D R A F T

FOR DISCUSSION ONLY

MODEL STATE

ADMINISTRATIVE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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WITH GENERAL INTRODUCTION AND COMMENTS

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MODEL STATE ADMINISTRATIVE PROCEDURES ACT

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MODEL STATE ADMINISTRATIVE PROCEDURES ACT

GENERAL INTRODUCTION

This proposed revision adopts a different approach to the concept of the model act. In order to make decisions for revision of state Administrative Procedure Acts for state legislatures clearer and more easily adaptable to the differing histories, constitutions and political structures in the various states, the Conference has adopted a two part approach to the revision of the Model State Administrative Procedure Act. The first part is a set of "core" provisions. Some of these core provisions resemble the 1961 Model State Administrative Procedure Act. They consist of a minimum core of administrative procedure provisions which can be adopted by a state just as they are drafted with minor revisions to fit local conditions. They are presented in a set of separate articles entitled "Core Articles"; each section of these core articles is designated with a "C" followed by the section number. The second part of the revision process is a set of "optional" provisions. These articles are designated "Optional Articles", and each section of the optional article is preceded by the letter "O" to signify that fact. These optional articles contain more procedural devices and details than the core articles. These optional provisions will be useful to states which desire a greater degree of detail, or which need to solve problems that are not covered in the core provisions. This approach is consistent with the concept of a "model" act. A model act is predicated upon the idea that, because of constitutional, historical and political differences, in some areas the law cannot become uniform in all of the states. Administrative procedure is one of the leading examples of this phenomenon. This core/optional approach is consistent with that view and represents an attempt to put it into practice in a manner that is of maximum benefit to the states.

MODEL STATE ADMINISTRATIVE PROCEDURES ACT

CORE PROVISIONS

CORE ARTICLE I

GENERAL PROVISIONS

§ C1-101. SHORT TITLE. This act may be cited as the [state] Administrative Procedure Act.

§ C1-102. DEFINITIONS. In this act:

(1) "Adjudication" means the process for determination of facts pursuant to which an agency formulates and issues an order. Chapter 4 of this Act does not apply to all adjudications but only to those adjudications defined in section C4-101. All adjudications to which Chapter 4 of this Act applies are subject to the requirements of the Adjudication Bill of Rights set forth §C4-102.

(2) "Agency"means each statewide board, authority, commission, institution, department, division, or officer, 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 of or under the authority of the agency head, or other statewide government entity that is authorized or required by law to make rules or to adjudicate.

The term does not include the Governor, the Legislature, or the Judiciary. The term does not include any political subdivision of the state or any of the administrative units, boards, authorities, commissions, or other entities of such political subdivision.

(3) “Agency Action” means:

(A) the whole or part of any agency order or rule; or

(B) the failure to issue an order or rule; or

(C) an agency’s performance of, or failure to perform, any duty, function or activity placed upon it by law.

(4) “Agency Head” means an individual or body of individuals in whom the ultimate legal authority of the agency is vested.

(5) “Document” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(6) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(7) “Electronic Document” means a document that is received, recorded or maintained by the [publisher][registrar] or agency in an electronic form.

(8) “Evidentiary Hearing” means a hearing for the reception of evidence in which the hearing officer is limited in making his decision to material contained in the record created at the hearing.

(9) “Formal Adjudication” means the default procedure for adjudication under Chapter 4 and applies unless the procedures for informal adjudication or emergency adjudication are applicable. The requirements for formal adjudication are set forth in §C4-104.

(10) “Guidance Document” means any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations, excluding agency minutes or

documents that pertain only to the internal management of agencies. Nothing in this definition shall be construed or interpreted to expand the identification or release of any document otherwise protected by law.

(11) “Index” means an alphabetical list of items by subject and title in a document with a page number, hyperlink or any other connector that will link the alphabetical list with the document to which it refers.

(12) “Informal Adjudication” means adjudication procedure in the nature of a conference rather than a trial, as provided in C4-111.

(13) “Law” means the whole or a part of the federal or state Constitution, or of any federal or state statute, case law or common law, rule of court, executive order, or rule or order of an administrative agency.

(14) “License” means the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law.

(15) “Licensing” means a state agency process relating to the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(16) “Order” means an agency action of particular applicability that determines the legal rights, duties, privileges or immunities or other legal interests of one or more specific persons.

(17) “Party” means the agency taking action, the person against whom the action is directed, and any other person named as a party or permitted to intervene or to participate in the agency proceedings.

(18) “Person” means an individual, corporation, business trust, estate, trust,

partnership, limited liability company, association, joint venture, governmental subdivision, instrumentality, or agency, public corporation, or any other legal or commercial entity.

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

(20) "Rulemaking" means the process for adopting, amending, or repealing a rule.

(21) "Presiding officer" means the person who presides over the hearing in an adjudication to which Chapter 4 applies. The presiding officer can be an agency staff member, [an administrative law judge as provided in §], or one or more members of the agency head.

(22)"Written" means inscribed on a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form.

Comment

Adjudication. This definition combines includes formal adjudicative proceedings and informal adjudicative proceedings as defined in this Act. Both formal and informal proceedings must be exclusively on the record.

Agency. This definition is drawn in large part from the 1981 MSAPA and the Federal APA. The object is to subject as many state actors as possible to this definition. To that end, the language has been extended to include not only those statewide agencies that adjudicate or make rules, but also any agency with statewide jurisdiction created by the legislature. This will include state agencies that affect individuals in ways different from adjudication or rulemaking.

Agency Head. This definition differentiates between the agency as an organic whole and the particular persons (commissioners, board members or the like) in whom final authority is vested.

Document. A document consists of information stored on a medium, whether the medium be tangible or electronic, provided that the information is retrievable in a perceivable form. The traditional tangible medium has been paper on which information is inscribed by

writing, typing, printing or similar means. It is perceivable by reading it directly from the paper on which it is inscribed. This definition also includes information or date stored in an electronic medium that is stored magnetically that may be retrieved and read on a computer monitor or a paper printout.

Electronic. The term "electronic" refers to the use of electrical, digital, magnetic, wireless, optical, electromagnetic and similar technologies. It is a descriptive term meant to include all technologies involving electronic processes. The listing of specific technologies is not intended to be a limiting one. The definition is intended to assure that this act will be applied broadly as new technologies develop. For example, biometric identification technologies would be included if they affect communication and storage of information by electronic means. As electronic technologies expand and include other competencies, those competencies should also be included under this definition. The definition of the term "electronic" in this act has the same meaning as it has in UETA § 2(5) and in the Uniform Real Property Electronic Recording Act.

Electronic Document. An "electronic document" is a "document" that is in an "electronic" form. Documents may be communicated in electronic form; they may be received in electronic form; they may be recorded and stored in electronic form; and they may be received in paper, hard copy, and converted into an electronic document. This Act does not limit the type of electronic documents received by the publisher. The purpose of defining and recognizing electronic documents is to facilitate and encourage agency use of electronic communication and maintenance of records.

Guidance Document. This definition is taken from the Virginia APA. See Va. Code Ann. § 2.2-4001. See also the Michigan APA, M.C.L.A. 24.203(6) ; Idaho I.C. § 67-5250 and N.Y. McKinneys State Administrative Procedure Act, § 102. This is a definition intended to recognize that there exist agency statements for the guidance of staff and the public that differ from, and that do not constitute, rules. Many states recognize such statements under the label "interpretive statement" or "policy statement." See Wash. Rev. Code, § 34.05.010(8) & (15). Later sections of this Act will provide for the publication and availability of this type of document so that they are not "secret" documents. See: Michael Asimow, Guidance Documents in the States, 54 Adm. L. Rev. 631 (2002); Michael Asimow, California Underground Regulations, 44 Adm. L. Rev. 43 (1992).

Index. The definition of index has been added as a guide to agencies, publishers and editors about their duties to make records available and easily accessible to the public in the form of an index, as that term is used throughout this act.

License. The definition of license is drawn largely from the 1961 MSAPA.

Order. This definition is drawn from the 1981 MSAPA. Unlike the federal APA which defines rule, but not order, this section provides a positive definition of order based on case law and agency experience. The key concept is that an order includes solely agency legal

determinations that are addressed to particular, specific, identified individuals in particular circumstances. An order may be addressed to more than one person. Further, the definition is consistent with modern law in rejecting the right/privilege distinction in constitutional law. The addition of the language "or other interests" is intended to clarify this change and to include entitlements. See also Cal.Gov.Code § 11405.50.

Person. The definition of a "person" is the standard definition for that term used in acts adopted by the National Conference of Commissioners on Uniform State Laws. It includes individuals, associations of individuals, and corporate and governmental entities.

Rule. This is identical to the 1981 MSAPA definition, which was modeled on the 1961 MSAPA definition. The essential part of this definition is the requirement of general applicability of the statement. This criterion distinguishes a rule from an order, which focuses upon particular applicability to identified parties only. Applicability of a rule may be general, even though at the time of the adoption of the rule there is only one person or firm affected: persons or firms in the future who are in the same situation will also be bound by the standard established by such a rule. It is sometimes helpful to ask in borderline situations what the effect of the statement will be in the future. If unnamed parties in the same factual situation in the future will be bound by the statement, then it is a rule. The word "statement" has been used to make clear that, regardless of the term that an agency uses to describe a declaration or publication and whether it is internal or external to the agency, if the legal operation or effect of the agency action is the same as a substantive rule, then it meets this definition.

§ C1-103. APPLICABILITY.

(a) This act shall apply to all agencies unless 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) This act does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

Comment

This section is intended to define which agencies are subject to the procedural provisions of this act. It is largely patterned on the same provision in the 1981 MSAPA.

Many states have made use of an applicability provision to define the coverage of their Administrative Procedure Act. See: Iowa, I.C.A. § 17A.23; Kansas, K.S.A. § 77-503; Kentucky, KRS § 13B.020; Maryland, MD Code, State Government, § 10-203; Minnesota, M.S.A. § 14.03; Mississippi, Miss. Code Ann. § 25-43-1.103; Washington, West's RCWA 34.05.020. These states include ones using primarily the 61 Administrative Procedure Act and others using the 81 MSAPA.

Subsection (b) was taken from the 1981 MSAPA.

Subsection (c) was taken from the Uniform Electronic Transactions Act (UETA). Although many agencies make extensive use of electronic records and this act recognizes and encourages such advances, there remain small agencies in many states that do not have sufficient resources to move to electronic documentation. This subsection makes clear that, although electronic documentation is encouraged, it is not mandatory.

§ C1-104. SUSPENSION OF ACT'S PROVISIONS WHEN NECESSARY TO AVOID LOSS OF FEDERAL FUNDS.

(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, may suspend, in whole or in part, one or more provisions of this act. The Governor, by executive order, 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) If any provision of this act is suspended pursuant to this section, the Governor shall promptly report the suspension to the Legislature. The report shall include recommendations concerning desirable legislation that may be necessary to conform this act to federal law, including the exemption, if appropriate, of a particular program from the provisions of this act.

Comment

This approach to the federal funds and federal requirements problem divides the state response between the governor and the legislature. See this Act, Optional § O1-103 for a different approach that attempts to limit and simplify the state action necessary in case of problems with federal funding.

CORE ARTICLE II

PUBLIC ACCESS TO AGENCY LAW AND POLICY

§ C2-101. ADMINISTRATIVE RULES PUBLISHER; PUBLICATION, COMPILATION, INDEXING, AND PUBLIC INSPECTION OF RULES.

(a) The [administrative rules [publisher] [registrar] [secretary of state] [publisher hereafter] shall be responsible for administering the provisions of this section.

(b) Subject to the provisions of this act, the [publisher] shall prescribe a uniform numbering system, form, and style for all proposed and adopted rules caused to be published by that office.

(c) The [administrative bulletin] shall be published as a document as prescribed by the [publisher] no less frequently than [once per _]. [The [administrative bulletin] must be made available in written, paper form upon request, for which the publisher may charge a reasonable fee]. 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 dissemination via the format and medium as prescribed. 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 changed and the change being made;

(3) any other notices and materials designated by [law] [the publisher] for publication therein; and

(4) an index to its contents by subject and caption.

(d) The [administrative code] shall be compiled, indexed by subject, and published in a format and medium as prescribed by the [publisher]. All of the effective rules of each agency must be published and indexed in that publication.

(e) The [administrative bulletin and administrative code] must be furnished online via the internet or other appropriate technology in a format and medium as prescribed by the [publisher] without charge, or in writing upon request and to all subscribers at a cost to be determined by the [publisher]. 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.

(f) Except as otherwise required by a provision of law, subsections (1) through (6) of this section do not apply to rules governed by [§§ C3-108 and C3-109], and the following provisions apply instead:

(1) Each agency shall maintain a separate, official, current, and dated index, containing all of its exempt rules within the scope of §[ ]. Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. The compilation must be made available for public inspection and copying and online via the internet. Certified copies of the full compilation must also be furnished to the [secretary of state, the attorney general or made available online via the internet or other appropriate technology], and be kept current by the agency at least every [30] days.

(2) A rule subject to the requirements of this subsection that is not indexed and made available as prescribed by this subsection shall not be relied on by an agency; however, this provision is inapplicable to the extent necessary to avoid imminent peril to the public health or safety.

Comment

This section seeks to assure adequate notice to the public of proposed agency action. It also seeks to assure adequate recordkeeping and availability of records for the public. Article C2 is intended to provide easy public access to agency law and policy that are relevant to agency process. Article C2 also adds provisions for electronic publication of the administrative bulletin and code. Generally, this section is modeled after the 81 Model State Administrative Procedure Act. Most states now have an administrative rules editor or her equivalent and an administrative bulletin published on a regular basis. This Act substitutes the word "publisher" for editor and limits the authority of the publisher to make changes to material submitted to her, except for creating a uniform numbering system, form and style. Subsection (f) is important to provide for public access to all rules and notice of applicable rules, even though those rules are exempted from normal rulemaking procedures under section [§§ C3-108 & C3-109] *infra*. A distinction must be made for statements that fall within § , because they are true rules–they fit the definition of rules in § C1-101 supra. However, these rules are exempted from normal rulemaking procedures in this Act for specific reasons such as law enforcment and the like. For more explanation of the reasons for exemption, see §C3-109. .

§ C2-102. REQUIRED AGENCY RULEMAKING AND RECORDKEEPING. In addition to the other rulemaking requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby 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, including a description of all forms and instructions used by the agency;

(3) adopt as rules descriptions in plain English of the process for application for license, benefits available or other matters for which an application would be appropriate unless such process is prescribed by a statute;

(4) file with the [publisher] all rules and guidance documents, including an index;

(5) file with the administrative rules publisher for publication in the administrative bulletin a list of any guidance documents upon which the agency currently relies. The filing shall be made on or before January 1 of each year in a format to be developed by the administrative rules publisher.

(6) maintain an index of all of its currently operative guidance documents and make the index available for public inspection;

(7) make available for public inspection the full texts of all guidance documents to the extent inspection is permitted by law, and upon request, make copies of such lists or guidance documents available without charge, at cost, or on payment of a reasonable fee.

Comment

Like the 1981 MSAPA, one object of this section is to make available to the public all procedures followed by the agency, including especially how to file for a license or benefit. It is modeled on the 1961 Model State Administrative Procedure Act, Sections 2(a) (4) & 2(b), the 1981 MSAPA, Sections 2-102 & 103, and the Kentucky Administrative Procedure Act, KRS § 13A.100. Persons seeking licenses or benefits should have a readily available and understandable reference sources from the agency. A second reason is to eliminate "secret law" by making all guidance documents used by the agency available from the agency and the administrative publisher.

§ C2-103. DECLARATIONS BY AGENCY.

(1) Any interested person may petition an agency for a declaration about the applicability of any rule or prior order issued by the agency.

(2) Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. The provisions of this Act for formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for a declaration, except to the extent provided in this article or to the extent the agency so provides by regulation or order.

(3) Within sixty days after receipt of a petition pursuant to this section, an agency shall either decline to issue a declaration in writing or schedule the matter for hearing.

(4) If the agency declines to consider the petition, it shall promptly notify the person who filed the petition of its decision, including a brief statement of the reasons therefor. An agency decision to decline to issue a declaration is not subject to judicial review.

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

Comment

This section embodies a policy of creating a convenient procedural device that will enable parties to obtain reliable advice from an agency. Such guidance is valuable to enable citizens to conform with agency standards as well as to reduce litigation. It is based on the 1981 MSAPA, Section 2-103 and Hawaii Revised Statutes, Section 91-8.

Subsection (5) is based on the 1981 MSAPA, § 2-103, the California APA, West's Ann.Cal.Gov.Code § 11465.60; and the Washington APA, West's RCWA 34.05.240. A declaratory decision issued by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has the same precedential effect as other agency adjudications. A declaratory decision, like other decisions, only determines the legal rights of the particular parties to the proceeding in which it was issued. The requirement in subdivision (a) that each declaratory decision issued contain the facts on which it is based and the reasons for its conclusion will

facilitate any subsequent judicial review of the decision's legality. It also ensures a clear record of what occurred for the parties and for persons interested in the decision because of its possible precedential effect.

CORE ARTICLE III

RULEMAKING

ADOPTION AND EFFECTIVENESS OF RULES

§ C3-101. CURRENT RULEMAKING DOCKET. Each agency shall maintain a current rulemaking docket. The current rulemaking docket must list each pending rulemaking proceeding. The docket shall indicate or contain: the subject matter; notices; where written or electronic comments can be inspected; time within which written or electronic comments may be made; electronic and written requests for public hearing; information about the public hearing, if any, including the names of the persons making the request; how comments may be made in writing and electronically; and the timetable for action. Whether or not an agency maintains a docket electronically, it must also maintain a written, hard copy current docket.

Comment

This section is modeled on Minn. M.S.A. § 14.366. This section and the following section, § C3-102 state the minimum docketing and rule making record keeping requirements for all agencies. This section also recognizes that many agencies use electronic recording and maintenance of dockets and records. However, for smaller agencies, the use of electronic recording and maintenance may not be feasible. This section therefore permits the use of exclusively written, hard copy dockets. The current rulemaking docket is a summary list of pending rule-making proceedings or an agenda referring to pending rulemaking.

§ C3-102. AGENCY RULEMAKING RECORD.

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

inspection or online via the internet.

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

(1) copies of all publications in the [administrative bulletin] with respect 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 or electronic petitions, requests, submissions, and comments received by the agency and all other written or electronic materials or documents 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 the rule and explanatory statement filed in the office of the [secretary of state];

(6) all petitions for exceptions to, amendments of, or repeal or suspension of, 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 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

This section is taken from the 1981 MSAPA, section 3-112. The following states have similar or identical agency rule-making record provisions: Az., A.R.S. § 41-1029; Colo., C.R.S.A. § 24-4-103; Minn., M.S.A. § 14.365; Miss., Miss. Code Ann. § 25-43-3.110; Mont., MCA 2-4-402; Okl., 75 Okl.St.Ann. § 302; and Wash., RCWA 34.05.370.

The comment to the 1981 MSAPA section from which this section is taken makes the case for adoption of this section, and especially for subsection (c) for judicial review.

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 *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," *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 *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.UnivL.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.

§ C3-103. 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) the text of the proposed rule;

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

(5) A concise summary of the regulatory analysis required under § C3-104 of this Act must be published in the [administrative bulletin] at least [10] days before the earliest of:

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

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

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

(6) 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.

(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 or sent electronically to each person who has made a timely request to the agency for a mailed or electronic copy of the notice. An agency may charge persons for the actual cost of providing them with written mailed copies where a person has made a request for a written copy.

Comment

This section is taken from the 1981 MSAPA, § 3-103. For a more detailed public notice provision, see Optional § O3-[ ].

§ C3-104. REGULATORY ANALYSIS.

(a) For action with an estimated economic impact of less than [$], 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 [ ] persons signing the request]. The [secretary of state] shall immediately forward to the agency a certified copy of the filed request. The agency shall then prepare a regulatory analysis under this section.

(b) For action with an estimated impact of more than $[ ], the

agency shall prepare a regulatory analysis according to this section.

(c) Except to the extent excused by law, in the situations described in subsections (1) and (2) of this section, an agency shall prepare a regulatory analysis in conformity with this section, which contains:

(1) a description of any persons or classes of persons who will be affected by the rule and the costs and benefits to those classes of persons;

(2) an estimate of the probable impact, economic or otherwise, of the proposed rule upon affected classes;

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

(4) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

(d) Each regulatory analysis statement filed under this section shall be filed with the [publisher] in the manner provided in § C3-103 [and shall be submitted to the [regulatory review agency] [department of finance and revenue] [other]].

Comment

These provisions are taken primarily from the 1981 MSAPA. Regulatory analyses are widely used as part of the rulemaking process in the states. Subsection (4) provides for a summary of the regulatory review analysis to be published in order to give the public notice of the claimed benefits and costs, and an opportunity to challenge them. The subsection also provides for submission to the rules review entity in the state, if the state has one.

§ C3-105. PUBLIC PARTICIPATION.

(a) An agency shall afford persons the opportunity to submit information and

comment on the proposed rule electronically or in writing for at least [30] days after publication of the notice of proposed rule adoption.

(b) Unless required by law other than this Act, an agency is not required to hold a public hearing. An agency may schedule an oral proceeding on a proposed rule, if such hearing is not required by law. At the discretion of the agency at such proceeding, persons may present oral argument, data, and views on the proposed rule.

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

(d) The agency, a member of the agency, or another presiding officer designated by the agency, shall preside at an 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.

(e) Each agency shall issue rules for the conduct of public hearings.

Comment

This section is substantially similar to § 3-104 of the 1981 MSAPA. However, the decision about whether to hold an oral hearing is left to the discretion of the agency in the absence of a statutory or constitutional requirement that an oral hearing be held.

§ C3-106. TIME AND MANNER OF ADOPTION.

(a) An agency may not adopt a rule until the period for making electronic or written submissions has expired.

(b) Within [ ] after the later of the expiration of the time for submission of

comments on the proposed rule or 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], except that:

(1) An agency may obtain one extension of [ ] days, which the governor must approve; or the governor may impose by executive order an extension of [ ] in case of a change in the regulation with substantial impact.

(2) The time for adoption described in this section shall not include the time during which the rule is before the [legislative] [executive] [regulatory review commission].

(3) A rule not adopted and filed within the time limits set by this section is invalid.

(c) Before the adoption of a rule, an agency shall consider the all information and comments received.

Comment

This section is substantially similar to § 3-106 of the 1981 MSAPA. However, in subsection (b) the agency has been given a substantially longer period of time to act.

§ C3-107. VARIANCE BETWEEN NOTICE OF RULE AND RULE ADOPTED.

An agency may not adopt a rule that substantially differs from the rule proposed in the notice of proposed rule adoption on which the rule is based unless the rule being adopted is the logical outgrowth of the notice of proposed rule, as determined from consideration of the following factors:

(1) the extent to which all persons affected by the adopted rule should have understood that the published proposed rule would affect their interests; and

(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

This section is based in large part upon the 1981 MSAPA, section 3-107, Mississippi Administrative Procedure Act, Miss. Code Ann. § 25-43-3.107 and the Minn. Administrative Procedure Act, M.S.A. § 14.05. The 1981 MSAPA drew heavily on the federal "logical outgrowth" test. Both the 1981 MSAPA and the logical outgrowth tests are an attempts to strike a balance between the need for notice to the public in rulemaking, the need of the agency to make modifications in proposed rules as a result of comments received, and encouragement to agencies to consider the information receive in comments from the public in formulating final rules. The 1981 MSAPA accurately reflected the factors that courts consider in applying the logical outgrowth test. See *First Am. Discount Corp. v. Commodity Futures Trading Comm'n,* 222 F.3d 1008, 1015 (D.C.Cir.2000); *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C.Cir.2000); *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994). Many states have adopted the "logical outgrowth" test. See, *Trustees for Alaska v. Dept. Nat. Resources*, ___AK____, 795 P.2d 805 (1990); *Sullivan v. Evergreen Health Care*, 678 N.E.2d 129 (Ind. App. 1997); *Iowa Citizen Energy Coalition v. Iowa St. Commerce Comm*. ___IA___, 335 N.W.2d 178 (1983); *Motor Veh. Mfrs. Ass'n v. Jorling,* 152 Misc.2d 405, 577 N.Y.S.2d 346 (N.Y.Sup.,1991); *Tennessee Envir. Coun. v. Solid Waste Control Bd.*, 852 S.W.2d 893 (Tenn. App. 1992); *Workers' Comp. Comm. v. Patients Advocate,* 47 Tex. 607, 136 S.W.3d 643 (2004); *Dept. Of Pub. Svc. re Small Power Projects*, 161 Vt. 97, 632 A.2d 1373 (1993); *Amer. Bankers Life Ins. Co. v. Div. of Consumer Counsel*, 220 Va. 773, 263 S.E.2d 867 (1980).

§ C3-108. EMERGENCY RULES; NONCONTROVERSIAL RULES.

(a) If an agency finds that an imminent peril to the public health, safety, or welfare requires immediate adoption of a rule and states in writing its reasons for that finding, the requirements of Sections 3-102 through 3-105 do not apply, and the agency may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to

adopt an emergency rule. The rule may be effective for a period of not longer than [ ] days [renewable once for a period not exceeding ( ) days], but the adoption of an identical rule under the provisions of § § C3- [102] to C3-[105] is not precluded.

(b) Notwithstanding any other provision, rules that are expected to be noncontroversial may be promulgated in accordance with the process set out in this subsection. [With the concurrence of the Governor, and a]fter written notice to the applicable standing committees of both houses of the [state] legislature, and to the [Commission on Administrative Rules], the agency may submit a fast-track regulation without compliance with § § C3-104 to 106 of this Act. The fast-track regulation shall be subject to the requirements set out in § § C2-102, C3-103, and shall be published in the [administrative bulletin] along with an agency statement setting out the reasons for using the fast-track rulemaking process. If an objection to the use of the fast-track process is received within the public comment period from [ ] or more persons, any member of the applicable standing committee of either house of the General Assembly or of the [Commission on Administrative Rules] , the agency shall (i) file notice of the objection with the Publisher for publication in the [administrative bulletin], and (ii) proceed with the normal promulgation process set out in this article with the initial publication of the fast-track regulation serving as the Notice of Proposed Rule Adoption. Otherwise, the regulation will become effective 15 days after the close of the comment period, unless the regulation is withdrawn or a later effective date is specified by the agency.

Comment

This section is taken from the 1961 MSAPA, § 3(2)(b), and the Virginia Administrative Procedure Act, Va. Code Ann. § 2.2-4012.1. Some state courts have indicated that *any* exemption from rulemaking requirements must be strictly construed to be limited to an

emergency or virtual emergency situation.

However, recognizing that there may be a few other justifications for exemption, this section adopts a broader rule for matters that will be noncontroversial. Thus, a situation where the agency is merely making a correction that the agency believes is noncontroversial may be adopted without formal rulemaking procedures. See the VA Fast-Track Regulation provision at Va. Code Ann. § 2.2-4012.1.

In order to prevent misuse of this procedural device, noncontroversial rule promulgation requires the consent of elected officials, and may be prevented by the requisite number of persons filing objections.

§ C3-109. EXEMPTION FOR GUIDANCE DOCUMENTS.

(a) An agency shall have the authority to issue guidance documents.

(b) An agency need not follow the procedures of sections 3-102 to 3-105 for guidance documents. Each guidance document must include a statement that it was adopted pursuant to this section when published in the [administrative bulletin]. Guidance documents are advisory only to the public; however, they are binding on the agency.

(c) A reviewing court may determine de novo the validity of a guidance document adopted under this section.

(d) It shall be the duty of every agency annually to file with the [publisher] for publication in the [administrative bulletin] a list of any guidance documents upon which the agency currently relies. The filing shall be made on or before January 1 of each year in a format to be developed by the [publisher]. The publisher shall index the guidance documents so submitted and make them available to the public.

(e) Each agency shall also maintain an index of all of its currently operative guidance documents and make the index available for public inspection, make available for

public inspection the full texts of all guidance documents to the extent inspection is permitted by law, and, upon request, make copies of such lists or guidance documents available without charge, at cost, or on payment of a reasonable fee.

Comment

This section is modeled largely on the provision in the Va. APA. See Va. Code Ann. § 2.2–4008.

This section recognizes the need for guidance documents that an agency will prepare 1) as a guide to its employees and 2) as a guide to the public. Agency law often needs interpretation, and agency discretion needs some channelling. The public needs to know the agency opinion about the meaning of the law and regulations that it administers. Increasing public knowledge and understanding reduces unintentional violations and lowers transaction costs. See Michael Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43 (1992); Peter Strauss, *The Rulemaking Continuum,* 44 Duke L. J. 1463 (1992). Excusing the agency from full procedural rulemaking for guidance documents furnishes a powerful economic incentive for agencies to use these devices to inform their employees and the public.

Many states have recognized the need for this type of exemption in their statutes. These states have defined interpretive and policy statements differently from rules, and also excused agencies creating them from some or all of the procedural requirements for rulemaking. See Ala. Ala. Code § 41-22-3(9)(c) (2000) ("memoranda, directives, manuals, or other communications which do not substantially affect the legal rights of, or procedures available to, the public."); Colo. Colo. Rev. Stat. §§ 24-4-102(15), 24-4- 103(1) (exception for interpretive rules or policy statements "which are not meant to be binding as rules"); *AMAX, Inc. v. Grand County Bd. of Equalization*, 892 P.2d 409, 417 (Colo. Ct. App. 1994) (assessors' manual is interpretive rule) (2001); Ga. Ga. Code Ann., § 50-13-4 ("Prior to the adoption, amendment, or repeal of any rule, other than interpretive rules or general statements of policy, the agency shall") (emphasis added); Mich, M.C.L.A. 24.207(h) (excepts "A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.). Wyoming, WY ST § 16-3-103 ("Prior to an agency's adoption, amendment or repeal of all rules *other than interpretative rules or statements of general policy*, the agency shall") (emphasis added) and see *In re GP*, 679 P.2d 976, 996-97 (Wyo. 1984). See also, Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 Admin. L. Rev. 631(2002). (Professor Asimow estimates that more than thirty states have adopted some provision for agency guidance documents such as interpretive and policy statements).

The federal Administrative Procedure Act also makes a similar distinction. See 5 U.S.C. § 553(b)(A) (1988) (Under this section "interpretative rules, general statements of policy, or rules

of agency organization, procedure, or practice" are excused from normal section 553 notice and comment procedural requirements).

§ C3-110. 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, which shall include an explanation of the principal reasons for and against its adoption, and its reasons for overruling substantial arguments and considerations made in oral testimony and comments; and

(2) the reasons for 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.

(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

This provision is similar to the 1981 MSAPA, § 3-110 requirementfor a concise explanatory statement of a rule when it is adopted. Arkansas (A.C.A. § 25-15-204) and Colorado (C.R.S.A. § 24-4-103) have similar provisions. The federal Administrative Procedure Act uses the identical terms in section 553 (c) (5 U.S.C.A. § 553). However, this provision also requires the agency to explain why it rejected substantial arguments made in comments.

§ C3-111. COMPLIANCE AND TIME LIMITATION. No rule hereafter adopted is valid unless adopted in substantial compliance with the procedural requirements of this act. A proceeding to contest any rule on the ground of non-compliance with the procedural

requirements of this act must be commenced within 2 years from the effective date of the rule.

Comment

This section is a slightly modified form of the 1961 Model State Administrative Procedure Act, section (3)(c). As noted in the comment to the 1981 MSAPA, section 3-113, there have been no complaints from the states about the two year time limitation on procedural challenges to rules.

§ C3-112. 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 agency may file a rule under this section as an electronic document. 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 § C3-110. 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) Subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing with the [Publisher] [Secretary of State], or at a stated date, if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of the reasons therefor shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to the persons who may be affected by them.

Comment

This section is based on the 1961 Model State Administrative Procedure Act, § 4(a) and its expansion in the 1981 MSAPA, § 3-114.

§ C3-113. EFFECTIVE DATE OF RULES.

(a) Except to the extent that subsection (b) of this section provides otherwise, each rule adopted after the effective date of this Act becomes effective [60] days after the later of (i) its publication in the [administrative bullietin] or (ii) its filing in the office of the [secretary of state].

(b) 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.

(c) A rule may become effective immediately upon its filing or on any subsequent date earlier than that established by subsection (1) if the agency establishes such an effective date and finds that:

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

(2) the rule is an emergency rule enacted under the provisions of § C3-108(1);

(3) A guidance document may become effective immediately upon its filing or any subsequent date earlier than that established by subsection (1) if the agency establishes such an effective date.

(4) An unobjected to noncontroversial rule adopted under the provisions of § C3-108(2) of this Act shall become effective on the date provided in that section.

(d) if a federal statute or regulation requires that a state agency implement a rule

by a certain date, the rule is effective on the prescribed date.

Comment

This is a substantially revised version of the 1961 Model State Administrative Procedure Act, section 4 (b)&(c) and 1981 Model State Administrative Procedure Act, section 3-115. Most of the states have adopted provisions similar to both the 1961 Model State Administrative Procedure Act and the 1981 Model State Administrative Procedure Act, although they may differ on specific time periods. Subsection (c)(3) has been adopted from TX, V.T.C.A., Government Code § 2001.036.

§ C3-114. SPECIAL PROVISION FOR CERTAIN CLASSES OF RULES. Except to the extent otherwise provided by law, Sections C3- 102 through C3-105 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 declaration by an agency made under § C2-103 of this Act;

(3) intra-agency memoranda;

(4) guidance documents issued under § C3-109 of this Act.

Comment

As was explained in the comment to the 1981 MSAPA, these exemptions attempt 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. The four exemptions listed here are widely used in the states, and represent a judgement in those states that, for rules of this type, the full procedural rules process is unnecessary, unduly burdensome on the agencies, or would lead to inefficient or ineffective government. States that have some or all of these exemptions are: Arizona, A.R.S. § 41-1005; California, West's Ann.Cal.Gov.Code § 11340.9; Florida, F.S.A. § 120. 52; Georgia, Ga. Code Ann., § 50-13-2; Hawaii, HRS § 91-1; Idaho, I.C. § 67-5201; Illinois, 5 ILCS 100/1-70; Massachusetts, M.G.L.A. 30A § 1; Maryland, MD Code, State Government, § 10-101; Minnesota, M.S.A. § 14.02; Montana, MCA 2-4-102; New York, McKinney's State Administrative Procedure Act § 102; North Carolina, N.C.G.S.A. § 150B-2; Ohio, R.C. § 119.01; Oklahoma, 75 Okl.St.Ann. § 250.3; Oregon, O.R.S. § 183.310; Tennessee, T. C. A. § 4-

5-102; Texas, V.T.C.A., Government Code § 2001.003; and Wisconsin, W.S.A. 227.01. There are other exemption provisions that agencies have persuaded some state legislatures to adopt. For this more extensive, but not so widely accepted list of exemptions, see Optional § O3-113.

§ C3-115. 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:

(1) deny the petition in a document, stating its reasons therefore;

(2) initiate rule-making proceedings in accordance with this act; or

(3) if otherwise lawful, adopt a rule.

Comment

This section is substantially similar to the 1961 MSAPA as modified slightly by the 1981 MSAPA.

CORE ARTICLE IV

ADJUDICATION

§ C4-101. WHEN CHAPTER 4 OF THIS ACT APPLIES TO ADJUDICATIONS.

This chapter applies to an order made by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the order. This section is subject to the exceptions for informal adjudication in § C4-111 of this Act. The default procedure under this Chapter is formal adjudication, but this chapter also provides for informal adjudication (§C4-111) and emergency adjudication.

Comment

The general principle of this section is that an agency must conduct an appropriate adjudicative proceeding whenever a statute or the due process clause of the state or federal constitution requires an evidentiary hearing for the determination of facts. If an adjudication is required by this section, the default procedure is a formal hearing procedure; but the agency can instead conduct an informal hearing or an emergency hearing if the requirements for those alternative procedures apply.

This type of hearing is made by a neutral decision maker, and must be based exclusively on evidence contained in a record made at the hearing. This type of hearing requires at a minimum that a party be permitted to introduce evidence, argue to the presiding officer, rebut opposing evidence. The hearing must also be conducted on the record. In some cases, statutes or the constitution call for administrative proceedings that do not reach the level of an evidentiary hearing. For example, the constitution or a statute might merely require a consultation or a decision that is not based on an exclusive record or a purely written procedure or an opportunity for the general public to make statements. In some cases, the agency has discretion to provide or not provide the procedure. In other cases, the hearing called for by the statute is informal and investigative in nature, and any decision that results is not final but is subject to a full administrative hearing at a higher agency level. This section does not apply in such cases. Examples of cases in which the required procedure does not meet the standard of an evidentiary hearing for determination of facts are: Goss v. Lopez, 419 U.S. 565 (1975) and Hewitt v. Helms, 459 U.S. 460 (1983). Agency action pursuant to statutes that do not require evidentiary hearings

are not subject to this section. This section does not apply where agency regulations or practice, rather than a statute or the constitution, call for a hearing.

If an adjudicative proceeding is required by this section, the proceeding may be a formal hearing procedure, or may be a special hearing procedure provided by a statute applicable to the particular proceeding. This Act also makes available the alternatives of an informal hearing or an emergency decision. For a statute to create a right to an evidentiary hearing, express use of the term "evidentiary hearing" is not necessary in the statute. Statutes often use terms like "appeal" or "proceeding" or "hearing" but in context it is clear that they mean an evidentiary hearing. An evidentiary hearing is one in which the presiding officer is limited to material in the record in making his decision.

Hearings that are required by procedural due process guarantees include life, liberty and property *interests*, where a statute creates a justified expectation or legitimate entitlement. Thus, this section seeks to include more than what were described as "rights" under older common law. In cases where the right to an evidentiary hearing is created by due process, attention is directed to section C4-110 (1) F *infra* which may permit an informal hearing.

However, this section does not apply to an investigatory hearing, or a hearing that merely seeks public input or comment. Also, this section is not applicable to the situation where a party is entitled to a de novo administrative or judicial hearing. This section does not apply to a situation where a procedural rule creates a right to an evidentiary hearing.

This section is modeled on the California, (see Cal. Cal.Gov.Code § 11410.10); Minnesota, (see Minnesota Statutes Annotated, § 14.02, subd. 3; Washington (see Revised Code of Washington, 34.05.413(2) and (perhaps) Kansas (see Kansas Stat. Ann., KS ST § 77-502(d) & Kansas Stat. Ann., KS ST § 77-503). Note that Arizona retained the narrower provision of the 1961 Model State Administrative Procedure Act even though it revised its Administrative Procedure Act subsequent to the promulgation of the 1981 Model State Administrative Procedure Act (see A.R.S. § 41-1001-4) and that Misssissippi refused to change its adjudication provisions when it revised its APA in 2002.

§ C4-102. PROCEDURAL REQUIREMENTS FOR AGENCY ADJUDICATION–ADJUDICATION BILL OF RIGHTS.

(a) Except as otherwise provided in the procedures for informal adjudication (§ C4-111) or emergency adjudication, the governing procedure by which an agency conducts an adjudication is subject to all of the following requirements:

(1) The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence.

(2) The agency shall make available to the person to which the agency action is directed a copy of the governing procedure.

(3) The hearing shall be open to the public.

(4) Any party may be advised or represented by counsel provided at the party's expense.

(5) The adjudicative function shall be separated from the [investigative], [advisory], prosecutorial, and advocacy functions within the agency.

(6) A presiding officer shall voluntarily disqualify himself and withdraw from any case in which he cannot accord a fair and impartial hearing or consideration, or when required by the applicable rules governing the practice of law in the [state]. Any party may request the disqualification of a presiding officer by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule of practice requiring disqualification.

(7) The decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision.

[(8) A decision may not be relied on as precedent unless the agency designates and indexes the decision as precedent].

(9) Ex parte communications shall be restricted according to § C4-106 of this Act.

(b) The requirements of this section apply to the governing procedure by which an agency conducts an adjudicative proceeding without further action by the agency, and prevail over a conflicting or inconsistent provision of the agency's governing procedure. The governing procedure by which an agency conducts an adjudicative proceeding may include provisions equivalent to, or more protective of the rights of the person to which the agency action is directed, than the requirements of this section.

(c) Provisions of this section shall be reduced, changed or displaced only by express statutory language that names this section and its caption.

Comment

This section specifies the minimum hearing requirements that must be met in agency adjudication under this statute. This section applies to all agencies whether or not an agency provision provides a different procedure; this procedure is excused only if a state or federal statute specifically provides otherwise. This section does not prevent an agency from adopting more stringent procedures than those in this section.

This section is modeled on the Arizona Regulatory Bill of Rights, see A.R.S. § 41-1001.01 and the California Administrative Adjudication Bill of Rights, see West Ann.Cal.Gov.Code § 11425.10. The right to be represented by counsel has been adapted from the 1981 Model State Administrative Procedure Act section 4-203.

There are two interrelated purposes for this procedural provision: 1) to create statutorily a minimum fair hearing procedure; and 2) to provide that minimum procedure "across the board" so that it is applicable to all agencies. In many states, agencies have petitioned and lobbied the legislature to remove various requirements of the state Administrative Procedure Act from them. The result is a crazy quilt of widely different agency procedures in a single state. This lack of uniformity creates problems for litigants, the bar and the reviewing courts. This section represents an attempt to provide a minimum, bare bones, across the board procedure for all agency adjudications. The important goal of this section is to protect citizens by a guarantee of minimum fair procedural protections. The procedures required here are only for actions that fit the definition of adjudication under this Act and are not so onerous as to create any substantial loss of efficiency or increased cost.

Subsection (c) has been included in order to help to insure that full consideration is given to the consequences of reducing the minimum provisions of this section.

Subsection (a)(6) was modeled on the Virginia provision on judicial bias and prejudice. See Va. Code Ann. § 2.2-4024.

§ C4-103. NOTICE OF HEARING.

(a) In an adjudication, all parties shall be afforded an opportunity for hearing after reasonable notice. Unless otherwise provided by law, the notice shall be given at least [ ] days prior to the date set for the hearing.

(b) the notice shall 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 state 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 short and plain statement of the matters asserted which includes a statement of the issues involved. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement must be furnished;

and

(8) a statement that a party who fails to attend or participate in a hearing or other stage of an adjudicative proceeding may be held in default under this act. A default judgement may be entered only upon making out a prima facie case.

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

Comment

This section is taken from: the 1961 Model State Administrative Procedure Act, section 9; the 1981 Model State Administrative Procedure Act, section 4-206. See also; Oregon, O.R.S. § 183.415; Kansas, K.S.A. § 77-518; Iowa, I.C.A. § 17A.12; Montana, MCA 2-4-601; and Michigan, M.C.L.A. 24.271.

§ C4-104. FORMAL ADJUDICATION PROCEDURE.

(a) A presiding officer shall preside over the conduct of an administrative hearing and shall regulate the course of the proceedings in a manner which will promote the orderly and prompt conduct of the hearing.

(b) A hearing may be conducted in an informal manner. Neither the informal manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings shall be grounds for reversing any administrative decision or order. Irrelevant, immaterial or unduly repetitious evidence shall be excluded.

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

orders. The original of all filings shall be mailed to the agency, and copies of any filed item shall be served on all parties and the presiding officer by any means permitted by law or prescribed by rule.

(d) To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall permit all parties to be represented by counsel at their expense, and 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 a pre-hearing order.

(e) A presiding officer may conduct all or part of an administrative hearing, or a prehearing conference, by telephone, television, or other electronic means, if each party to the hearing has an opportunity to hear, and, if technically feasible, to see the entire proceeding as it occurs.

(f) All testimony of parties and witnesses shall be made under oath or affirmation and the presiding officer shall have the power to administer an oath or affirmation for that purpose.

(g) An agency may issue subpoenas on its own motion. In addition, an agency or presiding officer may issue subpoenas upon the request of a party upon a showing of general relevance and reasonable scope of the evidence sought. A party entitled to have witnesses on behalf of the party may have subpoenas issued by an attorney of record of the party, subscribed by the signature of the attorney.

(h) 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. 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.

(i) All evidence, including records and documents containing information classified by law as not public, in the possession of the agency of which it desires to avail itself or which is offered into evidence by a party to a contested case proceeding, shall be made a part of the hearing record of the case. No factual information or evidence shall be considered in the determination of the case unless it is part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. When the hearing record contains information which is not public, the administrative law judge or the agency may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.

(j) Official notice may be taken of all facts of which judicial notice may be taken and of other scientific and technical facts within the specialized knowledge of the agency. Parties shall be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data, and the parties shall be afforded an opportunity to contest such facts before the decision is announced unless the agency determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts. The experience, technical competence, and specialized knowledge of the agency may be utilized in the evaluation of the evidence.

(k) An administrative hearing shall be open to the public unless specifically closed pursuant to a provision of law. If an administrative hearing is conducted by telephone, television,

or other electronic means, and is not closed, public access shall be satisfied by giving the public an opportunity, at reasonable times, to hear or inspect the agency's record.

Comment

Section (a) is taken from Kentucky, KRS § 13B.080.

Section (b) is taken from Arizona, A.R.S. § 41-1062.

Section (c) is taken from Arizona, A.R.S. § 41-1062.

Section (d) is taken from 1981 Model State Administrative Procedure Act, Section 4-211(2) and from Kentucky, KRS § 13B.080 (4).

Section (e) is taken from from Kentucky, KRS § 13B.080 (7).

Section (f) is taken from Kansas, K.S.A. § 77-524 and 1981 Model State Administrative Procedure Act, Section 4-212(b).

Section (g) is taken from Oregon, O.R.S. § 183.440 (1).

Section (h) is taken from 1981 Model State Administrative Procedure Act, Section 4-212 (d) and (e). Iowa, I.C.A. § 17A.14(2), Kansas, K.S.A. § 77-524 (d) and (e), and Wisconsin, K.S.A. § 77-524 (5) have similar provision, but limit admission of copies of documentary evidence to situations where the original is not readily available.

Section (i) is taken from Minnesota, M.S.A. § 14.60 subd.2. All government proceedings should be public, except if there is good cause for them not to be.

Section (j) is taken from Alabama, Ala.Code 1975 § 41-22-13 and from the 1981 Model State Administrative Procedure Act, section 4-212 (f).

Section (k) is taken from Kentucky, KRS § 13B.080, and from 1981 Model State Administrative Procedure Act, section 4-211.

§ C4-105. 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, except as provided by law.

Comment

This is the same provision as the 1981 MSAPA section for informal settlement. 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(9) definition of that term. The last clause of the section "except as provided by law" is intended to make clear that other provisions of this act or other statutes may make provisions for informal settlement procedure, and this section and parties are subject to those other provisions.

§ C4-106. NO EX PARTE COMMUNICATIONS.

(a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the hearing officer or agency head from an employee or representative of an agency that is a party or from a party or an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.

(b) communication otherwise prohibited by subparagraph (1) of this section from an employee or representative of an agency that is a party to the hearing officer is permissible in any of the following circumstances:

(1) The communication is for the purpose of assistance and advice to the presiding officer or agency head from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the

record; or

(2) The communication is for the purpose of advising the hearing officer or agency head concerning a settlement proposal advocated by the advisor.

(c) If a presiding officer or agency head receives a communication in violation of this article, the hearing officer shall make a part of the record: i) the written communication, if the communication is written; and/or ii) a memorandum that contains the substance, response of the presiding officer and the identity of the parties who communicated.

(d) The presiding officer or agency head shall notify all parties that a communication prohibited under this section has been made, and permit parties to respond within ten (10) days in a document, and, when appropriate, by introducing testimony or other evidence relevant to the communication.

(e) There shall be no communication, direct or indirect, while a proceeding is pending regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(f) This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or where the presiding officer does not issue a decision in the proceeding.

Comment

This section is taken from the extensive and systematic California provisions on ex parte contacts. See West's Ann.Cal.Gov.Code § 11430.10 to 11430.80. The California sections address many of the problems that arise in this area, and attempt to distinguish technical, advisory contacts from agency staff to presiding officers or agency heads.

§ C4-107. LICENSES.

(a) When the grant, denial, or renewal of a license is required by Constitution or a statute to be preceded by notice and opportunity for an evidentiary hearing, the provisions of this article concerning adjudication apply, except that

(1) When an agency refuses to issue a license required to pursue any commercial activity, trade, occupation or profession, if the refusal is based on grounds other than the results of a test or inspection, that agency shall grant the person requesting the license 60 days from notification of the refusal to request a hearing.

(2) In case of license applications not required to be acted on by adjudication, the agency shall give prompt notice of its action.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally acted upon by the agency, and, if the application is denied or the terms of the new license are limited, until the last day for seeking review of the agency decision or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the action, the agency provides the licensee with notice and an opportunity for an evidentiary hearing in accordance with this chapter. If the agency finds that the public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

Comment

Subsection (1) is modeled on the following Administrative Procedure Acts: 1961 Model State Administrative Procedure Act, section 14(c), 1981 MSAPA, section 4-501; Arizona, A.R.S. § 41-1065; Iowa, I.C.A. § 17A.18; Wisconsin, W.S.A. 227.51.

Subsection (a)(1) is modeled on the Oregon Administrative Procedure Act, O.R.S. § 183.435. Commercial and occupational licenses frequently represent such a substantial investment by the claimant, that, where the result is not based on test and inspection, an evidentiary hearing should be held to assure a high degree of accuracy.

Subsection (a) (2). is loosely based on the 1981 Model State Administrative Procedure Act, section 4-104 and the Florida Administrative Procedure Act, West's F.S.A. § 120.60. This section does not include as much detail.

Subsection (b) was taken from the 1961 Model State Administrative Procedure Act, section 14(b), which has been adopted by many states. See, for example: Alabama, Ala.Code 1975 § 41-22-19; Tennessee, T. C. A. § 4-5-320; Michigan, M.C.L.A. 24.291; and Wisconsin, W.S.A. 227.51.

Subsection (c) was modeled on the 1961 Model State Administrative Procedure Act, section 14(c) and the 81 Model State Administrative Procedure Act, section 4-104(b). Many states have adopted similar provisions. E.g. Arizona, A.R.S. § 41-1064 C.; Iowa, I.C.A. § 17A.18 3.; Tennessee, T. C. A. § 4-5-320 (c); and New Hampshire, N.H. Rev. Stat. § 541-A:30, II & III. This section controls proceedings to revoke, suspend, withhold, annul or modify a license whether or not hearing rights are granted by statute or constitution.

§ C4-108. INITIAL ORDER AND FINAL 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 by the agency on its own motion or on petition of a party.

(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.

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

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

(g) 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 is closely modeled on the 1981 Model State Administrative Procedure Act, Section 4-215. That provision follows includes useful provisions from a substantial number of states. E.g. see: Alabama, Ala.Code 1975 § 41-22-16; Iowa, I.C.A. § 17A.15; Kansas, K.S.A. §

77-526; Michigan, M.C.L.A. 24.281; Montana, MCA 2-4-623; Washington, RCWA 34.05.461.

§ C4-109. STAY. A party may submit to the hearing officer a petition for stay of effectiveness of an initial or final order within [ ] 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

This section is taken verbatim from 1981 Model State Administrative Procedure Act, Section 4-217. Stays are needed for judicial review and for agency review.

§ C4-110. AVAILABILITY OF DECISIONS AND OPINIONS; INDEX.

(a) It shall be the duty of the agency to make available for public inspection and copying, at cost, and index by caption and subject all final decisions and opinions that are the result of an adjudication, except

(1) those privileged by statute or order of court.

(2) those necessary to prevent a clearly unwarranted invasion of privacy or release of trade secrets.

(3) In each case the justification for the deletion must be explained in writing and attached to the order.

(4) A final decision of an adjudication shall not be relied on as precedent by an agency until it has been made available for public inspection and indexed in the manner described in this section.

Comment

This section continues the concept, seen earlier in connection with rules, of preventing "secret" law by making adjudications available to the public. Decisions relied upon by the agency as precedent will be available to the public.

§ C4-111. INFORMAL ADJUDICATION.

(a) an agency may use an informal hearing procedure in any of the following proceedings, if in the circumstances its use does not violate another statute or the federal or state Constitution:

(1) A proceeding where there is no disputed issue of material fact.

(2) A proceeding where there is a disputed issue of material fact, if the matter is limited to any of the following:

(A) A monetary amount of not more than one thousand dollars ($1,000);

(B) A disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days;

(C) A disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days;

(D) A disciplinary sanction against a licensee that does not involve an actual revocation of a license or an actual suspension of a license for more than five days. Nothing in this section precludes an agency from imposing a stayed revocation or a stayed suspension of a license in an informal hearing;

(E) A proceeding where, by regulation, the agency has authorized use of an informal hearing, and there is no violation of statute or constitution;

(F) A proceeding where an evidentiary hearing for determination of facts is not required by statute but where the agency determines the federal or state Constitution require an evidentiary hearing.

Comment

The informal hearing procedure is intended to satisfy due process and public policy requirements in a manner that is simpler and more expeditious than formal adjudication. The informal hearing procedure provides a forum in the nature of a conference in which a party has an opportunity to be heard by the presiding officer. The informal hearing procedure provides a forum that may accommodate a hearing where by regulation or statute a member of the public may participate without appearing or intervening as a party.

This section builds on the 1981 Model State Administrative Procedure Act, Articles 4-401 *et seq.* and 4-501 *et seq*., which provided for two different types of informal hearings, the conference and the summary hearing. This section adopts a single category of informal procedure that an agency may use to perform the same functions as the conference and summary hearings. This section also draws upon the California provision for an informal procedure, see Ann.Cal.Gov.Code § 11445.20.

§ C4-112. INFORMAL ADJUDICATION PROCEDURE.

(a) Except as provided in this section and preceding § C4-111, the hearing procedures otherwise required by statute for an adjudicative proceeding apply to an informal hearing.

(b) In an informal hearing the presiding officer shall regulate the course of the proceeding. The presiding officer shall permit the parties and may permit others to offer written or oral comments on the issues. The presiding officer may limit the use of witnesses, testimony, evidence, and argument, and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal.

Comment

This section is modeled on the 1981 Model State Administrative Procedure Act, section 4-402 and California Administrative Procedure Act, West's Ann.Cal.Gov.Code § 11445.40. Under this section, the informal adjudication is a simplified form of an adjudication under the control of the presiding officer.

§ C4-113. CONVERSION.

(a) Subject to any applicable regulation adopted under Section C2-102 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 statute if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party.

(2) Shall convert the proceeding to another type of agency proceeding provided for by statute, if required by regulation or statute.

(b) A proceeding of one type may be converted to a proceeding of another type only on notice to all parties to the original proceeding.

Comment

This section is modeled on 1981 Model State APA § 1-107(a)-(b) and California Section § 11470.10. This section applies to rulemaking proceedings as well as adjudications. For conversion under section (1)(a) the conversion must be to a form that is appropriate for the type of action being taken. Also, it must not substantially prejudice the rights of parties. This may require judicial application to decide what constitutes substantial prejudice, as was noted in the comment to section 1-107 of the 1981 Model State Administrative Procedure Act.

CORE ARTICLE V

JUDICIAL REVIEW

§ C5-101. RELATION TO OTHER APPEAL LAW AND RULES. Appeals from agency action shall be taken by filing a [form or procedure provided by state appellate rules] in accordance with the [state] [Rules of Appellate Procedure] or as otherwise provided by law.

Comment

This section seeks to fit appeals from final agency action within the existing state rules of appellate procedure. Such action may be preferred by some states because of constitutional provisions or that have rules of appellate procedure that the legislature may not wish to change. This practice was followed under the 1961 MSAPA, and is followed in several states today: Alaska (AS 44.62.560), California (West's Ann.Cal.Gov.Code § 11523), Delaware (29 Del.C. § 10143), Florida (West's F.S.A. § 120.68), Michigan (M.C.L.A. 24.302), and Virginia (Va. Code Ann. § 2.2-4026).

§ C5-102. FINAL AGENCY ACTION REVIEWABLE. Any person affected or aggrieved by final agency action, whether formal or informal or affirmative or prohibitory in nature, who has exhausted administrative remedies and complied with other requirements of this article, is entitled to judicial review.

Comment

This section provides a right of judicial review of final administrative action by appropriate parties. The definition of "agency action"is found in § C1-101. This section is taken in part from the 1981 MSAPA, and is similar to the judicial review provisions of Florida (West's F.S.A. § 120.68), Iowa (I.C.A. § 17A.19), Virginia (Va. Code Ann. § 2.2-4026) and Wyoming (W.S.1977 § 16-3-114).

§ C5-103. NON FINAL AGENCY ACTION REVIEWABLE.

(a) A person is entitled to judicial review of non-final agency action only if

postponement of judicial review would result in:

(1) an inadequate remedy or substantial and irreparable harm

(2) that is disproportionate to the public benefit derived from

postponement.

Comment

This section provides a limited right to review of non final agency action, and to interlocutory review during the pendency of judicial review. This section draws upon the 1961 MSAPA provision regarding inadequacy of remedy, but adds the requirement from the 1981 MSAPA that the harm to the individual by denying immediate review must outweigh or be found disproportionate to the public benefit that results from waiting until the agency action is final. This is a factor that agencies frequently raise in response to petitions for non-final review, and is justified by the delegation by the legislature to the agency to defend the public interest.

§ C5-104. FORM OF PETITION, JURISDICTION, VENUE. Judicial review is initiated by filing [the appropriate] [petition] [form] of action in [the appropriate] [state] court. A petition may seek any type of relief available. Such petition shall be filed within sixty (60) days of the agency action complained of. The appeal may be taken regardless of the amount involved.

Comment

This section recognizes the form of appeal from agency action that exists under the rules of civil and appellate procedure of the particular state, consistent with § C5-101. The petition for review may be used to seek review of any type of reviewable agency action. The final sentence that does away with jurisdictional amount is taken from the Iowa APA (I.C.A. § 17A.20).

§ C5-105. STAYS PENDING APPEAL. The filing of a review petition does not automatically stay the decision of the agency appealed from. An appellant may petition the agency or the reviewing court for a stay upon a showing of immediate, unavoidable, irreparable harm and a colorable claim of error in the agency proceedings. It shall not be a condition of

seeking a stay from the reviewing court that the appellant first seek a stay from the agency. The court may act even though the appellant has sought a stay from the agency.

Comment

This provision for stay permits a party appealing agency final action to seek a stay of the agency decision from the agency and the court. This is similar to the 1961 MSAPA, but it adds standards to help guide appellants. The standards for issuing a stay are taken from the Virginia APA (Va. Code Ann. § 2.2-4028), the Delaware APA (29 Del.C. § 10144), and the Oregon APA (O.R.S. § 183.482).

§ C5-106. 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.

Comment

This section adopts an approach to standing that incorporates primarily the injury in fact test for standing. It does not include the legal interest or "zone of interests" test from federal law. There are several reasons for this difference from federal standing law. First, many states have explicitly rejected the federal approach to standing. See: *Rhode Island Ophtalmological Soc. v. Director of Health*, 113 R.I. 16, 317 A.2d 124 (1974); *Alliance for Metropolitan Security v. Council*, 671 N.W.2d 905 (Minn. Ct. Apps., 2003); *Snyder's Drug Stores v. Board of Pharmacy*, 301 Minn. 28, 35, 221 N.W.2d 162, 166 (1974); *O'Connell v. Dept. of Community Affairs*, 874 So.2d 673 (Fla. App. 2004); *Greer v. Housing Auth.*, 122 Ill.2d 462, 120 Ill.Dec. 531 (1988);

Iowa Bankers Assn v. Iowa Credit Union Dept., 335 N.W.2d 439 (Iowa, 1983); *City of Des Moines v. Public Employment Relations Bd.*, 275 N.W.2d 753 (Iowa, 1979). These states have done so for various reasons. One is the perception that the zone of interests test is drawn from the specific language of the federal APA; the language of most of the state APA's is different. Another is that states have constitutional requirements that differ from the Article III requirements of the federal constitution. Those states that have rejected the zone of interest test have stated that this simpler test is preferable to searching for legislative intent. States rejecting the zone test have also done so with the purpose of making judicial review more freely available than in the federal arena.

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." The scope of paragraph (a)(5) will ultimately be established by judicial interpretation.

§ C5-107. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

(a) 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

This section is identical with § 5-107 of the 1981 MSAPA. It accurately reflects the approach that many states have taken to exhaustion of administrative remedies. The default rule created by this section is a requirement of exhaustion. However, subsections (a)(1) to (3) create a series of exceptions that have been widely recognized in judicial decisions to the exhaustion requirement. Subsection(a) (1) excuses persons seeking judicial review who were not parties before the agency from the exhaustion requirement. Subsection (a)(2) excuses exhaustion where any other provision of this Act or another law permits it. Subsection (a)(3) recognizes the judicially created exception to the exhaustion requirement where an agency relief would be inadequate. The bracketed material is optional.

§ C5-108. CLOSED RECORD; EXCEPTION.

(a) Judicial review of adjudication and rulemaking as defined in this act shall be confined to the agency record for judicial review as defined in this act.

(b) Judicial review of adjudication and rulemaking as defined in this act shall not be confined to the record in situations where the appellant alleges procedural error arising from matters outside the record or matters that are not evident from the record.

Comment

This section establishes a default closed record for judicial review of adjudication and rulemaking. It is well established in most states and in federal administrative procedure that, in case of adjudication, judicial review is based upon that which was before the agency. Otherwise, for example, the standards of judicial review could be subverted by the introduction of additional evidence to the court that was not before the agency. See *Western States Petroleum Ass'n v. Superior Court*, 888 P.2d 1268 (Cal. 1995). For rulemaking, the record for judicial review is defined in § C3-102 of this Act.

An effect of this definition is that the closed record approach does not apply to informal agency action and ministerial agency action.

Section (b) creates an exception to the closed record on review in the limited situations where procedural error, such as, for example, ex parte contacts or violation of separation of functions, that do not appear or are not evident from the record.

§ C5-109. SCOPE OF REVIEW.

(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 action exceeds the authority granted by, or violates limitations imposed by; the federal or state constitutions, statute, common law, an agency rule having the force of law, or any other source of law that is binding on the agency.

(2) The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.

(3) The agency action is arbitrary, capricious or an abuse of discretion, which includes, but is not limited to, agency:

(A) reliance on factors that may not be taken into account under subsection (c) (1) of this section.

(B) failure to rely on factors required to be taken into account under subsection (c) (1) of this section.

(C) assertion or reliance on factual bases for action that do not withstand review under the relevant standard of review for factual findings in subsection (4) of this section.

(D) failure to consider substantial aspects of the problem considered or to consider alternatives without adequate justification.

(E) failure to consider significant arguments, or respond to relevant and significant comments, made by the participants in the proceeding that gave rise to the agency action.

(F) unsupported by any explanation or rests upon reasoning that is irrational or seriously flawed.

(G) otherwise irrational, arbitrary or capricious.

(d) 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.

Comment

Subsections (a) to (c) are taken from the 1961 and 1981 MSAPA. These subsections accurately describe the law relative to the general burdens on the appellant and the approach under this Act. They are substantially similar to the general scope of review provisions of the Federal APA, 5 U.S.C. § 706.

Subsection (a)(1) identifies the courts' power to decide questions of law. Subsection (a)(1) includes, but is not limited to, violations of constitutional or statutory provisions and actions that are in excess of statutory authority from § 15(g) of the 1961 MSAPA, and includes subsections (c) (1), (2) and (4) of the 1981 MSAPA.

Subsection (b) is part of both the 1961 and 1981 MSAPA's.

This section is not intended to preclude courts from according deference to agency

interpretations of law where such deference is appropriate.

§ C5-110. 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.

§ C5-111. 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.

MODEL STATE ADMINISTRATIVE PROCEDURES ACT

OPTIONAL PROVISIONS

OPTIONAL ARTICLE I

GENERAL PROVISIONS

§ O1-102. DEFINITIONS.

(1) "Code" means the [state] administrative code.

(2) "Electronic distribution" or "electronically" means distribution by electronic mail or facsimile mail.

(3) "Entry" of an order means the signing of the order by all persons who are to sign the order, as an official act indicating that the order is to be effective.

(4) "Fee" means a charge prescribed by an agency for an inspection or for obtaining a license.

(5) "Filing" of a document that is required to be filed with an agency means delivery of the document to a place designated by the agency by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.

(6) "Mail" or "send," for purposes of any notice relating to rule making or policy or interpretive statements, means regular mail or electronic distribution.

(7) "Party to judicial review or civil enforcement proceedings," or "party" in context so indicating, means:

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

(b) 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) "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.

(9) "Register" means the [state] administrative register.

(10) "Service," except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic telefacsimile transmission, where copies are mailed simultaneously, or by commercial parcel delivery company.

Comment

Section (1) is modeled on the Arizona Administrative Procedure Act, A.R.S. § 41-1001 2.

Section (3) is modeled on the Washington Administrative Procedure Act, RCWA 34.05.010 (5).

Section (4) is modeled on the Arizona Administrative Procedure Act, A.R.S. § 41-1001 8.

Section (5) is modeled on the Washington Administrative Procedure Act, RCWA 34.05.010 (6).

Section (6) is modeled on the Washington Administrative Procedure Act, RCWA 34.05.010 (10).

Section (7) is modeled on the 81 Model State Administrative Procedure Act, Section 1-102(7).

Section (8) is modeled on the 81 Model State Administrative Procedure Act, Section 1-102(9).

Section (9) is modeled on the Arizona Administrative Procedure Act, Arizona, A.R.S. § 41-1001 16.

Section (10) is modeled on the Washington Administrative Procedure Act, West's RCWA 34.05.010(19).

§ O1-103. SUSPENSION OF ACT'S PROVISIONS WHEN NECESSARY TO AVOID LOSS OF FEDERAL FUNDS. If any part of this chapter is found to be in conflict with federal requirements which are a condition precedent to the allocation of federal funds to the state, the conflicting part of this chapter is inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and such findings or determination shall not affect the operation of the remainder of this chapter in its application to the agencies concerned.

Comment

This approach is taken from the Washington APA. This approach has the advantage of simplicity and transparency. It eliminates as many formal procedures as possible.

OPTIONAL ARTICLE II

OPTIONAL GENERAL PROVISIONS

§ O2-104. MODEL RULES.

ALTERNATIVE 1

(1) The [Attorney General] [Legislature] shall publish model procedural rules for use by the agencies. The model rules shall include general procedural functions and duties of as many agencies as is practicable.

(2) The model procedural rules shall constitute the default procedural rules for use by all agencies, and shall bind all agencies as of the date of publication by [Attorney General] [Legislature].

(3) An agency may adopt a rule of procedure that differs from the model procedural rules only through a rulemaking proceeding [, and the final rule must state with particularity the need and reasons for the variation from the model procedural rules].

ALTERNATIVE 2

(1) The [Attorney General] [Legislature] shall publish model procedural rules for use by the agencies. The model rules shall include general procedural functions and duties of as many agencies as is practicable.

(2) The model rules and additions, amendments, or revisions thereto shall be appropriate for the use of as many agencies as is practicable and shall be filed with the [secretary of state] [administrative rules publisher] and provided to any agency upon request. The adoption by an agency of all or part of the model rules does not relieve the agency from following the

rulemaking procedures required by this Act.

Comment

The purpose of Alternative 1 section is to create as uniform a set of procedures for all agencies as is realistic, but to preserve the power of agencies to deviate from the common model where necessary because the use of the model rules is demonstrated to be impractical for that particular agency. Like § 2-105 of the 81 MSAPA, Alternative 1 of this section requires all agencies to use the model rules as the basis for the rules that they are required to adopt under § C2-102. An agency may deviate from the model rules only for impracticability.

Alternative 2 recognizes that the availability of model rules will be helpful to smaller agencies that lack sufficient resources to draft their own rules effectively. However, Alternative 2 does not attempt to channel agencies into a uniform set of procedural rules as does Alternative 1. States with model rules provisions: Arkansas, A.C.A. § 25-15-215; Montana, MCA 2-4-202; Oregon, O.R.S. § 183.341; New Hampshire, N.H. Rev. Stat. § 541-A:30-a; Nebraska, Neb.Rev.St. § 84-205.

OPTIONAL ARTICLE III

RULEMAKING

OPTIONAL GENERAL PROVISIONS

§O3-101. ADVICE 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, 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, 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

This section is modeled on the 81 Model State Administrative Procedure Act, section 3-101.

§ O3-103. 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.

(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

This section is modeled on 81 Model State Administrative Procedure Act, Section 3-111.

§ O3-104. INVALIDITY OF RULES NOT ADOPTED ACCORDING TO CHAPTER. A rule adopted after [date] is invalid unless adopted in substantial compliance with the provisions of [Sections] through [ ] and [ ] through [ ]. However, inadvertent failure to mail a notice of proposed rule adoption to any person as required by [ ] does not invalidate a rule.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 3-113(a).

§ O3-113. SPECIAL PROVISION FOR CERTAIN CLASSES OF RULES.

(a) Except to the extent otherwise provided by any provision of law, Sections C3-102 through C3-115 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:

(A) enable law violators to avoid detection;

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

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

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

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

(F) 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;

(G) 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;

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

(I) an agency budget; [or]

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

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

Comment

This section is virtually identical to section 3-116 of the 81 Model State Administrative Procedure Act. It continues the 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 sometimes conflicting need for efficient, economical, and effective government on the other hand. See: Ala. § 41-22-3(1)(a); Fla. F.S.A. § 120.52(15)(a); see Ky. KRS § 13A.010(2)(a). And see generally: Az. A.R.S. § 41-1005; Ia. I.C.A. § 17A.2(11); Fla. West's F.S.A. § 120.52(15); Ky. KRS § 13A.010(2); Va. Va. Code Ann. § 2.2-4002(B); Wa. West's RCWA 34.05.010(16);

WI, W.S.A. 227.01(13). 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.

OPTIONAL AGENCY REVIEW PROVISIONS

§ O3-105. RULE REVIEW BY AGENCY.

(a) 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.

(b) 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.

(c) 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

This section is modeled on 81 Model State Administrative Procedure Act, Section 3-201.

§ O3-106. 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

This section is modeled on 81 Model State Administrative Procedure Act, Section 3-202.

§ O3-107. 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 modeled on 81 Model State Administrative Procedure Act, Section 3-203.

§ O3-108. 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.

(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 [ ], 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.]

(d) 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 [ ] through [ ]. An agency is not required to adopt the proposed rule.]

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

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 3-204.

OPTIONAL ARTICLE IV

ADJUDICATIVE PROCEEDINGS

OPTIONAL PROVISIONS ON AVAILABILITY

§ O4-101. ADJUDICATIVE PROCEEDINGS; COMMENCEMENT.

(a) An agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction for which an evidentiary hearing is required.

(b) 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:

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

(B) a decision which the agency may make without conducting an adjudicative proceeding.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-102. It removes the presumption that all matters that are not rule making are some form of adjudication covered by one of the specific forms in this Administrative Procedure Act.

§ O4-102. 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 administrative review available to the applicant.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-103.

OPTIONAL PROVISIONS ON FORMAL ADJUDICATION

§ O4-103. 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 [ ] [, 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

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-202.

§ O4-104. 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 is modeled on 81 Model State Administrative Procedure Act, Section 4-203.

§ O4-105. PRE-HEARING CONFERENCE--AVAILABILITY, NOTICE.

(a) 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 [ ] 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.

(b) 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 pre-hearing conference;

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

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

(7) 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

(8) 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.

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

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-204.

§ O4-106. PRE-HEARING CONFERENCE--PROCEDURE AND PRE-HEARING ORDER.

(a) The hearing 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

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-205.

§ O4-106. INTERVENTION.

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

(1) The petitioner has a statutory right to initiate the proceeding in which he wishes to intervene; or

(2) The petitioner has an interest which is or may be adversely affected by the outcome of the proceeding.

(b) The presiding officer may grant intervention after consideration of the following factors and a determination that intervention is in the interests of justice

(1) The nature of the issues;

(2) The adequacy of representation of the petitioner's interest which is provided by the existing parties to the proceeding;

(3) The ability of the petitioner to present relevant evidence and argument; and

(4) effect of intervention on the agency's ability to implement its statutory mandate.

(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

Sections (1) and (2) are taken from the Kentucky provisions on intervention, KRS § 13B.060. They clearly include de jure and de facto injury to the petitioning intervenor as a sufficient conditions for intervention.

Sections (3) and (4) are taken from the 81 Model State Administrative Procedure Act, section 4-209(c)&(d). Section three recognizes the normal judicial practice of limiting the participation of intervenors to their interest and maintaining an orderly and expeditious hearing.

Section four simply provides for notice suitable under the circumstances to enable parties to anticipate and prepare for changes that may be caused by the intervention.

§ O4-107. 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 (2).

(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

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-208.

§ O4-108. 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 [ ].

(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 [ ].

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-214.

§ O4-109. 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,

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

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

(C) 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 [ ], 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 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 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 hearing 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 [ ].

(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 is modeled on 81 Model State Administrative Procedure Act, Section 4-216.

§ O4-110. 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

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-218.

§ O4-111. 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 [ ].

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-219.

§ O4-112. 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 [ ] 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 [ ] 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

(3) 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 [ ].

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-220.

OFFICE OF ADMINISTRATIVE HEARINGS

§ O4-113. 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

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-301.

OPTIONAL ARTICLE V

JUDICIAL REVIEW

§ O5-101. EXCLUSIVE MEANS OF RELIEF. This Act constitutes the exclusive method for conducting appeals from final agency action; however, if relief available under this Act is not substantially equivalent to the relief otherwise available under law, the relief otherwise available and the related procedures supersede and supplement the provisions of this Act.

Comment

This section is taken in part from the 1981 MSAPA. Several states have adopted provisions similar to this section into their APA's. States which have adopted similar provisions are: Alabama (Ala.Code 1975 § 41-22-20), Iowa (I.C.A. § 17A.19), Kansas (K.S.A. § 77-606), Oregon (O.R.S. § 183.480), Tennessee (T. C. A. § 4-5-322) and Wisconsin (W.S.A. 227.53). A provision of this type, one that establishes a unitary form of appeal procedure, gives clear notice of procedure for appeal. In addition, the judicial appeal provisions within this APA have been drafted with the procedural problems and situations that frequently arise in judicial appeals from administrative agencies. This provision will also generate a more coherent and accessible body of procedural law, thus making the judicial task more manageable. See Donald W. Brodie and Hans A. Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review*, 1977 Az. St. L. Rev. 537. If it is impossible to enact this provision because of constitutional prohibition or other legislative or statutory problem, § § C5-101 & 104 provide an alternative, non exclusive judicial appeal provision.

§ O5-102. FINAL AGENCY ACTION REVIEWABLE. A person who qualifies under this Act regarding (i) standing, (ii) exhaustion of administrative remedies ( ), and (iii) time for filing the petition for review ( ), and other applicable provisions of law 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.

Comment

This section creates a right to judicial review of final action, and lists the requirements that must be met in order to obtain judicial review. This right was recognized by the 1961 MSAPA and the 1981 MSAPA. The definitions (§ 1-101) define "agency action" and "final agency action."

§ O5-103. NON FINAL AGENCY ACTION REVIEWABLE. A party may seek judicial review of non final agency action only upon showing that:

(1) the agency's conclusions with respect to that issue are intended to be definitive rather than tentative or interlocutory in character; and

(2) postponement will cause the party to suffer substantial and irreparable harm that is disproportionate to the public benefit derived from postponement; and

(3) the risk of such harm outweighs the risk that immediate judicial consideration of that issue would prevent the court from reaching a sufficiently informed decision with respect to that issue or would unduly interfere with the orderly development of agency policy.

Comment

This section provides for an interlocutory review and continues the approach of the 1961 and 1981 MSAPAs that the circumstances in which this remedy is available should be limited. Generally, finality requires that 1) the agency action marks the consummation or termination of the agency's decisionmaking process. Subparagraph (1) addresses that question. Under this section, an agency that has left open the possibility of reexamining an issue, upon a showing of good reasons to do so, can still be found to have rendered a "final" decision with respect to that issue, if the agency has no plans to reexamine it. Subparagraph (2) incorporates the principle, taken from case law, that permits exceptions to exhaustion and ripeness requirements where the parties will suffer exceptional hardship from delay; however, the subsection limits the operation of the section further by the additional requirement that a court should permit an interlocutory appeal only where the harm to the individual is substantially greater than the benefit to the public of waiting for a final order, as was provided in the 1981 MSAPA. Subparagraph (3) draws from case law the considerations that should be taken into account in deciding whether to permit interlocutory review. This subsection seeks to identify the factors commonly accepted from case law in the area, for example, of ripeness. Subsection (3) will also be helpful in making decisions about timing of judicial review of appropriate rules and guidance documents.

§ O5-104. FORM OF APPEAL. Judicial review is initiated by filing a petition for review in [the appropriate] court. A petition for review may seek any type of relief available under law.

Comment

This section establishes a single form of action for appeals. It is taken from the 1981 MSAPA. The unitary form of action provided for in this act is a type of limited judicial review of agency action, as prescribed by the other provisions of this Act. However, another statute may provide different standards for judicial review.

§ O5-105. VENUE OF APPEALS FROM AGENCY ACTION. Any person affected or aggrieved by final agency action as described in § O5-101 of this Act shall seek review where the agency maintains its headquarters, where the person filing the appeal resides or as otherwise provided by law by filing a petition for review.

Comment

This section establishes a single form of review. Such a procedure gives clear notice of the type of action that must be taken to seek judicial review. It also eliminates the risk created by traditional legal procedural distinctions between, and requirements of, different writs used to seek judicial relief from agency action. However, other statutes may impose different requirements for appeal.

§ O5-106. 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:

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

(B) that person's asserted interests are not marginally related to or consistent with the purposes of the statute involved; and

(C) 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.

Comment

This section is drawn substantially from the 1981 MSAPA. It includes both the injury in fact test and the zone of interest test, a part of the federal standing test which some states have followed. See *Friends of Black Forest v. County of El Paso*,80 P.3d 871 (Colo.App.,2003); *United Television Svc. Corp. v. Dept. Pub. Utility Control*,235 Conn. 334, 663 A.2d 1011 (2003); *Ginther v. Comm'r of Ins*.,427 Mass. 319, 693 N.E.2d 153 (1998); *Washington Indep. Telephone Assn v. Washington Utils. And Trans. Comm*, 41 P.3d 1212 (Wash. App. 2002); *Wisc. v. Dept. of Nat. Resources*, 184 Wis.2d 407, 515 N.W.2d 897 (1994). Justification for the zone test is that persons who have nothing to do with the objectives that led the legislature to pass a particular substantive statute are unlikely to bring actions that will advance or promote those legislative goals and purposes. Where standing is at issue, the principal inquiry should be whether the legislature has created a cause of action through the APA or otherwise. Cass R. Sunstein, Standing and the Privatization of Law, 88 Colum. L. Rev. 1432, 1433 (1988); ABA Statement of Black Letter Law, 54 Admin. L. Rev. 17 (2002); Clarke v. Securities Industry Ass's, 479 U.S. 388, 107 S.Ct. 750 (1987). This section also adopts the federal "remediability" test for standing If a state legislature desires, this section can be substituted for § C5-106.

§ O5-107. TIME FOR FILING PETITION FOR REVIEW. Subject to other

requirements of this Act or of another statute:

(a) A petition for judicial review of a rule may be filed at any time, except as limited by § [ ].

(b) A petition for judicial review of an order is not timely unless filed within [ ] 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.

(c) A petition for judicial review of agency action other than a rule or order is not timely unless filed within [ ] days after the agency action, but the time is extended:

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

(2) 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

This section establishes the time limits within which action must be brought. Subsection (1) establishes the time when appeals from rules must be taken. Subsection (2) establishes the time for taking an appeal from an adjudication. That subsection also tolls the time for appeal while a party makes good faith efforts to exhaust remedies. This tolling is recognized by several cases. See *ICC v. Bhd. of Locomotive Eng'rs,* 452 U.S. 270 (1987); *32 County Sovereignty Cmte. v. Dept. of State*, 292 F.3d 727 (D.C. Cir. 2002), both of which hold that an appeal *cannot* be filed while relief is being sought before the agency. Subsection (3) establishes the time when appeals must be taken from agency action other than adjudication or rulemaking. Subsection (3)(ii) deals with the situation involving a rule or other agency action such as a guideline or statement that is unlikely in good faith to be discovered in a timely fashion by a party affected by it.

§ O5-108. 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 as described in §O5-102(i),(ii) and (iii);

(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

This section is identical to § 5-109 of the 1981 MSAPA. The detail will be of assistance to unrepresented parties and will also assist the court by requiring specified useful information.

§ O5-109. PETITION FOR REVIEW.

(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 is taken from § 5-110 of the 1981 MSAPA. 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."

§ O5-110. LIMITATION ON NEW ISSUES.

(a) 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:

(A) a change in controlling law occurring after the agency action; or

(B) agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

Comment

This section is taken from the 1981 MSAPA.

§ O5-111. SCOPE OF REVIEW; VALIDITY OF AGENCY ACTION.

(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 the law.

(5) The agency has erroneously applied the law; however, in making this determination the court shall take into account the discretion that the legislature has accorded to the agency to apply the law.

(6) The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.

(7) The persons taking the agency action were improperly constituted as a decision-making body, motivated by an improper purpose, or subject to disqualification.

(8) 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.

(9) The agency action is:

(A) outside the range of discretion delegated to the agency by any provision of law;

(B) agency action, other than a rule, that is inconsistent with a rule of the agency; [or]

(C) 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] [.]

(D) [otherwise unreasonable, arbitrary or capricious.]