D R A F T

FOR APPROVAL

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

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ON UNIFORM STATE LAWS

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REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

WITH PREFATORY NOTE AND COMMENTS

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REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

Prefatory Note

The 1946 Model State Administrative Procedure Act

The Model State Administrative Procedure Act (Act) of the National Conference of Commissioners on Uniform State Laws (Conference) has furnished guidance to the states since 1946, the date that the first version of the Act was promulgated and published. The Federal Administrative Procedure Act was drafted at about the same time as the 1946 Act, and there was substantial communication between the drafters of the two acts.

The 1946 Act incorporated basic principles with only enough elaboration of detail to support essential features[1] of an administrative procedure act. This is the major characteristic of a "model", as distinguished from a "uniform", act. The drafters of the 1946 Act explained that a model act approach was required because details of administrative procedure must vary from state to state as a result of different general histories, different histories of legislative enactment and different state constitutions. Furthermore, the drafters explained, the Act could only articulate general principles because 1) agencies – even within a single state – perform widely diverse tasks, so that no single detailed procedure is adequate for all their needs; and 2) the legislatures of different states have taken dissimilar approaches to virtually identical problems.[2] By about 1960, twelve states had adopted the 1946 Act.[3]

The 1961 Model State Administrative Procedure Act

As a result of several studies conducted in the nineteen fifties, the Conference decided to revise the 1946 Act. The basis given for that decision was that a maturing of thought on administrative procedure had occurred since 1946. The drafters of the 1961 Act explained that their goals were fairness to the parties involved and creation of procedure that is effective from the standpoint of government.[4] The resulting 1961 Act also followed the model, not uniform, act approach, because "details must vary from state to state." The 1961 APA purposely included only "basic principles" and "essential major features." Some of those major principles were: requiring agency rulemaking for procedural rules; rulemaking procedure that provided for notice, public input and publication; judicial review of rules; guarantees of fundamental fairness in adjudications; and provision for judicial review of agency adjudication. Over one half of the states adopted the 1961 Act or large parts of it.[5]

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[1] 1946 Model State Administrative Procedure Act preface at 200.

[2] Id. at 200

[3] Those states, as identified in the preface to the 1961 Model State Administrative Procedure Act were: North Dakota, Wisconsin, North Carolina, Ohio, Virginia, California, Illinois, Pennsylvania, Missouri, Indiana.

[4] Preface to 1961 Model State Administrative Procedure Act.

[5] Uniform Laws Annotated at 357 (1980 Master Edition) catalogued numerous states that used the 1961 Model State Administrative Procedure Act. They are: Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma,

The 1981 Model State Administrative Procedure Act

In the nineteen seventies, the Conference began work on another revision of the Act which was completed in 1981. The Conference based the need for this revision on greater experience with administrative procedure by state governments, and growth in state government in such areas as the environment, workplace safety and benefit programs. This growth, it was argued, was so great as to effect a change in the nature of state government. The 1981 Act sought to deal with those changes.

The preface to the 1981 Act explained that the approach to drafting had changed from the 1946 and 1961 Acts. According to the drafters, the 1981 Act was entirely new, with more detail than earlier versions of the Act. This expanded focus on detail was based on changed circumstances in the states and greater state experience with administrative procedure since 1961.[6] The 1981 Act, when completed, consisted of ninety-four sections[7]. In the twenty-odd years since promulgation of the 1981 Act, Arizona, New Hampshire, and Washington have adopted many of its provisions. Several other states have drawn some of their administrative procedure provisions from the 1981 Act.[8]

The Present Revision

There are several reasons for revision of the 1981 Act. It has been more than twenty-eight years since the Act was last revised. There now exists a substantial body of legislative action, judicial opinion and academic commentary that explain, interpret and critique the 1961 and 1981 Acts and the Federal Administrative Procedure Act. In the past two decades state legislatures, dissatisfied with agency rulemaking and adjudication, have enacted statutes that modify administrative adjudication and rulemaking procedure. The Section on Administrative Law & Regulatory Practice of the American Bar Association has recently undertaken a major study of the Federal Administrative Procedure Act and has recommended revision of some provisions of that act. Since some sections of the Model State Administrative Procedure Act are similar to the Federal Act, the ABA study furnishes useful comparisons for the Act. The emergence of the

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Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

[6] Preface, 1981 Model State Administrative Procedure Act. The greater emphasis on detail in the 1981 Model State Administrative Procedure Act is apparent from the text of the preface:

> In addition, the drafters of this effort have produced an act that is more detailed than the earlier Model Act. There are several reasons for this. First, virtually all state administrative procedure acts are much more detailed than the 1961 Revised Model Act. Second, the states badly need and want guidance on this subject in more detail than the earlier act provided. Third, substantial experience under the acts of the several states suggests that much more detail than is provided in the earlier Model Act is in fact necessary and workable in light of current conditions of state government and society. Since this is a Model Act and not a Uniform Act, greater detail in this act should also be more acceptable because each state is only encouraged to adopt as much of the act as is helpful in its particular circumstances.

[7] For example, the 1961 Model State Administrative Procedure Act contained nineteen sections; the 1981 Model State Administrative Procedure Act contained almost ninety sections divided among five different articles. The current Act contains slightly more than 60 sections divided into eight articles.

[8] Some of those states are: Florida, Iowa, Kansas, California, Mississippi and Montana.

Internet, which did not exist at the time of the last revision of the Act, is another event that the Model State Administrative Procedure Act must address. Many states adopted legislative review statutes since the 1981 Act was adopted. Finally, since the 1981 Act, twenty five states have adopted central panel administrative law judge provisions. What has been learned from the experience in those states can be used to improve this Act.

This Act is a Model Act like the 1946, 1961, and 1981 Acts. A model act is needed because state administrative law in the 50 states is not uniform, and there are a variety of approaches used in the various states. The drafting committee has sought to draft provisions that represent best practices in the states, and has limited the use of alternatives. The Act has made use of bracketed language in many sections of the act so that a state legislature may make one of several decisions depending on the type of bracket. For example, the bracketed term [publisher] in Article Two allows state legislatures to substitute the specific state agency name in their state, for the agency that performs publication functions. Other brackets give state legislatures the choice to select one of several alternatives. For example, in Section 201(b), four options are bracketed for the type of format, electronic or written, in which the publisher can publish rulemaking documents. Other brackets are used for timing requirements and the numbers of days, months or years are bracketed so that state legislatures have the option of changing the specified amount of time for that particular timing requirement. The bracketed number represents the drafting committee recommendation as to best practices. See for example, Section 304(a), which brackets the number 30 as part of timing requirements for rulemaking. Finally brackets are use in article Seven with the term [joint resolution] or [concurrent resolution] because states constitutions vary as to whether a concurrent resolution (without the governor signing a bill) is proper for legislative disapproval review of an agency rule. States can choose which provisions of the Model Act to adopt.

This Act maintains continuity with the provisions of the 1961 Act, and to a lesser degree, the 1981Act. This Act returns to the external hearing rights approach followed in the 1961 Act, but also includes constitutionally required hearings in the mix of sources of hearing rights law. This approach is codified in the definition of a contested case in Section 102(7). The external hearing rights approach is narrower than the approach adopted in the 1981 Act which contained an internal definition of the scope of hearing rights (1981 MSAPA Section 4-102). This Act is more lengthy than the 1961 Act, but shorter and less detailed than the 1981 Act. This Act is designed especially for adoption by states that currently have the 1961 Act, but would like to replace that act with a more modern up to date administrative procedure act. The Act is designed to ensure fairness in administrative proceedings, increase public access to the law administered by agencies, and promote efficiency in agency proceedings by providing for extensive use of electronic technology by state governments. The Act has been drafted to be less detailed and less comprehensive than the 1981 Act. Consistent with both the 1961 MSAPA and the 1981 MSAPA, the Act provides for a uniform minimum set of procedures to be followed by agencies subject to the act.[fn] The Act creates only procedural rights and imposes only procedural duties [fn]. Throughout the Act there are provisions that refer generally to other state laws governing related topics. When specific state laws are inconsistent with the provisions of the Act, those specific state laws will be controlling [fn].

This Act is divided into eight articles. Article One contains extensive definitions of key

terms used in the act. The definitions in this Act are lengthier than in the 1961 and 1981 Acts. These definitions are designed to be used with the operative provisions in the other articles of the act. Terms that are used only in one article are defined in that article. Terms that are used in more than one article are included in the definition sections in Article One. Some key definitions set forth in the 1961 and the 1981 Act are continued in this act. The 1961 Act definitions which are continued or modernized in this act include the definition of agency (Section 102(2)), contested case (Section 102(6)), license (Section 102(17)), licensing (Section 102(18), party (Section 102(21)), person (Section 102(22)), and rule (Section 102(27)). All of these definitions (except for contested case) are also contained in the 1981 Act. See the comments for each section for an explanation. The added1981 Act definitions which are continued or modernized in this act include the definition of agency action (Section 102(3)), agency head (Section 102(4)), order (Section 102(20), and rulemaking (Section 102(28). New definitions in Article One include adjudication (Section 102(1)), agency record (Section 102(5)), electronic (Section 102(7)), electronic record (Section 102(8)), emergency adjudication (Section 102(9), evidentiary hearing (Section 102(10)), final order(Section 102(11)), guidance document (Section 102(12)), index (Section 102(13)), initial order (Section 102(14)), internet web site (Section 102(15)), law (Section 102(16)), notify (Section 102(19)), presiding officer (Section 102(23)), proceeding (Section 102(24)), recommended order (Section 102(25)), record (Section 102(26)), sign (Section 102(29)), and writing (Section 102(30)).

Many of the new Article One definitions result from the technological development of the internet and the widespread use of electronic media by governmental entities. Examples of this type of definition include electronic (Section 102(7), electronic record (Section 102(8), internet web site (Section 102(15), and record (Section 102(26). Other new definitions are designed to shorten the text of provisions in the other articles in the act by providing for one definition that applies to all sections of the Act in which that term is used. Two examples of this type of definition are writing (Section 102(30), and proceeding (Section 102(24). There are also new definitions of terms used in adjudication under Article four. Examples of this type of definition are presiding officer (Section 102(23), final order (Section 102(11)), initial order (Section 102(14)), and recommended order (Section 102(25)). The latter three definitions reflect the complexity of types of orders in state administrative law. The meaning of operative provisions in the Act is informed by the definition of key terms related to that provision. For example, Section 311 governs guidance documents, which are defined in Section 102(12).

Article Two contains provisions ensuring public access to agency law and policy. This article continues provisions in the 1961 and 1981 Acts but substantially modernizes those Acts by providing for indexing of agency documents, as well as electronic posting and distribution of documents. Article Two modernizes and codifies publishing responsibilities for agencies that have primary responsibility for rules publishing (Section 201), and for agencies that adopt rules (Section 202 and 203). Article Two continues provisions from the 1961 and 1981 Acts that provide for declaratory orders (Section 204) and default procedural rules (Section 205).

Article Three contains provisions governing rulemaking by agencies. This article continues provisions in the 1961 and 1981 Acts but substantially modernizes those Acts provisions. Key new or modernized provisions in this Article include current rulemaking docket (Section 301), agency record in rulemaking (Section 302), negotiated rulemaking (Section 303),

regulatory analysis (Section 305), direct final rulemaking (Section 310), and guidance documents (Section 311). The Act returns to the provisions of the 1961 Act for emergency rulemaking requirements (Section 309). Other provisions of Article Three for notice (Section 304), public participation (Section 306), concise explanatory statement (Section 313), adoption time limits (Section 307), and publication (Section 316) are similar to requirements in the 1981 Act that govern rulemaking. Article three also includes provisions relating to variance between proposed and adopted rule (Section 308), required information for rule (Section 312), incorporation by reference (Section 314), compliance (Section 315), effective date (Section 317), and petition for adoption of rule (Section 318). Article Three provides a basic set of rulemaking procedures, with exceptions for emergency rulemaking (Section 309) and direct final rulemaking (Section 310) which are governed by different procedures.

Article Four contains provisions governing adjudication by agencies. This article continues provisions in the 1961 and 1981 Acts but substantially modernizes those Acts' provisions. Article Four contains provisions for adjudication in contested cases (Section 401), but also provides for emergency adjudication procedures (Section 407), and some limited provisions for licenses (Section 419), which is based on the 1961 Act. Some of the key provisions in Article 4 govern ex parte communications (Section 408), evidence in contested cases (Section 404), procedures in contested cases (Section 403), notice in contested case (Section 405) discovery (Section 411), and availability, indexing, and publication of orders (Section 418). Other provisions in article four govern hearing record in contested cases (Section 406), intervention (Section 409), subpoenas (Section 410), default (Section 412), agency review of initial orders (Section 414) and recommended orders (Section 415), reconsideration (Section 416) and stays (Section 417). Article Four provides for a variety of presiding officers (Section 402), including the agency head, and for recommended, initial, and final orders in contested cases (Section 413). This is based on variations in state law governing delegation of decisional authority in adjudication. Article 4 procedures are designed to be used by both central panel agencies (governed by Article Six) and enforcement agencies that conduct their own contested case hearings (Section 402(a)).

Section 408 governs ex parte communications but also contains separation of functions provisions (Section 408(d), (e)). Section 408 (c) includes exceptions for ex parte matters authorized by statute or for uncontested procedural issues. Section 408(d) contains exceptions for communications with legal advisors, and ministerial communications with staff of the presiding officer and the final decision maker. Section 408(e) includes an agency head exception that is narrower than the provisions of the 1981 Act (Section 4-213(b)). Section 408(e) permits the agency head to have communications with staff that does not augment, diminish or modify the evidence in the agency hearing record (Section 408(e)(2)), and that satisfies one of three other alternatives: including an explanation of the technical or scientific basis or terms in the evidence in the agency hearing record (Section 408(e)(2)(A)), an explanation of the precedent, policies, or procedures of the agency (Section 408(e)(2)(B)), or any other communication that does not address the quality, sufficiency of , or the weight that should be given to evidence in the agency hearing record, or the credibility of witnesses (Section 408(e)(2)(C)). These three alternatives are new and are a departure from the 1981 Act which included only the "does not augment, diminish or modify the evidence in the agency hearing record" language. An ex parte communication will fall within the Section 408(e) exception if both the stated language of subsection (e)(2), and one

of the alternatives listed in subsection (e)(2)(A),(B), or (C), are satisfied. Section 408(e) (2) is a compromise reached by the drafting committee in response to polar positions that advocated for no agency head exception (thus deleting subsection (e) entirely), and those that supported the approach of the 1981 Act (with only the language of subsection (e)(2) and not the added language in subsection (e)(2)(A),(B), or (C). The compromise recognizes the need for agency heads, who are often political appointees with little knowledge of the legal issues that come before the agency, to obtain staff advice when acting as a presiding officer or a final decision maker, but also carefully circumscribes the types of communication that can occur.

Article Five contains provisions governing judicial review of final agency action. This article continues provisions in the 1961 and 1981 Acts but substantially modernizes those acts provisions. Article Five addresses the major issues in judicial review including the right to judicial review and finality of agency action (Section 501), relation to other judicial review law (Section 502), time for seeking judicial review (Section 503), stay pending appeal (Section 504), standing (Section 505), exhaustion of administrative remedies (Section 506), and scope of review (Section 507). The standing and scope of review provisions are set forth in short and concise language. Most states have a substantial body of judicial review case law covering these issues and others. The Act's provisions are designed to be consistent with the existing laws of many states that take a variety of approaches to judicial review. The Act does not address civil or appellate procedure issues, court chosen for judicial review of administrative law rules or orders, or the vehicle for review such as whether an appeal or a writ of mandate is filed to invoke judicial review of administrative agency action. Those issues are governed by state law other than this act.

Article Six contains provisions governing central panel hearing agencies, typically named the office of administrative hearings. 1981 MSAPA Section 4-301 provided for an office of administrative hearings, but Article Six of this act is far more extensive in addressing powers and duties of central panel agencies. The growth of central panel agencies in the states since the adoption of the 1981 Act has been significant with 25 states currently having these agencies. In central panel agencies, the ALJ's who preside over contested case hearings work for the central panel agency, not for the agency whose contested case is being adjudicated. This provides for a separation of the hearing and decision authority from the agency authority to enforce the law and adopt agency rules. Central panel agencies have independence from other executive branch agencies which can provide for greater fairness in contested case hearings. Article Six contains provisions governing creation of the office of administrative hearings (Section 601), the chief administrative law judge (Section 602), administrative law judges (Section 603), the powers of the chief administrative law judge (Section 604), cooperation of agencies (Section 605), and powers of administrative law judges (Section 606). Article Six is based on the ABA Model Central Panel Act, and provides for the essential provisions of law that a state legislature would need to create a central panel agency. This Act is drafted so that central panel administrative law judges would be presiding officers in contested case proceedings governed by the provisions of Article Four (Section 402(a)), and those provisions would govern procedures in contested cases heard by central panel administrative law judges. The chief administrative law judge of the central panel agency may also adopt procedural rules to govern contested case hearings (Section 604(6)).

Article Seven contains provisions related to legislative review of agency rules. This Article modernizes provisions for legislative rules review contained in the 1981 Act. Article seven includes a legislative rules review committee (Section 701), review by a rules review committee (Section 702), and rule review committee procedure and powers (Section 703). Legislative review of agency rules has become widespread in the states since the passage of the 1981 act. State constitutions vary as to whether a joint or concurrent resolution (without gubernatorial approval) vetoing an agency rule satisfies the state constitution. Some state constitutions require that the legislature pass a bill that is presented to the governor for approval. Article Seven is drafted so both state approaches are presented as bracketed alternatives.

Article Eight contains provisions governing applicability of this Act, relation to other Acts, repeals, and effective date.

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the State Administrative Procedure Act.

SECTION 102. DEFINITIONS. In this [act]:

(1) "Adjudication" means the process for determining facts or applying law pursuant to which an agency formulates and issues an order. "Adjudicate" has a corresponding meaning.

(2) "Agency" means a state board, authority, commission, institution, department, division, office, officer, or other state entity that is authorized by law of this state to make rules or to adjudicate. The term does not include the Governor, the [Legislature], or the Judiciary.

(3) "Agency action" means:

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

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

(C) an agency's performing or failing to perform any duty, function, or activity or to make any determination required by law.

(4) "Agency head" means the individual in whom, or one or more members of the body of individuals in which, the ultimate legal authority of an agency is vested.

(5) "Agency record" means the agency rulemaking record required by Section 302, the hearing record in adjudication required by Section 406, the hearing record in an emergency adjudication under Section 407, or the record for review compiled pursuant to Section 507(b).

(6) "Contested case" means an adjudication in which an opportunity for an evidentiary hearing is required by the federal constitution or a federal statute or the constitution or a statute

of this state.

(7) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(8) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(9) "Emergency adjudication" means an adjudication in a contested case when the public health, safety, or welfare requires immediate action.

(10) "Evidentiary hearing" means a hearing for the receipt of evidence on issues on which a decision of the presiding officer may be made in a contested case.

(11) "Final order" means the order issued by the agency head sitting as the presiding officer in a contested case, the order issued following the agency head review of a recommended order, or the order issued following the agency head review of an initial order.

(12) "Guidance document" means a record of general applicability developed by an agency which lacks the force of law but states the agency's current approach to, or interpretation of, law, or describes how and when the agency will exercise discretionary functions. The term does not include records described in paragraph (30) (A), (B), (C), and (D).

(13) "Index" means a searchable list in a record of subjects and titles with page numbers, hyperlinks, or other connectors that link each index entry to the text to which it refers.

(14) "Initial order" means an order that is issued by a presiding officer with final decisional authority if the order is subject to discretionary review by the agency.

(15) "Internet website" means a web site on the Internet or other appropriate technology or successor technology that permits the public to search a database that archives materials required to be published by the [publisher] under this [act].

(16) “Law” means the federal or state constitution, a federal or state statute, a federal or state judicial decision, a federal or state rule of court, an executive order that rests on statutory or constitutional authorization, or a rule or order of an agency.

(17) “License” means a permit, certificate, approval, registration, charter, or similar form of permission required by law and issued by an agency.

(18) “Licensing” means the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(19) “Notify” means to take steps reasonably required to inform a person, whether the person actually comes to know of the information.

(20) “Order” means an agency decision that determines or declares the rights, duties, privileges, immunities, or other interests of a specific person.

(21) “Party” means the agency taking action, the person against which the action is directed, and any other person named as a party or permitted to intervene and that does intervene.

(22) “Person” means an individual, corporation, business trust, statutory trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(23) “Presiding officer” means an individual who presides over the evidentiary hearing in a contested case.

(24) “Proceeding” means any type of formal or informal agency process or procedure commenced or conducted by an agency. The term includes adjudication, rulemaking, and investigation.

(25) “Recommended order” means an order issued by a presiding officer other than the

agency head if the presiding officer does not have final decisional authority and the order is subject to review by the agency head.

(26) "Record" 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.

(27) "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 and has the force of law. The term includes the amendment, or repeal, of an existing rule. The term does not include:

(A) a statement that concerns only the internal management of an agency and that does not affect private rights or procedures available to the public;

(B) an intergovernmental or interagency memorandum, directive, or communication that does not affect private rights or procedures available to the public;

(C) an opinion of the Attorney General;

(D) a statement 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 defending, prosecuting or settling cases, if disclosure of the criteria or guidelines would enable persons violating the law to avoid detection, facilitate disregard of requirements imposed by law, or give an improper advantage to persons that are in an adverse position to the state;

(E) a form developed by an agency to implement or interpret agency law or policy; or

(F) a guidance document.

(28) "Rulemaking" means the process for the adoption of a new rule, or the amendment

or repeal of an existing rule.

(29) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(30) "Writing" means a record inscribed on a tangible medium. "Written" has a corresponding meaning.

Comment

Adjudication. This definition is based on 1981 MSAPA Section 4-101(a). The purpose of the definition is to differentiate between agency proceedings under Article Four from rulemaking proceedings under Article Three. This definition should be read in conjunction with the definitions of "contested case" Section 102(6), "evidentiary hearing" under Section 102(10), and of "order", Section 102(20), infra. Article Four procedures apply to adjudications that are contested cases, Section 401, and that result in a final order of the agency, Section 413.

Agency. This definition is based on 1961 MSAPA Section 1(1), and 1981 MSAPA Section 102(1). The definition includes the authorized by law to make rules or to adjudicate language from 1961 MSAPA Section 1(1), which was omitted from 1981 MSAPA Section 102(1). This definition uses the term to adjudicate rather than the term to determine contested cases from the 1961 Act. The purpose of this definition is to subject as many state actors in the executive branch of state government as possible to this definition. The definition applies only to state actors, not local agencies. There are exceptions for the governor, the legislature, and the judiciary. The exception for the governor means the governor personally. The term agency is used numerous times in the other articles of the Act. The term "agency" includes the Office of Administrative Hearings provided in Article 6. The term "agency should be read in conjunction with the terms "party" in section 102(21), and the term "person" in Section 102(22).

Agency Action. This definition is based on 1981 MSAPA Section 1-102(2). The purpose of the definition is to identify those matters that are subject to judicial review under Article Five. The term "agency action" includes the term "rule", defined in Section 102(27), and the term "order", defined in section 102(20). Failure to issue an order or rule is not judicially reviewable except as provided in Section 501(d) of the Act. Failure to issue an order or rule does not include an agency denial of a petition for a declaratory order or to initiate rulemaking. See Sections 204(d) and 318(1) of the Act. The third definition of agency action, under Section 102(4)(C), is broader and includes agency action that is neither a "rule" nor an "order". The purpose of third definition is to make agency action broadly subject to judicial review, but the availability of judicial review of agency action is governed by the provisions of Article Five, See Section 501, and the scope of review by Section 508.

Agency Head. This definition is based on 1981 MSAPA Section 1-102(3). The purpose of the definition is to differentiate between the agency as an organic whole and the particular person or persons (single agency head, or commissioners, and board members) in whom the final decisional authority of the agency is vested . The term "agency head" is also used numerous times throughout the act to differentiate between agency employees other than the agency head who may be delegated the responsibility to carry out functions under the Act from the agency head who has the legal authority to carry out those functions. See, for example, Section 402(a) in which the agency head has the authority to be the presiding officer in a contested case, but the agency head may also designate another individual to be the presiding officer.

Agency Record. This definition is new to the Act. The purpose of the definition is to differentiate between the different types of agency records required to be maintained under the provisions of Articles Three, Four, and Five. The definition lists the different types of agency records by more specific terms and by sections of the Act. The definition provides a roadmap for the various types of agency records requirements in the Act. The definition should be read, as applicable, in conjunction with the provisions of Sections 302, 309, 310, 406, 407, and 507(b). The term "record" defined in Section 102 (26) refers to the medium for storage of information and does not address the requirements of the content of agency records.

Contested case. This term is similar to the "contested case" definition in Section 1(2) of the 1961 MSAPA. Like the 1961 MSAPA, this Act looks to external sources such as statutes and constitutions to determine when a party is entitled to an evidentiary hearing. However, this term differs from the 1961 MSAPA's term "contested case" because it also includes evidentiary hearings required by the constitution, federal or state, and makes provision in Article 4 for the type of evidentiary hearing to be held in a case where a constitution creates the right to an evidentiary hearing. Including constitutionally created rights to an evidentiary hearing within the provisions of this Act eliminates the problem of looking outside the Act to determine the type of evidentiary hearing required in cases where the right to the evidentiary hearing is created by a constitution. Evidentiary hearing rights created by judicial decisions means constitutional decisions by courts in that state. See Goldberg v. Kelly, 397 U.S. 254 (1970). The definition of "contested case" should be read in conjunction with the definitions of "adjudication" under Section 102(1), "evidentiary hearing" under Section 102(10), and of "order", Section 102(20), infra. Article Four procedures apply to adjudications that are contested cases, Section 401, and that result in a final order of the agency, Section 413. Article Four does not apply to informal adjudications, which are not contested cases.

Electronic. This definition is new to the act. The definition is based on and has the same meaning as the provisions of the Uniform Computer Information Transactions Act Section 102(a)(26), and the Uniform Electronic Transactions Act, Section 2(5). 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. State agencies widely use electronic media to disseminate information to the public. See Article Two for agency duties to provide public access to agency law. This definition should be read in conjunction with the terms "record" defined in Section 102(26), "electronic record" defined in Section 102(8), and "internet web site" defined in Section 102(15).

Electronic Record. This definition is new to the Act. The definition is based on and has the same meaning as the provisions of the Uniform Electronic Transactions Act, Section 2(7). An "electronic record" 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 copies and converted into an electronic record. 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 electronic records. State agencies widely use electronic media to disseminate information to the public. See Article Two for agency duties to provide public access to agency law. This definition should be read in conjunction with the terms "record" defined in Section 102(26), "electronic" defined in Section 102(7), and "internet web site" defined in Section 102(15).

Emergency Adjudication. This definition is based on 1981 MSAPA Section 4-105(a). The definition should be read in conjunction with Section 407, emergency adjudication procedure. The definition is designed to be used with the emergency adjudication procedures provided by Section 408. The danger to the public health, safety, or welfare standard requiring immediate action is a strict standard that is defined by law other than this Act. Federal and state case law have held that in an emergency situation an agency may act rapidly and postpone any formal hearing without violation, respectively, of federal or state constitutional law. FDIC v. Mallen, 486 U.S. 230 (1988); Gilbert v. Homar (1997) 520 U.S. 924; Dep't of Agric. v. Yanes, 755 P.2d 611 (OK. 1987).

Evidentiary Hearing. This definition is new to this Act and describes the process for an evidentiary hearing. This definition should be read in conjunction with the definitions of "adjudication" under Section 102(1), "contested case" under Section 102(6), , and of "order", Section 102(20), infra. Article Four procedures apply to adjudications that are contested cases, Section 401, and that result in a final order of the agency, Section 413. The definition of contested case in Section 102(6) includes the language "opportunity for an evidentiary hearing", and that term is defined here. The contested case definition provides for external sources of law to determine the opportunity for an evidentiary hearing, but the type of hearing provided is defined in this definition. The specifics of hearing procedure for contested cases are detailed in the provisions of Article Four of this Act.

Final Order. This definition is new to this act and applies to Article Four adjudication proceedings. See Section 413, Orders: Final, Recommended, and Initial. This definition should be read in conjunction with the terms "initial order" in Section 102(14), "order" in Section 102(20), and "recommended order" in section 102(25).

Guidance document. This definition is new to this act and is similar to the Michigan APA, M.C.L.A. 24.203(6), and the Virginia APA, Va. Code Ann. SECTION 2.2-4001. See also the; Idaho I.C. SECTION 67-5250 and N.Y. McKinneys State Administrative Procedure Act, SECTION 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, SECTION 34.05.010(8) & (15). 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). This definition should be read in conjunction with Section 311, Guidance Documents. Agencies are required by Section 202(a) to publish guidance documents issued by agencies under Section 311 and to publish the index of currently effective guidance documents prepared under Section 311(f).

Index. This definition is new to this act and is designed to include both paper and electronic versions of an index. The definition of index has been added as a guide to agencies, [publisher]s 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. States can satisfy the requirement of an index by providing a record that is searchable by Word on the Internet, unless a hard copy index is required. Agencies may also satisfy the index requirements by providing hypertext links to index items. This definition should be read in conjunction with Sections 201, and 202. The rules publisher is required to publish an index of the contents in the administrative bulletin, Section 201(g), and index of the contents of the administrative code, Section 201(h). Agencies are required by Section 202 to publish an index of declaratory orders prepared under Section 204(g), an index of currently effective guidance documents prepared under Section 311(f), and an index of final orders in contested cases prepared under Section 418(a).

Initial Order. This definition is new to this act and applies to Article Four adjudication proceedings. See Section 413, Orders: Final, Recommended, and Initial. This definition should be read in conjunction with the terms "final order" in Section 102(11), "order" in Section 102(20), and "recommended order" in section 102(25).

Internet website. This definition is new to the act and is designed to be used by agencies and publishers to comply with the requirements of Section 201, publication: publisher's duties, Section 202, publication: agency duties, Section 316, filing of rules, and Section 418, availability of orders; index of this Act. In many states, the Internet website is maintained by the [publisher], and in some states the agency also maintains its own Internet website. State agencies widely use electronic media to disseminate information to the public. See Article Two for agency duties to provide public access to agency law. This definition should be read in conjunction with the terms "electronic" defined in Section 102(7), "electronic record" defined in Section 102(8), and "record" defined in Section 102(26). The definition of "internet web site" broadly includes successor technology so that the definition does not become obsolete with technological changes that have not been anticipated.

Law. This definition is new to this act and includes a broad definition of types of laws applicable to this Act. The definition broadly defines "law" to include legal authority that is binding on either the public or the agency. The term "Law" includes an executive order that rests

on statutory or constitutional authorization. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 188-89 (1999) ; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) . See also Kevin M. Stack, "The Statutory President," 90 Iowa L. Rev. 539, 550-52 (2005); Jim Rossi, "State Executive Law making in Crisis," 56 Duke L. Rev. 237, 261-64 (2006). For example, a Governor's declaration of a state of emergency would fall within the category of an executive order with statutory or constitutional authorization. See, e.g., New Mexico Executive Order 2005-040 (2005). This definition should be read in conjunction with the defined terms "rule", Section 102(27) and "order", Section 102(20).

License. This definition is based on 1981 MSAPA Section 102(4), which is a revised version of 1961 MSAPA Section 1(3) definition of license. This definition should be read in conjunction with Section 419, licenses.

Licensing. This definition is based on 1961 MSAPA Section 14(a). This definition should be read in conjunction with Section 419, licenses.

Notify. The definition of notify is new to this act and is similar to the definition of notice in the Uniform Arbitration Act Section 2(a), and the Uniform Computer Information Transactions Act Section 102(a)(49), which is based on the provisions of the Uniform Commercial Code Section 1-201(26). The definition is consistent with the due process of law requirements for methods of notifying persons. Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306, 314-316 (1950); Goldberg v. Kelley, 397 U.S. 254, 267-268 (1970); Dusenberry v. United States, 534 U.S. 161, 168-170 (2002); See Ho v. Donovan 569 F.3d 677, 680-681 (7th. Cir., 2009). Under those requirements, using a method of notice that is reasonable likely to inform is sufficient to satisfy due process of law requirements. The notice sender does not have to prove that the notice recipient received the notice in every case to satisfy due process of law requirements. See Section 405, notice in contested case, for more specific requirements of notice in contested cases.

Order. This definition is based on 1981 MSAPA Section 102(5).An order includes solely agency legal determinations that are addressed to particular, , identified persons 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. The definition of "order" should be read in conjunction with the definitions of "adjudication" under Section 102(1), "contested case" under Section 102(6)", and "evidentiary hearing" under Section 102(10). The term "order" is primarily used in Article Four contested case proceedings. Article Four procedures apply to adjudications that are contested cases, Section 401, and that result in a final order of the agency, Section 413. In addition to this term, three type of orders are defined in the act, and the term "order" should be read in conjunction with the terms "final order" in section 102(11), "initial order in section 102(14), and "recommended order in section 102(25)

Party. This definition is similar to 1961 MSAPA Section 1(5), and 1981 MSAPA Section 102(6). The definition includes the agency, any person against whom agency action is brought and any person who intervenes. The term" party' should be read in conjunction with the terms

"agency" in Section 102(2), and the term "person" in Section 102(22). The term "party" is used in Article Four contested case proceedings. For example, See Section 403, contested case procedure, Section 404, evidence in contested case, Section 405, notice in contested case, and Section 409 intervention. The term "agency" is also used extensively in Articles Three, Four, and Five. This section is not intended to deal with the issue of a person's entitlement to judicial review. Standing and other issues relating to judicial review of agency action are addressed in Article 5 of this Act.

Person. This definition is based on 1961 MSAPA Section 1(6), and 1981 MSAPA Section 102(8). The term "person" should be read in conjunction with the term "agency" in Section 102(2), and the term "party" in Section 102(21). The term "person" is broadly defined to include individuals, associations of individuals, and corporate and governmental entities. The term "person" is used extensively in the act including Article Two (See, e.g., Section 204(a)), Article Three (See, e.g., Section 306(a)), Article Four (See, e.g., Section 405(b)), and Article Five (See, e.g., Section 505). The term "person" is based on the standard definition used in acts adopted by the National Conference of Commissioners on Uniform State Laws. See UCITA Section 102 (a)(51).

Presiding Officer. This definition is new to the Act and should be read in conjunction with the definitions of "adjudication" under Section 102(1), "agency head" under Section 102(4) "contested case" under Section 102(6), "evidentiary hearing" under Section 102(10), and of "order", Section 102(20). The term 'presiding officer" is used in Article Four procedures which apply to adjudications that are contested cases, Section 401, and that result in a final order of the agency, Section 413. The presiding officer presides over contested case evidentiary hearings, Section 402. Under Section 402(a), the "presiding officer" includes an agency staff member, an administrative law judge appointed under Section 602, the agency head, or one or more members of the agency head when designated to preside at a hearing.

Proceeding. This definition is new to this act and broadly defines agency actions including those conducted by an agency in rulemaking, governed by Article Three, and in adjudication, governed by Article four.

Recommended Order. This definition is new to this act and applies to Article Four adjudication proceedings. See Section 413, Orders: Final, Recommended, and Initial. This definition should be read in conjunction with the terms "final order" in section 102(11), "initial order" in Section 102(14), and "order" in Section 102(20).

Record. This definition is new to the act and is based on the broad definition of record in modern electronic age statutes such as the Uniform Computer Information Transactions Act, Section 102(a)(55), and the Uniform Electronic Transactions Act, Section 2(13). This definition is also based on the definition of record in the E-Sign Act, 15 U.S.C. Section 7006(9). The definition includes both paper and electronic documents. State agencies widely use electronic media to disseminate information to the public. See Article Two for agency duties to provide public access to agency law. This definition should be read in conjunction with the terms "electronic" defined in Section 102(7), "electronic record" defined in Section 102(8), and "internet web site" defined in Section 102(15). The term "record" refers to the medium for

storage of information and does not address the requirements for the content of agency records. See the definition of "agency record" in Section 102(5) and the types of agency records defined there for that purpose.

Rule. This first sentence of this definition is based on 1961 MSAPA Section 1(7), and 1981 MSAPA Section 102 (10). The language "and has the force of law" is new to this act and is designed to contrast rules with guidance documents which do not have the force of law. The second sentence of this definition is based on the second sentence of 1981 MSAPA Section 102(10). The exceptions to the definition are widely used in state APAs. Subsection (A) is drawn from 1981 Model State APA § 3-116(1). Subsection (B) is based on 1961 MSAPA Section 1(7)(C). Subsection (C) is drawn from 1981 Model State APA § 3-116(9). Subsection (D) is drawn from 1981 Model State APA § 3-116(2). Subsection (E) is based on 1981 Model State APA § 3-116(7). Subsection (f) is new to this act, and should be read in conjunction with the term "guidance document" in Section 102(13) and Section 311, Guidance documents. With the exception of guidance documents which must be made available to the public under Section 311(c), the stated exceptions are designed to exempt those statements from the procedural and publication requirements of Article Three that otherwise apply to "rules".

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 on 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 that it has the force of law, then it meets this definition. The term "rule" applies primarily to Article Three rulemaking proceedings but the term is also used in the other articles. The term "rule" should be read in conjunction with the term "rulemaking" in Section 102(28).

Rulemaking. This definition is a revised version of 1981 MSAPA Section 102(11). The purpose of this definition is to include amendment or repeal of an existing rule within the meaning of adoption of a rule. This definition eliminates the need to repeat the phrase "adopt, amend or repeal" in numerous sections of the act. This definition should be read in conjunction with the term "rule" in Section 102 (27). This term is primarily used in Article Three which governs rulemaking by agencies.

This term should be read in conjunction with the term "rule" in section 102(27). This term applies primarily to Article Three rulemaking proceedings.

Sign. This definition is based on UETA Section 2(8), and includes both paper and electronic signatures. See also the federal E-Sign Act, 15 U.S.C. Section 7001 et. Seq.

Written. This definition is new to this act and relates to the definition of record in

Section 102(26) in that written documents are inscribed on a tangible medium. The definition of record in Section 102(26) includes both tangible medium (written) and electronic documents.

SECTION 103. APPLICABILITY.

(a) This [act] applies to an agency unless the agency is expressly exempted by a statute of this state.

(b) This [act] governs all agency proceedings and all proceedings for judicial review or civil enforcement of agency action commenced after [the effective date of this [act]. This [act] does not govern an adjudication for which notice was given before the effective date and rulemaking for which notice was given or a petition filed before that date.

Comment

Subsection (a) is intended to define which agencies are subject to the provisions of this act. Many states have made use of an applicability provision to define the coverage of their Administrative Procedure Act. See: Iowa, I.C.A. SECTION 17A.23; Kansas, K.S.A. SECTION 77-503; Kentucky, KRS SECTION 13B.020; Maryland, MD Code, State Government, SECTION 10-203; Minnesota, M.S.A. SECTION 14.03; Mississippi, Miss. Code Ann. SECTION 25-43-1.103; Washington, West's RCWA 34.05.020. States vary widely as to what state agencies are subject to the APA, and what agencies are exempt from the APA. The issue of what agencies are exempt from the APA will be decided by each state using its own legislative process. Some states list the agencies or agency proceedings that are exempt from the requirements of the APA. See Washington, West's RCWA 34.05.30.This section provides a way to resolve those issues.

Subsection (b) is based on Section 1-108 of the 1981 MSAPA. Agency proceedings on remand following judicial review after the act takes effect are governed by the prior law.

[ARTICLE] 2

PUBLIC ACCESS TO AGENCY LAW AND POLICY

SECTION 201. PUBLICATION, COMPILATION, INDEXING, AND PUBLIC INSPECTION OF RULEMAKING DOCUMENTS; ORDERS.

(a) The [publisher] shall administer this section and other sections of this [act] that require publication. The [publisher] shall publish the [administrative bulletin] and the [administrative code].

(b) The [publisher] shall publish in [electronic and written] [electronic or written] [electronic] [written] format all rulemaking-related documents listed in Section 202(c). The [publisher] shall prescribe a uniform numbering system, form, and style for all proposed rules.

(c) The [publisher] shall maintain the official record of the adoption of a rule, including the text of the rule and any supporting documents, filed with the [publisher] by an agency. An agency adopting a rule shall maintain the rulemaking record required by Section 302(b) for that rule.

(d) The [publisher] shall create and maintain an Internet web site on which it maintains a searchable database. The [publisher] shall make available on the Internet web site the [administrative bulletin], the [administrative code], and any guidance document filed with the [publisher] by an agency.

(e) The [publisher] must publish the [administrative bulletin] at least once [each month].

(f) The [administrative bulletin] must be provided in written form on request, for which the [publisher] may charge a reasonable fee.

(g) The [administrative bulletin] must contain:

(1) notices of the proposed adoption of a rule 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 a newly filed amended rule shows the text of the existing rule and the change that is made;

(3) any other notice and material required to be published in the [administrative bulletin]; and

(4) an index.

(h) The [administrative code] must be compiled, indexed by subject, and published in a format and medium as prescribed by the [publisher]. The rules of an agency must be published and indexed in the [administrative code].

(i) The [publisher] shall make the [administrative bulletin] and the [administrative code] available for public inspection and, for a reasonable charge, copying.

(j) The [publisher], with notification to the agency, may make minor nonsubstantive corrections in spelling, grammar, and format in proposed or adopted rules. The [publisher] shall make a record of the corrections.

(k) The [publisher] shall make available on the [publisher's] Internet website, at no charge, all of the documents provided by an agency under Section 202(c).

Legislative Note: *Throughout this act the drafting committee has used the term [publisher] to describe the official or agency to which substantive publishing functions are assigned. All states have such an official, but their titles vary. Each state using this act should determine what that agency is, then insert its title in place of [publisher] throughout this act. Each state also has an [administrative bulletin] and an [administrative code]. The bulletin is similar to the federal register, and the code is similar to the code of federal regulations. The names of the administrative bulletin and the administrative code vary from state to state. Each state should insert the proper title in place of [administrative bulletin], and [administrative code]. The [publisher] has statutory authority under subsections (f) and (i) to provide written materials for a reasonable charge. In many states, [publishers] have statutory authority under public records act to adopt regulations setting fees for providing written copies of documents under this section*

Comment

Article 2 is intended to provide easy public access to agency law and policy that are relevant to agency process. Article 2 also adds provisions for electronic publication of the administrative bulletin and code. The development of the internet and the widespread use of electronic media have made public access to agency law and policy much easier. The arrival of the Internet and electronic information transfer, which occurred after the last revision of the Model State Administrative Procedure Act, has revolutionized communication. It has made available rapid, efficient and low cost communication and information transfer. Many states as well as the federal agencies have found that it is an ideal medium for communication between agencies and the public, especially in connection with rulemaking. Since the last Model Administrative Procedure Act was written, many states have adopted various types of statutes that permit agencies to use electronic technology to communicate with the public. The agencies have found this technology particularly useful in connection with rulemaking.

Section 201 is a revised and modernized version of 1961 MSAPA Section 5 and 1981 MSAPA Section 2-101. The purpose of this section is to provide adequate notice to the public of proposed and final agency action in rulemaking. It also seeks to assure adequate record keeping and availability of records for the public. Subsection (a) provides for the publisher's responsibilities to administer publication provisions of this section and other publication sections of the act, and to publish the administrative bulletin and the administrative code. Throughout this article and article three, the term publisher is bracketed. States have a variety of names for the agency that performs publishing responsibilities. Each state should insert the correct name for that state in the brackets whenever the term publisher appears in the act. The terms administrative bulletin and administrative code are also bracketed for similar reasons. Each state should insert the correct name for that state whenever those terms appear in that act. Section 201 does not address the issue related to what languages rules should be published in, nor does it address issues related to translation of information contained in these documents into languages other than English.

Subsection (b) requires the publisher to publish rulemaking documents that are filed by an agency with the publisher under section 203(c). Subsection (b) has four bracketed options for publication format. A state may select one of the four options. The issue raised by these options is whether or not a state wants to make available to its citizens a written publication option or electronic publication only. Electronic publication provides for substantial cost savings to agencies but some members of the public may lack access to the internet or may prefer a written publication format. The second sentence of subsection (b) is based on 1981 MSAPA Section 2-101(b) [first clause]. Publishers that administer the provisions of this subsection must also comply with the applicable provisions of the federal E-Sign Act (15 U.S.C. Section 7001 to 7031) and the Uniform Electronic Transactions Act (UETA).

Subsection (c) requires that the [publisher] maintain the official record for adopted rules, including the text of the rules and any supporting documents, filed by the agency. Subsection (c) also requires that the agency adopting the rule maintain the rulemaking record for that rule. Section 302(b) provides the requirements for the rulemaking record. While the [publisher] is an agency, and the term "agency" is defined broadly in section 102(3), the term agency used in

Article Two and Three means an agency other than the publisher except to the extent that the publisher has rulemaking authority and does adopt rules. In that case the publisher would have to comply with the requirements of section 202, as well as administer the requirements of this section.

Subsection (d) requires the [publisher] to 1) maintain an Internet web site, and 2) publish the [administrative bulletin], the [administrative code] and any guidance document filed with the [publisher] by an agency on the Internet web site. The term "Internet web site" is defined in Section 102(15) and includes successor technology. The term "guidance document" is defined in Section 102(12), is excluded from the term rule in section 102(27)(F), and is governed by the provisions of section 311. Most states have internet web sites for state agencies. The provisions of subsection (d) can be implemented with existing internet technology. Subsection (d) does not address issues related to authentication, preservation and archival storage of electronic documents published on an Internet website. Subsection (d) does not address the principles for deciding what rules are in effect and enforceable at a specific point in time. Providing a hypertext link on an Internet website will satisfy the publication requirements for agencies and publishers.

Subsection (e) requires the publisher to publish the [administrative bulletin] at least once [each month]. The term [each month] is bracketed to give states the option of adapting this requirement to existing laws governing frequency of publication of the [administrative bulletin] in each state.

Subsection (f) requires the publisher to provide the administrative bulletin in written form on request, for which the publisher may charge a reasonable fee. This requirement can be satisfied by states making the administrative bulletin available on the Internet, searchable, and printable.

Subsection (g) requires the [administrative bulletin] to contain notices of proposed adoption of a rule, newly filed rules, other notices and materials, and an index of the contents of the bulletin. The text of subsection (g)(1) and (g)(2) requires an agency to utilize redlining or underlining and striking of the text of the proposed or adopted rules so that changes from the existing text of the rule are clearly delineated.

Subsection (h) requires the publisher to compile, index by subject, and publish the administrative code which must include the publication and indexing of the rules of an agency States can satisfy this requirement by providing an administrative code that is searchable by word on the Internet.

Subsection (i) requires the publisher to make the [administrative bulletin] and the [administrative code] available for public inspection and, for a reasonable charge, copying.

Subsection (j) provides for a limited non substantive power of the publisher to make corrections in spelling, grammar, and format in proposed or adopted rules of the agency provided that the agency is notified by the rules [publisher] of the changes. The [publisher] must make a record of the corrections. Subsection (j) is based on the Maine Administrative Procedure Act, 5

M.R.S.A. Section 8056(10).

Subsection (k) is drawn from the Washington Administrative Procedure Act. See WA ST 34.05.260.

SECTION 202. PUBLICATION; AGENCY DUTIES.

(a) Unless a particular record is exempt from disclosure under law other than this [act], an agency shall publish on its Internet web site and, on request and for a reasonable charge, make available through the regular mail each notice of the proposed adoption of a rule under Section 304, each rule filed under Section 316, each summary of regulatory analysis required by Section 305, each declaratory order issued under Section 204, the index of declaratory orders prepared pursuant to Section 204(g), each guidance document issued pursuant to Section 311, the index of currently effective guidance documents prepared pursuant to Section 311(e), each final order in a contested case issued pursuant to Section 413, 414, or 415, and the index of final orders in contested cases prepared pursuant to Section 418(a).

(b) An agency may provide for electronic distribution of notices related to rulemaking or guidance documents to a person that requests it. If a notice is distributed electronically, the agency need not transmit the actual notice but shall send all the information contained in the notice.

(c) An agency shall file with the [publisher] in an electronic format acceptable to the [publisher]:

(1) notice of the adoption of a rule;

(2) a summary of the regulatory analysis required by Section 305 for each proposed rule;

(3) each adopted rule;

(4) an index of currently effective guidance documents under Section 311(f); and

(5) any other notice or matter that an agency is required to publish under this [act].

Legislative note: *Agencies have statutory authority under subsection (a) to provide written materials for a reasonable charge. In many states, agencies have statutory authority under public records act to adopt regulations setting fees for providing written copies of documents under this section.*

Comment

This Section provides for the publication duties of agencies. See Section 201 for publication duties of the [publisher]. The term "agency" is broadly defined in Section 102(3). The term "agency", as used in Section 202, does not include the publisher unless the publisher has rulemaking authority in which case the publisher will have to comply with the publication responsibilities of Section 202 when it engages in rulemaking a well as the Section 201 publication responsibilities. In states in which the publisher is responsible for all publication duties, particularly the maintenance of Internet web sites, the agency can carry out its responsibilities under Section 202 by providing the required information to the publisher.

Subsection (a) requires agencies to publish on the agency Internet web site the following: notice of proposed rulemaking, filed rules, summary of regulatory analysis, declaratory order and index of declaratory orders, guidance documents and index of currently effective guidance documents, final order and index of final orders. These documents are also to be made available by the agency thorough the regular mail on request an for a reasonable charge. In states where the publisher has the sole responsibility for publishing agency rules and other documents, including guidance documents, an agency may satisfy the publication requirement of subsection (a) by filing the listed documents with the publisher. The term "Internet web site" is defined in Section 102(15) and includes successor technology. The term "guidance document" is defined in Section 102(12), is excluded from the term rule in section 102(27)(F), and is governed by the provisions of section 311.

Subsection (b) is drawn from the Washington Administrative Procedure Act. See WA ST 34.05.260. Subsection (b) authorizes agencies to utilize electronic distribution of notices or guidance documents. The term "electronic" is defined in Section 102(7), and the term "electronic record" is defined in Section 102(8).

Subsection (c) requires an agency to file with the [publisher] in an electronic format acceptable to the publisher (1) notice of the adoption of a rule, (2) summary of the regulatory analysis, (3) each adopted rule, (4) an index of currently effective guidance documents, and (5) any other notice or matter that an agency is required to publish under this act. Subsection (c)(5) would require the agency to file with the publisher the list of documents stated in subsection (a).

SECTION 203. REQUIRED AGENCY PUBLICATION AND RECORDKEEPING. An agency shall:

(1) publish a description of its organization, stating the general course and method of its operations and the methods by which the public may obtain information or make submissions or requests;

(2) publish a description of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(3) publish a description of the process for application for a license, available benefits, or other matters for which an application is appropriate, unless the process is prescribed by law other than this [act];

(4) adopt rules for the conduct of public hearings [if the standard procedural rules adopted under Section 205 do not include provisions for the conduct of public hearings];

(5) maintain [custody of] the agency's current rulemaking docket required by Section 301(b); and

(6) maintain a separate, official, current, and dated index and compilation of all rules adopted under [Article] 3, make the index and compilation available for public inspection and, for a reasonable charge, copying at the principal office of the agency [and online on the [publisher]'s Internet website], update the index and compilation at least [monthly], and file the index and the compilation and all changes to both with the [publisher].

Comment

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) (1) & (2), the 1981 Model State APA Sections 2-104(1), (2), and the Kentucky Administrative Procedure Act, KRS Section 13A.100. Persons seeking licenses or benefits should have a readily available and understandable reference sources from the agency. Subsections (1), (2), and (3), require the agency to publish the

description of the organization of the agency and the procedures followed by the agency. This is a modified version of the provisions in the 1961 and 1981 MSAPA's which required the agency to adopt rules providing this information. Some states provide more detail in subsection (1) including contact information for agency officials, organizational charts, and hours of operations for agency offices. The term methods of operation in subsection (1) refers to information about how the agency carries out its responsibilities that would be helpful to the public Subsection (2) is not intended to require publication of internal procedures available to and applicable to employees only, and that are of no real interest to the public. Subsection (3) requires publication of a description of application processes that are appropriate to the agency. For social welfare agencies, the publication would include available benefits administered by that agency.

Subsection (4) requires that agencies adopt rules for the conduct of public hearings. An agency may use a guidance document to elaborate on issues not squarely addressed by these rules.

Subsection (5) requires the agency to maintain custody of the agency's current rulemaking docket required by Section 302(b).

Subsection (6) requires an agency to maintain the official version of the index and rules compilation and to make that available to the public for inspection and for a reasonable charge copying at the principal office of the agency. An agency must also make the index and compilation available online on the publisher's internet web site, must update the index and compilation at least monthly, and must file the index and compilation and all changes to both with the publisher. The publisher is the repository of the official language of the rules. If questions arise about authentication of agency rules, the publisher is the source for the official version of the rule in question.

SECTION 204. DECLARATORY ORDER.

(a) A person may petition an agency for a declaratory order that interprets or applies the statute administered by the agency or states whether or in what manner a rule, guidance document, or order issued by the agency applies to the petitioner.

(b) An agency shall adopt rules prescribing the form of a petition for purposes of subsection (a) and the procedure for its submission, consideration, and prompt disposition. The provisions of this [act] concerning formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for a declaratory order, except to the extent provided in this [article] or to the extent the agency provides by rule or order.

(c) Not later than 60 days [or at the next regularly scheduled meeting of the agency, whichever is later,] after receipt of a petition pursuant to subsection (a), an agency shall issue a declaratory order in response to the petition, decline to issue the order, or schedule the matter for further consideration. [If the agency fails to act within the applicable time, the agency is deemed to have declined to issue the order.]

(d) If an agency declines to issue a declaratory order as requested under subsection (a), it shall notify promptly the petitioner of its decision. The decision shall be in a record and shall include a brief statement of the reasons for declining. An agency decision to decline to issue a declaratory order is subject to judicial review for abuse of discretion. This subsection does not apply to agency failures to act within the applicable time period under subsection (c).

(e) If an agency issues a declaratory order, the order must contain the names of all parties to the proceeding, the facts on which it is based, and the reasons for the agency's conclusion. If an agency is authorized not to disclose certain information in its records to protect confidentiality, the agency may redact confidential information in the order. The order has the same status and binding effect as an order issued in an adjudication and is subject to judicial review under Section 501.

(f) An agency shall publish each currently effective declaratory order.

(g) An agency shall maintain an index of all of its currently effective declaratory orders, file the index [annually] with the [publisher], make the index readily available for public inspection, and make available for public inspection and, at a reasonable cost, copying the full text of all declaratory orders to the extent inspection is permitted by law other than this [act].

Comment

This section is a revised version of 1961 MSAPA Section 8, and 1981 MSAPA Section 2-103 and Hawaii Revised Statutes, Section 91-8. 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. The term "person" in Subsection (a) is broader than the term aggrieved person for judicial review in Article 5, and is also broader than the term person toward whom agency action is directed in adjudication under Article 4. Ripeness and standing requirements that restrict court issued declaratory judgments do not apply to declaratory orders issued by administrative agencies. Subsection (a) refers to declaratory orders that interpret or apply the statue administered by the agency. In states that have constitutional agencies, the term statute would include the entire body of law, including constitutional provisions, that the agency is responsible for enforcing.

Subsection (d) provides that agency decisions to decline to issue a declaratory order are reviewable for abuse of discretion (See Massachusetts v. EPA 549 U.S. 497(2007) (EPA decision to reject rulemaking petition and therefore not to regulate greenhouse gases associated with global warming was judicially reviewable and decision was arbitrary and capricious.). Limited agency resources may provide a valid basis for an agency to decline to issue a declaratory order. The term notify in subsection (d) incorporates the definition of notify in section 102(19) (reasonable steps to inform a person). Mailing [or e-mailing] a copy of the notice to the petitioner at the address last known to the agency would satisfy the requirement to notify the person.

Subsection (e) is based on 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 (e) 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.

Subsections (f), and (g) require that an agency publish and index all current declaratory orders. Subsection (f) requires publication of currently effective declaratory orders. This would include all declaratory orders issued by the agency that are currently being relied on by the agencies, and this would exclude declaratory orders that have been amended, repealed, or replaced by later orders.

SECTION 205. STANDARD PROCEDURAL RULES.

(a) The [Governor] [Attorney General] [designated state agency] shall adopt standard procedural rules for use by agencies. The standard rules must provide for the procedural functions and duties of as many agencies as is practicable.

(b) Except as otherwise provided in subsection (c), an agency shall use the standard procedural rules adopted under subsection (a).

(c) An agency may adopt a rule of procedure that differs from the standard procedural rules adopted under subsection (a) by adopting a rule that states with particularity the reasons for the variation.

Comment

This Section is based on Section 2-105 of the 1981 MSAPA. One purpose of this provision is to provide agencies with a set of standard procedural rules. This is especially important for smaller agencies. Another purpose of this 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 standard rules is demonstrated to be impractical for that particular agency. This section requires all agencies to use the standard rules as the basis for the rules that they are required to adopt under Section 203(4). An agency may deviate from the standard rules only for impracticability. Agency procedural rules must be consistent with the statutory requirements of this Act. An agency may adopt a procedural rule that is more protective of the rights of parties to a contested case under Section 403(k) provided that the agency satisfies the requirements of Section 205(c). Procedural rules adopted under Section 205 have the force of law and must be adopted consistent with the requirements of Sections 304 to 308 of Article Three of the Act.

[ARTICLE] 3

RULEMAKING; ADOPTION AND EFFECTIVENESS OF RULES

SECTION 301. CURRENT RULEMAKING DOCKET.

(a) In this section, "rule" does not include a rule adopted using the emergency process under Section 309 or a rule adopted using the direct final process under Section 310.

(b) An agency shall maintain a current rulemaking docket that is indexed.

(c) A current rulemaking docket must list each pending rulemaking proceeding. The docket must state or contain:

(1) the subject matter of the proposed rule;

(2) notices related to the proposed rule;

(3) how comments on the proposed rule may be submitted;

(4) the time within which comments may be submitted;

(5) where comments may be inspected;

(6) requests for a public hearing;

(7) appropriate information concerning a public hearing, if any; and

(8) the timetable for action on the proposed rule.

(d) On request, the agency shall provide, for a reasonable charge, a written rulemaking docket.

Comment

This section is modeled on Minn. M.S.A. Section 14.366, and is similar to 1981 MSAPA Section 3-102. This section and the following section, Section 302, state the minimum docketing and rulemaking record keeping requirements for all agencies. This section also recognizes that many agencies use electronic recording and maintenance of dockets and records. Electronic recording and docket maintenance has become the standard practice for state agencies. However, under subsection (d), a state agency is required to provide a written rulemaking docket on request and for a reasonable charge. The current rulemaking docket is a summary list of pending rulemaking proceedings or an agenda referring to pending rulemaking. The requirements of this

section do not apply to emergency rules under Section 309, and direct final rules under Section 310.

SECTION 302. AGENCY RECORD IN RULEMAKING.

(a) An agency shall maintain a rulemaking record for each rule it proposes to adopt. Unless the record and materials are privileged or exempt from disclosure under the law of this state other than this [act], the record and materials incorporated by reference must be readily available for public inspection in the principal office of the agency and available for public display on the Internet website maintained by the [publisher]. If an agency determines that any part of the rulemaking record cannot practicably be displayed or is inappropriate for public display on the Internet website, the agency shall describe the document and note on the Internet website that the document is not displayed.

(b) A rulemaking record must contain:

(1) a copy of all publications in the [administrative bulletin] relating to the rule and the proceeding on which the rule is based;

(2) a copy of any part of the rulemaking docket containing entries relating to the rule and the proceeding on which the rule is based;

(3) a copy and an index, if prepared, of all factual material, studies, and reports agency personnel relied on or consulted in formulating the proposed or final rule;

(4) any official transcript of oral presentations made in the proceeding on which the rule is based or, if not transcribed, any audio recording or verbatim transcript of the presentations, and any memorandum summarizing the contents of the presentations prepared by the agency official who presided over the hearing;

(5) a copy of all comments received by the agency under Section 306(a) in

response to the notice of proposed rulemaking;

(6) a copy of the rule and explanatory statement filed with the [publisher]; and

(7) all petitions for any agency action on the rule, except for petitions governed by Section 204.

Comment

Several states have adopted this type of agency rule-making record provisions: Az., A.R.S. Section 41-1029; Colo., C.R.S.A. Section 24-4-103; Minn., M.S.A. Section 14.365; Miss., Miss. Code Ann. Section 25-43-3.110; Mont., MCA 2-4-402; Okl., 75 Okl.St.Ann. Section 302; and Wash., RCWA 34.05.370.

The language of subsection (a) is based on Section 3-112(a) of the 1981 Model Act. Similar language is found in the Washington Administrative Procedures Act, RCWA Section 34.05.370. The requirement of an official agency rulemaking record in subsection (a) should facilitate a more structured and rational agency and public consideration of proposed rules. It will also aid the process of judicial review of the validity of rules. The requirement of an official agency rulemaking record was 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). The second sentence of subsection (a) is intended to exclude privileged material from disclosure and display. Privileged material includes confidential business information and trade secrets, as well as internal advice memoranda. Procedures that an agency may use in dealing with confidential communications and materials in rulemaking are discussed in Jeffrey Lubbers, Federal Agency Rulemaking Guide (4^{th} ed., 2006), pp 331-333. The exemptions in the state open records laws would be examples of records and materials that are exempt from disclosure and display under law other than this act. The third sentence in subsection (a) is intended to enable an agency to decide, for example, that a blueprint that may not be practically displayed on the internet, indecent material, or copyrighted material should be available for inspection in hard copy but not posted on the Internet. It is not intended to authorize exclusion from the Internet record of, for example, information that reflects adversely on the government.

The language of subsection (b) is based on 1981 MSAPA Section 3-112(b). Subsection (b) requires *all written* submissions made to an agency and *all written* materials considered by an agency in connection with a rulemaking 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 rulemaking record. The language in Subsection (b) (3) is based on language endorsed by the ABA Section of Administrative Law & Regulatory Practice. See ABA Section of Administrative Law and Regulatory Practice, "A Blackletter Statement of Federal Administrative Law," 54 Admin. L. Rev. 1, 34 (2002)

Section 310 says that the agency must comply with Section 313(1) (concise explanatory statement) when it issues a direct final rule. In the case of direct final rules, the agency is expected to publish the rule in the administrative bulletin along with a statement that it does not

expect the rule to be controversial. This would then trigger Section 302(1) ("all publications in the [administrative bulletin] relating to the rule").

Section 309 doesn't expressly require this, but neither is the agency exempted from Section 313. This statement would be incorporated into the agency record under Section 302(6). To issue an emergency rule, the agency has to determine that some imminent peril requires immediate action, and this finding must be memorialized in a record. This "record" (meaning stored information) needs to be included in the Section 302 "agency record," so that a court can potentially review it. Section 302 includes this concept. Under Section 312(3), any adopted rule must be filed with the publisher and be accompanied by "any finding required by law as a prerequisite to adoption or effectiveness of the adoption." And Section 302(6) says the agency record must include "a copy of the rule and explanatory statement filed with the [publisher]." Reading the two together, the finding will have to be part of the agency record.

SECTION 303. ADVANCE NOTICE OF PROPOSED RULEMAKING; NEGOTIATED RULEMAKING.

(a) An agency may gather information relevant to the subject matter of a potential rulemaking and may solicit comments and recommendations from the public by publishing an advance notice of proposed rulemaking in the [administrative bulletin] and indicating where, when, and how persons may comment.

(b) An agency may engage in negotiated rulemaking by appointing a committee to comment or make recommendations on the subject matter of a proposed rulemaking under active consideration within the agency. In making appointments to the committee, the agency shall make reasonable efforts to establish a balance in representation among members of the public known to have an interest in the subject matter of the proposed rulemaking. At least annually, the agency shall publish in the [administrative bulletin] a list of all committees with their membership. Notice of a meeting of the committee must be published in the [administrative bulletin] at least [15 days] before the meeting. A meeting of the committee is open to the public.

(c) A committee appointed under subsection (b), in consultation with one or more agency representatives, may attempt to reach a consensus on the terms or substance of a

proposed rule. The committee shall present the consensus recommendation, if any, to the agency. The agency shall consider whether to use it as the basis for a proposed rule under Section 304, but the agency is not required to propose or adopt it.

(d) This section does not prohibit an agency from obtaining information and opinions from members of the public on the subject of a proposed rule by any other method or procedure.

Comment

This section is based on the provisions of Section 3-101 of the 1981 MSAPA. Seeking advice before proposing a rule frequently alerts the agency to potential serious problems that will change the notice of proposed rulemaking and the rule ultimately adopted. This section is designed to encourage gathering information. This device is commonly used in federal administrative law. See William Funk, "Public Participation and Transparency in Administrative Law—Three Examples and an Object Lesson," 61 Admin. L. Rev. 171, 191 -197 (2009). It is not intended to prohibit any type of reasonable agency information gathering activities; however, the section seeks to enable agencies to act in a fashion that will result in a balance among interested groups from whom information is received. The advanced notice of proposed rulemaking under subsection (a) is a preliminary step for seeking information and is not the same as the notice of proposed rulemaking under Section 304, which begins the rulemaking process.

Several states have enacted provisions of this type in their APAs. Some of them merely authorize agencies to seek informal input before proposing a rule; several of them indicate that the purpose of this type of provision is to promote negotiated rulemaking. Those states are Idaho, I.C. ‘ 67-5220; Minnesota, M.S.A. § 14.101; Montana, MCA 2-4-304; and Wisconsin, W.S.A. 227.13. Subsection (b) is intended to authorize negotiated rulemaking.

Subsection (c) provides that the committee may seek to reach a consensus on the terms or substance of a proposed rule but the agency is not required to propose or adopt the consensus recommendation only to consider it.

Subsection (d) authorizes agencies to use other methods to obtain information and opinions. Under subsection (d), agencies may meet informally with specific stakeholders to discuss issues raised in the negotiated rulemaking process. Negotiated rulemaking under subsection (b) is an option for agency use but is not required to be used prior to starting a rulemaking proceeding. Negotiated rulemaking committees are also used in federal administrative law. See the federal Negotiating Rulemaking Act, 5 U.S.C. Sections 561 to 570.

SECTION 304. NOTICE OF PROPOSED ADOPTION OF RULE

(a) Not later than [30] days before the adoption of a rule, an agency shall file notice of

the proposed rulemaking with the [publisher] for publication in the [administrative bulletin]. The publisher shall publish the notice in the [administrative bulletin]. The notice must include:

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

(2) a citation or reference to the specific legal authority authorizing the proposed rule;

(3) the text of the proposed rule;

(4) how a copy of the full text of any regulatory analysis of the proposed rule may be obtained;

(5) where, when, and how a person may comment on the proposed rule and request a hearing;

(6) a citation to and summary of each scientific or statistical study, report, or analysis that served as a basis for the proposed rule, together with an indication of how the full text of the study, report, or analysis may be obtained; and

(7) any summary of a regulatory analysis prepared under Section 305(d).

(b) Not later than three days after publication of the notice of the proposed rulemaking in the [administrative bulletin], the agency shall mail the notice or send it electronically to each person that has made a timely request to the agency for a mailed or electronic copy of the notice. An agency may charge a reasonable fee for a mailed copy requested by a person.

Comment

Many states have similar provisions to provide notice of proposed rulemaking to the public. Most states have an administrative bulletin that is published regularly. If a state does not have an administrative bulletin, it will still have to comply with the publication requirement. This section is based on the provisions of Section 3-103 of the 1981 MSAPA. Rule is defined in Section 102(27). Rulemaking is defined in Section 102(28). The publisher has the responsibility to publish a notice of proposed rulemaking under Section 201(g)(1). Subsection (b) requires that individual notice of the proposed rulemaking be provided in written or electronic form to each individual who has made a timely request to the agency. To be timely under this subsection, the

request would have to be made prior to the publication of the notice of proposed rulemaking.

Subsection (a)(6) This language is adapted from N.Y. APA § 202-a. This language also codifies requirements used in federal administrative law. In the federal cases, disclosure of technical information underlying a rule has been deemed essential to effective use of the opportunity to comment. See *American Radio Relay League v. FCC*, 524 F.3d 227(D.C. Cir., 2008); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

SECTION 305. REGULATORY ANALYSIS.

(a) An agency shall prepare a regulatory analysis for a proposed rule that has an estimated economic impact of more than $[ ]. The analysis must be completed before the notice of the proposed rulemaking is published. The summary of the analysis prepared under subsection (d) must be published with the notice of proposed rulemaking.

(b) If a proposed rule has an economic impact of less than $[ ], the agency shall prepare a statement of minimal estimated economic impact.

(c) A regulatory analysis must contain:

(1) an analysis of the benefits and costs of a reasonable range of regulatory alternatives reflecting the scope of discretion provided by the statute authorizing the proposed rule; and

(2) a determination whether:

(A) the benefits of the proposed rule justify the costs of the proposed rule; and

(B) the proposed rule will achieve the objectives of the authorizing statute in a more cost effective manner, or with greater net benefits, than other regulatory alternatives.

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

(e) An agency preparing a regulatory analysis under this section shall submit the analysis

to the [appropriate state agency].

(f) If an agency has made a good faith effort to comply with this section, a rule is not invalid solely because the regulatory analysis for the proposed rule is insufficient or inaccurate.

Legislative Note: *State laws vary as to which state agency or body that an agency preparing the regulatory analysis should submit that analysis. In some states, it is the department of finance or revenue, in others it is a regulatory review agency, or regulatory review committee. The appropriate state agency in each state should be inserted into the brackets.*

Comment

Regulatory analyses are widely used as part of the rulemaking process in the states. See Robert W. Hahn, "State and Federal Regulatory Reform: A Comparative Analysis," 29 J. Legal Stud. 873, 875-78 (2000); Richard Wisnant & Diane De Witt Cherry, "Economic Analysis of Rules: Devolution, Evolution, and Realism," 31 Wake Forest L.Rev. 693, 694 n.2 (1996). States should set the dollar amount of estimated economic impact for triggering the regulatory analysis requirement of this section at a dollar amount so that as they deem appropriate or by other approach make the choice to prepare regulatory analyses carefully so that the number of regulatory analyses prepared by any agency are proportionate to the resources that are available . The subsection also provides for submission to the rules review entity in the state, if the state has one. States that already have regulatory analysis laws can utilize the provisions of Section 305 to the extent that this section is not inconsistent with existing law other than this act. Agencies may rely on agency staff expertise and information provided by interested stakeholders and participants in the rulemaking process. Agencies are not required by this act to hire and pay for private consultants to complete regulatory impact analysis. The concise summary of the regulatory analysis required by subsection (d) means a short statement that contains the major conclusions reached in the regulatory analysis. Subsection (f) is based on 1981 MSAPA Section 3-105(f).

SECTION 306. PUBLIC PARTICIPATION.

(a) An agency proposing a rule shall specify a public comment period of at least [30] days after publication of the notice of the proposed rulemaking during which a person may submit information and comment on the proposed rule. The information or comment may be submitted in an electronic or written format. The agency shall consider all information and comment on a proposed rule which is submitted pursuant to this subsection within the comment period.

(b) An agency may consider any other information it received concerning the proposed rule during the rulemaking. Any information considered by an agency must be incorporated into the record under Section 302(b)(3). The information need not be submitted in an electronic or written format. Nothing in this section prohibits an agency from discussing with any person at any time the subject of a proposed rule.

(c) Unless a hearing is required by law other than this [act], an agency is not required to hold a hearing on a proposed rule. If an agency holds a hearing, the agency may allow a person to make an oral presentation with information and comment about the rule. The hearing must be open to the public, recorded, and held not later than [10] days before the end of the public-comment period.

(d) A hearing on a proposed rule may not be held earlier than [20] days after notice of its location, date, and time is published in the [administrative bulletin].

(e) An agency representative shall preside over a hearing on a proposed rule. If the presiding agency representative is not the agency head, the representative shall prepare a memorandum summarizing the contents of the presentations made at the hearing for consideration by the agency head.

Legislative Note: *State laws vary on the length of public comment periods and on whether a rulemaking hearing is required. The bracketed number of days in subsections (a) and (d) should be interpreted to require that if a rulemaking hearing is held, it will be held before the end of the public comment period. In that case, the minimum time period would be 50 days rather than 30 days.*

Comment

This section gives discretion to the agency about whether to hold an oral hearing on proposed rules in the absence of a statutory or constitutional requirement that an oral hearing be held. The first sentence of subsection (a) is based on 1981 MSAPA Section 3-104(a). Subsection (b) is based on 1981 MSAPA Section 3-104(b)(2). Under subsection (c), the agency may extend the comment period for 10 days after the hearing in cases in which the agency holds a rule making hearing under this subsection. Subsection (e) is based on 1981 MSAPA Section 3-

104(b)(3). The agency representative described in subsection (e) need not be an officer or employee of the agency unless that is required by law other than this [act]. In some states, an employee of the state attorney general's office will serve as the agency representative presiding on a hearing related to rulemaking.

SECTION 307. TIME LIMIT ON ADOPTION OF RULE.

(a) An agency may not adopt a rule until the public comment period has ended.

(b) Not later than [two years] after the notice of proposed rulemaking, the agency shall adopt a rule pursuant to the rulemaking proceeding or terminate the proceeding by publication of a notice of termination in the [administrative bulletin]. [The agency may extend the time for adopting the rule for an additional [two years] by publishing a statement of good cause for the extension, but must provide for additional public participation as provided in Section 306 prior to adopting the rule.]

(c) An agency shall file an adopted rule with the [publisher] not later than [ ] days after the adoption of the rule.

(d) A rule is void unless it is adopted and filed within the time limits set by this section.

Comment

This section codifies the final adoption and filing for publication requirements for rulemaking that is subject to the procedures provided in Sections 304 through 308 of this Act. Subsection (a) is based on 1981 MSAPA Section 3-106 (a). Section 702(a) of this act requires that the agency shall file a copy of the adopted amended or repealed rule with the rules review committee at the same time it is filed with the publisher. Subsection (d) provides that a rule that is not properly adopted and filed for publication has no legal effect.

SECTION 308. VARIANCE BETWEEN PROPOSED AND ADOPTED RULE. An agency may not adopt a rule that differs from the rule proposed in the notice of proposed rulemaking unless the rule adopted is a logical outgrowth of the rule proposed in the notice.

Comment

This section draws on provisions from several states. See Mississippi Administrative Procedure Act, Miss. Code Ann. Section 25-43-3.107 and the Minn. Administrative Procedure Act, M.S.A. Section 14.05. The variance test adopted by state and federal courts is the logical outgrowth test. If the adopted rule is a logical outgrowth of the proposed rule, no further comment period is required. If it is not a logical outgrowth, then a further comment period is required. At a minimum, the logical outgrowth test is designed to ensure fair notice to affected persons. *Long Island Care at Home Ltd. v. Coke* 551 U.S. 158 (2007). Fair notice is met when changes between the adopted rule and the proposed rule are reasonable foreseeable from the proposed rule. Courts utilize several factors to apply the logical outgrowth test including: (1) any person affected by the adopted rule should have reasonably expected that the change from the published proposed rule would affect the person's interest; (2) 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 rule proposed to be adopted; and (3) the effect of the adopted rule differs from the effect of the rule proposed to be adopted or amended. 1981 MSAPA Section 3-107 dealt with variance by using the language "substantially different" as the test for improper variance. The "logical outgrowth" language used in Section 308 is based on the case law set forth below.

The following cases discuss and analyze the logical outgrowth test and these factors. These judicial opinions also convey the wide acceptance and use of the logical outgrowth test in the states. *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); *Trustees for Alaska v. Dept. Nat. Resources*, 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 13 73 (1993); *Amer. Bankers Life Ins. Co. v. Div. of Consumer Counsel*, 220 Va. 773, 263 S.E.2d 867 (1980).

SECTION 309. EMERGENCY RULE. If an agency finds that an imminent peril to the public health, safety, or welfare, or the loss of federal funding for an agency program, requires the immediate adoption of a rule and publishes in a record its reasons for that finding, the agency, without prior notice or hearing or on any abbreviated notice and hearing that it finds practicable, may adopt a rule without complying with Sections 304 through 307. The adoption may be effective for not longer than [180] days [renewable once up to an additional [180] days]. The adoption of an emergency rule does not preclude the adoption of a rule under Sections 304

through 307. The agency shall file with the [publisher] a rule adopted under this section as soon as practicable given the nature of the emergency, shall publish the rule on its Internet website, and shall notify persons that have requested notice of rules related to that subject matter. This section does not prohibit the adoption of a new emergency rule if, at the end of the effective period of the original emergency rule, the agency finds that the imminent peril to the public health, safety, or welfare, including the loss of federal funding for an agency program, still exists.

Comment

This section is taken from the 1961 MSAPA, Section 3(2)(b), and the Virginia Administrative Procedure Act, Va. Code Ann. Section 2.2-4012.1. Many states have emergency rulemaking provisions that are based on these provisions of the 1961 MSAPA. See N.Y.S. A. Section 202(6); F.S.A. Section 120.54(4)(a); 29 Del. Stats. Ch. 101, Section 10119; Utah Stats.Ch 63G-3-304; and Wash. Stats.RCW 34.05.350. Some state courts will invalidate an emergency rule when the agency has not established that there is an emergency that justifies the use of emergency rulemaking procedures. Citizens for a Better Environment v. Illinois Pollution Control Bd. 152 Ill.App.3d 105, 504 N.E.2d 166 (Ill.App. 1 Dist., 1987). Both the 1981 MSAPA Section 3-108(a) and the federal Administrative Procedure Act, 5 U.S.C. Section 553(b)(B) use the "unnecessary, impracticable or contrary to the public interest" good cause standard for the same purposes as the imminent peril standard used in this section and in the 1961 MSAPA Section (3)(2)(b). For scholarly commentary, See Michael Asimow, "Interim Final Rules: Making Haste Slowly," 51 Admin. L. Rev. 703, 712-15 (1999); Ellen R. Jordan, "The Administrative Procedure Acts Good Cause Exemption," 36 Admin. L. Rev. 113, 132-33(1984). This Section can be used to adopt program requirements necessary to comply with federal funding requirements, or to avoid suspension of federal funds for noncompliance with program requirements. When an emergency rule has the effect of repealing an existing rule, the impact of the end of the emergency on the repealed rule, whether the repealed rule comes back into existence, is not governed by the provisions of Section 309 but would be governed by law of this state other than this act, such as the governing statute that delegates rulemaking authority to the agency that issued the emergency rule.

SECTION 310. DIRECT FINAL RULE. If an agency proposes to adopt a rule which is expected to be noncontroversial, it may use direct final rulemaking authorized by this subsection and must comply with Section 304 (a)(1), (2), (3), and (5), Section 304(b), and Section 313(1). The proposed rule must be published in the [administrative bulletin] along with a

statement by the agency that it does not expect the adoption of the rule to be controversial and that the proposed rule takes effect 30 days after publication if no objection is received. If no objection is received, the rule becomes final under Section 317(e). If an objection to the use of direct final rulemaking is received from any person not later than [ ] days after publication of the public notice, the proposed rule does not become final. The agency shall file notice of the objection with the [publisher] for publication in the [administrative bulletin], and may proceed with rulemaking under Sections 304 through 307.

Comment

Section 310 Direct final rulemaking has been recommended by the Administrative Conference of the United States [ACUS Recommendation 95-4, 60 Fed. Reg. 43110 (1995)]. The study that provided the basis for the recommendation was prepared by Professor Ronald M. Levin and has been published [Ronald M. Levin, "Direct Final Rulemaking" 64 George Washington Law Review 1 (1995)]. Section 310 provides a procedure for direct final rulemaking that applies to noncontroversial rules. Under this rule when the agency is merely making a stylistic correction or correcting an error that the agency believes is noncontroversial, the rule may be adopted without full rulemaking procedures. See the VA Fast-Track Rule provision at Va. Code Ann. Section 2.2-4012.1.]

In order to prevent misuse of this procedural device, noncontroversial rule promulgation may be prevented by the objection of any person. The public comment period provides notice of the noncontroversial rule and the opportunity to object to the adoption of the rule. If an objection to the direct final rulemaking process is received within the public comment period, the agency must give notice of the objection and then the agency may proceed with the normal rulemaking process, including the public comment provisions of Section 306.

SECTION 311. GUIDANCE DOCUMENT.

(a) An agency may issue a guidance document without following the procedures set forth in Sections 304 through 308.

(b) An agency that proposes to rely on a guidance document to the detriment of a person in any administrative proceeding must afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the document. The agency may not use a guidance

document to foreclose consideration of issues raised in the document.

(c) A guidance document may contain binding instructions to agency staff members if, at an appropriate stage in the administrative process, the agency's procedures provide an affected person an adequate opportunity to contest a position taken in the document as illegal or unwise.

(d) If an agency proposes to act in an adjudication at variance with a position expressed in a guidance document, it shall provide a reasonable explanation for the variance. If an affected person in an adjudication may have reasonably relied on the agency's position, the explanation must include a reasonable justification for the agency's conclusion that the need for the variance outweighs the affected person's reliance interest.

(e) An agency shall maintain an index of all of its currently effective guidance documents, publish the index on its Internet web site, make all guidance documents available to the public, and file the index [annually] with the [publisher]. The agency may not rely on a guidance document, or cite it as precedent against any party to a proceeding, unless the guidance document is published on its Internet website.

(f) A guidance document may be considered by a presiding officer or final decision maker in an agency adjudication, but it does not bind the presiding officer or the final decision maker in the exercise of discretion.

(g) A person may petition an agency under Section 318 to adopt a rule in place of a guidance document.

(h) A person may petition an agency to revise or repeal a guidance document. Not later than [60] days after submission of the petition, the agency shall:

(1) revise or repeal the guidance document;

(2) initiate a proceeding for the purpose of considering a revision or repeal; or

(3) deny the petition in a record and state its reasons for the denial.

Comment

This section seeks to encourage an agency to advise the public of its current opinions, approaches, and likely courses of action by using guidance documents (also commonly known as interpretive rules and policy statements). The section also recognizes agencies' need to promulgate such documents for the guidance of both its employees and the public. Agency law often needs interpretation, and agency discretion needs some channeling. The public needs to know the agency's opinion about the meaning of the law and rules 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 L. Strauss, "Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element," 53 Admin. L. Rev. 803 (2001). This section strengthens agencies' ability to fulfill these legitimate objectives by excusing them from having to comply with the full range of rulemaking procedures before they may issue these nonbinding statements. At the same time, the section incorporates safeguards to ensure that agencies will not use guidance documents in a manner that would undermine the public's interest in administrative openness and accountability.

Four states have adopted detailed provisions regulating guidance documents in their administrative procedure acts. See Ariz. Rev. Stat. Ann. §§ 41-1001, 41-1091; Mich. Comp. Laws §§ 24.203, 24.224; Va. Code Ann. § 2.2-4008; Wash. Rev. Code Ann. § 34.05.230. This section draws on those provisions, and also on requirements and recommendations issued by federal authorities and the American Bar Association.

The term guidance document is defined in section 102(12) and is excluded from the definition of rule in section 102(27)(F). Subsection (a) exempts guidance documents from the procedures that are required for issuance of rules. Many states have recognized the need for this type of exemption in their administrative procedure statutes. These states have defined guidance documents—or interpretive rules and policy statements—differently from rules, and have also excused agencies creating them from some or all of the procedural requirements for rulemaking. See Ala. Code § 41-22-3(9)(c) ("memoranda, directives, manuals, or other communications which do not substantially affect the legal rights of, or procedures available to, the public"); 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); 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 [follow notice-and-comment procedure]") (emphasis added); Mich. Comp. Laws § 24.207(h) (defining "rule" to exclude "[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"); Wyo. Stat. Ann. § 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); 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) (estimating that

more than thirty states have relaxed rulemaking requirements for agency guidance documents such as interpretive and policy statements). The federal Administrative Procedure Act draws a similar distinction. See 5 U.S.C. § 553(b)(A) (exempting "interpretative rules [and] general statements of policy" from notice-and-comment procedural requirements).

A guidance document, in contrast to a rule, lacks the force of law. Many state and federal decisions recognize the distinction. See, e.g., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986); District of Columbia v. Craig, 930 A.2d 946, 968-69 (D.C. 2007); Clonlara v. State Bd. of Educ., 501 N.W.2d 88, 94 (Mich. 1993); Penn. Human Relations Comm'n v. Norristown Area School Dist., 374 A.2d 671, 678 (Pa. 1977).

Subsection (b) requires an agency to allow affected persons to challenge the legality or wisdom of guidance documents when it seeks to rely on these documents to their detriment. In effect, this subsection prohibits an agency from treating guidance documents as though they were rules. Because rules have the force of law (i.e., are binding), an agency need not respond to criticisms of their legality or wisdom during an adjudicative proceeding; the agency would be obliged in any event to adhere to them until such time as they have been lawfully rescinded or invalidated. In contrast, a guidance document is not binding. Therefore, when affected persons seek to contest a position expressed in a guidance document, the agency may not treat the document as determinative of the issues raised. See Recommendation 120C of the American Bar Association, 118-2 A.B.A. Rep. 57, 380 (August 1993) ("When an agency proposes to apply a nonlegislative rule . . . , it [should] provide affected private parties an opportunity to challenge the wisdom or legality of the rule [and] not allow the fact that a rule has already been made available to the public to foreclose consideration of [their] positions"); Robert A. Anthony, "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?," 41 Duke L.J. 1311 (1992).

An integral aspect of an adequate opportunity to challenge a guidance document is the agency's responsibility to respond reasonably to arguments made against the document. Thus, when affected persons take issue with propositions expressed in a guidance document, the agency "must be prepared to support the policy just as if the [guidance document] had never been issued." Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974); see Center for Auto Safety v. NHTSA, 452 F.3d 798, 807 (D.C. Cir. 2006); Professionals and Patients for Customized Care v. Shalala, 56 F.3d 592, 596 (5th Cir. 1995); American Mining Cong. v. MSHA, 995 F.2d 1106, 1111 (D.C. Cir. 1993); Anthony, supra. An agency may not, therefore, treat its prior promulgation of a guidance document as a justification for not responding to arguments against the legality or wisdom of the positions expressed in such a document. Flagstaff Broadcasting Found. v. FCC, 979 F.2d 1566 (D.C. Cir. 1992); Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992); Giant Food Stores, Inc. v. Commonwealth, 713 A.2d 177, 180 (Pa. Cmwlth. 1998); Agency Policy Statements, Recommendation 92-2 of the Admin. Conf. of the U.S. (ACUS), 57 Fed. Reg. 30,103 (1992), ¶ II.B.

An agency may, however, refer to a guidance document during a subsequent administrative proceeding and rely on its reasoning, if it also recognizes that it has leeway to depart from the positions expressed in the document. See, e.g., Steeltech, Ltd. v. USEPA, 273 F.3d 652, 655-56 (6th Cir. 2001) (upholding decision of ALJ who "expressly stated that the

[guidance document] was not a rule and that she had the discretion to depart from [it], if appropriate," but who adhered to the document on determining "that the present case does not present circumstances that raise policy issues not accounted for in the [document]"); Panhandle Producers & Royalty Owners Ass'n v. Econ. Reg. Admin., 847 F.2d 1168, 1175 (5th Cir. 1988) (agency "responded fully to each argument made by opponents of the order, without merely relying on the force of the policy statement," but was not "bound to ignore [it] altogether"); American Cyanamid Co. v. State Dep't of Envir. Protection, 555 A.2d 684, 693 (N.J. Super. 1989) (rejecting contention that agency had treated a computer model as a rule, because agency afforded opposing party a meaningful opportunity to challenge the model's basis and did not apply the model uniformly in every case). See generally John F. Manning, "Nonlegislative Rules," 72 Geo. Wash. L. Rev. 893, 933-34 (2004); Ronald M. Levin, "Nonlegislative Rules and the Administrative Open Mind," 41 Duke L.J. 1497 (1992). The relevance of a guidance document to subsequent administrative proceedings has been compared with that of the agency's adjudicative precedents. See subsection (d) infra.

What constitutes an adequate opportunity to contest a policy statement within an agency will depend on the circumstances. See ACUS Recommendation 92-2, supra, ¶ II.B. ("[A]ffected persons should be afforded a fair opportunity to challenge the legality or wisdom of [a policy statement] and suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials," preferably "at or before the time the policy statement is applied to [them]"). Affected persons' right to a meaningful opportunity to be heard on the issues addressed in guidance documents must be reconciled with the agency's interest in being able to set forth its interpretations and policies for the guidance of agency personnel and the public without undue impediment. An agency may use its rulemaking authority to set forth procedures that it believes will provide affected persons with the requisite opportunity to be heard. To the extent that these procedures survive judicial scrutiny for compliance with the purposes of this subsection (b), the agency will thereafter be able to rely on established practice and precedent in determining what hearing rights to afford to persons who may be affected by its guidance documents. As new fact situations arise, however, courts should be prepared to entertain contentions that procedures that have been upheld in past cases did not, or will not, afford a meaningful opportunity to be heard to some persons who may wish to challenge the legality or wisdom of a particular guidance document.

Subsection (c) permits an agency to issue mandatory instructions to agency staff members, typically those who deal with members of the public at an early stage of the administrative process, provided that affected persons will have an adequate to contest the positions taken in the guidance document at a later stage. See Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (2007), § II(2)(h) (significant guidance documents shall not "contain mandatory language . . . unless . . . the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties"); ACUS Recommendation 92-2, supra, ¶ III (an agency should be able to "mak[e] a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence"). For example, an agency manual might prescribe requirements that are mandatory for low-level staff, leaving to higher-ranking officials the discretion to depart from the interpretation or policy stated in the manual. The question of what constitutes an adequate opportunity to be heard may vary among agencies or

programs. In some programs, centralization of discretionary authority may be a necessary concession to "administrative uniformity or policy coherence"; in other programs, the obligation to proceed through multiple stages of review might be considered so burdensome as to deprive members of the public of a meaningful opportunity to obtain agency consideration of whether the guidance document should apply to their particular situations. The touchstone in every case is whether the opportunity to be heard prescribed by subsection (b) remains realistically available to affected persons.

Subsection (d) is based on a similar provision in ABA Recommendation No. 120C, supra. It is in accord with general principles of administrative law, under which an agency's failure to reasonably explain its departure from established policies or interpretations renders its action arbitrary and capricious on judicial review. See 1981 MSAPA § 5-116(c)(8)(iii) (court may grant relief against agency action other than a rule if it is "inconsistent with the agency's prior practice or precedent, unless the agency has stated credible reasons sufficient to indicate a fair and rational basis for the inconsistency"); Yale-New Haven Hospital v. Leavitt, 470 F.3d 71, 79-80 (2d Cir. 2006). It has been said that a guidance document should constrain subsequent agency action in the same manner that the agency's adjudicative precedents do. See Peter L. Strauss, "The Rulemaking Continuum," 41 Duke L.J. 1463, 1472-73, 1486 (1992) (cited with approval on this point in United States v. Mead Corp., 533 U.S. 218, 232 (2001)); see also Manning, supra, at 934-37. Subsection (d) refers only to official acts of the agency (compare the definition of "agency action" in Section 102(3)), not to informal acts of agency staff, such as inspections. The latter types of conduct are frequently not accompanied by a written statement at all, so it would be outside the scope of requirements imposed by subsection (d) to require these government personnel to "explain" a departure from the position taken in a guidance document.

One purpose of this subsection is to protect the interests of persons who may have reasonably relied on a guidance document. An agency that acts at variance with its past practices may be held to have acted in an arbitrary and capricious manner if the unfairness to regulated persons outweighs the government's interest in applying its new view to those persons. Heckler v. Community Health Servs., 467 U.S. 51, 61 (1984) ("an administrative agency may not apply a new [case law] rule retroactively when to do so would unduly intrude upon reasonable reliance interests"); Miguel-Miguel v. Gonzales, 500 F.3d 941, 951 (9th Cir. 2007); Epilepsy Found. v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001); Microcomputer Tech. Inst. v. Riley, 139 F.3d 1044, 1050 (5th Cir. 1998). Accordingly, where persons may have justifiably relied on a guidance document, the agency's explanation for departing from the position taken in that document should ordinarily include a reasonable justification for the decision to override their reliance interests.

The first two sentences of subsection (e) are based directly on Va. Code Ann. § 2.2-4008. Similar provisions have been adopted in Arizona and Washington. See Ariz. Rev. Stat. Ann. § 41-1091; Wash. Rev. Code Ann. § 34.05.230(3)-(4).

The last sentence of the subsection is based on the federal APA. See 5 U.S.C. § 552(a)(2); Smith v. NTSB, 981 F.2d 1326 (D.C. Cir. 1993). Subject to harmless error principles, see Section 508(b), a court may invoke the sanction prescribed in this section without necessarily concluding that the party against whom the document is cited has valid objections to the

substance of the document.

Subsection (g) is based on Wash. Rev. Code Ann. § 34.05.230(2), which provides for petitions "requesting the conversion of interpretive and policy statements into rules." However, it is phrased more generally than the Washington provision, because an agency that receives a rulemaking petition will not necessarily wish to "convert" the existing guidance document into a rule without any revision. Knowing that it will now be speaking with the force of law, in a format that would be more difficult to alter than a guidance document is, the agency might prefer to adopt a rule that is narrower than, or otherwise differently phrased than, the guidance document that it would replace. In any event, the agency will, as provided in section 318, need to explain any rejection of the petition, whether in whole or in part, and such a rejection will be judicially reviewable to the same extent as other actions taken under that section.

Subsection (h) extends the principles of section 318 by allowing interested persons to petition an agency to revise or repeal an existing guidance document. Thus, while this Act does not require an agency to obtain the views of the public before issuing a guidance document, this subsection provides a procedure by which members of the public may bring their views regarding an existing guidance document to the agency's attention and request that the agency take account of those views. This process may be of particular importance to persons who are indirectly affected by a guidance document (such as persons who stand to benefit from the underlying regulatory program) but are unlikely to be the targets of an enforcement action in which they could challenge the legality or wisdom of the document under subsection (b). See Nina A. Mendelson, "Regulatory Beneficiaries and Informal Agency Policymaking," 92 Cornell L. Rev. 397, 438-44 (2007); see also ACUS Recommendation No. 76-5, 41 Fed. Reg. 56,769 (1976) (noting that section 553(e) of the federal APA "allow[s] any person to petition at any time for the amendment or repeal of . . . an interpretive rule or statement of general policy").

The subsection requires an agency to respond to the petition in [sixty] or fewer days. An agency that is not prepared to revise or repeal the guidance document within that time period may initiate a proceeding for the purpose of giving the matter further consideration. This proceeding can be informal; the notice and comment requirements of Sections 304 through 308 are inapplicable to it, because those sections deal with rules rather than guidance documents. The agency may, however, voluntarily solicit public comments on issues raised by the petition. Cf. ACUS Recommendation 76-5, supra, ¶ 2. This section does not prescribe a time period within which the agency must complete the proceeding, but judicial intervention to compel agency action "unlawfully withheld or unreasonably delayed" may be sought in an appropriate case. § 501(b). If the agency declines to revise or repeal the guidance document, within the [sixty] day period or otherwise, it must explain its decision. Denials of petitions under this subsection, like denials of petitions for rulemaking under section 318, are reviewable for abuse of discretion, and the agency's explanation will provide a basis for any judicial review of the denial.

When an agency grants a petition to revise or repeal a guidance document in part, and denies the petition in part, the agency should explain the partial denial to comply with the requirements of Section 311(h)(3).

SECTION 312. REQUIRED INFORMATION FOR RULE. An adopted rule filed by an agency with the [publisher] under Section 316 must contain the text of the rule adopted and be accompanied by a record that contains:

(1) the date the agency adopted the rule;

(2) a reference to the specific statutory or other authority authorizing the rule;

(3) any finding required by law as a prerequisite to adoption or effectiveness of the rule;

(4) the effective date of the rule; and

(5) the statement required by Section 313.

Comment

This section is based on 1981 MSAPA Section 3-111 (a). Agency action is defined in section 102(3) to include an agency rule or order [(subsection (3)(a)], and the failure to issue a rule or order [(subsection (3)(b)]. The term adoption in this section should be read with the definition of the term "rulemaking" in Section102 (28). The term rulemaking includes the adoption of a new rule and the amendment or repeal of an existing rule.

SECTION 313. CONCISE EXPLANATORY STATEMENT. At the time it adopts a rule, an agency shall issue a concise explanatory statement that contains:

(1) the agency's reasons for adopting the rule, including the agency's reasons for not accepting substantial arguments made in testimony and comments;

(2) subject to Section 308, the reasons for any change between the text of the proposed rule contained in the notice of proposed rulemaking and the text of the rule as finally adopted; and

(3) the summary of any regulatory analysis prepared under Section 305(d).

Comment

This section is based on 1981 MSAPA Section 3-110(a). Many states have adopted the requirement of a concise explanatory statement. Arkansas (A.C.A. Section 25-15-204) and Colorado (C.R.S.A. Section 24-4-103) have similar provisions. The federal Administrative

Procedure Act uses equivalent terms in Section 553 (c) (5 U.S.C.A. Section 553). This provision also requires the agency to explain why it rejected substantial arguments made in comments. Such explanation helps to encourage agency consideration of all substantial arguments and fosters perception of agency action as not arbitrary. Subsection (2) requires a statement of reasons for any substantial change between the text of the proposed rule, and the text of the adopted rule. Section 308 prohibits adoption of a rule that differs from the proposed rule unless the adopted rule is the logical outgrowth of the proposed rule. An adopted rule that contains a substantial change from the proposed rule can be adopted under Section 308 if the logical outgrowth test is satisfied but the agency will have to provide a statement of reasons under Section 313(2). If the logical outgrowth test is not met, then the rule can not be adopted under Section 308, and section 313(2) does not apply.

Agency action is defined in section 102(3) to include an agency rule or order [(subsection (3)(a)], and the failure to issue a rule or order [(subsection (3)(b)]. The term adoption in this section should be read with the definition of the term "rulemaking" in Section102 (28). The term rulemaking includes the adoption of a new rule and the amendment or repeal of an existing rule.

SECTION 314. 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, or 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, place of inspection, 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 form at no charge or for a reasonable charge;

(4) the rule states where copies of the code, standard, or rule are available from the agency adopting the rule, for a reasonable charge, if any, or 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 principal office of the agency.

Comment

Several states have provisions that require the agencies to retain the voluminous technical codes. See, Alabama, Ala.Code 1975 Section 41-22-9; Michigan, M.C.L.A. 24.232; and North Carolina, N.C.G.S.A. § 150B-21.6. To avoid the problems created by those retention provisions, but to assure that these technical codes are available to the public, this section adopts several specific procedures. One protection is to permit incorporating by reference only codes that are readily available from the outside promulgator, and that are of limited public interest as determined by a source outside the agency. See Wisconsin, W.S.A. 227.21. These provisions will guarantee that important material drawn from other sources is available to the public, but that less important material that is freely available elsewhere does not have to be retained. The bracketed language in subsection (2) is based on variations in state law as to whether later amendments to codes are automatically incorporated into the rule, or whether a new rulemaking proceeding would be required to include code amendments. This issue is discussed in Jim Rossi, "Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards," 46 W&M L.Rev. 1343 (2005).

SECTION 315. COMPLIANCE. An action taken under this [article], including the adoption of a rule under Section 309 or 310, is not valid unless taken in substantial compliance with this [article].

Comment

This section is a slightly modified form of the 1961 Model State Administrative Procedure Act, section (3)(c). See also 1981 MSAPA Section 3-113(a). Section 503(a) governs the timing of judicial review proceedings to contest any rule on the ground of noncompliance with the procedural requirements of this [act]. The scope of challenges permitted under Section 503(a) includes all applicable requirements of article 3 for the type of rule being challenged.

SECTION 316. FILING OF RULE. An agency shall file in written and electronic form with the [publisher] each rule it adopts, including a rule adopted under Section 309 or 310. In filing an adopted rule, an agency shall use a standard form prescribed by the [publisher]. The agency shall file the rule not later than [ ] days after adoption. The [publisher] shall maintain a

permanent register of all filed rules and concise explanatory statements for the rules. The [publisher] shall affix to each adopted rule a certification of the time and date of filing. The [publisher] shall publish the notice of each adopted rule in the [administrative bulletin].

Comment

This section is based on the 1961 Model State Administrative Procedure Act, Section 4(a) and its expansion in the 1981 MSAPA, Section 3-114(a). Section 201(g)(2) provides that the administrative bulletin must contain newly filed adopted rules. This section provides that the publisher is responsible for publishing the notice of adopted rules in the administrative bulletin.

SECTION 317. EFFECTIVE DATE OF RULES.

(a) Except as otherwise provided in this section, [unless disapproved by the [rules review committee] or [withdrawn by the agency under Section 703,] a rule becomes effective [30] days after publication of the rule [in the administrative bulletin] [on the [publisher]'s Internet web site.]

(b) A rule may become effective on a date later than that established by subsection (a) if that date is required by law other than this [act] or specified in the rule.

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

(d) A rule adopted using the emergency process under Section 309 becomes effective on adoption by the agency.

(e) A rule adopted using direct final rulemaking under Section 310 to which no objection is made becomes effective [30] days after publication, unless the agency specifies a later effective 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. Some rules may have retroactive application or effect provided that there is express statutory authority for the agency to adopt retroactive rules. See Bowen v. Georgetown University Hospital 488 U.S. 204 (1988).

SECTION 318. PETITION FOR ADOPTION OF RULE. Any person may petition an agency to adopt a rule. An agency shall prescribe by rule the form of the petition and the procedure for its submission, consideration, and disposition. Not later than [60] days after submission of a petition, the agency shall:

(1) deny the petition in a record and state its reasons for the denial; or

(2) initiate rulemaking .

Comment

This section is substantially similar to the 1961 MSAPA Section 6.. See also Section 3-117 of the 1981 MSAPA. Agency decisions that decline to adopt a rule are judicially reviewable for abuse of discretion (See Massachusetts v. EPA 127 S. Ct. 1438 (2007) (EPA decision to reject rulemaking petition and therefore not to regulate greenhouse gases associated with global warming was judicially reviewable and decision was arbitrary and capricious.). When an agency grants a rulemaking petition in part, and denies the petition in part, the agency should explain the partial denial to comply with the requirements of Section 318(1).

[ARTICLE] 4

ADJUDICATION IN A CONTESTED CASE

SECTION 401. CONTESTED CASE. This [article] applies to an adjudication made by an agency in a contested case.

Comment

Article 4 of this Act does not apply to all adjudications but only to those adjudications, defined in Section 102(7) as a "contested case." An adjudication that is not made in a contested case is not subject to this article but is subject to Sections 311(d) and (f), and Article 5. 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 resolution of the dispute involves particular facts and the presiding officer's decision is based on the hearing record. Hearing rights are created by statutes that establish an agency and delegate powers to the agency (agency enabling acts). The provisions of this [act] do not create hearing rights. Article Four does not apply to adjudications that are not a contested case. See Goss v. Lopez 419 U.S. 565 (1975) for an example of informal adjudication procedures required when a public school district suspends students for ten days or less. In those circumstances the constitution does not require an an opportunity for an evidentiary hearing.

The term "contested case" used in this section is similar to the "contested case" definition in Section 1(2) of the 1961 MSAPA. Like the 1961 MSAPA Section 9, this Act looks to external sources such as statutes and constitutions to determine when a party is entitled to a hearing. However, this term differs from the 1961 MSAPA's term "contested case" because it also includes hearings required by the constitution, federal or state, and makes provision in Article 4 for the type of hearing to be held in a case where a constitution creates the right to a hearing. Including constitutionally created rights to a hearing within the provisions of this Act eliminates the problem of looking outside the Act to determine the type of hearing required in cases where the right to the hearing is created by a constitution. Hearing rights created by judicial decisions mean a constitutional decision by a court in that state. See Goldberg v. Kelley, 397 U.S. 254 (1970). The definition of "contested case" should be read in conjunction with the definitions of "adjudication" under Section 102(1), "evidentiary hearing" under Section 102(10), and of "order", Section 102(20), infra. Article Four procedures apply to adjudications that are contested cases, Section 401, and that result in a final order of the agency, Section 413.

This Section is subject to the exception in Section 407 for an emergency hearing if the requirements for that exception under this Article apply. If the requirements for an emergency adjudication under Section 407 are met, a hearing in a contested case may be conducted following the procedures in that section. This is an external hearing rights approach that is consistent with the 1961 MSAPA Section 9. Hearings that are required by procedural due process guarantees serve to protect life, liberty and property *interests*, which arise where a statute creates a justified expectation or legitimate entitlement. This section includes more than what

were described as “rights” under older common law.

Section 401 does not apply to adjudications that are not a contested case. However, these types of adjudications are subject to the provisions of Article 5 governing judicial review, and they are subject to the provisions of Section 311(d), and (f), governing variance by the agency from a position supported by a guidance documents and use of guidance documents in agency adjudication, respectively. Those requirements apply to all adjudications, including informal adjudications, and not just to contested cases. Section 401, governing contested case hearings, does not apply to investigatory hearings, a hearing that merely seeks public input or comment, pure administrative process proceedings such as tests, elections, or inspections, and situations in which a party has a right to a de novo administrative or judicial hearing. An agency may by rule make all or part of article 4 applicable to adjudication that does not fall within the requirements of Section 401, including hearing rights conferred by agency regulations, or on the record appeals.

This section draws on the Minnesota, (see Minnesota Statutes Annotated, Section 14.02, subd. 3); Washington (see Revised Code of Washington, 34.05.413(2)) and Kansas (see Kansas Stat. Ann., KS ST Section 77-502(d) & Kansas Stat. Ann., KS ST Section 77-503) Administrative Procedure Acts.

SECTION 402. PRESIDING OFFICERS.

(a) A presiding officer must be an administrative law judge assigned in accordance with Section 604(2), the individual who is the agency head, a member of a multi-member body of individuals that is the agency head, or, unless prohibited by law of this state other than this [act], an individual designated by the agency head.

(b) An individual who has served as investigator, prosecutor, or advocate at any stage in a contested case or who is subject to the authority, direction, or discretion of an individual who has served as investigator, prosecutor, or advocate at any stage in a contested case may not serve as the presiding officer in the same case. An agency head who has participated in a determination of probable cause or other preliminary determination in an adjudicative proceeding may serve as the presiding officer or final decision maker in the same proceeding unless a party demonstrates grounds for disqualification under subsection (c).

(c) A presiding officer or agency head is subject to disqualification for bias, prejudice,

financial interest, ex parte communications as provided in Section 408(h), or any other factor that would cause a reasonable person to question the impartiality of the presiding officer or agency head. A presiding officer or agency head, after making a reasonable inquiry, shall disclose to all parties any known facts related to grounds for disqualification which are material to the impartiality of the presiding officer or agency head in the proceeding.

(d) Any party may petition for the disqualification of a presiding officer or agency head promptly after notice that the person will preside or, if later, promptly on discovering facts establishing a ground for disqualification. The petition must state with particularity the ground on which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rule or canon of practice or ethics that requires disqualification. The petition may be denied if the party fails to exercise due diligence in requesting disqualification after discovering a ground for disqualification.

(e) A presiding officer or agency head whose disqualification is requested shall determine whether to grant the petition and state in a record facts and reasons for the determination in a record. The decision of a presiding officer or an agency head to deny disqualification is not subject to interlocutory judicial review.

(f) If a substitute presiding officer is required, the substitute must be appointed [as required by law, or if no law governs,] by:

(1) the Governor, if the original presiding officer is an elected official; or

(2) the appointing authority, if the original presiding officer is an appointed official.

(g) If participation of the agency head is necessary to enable the agency to take action, the agency head may continue to participate notwithstanding a ground for disqualification or

exclusion.

Legislative Note: *The first alternative under subsection (a) would be applicable in states that have adopted central panel hearing offices but would not apply to states that do not have central panel hearing offices. Article 6 governs central panel hearing offices under this act. If a state does not have a central panel hearing agency, presiding officers would include administrative law judges who are employees of the agency with final decisional authority. States vary in the terms used to describe agency employees who are presiding officers. The term includes administrative judges, hearing officers, and hearing examiners. Administrative law judges can be employees of the central panel hearing office or of the agency with final decision authority.*

Comment

Section 402(a) is based on 1981 MSAPA Section 4-202(a). Subsection (a) governs who may be appointed to serve as a presiding officer in a contested case. If the case is heard by a multimember body of individuals as the agency head, , one member of the agency head may serve as chair, but all of the persons sitting as judge in the case are collectively the presiding officer. Otherwise, the presiding officer will be a single individual, either the agency head, or an individual designated by the agency head, or one or more administrative law judges assigned by the Office of Administrative Hearings in accordance with Section 604(2). The term presiding officer is defined in Section 102(23), and the term agency head is defined in Section 102(4). Subsection (a) confers a limited amount of discretion on the agency head to determine who will preside. This discretion is also limited by the phrase "unless prohibited by law of this state other than this act," which prevents the use of "other persons" as presiding officers to the extent that the other state law prohibits their use. Thus, if this language is adopted by a state that has an existing central panel of administrative law judges whose use is mandatory in enumerated types of proceedings, the agencies must continue to use the central panel for those proceedings, but may exercise their option to use "other persons" for other types of proceedings.

Subsection (a) provides for states that have created a central panel of administrative law judges, and have made the use of administrative law judges from the central panel mandatory unless the agency head or one or more members of the agency head presides. In some states, however, the use of central panel administrative law judges is mandatory only in certain enumerated agencies or types of proceedings. Half of the states have central panels. For those states with central panels, the first clause in subsection (a) would harmonize Section 401 with the existing central panel legislation. For states that do not have a central panel agency, this first clause would not apply.

Subsection (b) is based on 1981 MSAPA Section 4-214. Subsection (b) prohibits agency employees from serving as presiding officers in a specific contested case if they have served in the same case as a staff adversary or advocate, or if they are subject to supervision by a staff advocate or adversary in the same case. These employees are subject to the ex parte communication prohibitions contained in section 408 and to disqualification under subsection (c).

Subsection (c) is based in part on 1981 MSAPA Section 4-202(b).

Subsection (d) is based on 1981 MSAPA Section 4-202(c).

Subsection (e) is based in part on 1981 MSAPA Section 4-202(d). Disclosure duties under subsection (e) are based on state ethics codes governing ethical standards for judges in the judicial branch of the government, Section 12 of the 2000 Uniform Arbitration Act, and on state law governing the ethical responsibilities of government officials and employees.

Subsection (f) is based on 1981 MSAPA Section 4-202(e). Subsection (g) adopts the rule of necessity for agency decision makers. See California Government Code Section 11512(c) (agency member not disqualified if loss of a quorum would result); United States v. Will (1980) 449 U.S. 200 (common law rule of necessity applied to U.S. Supreme Court to decide issues before the court relating to compensation of all Article III judges).

SECTION 403. CONTESTED CASE PROCEDURE.

(a) This section does not apply to an emergency adjudication.

(b) In a contested case, the agency shall make available to the person to which the agency action is directed a copy of the agency procedures governing the case. The agency shall give notice of the agency decision to a person when the agency takes an action as to which the person has a right to a contested case hearing. The notice must be in writing, set forth the agency action, and inform the person of the right, procedure, and time limit to file a contested-case petition.

(c) In a contested case, the presiding officer shall give all parties a timely opportunity to file pleadings, motions, and objections. The presiding officer may give all parties the opportunity to file briefs, proposed findings of fact and conclusions of law, and recommended, initial, or final orders. The presiding officer, with the consent of all parties, may refer the parties in a contested case proceeding to mediation or other dispute resolution procedure.

(d) In a contested case, to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence.

(e) Except as otherwise provided by law other than this [act], the presiding officer may conduct all or part of an evidentiary hearing or a prehearing conference by telephone, television, video conference, or other electronic means as provided in this subsection. The hearing may be conducted by telephone or other method by which the witnesses may not be seen only if the parties consent [or the presiding officer finds that this method will not impair reliable determination of the credibility of testimony]. Each party must be given an opportunity to attend, hear, speak, and be heard at the proceeding as it occurs. Nothing in this subsection prevents an agency from providing by rule for electronic hearings.

(f) Except as otherwise provided in subsection (g), a hearing in a contested case must be open to the public. A hearing conducted by telephone, television, video conference, or other electronic means is open to the public if members of the public have an opportunity to attend the hearing at the place where the presiding officer is located or they have an opportunity to hear or see the proceeding as it occurs.

(g) A presiding officer may close a hearing to the public on a ground on which this state may close a judicial proceeding to the public or pursuant to a statute other than this [act].

(h) Unless prohibited by law other than this [act], a party, at the party's expense, may be represented by counsel or may be advised, accompanied, or represented by another individual.

(i) A presiding officer shall ensure that a hearing record is created.

(j) The decision in a contested case must be based on the hearing record, and contain a statement of the factual and legal bases of the decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. The decision must be prepared electronically or, on request, in writing,

(k) Subject to Section 205, the rules by which an agency conducts a contested case may

include provisions more protective of the rights of parties to an agency adjudication than the requirements of this section.

(l) Unless prohibited by law other than this [act], an agency may make an informal disposition of any contested case by stipulation, agreed settlement, consent order, or default.

Comment

This section specifies the minimum hearing procedure requirements that must be met in contested cases under this act. This section applies to all agencies whether or not an agency rule provides for a different procedure; this procedure is excused only if a statute expressly provides otherwise. This section does not prevent an agency from adopting more stringent procedures than those in this section. This section does not supersede conflicting state or federal statutes.

There are several interrelated purposes for this procedural provision: 1) to create a minimum fair hearing procedure; and 2) to attempt to make that minimum procedure applicable to all agencies. In many states, individual agencies have lobbied the legislature to remove various requirements of the state Administrative Procedure Act from them. The result in a considerable number of states is a multitude of divergent agency procedures. This lack of procedural uniformity creates problems for litigants, the bar and the reviewing courts. This section attempts to provide a minimum, universally applicable procedure in all disputed cases. 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 a contested case and fall within the provisions of Section 401. Thus, they do not spread quasi judicial procedures widely, and do not create any significant agency loss of efficiency or increased cost.

This section is modeled in part on the Arizona Regulatory Bill of Rights, see A.R.S. Section 41-1001.01 and the California Administrative Adjudication Bill of Rights, see West Ann.Cal.Gov.Code Section 11425.10.

Subsection (a) excludes emergency adjudications from the requirements of this Section. Section 407 provides for the procedures to be used in emergency adjudications.

Subsection (b) requires the agency to make available to a person to which an agency action is directed a copy of the agency procedures governing the contested case. Those agency procedures would include applicable procedures published by the agency under Section 203(2), procedures required under the agency governing statute, and procedural rules adopted under Section 205(a), or (c). The second sentence of subsection (b) requires that the agency give notice to a person when the agency takes an action and the person has a right to a contested case hearing to challenge the agency action. This notice would precede the filing of a contested case proceeding. The notice requirements in Section 405 would apply when the contested case proceeding has commenced. The third sentence of subsection (b) is based on provisions of the North Carolina Administrative Procedure Act. N.C. stats. § 150B-23(f).

Subsection (c) is based in part on 1981 MSAPA Section 4-207. The first sentence of subsection (c) is based on 1981 MSAPA Section 4-207(a). The second sentence of subsection (c) is based on 1981 MSAPA Section 4-207(b). The third sentence of subsection (c) is new, and authorizes the use of mediation and other alternative dispute resolution procedures to resolve or settle contested cases. Since the 1981 MSAPA was adopted, the use of mediation and other alternative dispute resolution procedures has become widespread not only in civil litigation but also in administrative adjudication. See the Administrative Dispute Resolution Act, 5 U.S.C. Sections 571 to 583 (1990).

Subsection (d) is based on 1981 MSAPA Section 4-211(2).

Subsection (e) is based on 1981 MSAPA Section 4-211(4). Under subsection (e) hearings in contested cases can be conducted using the telephone, television, video conferences, or other electronic means. Due process of law may require live in person hearings when there are disputed issues of material fact that require the fact finder to make credibility determinations. See Whiteside v. State, (2001) 20 P. 3d 1130 (Supreme Court of Alaska) (due process of law violated with telephone hearing in driver's license revocation hearing when driver's credibility was material to the hearing, and the driver was not offered an in person hearing). But see Babcock v. Employment Division (1985) 72 Or. App. 486, 696 P. 2d 19, 21 (telephone hearings do not violate due process of law in hearings in which the credibility of a party is at issue because audible indicia of a witness's demeanor are sufficient for credibility). Telephone hearings are widely used in high volume short hearing dockets such as unemployment compensation hearings.

Subsection (f) is based on the second sentence of 1981 MSAPA Section 4-211(6).

Subsection (g) is based on the first sentence of 1981 MSAPA Section 4-211(6).

Subsection (h) is based on 1981 MSAPA Section 4-203(b).

Subsection (i) is based on the first sentence of 1981 MSAPSA Section 4-211(5).

Subsection (j) is based on 1961 MSAPA Section 12, and on 1981 MSAPA Section 4-211(5).

See also Section 202(a) requiring an agency to publish on its Internet web site each final order in a contested case, and the provisions of 15 U.S.C. Section 7004.

Subsection (k) is new, and permits an agency to adopt procedural rules that are more protective of the rights of parties to an agency adjudication than the requirements of this section, subject to the provisions of Section 205(a) which provide for the adoption of procedural rules which must be used by all agencies in the state under Section 205(b) unless the agency adopts their own rules under Section 205(c).

Subsection (l) is based on 1961 MSAPA Section 9(d).

SECTION 404. EVIDENCE IN CONTESTED CASE. The following rules apply in contested cases:

(1) Except as otherwise provided by law other than this [act], when the agency initiates a contested case, the agency has the burden of proof. When a party other than the agency initiates a contested case, that party has the burden of proof.

(2) On proper objection, the presiding officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious, excludable on constitutional or statutory grounds, or excludable on the basis of an evidentiary privilege recognized in the courts of this state. Any other relevant evidence [including hearsay evidence] may be received if it is of a type commonly relied on by a reasonably prudent individual in the conduct of the affairs of the individual.

(3) The presiding officer may exclude evidence at the time it is offered with or without objection. An objection must be made at the time the evidence is offered. A party may make an offer of proof when evidence is objected to or before the presiding officer's decision to exclude evidence.

(4) Evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to a party. Documentary evidence may be received in the form of a copy if the original is not readily available or by incorporation by reference. On request, parties must be given an opportunity to compare the copy with the original.

(5) Testimony must be made under oath or affirmation.

(6) Evidence must be made part of the hearing record of the case. Information or evidence may not be considered in determining the case unless it is part of the hearing record. If the hearing record contains information that is confidential, the presiding officer may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part

of the hearing record.

(7) The presiding officer may take official notice of all facts of which judicial notice may be taken and of scientific, technical, or other facts within the specialized knowledge of the agency. A party must be notified at the earliest practicable time of the facts proposed to be noticed and their source, including any staff memoranda or data. The party must be afforded an opportunity to contest any officially noticed facts before the decision becomes final.

(8) The experience, technical competence, and specialized knowledge of the presiding officer may be used in the evaluation of the evidence in the hearing record.

Comment

Subsection 404(1) is based on the provisions of the Federal Administrative Procedures Act, 5 U.S.C. Section 556(d) and it governs the burden of proof in contested case hearings. The burden of proof is assigned based on which party, the agency or the non agency party, initiates a contested case. The burden of proof includes the burden of production, which party has the responsibility of coming forward with evidence, and it includes the burden of persuasion, which party has the responsibility to be convincing in the evidence presented. In most contested case hearings, the burden of persuasion is the preponderance of the evidence standard. This is the same standard used in civil trials in the court systems of most states. In some contested case hearings, the clear and convincing evidence standard of persuasion is used, such as when licensing agencies seek to revoke the license of a professional such as a doctor or a lawyer.

The first sentence of subsection (2) is based upon 1981 MSAPA Section 4-212(a). The second sentence of subsection (2) is based upon 1961 MSAPA Section 10(1), and 1981 MSAPA Section 4-215(d). Subsection (2) codifies the rule that hearsay evidence is admissible in contested case hearings whether or not a hearsay exception applies. This is a relaxed standard for admissibility in contrast to the evidence rules in civil jury proceedings in which hearsay evidence would not be admissible unless a hearsay exception applied. See Section 413(f) for the legal residuum rule and the reliability alternatives. Under subsection (2) evidence is unduly repetitious if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. In most states a presiding officer's determination that evidence is unduly repetitious may be overturned only for abuse of discretion. The term statutory in subsection (2) refers to evidence rules that are codified by statute in some states with an evidence code (See California Evidence code).

The first sentence of subsection (3) is based upon 1981 MSAPA Section 4-212(a). The second sentence of subsection (3) is new but codifies generally accepted practices for evidentiary objections.

The first sentence of subsection (4) is based upon 1961 MSAPA Section 10 (1) and 1981 MSAPA Section 4-212(d). The second and third sentences of subsection (4) is based upon 1961 MSAPA Section 10 (2), and 1981 MSAPA section 4-212(e).

Subsection (5) is based on 1981 MSAPA Section 4-212(b).

Government Code Section 11515, and 1961 MSAPA Section 10(4).

The first and third sentences of subsection (6) are new. The second sentence of subsection (6) is based on 1981 MSAPA Section 4-215(d), first sentence.

Subsection (7) is based generally on 1961 MSAPA Section 10 (4), and on 1981 MSAPA Section 4-212(f).

Subsection (8) is based upon 1961 MSAPA Section 10(4), fourth sentence, and 1981 MSAPA Section 4-215(d), third sentence.

SECTION 405. NOTICE IN CONTESTED CASE.

(a) Except as otherwise provided for in an emergency adjudication under Section 407, an agency shall give notice as provided in this section.

(b) In a contested case initiated by a person other than an agency, within [5] days after filing, the agency shall give notice to all parties that an action has been commenced. The notice must contain:

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

(2) contact information for communicating with the agency, including the agency mailing address and telephone number;

(3) a statement of the time, place, and nature of the prehearing conference or hearing, if any; and

(4) the name, official title, mailing address, and telephone number of any attorney or employee who has been designated to represent the agency.

(c) In a contested case initiated by the agency, the agency shall give an initial notice to the party against which the action is brought. The notice must contain:

(1) notification that an action that may result in an order has been commenced against the party;

(2) a short and plain statement of the matters asserted, including the issues involved;

(3) a statement of the legal authority under which the hearing is held citing the statutes and any rules involved;

(4) the official file or other reference number and the name of the proceeding;

(5) the name, official title, [and] mailing address, [and] [electronic mail address,] [and] [facsimile number,] of the presiding officer and the name, official title, [and] mailing address, [and] [electronic mail address,] [and] [facsimile number,] and telephone number of the agency's representative;

(6) a statement that a party that fails to attend or participate in any subsequent proceeding in a contested case may be held in default;

(7) a statement that the party served may request a hearing and instructions in plain language about how to request a hearing; and

(8) the names and last known addresses of all parties and other persons to which notice is being given by the agency.

(d) When a hearing or a prehearing conference is scheduled, the agency shall give parties notice that contains the information required by subsection (c) at least [30] days before the hearing or prehearing conference.

(e) Notice may include other matters that the presiding officer considers desirable to

expedite the proceedings.

Comment

Section 405 is based generally on 1961 MSAPA Section 9 (a), and (b), and 1981 MSAPA Section 4-206. See also; Oregon, O.R.S. Section 183.415; Kansas, K.S.A. Section 77-518; Iowa, I.C.A. Section 17A.12; Montana, MCA 2-4-601; and Michigan, M.C.L.A. 24.271.

Subsection (a) is new and provides that notice requirements in this section apply to contested case proceedings but do not apply to emergency adjudications which are governed by Section 407.

Subsection (b) is also new and codifies a timing requirement for notice (within 5 days) and separate notice requirements for an agency when a person other than an agency initiates a contested case proceeding. This subsection would apply when a person other than an agency applies for a license or for governmental benefits, and the agency denies the application. The person may commence a contested case proceeding to challenge the denial of the application. When a contested case proceeding is commenced, subsection (b) requires the agency to give notice to all parties that the proceeding has been commenced. The notice must contain the matters listed in subsection (b)(1) to (b)(4). Subsection (b)(1) is based upon 1981 MSAPA Section 4-206(c)(3). Subsection (b)(2) is new, and requires notice of agency contact information including the agency mailing address and telephone number. Subsection (b)(3) is based upon 1961 MSAPA Section 9(b)(1), and 1981 MSAPA Section 4-206(c)(4). Subsection (b)(4) is based upon 1981 MSAPA Section 4-206(c)(2).

Subsection (c) is new and applies when the agency initiates a contested case proceeding against a person other than the agency. This subsection applies when the agency seeks the revocation of an existing professional license or seeks to terminate a recipient's governmental benefits. When the agency is required to provide the licensee or recipient with the opportunity for a contested case hearing, the notice requirements of this subsection apply. Subsection (c)(1) is new and requires notice that an action that may result in an order has been commenced against the party notified. Subsection (c)(2) is based on 1961 MSAPA Section 9(b)(4), and 1981 MSAPA Section 4-206(c)(7). Subsection (c)(3) is based upon 1961 MSAPA Section 9 (b)(2), and 1981 MSAPA Section 4-206(c)(5). Subsection (c)(4) is based upon 1981 MSAPA Section 4-206(c)(3). Subsection (c)(5) is a modified version of 1981 MSAPA Section 4-206(c)(2),(6) with electronic mail and facsimile information requested. Subsection (c)(6) is based upon 1981 MSAPA Section 4-206(c)(8). Subsection (c)(7) is new and provides for plain language instructions on how to request a hearing. Subsection (c)(8) is based upon 1981 MSAPA Section 4-206(c)(1).

Subsection (d) is a modified version of 1981 MSAPA Section 4-206(a), with a minimum time limit of 30 days notice before the hearing.

Subsection (e) is based upon 1981 MSAPA section 4-206(d).

SECTION 406. HEARING RECORD IN CONTESTED CASE.

(a) An agency shall maintain the hearing record created under Section 403(i) in each contested case.

(b) The hearing record must contain:

(1) a recording of the proceeding;

(2) notices of all proceedings;

(3) any prehearing order;

(4) any motion, pleading, brief, petition, request, and intermediate rulings;

(5) evidence admitted, received, or considered;

(6) a statement of any matter officially noticed;

(7) any proffer of proof and objection and ruling thereon;

(8) any proposed finding, requested order, and exception;

(9) any transcript of the hearing;

(10) any recommended decision, final order, or order on reconsideration; and

(11) any matter placed on the record after an ex parte communication under Section 408(f).

(c) The hearing record constitutes the exclusive basis for agency action in a contested case.

Comment

Section 406 is based generally on 1961 MSAPA Section 9(e) and 1981 MSAPA Section 4-221. Subsection (a) is a modified version of 1981 MSAPA Section 4-221(a). Subsection (b)(1) is a modified version of 1981 MSAPA Section 4-221(b)(8). Subsections (b)(2) to (8) are based upon 1981 MSAPA Section 4-221(b)(1) to (7). Subsection (b)(9) is a modified version of 1981 MSAPA Section 4-221(b)(8). Subsection (b)(10) is a modified version of 1981 MSAPA Section 4-221(b)(9). Subsection (b)(11) is based upon 1981 MSAPA Section 4-221(b)(11). Subsection (c) is a revised version of 1981 MSAPA Section 4-221(c). The recording of an agency hearing can be made by certified shorthand reporter, video or audio recording, or other electronic means.

Judicial review under Section 507 is limited to matters in the agency hearing record.

SECTION 407. EMERGENCY ADJUDICATION PROCEDURE.

(a) Unless prohibited by law other than this [act], an agency may conduct an emergency adjudication in a contested case under this section.

(b) An agency may take action and issue an order under this section only to deal with an imminent peril to the public health, safety, or welfare.

(c) Before issuing an order under this section, an agency, if practicable, shall give notice and an opportunity to be heard to the person to which the agency action is directed. The notice and hearing may be oral or written and may be communicated by telephone, facsimile, or other electronic means.

(d) An order issued under this section must briefly explain the factual and legal reasons for making the decision using emergency adjudication procedures.

(e) To the extent practicable, an agency shall give notice of an order to the person to which the agency action is directed. The order is effective when signed by the agency head or the designee of the agency head.

(f) After issuing an order pursuant to this section, an agency shall proceed as soon as practicable to provide notice and an opportunity for a hearing following the procedure under Section 403 to determine the issues underlying the temporary order.

(g) The emergency order is effective for 180 days, or until the effective date of an order issued under the procedures of Section 403, whichever is shorter.

Comment

Section 407 is based generally on the 1961 Model State Administrative Procedure Act, section 14(c) and the 1981 Model State Administrative Procedure Act, Section 4-501. Subsection (a) is new and authorizes emergency adjudication in a contested case following the

requirements of this section unless law other than this act prohibits such action. Subsection (b) is a revised version of 1961 MSAPA Section 14(c), and 1981 MSAPA Section 4-501(b). subsection (b) uses the terms "imminent peril to the public health, safety or welfare, rather than the 1981 MSAPA terms "immediate danger to the public health, safety, or welfare" but no operative difference in emergency adjudication standards is intended. Subsection (c) is new, and requires the agency, if practicable, to give advance notice and opportunity to be heard to the person to whom the agency action is directed. The means of notice and hearing are also specified. Subsection (d) is a revised version of 1981 MSAPA Section 4-501(c). Subsection (e) is a revised version of 1981 MSAPA Section 4-501(d). Subsection (f) is a revised version of 1981 MSAPA Section 4-501(e). Subsection (g) is new, and provides for a time limit for the effectiveness of the emergency order either 180 days, or the effective date of an order in a contested case proceeding governed by Section 403 procedures, whichever is shorter.

The procedure of this section is intended permit immediate agency emergency adjudication, but also to provide minimal protections to parties against whom such action is taken. Emergencies regularly occur that immediately threaten public health, safety or welfare: licensed health professionals may endanger the public; developers may act rapidly in violation of law; or restaurants may create a public health hazard. In these cases the agencies must possess the power to act rapidly to curb the threat to the public. On the other hand, when the agency acts in such a situation, there should be some modicum of fairness, and the standards for invoking this remedy must be clear, so that the emergency label may be used only in situations where it fairly can be asserted that rapid action is necessary to protect the public.

Federal and state case law have held that in an emergency situation an agency may act rapidly and postpone any formal hearing without violation, respectively, of federal or state constitutional law. FDIC v. Mallen, 486 U.S. 230 (1988); Gilbert v. Homar (1997) 520 U.S. 924; Dep't of Agric. v. Yanes, 755 P.2d 611 (OK. 1987).

The generic provision in this section has several advantages over the present divergent approaches to emergency agency action. First, all agencies have the needed power to act without delay, but there is provision for some type of brief hearing, if feasible. Second, this article limits the agency to action of this type only in a genuine, defined emergency. Third, there are pre and post deprivation protections. This section seeks to strike an appropriate balance between public need and private fairness.

This section does not apply to an emergency adjudication, cease and desist order, or other action in the nature of emergency relief issued pursuant to express statutory authority arising outside of this act.

SECTION 408. EX PARTE COMMUNICATIONS.

(a) In this section, "final decision maker" means the agency head or another person or body to which the power to decide the proceeding is delegated.

(b) Except as otherwise provided in subsections (c), (d), (e), or (h), while a contested case is pending, the presiding officer and the final decision maker may not make to or receive from any person any communication concerning a pending contested case without notice and opportunity for all parties to participate in the communication. For the purpose of this section, a proceeding is pending from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier.

(c) A presiding officer or the final decision maker may communicate about a pending contested case with any person if the communication is required for the disposition of ex parte matters authorized by statute or concerns an uncontested procedural issue.

(d) A presiding officer or the final decision maker may communicate about a pending contested case with an individual authorized by law to provide legal advice to the presiding officer or to the final decision maker and may communicate on ministerial matters with an individual who serves on the [administrative] [personal] staff of the presiding officer or the staff of the final decision maker if the person providing legal advice or ministerial information has not served as investigator, prosecutor, or advocate at any stage of the contested case, and if the communication does not augment, diminish, or modify the evidence in the record.

(e) An agency head who is the presiding officer or final decision maker in a pending contested case may communicate about that case with an employee or representative of the agency if:

(1) the employee or representative:

(A) has not served as an investigator, prosecutor, or advocate at any stage of the contested case;

(B) has not otherwise had a communication with any person about the

case other than a communication a presiding officer or decision maker is permitted to make or receive under subsection (c) or (d) or a communication of the type permitted by paragraph (2); and

(2) the communication does not augment, diminish, or modify the evidence in the agency hearing record and is:

(A) an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record;

(B) an explanation of the precedent, policies, or procedures of the agency; or

(C) any other communication that does not address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses.

(f) If a presiding officer or the final decision maker makes or receives a communication in violation of this section, the presiding officer or the final decision maker:

(1) if the communication is written, shall make the communication a part of the hearing record and prepare and make part of the record a memorandum that contains the response of the presiding officer and the final decision maker to the communication and the identity of the party or person that communicated; or

(2) if the communication is oral, shall prepare a memorandum that contains the substance of the verbal communication, the response of the presiding officer and the final decision maker, and the identity of the party or person that communicated.

(g) If a communication prohibited by this section is made, the presiding officer or the final decision maker shall notify all parties of the prohibited communication and permit parties to

respond in writing within 15 days after the notice. On good cause shown, the presiding officer or the final decision maker may permit additional testimony in response to the prohibited communication.

(h) If a presiding officer is a member of a multi-member body of individuals that is the agency head, the presiding officer may communicate with the other members of the body when sitting as the presiding officer and final decision maker. Otherwise, while a proceeding is pending, there may be no communication, direct or indirect, regarding 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 the proceeding is delegated.

(i) If necessary to eliminate the effect of a communication received in violation of this section, a presiding officer and final decision maker may be disqualified under Section 402 (d) and (e), the parts of the record pertaining to the communication may be sealed by protective order, or other appropriate relief may be granted, including an adverse ruling on the merits of the case or dismissal of the application.

Comment

Section 408 governs ex parte communications. Many of the provisions in this section are new, but some are based upon 1961 MSAPA Section 13, and 1981 MSAPA Section 4-213. Ex parte communication provisions are also contained in the federal Administrative Procedure Act, 5 U.S.C. Section 557(d).

Subsection (a) is new and provides a definition of "final decision maker" for purposes of this section.

The first sentence of subsection (b) is a revised version of 1981 MSAPA Section 4-213(a),(c). One major difference between the two provisions is that the 1981 MSAPA limited the prohibition on types of ex parte communications to those relating to any issues in the proceeding, and subsection (b) is broader and prohibits any communication concerning a pending contested case. Another difference is that there are four exceptions to the prohibition that are referenced in in current subsection (b), whereas 1981 MSAPA Section 4-213(b) had three exceptions. The second sentence of subsection (b) is new and provides a specific definition of when a proceeding is pending for purposes of subsection (b). Subsection (b) prohibits ex parte communications but

recognizes four exceptions to the prohibition that are codified in subsections (c), (d),(e), and (h)

Subsection (c) contains two exceptions. The first exception is for disposition of ex parte matters authorized by statute, and this exception is based upon 1961 MSAPA Section 13, and 1981 MSAPA Section 4-213(a),(c). The second exception is new and applies to communications related to uncontested procedural issues. This exception does not apply to contested procedural issues nor does it apply to issues that do not easily fall into the procedural category. For example, other communications not on the merits but are related to security or to the credibility of a party or witness are prohibited by subsection (b). See Matthew Zaheri Corp., Inc. v. New Motor Vehicle Board (1997) 55 Cal. App. 4th 1305.

Subsection (d) contains two exceptions. The first exception is new and allows communications by a presiding officer or final decision maker with an individual authorized by law to provide legal advice to the presiding officer or final decision maker. This recognizes the role of agency counsel in advising agency officials in adjudication. The second exception for communications on ministerial matters with staff who work for the presiding officer or final decision maker is based upon 1961 MSAPA Section 13(2), and 1981 MSAPA Section 4-213(b). Both exceptions require that the communicating individual that provides legal advice or ministerial information to the presiding officer or final decision maker must not have served as an investigator, prosecutor or advocate in the same contested case and that the communication must not augment diminish or modify the evidence in the record. The first requirement of separation of functions is similar to the requirements of Section 402(b) for presiding officers. The second requirement, relating to augmenting, diminishing, or modifying the evidence in the record, is based upon 1981 MSAPA Section 4-213(b)(ii).

Subsection (e) is new and provides an exception for communications about a pending contested case between an agency employee or representative and the agency head acting as a presiding officer or final decisions maker in that case. The exception is limited by the conditions stated in in subsections (e)(1), and (2). Subsection (e)(1) requires that the employee or representative (a) not have served as an investigator, prosecutor or advocate in the contested case, and (b) not have had an ex parte communication that would be improper for the agency head acting as presiding officer or final decision maker to make or receive. Subsection (e)(1)(A)is based upon 1981 MSAPA Section 4-214(a). Subsection (e)(1)(B) is based upon 1981 MSAPA Section 4-213(b)(i). Subsection (e)(2) is based upon 1981 MSAPA Section 4-213(b)(ii). Subsections (e)(2)(A)(B) and (C) are new and provide alternative descriptions of types of communications that are allowed under this exception. Subsections (e)(2)(A)(B)(C) were added based on a compromise reached by the drafting committee after lengthy discussion. The opposing positions on the issue of whether there should be an ex parte communications exception for agency head communications with employees are 1) no exception for agency head communications with employees, and thus no subsection (e); and 2) an exception for agency head communications with employees with subsection (e)(2) but not subsections (e)(2) (A),(B), or (C). The current compromise is more restrictive than (e)(2) because a communication has to satisfy one of the alternatives under (e)(2)(A)(B)(C) in addition to meeting the (e)(2) requirements of not augmenting, diminishing, or modifying the evidence in the agency hearing record.

Subsection (f) is based upon 1981 MSAPA Section 4-213(e).

Subsection (g) is a revised version of 1981 MSAPA Section 4-213(e). The major differences are that subsection (g) provides for a 15 day time period after notice for a party to respond in writing to the prohibited communication and under subsection (g) the presiding officer must find that there is good cause shown to permit additional testimony in response to the prohibited communication.

The first sentence of subsection (h) is a revised version of 1961 MSAPA Section 13(1) and of the first clause of 1981 MSAPA Section 4-213(b). The second sentence of subsection (h) is new and prohibits ex parte communications between the presiding officer and the agency head or other person or body to whom the power to hear or decide is delegated. This sentence is based upon California Govt. Code Section 11430.80.

Subsection (i) is a revised version of 1981 MSAPA Section 4-213(f).

SECTION 409. INTERVENTION.

(a) A presiding officer shall grant a timely petition for intervention in a contested case if:

(1) the petitioner has a statutory right under law other than this [act] to initiate or to intervene in the proceeding in which intervention is sought; or

(2) the petitioner has an interest that may be adversely affected by the outcome of the proceeding and that interest is not adequately represented by existing parties.

(b) A presiding officer may grant a timely petition for intervention if the petitioner has a permissive statutory right under law other than this [act] to intervene or if the petitioner's claim or defense is based on the same transaction or occurrence as the contested case.

(c) A presiding officer may impose conditions at any time on the intervener's participation in the proceedings.

(d) A presiding officer may permit intervention provisionally and, at any time later in the proceedings or at the end of the proceedings, may revoke the provisional intervention.

(e) On request by the interveners or existing parties or by action of the presiding officer, the presiding officer may hold a hearing on the intervention petition.

(f) A presiding officer shall promptly give notice of an order granting, denying, or revoking intervention to the petitioner for intervention and to all parties. The notice must be given at a reasonable time to allow parties to reasonably prepare for the hearing on the merits.

Comment

Section 409 is based on 1981 MSAPA Section 4-209, and on Federal Rule of Civil Procedure Rule 24 (intervention of right under Rule 24(a), and permissive intervention under Rule 24(b)). Subsection (a) is a revised version of 1918 MSAPA Section 4-209(a). Subsections (a) (1),(2) are adapted from Rule 24(a), intervention of right in the Federal Rules of Civil Procedure. Under subsection (a) a petition for intervention must be timely. Under ordinary circumstances a timely petition would be filed far enough in advance of the contested case hearing so that the intervenor would be able to prepare for that hearing, and the existing parties would have time to respond to the intervenor's petition.

Subsection (b) is a revised version of 1981 MSAPA Section 4-209(b). Subsection (b) is also based upon Rule 24(b), permissive intervention in the Federal Rules of Civil Procedure.

Subsection (c) is a revised version of the first sentence of1981 MSAPA Section 4-209(c).

Subsection (d) is new and allows for provisional intervention.

Subsection (e) is new and allows the presiding officer to schedule a hearing on the intervention petition on request of the intervenors, or existing parties, or the presiding officer's decision.

Subsection (f) is a revised version of 1981 MSAPA Section 4-209(d). Subsection (f) provides for notice suitable under the circumstances to enable parties to anticipate and prepare for changes that may be caused by the intervention.

SECTION 410. SUBPOENAS.

(a) On a request in a record by a party in a contested case, the presiding officer or any other officer to whom the power is delegated pursuant to statute shall issue a subpoena for the attendance of a witness and the production of books, records, and other evidence on a showing of general relevance and reasonable scope of the evidence sought for use at the hearing.

(b) Unless otherwise provided by law or agency rule, a subpoena issued under subsection (a) shall be served and, on application to the court by a party or the agency, enforced in the

manner provided by law for the service and enforcement of subpoenas in a civil action.

(c) Witness fees shall be paid by the party requesting the subpoena in the manner as provided by law for witness fees in a civil action.

Comment

Section 410 is similar to 1981 MSAPA Section 4-210. Subsection (a) authorizes the presiding officer upon request by a party to issue subpoenas for the attendance of witnesses and the production of books, records, and other evidence for use at the contested case hearing upon a showing of general relevance and reasonable scope of evidence. This provides a stricter standard for subpoena issuance than the provisions of 1981 MSAPA Section 4-210(a) which authorizes the presiding officer to issue subpoenas and other orders based on a request by a party or based on the presiding officer's own motion.

Subsection (b) is based on Arizona administrative procedure act Section 41-1062A.4.

Subsection (c) is based upon California Government Code Section 11450.40.

SECTION 411. DISCOVERY.

(a) In this section, "statement" includes a record of a person's written statement signed by a person and a record that summarizes an oral statement made by a person.

(b) Except in an emergency hearing under Section 407, a party, on written notice to another party at least [ ] days before an evidentiary hearing and unless otherwise provided by agency rule under subsection (f), may:

(1) obtain the names and addresses of witnesses the disclosing party will present at the hearing to the extent known to the other party; and

(2) inspect and copy any of the following material in the possession, custody, or control of the other party:

(A) statements of parties and witnesses proposed to be called;

(B) all records, including reports of mental, physical, and blood examinations, and other evidence the party proposes to offer;

(C) investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the adjudication;

(D) statements of expert witnesses proposed to be called;

(E) any exculpatory material in the possession of the agency; or

(F) other materials for good cause shown.

(3) Parties to a contested case proceeding have a duty to supplement responses provided under subsection (b) to include information thereafter acquired to the extent that the information is relied on in the hearing.

(c) On petition, a presiding officer may issue a protective order for any material for which discovery is sought under this section that is exempt, privileged, or otherwise made confidential or protected from disclosure by law, including material subject to the attorney-client privilege, attorney work product, and [executive] [deliberative process] privilege, and material the disclosure of which would result in annoyance, embarrassment, oppression, or undue burden or expense to any person or party.

(d) On petition, the presiding officer shall issue an order compelling discovery for refusal to comply with a discovery request unless good cause exists for refusal. Failure to comply with the discovery order may be enforced according to the rules of civil procedure.

(e) On petition and for good cause shown, the presiding officer shall issue an order authorizing discovery in accordance with the rules of civil procedure.

(f) An agency may provide by rule that some or all discovery procedures afforded by this section do not apply to a specified program or category of cases if it finds for good cause that:

(1) the availability of discovery would unduly complicate or interfere with the hearing process in those cases, because of the volume of the applicable caseload and the need for

expedition and informality in that process; and

(2) that alternative procedures for the sharing of relevant information are sufficient to ensure the fundamental fairness of the agency proceedings.

Comment

1981 MSAPA Section 4-210(a) authorized the presiding officer to issue discovery orders and protective orders in accordance with the rules of civil procedure. Presiding officers were required to follow and apply the discovery rules used in the civil courts in the state in which the contested case proceeding was held. Section 411 does not follow that approach. Under Section 411, mandatory disclosure of party and witness statements and documents is provided for in subsection (b), with protective orders and orders compelling discovery provided for in subsections (c), and (d). Under subsection (e), a presiding officer can issue an order, for good cause shown, authorizing discovery in accordance with the rules of civil procedure. This order could authorize taking of depositions, interrogatories, medical examinations, production of documents, and requests for admissions. Finally, in subsection (f), an agency can provide by rule for good cause that specific programs or a category of cases are exempt from some or all of the discovery procedures provided in Section 411. Contested case proceedings can vary widely in the length and complexity of the issues to be decided. Providing a range of options for discovery procedures will allow for flexibility. Under subsection (f), presiding officers in high volume short duration cases would not use discovery procedures if their agency exempted those cases by rule. . In contrast, presiding officers in complex and lengthy contested case proceedings could authorize more extensive discovery than provided in subsection (b). Presiding officers in contested case proceedings that do not fit either of the above categories could rely upon the discovery requirements provided for in subsection (b).

Subsection (a) provides a definition of the term statement for purposes of subsection (b)(2). Subsection (a) is a revised version of the definition of statements taken from California Government Code Section 11507.6.

Subsection (b) is new and provides for disclosure by a party to a contested case of the items listed in subsections (b) (1), and (2) upon written notice of another party unless the contested case proceeding is an emergency hearing under Section 407, or unless the proceeding has been exempted from discovery by agency rule under subsection (f). Subsection (b) (1) is based upon California Government Code Section 11507.6(1). Subsection (b)(2) is based upon California Government Code Section 11507.6(2). Subsections (b)(2)(A) to (F) are a revised version of California Government Code Section 11507.6(2) (a)to (f). Subsection (b)(3) is new and requires parties to contested case proceedings to supplement responses to include after acquired information relied on at the hearing.

Subsection (c) is new and authorizes the presiding officer to issue protective orders for material sought to be discovered that is protected by confidentiality laws, recognized privileges, or material the disclosure of which would result in annoyance, embarrassment, oppression or undue burden or expense.

Subsection (d) is new and authorizes the presiding officer to issue orders compelling discovery for refusal to comply with a discovery request unless good cause for refusal exists. Failure to comply with the discovery order is enforceable under the rules of civil procedure. The presiding officer has the authority to apply the discovery sanctions rules in the state in which the contested case proceeding is held.

Subsection (e) is new and authorizes the presiding officer, for good cause shown, to issue an order authorizing discovery in accordance with the rules of civil procedure.

Subsection (f) provides that an agency can provide by rule that some or all of the discovery procedures authorized in section 411 do not apply to a specified program or a category of cases when the agency finds for good cause that the provisions of subsection 9(f)(1) and (2) are satisfied.

SECTION 412. DEFAULT.

(a) Unless otherwise provided by law other than this [act], if a party without good cause fails to attend or participate in a prehearing conference or hearing in a contested case, the presiding officer may issue a default order.

(b) If a default order is issued, the presiding officer may conduct any further proceedings necessary to complete the adjudication without the defaulting party and shall determine all issues in the adjudication, including those affecting the defaulting party.

(c) A recommended, initial, or final order issued against a defaulting party may be based on the defaulting party's admissions or other evidence that may be used without notice to the defaulting party. If the burden of proof is on the defaulting party to establish that the party is entitled to the agency action sought, the presiding officer may issue a recommended, initial, or final order without taking evidence.

(d) Not later than [ ] days after the date of notifying a party subject to a default order that a recommended, initial, or final order has been rendered against that party, that party may petition the presiding officer to vacate the recommended, initial, or final order. If good cause is shown for the party's failure to appear, the presiding officer shall vacate the decision and, after

proper service of notice, conduct another evidentiary hearing. If good cause is not shown for the party's failure to appear, the presiding officer shall deny the motion to vacate.

Comment

Section 412 is based upon 1981 MSAPA Section 4-208. Under this section, the presiding officer has the power to enter a default order against a party to a contested case proceeding.

Subsection (a) is a revised version of 1981 MSAPA Section 4-208(a).The major difference is that the presiding officer may issue a default order for the parties' failure to attend or participate in a hearing or prehearing conference unless good cause is shown. This simplifies the procedures for determining a default compared to the 1981 MSAPA Section 4-208(a) requirement of a written notice of a proposed default order.

Subsection (b) is a revised version of the second sentence of 1981 MSAPA Section 4-208(b).

Subsection (c) is a revised version of California Government Code Section 11520(a).

Subsection (d) is a revised version of California Government Code Section 11520(c).

SECTION 413. ORDERS: FINAL, RECOMMENDED, INITIAL.

(a) If the presiding officer is the agency head, the presiding officer shall render a final order.

(b) Except as otherwise provided by law other than this [act], if the presiding officer is not the agency head and has not been delegated final decisional authority, the presiding officer shall render a recommended order. If the presiding officer is not the agency head and has been delegated final decisional authority, the presiding officer shall render an initial order that becomes a final order [30] days after issuance, unless reviewed by the agency head on its own motion or on petition of a party.

(c) A recommended, initial, or final order must be served in a record on each party and the agency head within [90] days after the hearing ends, the record closes, or memos, briefs, or proposed findings are submitted, whichever is later. The time may be extended by stipulation,

waiver, or on a showing of good cause.

(d) A recommended, initial, or final order must contain separately stated findings of fact and conclusions of law on all material issues of fact, law, or discretion, the remedy prescribed, and, if applicable, the action taken on a petition for stay. At the discretion of the presiding officer, a party may submit proposed findings of fact and conclusions of law. The order must also contain a statement of the available procedures and time limits for seeking reconsideration or other administrative relief and a statement of the time limits for seeking judicial review of the agency order. A recommended or initial order must contain a statement of any circumstances under which the order, without further notice, may become a final order.

(e) Findings of fact must be based exclusively on the evidence in the hearing record in the contested case and on matters officially noticed.

Alternative A

(f) Hearsay evidence may be used to supplement or explain other evidence, but on timely objection, is not sufficient by itself to support a fact finding unless it would be admissible over objection in a civil action.

Alternative B

(f) Hearsay evidence is sufficient to support fact findings if it constitutes reliable, probative, and substantial evidence.

End of Alternatives

(g) An order is issued under this section when it is signed by the agency head, presiding officer, or an individual authorized by law other than this [act] to sign the order.

Comment

This section is based upon 1981 MSAPA Section 4-215. This section also draws on useful provisions from several states. E.g. see: Alabama, Ala.Code 1975 Section 41-22-16; Iowa,

I.C.A. Section 17A.15; Kansas, K.S.A. Section 77-526; Michigan, M.C.L.A. 24.281; Montana, MCA 2-4-623; Washington, RCWA 34.05.461. See Section 102(12) for the definition of "final order" Section 102(15) for the definition of initial order, and section 102 (27) of this act for the definition of "recommended order". Emergency orders are issued under the provisions of Section 408, not this section.

Subsection (a) is based on 1981 MSAPA Section 4-215 (a), and provides that if the presiding officer is the agency head, the presiding office shall render a final order.

Subsection (b) is new and varies from the provisions of 1981 MSAPA Section 4-215(b). Subsection (b) provides for both recommended orders, and initial orders. Initial orders are issued by presiding officers who are not the agency head but who have been delegated final decisional authority. Recommended orders are issued by presiding officers who are not the agency head but who have not been delegated final decisional authority. The three types of orders are recognized in this section, but which type of order, initial, final, or recommended, will apply to which type of decision is based on law other than this act, usually the organic statute that the agency is responsible for administering or enforcing.

Subsection (c) is a revised version of 1981 MSAPA Section 4-215(g),(h).

Subsection (d) is a revised version of 1981 MSAPA Section 4-215(c).

Subsection (e) is based on the first sentence of 1981 MSAPA Section 4-215(d).

Subsection (f), Alternative A, adopts the legal residuum rule, and provides that hearsay evidence may be used to supplement or explain other evidence but would not be sufficient to support a fact finding unless admissible over objection in a civil action. The legal residuum rule is followed in many states. States that follow the legal residuum rule include California (California Government Code Section 11513(d)), Wisconsin (Gehin v. Wisconsin Group Insurance Board 278 Wisc.2d 111, 692 N.W.2d 572 (Wisc. 2005)), Utah, (McMillen v. Matheson 741 P.2d 960 (Utah, 1987)) , and New Mexico (Trujillo v. Employment Sec. Commission of New Mexico 94 N.M. 343, 610 P. 2d 747 (N.M., 1981)).

Subsection (f), Alternative B is based on the second sentence of 1981 MSAPA Section 4-215(d). Alternative B provides that hearsay evidence can be sufficient to support fact findings if the hearsay evidence is sufficiently reliable. This provision is based on the federal A.P.A. provision, 5 U.S.C. Section 556 (d), Richardson v. Perales, (1971) 402 U.S. 389, and the 1981 MSAPA Section 4-215(d). (reasonably prudent person standard for reliability). States that follow the reliability standard include Oregon (Reguero v. Teacher Standards and Practices Commission 822 P. 2d 1171 (Ore.1991)), Pennsylvania (Commonwealth, Unemployment Compensation Board of Review v. Ceja 493 Pa. 588, 427 A. 3d 631 (Pa. 1981),Vermont (Watker v. Vermont Parole Board, 157 Vt. 72, 596 A.2d 1277 (Vt., 1991), and New York (300 Gramaton Avenue Associates v. State Division of Human Rights 45 N.Y.2d 156, 379 N.E.2d 1183.

Subsection (g) is new and defines when an order is issued under this section as the time when an order is signed by the agency head, presiding officer, or other authorized individual.

SECTION 414. AGENCY REVIEW OF INITIAL ORDER.

(a) An agency head may review an initial order on its own motion.

(b) A party may petition an agency head to review an initial order. On petition by a party, the agency head may review an initial order.

(c) A petition for review of an initial order must be filed with the agency head, or with any person designated for this purpose by agency rule not later than [15] days after the initial order is issued, or from the date that the parties are notified of the order, whichever is later. If the agency head decides to review an initial order on its own motion, the agency head shall give notice in a record of its intention to review the order within [15] days after it is issued, or the parties are notified of the order, whichever is later. If a petition for review is not filed or the agency head does not elect to review the initial order within the proscribed time limit, the initial order becomes a final order.

(d) The [15]-day period in subsection (c) for a party to file a petition or for the agency head to notify the parties of its intention to review an initial order, is tolled by the submission of a timely petition under Section 416 for reconsideration of the order. A new [15]-day period begins on disposition of the petition for reconsideration. If an order is subject both to a timely petition for reconsideration and to a petition for review by the agency head, 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.

(e) When reviewing an initial order, the agency head shall exercise all the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the order, except to the extent that the issues subject to review are limited

by a provision of law other than this [act] or by order of the agency head on notice to all the parties. In reviewing findings of fact in an initial order by the presiding officer, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the hearing record or parts of the record designated by the parties.

(f) If an agency head reviews an initial order under Section 413(b), an agency head may render a final order disposing of the proceeding within 120 days, or may remand the matter for further proceedings with instructions to the presiding officer who rendered the initial order. On remanding a matter, the agency head may order such temporary relief as is authorized and appropriate.

(g) A final order or an order remanding the matter for further proceedings must identify any difference between the order and the initial order and must state the facts of record that support any difference in findings of fact, the source of law that supports any difference in legal conclusions, and the policy reasons that support any difference in the exercise of discretion. Findings of fact must be based exclusively on the evidence in the hearing record in the contested case and on matters officially noticed. A final order under this section must include, or incorporate by express reference to the initial order, all the matters required by Section 413(d). The agency head shall deliver the order to the presiding officer and all parties.

Comment

Subsection (a) is a revised version of 1981 MSAPA Section 4-216(a).

Subsection (b) is a revised version of 1981 MSAPA Section 4-216(a).

Subsection (c) is a revised version of the first two sentences of 1981 MSAPA Section 4-216(b).

Subsection (d) is a revised version of the last two sentences of 1981 MSAPA Section 4-

216(b).

The first sentence of subsection (e) is based on the 1981 MSAPA Section 4-216(d). the second sentence of subsection (e) is based upon provisions of the Washington Administrative Procedure Act (R.C.W. Section 34.05.464(4)). The third sentence of subsection (e) is new and requires the agency head to consider the hearing record or parts of the record designated by the parties.

Subsection (f) is based upon 1981 MSAPA Section 4-216(g).

Subsection (g) is a revised version of 1981 MSAPA Section 4-216(i),(j).

SECTION 415. AGENCY REVIEW OF RECOMMENDED ORDER.

(a) An agency head shall review a recommended order pursuant to this section.

(b) When reviewing a recommended order, the agency head shall exercise all the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the order, except to the extent that the issues subject to review are limited by a provision of law other than this [act] or by order of the agency head on notice to all the parties. In reviewing findings of fact in a recommended order by the presiding officer, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the hearing record or parts that are designated by the parties.

(c) An agency head may render a final order disposing of the proceeding or may remand the matter for further proceedings with instructions to the presiding officer who rendered the recommended order. On remanding a matter, the agency head may order such temporary relief as is authorized and appropriate.

(d) A final order or an order remanding the matter for further proceedings must identify any difference between the order and the recommended order and must state the facts of record that support any difference in findings of fact, the source of law that supports any difference in

legal conclusions, and the policy reasons that support any difference in the exercise of discretion. Findings of fact must be based exclusively on the evidence in the hearing record in the contested case and on matters officially noticed. A final order under this section must include, or incorporate by express reference to the recommended order, all the matters required by Section 413(d). The agency head shall deliver the order to the presiding officer and all parties.

Comment

Section 415 provides for a review procedure for recommended orders. The agency is required to review a recommended order.

Subsection (a) is new and provides for mandatory review of a recommended order by an agency head.

The first sentence of subsection (b) is based on the 1981 MSAPA Section 4-216(d). the second sentence of subsection (b) is based upon provisions of the Washington Administrative Procedure Act (R.C.W. Section 34.05.464(4)). The third sentence of subsection (b) is new and requires the agency head to consider the hearing record or parts of the record designated by the parties.

Subsection (c) is based upon 1981 MSAPA Section 4-216(g).

Subsection (d) is a revised version of 1981 MSAPA Section 4-216(i),(j).

SECTION 416. RECONSIDERATION.

(a) Any party, not later than [ ] days after the date of notification to the parties that a final order has been issued, may file a petition for reconsideration that states the specific grounds on which relief is requested. The place of filing and other procedures, if any, must be specified by agency rule and must be stated in the final order.

(b) If a petition for reconsideration is timely filed, and if the petitioner has complied with an agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial review does not begin until the agency disposes of the petition for reconsideration as provided in Section 503(d).

(c) If a petition is filed under subsection (a), the decision maker shall issue a written order not later than [20] days after the filing denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings. If the decision maker does not respond to the petition within [30] days after filing, or a longer period agreed to by the parties, the petition is deemed denied. The petition may be granted only if the decision maker states findings of facts, conclusions of law, and the reasons for granting the petition.

Comment

This section provides a right to seek reconsideration of a final order of an agency. This section is based in part on the Washington APA, West's RCWA 34.05.470, and in part on 1981 MSAPA Section 4-218.

Subsection (a) is based upon the Washington APA, R.C.W. 34.05.470(1).

Subsection (b) is based upon the Washington APA, R.C.W. 34.05.470(3).

Subsection (c) is based upon the 1981 MSAPA Section 4-218(3).

SECTION 417. STAY. Except as otherwise provided by law other than this [act], a party, not later than [seven] days after the parties are notified of the order, may request the agency to stay a final order pending judicial review. The agency may grant the request for a stay pending judicial review if an agency finds that justice so requires. The agency may grant or deny the request for stay of the order before, on, or after the effective date of the order.

Comment

This section is based upon 1961 MSAPA Section 15(c), and on 1981 MSAPA Section 4-217 The first and third sentences of this section are based upon 1981 MSAPA Section 4-217. The second sentence of this section is based on the first sentence of Section 705 of the federal administrative procedure act, 5 U.S.C. Section 705.

SECTION 418. AVAILABILITY OF ORDERS; INDEX.

(a) Except as otherwise provided in subsections (b) and (c), an agency shall create an index of all final orders in contested cases and make the index and all final orders available for public inspection and copying, at cost, in its principal offices.

(b) Final orders or decisions that are exempt, privileged, or otherwise made confidential or protected from disclosure by [the public records law of this state] are not public records and may not be indexed.

(c) A final order may be excluded from an index and disclosure only by order of the presiding officer with a written statement of reasons attached to the order. If the presiding officer determines it is possible to redact a final order that is exempt, privileged, or otherwise made confidential or protected from disclosure by [the public records law of this state] so that it complies with the requirements of that law, the redacted order may be placed in the index and published.

(d) An agency may not rely on a final order adverse to a party other than the agency as precedent in future adjudications unless the agency designates the order as a precedent, and the order has been published, placed in an index, and made available for public inspection.

Comment

This section is entirely new. This section continues the concept, seen earlier in connection with rules, of preventing earlier decisional law known only to agency personnel from constituting the basis for decision in a disputed case. Subsection (d) is based in part on the provisions of California Government Code Section 11425.60. If the agency wishes to use a case as precedent in the future, it must make the order and decision in that case available to the public. The only situations in which an agency may rely on a contested case as precedent without indexing and making that decision and order available to the public are described in subsection (c) of this section.

In some states there have been attacks on agency adjudications on the basis that the proceeding should be conducted under the provisions for rulemaking. In the case of SEC v. Chenery Corp., 332 U.S. 194 (1947) the United States Supreme Court held that the choice of whether to proceed by rulemaking or adjudication is left entirely to the discretion of the agency, because not every principle can be immediately promulgated in the form of a rule. In the words

of the Supreme Court "Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations." Most states follow Chenery. See Illuminating a Bureaucratic Shadow World: Precedent Decisions under California's Revised Administrative Procedure Act, 21 J. Nat'l A. Admin. L. Judges 247 (2001) at n. 68.

This section makes clear that the choice between rulemaking and adjudication is entirely in the discretion of the agency. However, in order to prevent law to which the public does not have access from constituting the basis for decision, final orders must be indexed and available to the public. See also the California administrative procedure act at West's Ann. Cal. Gov. Code, § 11425.60

Most states have public records act that require disclosure of government documents and records to the public unless particular documents are exempt from disclosure under that act. Subsections (b) and (c) refer to those acts, and to exempt decisions under those acts.

SECTION 419. LICENSES.

(a) 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 determined by the agency and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(b) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, before the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare 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 must be promptly instituted and determined.

Comment

Section 419 is based on Section 14 of the 1961 MSAPA. Subsection (a) is based on Section 14(b), 1961 MSAPA. Subsection (b) is based on Section 14(c), 1961 MSAPA. Section

401 of this [act] governs licensing proceedings when the licensee has a right to notice and an opportunity to be heard before the agency action granting, denying, or renewing a license becomes final agency action.

[ARTICLE] 5

JUDICIAL REVIEW

SECTION 501. RIGHT TO JUDICIAL REVIEW; FINAL AGENCY ACTION REVIEWABLE.

(a) In this [article], "final agency action" means an act of an agency that imposes an obligation, grants or denies a right, confers a benefit, or determines a legal relationship as a result of an administrative process.

(b) Except to the extent that a statute of this state other than this [act] limits or precludes judicial review, a person who meets the requirements of this [article] is entitled to judicial review of a final agency action.

(c) A person that may be entitled to judicial review of a final agency action under subsection (b) is entitled to judicial review of an agency action that is not final if postponement of judicial review would result in an inadequate remedy or irreparable harm that outweighs the public benefit derived from postponement.

(d) Agency action that is a failure to act is not subject to judicial review. However, a reviewing court shall compel agency action that is unlawfully withheld or unreasonably delayed.

Comment

Section 501 is similar to the judicial review provisions of Florida (West's F.S.A. Section 120.68), Iowa (I.C.A. Section17A.19), Virginia (Va. Code Ann. Section 2.2-4026) and Wyoming (W.S.1977 Section 16-3-114). Under this section, the person seeking review must meet all of the requirements of this article, which include standing (Section 505), exhaustion of remedies (Section 506), and time for filing (Section 503). The definition of "agency action" is found in Section 102(4).

Subsection (a) defines "final agency action" for purposes of Article 5. This definition is based on state and federal cases. See State Bd. Of Tax Comm'rs v. Ispat Inland, 784 N.E.2D 477 (Ind., 2003); District Intown Properties v. D.C. Dept. Consumer and Regulatory Affairs, 680 A.2d 1373 (Ct. Apps. D.C. 1996); Texas Utilities Co. v. Public Citizen, Inc, 897 S.W.2d 443 (Tex. App. 1995); Bennet v. Spear, 520 U.S. 154, 117 S.Ct. 1154 (1997); Mobil Exploration and

Producing Inc. v. Dept. Interior, 180 F.3d 1192, 1197 (10th Cir. 1999).

Subsection (b) of this section provides a right of judicial review of final agency action by appropriate parties. Under subsection (b), final agency action includes a final order in a contested case and a final rule. The exception in subsection (b) for statutes that limit or preclude judicial review applies to limit or preclude judicial review of final agency action when a statute of the state other than this Act limits or precludes judicial review of that type of action. See the laws of the following states: Wyoming (W.S.A. Section 16-3-114(a)); New York (McKinneys' Civil Service law Section 76.3; New York City Dept. of Environmental Protection v. New York City Civil Service Com'n, 78 N.Y.2d 318, 579 N.E.2d 1385 (N.Y., 1991); and the District of Columbia (District of Columbia v. Sierra Club, 670 A2d. 354 (D.C., 1996).

Subsection (c) is based on 1981 MSAPA Section 5-103 and it creates a limited right to review of non-final agency action.

Subsection (d) is based on the federal A.P.A., 5 U.S.C. Section 706(1). Agency failure to act is not judicially reviewable unless agency action is unlawfully withheld or unreasonably delayed. Agency action is defined in section 102(4), and includes in subsection (4)(B), the failure to issue an order or rule, and in subsection (4)(C), failure to perform, duties, functions, activities, or determinations required by law.

SECTION 502. RELATION TO OTHER JUDICIAL REVIEW LAW AND RULES.

(a) Except as provided by law of this state other than this [act], judicial review of final agency action may only be taken as provided by rules of [appellate] [civil] procedure [of this state]. The court may grant any type of legal and equitable remedies that are appropriate.

(b) This [article] does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law of this state other than this [act]. Except to the extent that prior, adequate and exclusive opportunity for judicial review is available under this [article] or under law other than this [act], final agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement

Comment

This section places 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 because of the existence of rules of appellate procedure that the legislature may not wish to change. This practice was followed under the 1961 MSAPA, and is followed in a number of states today. See e.g.: Alaska (AS 44.62.560), California (West's Ann.Cal.Gov.Code Section 11523), Delaware (29 Del.C. Section 10143), Florida (West's F.S.A. Section 120.68), Iowa (I.C.A. § 17A.20), Michigan (M.C.L.A. 24.302), Minnesota (M.S.A. § 14.63) (Appeal integrated with state appellate rules), Virginia (Va. Code Ann. Section 2.2-4026), Wyoming (W.S.1977 § 16-3-114).

The first sentence of subsection (b) is based on the second sentence of Section 15a of the 1961 MSAPA. The second sentence of (b) is based on the last sentence of Section 703, federal Administrative Procedure Act, 5 U.S.C. Section 703.

SECTION 503. TIME FOR SEEKING JUDICIAL REVIEW OF AGENCY ACTION; LIMITATIONS.

(a) Judicial review of a rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced not later than [two] years after the effective date of the rule. Judicial review of a rule or guidance document on other grounds may be sought at any time.

(b) Judicial review of an order or other final agency action other than a rule or guidance document must be commenced not later than [30] days after the date the parties are notified of the order or other agency action.

(c) The time for seeking judicial review under this section is tolled during any time a party pursues an administrative remedy before the agency which must be exhausted as a condition of judicial review.

(d) A party may not petition for judicial review while seeking reconsideration under Section 416. During the time a petition for reconsideration is pending before an agency, the time for seeking judicial review in subsection (b) is tolled.

Comment

The first sentence of subsection (a) is based on 1961 Model State Administrative Procedure Act, section (3)(c), and on Section 3-113(b) of the 1981 Model State Administrative

Procedures Act. The scope of challenges permitted for noncompliance with procedural requirements under Section 314 includes all applicable requirements of article 3 for the type of rule being challenged.

Subsection (b) is based on 1981 MSAPA Section 5-108(2).

Subsection (c) is based on 1981 MSAPA Section 5-108(3).

Subsection (d) is new and provide for tolling of the time to seek judicial review while a reconsideration petition is pending before an agency.

SECTION 504. STAYS PENDING APPEAL. A petition for judicial review does not automatically stay an agency decision. An appellant may petition the reviewing court for a stay on the same basis as stays are granted under the rules of [appellate] [civil] procedure [of this state], and the reviewing court may grant a stay regardless of whether the appellant first 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 in the court. The first sentence of this section is based upon 1961 MSAPA Section 15(c). See also 1981 MSAPA Section 5-111 which governs stays. Unlike the 1981 MSAPA Section 5-111, this section authorizes the granting of a stay by the reviewing court but not by the agency.

SECTION 505. STANDING. The following persons have standing to obtain judicial review of a final agency action:

(1) a person aggrieved or adversely affected by the agency action; or

(2) a person that has standing under law of this state other than this [act].

Comment

Standing requirements are contained in the first sentence of 1961 MSAPA Section 15(a), and 1981 MSAPA Section 5-106.

Subsection (1) is a revised version of 1981 MSAPA Section 5-106(a)(5), and is also based on the first sentence of Section 702 of the federal Administrative Procedure Act, 5 U.S.C.

Section 702.

Subsection (2) is a revised version of 1981 MSAPA Section 5-106(a)(4). This subsection confers standing that arises under any other provision of law. Examples of this type of standing are statutes that expressly confer standing in general language such as, for example, "any person may commence a civil suit in his own behalf... to enjoin... an agency... alleged to be in violation of this chapter. . . ." 16 U.S.C.A. § 1540, explained in Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154(1997). Another example is standing recognized in judicial decision or common law.

Most states have established case law detailing the standing requirements for that particular jurisdiction. Section 505 is drafted broadly but generically so that existing state law on standing will be compatible with this section.

SECTION 506. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

(a) Subject to subsection (d) or law of this state other than this [act] which provides that a person need not exhaust administrative remedies, a person may file a petition for judicial review under this [act] only after exhausting all administrative remedies available within the agency the action of which is being challenged and within any other agency authorized to exercise administrative review.

(b) Filing a petition for reconsideration or a stay of proceedings is not a prerequisite for seeking judicial review.

(c) A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding on which the rule is based nor have filed a petition to adopt a rule under Section 318.

(d) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent the administrative remedies are inadequate or would result in irreparable harm.

Comment

The first clause of the first sentence of subsection (a) is based upon 1981 MSAPA Section 5-107(2). The remaining language in subsection (a) is based upon the first sentence of 1981 MSAPA Section 5-107.

Subsection (b) is based upon the second sentence of 1981 MSAPA Section 4-218(1).

Subsection (c) is based upon 1981 MSAPA Section 5-107(1).

Subsection (d) is a revised version of 1981 MSAPA Section 5-107(3).

SECTION 507. AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTION.

(a) In a contested case, the court's review is confined to the hearing record and to matters arising from that hearing record. The court, however, may receive additional evidence if the party seeking judicial review makes allegations of procedural error arising from matters outside the hearing record or except when necessary to avoid manifest injustice.

(b) In any case that is not a contested case, the record for review consists of the agency record and all unprivileged material that an agency decision maker directly or indirectly considered, or that was submitted for consideration by any person, in connection with the action under review, including information reasonably available to the agency at the time of the agency's action that is adverse to the agency's position. The court may allow discovery and other evidentiary proceedings in order to supervise the agency's completion of the record for review. The court may also consider evidence outside of the agency record:

(1) if the agency action was ministerial or was rendered without an administrative record or on the basis of a minimal administrative record; or

(2) [insofar as the petitioner alleges procedural error not disclosed by the record]; or

[except when necessary to avoid manifest injustice].

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 on that evidence which was before the agency on

the record. Otherwise, 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 Section 302 of this Act. The section contains an exception to the closed record on review where petitioner alleges error, such as ex parte contacts, that does not appear in or is not evident from the record. Other examples of error that do not appear or are not evident from the record are: improper constitution of the decision making body, grounds for disqualification of a decision maker, or unlawful procedure. However, the standard for opening the record on appeal is high.

Subsection (a) is a revised version of 1961 MSAPA Section 15(f).

Subsection (b) is new and defines the record for review in any case that is not a contested case.

SECTION 508. SCOPE OF REVIEW.

(a) Except as provided by law of this state other than this [act], in judicial review of an agency action, the following rules apply:

(1) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity.

(2) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(3) The court may grant relief only if it determines that a person seeking judicial review has been prejudiced by one or more of the following:

(A) the agency erroneously interpreted the law;

(B) the agency committed an error of procedure;

(C) the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(D) an agency determination of fact, in a contested case, is not supported by substantial evidence in the record as a whole; or

(E) to the extent that the facts are subject to trial de novo by the reviewing court, the action was unwarranted by the facts.

(b) In making determinations under this section, the court shall review the whole agency record, or the parts designated by the parties and shall apply the rule of harmless error.

Comment

Subsection (a) (1) is based upon 1981 MSAPA Section 5-116(a)(1). Subsection (a)(2) is based upon 1981 MSAPA Section 5-116(b). They are substantially similar to the general scope of review provisions of the Federal APA, 5 U.S.C. Section 706.

Judicial review is essential and exists in all states. Section 508 follows the approach that scope of review is notoriously difficult to capture in verbal formulas, and its application varies depending on context. For that reason, Section 508(3) follows the shorter, skeletal formulations of the scope of review, similar to the 1961 MSAPA Section 15(g), and the Federal APA, 5 U.S.C. Section 706(2). See Ronald M. Levin, Scope of Review Legislation, 31 Wake Forest L. Rev. 647 (1996) at 664-66. William D. Araiza, In Praise of a Skeletal APA, 56 Admin. L. Rev. 979 (2004). (Judiciary, not legislature, appropriate body to evolve specific standards for review, because of great variety of agency action and contexts, and inability to describe how general standards of review should apply to many of them).

Most states have established bodies of law governing judicial review of agency rules and orders. Section 508(a)(3) has been drafted generally to make it easier for states to adopt Article Five because state specific understandings of the scope of review of agency action can be more easily accommodated with general standards of review.

The first clause of subsection (a)(3) is based on 1981 MSAPA Section 5-116(c). Subsection (a)(3) (A) includes, but is not limited to, violations of constitutional or statutory provisions and actions that are in excess of statutory authority from Section 15(g)(1), and (2) of the 1961 MSAPA, and includes 1981 MSAPA Section 5-116 subsections (c) (1), (2) and (4). The subsection includes challenges to the facial or applied constitutionality of a statute, challenges to the jurisdiction of the agency, erroneous interpretation of the law, and may include erroneous application of the law. This section is not intended to preclude courts from according deference to agency interpretations of law, where such deference is appropriate. Subsection (a)(3)(B) includes violations of procedures required by law from 1961 MSAPA Section 15(g)(3) and includes 1981 MSAPA Section 5-116 subsections (c)(5) and (6).

Subsection (a)(3)(C) includes discretionary decisions of agencies that are judicially reviewable from 1961 MSAPA Section 15(g)(6) and 1981 MSAPA Section 5-116(8), and federal A.P.A. Section 706 (2)(A). Section (a)(3)(D) includes the fact determinations in contested cases form 1981 MSAPA Section 5-116(c)(7) and the federal APA Section 706(2)(E). Section (a)(3)(E) includes fact determinations that are not made in contested cases and is based upon the Federal APA Section 706(2)(F). Subsection (b) is based upon the federal APA section 706, last

sentence.

[ARTICLE] 6

OFFICE OF ADMININISTRATIVE HEARINGS

SECTION 601. CREATION OF OFFICE OF ADMINISTRATIVE HEARINGS.

(a) In this [article], "office" means the [Office of Administrative Hearings].

(b) The [Office of Administrative Hearings] is created in the executive branch of state government [within the [ ] agency].

Comment

Section 601 is based on Section 1-2(a) of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997). Twenty five states (including the District of Columbia) have established central panel agencies. Representative state statutes creating a central panel include Alaska statutes, section 44.64.010, California Government Code Section 11370.2, Louisiana: statutes, Section 49.991, and Washington Administrative Procedure Act, Section 34.12.010. Article Six has been drafted to include the necessary minimum provisions for a state that wants to adopt a central panel hearing agency. For states that adopt this act, Article Four procedures for contested cases would be followed by administrative law judges who work for the Office of Administrative Hearings. States that adopt Article Six would provide for a separate hearing agency and would ensure impartiality and fairness in contested cases by separating the adjudication function from the prosecution and investigative functions. Administrative law judges that work for the Office of Administrative Hearings would not be subject to command influence from the agency head whose contested cases the administrative law judge is presiding over.

SECTION 602. CHIEF ADMINISTRATIVE LAW JUDGE; APPOINTMENT; QUALIFICATIONS; TERM; REMOVAL.

(a) The office is headed by a chief administrative law judge appointed by [the Governor] [with the advice and consent of the Senate].

(b) A chief administrative law judge serves a term of [five] years, and until a successor is appointed and qualifies for office, is entitled to the salary provided by law, and may be reappointed.

(c) At the time of appointment, the chief administrative law judge must have been

admitted to the practice of law in this state for at least five years and have substantial experience in administrative law.

(d) A chief administrative law judge:

(1) must take the oath of office required by law before beginning the duties of the office;

(2) shall devote full time to the duties of the office and may not engage in the private practice of law; and

(3) is subject to the code of conduct for administrative law judges adopted pursuant to Section 604(7).

(e) A chief administrative law judge may be removed from office only for cause and only after notice and an opportunity for a contested case hearing.

Comment

Section 602 is based on Section 1-4 of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).

SECTION 603. ADMININSTRATIVE LAW JUDGES; APPOINTMENT; QUALIFICATIONS, DISCIPLINE.

(a) The chief administrative law judge shall appoint administrative law judges pursuant to the [state merit system].

(b) In addition to meeting other requirements of the [state merit system], to be eligible for appointment as an administrative law judge, an individual must have been admitted to the practice of law in this state for at least [three] years.

(c) An administrative law judge:

(1) shall take the oath of office required by law before beginning duties as an administrative law judge;

(2) is subject to the code of conduct for administrative law judges adopted pursuant to Section 604(7);

(3) is entitled to the compensation provided by law; and

(4) may not perform any act inconsistent with the duties and responsibilities of an administrative law judge.

(d) An administrative law judge:

(1) is subject to the administrative supervision of the chief administrative law judge;

(2) may be disciplined pursuant to the [state merit system law];

(3) Except as otherwise provided in paragraph (4), may be removed from office only for cause and only after notice and an opportunity for a contested case hearing; and

(4) is subject to a reduction in force in accordance with the [state merit system law].

(e) On the [effective date of this [act]], administrative law judges employed by agencies to which this [article] applies are transferred to the office and, regardless of the minimum qualifications imposed by this [article], are administrative law judges in the office.

Comment

Section 603 is based on Sections 1-2(b), and 1-6 of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).

SECTION 604. CHIEF ADMINISTRATIVE LAW JUDGE; POWERS; DUTIES. The chief administrative law judge has the powers and duties specified in this section. The chief

administrative law judge:

(1) shall supervise and manage the office;

(2) shall assign administrative law judges in any case referred to the office;

(3) shall assure the decisional independence of each administrative law judge;

(4) shall establish and implement standards for equipment, supplies, and technology for administrative law judges;

(5) shall provide and coordinate continuing education programs and services for administrative law judges and advise them of changes in the law concerning their duties;

(6) shall adopt rules pursuant to this [act] to implement [Article] 4 and this [article];

(7) shall adopt a code of conduct for administrative law judges;

(8) shall monitor the quality of adjudications conducted by administrative law judges;

(9) shall discipline [pursuant to the [state merit system law] administrative law judges who do not meet appropriate standards of conduct and competence;

(10) may accept grants and gifts for the benefit of the office; and

(11) may contract with other public agencies for the services of the office.

Comment

Section 604 is based on Section 1-5 of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).

SECTION 605. COOPERATION OF AGENCIES.

(a) All agencies shall cooperate with the chief administrative law judge in the discharge of the duties of the office.

(b) Subject to Section 402, an agency may not reject a particular administrative law judge for a particular hearing.

Comment

Section 605 is based on Section 1-7(a) of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997). There are similar provisions in Alaska statutes, Section 44.64.080. Agencies should cooperate with the office of administrative hearings by providing information and coordinating schedules for contested case hearings.

SECTION 606. ADMINISTRATIVE LAW JUDGES; POWERS; DUTIES; DECISION MAKING AUTHORITY.

(a) [Except as otherwise provided in subsection (d), in] In a contested case, unless the hearing is conducted by a presiding officer other than an administrative law judge assigned under Section 402(a), an administrative law judge must be assigned to be the presiding officer. The administrative law judge shall issue a recommended or initial order to the agency head in the contested case pursuant to Section 413.

(b) Except as provided by law of this state other than this [act], if a matter is referred to the office by an agency, the agency may not take further action with respect to the proceeding, except as a party, until a recommended or initial order is issued. [This subsection does not prevent an appropriate interlocutory review by the agency or an appropriate termination or modification of the proceeding by the agency when authorized by law other than this [act].]

(c) In addition to acting as the presiding officer in contested cases under this [act], subject to the direction of the chief administrative law judge, an administrative law judge may perform such other duties as are authorized by law of this state other than this [act].

[(d) This section does not apply to the following agencies: [list agencies exempted]].

Comment

Section 606(b) is based on Section 1-10(c) of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).

[[ARTICLE] 7]

RULES REVIEW

SECTION 701. [LEGISLATIVE RULES REVIEW COMMITTEE]. There is created a standing committee of the [Legislature] designated the [rules review committee].

Legislative Note: *States that have existing rules review committees can incorporate the provisions of Sections 701 and 702, using the existing number of members of their current rules review committee. Because state practice varies as to how these committees are structured, and how many members of the legislative body serve on this committee, as well as how they are selected, the act does not specify the details of the legislative review committee selection process. Details of the committee staff and adoption of rules to govern the rules review committee staff and organization are governed by law other than this act including the existing law in each state.*

Comment

This section is based on the first sentence of 1981 MSAPA Section 3-203.

SECTION 702. REVIEW BY [RULES REVIEW COMMITTEE].

(a) An agency shall file a copy of an adopted rule with the [rules review committee] at the same time it is filed with the [publisher]. An agency is not required to file an emergency rule adopted under Section 309 with the [rules review committee].

(b) The [rules review committee] may examine rules in effect and newly adopted rules to determine whether the:

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

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

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

(4) rule is a reasonable implementation of the law as it applies to any affected class of persons; and

(5) agency complied with the regulatory analysis requirements of Section 305

and the analysis properly reflects the effect of the rule.

(c) The [rules review committee] may request from an agency information necessary to exercise its powers under subsection (b). The [rules review committee] shall consult with standing committees of the [Legislature] with subject matter jurisdiction over the subjects of the rule under examination.

(d) The [rules review committee] shall:

(1) maintain oversight over agency rulemaking; and

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

Comment

This section adopts a rules review committee process that is widely followed in state administrative law as a method for legislative review of agency rules. States that have rules review committees include Texas, TX GOVT § 2001.032, Iowa, I.C.A. § 17A.8, Utah, U.C.A. 1953 § 63G-3-501, Wisconsin, W.S.A. 227.26 and Montana, MCA § 2-4-402.

The first sentence of subsection (a) requires the agency to file a copy of an adopted rule with the [rules review committee] at the same time it is filed with the publisher. Section 316 requires the agency to file adopted rules with the publisher. The second sentence of subsection (a) exempts emergency rules adopted under Section 309 from the rules review process. Emergency rules take effect upon adoption and are effective for a short period of time.

Subsection (b) allows the legislative rules review committee to review currently effective rules and newly adopted rules. The rules review committee may establish priorities for rules review including review of newly adopted or amended rules, and may manage the rules review process consistent with committee staff and budgetary resources. If the content of the rule changes because of legislative amendments, the agency will be required to file the amended rule with the publisher, and the amended rule will replace the original rule that was filed with the publisher. The rules review process applies to rules adopted following the requirements of Sections 304 to 307. This process does not apply to emergency rules adopted under Section 309 nor to direct final rules adopted under Section 310.

Subsection (b)(1) requires the [rules review committee] to determine whether the rule is a valid exercise of delegated legislative authority. Subsection (b)(2) requires the [rules review committee] to determine whether the statutory authority for the rule has expired or been repealed Subsection (b)(3) requires the [rules review committee] to determine whether the rule is necessary to accomplish the apparent or expressed intent of the specific statute that the rule implements. Subsection (b)(4) requires the [rules review committee] to determine whether the rule is a reasonable implementation of the law as it applies to any affected class of persons.

Subsection (b)(5) requires the [rules review committee] to determine whether the agency complied with the regulatory analysis requirements of Section 305and the analysis properly reflects the effect of the rule. See section 305 for the regulatory analysis requirements agencies are required to undertake as part of the rulemaking process.

The first sentence of subsection (c) permits the [rules review committee] to request from the adopting agency information necessary to make the determinations under subsection (2). The second sentence of subsection (c) directs the [rules review committee] to consult with the standing committees of the legislature with subject matter authority over the subjects of the rule in question.

SECTION 703. [RULES REVIEW COMMITTEE] PROCEDURE AND POWERS.

(a) Not later than [30] days after receiving a copy of an adopted rule from an agency under Section 702, the [rules review committee] may:

(1) approve the adopted rule;

(2) disapprove the rule and propose an amendment to the adopted rule; or

(3) disapprove the adopted rule.

(b) If the [rules review committee] approves an adopted rule or does not disapprove and propose an amendment under subsection (a)(2) or disapprove under subsection (a)(3), the adopted rule becomes effective on the date specified for the rule in Section 317.

(c) If the [rules review committee] proposes an amendment to an adopted rule under subsection (a)(2), the agency may make the amendment and resubmit the rule, as amended, to the [rules review committee]. The amended rule must be one that the agency could have adopted on the basis of the record in the rulemaking proceeding and the legal authority granted to the agency. The agency shall provide an explanation for the amended rule as provided in Section 313. An agency is not required to hold a hearing on an amendment made under this subsection. If the agency makes the amendment, it shall give notice to the [publisher] for publication of the

rule, as amended, in the [administrative bulletin]. The notice must include the text of the rule as amended. If the [rules review committee] does not disapprove the rule, as amended, or propose a further amendment, the rule becomes effective on the date specified for the rule under Section 317.

(d) If the [rules review committee] disapproves the adoption of a rule under subsection (a)(3), the adopted rule becomes effective on adjournment of the next regular session of the [Legislature] unless before adjournment the [Legislature] [adopts a [joint] [concurrent] resolution] [enacts a bill] sustaining the action of the committee.

(e) An agency may withdraw the adoption of a rule by giving notice of the withdrawal to the [rules review committee] and to the [publisher] for publication in the [administrative bulletin]. A withdrawal under this subsection terminates the rulemaking with respect to the adoption but does not prevent the agency from initiating new rulemaking for the same or substantially similar adoption.

Legislative Note: *The 30-day time period in subsection (a) is the same as the 30-day time period in section 317. State constitutions vary as to whether or not a joint resolution is a valid way of disapproving an agency rule. In some states, the Legislature must use the bill process with approval by the Governor. In other states the joint resolution process is proper. States should use the alternative that complies with their state constitution.* ***.*** *State constitutions vary on the federal constitutional issue decided by the U.S. Supreme Court in I.N.S. v. Chadha (1983) 462 U.S. 919, 103 S.Ct. 2764. The U.S. Supreme Court held that the one house legislative veto provided for in section 244(c)(2) violated the Article I requirement that legislative action requires passage of a law by both houses of congress (bicameralism) and presentation to the president for signing or veto (presentation requirement). Those state constitutions that require presentation to the governor need an additional step, presentation of the joint resolution to the governor for approval or disapproval. With state constitutions that do not require presentation to the governor the rules review process can be completed with legislative adoption of a joint resolution.*

Comment

This is a type of veto that provides for cooperation between the Legislature and the Governor, and attempts to avoid the I.N.S. v. Chadha (1983) 462 U.S. 919, 103 S.Ct. 2764. problem of unconstitutionality by delaying the effective date of the rule until the legislature has

the opportunity to enact legislation to annul or modify it. The governor may veto the act by which the legislature seeks to annul or modify the rule. This type of veto provision is widely used in the states. For example the following states have legislative review statutes as part of their state administrative procedures act: Texas, TX GOVT § 2001.032, Iowa, I.C.A. § 17A.8, Utah, U.C.A. 1953 § 63G-3-501, Wisconsin, W.S.A. 227.26 and Montana, MCA § 2-4-402.

For disapproval of a rule to be effective, the legislature as a whole must adopt a joint resolution, and in many states the governor must by presented with the joint resolution for approval or disapproval. While the rules review committee can recommend disapproval, the committee recommendation must be approved by the legislature by joint resolution. In some states, the legislature must comply with the legislative process for enacting a bill including presentation to the governor to exercise the power of legislative veto over an agency regulation. In at least one state use of a joint resolution without the governor's participation violates the state constitution. State v. A.L.I.V.E. Voluntary (Alaska, 1980) 606 P.2d 769. The rules review committee has the power to temporarily suspend an agency rule pending enactment of a permanent suspension by action of both houses of the state legislature, and presentation to the governor. Martinez v. Department of Industry, Labor, & Human Relations (Wisconsin, 1992) 165 W.2d 687, 478 N.W.2d 582 (temporary suspension statute held not to violate state constitution separation of powers doctrine).

[ARTICLE] 8

E-SIGN ACT RELATION; REPEALS EFFECTIVE DATE

SECTION 801. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101 (c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment

The federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et. seq., was enacted in summer of the year 2000. It precludes States from denying enforceability to an electronic record or an electronic signature solely because the record or signature is electronic, rather than in writing. The Electronic Signatures Act applies to cases where a state (or federal) law requires a writing or a written signature in order to have a particular effect. The Electronic Signatures Act allows state law to modify, limit or supersede its effect by laws consistent with it that are technologically neutral and that refer specifically to the Electronic Signatures Act.

This Act recognizes the validity of both electronic and written records. It is thus consistent with the policy of the Electronic Signatures Act in avoiding discrimination against electronics. Furthermore, the provisions of this Act relating to the effect of a record or an authentication are technologically neutral. This Act does not modify the consumer protection provisions of 15 USC § 7001(c) and, like the federal act, is neutral on whether the notices referenced in 15 USC § 7003 (b) may be provided electronically.

SECTION 802. REPEALS. The following acts are repealed:

(1) [the 1961 Model State Administrative Procedure Act].

(2) [the 1981 Model State Administrative Procedure Act].

Comment

The purpose of this section is to provide for the repeal of the prior model act applicable to the state when the state legislature adopts this model act. While this section has two subsections

providing for repeal of both the 1961 MSAPA and the 1981 MSAPA, most states will have only one of the two acts, and many of those will have the 1961 MSAPA. The prior act provisions are bracketed so that state legislatures can include the specific name of the prior model act in their state.

SECTION 803. EFFECTIVE DATE. This [act] takes effect on [ ].

Comment

This section is based upon the first clause of 1961 MSAPA Section 19, and the first clause of 1981 MSAPA Section 1-108. See Section 103(b) for applicability of the Act to agency proceedings.