

1 **MODEL STATE ADMINISTRATIVE PROCEDURE ACT**

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4 **AMENDMENTS TO ANNUAL MEETING DRAFT**
5 **July 3, 2008**
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8 **AMENDMENT 1**
9 **Section 305 Regulatory Analysis**
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11 *Action taken by committee:* Under Section 305 subsection (a), it was decided that the regulatory
12 analysis must be completed before notice of proposed rulemaking is given. Sub part 2 of (a) is
13 deleted (concerning the lesser economic impact and the request by the governor etc). The
14 summary of regulatory analysis must be published when the notice of proposed rule making is
15 given, and subsection (f) is deleted. Also, a judicial review standard (new subsection (f)) was
16 added to govern compliance with regulatory analysis requirements
17

18 Section 305 is revised to read:
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20 **SECTION 305. REGULATORY ANALYSIS.**

21 (a) An agency shall prepare a regulatory analysis for a proposed rule having an
22 estimated economic impact of more than [\$.]. The regulatory analysis shall be completed
23 before the notice of proposed rulemaking is published. The summary of the regulatory analysis
24 must be published when the notice of proposed rulemaking is given.

25 (b) An agency shall prepare a statement of no estimated economic impact for any rule
26 proposed to be adopted , amended, or repealed by the agency the adoption, amendment, or
27 repeal of which has no economic impact.

28 (c) A regulatory analysis must contain:

29 (1) a description of any classes of persons that would be affected by the
30 proposed rule and the costs and benefits to that class of persons;

31 (2) an estimate of the probable impact of the proposed rule upon affected classes;

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

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

3 (5) [a citation to and summary of each scientific or statistical study, report, or
4 analysis that served as a basis for the rule, together with an indication of how the full text may be
5 obtained].

6 (d) An agency preparing a regulatory analysis under this section shall prepare a concise
7 summary of the regulatory analysis.

8 (e) An agency preparing a regulatory analysis under this section shall submit the analysis
9 to the [regulatory review agency] [department of finance and revenue] [other]].

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

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14 **AMENDMENT 2**
15 **Section 306, Public Participation**
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17 *Action Taken by Committee:* Add a legislative note clarifying that any rulemaking hearing must
18 be held before the end of the public comment period. This clarifies a possible conflict between
19 the [30] day bracketed language in subsections (a) and (d)

20 Legislative Note has been added to read:
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23 ***Legislative Note:*** *state laws vary on the length of public comment periods and on whether or not*
24 *a rulemaking hearing is required. The bracketed number of days in subsections (a) and (d)*
25 *should be interpreted to require that if a rulemaking hearing is held, it will be held before the*
26 *end of the public comment period.*
27

28 **AMENDMENT 3**
29 **Section 307. Final Adoption**

30 *Action Taken by Committee:* Change the starting date for the 180 day period to after the last date
31 for submitting comments or after the date of the public hearing which ever is later. Delete
32 subsection (c).

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2 Section 307 is revised to read:
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4 **SECTION 307. FINAL ADOPTION.**

5 (a) An agency may not adopt a rule until the period for submitting information or
6 comments has expired.

7 (b) Not later than [180] days after the last date for submitting comments or after the date
8 of any public hearing, whichever is later, the agency shall adopt the rule pursuant to the
9 rulemaking proceeding or terminate the proceeding by publication of a notice to that effect in the
10 [administrative bulletin]. The agency shall file adopted rules with the [publisher] within []
11 days after the date of adoption of the rule.

12 (c) A rule not adopted and filed within the time limits set by this section is void.
13

14 **AMENDMENT 4**

15 **Section 308. Variance between proposed rule and adopted rule**

16 *Action Taken by Committee:* Delete all text except for the first sentence. State in comments to
17 section 308 the various tests used by the courts addressing the variance problem including the
18 logical out growth test.
19

20 Section 308 is revised to read:
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22 **SECTION 308. VARIANCE BETWEEN PROPOSED RULE AND ADOPTED**

23 **RULE.** An agency may not adopt a rule that differs from the rule proposed in the notice of
24 proposed adoption of a rule on which the rule is based unless the rule being adopted is the logical
25 outgrowth of the rule proposed in the notice.
26

1 **AMENDMENT 5**

2 **Section 309 Emergency rulemaking; Direct final rulemaking**

3 *Action Taken by Committee:* Change expedited to direct final. Delete the last clause in
4 subsection (b).

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6 Section 309 is revised to read:

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8 **SECTION 309. EMERGENCY RULEMAKING; DIRECT FINAL**

9 **RULEMAKING.**

10 (a) When an agency finds for good cause that an imminent peril to the public health,
11 safety, or welfare, including the imminent loss of federal funding for agency programs, requires
12 the immediate adoption of a rule and states in a record its reasons for that finding, the agency,
13 without prior notice or hearing or upon any abbreviated notice and hearing that it finds
14 practicable, may adopt, a rule without complying with Sections 304 to 308. The adoption may
15 be effective for not longer than [180] days [renewable once up to an additional [180] days]. The
16 adoption does not preclude adoption of an identical rule under Sections 304 through 308. The
17 agency shall file under Section 315 a rule not later than [] days of the adoption under the
18 subsection and shall notify persons who have requested notice of rules related to that subject
19 matter.

20 (b) If an agency proposes to adopt a rule and that action is expected to be
21 noncontroversial, it may use a direct final rulemaking process in accordance with this subsection
22 and without complying with Sections 304 to 308. A rule adopted under this subsection must be
23 published in the [administrative bulletin] along with a statement by the agency that it does not
24 expect the rule to be controversial. If no object is received, the rule shall become final. If an
25 objection to the use of the expedited rulemaking process is received within the public comment
26 period from any person, the agency shall file notice of the objection with the [publisher] for

publication in the [administrative bulletin], and may proceed with the normal rulemaking process under Sections 304 to 308.

AMENDMENT 6
Section 312 Concise Explanatory Statement

Action Taken by Committee: Revise the language of subsection (a)(1). Delete subsection (b), which addresses a subject that may fit better in Article 5.

Section 312 is revised to read:

SECTION 312. CONCISE EXPLANATORY STATEMENT. At the time it adopts a rule, an agency shall issue a concise explanatory statement containing:

(1) the agency’s reasons for the action, which must include the agency’s reasons for not accepting substantial arguments made in testimony and comments; and

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

AMENDMENT 7
Section 313 Incorporation by Reference

Action Taken by Committee: Replace the word “incorporation” with the words “repeating verbatim” in subsection (1). Add brackets to the last clause in subsection (2).

Section 313 is revised to read:

SECTION 313. INCORPORATION BY REFERENCE. A rule may incorporate by reference all or any part of a code, standard, or rule that has been adopted by an agency of the United States, this state, another state, or by a nationally recognized organization or association, if:

(1) repeating verbatim the text of the code, standard, or rule in the rule would be unduly

cumbersome, expensive, or otherwise inexpedient;

(2) the reference in the rule fully identifies the incorporated code, standard, or rule by citation, location, and date, [and states whether the rule includes any later amendments or editions of the incorporated code, standard, or rule];

(3) the code, standard, or rule is readily available to the public in written or electronic format;

(4) the rule states where copies of the code, standard, or rule are available for a reasonable charge from the agency adopting 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 the code, standard, or rule; and

(5) The agency maintains a copy of the code, standard, or rule readily available for public inspection at the agency office.

AMENDMENT 8

Section 315 Filing of Rules

Action Taken by Committee: Add language specifying the publisher's responsibility to publish notice of adopted rules in the administrative bulletin.

Section 315 is revised to read:

SECTION 315. FILING OF RULES. An agency shall file in written and electronic format with the [publisher] each rule it adopts, including a rule adopted under Section 309(a) or under Section 309(b), and all rules existing on [the effective date of this [act]] that have not previously been filed. The filing must be done as soon after adoption of the rule as practical. The [publisher] 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 concise

1 explanatory statements. The publisher shall publish the notice of adopted rules in the
2 [administrative bulletin]. In filing a rule, each agency shall use a standard form prescribed by the
3 [publisher].

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5 **AMENDMENT 9**
6 **Section 316 Effective Date of Rules**

7 *Action Taken by Committee:* Change bracketed language in subsection (a) from 60 days to 30
8 days. Change language in subsection (d) relating to effective date of emergency rules to “upon
9 adoption by the agency”

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11 Section 316 is revised to read:

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13 **SECTION 316. EFFECTIVE DATE OF RULES.**

14 (a) Except as otherwise provided in subsection (b), (c), (d) or (e), [unless disapproved by
15 the [rules review committee] or [withdrawn by the agency under Section 703] after [the effective
16 date of this [act] each rule adopted, and the repeal of a rule, becomes effective [30] days after
17 publication of the rule in the [administrative bulletin] [on the [publisher]'s Internet website.]

18 (b) The adoption of a rule may become effective on a later date than that established by
19 subsection (a) if the later date is required by another statute or specified in the rule.

20 (c) The adoption of a rule becomes effective immediately upon its filing with the
21 [publisher] or on any subsequent date earlier than that established by subsection (a) if it is
22 required to be implemented by a certain date by the federal or [state] constitution, a statute, or
23 court order.

24 (d) A rule adopted using the emergency process under Section 309(a) becomes effective
25 upon adoption by the agency.

26 (e) A rule adopted using the expedited process under Section 309(b) to which no
27 objection is made becomes effective [30] days after the close of the comment period, unless the

1 rulemaking proceeding is terminated or a later effective date is specified by the agency.

3 **AMENDMENT 10**

4 **Section 702 Review by Rules Review Committee**

5 *Action Taken by Committee:* Change language in subsection (b) to narrow the scope of rules that
6 the legislative rules review committee is required to review. This is a response to a comment
7 from a commissioner at the 2007 meeting.

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9 Section 702 is revised to read:
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11 **SECTION 702. REVIEW BY [RULES REVIEW COMMITTEE] .**

12 (a) An agency shall file a copy of an adopted, amended, or repealed rule with the [rules
13 review committee] at the same time it is filed with [the [publisher]].

14 (b) The [rules review committee] may examine currently effective rules and newly
15 adopted, amended, or repealed rules to determine whether the:

16 (1) rule is a valid exercise of delegated legislative authority;

17 (2) statutory authority for the rule has expired or been repealed;

18 (3) rule is necessary to accomplish the apparent or expressed intent of the specific
19 statute that the rule implements;

20 (4) rule is a reasonable implementation of the law as it affects persons
21 particularly affected by the rule;

22 (5) The rule complies with the regulatory analysis requirements of Section 305,
23 and properly determines the factors under Section 305(c).

24 (c) The [rules review committee] may request from an agency such information as is
25 necessary to carry out the duties of subsection (a). The [rules review committee] shall consult
26 with standing committees of the legislature with subject matter jurisdiction over the subjects of
27 the rule under examination.]

1 (d) The [rules review committee]:

2 (1) shall maintain oversight over agency rulemaking; and

3 (2) shall exercise other duties assigned to it under this [article].

4 **Comment**

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6 This section adopts a rules review committee process that is widely followed in state
7 administrative law as a method for legislative review of agency rules. Subsection (b) allows the
8 legislative rules review committee to review currently effective rules and newly adopted rules.
9 The rules review committee may establish priorities for rules review including review of newly
10 adopted or amended rules, and may manage the rules review process consistent with committee
11 staff and budgetary resources.