

2008 MODEL STATE ADMINISTRATIVE PROCEDURE ACT BACKGROUND AND ISSUES STATEMENT

HISTORY AND APPROACH TO THE CURRENT REVISION

The 1946 Model State Administrative Procedure Act

The 1946 Model State Administrative Procedure Act (MSAPA) drew heavily upon the Federal Administrative Procedure Act (FAPA) that was enacted in the same year. That MSAPA incorporated basic principles with only enough detail to support essential features of an administrative procedure act. The differences among the states in administrative procedure and the differences among agency tasks were so great that the drafters purposely adopted this “model act,” rather than a uniform act, approach.

The 1961 Model State Administrative Procedure Act

The MSAPA was revised in 1961 to take into account a “maturing” of thought on administrative procedure. The 1961 MSAPA articulated its objectives as fairness to parties and creation of procedure that was effective from the governmental standpoint. This revision also followed a model act approach that focused on major features, because, it explained, details must vary from state. A great deal of the 1961 MSAPA has been adopted by the states.

The 1981 Model State Administrative Procedure Act

The MSAPA was revised in 1981 because of the expansion in types of regulation carried out by the state agencies, such as, for example, workplace safety and environmental regulation. The 1981 MSAPA approach was “entirely new” with “more detail” than earlier acts. This approach offered guidance to the states so that they could select the parts of the MSAPA that were suitable for their particular situation, and took into account the greater experience with administrative procedure since 1961. There have been only a few adoptions of provisions from the 1981 MSAPA.

The Current Proposed Revision

It has been twenty-seven years since the 1981 revision of the MSAPA. There have been many changes and significant events since that time. One is the emergence of the Internet in the mid 1980's and its explosive growth since that time. States have discovered that the Internet furnishes an excellent, efficient and low-cost method for communication with the public. In the past two decades, state legislatures have expressed dissatisfaction with agency rulemaking, and have taken action to assure continuous oversight and creation of mechanisms and procedures overrule agency action. At the present time, the American Bar Association has undertaken a major study of the Federal Administrative Procedure Act and has recommended revisions that draw upon fifty years of experience with the FAPA, which is similar in many respects to the various revisions of the MSAPA. Finally, in the past twenty-five years, there have been a large number of state and federal judicial decisions that involve the administrative procedure acts of the various states and the Federal Administrative Procedure Act, a continuous stream of scholarly articles on federal administrative law, and the emergence of a body of academic writing on *state* administrative procedure. These developments have been taken into account in this revision of the MSAPA.

The objectives of the current revision are to conform the Act to current procedures and practices while enhancing the administrative process to make it more accessible, efficient and fair.

This reading by the Committee of the Whole will focus on Articles 1, 2, 3, and 7.

Key issues and the sections to which they relate include the following:

1. Section 201(b) Publication ...of rulemaking documents.

The issue: Electronic versus written publication of documents by the rules publisher. The current version of section 210(b) has bracketed [electronic][written] format, giving states the option of which approach to use.

Should this approach be the one adopted by the conference, or should the section mandate one or the other type of publication format, or require both electronic and written format?

2. Section 201(k) (l) Publication ...of rulemaking documents.

The issue: Electronic versus written publication of agency documents by the agency. The current version of section 210(k) requires electronic distribution but also mandates distribution through regular mail when requested and the agency may charge a reasonable fee for regular mail distribution. Section 210(l) permits the agency to use electronic distribution for rulemaking notices or guidance documents.

Should this approach be the one adopted by the conference, and should the approach be consistently followed in all parts of Section 201?

3. Section 301(d) Current Rulemaking Docket

The Issue: Electronic versus written publication of agency documents by the agency. Section 301(d) provides that the agency shall provide a written docket upon request. An unstated assumption is that the agency will maintain an electronic docket as the standard way of compiling and maintaining the current rulemaking docket.

Should the conference adopt the written docket upon request approach, or provide only for electronic rulemaking dockets?

4. Sec. 302 (b)(3)Agency Record in Rulemaking Proceeding;

The issue: The volume of materials submitted in rulemaking proceedings in the electronic era can be substantial, and can be burdensome for agency personnel to deal with. Should all of that material be included in the rulemaking record, or only the materials relied upon or seriously considered?

5. Section 310 Guidance documents and the definition of guidance documents in Section 102(12)

Publication and indexing of guidance documents provides for transparency, avoids secret law known only to the agency, and limits the circumstances in which parties with matters before agencies rely to their detriment on an agency position that has not been adopted as a rule.

Section 310 was extensively revised from the version presented at the 2007 annual conference. The drafting committee adopted this current version after substantial discussions.

Key issues include:

- the definition of guidance documents (Section 310(a), and Section 102(12)),
- the reliance test stated in Section 310 (b)
- the variance standard stated in Section 310 (d)
- the publication requirement stated in Section 310 (e)
- the index requirement stated in Section 310 (f)

Guidance documents: Should they be binding on the agency? If not what weight, if any, should they have?

Should the conference adopt this version of section 310?

6. Section 702 (b) Review by [Rules Review Committee]

The issue: The scope of rules that a legislative rules review committee must review can be substantial, and may exceed the committee's resources and time. The drafting committee proposed to limit the scope of rules subject to legislative review to include currently effective rules and newly adopted rules. Should this approach be adopted by the conference?

Note the current text of Section 702 can be found in the amendments handout prepared for this conference.