Memo
From Professor Gregory Ogden, Reporter, Model State APA Drafting Committee
To the committee advisors, and observers
For the telephone conference call on Friday 5.23.2008, 2 pm EDT.
Consent docket (5.23.2008)

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

1. Section 102 Definitions

[A] In ¶ (15), "law" is defined to include "an executive order." This led to criticism at the August 2007 plenary session on the basis that executive orders are not, as a class, binding. (Transcript 26 (Winkelman)). I suggest changing the language to "executive order that rests on statutory or constitutional authorization." See Kevin M. Stack, "The Statutory President," 90 Iowa L. Rev. 539, 550-52 (2005); Jim Rossi, "State Executive Lawmaking in Crisis," 56 Duke L.J. 237, 261-64 (2006).

[B] In ¶ (16) ("licenses"), insert "and" before "issued."

[C] In ¶ (19), "order" is defined as "an agency adjudication of particular applicability that determines the legal rights, duties, privileges or immunities, or other legal interests of one or more specific persons." I would change "adjudication" to "decision" to avoid circularity ("adjudication" is defined as an "order" in ¶ (1)). I would also delete the words "of particular applicability," because that idea is implicit in the statement that the decision determines the rights of specific persons.

[D] In ¶ (22) ("presiding officer"), change "the individual" to "an individual," because a case can have more than one presiding officer. See § 402(b).

2. Section 203 Declaratory Order

[A] Under ¶ (c), within 60 days the agency "shall decline to issue a declaratory order, issue the requested declaratory order, or schedule the matter for hearing." The agency might choose to issue a declaratory order other than the one the petitioner requested, and it might do this on briefs without the need for a "hearing." Thus, I suggest: ". . . shall issue a declaratory order in response to the petition, decline to issue a declaratory order, or schedule the matter for further consideration."

[B] Since ¶ (a) uses the word "petitioner," ¶ (d) can do likewise, instead of the more awkward "person who filed the petition."

3. SECTION 302. AGENCY RECORD IN RULEMAKING PROCEEDINGS.

[A] Paragraph (b)(5) defines the rulemaking record to include

> all written or electronic petitions, requests, submissions, and comments received by the agency and all other written or electronic materials or records whether or not relied upon by the agency in connection with the proceeding upon which the rule is based;

The latter clause has no outer limits in terms of relevance. I would suggest drawing on the ABA's language: "copies or an index of written factual material, studies, and reports *relied on or seriously consulted by agency personnel* in formulating the proposed or final rule." (ABA Section of Administrative Law and Regulatory Practice, "A Blackletter Statement of Federal Administrative Law," 54 Admin. L. Rev. 1, 34 (2002) (emphasis added).

4. SECTION 303. Advance Notice of Proposed Rulemaking: NEGOTIATED RULEMAKING.

[A] The federal term for the solicitation described in ¶ (a) is an "advance notice of proposed rulemaking." If that term were borrowed, this rather wordy paragraph could be made more concise: "An agency may gather information relevant to the subject matter of possible rulemaking and may solicit comments and recommendations from the public about that possibility by publishing an advance notice of proposed rulemaking in the [administrative bulletin] and indicating where, when, and how persons may comment."

5. SECTION 309. EMERGENCY RULEMAKING; EXPEDITED RULEMAKING.

[A] Paragraph (a) provides that, in order to issue an emergency rule, the agency must make a finding of imminent peril, but it does not say that the agency must have good cause for making its finding, as does 1981 MSAPA § 3-108(a), as well as the federal APA, 5 U.S.C. § 553(b)(B). Presumably the Committee intends for the finding to be reviewable, so the good cause language should be added. Numerous federal and state cases hold that "good cause" should be narrowly construed, and these cases could be referenced in a comment. In addition, "loss of federal funding" should be changed to "imminent loss of federal funding."

[B] I do not think an expedited rule should have to be accompanied by a statement of "reasons for using expedited rulemaking," other than a simple statement that the agency does not expect the rule to be controversial. ACUS

did not recommend that the agency must explain *why* it expects no controversy. It is hard to prove a negative; and anyway, the rule will not survive the expedited rulemaking process unless nobody objects to it, in which case the agency's prediction would of course be confirmed.

[C] The last sentence of ¶ (b) should say that, upon receiving an objection to the rule, the agency "may" proceed with the normal rulemaking process on the same rule, not that it "shall" do so. It is entirely possible that the objection(s) will persuade the agency that the rule should be revised, or abandoned altogether.

7. **SECTION 312. CONCISE EXPLANATORY STATEMENT.**

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

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

[B] If the "repeal" language is not removed from this section, the language of the section should be made more precise. A repealed rule cannot have an effective date; rather, the *repeal of the rule* does.

[C] I do not agree with the expedited effective date for an expedited rule (¶ (e)). Just because a rule is noncontroversial doesn't mean that affected persons need less than the usual amount of time to prepare to come into compliance with it.

[D] According to ¶ (f), "A guidance document becomes effective immediately upon adoption or at a later date established by the agency." I would delete this paragraph, because a guidance document lacks the force of law and thus has, properly speaking, no effective date. The guidance document can, for example, serve to memorialize an interpretation or policy that the agency has long followed but has not previously committed to writing. Moreover, courts and agencies frequently apply interpretive rules retroactively. This practice is not illegitimate, because theoretically an interpretive rule merely construes preexisting law, but it belies the idea that the rule has an "effective date." On the other hand, if ¶ (f) is eliminated, the reason for the omission of an effective-date provision for guidance documents could be spelled out in the accompanying comment.

9. **SECTION 317. PETITION FOR ADOPTION OF RULE.**

The last sentence of this rule provides: "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; (2) initiate rulemaking proceedings in accordance with this [act]; or (3) adopt, amend, or repeal the rule." It seems to me that clauses (1) and (2) are sufficient, and clause (3) is unnecessary. In general, an agency

should not be able to adopt the rule outright, without inviting input from persons other than the petitioner, and § 317 should not suggest otherwise. To be sure, the agency could take immediate action in cases of emergency or expedited rulemaking, but clause (2) seems broad enough to cover the agency's use of those devices when they are otherwise appropriate.