Memo
From Professor Gregory Ogden, Reporter, Model State APA Drafting Committee
To the committee advisors, and observers
For the telephone conference call on .
Consent docket (June telephone conference call)

The following are items that are proposed to be treated as consent docket items. If a member of the committee wants to discuss any of the items on the consent docket, then that item can be taken off the consent docket, and added to the regular agenda. Changes recommended in consent docket items, will be included in the draft of the act that is submitted for the 2008 annual conference.
Consent docket for June telephone conference call

1. Section 306 Public Participation

[Ron Levin] [A] According to ¶ (a), "The information or comments may be submitted electronically or in writing." Today this section's conferral of a categorical right to submit comments in hard copy may be quite proper, but I suspect that in the future, well before this Model Act is next updated, the possibility that agencies might require that all comments be submitted electronically, at least in some rulemaking contexts, will not seem particularly unreasonable. One solution would be to put the words "or in writing" in brackets, accompanied by a comment that contains the appropriate caveats about sensitivity to the capabilities of the likely universe of commenters, etc.

[B] In the modern era of electronic submission of comments, federal agencies sometimes receive thousands, or hundreds of thousands, of comments on high-profile rulemakings. They have had to resort to hiring consultants to sort through the comments, use of sophisticated software to group like comments together, etc. Similar challenges for the states may be on the horizon. I am not sure the text of § 306 can speak directly to this problem, but perhaps the comment can say that the agency's duty to "consider all information and comments" (¶ (b)] may have to be implemented in light of these emerging realities.

2. Section 309

[A] I think the tacit assumption of ¶ (b) is that Sections 304 through 308 will not apply, but this is not spelled out, as it is in ¶ (a). This assumption should be made explicit. Also, the paragraph should say clearly that if no objection is received, the rule will go into effect as proposed. It's true that a careful reading of § 316(e) would disclose that this is so, but the average reader who reads § 309 and is unfamiliar with this type of rulemaking would probably overlook that point, so it should be spelled out in this section as well.

[B] As currently drafted, the paragraph says that an agency must withdraw the rule if it receives "an objection to the use of the expedited rulemaking process." Properly speaking, however, the question is not whether the commenter objects to the *process*;

rather, it is whether he objects to the *rule*. Actually, the ACUS recommendation recognized that various agencies have framed the applicable test in different ways. One reasonable approach based on the recommendation would be to say that the agency must withdraw the rule if it receives an "adverse comment," and then to add: "A comment is adverse if it explains why the rule would be inappropriate or should be changed." (ACUS used the term "significant adverse comment." That phrasing gives agencies more protection against the risk that their rules could be derailed by indiscriminate objections; but it can also be criticized as encouraging an agency to plow ahead in the face of opposition by dismissing valid comments as "insignificant.") Another useful observation from the ACUS recommendation, which might be quoted in a comment to § 309, is that an agency, in making this determination, should consider "whether the comment raises an issue serious enough to warrant a response in a notice-and-comment proceeding."

3. Section 312:

[A] Under ¶ (a)(2), the statement must contain "the reasons for any change between the text of the proposed rule contained in the published notice of the proposed adoption or amendment of the rule and the text of the rule as finally adopted or amended." I would change "any change" to "any substantial change."

[B}
What is the publisher's role? Is it our intent that the Concise Explanatory Statement be published in the bulletin? **[John/Ken]** *Yes, see section 311(6)*

4. Section 702 Under ¶ (b), "The [rules review committee] shall examine final agency rules and shall review newly adopted, amended, or repealed rules on an ongoing basis. . . ." The two halves of this partial sentence appear to overlap. If the goal is to empower the committee to review rules that are (and perhaps have long been) part of the existing regulatory landscape, I would suggest changing "final" to "currently effective." If that is not the intention, perhaps the reference to final agency rules could be deleted.
RECOMMENDATION: Change "final" to "currently effective"

This addresses the following: 1. Section 702,
Subsection (b) (page 90, line 20): We have not defined the term "final agency rules".?
[John/Ken]