause a reporter approved by the agency to prepare a transcript from the agency's record, or cause additional recordings to be made during the hearing if the making of the additional recordings does not cause distraction or disruption.

(6) The hearing is open to public observation, except for the parts that the presiding officer states to be closed pursuant to a provision of law expressly authorizing closure. To the extent that a hearing is conducted by telephone, television, or other electronic means, and is not closed, the availability of public observation is satisfied by giving members of the public an opportunity, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

COMMENT

This is a greatly expanded treatment of procedures that were briefly addressed in the 1961 Revised Model Act, portions of Sections 9 and 10.

Participation by non-parties, paragraph (3), is adapted from the Florida Act, Section 120.57(1)(b) 4.

Telephone, television, or other electronic means may be used; see Comments to Section 4-205.

The hearing is open to public observation unless otherwise provided by law, paragraph (6). This provision may have to be aligned with general laws on open meetings.

On the opportunity to "see the entire proceeding" if it is conducted by telephone, television or other electronic means, refer to Comment to Section 4-205.

As an alternative to receiving a statement from a nonparty, the presiding officer may, within the general power to regulate the course of the proceedings, suggest that the nonparty file a petition for intervention; see Section 4-209.
§ 4-212. [Evidence, Official Notice].

(a) Upon proper objection, the presiding officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. In the absence of proper objection, the presiding officer may exclude objectionable evidence. Evidence may not be excluded solely because it is hearsay.

(b) All testimony of parties and witnesses must be made under oath or affirmation.

(c) Statements presented by nonparties in accordance with Section 4-211(3) may be received as evidence.

(d) Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party.

(e) Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties must be given an opportunity to compare the copy with the original if available.

(f) Official notice may be taken of (i) any fact that could be judicially noticed in the courts of this State, (ii) the record of other proceedings before the agency, (iii) technical or scientific matters within the agency's specialized knowledge, and (iv) codes or standards that have been adopted by an agency of the United States, of this State or of another state, or by a nationally recognized organization or association. Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or material so noticed.

COMMENT

This is an adaptation of the 1961 Revised Model Act Section 10, regarding the admissibility of evidence. Separate treatment is devoted, in Section 4-215(d) of this Act, to the type of evidence that may support a finding of fact.

Section 4-212(a) prohibits the exclusion of evidence solely because it is hearsay. This is consistent with Section 4-215(d), which rejects the requirement that findings must be supported by a "residuum" of legally admissible evidence.

Section 4-212(e) requires that parties be given an opportunity to compare a copy with the original, "if available." If the original is not available, the copy may still be received in evidence, but its probative effect is likely to be weaker than if the original were available.

§ 4-213. [Ex parte Communications].

(a) Except as provided in subsection (b) or unless required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided
at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

(b) A member of a multi-member panel of presiding officers may communicate with other members of the panel regarding a matter pending before the panel, and any presiding officer may receive aid from staff assistants if the assistants do not (i) receive ex parte communications of a type that the presiding officer would be prohibited from receiving or (ii) furnish, augment, diminish, or modify the evidence in the record.

(c) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may communicate, directly or indirectly, in connection with any issue in that proceeding, while the proceeding is pending, with any person serving as presiding officer, without notice and opportunity for all parties to participate in the communication.

(d) If, before serving as presiding officer in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (e).

(e) A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal within [10] days after notice of the communication.

(f) If necessary to eliminate the effect of an ex parte communication received in violation of this section, a presiding officer who receives the communication may be disqualified and the portions of the record pertaining to the communication may be sealed by protective order.

(g) The agency shall, and any party may, report any willful violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, for any violations of this section.

COMMENT

This is an expanded provision, adapted from the Iowa Act, Section 17A.17(1), (2) to replace 1961 Revised Model Act Section 13.

This section is not intended to apply to communications made to or by a presiding officer or staff assistant, regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, or manner of service; such topics are not regarded as "issues," provided they appear to be noncontroversial in context of the specific case.

Subsection (f) permits the disqualification of a presiding officer if necessary to eliminate the effect of an
ex parte communication. In addition, this subsection permits the pertinent portions of the record to be sealed by protective order. The intent of this provision is to remove the improper communication from the view of the successor presiding officer, while preserving it as a sealed part of the record, for purposes of subsequent administrative or judicial review. Issuance of a protective order under this subsection is permissive, not mandatory, and is therefore within the discretion of a presiding officer who has knowledge of the improper communication.

§ 4-214. [Separation of Functions].

(a) A person who has served as investigator, prosecutor or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

(b) A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

(c) A person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise a presiding officer in the same proceeding, unless a party demonstrates grounds for disqualification in accordance with Section 4-202.

(d) A person may serve as presiding officer at successive stages of the same adjudicative proceeding, unless a party demonstrates grounds for disqualification in accordance with Section 4-202.

COMMENT

This section is adapted from the Iowa Act, Section 17A.17(3). The 1961 Revised Model Act did not address the question.

The term "a person who has served" in any of the capacities mentioned in this section is intended to mean a person who has personally carried out the function, and not one who has merely supervised or been organizationally connected with a person who has personally carried out the function.

Subsections (c) and (d), dealing with the extent to which a person may serve as presiding officer at different stages of the same proceeding, should be distinguished from Section 4-213(a), which prohibits certain ex parte communications, including those between a presiding officer and another person who has served as presiding officer at a previous stage of the same proceeding. The policy issues in Section 4-213(a), regarding ex parte communications between two persons, differ from the policy issues in Section 4-214(c) and (d), regarding the participation by one individual in two stages of the same proceeding.

§ 4-215. [Final Order, Initial Order].

(a) If the presiding officer is the agency head, the presiding officer shall render a final order.
(b) If the presiding officer is not the agency head, the presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with Section 4-216.

(c) A final order or initial order must include, separately stated, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, must be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. If a party has submitted proposed findings of fact, the order must include a ruling on the proposed findings. The order must also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order must include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(d) Findings of fact must be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a civil trial. The presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence.

(e) If a person serving or designated to serve as presiding officer becomes unavailable, for any reason, before rendition of the final order or initial order, a substitute presiding officer must be appointed as provided in Section 4-202. The substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(f) The presiding officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

(g) A final order or initial order pursuant to this section must be rendered in writing within [90] days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown.

(h) The presiding officer shall cause copies of the final order or initial order to be delivered to each party and to the agency head.

COMMENT

This section provides more detail, regarding the contents of the final order, than was in 1961 Revised Model Act Section 12. In addition, this section specifies that when the agency head presides, the presiding officer shall render a final order; when the agency head does not preside, the presiding officer shall render an initial order. The possibility of review of initial orders is addressed in Section 4-216. This eliminates the proposed order found in 1961 Revised Model Act Section 11; see Comments to Section 4-216.

Subsection (c) prescribes the minimum contents of a final order rendered by the agency head under subsection (a), and of an initial order rendered by any other presiding officer under subsection (b). (On the contents of a final order issued by the agency head upon review of an initial order, see Section 4-216(i).) The
requirement that the order must include policy reasons for the decision, if it is an exercise of the agency's discretion, is particularly significant when an agency develops new policy through the adjudication of specific cases rather than through rule making. Articulation of the policy reasons in the agency's order facilitates administrative and judicial review; clarifies the precedential effect of the order, see Section 2-102; and focuses attention on policy questions that the agency should address in subsequent rule making to supersede the policy that has been developed through adjudicative proceedings, see Section 2-104(4). The requirement that the order must include a ruling on the proposed findings of fact is intended to confer discretion on the presiding officer, to make the ruling on the proposed findings submitted by the parties either detailed or summary, as appropriate in the circumstances. The requirement that an initial order must include a statement of any circumstances under which the initial order may become a final order relates to subsection (b), under which an initial order becomes a final order unless reviewed in accordance with Section 4-216. (With regard to the time when an initial order becomes a final order, and when such an order becomes effective, see Section 4-220.)

Subsection (d) of this section, derived from the Iowa Act, Section 17A.14(1), deals with the type of evidence that may support a finding of fact in an initial or final order. The standard is the kind of evidence relied upon by "reasonably prudent persons . . . in the conduct of . . . serious affairs." Findings may be based upon this type of evidence, even if it would be inadmissible in a civil trial. Thus, this Act rejects the "residuum rule," under which findings can be made only if supported, in the record, by at least a "residuum" of legally admissible evidence.

See also Section 2-102 on public inspection and indexing of final orders and the conditions for their use as precedent, and Section 4-220 on the effectiveness of orders.

§ 4-216. [Review of Initial Order; Exceptions to Reviewability].

(a) The agency head, upon its own motion may, and upon appeal by any party shall, review an initial order, except to the extent that:

(1) a provision of law precludes or limits agency review of the initial order; or

(2) the agency head, in the exercise of discretion conferred by a provision of law,

(i) determines to review some but not all issues, or not to exercise any review,

(ii) delegates its authority to review the initial order to one or more persons, or

(iii) authorizes one or more persons to review the initial order, subject to further review by the agency head.

(b) A petition for appeal from an initial order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within [10] days after rendition of the initial order. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within [10] days after its rendition. The [10]-day period for a party to file a
petition for appeal or for the agency head to give notice of its intention to review an initial order on the agency head's own motion is tolled by the submission of a timely petition for reconsideration of the initial order pursuant to Section 4-218, and a new [10]-day period starts to run upon disposition of the petition for reconsideration. If an initial order is subject both to a timely petition for reconsideration and to a petition for appeal or to review by the agency head on its own motion, the petition for reconsideration must be disposed of first, unless the agency head determines that action on the petition for reconsideration has been unreasonably delayed.

(c) The petition for appeal must state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identity the issues that it intends to review.

(d) The presiding officer for the review of an initial order shall exercise all the decision-making power that the presiding officer would have had to render a final order had the presiding officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the presiding officer upon notice to all parties.

(e) The presiding officer shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) Before rendering a final order, the presiding officer may cause a transcript to be prepared, at the agency's expense, of such portions of the proceeding under review as the presiding officer considers necessary.

(g) The presiding officer may render a final order disposing of the proceeding or may remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a matter, the presiding officer may order such temporary relief as is authorized and appropriate.

(h) A final order or an order remanding the matter for further proceedings must be rendered in writing within [60] days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.

(i) A final order or an order remanding the matter for further proceedings under this section must identify any difference between this order and the initial order and must include, or incorporate by express reference to the initial order, all the matters required by Section 4-215(c).

(j) The presiding officer shall cause copies of the final order or order remanding the matter for further proceedings to be delivered to each party and to the agency head.

COMMENT

This section establishes a general mechanism for the agency head to review initial orders, making the proposed order of 1961 Revised Model Act Section 11 unnecessary. The reviewability of initial orders may be limited or eliminated by a provision of law, pursuant to subsection (a).

See Section 4-220 on the effectiveness of orders.
A party may submit to the presiding officer a petition for stay of effectiveness of an initial or final order within [7] days after its rendition unless otherwise provided by statute or stated in the initial or final order. The presiding officer may take action on the petition for stay, either before or after the effective date of the initial or final order.

COMMENT

The 1961 Revised Model Act mentioned a stay granted by the agency or ordered by the court only in context of judicial review, Section 15(c). This Act makes a general provision for a stay, which may be invoked, for example, pending the agency head's review of an initial order. See also Section 5-111, on stay and other temporary remedies pending judicial review.

§ 4-218. [Reconsideration].

Unless otherwise provided by statute or rule:

(1) Any party, within [10] days after rendition of an initial or final order, may file a petition for reconsideration, stating the specific grounds upon which relief is requested. The filing of the petition is not a prerequisite for seeking administrative or judicial review.

(2) The petition must be disposed of by the same person or persons who rendered the initial or final order, if available.

(3) The presiding officer shall render a written order denying the petition, granting the petition and dissolving or modifying the initial or final order, or granting the petition and setting the matter for further proceedings. The petition may be granted, in whole or in part, only if the presiding officer states, in the written order, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the order. The petition is deemed to have been denied if the presiding officer does not dispose of it within [20] days after the filing of the petition.

COMMENT

The 1961 Revised Model Act mentioned rehearing only in context of determining the time for seeking judicial review, Section 15(b).

This Act establishes the general right to seek reconsideration of an initial or final order unless otherwise provided by statute or rule.

Paragraph (1) adds that the filing of such a petition is not a prerequisite for seeking administrative or judicial review. A conforming provision appears in Section 5-107(2), relieving a petitioner for judicial review from the need to exhaust administrative remedies to the extent that this Act or any other statute states that exhaustion is not required.

§ 4-219. [Review by Superior Agency].
If, pursuant to statute, an agency may review the final order of another agency, the review is deemed to be a continuous proceeding as if before a single agency. The final order of the first agency is treated as an initial order and the second agency functions as though it were reviewing an initial order in accordance with Section 4-216.

COMMENT

This section derives from the Iowa Act, Section 17A.15(5). No similar provision was in the 1961 Revised Model Act.

§ 4-220. [Effectiveness of Orders].

(a) Unless a later date is stated in a final order or a stay is granted, a final order is effective [10] days after rendition, but:

   (1) a party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the final order;

   (2) a nonparty may not be required to comply with a final order unless the agency has made the final order available for public inspection and copying or the nonparty has actual knowledge of the final order.

(b) Unless a later date is stated in an initial order or a stay is granted, the time when an initial order becomes a final order in accordance with Section 4-215 is determined as follows:

   (1) when the initial order is rendered, if administrative review is unavailable;

   (2) when the agency head renders an order stating, after a petition for appeal has been filed, that review will not be exercised, if discretion is available to make a determination to this effect; or

   (3) [10] days after rendition of the initial order, if no party has filed a petition for appeal and the agency head has not given written notice of its intention to exercise review.

(c) Unless a later date is stated in an initial order or a stay is granted, an initial order that becomes a final order in accordance with subsection (b) and Section 4-215 is effective [10] days after becoming a final order, but:

   (1) a party may not be required to comply with the final order unless the party has been served with or has actual knowledge of the initial order or of an order stating that review will not be exercised; and

   (2) a nonparty may not be required to comply with the final order unless the agency has made the initial order available for public inspection and copying or the nonparty has actual knowledge of the initial order or of an order stating that review will not be exercised.
(d) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with Section 4-501.

COMMENT

The 1961 Revised Model Act, Section 2(b), dealt briefly with the effectiveness of rules, orders and decisions. This Act more carefully distinguishes between the effective date of an order and the time when it can be enforced. This section also sets the time when an initial order becomes a final order.

The requirement of "actual knowledge" in subsections (a) and (c) is intended to include not only knowledge that an order has been issued, but also knowledge of the general contents of the order insofar as it pertains to the person who is required to comply with it. If a question arises whether a particular person had actual knowledge of an order, this must be resolved in the manner that other fact questions are resolved.

The binding effect of an order upon nonparties who have actual knowledge may be illustrated by a state law that prohibits wholesalers from delivering alcoholic beverages to liquor dealers unless the dealers hold valid licenses from the state beverage agency. If the agency issues an order revoking the license of a particular dealer, this order is binding on any wholesaler who has actual knowledge of it, even before the order is made available for public inspection and copying; the order binds all wholesalers, including those without actual knowledge, after it has been made available for public inspection and copying.

§ 4-221. [Agency Record].

(a) An agency shall maintain an official record of each adjudicative proceeding under this Chapter.

(b) The agency record consists only of:

(1) notices of all proceedings;
(2) any pre-hearing order;
(3) any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
(4) evidence received or considered;
(5) a statement of matters officially noticed;
(6) proffers of proof and objections and rulings thereon;
(7) proposed findings, requested orders, and exceptions;
(8) the record prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;
(9) any final order, initial order, or order on reconsideration;
(10) staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with Section 4-213(b); and

(11) matters placed on the record after an ex parte communication.

c) Except to the extent that this Act or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this Chapter and for judicial review thereof.

COMMENT

This is an expanded version of 1961 Revised Model Act Section 9(e).

Subsection (c) states the principle of "exclusiveness of the record" in formal adjudicative proceedings. Except as otherwise provided by this Act or another statute, the agency record is the exclusive basis, both for agency action and for judicial review. This principle is also the basis of Section 4-215(d), which requires findings of fact to be based exclusively upon evidence of record and on matters officially noticed. The latter also become part of the agency record; see paragraph (b)(5). See also Sections 5-113, 114 and 115 on the record for judicial review, which may in limited circumstances include new evidence in addition to that contained in the agency record.

CHAPTER III

OFFICE OF ADMINISTRATIVE HEARINGS

§ 4-301. [Office of Administrative Hearings-Creation, Powers, Duties].

(a) There is created the office of administrative hearings within the [Department of ______], to be headed by a director appointed by the governor [and confirmed by the senate].

(b) The office shall employ administrative law judges as necessary to conduct proceedings required by this Act or other provision of law. [Only a person admitted to practice law in [this State] [a jurisdiction in the United States] may be employed as an administrative law judge.]

(c) If the office cannot furnish one of its administrative law judges in response to an agency request, the director shall designate in writing a full-time employee of an agency other than the requesting agency to serve as administrative law judge for the proceeding, but only with the consent of the employing agency. The designee must possess the same qualifications required of administrative law judges employed by the office.

(d) The director may furnish administrative law judges on a contract basis to any governmental entity to conduct any proceeding not subject to this Act.

(e) The office may adopt rules:

   (1) to establish further qualifications for administrative law judges, procedures by which
candidates will be considered for employment, and the manner in which public notice of vacancies in the staff of the office will be given;

(2) to establish procedures for agencies to request and for the director to assign administrative law judges; however, an agency may neither select nor reject any individual administrative law judge for any proceeding except in accordance with this Act;

(3) to establish procedures and adopt forms, consistent with this Act, the model rules of procedure, and other provisions of law, to govern administrative law judges;

(4) to establish standards and procedures for the evaluation, training, promotion, and discipline of administrative law judges; and

(5) to facilitate the performance of the responsibilities conferred upon the office by this Act.

(f) The director may:

(1) maintain a staff of reporters and other personnel; and

(2) implement the provisions of this section and rules adopted under its authority.

COMMENT

The 1961 Revised Model Act did not discuss the possibility of creating an independent organization of administrative law judges. A number of states have such systems, including California, Colorado, Florida, Massachusetts, Minnesota, New Jersey, Tennessee and Washington. The question whether the use of administrative law judges from the central panel is permissive or mandatory depends upon whether or not a state adopts certain language that is bracketed in Section 4-202(a); see that subsection and the related comment.

This Act uses the term "administrative law judge," which is used in a number of state statutes as well as in the Federal APA. Some jurisdictions use other terms, such as "hearing examiner," "hearing officer" or "referee," to denote persons performing similar functions.

Cross-reference should be made to Sections 4-215 and 4-216, regarding the powers of administrative law judges when they preside over formal adjudicative proceedings. Since the administrative law judges are obviously not the agency head, they come within the requirements of Section 4-215(b), to the effect that a presiding officer who is not the agency head shall render an initial order. Such orders are generally appealable to the agency head, under Section 4-216(a), but a provision of law may depart from this general structure. Consequently, a provision of law may confer finality upon the initial order of an administrative law judge, or may declare an initial order to be appealable to one or more persons other than the agency head.

The provisions on initial orders and final orders of Sections 4-215 and 4-216 apply also to conference adjudicative hearings, since Section 4-402 incorporates into the conference adjudicative hearing all procedures of the Act pertaining to formal hearings unless otherwise stated, and no special provisions have been inserted
regarding presiding officers at conference adjudicative hearings.

Administrative law judges may also preside at summary adjudicative proceedings, pursuant to Section 4-503(a). As regards emergency adjudication, Section 4-501 does not specify who may serve as presiding officer. Thus the Act does not preclude the use of an administrative law judge in such proceedings, if this would fulfill the requirement of subsection (b) that the agency take "only such action as is necessary."

The present section locates the office of administrative hearings within the "Department of ________" without attempting to identify the appropriate department. The intent is to place the office in the most neutral possible organizational position, so as to maximize the independence of the office.

The power conferred upon the office of administrative hearings by paragraph (e)(4), to establish standards and procedures for the evaluation, training, promotion and discipline of administrative law judges, should be related to the civil service law of the state.

CHAPTER IV

CONFERENCE ADJUDICATIVE HEARING

§ 4-401. [Conference Adjudicative Hearing-Applicability].

A conference adjudicative hearing may be used if its use in the circumstances does not violate any provision of law and the matter is entirely within one or more categories for which the agency by rule had adopted this chapter [; however, those categories may include only the following:

(1) a matter in which there is no disputed issue of material fact; or

(2) a matter in which there is a disputed issue of material fact, if the matter involves only:

(i) a monetary amount of not more than [$1,000];

(ii) a disciplinary sanction against a prisoner;

(iii) a disciplinary sanction against a student which does not involve expulsion from an academic institution or suspension for more than [10] days;

(iv) a disciplinary sanction against a public employee which does not involve discharge from employment or suspension for more than [10] days;

(v) a disciplinary sanction against a licensee which does not involve revocation, suspension, annulment, withdrawal, or amendment of a license; or

(vi) . . . ]

COMMENT
The 1961 Revised Model Act contained no comparable provision. The conference adjudicative hearing is available, under this section, if its use in the circumstances does not violate any provision of law, and if the matter is within a category for which the agency has by rule adopted the conference adjudicative hearing. The bracketed provisions in Section 4-401 set forth a list of categories, so as to impose limits on the authority of the agency to adopt the conference adjudicative hearing by rule.

Paragraph (1) permits the conference hearing to be used, regardless of the type or amount of the matter at issue, if no disputed issue of material fact has appeared. An example might be a utility rate proceeding in which the utility company and the public service commission have agreed on all material facts. If, however, consumers intervene and raise material fact disputes, the proceeding will be subject to conversion from the conference adjudicative hearing to the formal adjudicative hearing in accordance with Section 1-107.

Paragraph (2) permits the conference adjudicative hearing to be used, even if a disputed issue of material fact has appeared, if the amount or other stake involved is relatively minor, or if the matter involves a disciplinary sanction against a prisoner. These categories overlap, to some extent, with the categories of still less serious items that may be subject to the summary adjudicative proceeding under Section 4-502. To the extent of overlap between the categories for which the conference adjudicative hearing and the summary adjudicative proceeding are available, the agency may by rule adopt the conference adjudicative hearing, the summary adjudicative proceeding, or neither. If the agency adopts neither, the formal adjudicative hearing automatically applies, pursuant to Section 2-201.

§ 4-402. [Conference Adjudicative Hearing-Procedures].

The procedures of this Act pertaining to formal adjudicative hearings apply to a conference adjudicative hearing, except to the following extent:

(1) If a matter is initiated as a conference adjudicative hearing, no pre-hearing conference may be held.

(2) The provisions of Section 4-210 do not apply to conference adjudicative hearings insofar as those provisions authorize the issuance and enforcement of subpoenas and discovery orders, but do apply to conference adjudicative hearings insofar as those provisions authorize the presiding officer to issue protective orders at the request of any party or upon the presiding officer's motion.

(3) Paragraphs (1), (2) and (3) of Section 4-211 do not apply; but,

   (i) the presiding officer shall regulate the course of the proceedings,

   (ii) only the parties may testify and present written exhibits, and

   (iii) the parties may offer comments on the issues.

COMMENT
This section indicates that the conference adjudicative hearing is a "peeled down" version of the formal adjudicative hearing. The conference adjudicative hearing does not have a pre-hearing conference, discovery, or testimony of anyone other than the parties.

§ 4-403. [Conference Adjudicative Hearing-Proposed Proof].

(a) If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require any party to state the identity of the witnesses or other sources through whom the party would propose to present proof if the proceeding were converted to a formal adjudicative hearing, but if disclosure of any fact, allegation, or source is privileged or expressly prohibited by any provision of law, the presiding officer may require the party to indicate that confidential facts, allegations, or sources are involved, but not to disclose the confidential facts, allegations, or sources.

(b) If a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from whom the party would propose to obtain those facts if the proceeding were converted to a formal adjudicative hearing.

COMMENT

This section permits the presiding officer at the conference adjudicative hearing to obtain an indication, from the parties, of the type of proof that could be presented if the proceeding were converted to a formal adjudicative hearing.

CHAPTER V

EMERGENCY AND SUMMARY ADJUDICATIVE PROCEEDINGS

§ 4-501. [Emergency Adjudicative Proceedings].

(a) An agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.

(b) The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.

(c) The agency shall render an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.

(d) The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when rendered.

(e) After issuing an order pursuant to this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger.
(f) The agency record consists of any documents regarding the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

(g) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review thereof.

COMMENT

This authorizes summary proceedings for emergencies, a matter not addressed in the 1961 Revised Model Act. This section is adapted from the Florida Act, Section 120.59(3).

If the emergency proceedings have rendered the matter completely moot, subsection (e) does not direct the agency to conduct useless follow-up proceedings, since these would not be "required" in the circumstances; see Comment to Section 4-104.

Subsection (f) requires the agency to maintain an official agency record, consisting of any documents that were considered or prepared by the agency in the emergency proceedings. However, subsection (g) states that, unless required by another provision of law, this agency record need not constitute the exclusive basis, either for the agency action in the emergency or for judicial review. The agency thus has flexibility to act on the basis of non-record information, and to render its order orally, if necessary to cope with the emergency.

If the emergency adjudicative order is issued orally, a person seeking judicial review of the order must set forth, in the petition for review, a summary or brief description of the agency action; see Section 5-109. See also Sections 5-113, 114 and 115 on the record for judicial review, which may in limited circumstances include new evidence in addition to that contained in the agency record.

§ 4-502. [Summary Adjudicative Proceedings-Applicability].

An agency may use summary adjudicative proceedings if:

(1) the use of those proceedings in the circumstances does not violate any provision of law;

(2) the protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties; and

(3) the matter is entirely within one or more categories for which the agency by rule has adopted this section and Sections 4-503 to 4-506 [; however, those categories may include only the following:

(i) a monetary amount of not more than [$100];

(ii) a reprimand, warning, disciplinary report, or other purely verbal sanction without continuing impact against a prisoner, student, public employee, or licensee;
(iii) the denial of an application after the applicant has abandoned the application;

(iv) the denial of an application for admission to an educational institution or for employment by an agency;

(v) the denial, in whole or in part, of an application if the applicant has an opportunity for administrative review in accordance with Section 4-504;

(vi) a matter that is resolved on the sole basis of inspections, examinations, or tests;

(vii) the acquisition, leasing, or disposal of property or the procurement of goods or services by contract;

(viii) any matter having only trivial potential impact upon the affected parties; and

(ix) ...........

**COMMENT**

This section imposes three conditions on the use of the summary adjudicative proceeding. First, the use of this type proceeding in the circumstances must not violate any provision of law.

The second condition on the use of the summary adjudicative proceeding is that protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties. This condition overlaps with the first condition, in situations where a provision of law other than this Act requires the agency to give such notice and opportunity, since the requirement is then imposed, both by a provision of law (thereby violating condition No. 1) and by the needs of the public interest as expressed by the provision of law (thereby violating the public interest test of condition No. 2). But even if no provision of law requires that notice and an opportunity to participate be given to persons other than the parties, the second condition would be violated if the agency failed to give but should have given such notice and opportunity, on the basis of the agency’s own perception of the needed protection of the public interest. A dispute on this matter would ultimately be resolved by judicial review. The notion that the protection of the public interest may require notice and an opportunity to participate to be given to persons other than the parties is adapted from the Delaware Act, Section 6424, which uses the term "matter of general public interest" in a somewhat similar context.

The third condition is that the matter must be entirely within one or more of the categories for which the agency has by rule adopted the summary adjudicative proceeding. A series of bracketed categories suggests the situations for which an agency may by rule adopt the summary adjudicative proceeding.

On the possibility of overlap between the availability of the summary adjudicative proceeding and the availability of the conference adjudicative hearing, see Comment to Section 4-401.
§ 4-503. [Summary Adjudicative Proceedings-Procedures].

(a) The agency head, one or more members of the agency head, one or more administrative law judges assigned by the office of administrative hearings in accordance with Section 4-301 [, or, unless prohibited by law, one or more other persons designated by the agency head], in the discretion of the agency head, may be the presiding officer. Unless prohibited by law, a person exercising authority over the matter is the presiding officer.

(b) If the proceeding involves a monetary matter or a reprimand, warning, disciplinary report, or other sanction:

(1) the presiding officer, before taking action, shall give each party an opportunity to be informed of the agency's view of the matter and to explain the party's view of the matter; and

(2) the presiding officer, at the time any unfavorable action is taken, shall give each party a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the action, and a notice of any available administrative review.

(c) An order rendered in a proceeding that involves a monetary matter must be in writing. An order in any other summary adjudicative proceeding may be oral or written.

(d) The agency, by reasonable means, shall furnish to each party notification of the order in a summary adjudicative proceeding. Notification must include at least a statement of the agency's action and a notice of any available administrative review.

COMMENT

Subsection (a) establishes a presumption that a person exercising authority over the matter is the presiding officer.

Subsection (b) establishes a threshold type of discussion and explanation in monetary and reprimand cases, adapted to some extent from the informal hearing of the Florida Act, Section 120.57(2).

Subsection (c) requires written orders only in monetary cases, and leaves the presiding officer with discretion to render a written or oral order in other summary adjudicative proceedings. If the order is rendered orally, it does not become a matter of record, Section 4-506.

Subsection (d) requires the agency to notify each party by using "reasonable means," a term that permits flexibility according to the circumstances.

§ 4-504. [Administrative Review of Summary Adjudicative Proceedings-Applicability].

Unless prohibited by any provision of law, an agency, on its own motion, may conduct administrative review of an order resulting from summary adjudicative proceedings, and shall conduct this review upon the
written or oral request of a party if the agency receives the request within [10] days after furnishing notification under Section 4-503(d).

COMMENT

This section establishes, unless prohibited by any provision of law, the right of a party to obtain administrative review upon request, as well as the right of an agency to conduct administrative review on the agency's own motion. The agency must notify each party of the availability of any administrative review when furnishing notification of an order resulting from summary adjudicative proceedings under Section 4-503(d).

If a provision of law precludes administrative review, a party can seek judicial review of the order resulting from summary adjudicative proceedings. The intent of this section is to vest discretion in agencies, unless otherwise provided by statute, to adopt rules precluding administrative review.

Reference should be made to Section 4-502(3)(v), permitting use of summary adjudicative proceedings for the denial of an application, but only if the applicant has an opportunity for administrative review, in accordance with Section 4-504. Thus, if administrative review is precluded, the agency may not use summary adjudicative proceedings for the denial of an application (unless the applicant has abandoned the application, see Section 4-502(3)(iii)).

§ 4-505. [Administrative Review of Summary Adjudicative Proceedings-Procedures].

Unless otherwise provided by statute [or rule]:

(1) An agency need not furnish notification of the pendency of administrative review to any person who did not request the review, but the agency may not take any action on review less favorable to any party than the original order without giving that party notice and an opportunity to explain that party's view of the matter.

(2) The reviewing officer, in the discretion of the agency head, may be any person who could have presided at the summary adjudicative proceeding, but the reviewing officer must be one who is authorized to grant appropriate relief upon review.

(3) The reviewing officer shall give each party an opportunity to explain the party's view of the matter unless the party's view is apparent from the written materials in the file submitted to the reviewing officer. The reviewing officer shall make any inquiries necessary to ascertain whether the proceeding must be converted to a conference adjudicative hearing or a formal adjudicative hearing.

(4) The reviewing officer may render an order disposing of the proceeding in any manner that was available to the presiding officer at the summary adjudicative proceeding or the reviewing officer may remand the matter for further proceedings, with or without conversion to a conference adjudicative hearing or a formal adjudicative hearing.
(5) If the order under review is or should have been in writing, the order on review must
be in writing, including a brief statement of findings of fact, conclusions of law, and policy
reasons for the decision if it is an exercise of the agency's discretion, to justify the order, and a
notice of any further available administrative review.

(6) A request for administrative review is deemed to have been denied if the reviewing
officer does not dispose of the matter or remand it for further proceedings within [20] days after
the request is submitted.

COMMENT

This section establishes procedures for administrative review of summary adjudicative proceedings, unless
otherwise provided by statute [or rule]. The words "or rule" are bracketed, to point out that an adopting state
should consider whether, as a matter of policy, an agency should be authorized to adopt different procedures for
administrative review than are set forth in this Act.

Paragraph (1) relieves the agency of the need to furnish notification of the pendency of administrative
review to a person who did not request the review. The intent of this provision is to enable an agency to perform
"quality control" types of administrative review without the participation or knowledge of the affected parties.
Notice and an opportunity to explain must, however, be given to any party before the issuance of an order on
review less favorable to that party than was the original order.

The powers of the reviewing officer under this section include the power to dispose of the matter on the
merits, with or without converting it to another type of adjudicative proceeding under Section 1-107, or to remand
the matter for further proceedings, with or without conversion to another type of adjudicative proceeding.

§ 4-506. [Agency Record of Summary Adjudicative Proceedings and
Administrative Review].

(a) The agency record consists of any documents regarding the matter that were considered or prepared
by the presiding officer for the summary adjudicative proceeding or by the reviewing officer for any review. The
agency shall maintain these documents as its official record.

(b) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive
basis for agency action in summary adjudicative proceedings or for judicial review thereof.

COMMENT

The agency record in summary adjudicative proceedings, including administrative review, is limited to
documents that were considered or prepared. Thus if an order is issued orally, it does not become part of the
record.

Subsection (b) states that, unless otherwise required by a provision of law, the agency record in summary
adjudicative proceedings need not constitute the exclusive basis, either for the agency action or for judicial
review. The agency thus has flexibility to act on the basis of non-record information, and to render its order orally
If the order resulting from summary adjudicative proceedings is issued orally, a person seeking judicial review of an oral order must set forth, in the petition for review, a summary or brief description of the agency action; see Section 5-109. See also Sections 5-113, 115 and 115 on the record for judicial review, which may in limited circumstances include new evidence in addition to that contained in the agency record.

ARTICLE V

JUDICIAL REVIEW AND CIVIL ENFORCEMENT

CHAPTER I

JUDICIAL REVIEW

§ 5-101. [Relationship Between this Act and Other Law on Judicial Review and Other Judicial Remedies].

This Act establishes the exclusive means of judicial review of agency action, but:

(1) The provisions of this Act for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(2) Ancillary procedural matters, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this Act, by other applicable law.

(3) If the relief available under other sections of this Act is not equal or substantially equivalent to the relief otherwise available under law, the relief otherwise available and the related procedures supersede and supplement this Act to the extent necessary for their effectuation. The applicable provisions of this Act and other law must be combined to govern a single proceeding or, if the court orders, 2 or more separate proceedings, with or without transfer to other courts, but no type of relief may be sought in a combined proceeding after expiration of the time limit for doing so.

COMMENT

The 1961 Revised Model Act did not purport to establish an exclusive method of judicial review (Section 15(a) and Comment.) This Act establishes an exclusive method, with some exceptions.

In addition, this section permits the provisions of this Act to be combined with other applicable law so that all matters arising from agency action may be disposed of in a single lawsuit, or in a connected series of suits resulting from a court order of severance.

Appropriate amendments of court rules should be sought where necessary for full implementation of
Article V of this Act.

§ 5-102. [Final Agency Action Reviewable].

(a) A person who qualifies under this Act regarding (i) standing (Section 5-106), (ii) exhaustion of administrative remedies (Section 5-107), and (iii) time for filing the petition for review (Section 5-108), and other applicable provisions of law regarding bond, compliance, and other pre-conditions is entitled to judicial review of final agency action, whether or not the person has sought judicial review of any related non-final agency action.

(b) For purposes of this section and Section 5-103:

(1) "Final agency action" means the whole or a part of any agency action other than non-final agency action;

(2) "Non-final agency action" means the whole or a part of an agency determination, investigation, proceeding, hearing, conference, or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action of that agency or another agency.

COMMENT

Subsection (a) ties together the threshold requirements for obtaining judicial review of final agency action, and guarantees the right to judicial review if these requirements are met.

Subsection (b) defines "final" and "non-final" agency action for purposes of Sections 5-102 and 5-103. This definition is crucial, since Section 5-102 guarantees the right to judicial review of final agency action if the stated requirements are met, while Section 5-103 confers only a limited right to judicial review of non-final agency action. Paragraph (b)(1) of Section 5-102 defines "final agency action" as any agency action other than non-final. Accordingly, any agency action that does not fit within the paragraph (b)(2) definition of "non-final" falls automatically into the paragraph (b)(1) definition of "final."

Included in the paragraph (b)(2) definition of "non-final agency action" is "an agency determination . . . that the agency . . . is reasonably believed to intend to be preliminary . . ." The purpose of this provision is illustrated by the following hypothetical facts. An agency takes action that the agency regards as final, but gives a misleading impression that causes a party reasonably to believe that the agency's action is non-final. The party makes no attempt, for the time being, to seek judicial review, since the party anticipates that a petition for review will be timely if filed within the proper time after the expected final agency action. When the party discovers that the agency regards the action already taken as being final, the party promptly seeks judicial review. The agency moves to dismiss the petition for judicial review as untimely, based on the time that has elapsed between the agency action and the filing of the petition for review. The agency's motion to dismiss must be denied, since the agency action is regarded as "non-final" for as long as the party reasonably believed it to be non-final. The time for seeking judicial review therefore starts to run only when the party can longer reasonably believe that the agency action was non-final. If the petition for judicial review is filed within the appropriate period after that time, the petition is timely and the party is entitled to judicial review under Section 5-102, whether or not the party previously sought judicial review of any related non-final agency action; see subsection (a).
The term "agency action" is defined in Section 1-102(2). This term includes rules, orders, and other types of agency action. This Act contains a single set of provisions for judicial review of all agency action; see Sections 5-105 and 106 and Comments.

§ 5-103. [Non-final Agency Action Reviewable].

A person is entitled to judicial review of non-final agency action only if:

(1) it appears likely that the person will qualify under Section 5-102 for judicial review of the related final agency action; and

(2) postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

COMMENT

This section establishes the limited right to review of non-final agency action. See Section 5-102 and Comment, on the distinction between final and non-final agency action. The 1961 Revised Model Act, Section 15(a), provided for judicial review of "preliminary, procedural, or intermediate agency action" with regard to contested cases "if review of the final agency decision would not provide an adequate remedy." This Act establishes an additional basis—irreparable harm disproportionate to the public benefit derived from postponement of judicial review.

§ 5-104. [Jurisdiction, Venue].

(a) The [trial court of general jurisdiction] shall conduct judicial review.

(b) Venue is in the [district] [that includes the state capital] [where the petitioner resides or maintains a principal place of business] unless otherwise provided by law.

[Alternative B.]

§ 5-104. [Jurisdiction, Venue].

(a) The [appellate court] shall conduct judicial review.

(b) Venue is in the [district] [that includes the state capital] [where the petitioner resides or maintains a principal place of business] unless otherwise provided by law.

(c) If evidence is to be adduced in the reviewing court in accordance with Section 5-114(a), the court shall appoint a [referee, master, trial court judge] for this purpose, having due regard for the convenience of the parties.

COMMENT

Alternative A is similar to the 1961 Revised Model Act, sections 7 and 15(b), providing for review in the
trial court of general jurisdiction.

Alternative B places review in the appellate court, following Florida and Oregon. Alternative B requires a provision, drafted as subsection (c) for this alternative, to arrange for the reception of evidence when needed for the appellate court.

The bracketed provisions on venue in subsection (b) of each alternative may require elaboration, either by an adopting state's insertion of additional language in this subsection, or by the incorporation of other law on venue in accordance with the general statement on incorporation in Section 5-101(2). For example, the bracketed provision on venue in the state capital may have to be expanded, in states where some agencies are headquartered outside the state capital, to include the district that includes the agency's headquarters. The bracketed provisions on venue where the petitioner resides or maintains a principal place of business may have to be expanded to deal with agency action affecting nonresidents, or numerous persons, or a specific piece of real property.

§ 5-105. [Form of Action].

Judicial review is initiated by filing a petition for review in [the appropriate] court. A petition may seek any type of relief available under Sections 5-101(3) and 5-117.

COMMENT

This section establishes a single form of action, the petition for review. New York's Article 78 proceeding was an early model. This approach differs significantly from the 1961 Revised Model Act, which provided one form of action for declaratory judgment on the validity or applicability of rules (Section 7), another for judicial review of contested cases (Section 15), and none for judicial review of agency action other than rules or contested cases.

While this Act designates the unitary form of action as a "petition for review," other terminology would be equally acceptable, and such terms as "appeal" or "complaint" may be substituted if they would more readily fit within the usage of a particular state. The unitary form of action here called a "petition for review"-is available as of right in accordance with Sections 5-102 and 5-103. This Act does not elaborate upon the responsive pleadings that may be filed after the petition; these matters should be adapted from existing law, such as the applicable rules of civil procedure, in accordance with Section 5-101(2). For example, existing law should be consulted on the time and manner in which a respondent may file a motion to dismiss the petition on the grounds that the petitioner lacks standing or is otherwise not entitled to maintain the action.

Whether called a "petition for review" or some other title, the unitary form of action provided in this Act is a type of limited review of agency action, as prescribed by various sections of Article V. Another statute may, however, impose different standards for judicial review; see Sections 5-101(3) and 5-116(a).

On the filing and contents of the petition for review under this Act, see Section 5-109.

§ 5-106. [Standing].

(a) The following persons have standing to obtain judicial review of final or non-final agency action:
(1) a person to whom the agency action is specifically directed;

(2) a person who was a party to the agency proceedings that led to the agency action;

(3) if the challenged agency action is a rule, a person subject to that rule;

(4) a person eligible for standing under another provision of law; or

(5) a person otherwise aggrieved or adversely affected by the agency action. For purposes of this paragraph, no person has standing as one otherwise aggrieved or adversely affected unless:

(i) the agency action has prejudiced or is likely to prejudice that person;

(ii) that person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(iii) a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

[ (b) A standing committee of the legislature which is required to exercise general and continuing oversight over administrative agencies and procedures may petition for judicial review of any rule or intervene in any litigation arising from agency action.]

COMMENT

The 1961 Revised Model Act conferred standing to challenge a rule upon a person who alleged that "the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff" (Section 7), and conferred standing to challenge a contested case decision upon a person who was "aggrieved" by that decision (Section 15). Since the 1961 Revised Model Act did not provide for judicial review of agency action other than rules or contested cases, that Act did not address the question of standing to seek judicial review of agency action that is neither a rule nor a contested case decision.

This Act provides a single type of judicial review of agency action; see Section 5-105 and Comment. The provisions on standing must therefore accommodate persons who seek judicial review of the entire range of agency actions, including rules, orders, and other types; see Section 1-102(2), defining "agency action."

Paragraphs (a)(1), (2) and (3) confer standing, as of right, to persons within the categories described in those paragraphs. Paragraph (a)(4) incorporates any other provision of law that confers standing. Paragraph (a)(5) establishes a residual category of persons "otherwise aggrieved or adversely affected by the agency action," but in order to qualify under this paragraph, a person must at least satisfy all three of the requirements that are set forth in subparagraphs (i) through (iii). The scope of paragraph (a)(5) will ultimately be established by judicial interpretation.

Subsection (b), conferring standing on a legislative oversight committee, is bracketed. This subsection
makes the distinction between the standing of a legislative oversight committee to petition for judicial review of a rule, and to intervene in any litigation arising from any type of agency action.

§ 5-107. [Exhaustion of Administrative Remedies].

A person may file a petition for judicial review under this Act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review, but:

(1) a petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, or have petitioned for its amendment or repeal;

(2) a petitioner for judicial review need not exhaust administrative remedies to the extent that this Act or any other statute states that exhaustion is not required; or

(3) the court may relieve a petitioner of the requirement to exhaust any or all administrative remedies, to the extent that the administrative remedies are inadequate, or requiring their exhaustion would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

COMMENT

Paragraph (1), like the 1961 Revised Model Act, imposes no exhaustion requirement on the petitioner for judicial review of a rule.

Paragraph (2) incorporates by reference any provision of this Act or other statute that relieves a petitioner from the exhaustion requirement. See Section 4-218(1) of this Act, to the effect that the filing of a petition for reconsideration is not a prerequisite for seeking administrative or judicial review.

Paragraph (3) authorizes the reviewing court to relieve the petitioner of the exhaustion requirement in limited circumstances; this enables the court to exercise some discretion, by contrast to the 1961 Revised Model Act Section 15(a), which made judicial review of contested cases available only to a person "who has exhausted all administrative remedies available within the agency and who is aggrieved . . ."

See also Section 5-112, limiting new issues that may be raised in the reviewing court, which is in effect an elaboration of the doctrine of exhaustion of administrative remedies.

§ 5-108. [Time for Filing Petition for Review].

Subject to other requirements of this Act or of another statute:

(1) A petition for judicial review of a rule may be filed at any time, except as limited by Section 3-113(b).

(2) A petition for judicial review of an order is not timely unless filed within [30] days after rendition of the order, but the time is extended during the pendency of the petitioner's timely attempts to exhaust administrative remedies, if the attempts are not clearly frivolous or repetitious.
(3) A petition for judicial review of agency action other than a rule or order is not timely unless filed within [30] days after the agency action, but the time is extended:

(i) during the pendency of the petitioner's timely attempts to exhaust administrative remedies, if the attempts are not clearly frivolous or repetitious; and

(ii) during any period that the petitioner did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this Act.

COMMENT

The 1961 Revised Model Act imposed a 2-year time limit for seeking judicial review of a rule on procedural grounds, Section 3(c), no time limit for seeking review of a rule on other grounds, Section 7, and a limit of [30] days for seeking review of a contested case, Section 15(b).

This Act is similar, with no time limit for seeking review of rules (except for a 2-year limit on procedural challenges, provided by Section 3-113(b) and incorporated into Section 5-108 as "other requirements of this Act"), and with a [30] day limit for seeking review of orders. Since this Act provides for judicial review of agency action that includes but is not limited to rules or orders, Section 5-108(3) adds that agency action other than a rule or order may be reviewed within [30] days, with some exceptions.

This section starts with the statement that its provisions are subject to other requirements of this Act or of another statute. See Section 2-103(h), establishing a special time limit for a petitioner to seek judicial review of an agency's failure to issue a declaratory order, and Section 3-113(b), establishing a 2 year time limit for seeking judicial review of a rule on procedural grounds.

§ 5-109. [Petition for Review-Filing and Contents].

(a) A petition for review must be filed with the clerk of the court.

(b) A petition for review must set forth:

(1) the name and mailing address of the petitioner;

(2) the name and mailing address of the agency whose action is at issue;

(3) identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;

(4) identification of persons who were parties in any adjudicative proceedings that led to the agency action;

(5) facts to demonstrate that the petitioner is entitled to obtain judicial review;
(6) the petitioner's reasons for believing that relief should be granted; and

(7) a request for relief, specifying the type and extent of relief requested.

COMMENT

The detail contained in this section may serve as a guide to unrepresented persons who wish to seek judicial review. It may also facilitate the judicial task, by requiring petitions to contain the specified material.

The requirement of paragraph (b)(5), that the petition set forth facts to demonstrate that the petitioner is entitled to judicial review, calls for facts establishing such matters as standing, exhaustion of administrative remedies, time for filing, and other applicable pre-conditions of judicial review; see Section 5-102(a).

§ 5-110. [Petition for Review-Service and Notification].

(a) A petitioner for judicial review shall serve a copy of the petition upon the agency in the manner provided by [statute] [the rules of civil procedure].

(b) The petitioner shall use means provided by [statute] [the rules of civil procedure] to give notice of the petition for review to all other parties in any adjudicative proceedings that led to the agency action.

COMMENT

This section makes a distinction between service upon the agency and notification of all other parties to any agency adjudicative proceedings. See the definition of "party to agency proceedings," Section 1-101(6).

Subsection (b), requiring notification of parties in any proceedings that led to the agency action, applies only if those proceedings were adjudicative, since that is the only type of agency proceeding under this Act in which persons may be "parties." By contrast, persons who offer input in rule-making proceedings do not become "parties."

§ 5-111. [Stay and Other Temporary Remedies Pending Final Disposition].

(a) Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.

(b) A party may file a motion in the reviewing court, during the pendency of judicial review, seeking interlocutory review of the agency's action on an application for stay or other temporary remedies.

(c) If the agency has found that its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety, or welfare, the court may not grant relief unless it finds that:

(1) the applicant is likely to prevail when the court finally disposes of the matter;
(2) without relief the applicant will suffer irreparable injury;

(3) the grant of relief to the applicant will not substantially harm other parties to the proceedings; and

(4) the threat to the public health, safety, or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances.

(d) If subsection (c) does not apply, the court shall grant relief if it finds, in its independent judgment, that the agency's action on the application for stay or other temporary remedies was unreasonable in the circumstances.

(e) If the court determines that relief should be granted from the agency's action on an application for stay or other temporary remedies, the court may remand the matter to the agency with directions to deny a stay, to grant a stay on appropriate terms, or to grant other temporary remedies, or the court may issue an order denying a stay, granting a stay on appropriate terms, or granting other temporary remedies.

COMMENT

If the agency has found that its action (on the application for stay or other temporary remedies) is justified to protect against a substantial threat to the public health, safety or welfare, the scope of the court's review is limited by subsection (c). This standard is derived from Virginia Petroleum Jobbers Assn. v. Federal Power Commission, 259 F.2d 921 (D.C.Cir.1958). In other cases, the court exercises independent judgment under subsection (d), to ascertain whether the agency's action (on the application for stay or other temporary remedies) was unreasonable in the circumstances. This section elaborates upon the 1961 Revised Model Act, Section 15(c).

§ 5-112. [Limitation on New Issues].

A person may obtain judicial review of an issue that was not raised before the agency, only to the extent that:

(1) the agency did not have jurisdiction to grant an adequate remedy based on a determination of the issue;

(2) the person did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, facts giving rise to the issue;

(3) the agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue;

(4) the agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this Act; or

(5) the interests of justice would be served by judicial resolution of an issue arising from:

(i) a change in controlling law occurring after the agency action; or
(ii) agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

COMMENT

This section limits the issues that may be raised and considered in the reviewing court to those that were raised before the agency, with the exceptions indicated.

The intent of paragraph (1) is to permit the court to consider issues that were not raised before the agency, if the agency did not have jurisdiction to grant an adequate remedy based on a determination of these issues. Examples include: (i) issues as to the facial constitutionality of the statute that enables the agency to function, if state law prohibits the agency from passing on the validity of the statute; (ii) issues as to the amount of compensation due as a result of an agency's breach of contract, if state law prohibits the agency from passing on this type of question.

Paragraph (2) permits a party to raise new issues in the reviewing court, if these issues arise from newly discovered facts that the party excusably did not know at the time of the agency proceedings.

Paragraph (3) permits a party to raise new issues in the reviewing court, if the challenged agency action is a rule, and if the party seeking to raise the new issues in court was not a party in adjudicative proceedings which provided an opportunity to raise the issues before the agency. This paragraph may be illustrated by judicial review proceedings in which the petitioner asserts that the agency's rule violates the enabling statute, an issue that was not raised before the agency. First, if there have never been any adjudicative proceedings which provided an opportunity for any party to raise this issue before the agency, the petitioner may now raise the issue in the reviewing court. Second, if adjudicative proceedings have been held, at which the opportunity to raise this issue was available, but the petitioner who now seeks judicial review was not a party to those agency proceedings, the petitioner may now raise the issue in the reviewing court. Third, if adjudicative proceedings have been held, and the present petitioner for judicial review was a party in those adjudicative proceedings, and if those adjudicative proceedings provided an opportunity to raise the issue before the agency, but the petitioner did not raise the issue before the agency, the petitioner may not now raise the issue in the reviewing court. This provision, in common with this entire section, is in effect an elaboration of the doctrine of exhaustion of administrative remedies; see also Section 5-107 and Comments.

Paragraph (4) permits new issues to be raised in the reviewing court by a person who was not properly notified of the adjudicative proceeding which produced the challenged order.

Paragraph (5) permits new issues to be raised in the reviewing court if the interests of justice would be served thereby and the new issues arise from a change in controlling law, or from agency action after the person exhausted the last opportunity for seeking relief from the agency.

§ 5-113. [Judicial Review of Facts Confined to Record for Judicial Review and Additional Evidence Taken Pursuant to Act].

Judicial review of disputed issues of fact must be confined to the agency record for judicial review as defined in this Act, supplemented by additional evidence taken pursuant to this Act.
COMMENT

This section performs the technical but important function of confining judicial review of facts to the agency record for judicial review and additional evidence taken pursuant to this Act. See Comments on Sections 5-114 (new evidence) and 5-115 (agency record for judicial review) for further discussion.

The 1961 Revised Model Act, Section 15(f), dealt with this matter to some extent, but only in the context of judicial review of contested cases. This Section and Sections 5-114 and 5-115 are more elaborate, since this Act provides for judicial review of all types of agency action, including but not limited to formal adjudication.

§ 5-114. [New Evidence Taken by Court or Agency Before Final Disposition].

(a) The court [ (if Alternative B of Section 5-104 is adopted), assisted by a referee, master, trial court judge as provided in Section 5-104(c),] may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(1) improper constitution as a decision-making body, or improper motive or grounds for disqualification, of those taking the agency action;

(2) unlawfulness of procedure or of decision-making process; or

(3) any material fact that was not required by any provision of law to be determined exclusively on an agency record of a type reasonably suitable for judicial review.

(b) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

(1) the agency was required by this Act or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

(2) the court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover, or did not know and was under a duty to discover but could not reasonably have discovered, until after the agency action, and (ii) the interests of justice would be served by remand to the agency;

(3) the agency improperly excluded or omitted evidence from the record; or

(4) a relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

COMMENT
Subsection (a) permits the court to receive evidence, subject to a number of conditions. First, the evidence must relate to the validity of the agency action at the time it was taken; in this context, the term "validity" is intended to encompass the provisions of Section 5-116 on scope of review. Thus, evidence may be received only if it is likely to contribute to the court's determination of the validity of agency action under one or more of the standards set forth in Section 5-116; see Section 5-116(a). Second, paragraphs (a)(1) and (2) identify some specific issues that may be addressed, if necessary, by new evidence. Third, paragraph (a)(3) permits new evidence to be received, subject to the general limitations of subsection (a), on any material fact if the agency was not required to determine that fact exclusively on a record of a type reasonably suitable for judicial review. In the absence of a contrary provision of law, paragraph (a)(3) therefore permits the court to receive new evidence regarding any material issues of fact during the judicial review of rules (see Section 3-112(c)), orders resulting from emergency adjudication (see Section 4-501(g)), and orders resulting from summary adjudicative proceedings (see Section 4-506(b)). However, paragraph (a)(3) does not permit the court to receive new evidence regarding any material issues of fact during the judicial review of orders resulting from formal adjudicative proceedings (see Section 4-221(c)), or from conference adjudicative proceedings (which in this respect are the same as formal adjudicative proceedings, see Section 4-402.)

Since subsection (a) permits the court to receive evidence only if needed to decide disputed "issues," this provision is applicable only with regard to "issues" that are properly before the court; see Section 5-112 on limitation of new issues.

Subsection (b) permits the court to remand a matter to the agency, with directions that the agency conduct fact-finding and further proceedings, in the situations listed in paragraphs (b)(1) through (4).

The 1961 Revised Model Act dealt with new evidence taken by the court, Section 15(f), and by the agency, Section 15(e), only in context of judicial review of contested cases.

§ 5-115. [Agency Record for Judicial Review-Contents, Preparation, Transmittal, Cost].

(a) Within [______] days after service of the petition, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action, consisting of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this Act as the agency record for the type of agency action at issue, subject to the provisions of this section.

(b) If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties stipulate to omit in accordance with subsection (d).

(c) The agency shall charge the petitioner with the reasonable cost of preparing any necessary copies and transcripts for transmittal to the court. [A failure by the petitioner to pay any of this cost to the agency does not relieve the agency from the responsibility for timely preparation of the record and transmittal to the court.]

(d) By stipulation of all parties to the review proceedings, the record may be shortened, summarized, or
organized.

(e) The court may tax the cost of preparing transcripts and copies for the record:

(1) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record;

(2) as provided by Section 5-117; or

(3) in accordance with any other provision of law.

(f) Additions to the record pursuant to Section 5-114 must be made as ordered by the court.

(g) The court may require or permit subsequent corrections or additions to the record.

COMMENT

This section deals with the agency record for judicial review, which is related but not necessarily identical to the record of agency proceedings that is prepared and maintained by the agency. Subsection (a) clarifies that the agency record for judicial review consists of (1) any documents expressing the agency action, (2) other documents identified by the agency as having been considered by it and used as a basis for its action, and (3) any other material described in this Act as the record for the type of agency action at issue (Section 3-112 for rule making, Section 4-221 for formal adjudicative hearings and conference adjudicative hearings, Section 4-501(f) for emergency adjudicative proceedings, Section 4-506 for summary adjudicative proceedings), all subject to the provisions of Section 5-115 on shortening, summarizing, or organizing the record.

When the challenged agency action is a rule, Section 3-110(b) must also be considered. That provision requires the court to consider, in support of the validity of the rule, "only those reasons on which the agency relied in its explanatory statement, and only those representations made by the agency that are consistent with its explanatory statement." See Comment on Section 3-110.

Subsection (b) and (c) require the agency to prepare any necessary transcript, and to charge the petitioner with the cost, subject to the power of the court to tax costs ultimately. A bracketed sentence in subsection (c) adds that, even if the petitioner does not pay the cost, the agency must still prepare the transcript on time. This solution requires the agency to bankroll the cost of the transcript, with the possibility of recovering from the petitioner later on.

The 1961 Revised Model Act Section 15(d) prescribed, in less detail than here, the record for judicial review of contested cases.

§ 5-116. [Scope of Review; Grounds for Invalidity].

(a) Except to the extent that this Act or another statute provides otherwise:

(1) The burden of demonstrating the invalidity of agency action is on the party asserting
invalidity; and

(2) The validity of agency action must be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(c) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by any one or more of the following:

1. The agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied.

2. The agency has acted beyond the jurisdiction conferred by any provision of law.

3. The agency has not decided all issues requiring resolution.

4. The agency has erroneously interpreted or applied the law.

5. The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.

6. The persons taking the agency action were improperly constituted as a decision-making body, motivated by an improper purpose, or subject to disqualification.

7. The agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this Act.

8. The agency action is:

   (i) outside the range of discretion delegated to the agency by any provision of law;

   (ii) agency action, other than a rule, that is inconsistent with a rule of the agency; [or]

   (iii) agency action, other than a rule, that is inconsistent with the agency's prior practice unless the agency justifies the inconsistency by stating facts and reasons to demonstrate a fair and rational basis for the inconsistency. [; or] [.]

   (iv) [otherwise unreasonable, arbitrary or capricious.]
COMMENT

The 1961 Revised Model Act prescribed standards for the judicial review of contested cases, Section 15(g), no standards for the judicial review of rules, Section 7, and no mention of judicial review of agency action other than rules or orders. This Act, having established a single form of action for judicial review of all types of agency action in Section 5-105, prescribes a single set of standards for judicial review in Section 5-116. This section is adapted, with considerable changes, from Florida Act, Section 120.68 and Wisconsin Act, Section 227.20, which are discussed with approval in Brodie & Linde, State Court Review of Administrative Action: Prescribing the Scope of Review, 1977 Ariz.St.L.J. 537.

The standards for judicial review in this section reflect the well-accepted principle that the role of the reviewing court is, in general, a limited one. The limited scope of judicial review provided in this section may be superseded by another statute, which could either preclude judicial review entirely (an approach that might raise constitutional questions), or establish review based on different standards than those of this Act. Further, in some states, the courts have established a constitutional right to de novo judicial review of certain matters in certain types of circumstances; see, e.g., Strumsky v. San Diego Employees Retirement Assn., 11 Cal.3d 28, 520 P.2d 29 (1974), noted in 63 Calif.L.Rev. 27 (1975), 26 Hastings L.J. 1465 (1975). This Act includes some special provisions on the scope of judicial review of agency action in specified circumstances—Section 3-109(b) (review of interpretative rules); Section 3-204(d)(5) (review of rule after the administrative rules committee has filed an objection); and Section 5-111(d) (review of agency action on an application for stay or other temporary remedies, unless the agency has found its action necessary to protect against a substantial threat to the public health, safety, or welfare.) In addition, this Act includes special adaptations of the Section 5-116 standards of review in Sections 5-202(c) and 5-203 (civil enforcement).

Subsection (a) places the burden of demonstrating the invalidity of agency action upon the party who asserts invalidity. This subsection also emphasizes that the focus of the reviewing court's inquiry must be the agency action at the time it was taken, and not at the time of judicial review.

Subsection (c) requires the person seeking judicial relief to demonstrate substantial prejudice in order to be entitled to relief. This prejudice must, moreover, arise from one or more of the grounds listed in the paragraphs under this subsection.

Paragraph (c)(3), providing for judicial relief if the agency has not decided all issues requiring resolution, deals with the possibility that the reviewing court may dispose of the case on the basis of issues that were not considered by the agency. An example would arise if the court had to decide on the facial constitutionality of the agency's enabling statute, in a state where agencies are precluded from passing on such questions; see Section 5-112(1). This provision is not intended to authorize the reviewing court to initially decide issues that are within the agency's primary jurisdiction; such issues should first be decided by the agency, subject to the limited judicial review provided by this Act.

Paragraph (c)(4) includes two distinct matters—interpretation and application of the law. With regard to the agency's interpretation to the law, courts generally give little deference to the agency, with the result that a court may decide that the agency has erroneously interpreted the law if the court merely disagrees with the agency's interpretation. By contrast, with regard to the agency's application of the law to specific situations, the enabling statute normally confers some discretion upon the agency. Accordingly, a court should find reversible
error in the agency's application of the law only if the agency has improperly exercised its discretion, within the framework of paragraph (c)(8).

One example of an agency's failure to follow prescribed procedure, under paragraph (c)(5), is the agency's failure to act within the prescribed time upon a matter submitted to the agency. Relief in such cases is available under Section 5-117(b) and (c).

Paragraph (c)(7) establishes the "substantial evidence on the whole record" test for judicial review of determinations of fact that are made or implied by the agency. In applying this test, the pertinent record is the whole record that is before the court, which includes not only the agency record, but also any additional evidence received by the court in accordance with Section 5-114. Thus, if the agency action under review is an order resulting from a formal or conference adjudicative hearing, and if no circumstances exist to justify the receipt of any additional evidence by the reviewing court beyond that contained in the agency record, the substantial evidence test will be applied to the agency record since in this situation the agency record is the "whole record before the court." By contrast, if the agency action under review is a rule, or an order issued pursuant to emergency or summary adjudicative proceedings, and if a determination of the validity of the agency action requires resolution of a factual dispute, the court may take new evidence under Section 5-114(a)(3), and the "whole record before the court" will then consist of a combination of the agency record plus the new evidence taken by the court. The 1961 Revised Model Act, Section 15(g)(5), dealt with judicial review of factual questions only with regard to the review of contested cases. For those purposes, the 1961 Revised Model Act used the "clearly erroneous" test. This Act opts for the "substantial evidence" test, which was used in the 1946 Model Act, Section 12(7)(e), and is used in the Federal Act, Section 706(2)(E), and an increasing number of states, either by express statutory language or judicial interpretation; see B. Schwartz, Administrative Law Section 214 (1976). Professor Schwartz also observes: "Substantial evidence is such evidence as might lead a reasonable person to make a finding. The evidence in support of a fact-finding is substantial when from it an inference of existence of the fact may be drawn reasonably. In such a case, the reviewing court must uphold the finding, even if it would have drawn a contrary inference from the evidence." Id., Section 210, at p. 595.

Paragraph (c)(8) is related, to some extent, to the formula found in the 1961 Revised Model Act Section 15(g)(6)-"arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." This Act offers two options, depending on whether or not bracketed subparagraph (iv) is adopted as part of paragraph (c)(8).

Without the bracketed language, this paragraph provides a more limited judicial role than the 1961 Model Act. The intent of this limitation is to discourage reviewing courts from substituting their judgment for that of the agency as to the wisdom or desirability of the agency action under review.

With inclusion of the bracketed language, this paragraph authorizes judicial relief if the agency action is "otherwise unreasonable, arbitrary or capricious." This language is approximately although not precisely the same as that of the 1961 Model Act. Cases decided under the 1961 Model Act are likely to be utilized, at least to some extent, as interpretations of this bracketed language of the 1981 Act, although the introduction of the term "unreasonable" in the bracketed language of the 1981 Act may provide judicial opportunities for interpretations that differ from precedents decided under the 1961 Model Act.

Note that subparagraph (iii) of (c)(8), providing for judicial relief if the challenged agency action is
inconsistent with the agency's prior practice, is related to Section 2-102, requiring agencies to prepare an index of their written final orders and to make this index and the orders available for public inspection and copying. A party may invoke the indexing and public access requirements of Section 2-102, for the purpose of ascertaining the agency's prior practice, so as to reveal any inconsistency between the challenged agency action and prior agency practice.

§ 5-117. [Type of Relief].

(a) The court may award damages or compensation only to the extent expressly authorized by another provision of law.

(b) The court may grant other appropriate relief, whether mandatory, injunctive, or declaratory; preliminary or final; temporary or permanent; equitable or legal. In granting relief, the court may order agency action required by law, order agency exercise of discretion required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, render a declaratory judgment, or take any other action that is authorized and appropriate.

(c) The court may also grant necessary ancillary relief to redress the effects of official action wrongfully taken or withheld, but the court may award attorney's fees or witness fees only to the extent expressly authorized by other law.

(d) If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public pending further proceedings or agency action.

COMMENT

This Section clarifies that the single form of action established by Section 5-105 provides any appropriate type of relief, with the exceptions indicated.

Section 5-117(a) relates closely to Section 5-101. The intent of both provisions is that this Act does not, of itself, authorize the award of damages or compensation, but that the applicable parts of this Act may be combined with applicable parts of other statutes, substantive and procedural, so that complete relief can be given in one lawsuit or in a connected series.

§ 5-118. [Review by Higher Court].

Decisions on petitions for review of agency action are reviewable by the [appellate court] as in other civil cases.]

COMMENT

This section is bracketed, because of the options provided by Section 5-104 regarding the court that first exercises judicial review of agency action. Under Alternative B of that section, which provides that judicial review starts in the [appellate court], that court's decisions may or may not be subject to further review by a higher
court in the state. If no further review is available beyond that provided by Section 5-104, no purpose is served by Section 5-118.

CHAPTER II

CIVIL ENFORCEMENT

§ 5-201. [Petition by Agency for Civil Enforcement of Rule or Order].

(a) In addition to other remedies provided by law, an agency may seek enforcement of its rule or order by filing a petition for civil enforcement in the [trial court of general jurisdiction.]

(b) The petition must name, as defendants, each alleged violator against whom the agency seeks to obtain civil enforcement.

(c) Venue is determined as in other civil cases.

(d) A petition for civil enforcement filed by an agency may request, and the court may grant, declaratory relief, temporary or permanent injunctive relief, any other civil remedy provided by law, or any combination of the foregoing.

COMMENT

The concept of a civil enforcement provision in an APA is adapted from the Florida Act, Section 120.69.

Section 5-201 authorizes the agency to seek civil enforcement of its rule or order.

§ 5-202. [Petition by Qualified Person for Civil Enforcement of Agency's Order].

(a) Any person who would qualify under this Act as having standing to obtain judicial review of an agency's failure to enforce its order may file a petition for civil enforcement of that order, but the action may not be commenced:

(1) until at least [60] days after the petitioner has given notice of the alleged violation and of the petitioner's intent to seek civil enforcement to the head of the agency concerned, to the attorney general, and to each alleged violator against whom the petitioner seeks civil enforcement;

(2) if the agency has filed and is diligently prosecuting a petition for civil enforcement of the same order against the same defendant; or

(3) if a petition for review of the same order has been filed and is pending in court.

(b) The petition must name, as defendants, the agency whose order is sought to be enforced and each alleged violator against whom the petitioner seeks civil enforcement.
(c) The agency whose order is sought to be enforced may move to dismiss on the grounds that the petition fails to qualify under this section or that enforcement would be contrary to the policy of the agency. The court shall grant the motion to dismiss unless the petitioner demonstrates that (i) the petition qualifies under this section and (ii) the agency's failure to enforce its order is based on an exercise of discretion that is improper on one or more of the grounds provided in Section 5-116(c)(8).

(d) Except to the extent expressly authorized by law, a petition for civil enforcement filed under this section may not request, and the court may not grant any monetary payment apart from taxable costs.

COMMENT

A person other than the agency may seek enforcement only of an agency's order, not its rule. The person must be able to qualify, under the Act, as having standing to obtain judicial review of the agency's failure to enforce its order. In some situations, this requirement leaves the court with discretion whether to confer standing; see Section 5-106(a)(5).

The prohibition in subsection (d) against any monetary payment other than taxable costs is intended to prevent any recovery by way of informer's fee, civil fine in the nature of a debt under qui tam actions, reward, damages, compensation, attorney's fees, witness fees, or the like, unless expressly authorized by law.

§ 5-203. [Defenses; Limitation on New Issues and New Evidence].

A defendant may assert, in a proceeding for civil enforcement:

(1) that the rule or order sought to be enforced is invalid on any of the grounds stated in Section 5-116. If that defense is raised, the court may consider issues and receive evidence only within the limitations provided by Sections 5-112, 5-113, and 5-114; and

(2) any of the following defenses on which the court, to the extent necessary for the determination of the matter, may consider new issues or take new evidence:

(i) the rule or order does not apply to the party;

(ii) the party has not violated the rule or order;

(iii) the party has violated the rule or order but has subsequently complied, but a party who establishes this defense is not necessarily relieved from any sanction provided by law for past violations; or

(iv) any other defense allowed by law.

COMMENT

This section combines two topics: the type of defense that can be raised, and the authority of the court to consider issues and take evidence.
Subparagraph (2)(iii) clarifies that a party who admits a past violation and demonstrates subsequent compliance is not necessarily relieved from any sanction provided by law for the past violation. This is intended to resolve an ambiguity in 1961 Revised Model Act Section 14(c), which prohibited revocation, suspension, etc. of a license unless "the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license."

§ 5-204. [Incorporation of Certain Provisions on Judicial Review].

Proceedings for civil enforcement are governed by the following provisions of this Act on judicial review, as modified where necessary to adapt them to those proceedings:

(1) Section 5-101(2) (ancillary procedural matters); and

(2) Section 5-115 (agency record for judicial review-contents, preparation, transmittal, cost.)

COMMENT

The intent of this section is to incorporate, with appropriate adaptation, the provisions of Section 5-101(2) (which itself incorporates other provisions of law) and of Section 5-115.

§ 5-205. [Review by Higher Court].

Decisions on petitions for civil enforcement are reviewable by the [appellate court] as in other civil cases.

COMMENT

This section is not bracketed, although the somewhat similar Section 5-118 is. The reason is that Section 5-118, dealing with higher court review of a court that exercises judicial review of agency action, builds on the alternative options contained in Section 5-104, as to whether the court that first exercises judicial review of agency action is a trial court or an appellate court; if the latter option is adopted, the appellate court's decisions may or may not be subject to further review. By contrast, Section 5-205 builds on the civil enforcement provisions of Section 5-201(a), which locate civil enforcement actions only in the trial court. Consequently, civil enforcement decisions are reviewable by an appellate court as are trial court decisions in other civil cases.