Model State Administrative Procedures Act

Drafting Committee NCCUSL

ISSUES MEMOS FOR April 2007 meeting

List of issues memos

1. Section 201(h) [(f)] issues memo.

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3. Section 201(j) issues memo

4. Section 309(b) issues memo.

5. Section 310(d) issues memo.

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1. Section 201(h)[(f)] issues memo

[Section 201(h)[(f)] (page 14, lines 9 to 11)] Should Section 201(h)[(f)] be deleted in that the agency duties under this section duplicate the duties of publishers?

What follows is a survey of relevant state laws, and responses from members of the ACR listserv to questions related to the question of whether section 201(h)[(f)] should be deleted as duplicative. Thanks to Ken Hanson and John Martinez for this helpful information.

1. California
A review of California agency web sites indicates that the California Office of Administrative Law compiles, reviews, and publishes all California executive branch agency regulations. The OAL website [http://www.oal.ca.gov/] has posted all California Code of Regulation sections for all executive branch agencies in California on the OAL website. Agencies link to the OAL web site, and do not post their own regulations on their own web site.

2. Delaware
The requirement duplicates what the Registrar does here in Delaware. The official version of a regulation is the one on file with the Registrar's office. 29 Del.C. 1132(3).

Jeff Hague, Registrar of Regulations
Legislative Council, State of Delaware

3. Iowa (Kathleen West)
In Iowa, agencies are required to make available for public inspection all of their rule-making records, including public comments received, rules adopted, and waivers requested and granted. The governor's office is designated as the permanent repository of rule-making documents and the administrative code editor is designated as the custodian of the official printed administrative code and bulletins.

Iowa Code section 2B.17(5) designates the official version of the rule and the only version admissible in court.

4. New York [Debbie Ritzko]
This response is quite lengthy because I included the text of a variety of sections of New York's Executive Law and Administrative Procedure Act in response to your questions.

For New York, it would be a replication of effort to require the Agencies to also maintain an index of their particular rule making activity. However, agencies are required to maintain for public inspection and copying the full text of all codes, rules and regulations adopted by the agency.

[See Executive Law, Section 102 Filing and Publication of Codes, Rules and Regulations:
Section 4(b) states:
b. each agency shall make readily available at a designated office or offices of the agency, for public inspection and copying, the full text of all codes, rules and regulations adopted by the agency;

Section 149:
§ 149. Format of state register

Section 147(3)
3. The department of state shall publish, quarterly, a special issue

QUESTION:
Also, does your state have any provisions establishing the copy of record? For example, does your state specify which copy of a rule is the legal version? If so, where is it kept and who has possession of it? Is the copy of record electronic or paper? Please provide specific citation to your state law.

RESPONSE:
Executive Law, Section 102, Section 5 states: (Text regarding "copy of record" is bolded)

> 5. The compilation printed pursuant to paragraph e of subdivision four of this section shall be known as the "official compilation of codes, rules and regulations of the state of New York" and shall presumptively establish the codes, rules and regulations of the state of New York, except such as relate solely to the organization or internal management of a department, board, bureau, authority, commission or other agency of the state, in force and effect on the first day of January, nineteen hundred forty-five.

REGARDING RETENTION OF OFFICIAL FILINGS:

Every hard copy Original Official Filing filed with the NYS Department of State (DOS) is subsequently sent to the NYS Archives (SARA) for permanent retention. Every filing receives a unique number for the year filed. Our office maintains the filings for two years. Each January the filings that are two years old are boxed up. The boxes are assigned a number and labeled with the contents and delivered to the Archives. Our office maintains a list that contains the Box number and its contents. The filings then become the property of SARA. When the DOS receives a request for a copy of a filing that resides at SARA, the DOS provides the unique file number and box number to the requestor. The unique number is easily found using our rule tracking application. The requestor contacts the Archives for a copy of the filing. The requestor is charged a fee set by statute. Every rule filed with the DOS since 1945 is at SARA.
Debbie

5. <u>Oklahoma [Peggy Coe]</u>
Do you feel this requirement for filing agencies duplicates the responsibility of the rules publisher? If so, should this provision be retained or deleted?
Yes and no . . . Each agency should be required to make its rules available to the public as a matter of public record, but it need not be "cop[ies of] those portions of the [administrative bulletin and administrative code]"
(see also my answer to next question regarding agency copies), and agencies should always identify copies as "unofficial."

Is there a need for filing agencies to retain copies of rules for the public? What is the practice in your state?
Yes . . . in Oklahoma, as an "open record," agencies must provide "unofficial" copies of their rules upon request. In practice, many agencies choose to publish their rules in "unofficial" publications that not only include their rules, but also applicable statutes, judicial decisions, etc. . . . and some agencies remove revoked sections and include currently-effective emergency rules in their "unofficial" rules. Also, many agencies publish a complete set of their "unofficial" rules annually (or after any rule changes become effective), whereas a complete set of an agency's current "official" rules must be compiled by finding the agency's rules in the last full edition of the Code, and then

checking for updates in the latest annual Code supplement, as well as in Register issues issued since publication of the last annual Code publication.

Also, does your state have any provisions establishing the copy of record?
For example, does your state specify which copy of a rule is the legal version? If so, where is it kept and who has possession of it? Is the copy of record electronic or paper? Please provide specific citation to your state law.
Oklahoma's official rules, as defined by statute, are comprised of permanent rules published by the Secretary of State in the Oklahoma Administrative Code (and its annual cumulative supplements) and in semi-monthly issues of the Oklahoma Register that are published between the annual Code/Supplement publications, as well as emergency rules published in the Oklahoma Register. The print and cdrom copies of the Code and Register are "official"; the online Code and Register, as well as any rules published or provided by the issuing agencies in any format, are "unofficial."

Does your state require that the legal copies of rules be retained for a specific period of time? If so, please provide a citation.
In Oklahoma, the Archives and Records Commission (http://www.odl.state.ok.us/oar/administration/oarc.htm) has the authority to establish retention schedules for all kinds of state records.
Currently, printed and cdrom copies of Code and Register publications are retained permanently, as well as paper copies of the Register filings (with signed attestations) submitted by agencies. In addition, agencies are required to permanently retain their "rulemaking records" [as described in
75 O.S., Section 302(B)].

6. South Dakota [Jill Wellhouse]
Do you feel this requirement for filing agencies duplicates the responsibility of the rules publisher? If so, should this provision be retained or deleted? Yes the duplicates the responsibility of the rules publisher. I feel the provision should be deleted.

Is there a need for filing agencies to retain copies of rules for the public? What is the practice in your state?
Although the practice in South Dakota is to retain copies for the public, I feel that need no longer exists since this information is readily available on-line. In South Dakota, we have a law that requires that we make copies available on request. For years we have maintained hard copies in each of our main offices accross the state. These are updated as the rules are updated and are costly to maintain. Over the last few years we have had virtually no requests from the public to access this information because of the availability of the rules on-line. However, we do continue to maintain it.

Also, does your state have any provisions establishing the copy of record? For example, does your state specify which copy of a rule is the legal version? If so, where is it kept and who has possession of it? Is the copy of record electronic or paper? Please provide specific citation to your state law. The established record is the paper copy filed with the Secretary of State.

Does your state require that the legal copies of rules be retained for a specific period of time? If so, please provide a citation. Rules are retained forever. Our state law follows:

1-26-7. Records retained--Copies--Public inspection of current rules. Each agency shall keep the original records, documents, and instruments required by this chapter. Agencies shall make copies of all records, documents, and exhibits available to members of the Legislature upon request. The secretary of state shall keep a copy of the agency's current rules and the certificates pertaining thereto, which shall be open to public inspection.

7. Texas [Dan Proctor]

>>Model Act, Section 201 . . .
(f)[g] Each agency shall also make available for public inspection and copying those portions of the [administrative bulletin and administrative code] containing all rules adopted or used by the agency in the discharge of its functions and an index to those rules.

Q: Do you feel this requirement for filing agencies duplicates the responsibility of the rules publisher?

A: The proposed wording is not in conflict with the existing Texas APA. But the Texas APA also includes this statement:
"A state agency may comply with this section through the actions of another agency, such as the secretary of state, on the agency's behalf." (Texas Govt. Code sec. 2001.007). Of course, agencies do not file all documents included in the rulemaking process with the Secretary of State, and the agencies are required specifically to index and make that information available too.

In practice, many agency Internet sites include a link to their rules on the Secretary of State site. Other agencies post recent or pending proposed rules on their own site as well as a link to the Secretary of State. So, yes, there is some duplication. The only worry is that the two versions might differ substantively. While the Texas APA is clear that the copy of record is the one on file with the Secretary of State (Texas Govt. Code sec. 2001.037), members of the public have a reasonable expectation to rely on the accuracy of information they find on a state government web site. So far, this kind of duplication has not led to any tears. My opinion is that the benefit outweighs the risk.

Q: Is the copy of record electronic or paper? Please provide specific citation to your state law.

A: The APA permits paper, microfilm, or an electronic storage and retrieval system. (Texas Govt. Code, sec. 2002.018)

Q: Does your state require that the legal copies of rules be retained for a specific period of time?

A: I was sure the term "permanent" was used in the APA, but in fact no specific period of time is stated. However, the records retention schedule for the Secretary of State does define the rule filings as permanent. The APA does specifically perm destruction of originals if a copy of the information is stored on film or electronic storage.

8. Utah [Ken Hansen]

Here is MSAPA question #4.

The proposed text of the draft MSAPA currently reads:
Section 201 . . .
(f)[g] Each agency shall also make available for public inspection and copying those portions of the [administrative bulletin and administrative code] containing all rules adopted or used by the agency in the discharge of its functions and an index to those rules.

1.Do you feel this requirement for filing agencies duplicates the responsibility of the rules publisher? If so, should this provision be retained or deleted?

UT: The provision requiring an agency to "make available for public inspection and copying" is a duplication, but a very small burden on the agency, especially if it may provide access to an electronic copy. This provision should be retained. However, I believe the provision requiring an agency to index its rules duplicates the responsibility of the rules publisher and should be removed.

2. Is there a need for filing agencies to retain copies of rules for the public? What is the practice in your state?

UT: There is a need. However, the agency should be given some flexibility (paper or electronic). Utah Code Subsection 63-46a-3(1) requires each agency to "maintain a current version of its rules" and "make it available to the public for inspection during its regular business hours."

3. Also, does your state have any provisions establishing the copy of record? For example, does your state specify which copy of a rule is the legal version? If so, where is it kept and who has possession of it? Is the copy of record electronic or paper? Please provide specific citation to your state law.

UT: Utah Code Subsection 63-46a-9.6(3) provides that "The division shall maintain the official compilation of the code and is the state-designated repository for administrative rules. If a dispute arises in which there is more than one version of a rule, the latest effective version on file with the division is considered the correct, current version." The Division maintains it copy in electronic format. Further, Utah Code 63-46a-16 requires

courts and others to take judicial notice of the administrative code. Utah's statute is incomplete in this area. For example, emergency rules are never published in the code because of their temporary nature. It is an area that we could really use guidance from the MSAPA.

4. Does your state require that the legal copies of rules be retained for a specific period of time? If so, please provide a citation.

UT: No. Records retention scheduling is a function that has been delegated to the Division of Archives. Using Archives' process, the Division of Administrative Rules has schedule rule filings submitted to the Division as permanent records. The Division of Administrative Rules retains filings in its office for two years (a period that coincides with the period of time in which a person may "contest any rule on the ground of noncompliance with the procedural requirements"). It then sends filings to the Division of Archives for microfilming. Upon the Division's review and acceptance of the microfilm, the paper copy is destroyed and the microfilm copy becomes the record copy (Agency Records Schedule, Records Series 7192). The copy maintained by an agency has a minimum retention of six years (Archives General Schedule for State Records, Item 1-42).

2. Section 201(i) [(g)] issues memo

Administrative rules editor or publisher

Should the act provide for an administrative rules editor, with the power to edit, for the publication, compilation, indexing, and public inspection of the rules or should the act provide for a publisher with limited power to edit?

[Section 201(i) [(g)], page 14, after line 11] Draft language has been added providing for a nonsubstantive power to edit.

A. Alternatives for this issue include:

1) the publisher should not be given any editing power leaving the content of the rules up to the adopting agency;

2) the publisher should be given non substantive editing power and should notify the agency of proposed editorial changes;

3) the publisher should be given broader editing power than correcting typographical or spelling errors.

B. The statutes below provide for variations of alternative number 2, with some of the statues providing great detail as to what types of edits and corrections are proper, and other statues granting the non substantive power to edit in more general terms. Several statutes use the term “manifest clerical or typographical errors”

C. The proposed language to be added to the draft [Section 201(g)] follows the Maine statue below, and recognizes that the publisher has a non substantive power to edit using general language that may be more adoptable than detailed provisions of some of the statues below.

Fifteen state statutes are listed below that provide for a power to edit rules, or address the issue of the powers of a rules publisher.

Relevant state statutes:

1. Arizona
A.R.S. § 41-1011. Publication and distribution of code and register

A. The secretary of state is responsible for the publication and distribution of the code and the register.

B. The secretary of state shall prescribe a uniform numbering system, form and style for all rules filed with and published by that office. The secretary of state shall reject rules if they are not in compliance with the prescribed numbering system, form and style.

C. The secretary of state shall prepare, arrange and correlate all rules and other text as necessary for the publication of the code and the register. The secretary of state may not alter the sense, meaning or effect of any rule but may renumber rules and parts of rules, rearrange rules, change reference numbers to agree with renumbered rules and parts of rules, substitute the proper rule number for "the preceding rule" and similar terms, delete figures if they are merely a repetition of written words, change capitalization for the purpose of uniformity and correct manifest clerical or typographical errors. With the consent of the attorney general the secretary of state may remove from the code a provision of a rule that a court of final appeal declares unconstitutional or otherwise invalid and a rule made by an agency that is abolished if the rule is not transferred to a successor agency.

2. Colorado C.R.S.A. § 24-4-103(11)(d)(II)

(II) Each rule adopted, together with the attorney general's opinion rendered in connection therewith, shall be filed pursuant to subsection (12) of this section within twenty days thereafter with the secretary of state for publication in the Colorado register. Upon written request of an agency, the secretary of state shall correct typographical and other nonsubstantive errors appearing in the rules as filed by such agency that occur after final adoption of the rules by the agency during the preparation of such rules for publication in order to conform the published rules with the adopted rules.

[thanks to candy herring for these comments] The Colorado Administrative Procedure Act provides very little guidance as to how the register and code are to be published. It does not address the editorial capabilities of the publisher. The excerpt below is the only reference made regarding the editing of rules.

24-4-103(11)(d)(II)...Upon written request of an agency, the secretary of state shall correct typographical and other nonsubstantive errors appearing in the rules as filed by such agency that occur after final adoption of the rules by the agency during the preparation of such rules for publication in order to conform the published rules with the adopted rules....

We have been operating under the assumption that the publisher should make no changes, including non-substantive ones, unless the agency requests a correction. I believe a more reasonable approach would be to allow at least the correction of typographical and other clerical errors, numbering errors, and citation errors.

3. Delaware statutes

§ 1134. Powers and duties of the Registrar in preparation and maintenance of the Register of Regulations.

(a) The Registrar in the course of compiling and maintaining the Register of Regulations shall:

(1) In writing, notify all agencies authorized to make regulations that they are to submit to the Division copies of all proposed regulations as well as all subsequent amendments, repeals, additions or new or proposed regulations as they are proposed and statements of purpose thereof;

(2) Advise agencies as to the form and style of the regulations, as well as, to the extent practicable, the classification thereof into categories of substance, procedure and organization;

(3) Have the authority to make revisions to both proposed and existing regulations that do not alter the sense, meaning or effect of such regulations, including, but not limited to:

a. Renumbering and rearranging sections or parts of sections;

b. Transferring of sections or dividing of sections so as to give to distinct subject matters a separate section number, but without changing the meaning;

c. Inserting or changing the wording of headnotes;

d. Change reference numbers to agree with renumbered regulations or sections thereof;

e. Substituting the proper section or regulation number for the terms "this regulation", "the preceding section" and the like;

f. Striking out figures where they are merely a repetition of written words and vice versa;

g. Changing capitalization for the purpose of uniformity;

h. Correcting of manifest typographical and grammatical errors; and

i. Making any other purely formal or clerical changes in keeping with the purpose of the revision.

(4) Have the authority to promulgate rules and regulations;

(5) Have authority to publish the full text or a summary of proposed, final or emergency regulations; and

(6) Publish the following month all proposed regulations received by the 15th of the month preceding.

(b) The Registrar may include in the Register of Regulations such other governmental information as the Registrar deems appropriate. (69 Del. Laws, c. 107, § 4; 70 Del. Laws, c. 186, § 1; 71 Del. Laws, c. 48, §§ 4, 12; 72 Del. Laws, c. 88, § 3.)

4. Iowa
I.C.A. § 2B.1

1. The director of the legislative services agency shall appoint the Iowa Code editor and the administrative code editor, subject to the approval of the legislative council, as provided in section 2.42. The Iowa Code editor and the administrative code editor shall serve at the pleasure of the director of the legislative services agency.

2. The Iowa Code and administrative code editors are responsible for the editing, compiling, and proofreading of the publications they prepare, as provided in this chapter. The Iowa Code editor is entitled to the temporary possession of the original enrolled Acts and resolutions as necessary to prepare them for publication.

I.C.A. § 2B.5

The administrative code editor shall:

1. Cause the Iowa administrative bulletin and the Iowa administrative code to be published as provided in chapter 17A.

2. Cause the Iowa court rules to be published and distributed, as directed by the supreme court after consultation with the legislative council. The Iowa court rules shall consist of all rules prescribed by the supreme court. The Iowa court rules and supplements to the court rules shall be priced as provided in section 2A.5.

3. Cause to be published annually a correct list of state officers and deputies; members of boards and commissions; justices of the supreme court, judges of the court of appeals, and judges of the district courts including district associate judges and judicial magistrates; and members of the general assembly. The office of the governor shall cooperate in the preparation of the list.

4. Notify the administrative rules coordinator if a rule is not in proper style or form.

5. Perform other duties as directed by the director of the legislative services agency, the legislative council, or the administrative rules review committee and as provided by law.

2B.13 EDITORIAL POWERS AND DUTIES.

1. *[Note: I deleted subsection 1, which pertains to the Iowa Code editor.]*
2. The administrative code editor in preparing the copy for an edition of the Iowa administrative code or bulletin shall not alter

the sense, meaning, or effect of any rule, but may:

a. Correct misspelled words and grammatical and clerical errors, including punctuation, and change capitalization, spelling, and punctuation for purposes of uniformity and consistency.

b. Correct references to rules or sections which are cited erroneously or have been repealed, amended, or renumbered.

c. Correct names of agencies, officers, or other entities when there appears to be no doubt as to the proper method of making the correction.

d. Transfer, divide, or combine rules or parts of rules and add or amend catchwords to rules and subrules.

e. Change words that designate one gender to reflect both genders when the provisions apply to both genders.

f. Perform any other editorial tasks required or authorized by section 17A.6.

5. Kansas

K.S.A. Section 77-435. Editing of rules and regulations by secretary of state.

In publishing the material in the Kansas administrative regulations and latest supplements thereto, the secretary of state shall not alter the sense, meaning or effect of any rule and regulation but may correct manifest orthographical, clerical or typographical errors and may edit the rules and regulations in the following manner:

(a) By inserting the correct references in lieu of any internal cross-references to session laws or other outdated statutory references or outdated references to other rules and regulations sections.

(b) By changing descriptive-subject-word headings of sections, subsections or subparts of a rule and regulation in order to briefly and clearly indicate the subject matter of such sections.

(c) Wherever a board, commission, commissioner, department or other agency or officer of the state government has been abolished by statute and the powers, duties and jurisdiction thereof transferred to some other board, commission, commissioner, department or other agency or officer now in existence, the secretary of state may edit the rules and regulations affected thereby by striking out the name of the abolished board, commission, commissioner, department or other agency or officer and inserting in lieu thereof the name of the proper board, commission, commissioner, department or other agency or officer.

(d) Where a pronoun of only masculine or only feminine gender appears a pronoun of the opposite gender may be added, or language may be changed for the same purpose, so long as the opening limitation of this section is not violated.

(e) By striking the word "that" wherever it appears as the first word of any section in the Kansas administrative regulations or the latest supplement thereto.

(f) By correcting doublets.

The secretary of state may submit to the state rules and regulations board, for the board's approval, any proposed changes made pursuant to the provisions of this section. No change made pursuant to the provisions of this section shall effect any change in the substantive meaning of the rule and regulation section, and any error made by the secretary of state in editing the rules and regulations as authorized by this section shall be construed as a clerical error only.

6. Louisiana

Louisiana Revised Statutes A R.S. 49:983 :

§983. Incorporation of Current Rules and Regulations Procedure
A. In preparing the *Louisiana Register* or the *Louisiana Administrative Code* as provided for in R.S. 49:981, the office of the state register shall not alter the sense, meaning, or effect of any rule properly promulgated under the Administrative Procedure Act, but it may:
(1) Renumber and rearrange sections or parts of sections.
(2) Transfer sections or divide sections so as to give to distinct subject matters a separate section number, but without changing the meaning.
(3) Insert or change the wording of headnotes.
(4) Change reference numbers to agree with renumbered parts, chapters, or sections.
(5) Substitute the proper section, chapter, or part number for the terms "this part", "the preceding section", and the like.
(6) Strike out figures where they are merely a repetition of written words and vice-versa.
(7) Change capitalization for the purpose of uniformity.
(8) Correct manifest typographical and grammatical errors.
(9) Make any other purely formal or clerical changes in keeping with the purpose of the revision.
B. The Office of the State Register shall notify the secretary or administrative officer charged with promulgation of the rule prior to making any proposed revision authorized by this Section. If no written disapproval of the secretary or administrative officer, or his designee, of the proposed revision is received by the office of the state register within seven days after the secretary or administrative officer receives the notice, the office of the state register shall proceed with the revision.
1.əActs 1993, No. 379,

[Thanks to Catherine Brindley for these comments and citation]
In Louisiana, we do provide editing services for proposed rules. This is done before the initial printing of the Notice for public review and comment, legislative oversight, and gubernatorial oversight. Each change is reviewed in our office on a case-by-case basis and then reviewed by the promulgating agency's liaison before processing. After public

review, we normally give the burden of making any needed changes to the promulgating agency. We choose not to change any wording after the Notice has become a Rule. We use the word "may" in Subsection A below to our advantage.

7. Maine
5 M.R.S.A. § 8056(10)
10. Minor errors. The Secretary of State may correct minor, nonsubstantive errors in spelling and format in proposed or adopted rules if the agency is notified.

8. Missouri
MO. ST Section 536.033. Sale of register and code of state regulations, cost, how established--correction of clerical errors authorized

1. Copies or subscription of the register or code shall be made available to the public by the secretary of state upon request for a reasonable charge to be established by him, said charge not to exceed the actual cost of publishing and delivery.

2. All costs of printing and mailing the Missouri Register and the code of state regulations shall be paid by the office of the secretary of state from funds appropriated for this purpose and all fees collected from the sale thereof by the secretary of state shall be deposited to general revenue.

3. The secretary of state may correct typographical or spelling errors in the publication of any rule, notice of proposed rulemaking, or order of rulemaking.

[Thanks to Waylene Hiles for these comments] Missouri has the following ability to make editing changes granted by statute: Section 536.033 RSMo provides that the secretary of state may correct typographical or spelling errors in the publication of any rule, notice of proposed rulemaking, or order of rulemaking. In practice, the editors notify the agency of any changes that are being considered or necessary and the agency responds if such change is acceptable before the change is made and published. Additionally, Missouri has a legislative approval process conducted by the Joint Committee on Administrative Rules pursuant to section 536.028 RSMo and frequently any substantive changes to the rule text are made on the basis of that process before the final order of rulemaking is filed with the secretary of state.

9. Montana

Montana follows 2-4-311, MCA

2-4-311. Publication and arrangement of ARM. (1) The secretary of state shall compile, index, arrange, rearrange, correct errors or inconsistencies without changing the meaning, intent, or effect of any rule, and publish in the appropriate format all rules filed pursuant to this chapter in the ARM. The secretary of state shall supplement, revise, and publish the ARM or any part of the ARM as often as the secretary of state considers necessary. The secretary of state may include editorial notes, cross-references, and other matter that the secretary of state considers desirable or advantageous. The secretary of state shall publish supplements to the ARM at the times and in the form that the secretary of state considers appropriate.

[thanks to jean Branscom for the statutory citation, and for the following comments: The ability to edit submitted documents, without making substantive changes, ensures a consistent, high quality product for the end user. We have a good relationship with the state agencies and they have come to value the review completed by our staff. We do make suggestions if we believe the wording is not clear for the customer, and the agencies determine whether or not a change is warranted. Otherwise, we generally work with them on changes we identify as needed to meet the style and format requirements set by our office.

10. New York
[thanks to Debbie Ritzko for these comments:
New York's APA states:

3. It shall be the duty of the secretary of state to prepare a master compilation of all such codes, rules and regulations in such form and order as he may determine. He shall not, however, change the language of any existing code, rule or regulation except a title or explanatory caption; but he shall recommend any such change as he may deem advisable to the department, board, bureau, officer, authority, commission or other agency of the state authorized to adopt such code, rule or regulation. Such master compilation shall include all codes, rules and regulations except such as relate solely to the organization or internal management of a department, board, bureau, authority, commission or other agency of the state, in effect on the first day of January, nineteen hundred forty-five, and which he shall certify as a true copy of the master compilation prepared by him.

5.....and in case of any inconsistency arising through omission or otherwise between the official compilation and such codes, rules and regulations as filed in the office of the secretary of state, the latter shall prevail.

New York's Statute does have a provision to correct non-substantial errors that are found after a rule is filed with the DOS but BEFORE a rule is effective. It is called an Amended Adoption (SAPA 203(2)(b)).

Agencies may file an Amended Adoption to effect a non-substantial revision. The Amended Adoption MUST be filed with the Department of State prior to the rule's effective date. Since a rule isn't effective until published in the Register (about two weeks after filing) most errors found by DOS staff are found after the effective date while generating a manuscript. Only two or three Amended Adoptions are filed in any given year and in those cases the Amended Adoption is used to delay an effective date.

Discrepancies are found after the agency head has formally adopted and certified that the text is adopted by the head of agency, board, etc.
Discrepancies are also found after the time frame has passed for utilization of an Amended Adoption. During my 20+ years of experience with these types of errors, I have found that a more accurate and complete historical record is generated when the rule is printed "as filed" AND notify the rule filer that the rule has a problem so that the rule filer can file a consensus rule making to correct the error.

If rule publishers are allowed to make changes to rules, then a very detailed and specific procedure, (document trail) MUST BE drafted that eliminates any questions regarding the validity of the printed code verses the rule that was filed. I have found a phone call to the agency with a subsequent notation on a filing in question isn't the best practice for a permanent historical record--especially for very high profile rules that are likely to or have been challenged.

Believe me-- we hate to print what we believe are errors in the NYCRR-- but it is difficult, time consuming and sometimes impossible to find all documentation that provides an explanation describing why a rule as published does not match a rule as filed. (especially when many years have gone by and the records with explanations and notations may no longer exist due to records retention time frames). Institutional memory starts to fade as one gets older and is eliminated when staff leave.

New York updates anywhere from 300-800 NYCRR pages every two weeks along with our weekly State Register. (Now there's another place for errors!!) The administrative burden of contacting the agencies along with follow-up to those contacts and delays to our production while waiting for a response from an agency negatively impacts NYCRR production. A new APA must contain very specific procedures and definitions for amending a rule after it is filed...perhaps an additional rule making form...

11. North Carolina
NC Stat.
§ 150B-21.20. Codifier's authority to revise form of rules.
(a) Authority. -- After consulting with the agency that adopted the rule, the Codifier of Rules may revise the form of a rule submitted for inclusion in the North Carolina Administrative Code within 10 business days after the rule is submitted to do one or more of the following:

(1) Rearrange the order of the rule in the Code or the order of the subsections, subdivisions, or other subparts of the rule.
(2) Provide a catch line or heading for the rule or revise the catch line or heading of the rule.
(3) Reletter or renumber the rule or the subparts of the rule in accordance with a uniform system.
(4) Rearrange definitions and lists.
(5) Make other changes in arrangement or in form that do not change the substance of the rule and are necessary or desirable for a clear and orderly arrangement of the rule.

(6) Omit from the published rule a map, a diagram, an illustration, a chart, or other graphic material, if the Codifier of Rules determines that the Office of Administrative Hearings does not have the capability to publish the material or that publication of the material is not practicable. When the Codifier of Rules omits graphic material from the published rule, the Codifier must insert a reference to the omitted material and information on how to obtain a copy of the omitted material.

(b) Effect. -- Revision of a rule by the Codifier of Rules under this section does not affect the effective date of the rule or require the agency to readopt or resubmit the rule. When the Codifier of Rules revises the form of a rule, the Codifier of Rules must send the agency that adopted the rule a copy of the revised rule. The revised rule is the official rule, unless the rule was revised under subdivision (a)(6) of this section to omit graphic material. When a rule is revised under that subdivision, the official rule is the published text of the rule plus the graphic material that was not published.

[Thanks to Molly Masich for these comments] Above is the statutory authority given to the Codifier of Rules in North Carolina. The majority of rules pass through the NC Rules Review Commission. During the review, the agencies make changes in response to technical changes requested of the staff attorneys and in response to RRC objections. Technical changes can be to correct spelling, correct format, clarify text, etc. By the time the Codifier receives the approved rule, the rule text is in good shape – only small format changes may be necessary. I will agree with Jane Chaffin, the Codifier of Rules needs a certain amount of editing authority to exercise quality control over the published administrative code.

12. Oregon statutes
ORS Section 183.360

[thanks to Jill Yamaka for these comments and citations]. In Oregon we have the authority to make non-substantive changes. This is in our APA - ORS 183.360 "... the Secretary of State shall not alter the sense, meaning, effect or substance of any rule, but may renumber sections and parts of sections of the rules, change the wording of headnotes, rearrange sections, change reference numbers to agree with renumbered chapters, sections of other parts, substitute the proper subsection, section or chapter or other division numbers, change capitalization for the purpose of uniformity, and correct manifest clerical or typographical errors."

We're used to working within these parameters, and think this is just about the right amount of authority to edit text.

13. Rhode Island

§ 42-35-5 Compilation and publication of rules. – (a) The secretary of state shall be the codifier of the rules of state agencies. The secretary of state may assign numbers to any rule in order to develop and maintain a comprehensive system of codification. The number shall be the official administrative code number of the rule. Any number so assigned shall be published in any publication of the Rhode Island administrative code. Rules of the Rhode Island administrative code shall be cited and referred to by their official numbers.

(b) The secretary of state, on or before July 1, 1994, shall publish the full text of all rules promulgated by agencies pursuant to this chapter. The secretary of state shall publish by reference all orders of state agencies pursuant to this chapter except orders of the human rights commission, including in the publication by reference the address and phone number where the orders may be obtained by the public.

(c) In accordance with the provisions of this chapter, the secretary of state will publish the Rhode Island administrative code which code shall:

(1) Contain a compilation of the full text of each rule and a reference to each order;

(2) Be divided into volumes to permit the sale of separate volumes;

(3) Contain the full text of each rule adopted after its initial publication and a citation by reference to each order adopted after its publication in supplements to the code published not less than monthly and compiled for insertion in the code not less than annually;

(4) Contain an index of the rules and references to rules that are included in the code and each supplement using terms easily understood by the general public;

(5) Be published in loose-leaf form and in any other form the secretary of state deems appropriate following, to the extent possible, the subject matter arrangement of the Rhode Island general laws;

(6) Be renumbered according to the numbering system devised by the secretary of state.

(7) The secretary of state is not obligated to publish any rule or regulation which has become void.

(d) The secretary of state may approve as acceptable a commercial publication of the code which conforms to all of the provisions of this section. If the secretary of state does not approve of a commercial publication of the code, the secretary of state shall prepare

and publish the code, or contract with any person under this section to prepare and publish the code. Any code published by the secretary of state or by any person under a contract let under this section shall include all of the requirements of this section. In addition, the secretary of state shall furnish any volume or issue of the code or supplement to any person who requests the material upon payment of a charge established by the secretary of state, not to exceed the cost of publication and handling.

(2) Upon the request of the secretary of state, the director of administration shall advertise and accept competitive bids and let a contract for the compilation and printing of the Rhode Island administrative code and supplements between the secretary of state and the person able to perform the contract at the lowest cost.

[Comments from Karen Wall]
I don't think publishers should be allowed to edit rule text at all because they are not the authors. It would invite the possibility that substantive text may inadvertently be interpreted as non-substantive.

In Rhode Island, the Secretary of State is the official codifier of the rules; however, codification was contracted out to Weil Publishing. The only allowance to the publisher is the ability to assign administrative code numbers and maintain the codification system.

14. South Dakota statutes

1-26A-1. Administrative Rules published--Authority of Legislative Research Council-- Contents--Publication of Register--Notice of hearings on rules. The Legislative Research Council shall publish from time to time, the Administrative Rules of South Dakota, which shall contain permanent rules of general application promulgated under the provisions of chapter 1-26. In preparing the text of the rules for publication, the Legislative Research Council shall make such changes as may be necessary to correct apparent errors, to correlate and integrate all the rules, to harmonize, to assign new title and other designations, to eliminate or clarify obviously obsolete or ambiguous rules and rules declared invalid by the South Dakota Supreme Court or the United States Supreme Court, and to substitute terms or phraseology, and names of boards, commissions, and agencies, wherever the Legislature has expressly or by implication indicated an intention to do so. The publication may also contain information concerning executive orders, agreements made pursuant to chapter 1-24, agreements and changes made pursuant to chapter 1-32, and court rules, of permanent and general application which are not otherwise generally available to the public. The Legislative Research Council shall also publish at periodic intervals, the South Dakota Register which shall contain notices of hearings on proposed rules at least ten days prior to hearing, notices of rules filed in the secretary of state's office and other information relating to agency and judicial rules and executive actions.

The Legislative Research Council shall prepare the manuscripts for such publications and supervise their publication.

[Thanks to Jill Wellhouse for these comments and citations].In South Dakota, our rules "publisher" is not a private entity but is the same agency (Legislative Research Council) that reviews and approves all rules before they become final. LRC does have authority under South Dakota law to correct apparent errors, assign new numbers, ect. They work with the agency when doing anything like this. I like this system. If I find an error, LRC is very willing to work with me to make the corrections without having to take the rule all the way back through the APA process which is costly and time consuming. For example: some of our rules contain web addresses. We refer people to these sites if they are looking for more information on a particular subject. Many of these are federal government sites. We recently discovered that several of these sites changed their web address. After consulting with LRC, they agreed to simply update their rules database to reflect the new web addresses. When they do these types of corrections, they always insert a "NOTE" that states that they have made the correction and specifies the date the correction was made. I would be opposed to allowing a publisher to make substantive changes.

15. Texas
Government Code Section 2002.017

[thanks to Dan Proctor for these comments and citations]: Non-substantive changes with consent of the filing agency. The Texas APA says The Secretary of State may adopt rules to "ensure effective administration" of rule publication, and specifically mentions "paper size and the format of documents". It says, "the secretary of state may refuse to accept for filing and publication a document that does not substantially conform to the rules." (Texas Government Code, 2002.017)

The answer to this question may differ where the publisher also has a "reviser" role. The Secretary of State here has no lawyer on staff to advise agencies regarding their rule filings. The Texas Register only enforces format and filing requirements. In practice we probably could get away with making many non-substantive edits, but we resist the temptation. We frequently make needed editorial changes after asking permission. If permission is denied, of course, we have the option to reject the filing.

16. Virginia statutes

The Virginia Code Commission has authority to make certain changes and corrections to the Virginia Administrative Code as noted in Section 30-150 of the Code of Virginia: http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+30-150. This language mirrors the Commission's authority to make changes and corrections to Virginia's statutory code.

[thanks to Jane Chaffin for these comments and citations]. A certain amount of editing authority is necessary to exercise quality control over the published administrative code. Changes are generally made in close consultation with the agencies. In Virginia, the regulatory process is quite lengthy and would be lengthened even more if we rejected regulations with errors so that the agency could correct and resubmit. In addition to making "minor, inconsequential changes," our office ensures the most up--to-date version

of an agency's regulation is amended in the promulgation process. For some reason, a common problem here is that many agencies don't seem to know what version of their regulations are current and sometimes gear amendments to an older version of a regulation.

17. Wisconsin
WI ST App Section 13.93(2m)(b)1.

The revisor of statutes bureau may do any of the following:

13.93(2m)(b)1. 1. Renumber any provision of the Wisconsin administrative code and, if it does so, shall change cross-references to agree with the renumbered provision.
13.93(2m)(b)2.
2. Change the title of any rule.
13.93(2m)(b)3.
3. Insert the proper cross-reference wherever "preceding section" or a similar term is used in the code.
13.93(2m)(b)4.
4. Delete surplus words such as "of this rule", "of this code", "of the statutes", "hereof" and "immediately above".
13.93(2m)(b)5.
5. Delete any masculine or feminine pronoun or adjective, except where the rule clearly applies to only one sex, and, if necessary, replace it with sex-neutral terminology.
13.93(2m)(b)6.
6. Change any incorrect agency name or address.
13.93(2m)(b)7.
7. Change any incorrect cross-reference to a federal or state statute, rule or regulation.
13.93(2m)(b)8.
8. Delete "hereby" when it is used in connection with a verb such as "consents", "grants", "gives" or "declares".
13.93(2m)(b)9.
9. Substitute "deems" for "may deem".
13.93(2m)(b)10.
10. Substitute "may" for a phrase such as "is hereby authorized to".
13.93(2m)(b)11.
11. Substitute "this state" for "the state of Wisconsin".
13.93(2m)(b)12.
12. Change any incorrect form of a word to the correct form.
13.93(2m)(b)13.
13. Insert the U.S. code citation for the citation to a federal act.
13.93(2m)(b)14.
14. If the application or effect of a rule, by its terms, depends on the time when the rule takes effect, substitute the actual effective date for a phrase which means that date, such as "when this rule takes effect", "on the effective date of this rule" or "after the effective date of this rule".
13.93(2m)(b)15.

15. Delete obsolete rules promulgated by an agency that no longer exists.
13.93(2m)(b)16.
16. Delete severability provisions.
[Thanks to Gary Poulson for the statutory citation.

3. Section 201(j) Guidance documents issues memo

ACR listerve questions

Here is question #3. (ok, I know it's a group of questions)

Should the MSAPA use the term "Guidance Documents"?
If so, how should they be defined?
What is their purpose?
What legal weight do they have?
How do they differ from rules?
Are they filed or published?

Responses:

1. Montana

Montana law defines that "Substantive rules" are either:

(a) legislative rules, which if adopted in accordance with this chapter and under expressly delegated authority to promulgate rules to implement a statute have the force of law and when not so adopted are invalid; or

(b) adjective or interpretive rules, which may be adopted in accordance with this chapter and under express or implied authority to codify an interpretation of a statute. The interpretation lacks the force of law.

Further, Montana statute lays out:
2-4-308. Adjective or interpretive rule -- statement of implied authority and legal effect.
(1) Each adjective or interpretive rule or portion of an adjective or interpretive rule to be adopted under implied rulemaking authority must contain a statement in the historical notations of the rule that the rule is advisory only but may be a correct interpretation of the law. The statement must be placed in the ARM when the rule in question is scheduled for reprinting.

(2) The appropriate administrative rule review committee may file with the secretary of state, for publication with any rule or portion of a rule that it considers to be adjective or interpretive, a statement indicating that it is the opinion of the appropriate administrative rule review committee that the rule or portion of a rule is adjective or interpretive and therefore advisory only. If the committee requests the statement to be published for an adopted rule not scheduled for reprinting in the ARM, the cost of publishing the statement in the ARM must be paid by the committee.

From other responses to this question, guidance documents in some instances may include the interpretation of a statute. For Montana, those would be interpretive rules and they are filed and published in the Register. They are advisory only and do not have the force of law. Per the compiler of the Montana statute, the provisions of the above section are generally based on section 3-109, Model State Administrative Procedure Act (1981).

Going with the "independent section" approach, I believe it would be beneficial to attempt to define guidance documents.
Jean Branscum

2. New York

Following is New York's Statute regarding Guidance Documents.
Section 201 Definitions:

14. "Guidance document" means any guideline, memorandum or similar document prepared by an agency that provides general information or guidance to assist regulated parties in complying with any statute, rule or other legal requirement, but shall not include documents that concern only the internal management of the agency or declaratory rulings issued pursuant to section two hundred four of this chapter.

§ 202-e. Guidance documents; availability to public. 1. Not less than once each year, every agency shall submit to the secretary of state for publication in the state register a list of all guidance documents on which the agency currently relies, and provide information on where and how regulated parties and members of the public may inspect and obtain copies of any such document; provided, however, that the department of environmental conservation shall be exempt from the requirements of this subdivision. Unless otherwise provided for by law, an agency may make such documents available as provided in the freedom of information law, and may charge fees pursuant to such law for copies of any such document.

2. The secretary of state may exempt an agency from compliance with the requirements of subdivision one of this section upon a determination that the agency has published on its website the full text of all guidance documents on which it currently relies. The secretary of state shall publish a notice of such determination identifying the website in the state register.

3. Nothing in this section shall be construed as authorizing or requiring the publication of any guidance document where such publication is prohibited or limited by law.

4. Not less than once every five years, every agency shall conduct a process for reviewing and updating all guidance documents on which it currently relies. In conducting such process, the agency shall obtain feedback from regulated parties and members of the public who are directly or indirectly affected by the guidelines.

5. The secretary of state may adopt regulations to implement the provisions of this section.

[Thanks to Debbie Ritzko for this detailed response.]

3. Virginia

The Virginia Administrative Law Advisory Committee to the Virginia Code Commission studied the issue of guidance documents in 1996. This study (http://legis.state.va.us/codecomm/valac/studies/gdreport.htm) resulted in legislation defining "guidance document" and requiring a listing of such documents to be filed and published in the Virginia Register fo Regulations annually. The listing is also posted on the Virginia Register website at http://legis.state.va.us/codecomm/GUIDANCE/guidedoc.htm.

Sections 2.2-4008 (http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+2.2-4008) and 2.2-4103 (http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+2.2-4103) of the Code of Virginia require annual publication in the Virginia Register of guidance document lists from state agencies covered by the Administrative Process Act and the Virginia Register Act. A guidance document is defined as "…any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations..." (see Va. Code sections 2.2-4001 (http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+2.2-4001) and 2.2-4101 (http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+2.2-4101)). Agencies are required to maintain a complete, current list of all guidance documents and make the full text of such documents available to the public.

According to the 1996 report, guidance documents are interpretations of rules, regulations and statutes. It further states that "Although these documents do not carry the force of law, guidance materials may indeed affect the public."

[Thanks to Jane D. Chaffin for this detailed response]

Publication requirements for state agency interpretive rules and policy statements

States that require publishing interpretive and policy statements:

1. Alabama (Ala.Code 1975 § 41-22-4)
2. Arkansas (A.C.A. § 25-15-203)
3. Connecticut (C.G.S.A. § 4-167)
4. Georgia (Ga. Code Ann., § 50-13-3)
5. Kansas (KS ST § 16a-6-403)
6. Kentucky (KRS § 346.040)
7. Louisiana (LSA-R.S. 49:952)
8. Maine (9-A M.R.S.A. § 6-104)
9. Montana (MT ST 2-4-103)

10. Ohio (R.C. § 1345.05) (R.C. § 1345.05)
11. Oklahoma (75 Okl.St.Ann. § 302)
12. Rhode Island (RI ST § 42-35-2)
13. South Carolina (Code 1976 § 37-6-403)
14. South Dakota (SDCL § 1-26-2)
15. Texas (V.T.C.A., Government Code § 2001.004)
16. Utah (U.C.A. 1953 § 13-11-9)
17. Washington (West's RCWA 34.05.220)
18. Wyoming (WY ST § 16-3-102)

19. Colorado = shall be made public upon request (C.R.S.A. § 25-6.5-102)
20. Idaho = The administrator shall make all rules, forms, interpretative opinions, and orders available to the public. (I.C. § 30-14-606) (ID ST § 30-14-606)
21. Iowa = The administrator shall make all rules, forms, interpretative opinions, and orders available to the public. (I.C.A. § 502.606)
22. Missouri = The commissioner shall make all rules, forms, interpretative opinions, and orders available to the public. (V.A.M.S. 409.6-606)
23. Vermont = The commissioner shall make all rules, forms, interpretative opinions, and orders available to the public. (VT ST T. 9 § 5606)

4. Section 309(b) issues memo [Fast Track Rules]

Direct Final Rulemaking

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 Ron Levin and has been published [Ronald M. Levin, “Direct Final Rulemaking” 64 George Washington Law Review 1 (1995)]. Direct final rulemaking works as described below (Comments by Larry Craddock) If this approach were adopted in place of the current language of Section 309(b) [fast track rule], the concurrence of the governor, attorney general or legislative committees would not be required.

Comments by Larry Craddock
While researching another issue, I came across a discussion of "direct final rulemaking" which is an idea that makes a good deal of sense to me. It is apparently catching hold in federal rulemaking. It consists of an agency publishing in final form with a delayed effective date, a rule which the agency believes is uncontroversial. If the agency receives adverse comment, or comment suggesting a need for further study or revision, the rule is pulled down before it becomes effective. The agency then follows standard rule making procedures. However, if there are no adverse comments, or comments suggesting need for further study or revision, the rule goes into effect without further agency action. I think this is an idea worthy of inclusion in the proposed revised model state APA. It

would cut out the unnecessary paperwork and expense agencies now have to go through on adoption of even the most uncontroversial rules and would encourage agencies to use rulemaking more often than they do now. The primary spokesperson advocating this procedure seems to be Professor Ronald Levin of Washington University School of Law. Discussions of direct final rulemaking by Professor Levin appear at http://www.american.edu/rulemaking/panel1_05.pdf and http://papers.ssrn.com/sol3/papers.cfm?abstract_id=164990.

5. Section 310(d) issues memo

Under federal law, legislative rules that are properly adopted under the federal administrative procedures act [5 U.S.C. Section 553] and that contain interpretations of the agency governing statute may be given strong deference under Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (reasonable agency interpretations of ambiguous statutory terms given deference by reviewing court). Agency interpretations that are not formally adopted in legislative rules including informal agency interpretations like those contained in guidance documents are at most entitled to weak deference (based on the power to persuade) under federal administrative law decisions. Skidmore v. Swift & Co., 323 U.S. 134 (1941) [rulings of administrator under fair labor standards act], Christenson v. Harris County (2000) 529 U.S. 576 [agency opinion letters] , U.S. v. Mead Corp., (2001) 533 U.S. 218 [classification ruling letters issued by customs officials] or to no deference. State administrative law decisions vary significantly but some decisions adopt strong deference approaches like the Chevron doctrine [Ramirez v. Yosemite Water Co (1999) 20 Cal. 4th 785, 800 (formally adopted agency regulation], weak deference approaches [Connecticut State Medical Society v. Connecticut Board of Examiners in Podiatry, 546 A.2d 830 (Conn. 1988)] including applying weak deference to opinion and advice letters [Bell v. Farmers Insurance Exchange (2004) 115 Cal. App. 4th 715], or no deference State ex rel. Celebrezze v. National Lime & Stone Co., 627 N.E. 2d 538 (Ohio 1994). The strong deference decisions in state administrative law are based on a rationale similar to the Chevron approach, in that strong deference is given to agency interpretations that are formally adopted in legislative regulations, or in more formal adjudicatory decisions. Less formal agency interpretations, that may be considered to more casually adopted, or are issued by agencies or their staff that do not have delegated authority to interpret the agency governing statute are entitled to weak deference, or to no deference.

6. Section 507(d) issues memo

Section 507(d) issues memo

C. Section 507(d). Should the MSAPA include a petition for rulemaking requirement as a precondition (exhaustion of administrative remedies) for judicial review of rules when the issue raised on judicial review was not raised or considered by the agency in the rulemaking proceeding? (issue exhaustion in rulemaking)

1. California Case law establishes issue exhaustion requirements for judicial review of adjudicative hearings and for judicial review of final environmental impact reports under the California Environmental Quality Act (CEQA). See the two recent case summaries below as to FEIR exhaustion requirements:

Citizens for Open government v. City of Lodi (2006) 144 Cal. App. 4th 865, 876-878, 50 Cal. Rptr.3d 636. In this case, the California Court of Appeal held that a citizens group that challenged a city's certification of a final environmental impact report by petitioning for a writ of mandate satisfied exhaustion of administrative remedies requirements by having group leaders or legal counsel attend, participate, and object to the approval of the environmental impact report at all planning commission and city council meetings that discussed the development project for which the environmental review was conducted. The citizens group was not required to file an appeal of the planning commission recommendation to trigger city council review of the planning commission decision.

Western Placer Citizens for an Agricultural and Rural Environment v. County of Placer (2006) 144 Cal. App. 4th 890, 897-899, 50 Cal. Rptr.3d 799. In this case, an environmental group that challenged a county's certification of a final environmental impact report (FEIR) and approval of a mining project was held to have exhausted administrative remedies by sufficiently raising issues about the inadequacy of the FEIR at the county decision making level, as well as at the superior court level, and the group was not required to have raised before the county exactly the same issue as the superior court based its decision on to overturn the certification by the county. The group was not required to b as specific in raising issues from an administrative hearing.

2. There is no requirement to petition the agency to adopt or repeal a rule before seeking judicial review of rulemaking under California law.

California Government Code Section 11350(a) provides:

(a) Any interested person may obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure. The right to judicial determination shall not be affected by the failure either to petition or to seek reconsideration of a petition filed pursuant to Section 11340.7 before the agency promulgating the regulation or order of repeal. The regulation or order of repeal may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order of repeal, upon the ground that the facts recited in the finding of emergency prepared pursuant to subdivision (b) of Section 11346.1 do not constitute an emergency within the provisions of Section 11346.1.

3. Petition to adopt rules
California Government Code § 11340.7. Petition for **adoption, amendment or repeal; relief; reconsideration; decision**

(a) Upon receipt of a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346), a state agency shall notify the petitioner in writing of the receipt and shall within 30 days deny the petition indicating why the agency has reached its decision on the merits of the petition in writing or schedule the matter for public hearing in accordance with the notice and hearing requirements of that article.
(b) A state agency may grant or deny the petition in part, and may grant any other relief or take any other action as it may determine to be warranted by the petition and shall notify the petitioner in writing of this action.

(c) Any interested person may request a reconsideration of any part or all of a decision of any agency on any petition submitted. The request shall be submitted in accordance with Section 11340.6 and include the reason or reasons why an agency should reconsider its previous decision no later than 60 days after the date of the decision involved. The agency's reconsideration of any matter relating to a petition shall be subject to subdivision (a).
(d) Any decision of a state agency denying in whole or in part or granting in whole or in part a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346) shall be in writing and shall be transmitted to the Office of Administrative Law for publication in the California Regulatory Notice Register at the earliest practicable date. The decision shall identify the agency, the party submitting the petition, the provisions of the California Code of Regulations requested to be affected, reference to authority to take the action requested, the reasons supporting the agency determination, an agency contact person, and the right of interested persons to obtain a copy of the petition from the agency.

4. Challengers of California agency regulations who seek judicial review under California Government Code Section 11350(a) are not required to exhaust administrative remedies by filing a petition with the agency to commence a rulemaking proceeding. Hillery v. Rushen 720 F.2d 1132 (9th. Cir., 1983); Motion Picture Studio Teachers & Welfare Workers v. Millan 51 Cal.App.4th 1190, 59 Cal.Rptr.2d 608 (Cal.App. 2 Dist.,1996).

7. Section 601 Issues memo

Section 601 issues memo

I. [Section 601] Does Section 601 include the necessary provisions to establish an office of administrative hearings [central panel] office? Should anything be added or taken away from these provisions?

A. California Government Code provisions related to the California Office of Administrative Hearings

1. California Government Code Section 11370.1
§ 11370.1. Director defined

As used in the Administrative Procedure Act "director" means the executive officer of the Office of Administrative Hearings.

2. California Government Code Section 11370.2
§ 11370.2. Office of administrative hearings; existence; director

(a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as administrative law judges, and shall be appointed by the Governor subject to the confirmation of the Senate.

(c) Any and all references in any law to the Office of Administrative Procedure shall be deemed to be the Office of Administrative Hearings.

3. California Government Code Section 11370.3
§ 11370.3. Administrative law judges and other personnel; appointment; assignment

The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges qualified under Section 11502 which is sufficient to fill the needs of the various state agencies. The director shall also appoint any other technical and clerical personnel as may be required to perform the duties of the office. The director shall assign an administrative law judge for any proceeding arising under Chapter 5 (commencing with Section 11500) and, upon request from any agency, may assign an administrative law judge to conduct other administrative proceedings not arising under that chapter and shall assign hearing reporters as required. Any administrative law judge or other employee so assigned shall be deemed an employee of the office and not of the agency to which he or she is assigned. When not engaged in hearing cases, administrative law judges may be assigned by the director to perform other duties vested in or required of the office, including those provided for in Section 11370.5.

4. California Government Code Section 11370.4
§ 11370.4. Costs; determination and collection

The total cost to the state of maintaining and operating the Office of Administrative Hearings shall be determined by, and collected by the Department of General Services in advance or upon such other basis as it may determine from the state or other public agencies for which services are provided by the office.

5. California Government Code Section 11370.5
§ 11370.5. Administrative adjudication; study; recommendations

(a) The office is authorized and directed to study the subject of administrative adjudication in all its aspects; to submit its suggestions to the various agencies in the interests of fairness, uniformity and the expedition of business; and to report its recommendations to the Governor and Legislature . All departments, agencies, officers, and employees of the state shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control. Nothing in this section authorizes an agency to provide access to records required by statute to be kept confidential.

(b) The office may adopt rules and regulations to carry out the functions and duties of the office under the Administrative Procedure Act. The regulations are subject to Chapter 3.5 (commencing with Section 11340).

6. California Government Code Section 11502
§ 11502. Administrative law judges; duties; appointment; qualifications

(a) All hearings of state agencies required to be conducted under this chapter shall be conducted by administrative law judges on the staff of the Office of Administrative Hearings. This subdivision applies to a hearing required to be conducted under this chapter that is conducted under the informal hearing or emergency decision procedure provided in Chapter 4.5 (commencing with Section 11400).

(b) The Director of the Office of Administrative Hearings has power to appoint a staff of administrative law judges for the office as provided in Section 11370.3. Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding his or her appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Other states with central panels and relevant statutes

Article 6 Issue
Office of Administrative Hearings and ALJs
State Statutes

Arizona
Ariz. Rev. Stat. Ann. § 41-1092.01 (establishing an office of administrative hearings)

Colorado
Colo. Rev. Stat. § 24-30-1001 (2001) (creating a division of administrative hearings in department of personnel)

District of Columbia
DC ST § 2-1831.02 (establishing an office of administrative hearings)

Florida

Fla. Stat. Ann. § 120.65 (creating Division of Administrative Hearings within Department of Management)

Georgia
Ga. Code Ann. § 50-13-40 (1998) (creating an independent administrative hearings agency within the executive branch)

Iowa
Iowa Code Ann. § 10A.801 (creating Division of Administrative Hearings)

Kansas
Kan. Stat. Ann. § 75-37,121 (creating office of administrative hearings)

Louisiana
La. Rev. Stat. Ann. § 49:991-997 (creating division of administrative law)

Maryland
Md. Code Ann., State Gov't § 9-1602 (1999) (establishing office of administrative hearings as independent unit of executive branch)

Massachusetts
Mass. Gen. Laws ch. 7, § 4H (1998) (creating a division of administrative appeals)

Michigan
Mich. Comp. Laws § 445.2001 (2001) (merging Michigan Departments of Commerce and Labor to create Department of Consumer and Industry Services, and creating a central panel of ALJs by executive order)

Minnesota
Minn. Stat. Ann. § 14.48 (creating administrative hearings office headed by chief ALJ appointed by governor)

Missouri
Mo. Ann. Stat. §§ 621.015-.205 (creating an administrative hearing commission)

New Jersey
N.J. Stat. Ann. §§ 52:14F-1-:14F-13 (establishing Office of Administrative Law and its duties)

North Carolina
N.C. Gen. Stat. § 7A-750 (2001) (creating an independent, quasi-judicial office of administrative hearings)

North Dakota
N.D. Cent. Code § 54-57-01 (2001) (establishing and defining office of administrative hearings)

Oregon
Or. Rev. Stat. § 183.605 (2003) (establishing hearing officer panel)

South Carolina
S.C. Code Ann. § 1-23-500 (creating ALJ division)

South Dakota
S.D. Codified Laws § 1-26D-1 (establishing an Office of Hearing Examiners)

Tennessee
Tenn. Code. Ann. § 4-5-321(a)(2) (1998) (creating the administrative procedures division)

Texas
Tex. Gov't Code Ann. § 2003.021 (defining state office of administrative hearings)

Virginia
Va. Code Ann. § 2.2- 4024 (establishing that Executive Secretary of Supreme Court maintains list of hearing officers to be appointed for formal hearings)

Washington
Wash. Rev. Code Ann. § 34.12.010 (creating an office of administrative hearings)

Wisconsin
Wis. Stat. Ann. § 227.43 (providing duties of administrator of division of hearings)

Wyoming
Wyo. Stat. Ann. § 9-2- 2201 (creating office of administrative hearings as a separate agency

8. Article 7 rules review memo

Article 7 Rules Review Issues memo
Comments are from the ACR listserv

1. Delaware

Delaware does not have a formal rules review function. There are two informal methods that rules can be reviewed. The Sunset committee, which reviews several executive branch agencies each year includes an informal rules review in the process. There is also a method of rules review that has never been used, at least as long as I have been here, by which the chair of the committee that oversees an agency can review a rule when the General Assembly is not in session.

Jeff Hague, Registrar of Regulations
Legislative Council, State of Delaware

[Thanks to Dennis Stevenson for these responses]
2. Idaho: Legislative Review

DOES YOUR STATE HAVE A FORMAL (I.E., STATUTORY OR CONSTITUTIONAL) RULES REVIEW FUNCTION?

Yes, the formal review process is outlined in statute (IAPA). A cursory review by the germane joint subcommittees is done when proposed rules are filed with my office and the legislative services office. At the beginning of each legislative session the individual germane committees of the legislature review all rules that have been submitted for final approval.

IS IT AN EXECUTIVE, LEGISLATIVE, JUDICIAL, OR COMBINED FUNCTION OR AGENCY?
Formally, this function is legislative. In practice most agencies perform some sort of internal review and in some cases the governor's office does a review but none of these reviews are considered formal nor are they addressed in statute.

IS IT BEFORE OR AFTER THE FINAL RULE IS ADOPTED BY THE RULEMAKING AGENCY?

It is after the agency's formal adoption of a rule. Rules adopted by the agency are called "pending rules" because they are pending legislative review for final approval. In Idaho a rule cannot become final and effective until it has been submitted to the legislature for review. Rules become final on the adjournment date of the legislative session unless they are acted on by concurrent resolution or some other effective date has been approved.

DOES IT – THE RULES REVIEW – APPLY TO A REVIEW OF:
PERMANENT PROPOSED RULES -- Yes
TEMPORARY PROPOSED RULES -- Yes
EMERGENCY PROPOSED RULES -- Idaho has no emergency rules; they are temporary rules.

DOES YOUR REVIEWING ENTITY (INCLUDING THE CODE PUBLISHER) HAVE THE AUTHORITY TO MAKE OR REQUIRE:
TECHNICAL, STYLISTIC, GRAMMATICAL, NON-SUBSTANTIVE CHANGES --
SUBSTANTIVE CHANGES TO THE CONTENT OF THE RULES --

Although the Idaho APA allows the legislature to "approve, reject, amend or modify" agency rules by concurrent resolution, they were advised to only approve and reject (in whole or in part) rules that are before them for review to avoid a separation of powers challenge. As the Code publisher I can make most of the changes mentioned here with the exception of substantive changes to the content.

DOES YOUR REVIEWING ENTITY HAVE THE AUTHORITY TO PREVENT A RULE FROM TAKING EFFECT?
Yes. The legislature can reject a rule before it takes effect.

PLEASE GIVE ANY STATUTORY OR ADMINISTRATIVE CODE REFERENCES TO YOUR:
APA: Title 67, Chapter 52, Idaho code

OTHER GENERIC RULEMAKING STATUTES:
RULEMAKING ADMINISTRATIVE CODES:

ANYTHING ELSE YOU WANT TO ADD:

[Thanks to Kathleen West for these responses]

3. Iowa: legislative Review

Responses from Iowa:

DOES YOUR STATE HAVE A FORMAL (I.E., STATUTORY OR CONSTITUTIONAL) RULES REVIEW FUNCTION?
Yes (Administrative Rules Review Committee) see Iowa Code section 17A.8.

IS IT AN EXECUTIVE, LEGISLATIVE, JUDICIAL, OR COMBINED FUNCTION OR AGENCY?
Legislative: 5 senators and 5 representatives

IS IT BEFORE OR AFTER THE FINAL RULE IS ADOPTED BY THE RULEMAKING AGENCY?
The Administrative Rules Review Committee reviews both proposed and adopted rules and may schedule a special review at any time.

DOES IT – THE RULES REVIEW – APPLY TO A REVIEW OF:
PERMANENT PROPOSED RULES --
TEMPORARY PROPOSED RULES --
EMERGENCY PROPOSED RULES --
There are no temporary rules in Iowa. The Administrative Rules Review Committee reviews all proposed and adopted rules.

DOES YOUR REVIEWING ENTITY (INCLUDING THE CODE PUBLISHER) HAVE THE AUTHORITY TO MAKE OR REQUIRE:
TECHNICAL, STYLISTIC, GRAMMATICAL, NON-SUBSTANTIVE CHANGES --
SUBSTANTIVE CHANGES TO THE CONTENT OF THE RULES --
The Administrative Code Editor has the authority, as set out in Iowa Code section 2B.13(2).
The Administrative Rules Review Committee cannot change a rule.

DOES YOUR REVIEWING ENTITY HAVE THE AUTHORITY TO PREVENT A RULE FROM TAKING EFFECT?
Yes. The Administrative Rules review Committee can delay the effective date for 70 days or until the end of the next General Assembly.
The General Assembly can nullify a rule.

PLEASE GIVE ANY STATUTORY OR ADMINISTRATIVE CODE REFERENCES TO YOUR:

APA: Iowa Code chapter 17A

OTHER GENERIC RULEMAKING STATUTES: Iowa Code chapter 2B (legal publications)

RULEMAKING ADMINISTRATIVE CODES:

[Thanks to Peggy Coe for these responses]

4. Oklahoma: Executive and Legislative Review

DOES YOUR STATE HAVE A FORMAL (I.E., STATUTORY OR CONSTITUTIONAL) RULES REVIEW FUNCTION?
Yes

IS IT AN EXECUTIVE, LEGISLATIVE, JUDICIAL, OR COMBINED FUNCTION OR AGENCY?
Executive (Governor) and Legislative (House and Senate) - Policy, authority, legal review Office of Administrative Rules (Secretary of State) --- Format, numbering review

IS IT BEFORE OR AFTER THE FINAL RULE IS ADOPTED BY THE RULEMAKING AGENCY?
Before

DOES IT – THE RULES REVIEW – APPLY TO A REVIEW OF:

PERMANENT PROPOSED RULES -- Yes

TEMPORARY PROPOSED RULES -- n/a

EMERGENCY PROPOSED RULES -- Yes (Governor and OAR/SOS only)

DOES YOUR REVIEWING ENTITY (INCLUDING THE CODE PUBLISHER) HAVE THE AUTHORITY TO MAKE OR REQUIRE:

TECHNICAL, STYLISTIC, GRAMMATICAL, NON-SUBSTANTIVE CHANGES -- Spelling only

SUBSTANTIVE CHANGES TO THE CONTENT OF THE RULES -- No

DOES YOUR REVIEWING ENTITY HAVE THE AUTHORITY TO PREVENT A RULE FROM TAKING EFFECT?
Yes . . . Proposed permanent rules must be approved by both the Governor and Legislature, or by joint resolution of the Legislature. Proposed emergency rules must be approved by the Governor. In addition, the SOS's Office of Administrative Rules has the authority to reject any Register filing that does not substantially comply with statutes or the SOS's rules.
PLEASE GIVE ANY STATUTORY OR ADMINISTRATIVE CODE REFERENCES TO YOUR:

APA: 75 O.S., Sections 250 et seq. (secifically, Sections 303.1 and 308) . . . http://www.lsb.state.ok.us/

OTHER GENERIC RULEMAKING STATUTES: n/a
RULEMAKING ADMINISTRATIVE CODES: Oklahoma Adminisrative Code (specifically OAC 655:10).

[thanks to Jill Wellhouse for these responses]
5. South Dakota

DOES YOUR STATE HAVE A FORMAL (I.E., STATUTORY OR CONSTITUTIONAL) RULES REVIEW FUNCTION? Yes.

IS IT AN EXECUTIVE, LEGISLATIVE, JUDICIAL, OR COMBINED FUNCTION OR AGENCY? Legislative.

IS IT BEFORE OR AFTER THE FINAL RULE IS ADOPTED BY THE RULEMAKING AGENCY? The final rules are "adopted" by the state agency, but cannot be filed with the Secretary of State and become effective until the rules committee has reviewed them. If the committee does not meet before the deadline for adopting rules has expired, the agency can proceed with filing the rules. The rules will become effective; however, they are still subject to a review by the committee. So in these few cases, the review will actually take place after the rules are adopted, filed, and become effective.

DOES IT – THE RULES REVIEW – APPLY TO A REVIEW OF:
PERMANENT PROPOSED RULES -- Yes.
TEMPORARY PROPOSED RULES -- We don't have "temporary" rules.
EMERGENCY PROPOSED RULES -- Yes.

DOES YOUR REVIEWING ENTITY (INCLUDING THE CODE PUBLISHER) HAVE THE AUTHORITY TO MAKE OR REQUIRE:
TECHNICAL, STYLISTIC, GRAMMATICAL, NON-SUBSTANTIVE CHANGES --
SUBSTANTIVE CHANGES TO THE CONTENT OF THE RULES -- The reviewing entity (which is also the publisher) recommends technical, stylistic, grammatical, and other non-substantive changes. The reviewing entity does not make substantive changes.

DOES YOUR REVIEWING ENTITY HAVE THE AUTHORITY TO PREVENT A RULE FROM TAKING EFFECT? Yes.

PLEASE GIVE ANY STATUTORY OR ADMINISTRATIVE CODE REFERENCES TO YOUR:
APA: SDCL ch 1-26
OTHER GENERIC RULEMAKING STATUTES: I'm not sure exactly what you are meaning here, but I can tell you that each agency has it's own statutes that must provide the basis for the rules is has or is attempting to adopt. If the agency does not have rule-making authority, it is prohibited from adopting rules...which isn't always a bad thing!! At any rate, our general rulemaking statutes are sprinkled throughout our code.

RULEMAKING ADMINISTRATIVE CODES: This would be our APA located in SDCL ch 1-26

[thanks to Dan Proctor for these responses]
6. Texas

DOES YOUR STATE HAVE A FORMAL (I.E., STATUTORY OR CONSTITUTIONAL) RULES REVIEW FUNCTION?
Texas: Statutory

IS IT AN EXECUTIVE, LEGISLATIVE, JUDICIAL, OR COMBINED FUNCTION OR AGENCY?
Texas: Legislative* Judicial** Administrative***

IS IT BEFORE OR AFTER THE FINAL RULE IS ADOPTED BY THE RULEMAKING AGENCY?
Texas: Legislative review is for Proposed rules

DOES IT - THE RULES REVIEW - APPLY TO A REVIEW OF:
PERMANENT PROPOSED RULES -- YES
TEMPORARY PROPOSED RULES -- YES
EMERGENCY PROPOSED RULES -- YES

DOES YOUR REVIEWING ENTITY (INCLUDING THE CODE PUBLISHER) HAVE THE AUTHORITY TO MAKE OR REQUIRE:
TECHNICAL, STYLISTIC, GRAMMATICAL, NON-SUBSTANTIVE CHANGES -- Secretary of State--yes, with agency's knowledge
SUBSTANTIVE CHANGES TO THE CONTENT OF THE RULES -- No.

DOES YOUR REVIEWING ENTITY HAVE THE AUTHORITY TO PREVENT A RULE FROM TAKING EFFECT?
Texas: No. (But district court may invalidate a rule or remand a rule to agency.)

PLEASE GIVE ANY STATUTORY OR ADMINISTRATIVE CODE REFERENCES TO YOUR:
APA: Texas Government Code, Chapters 2001 and 2002
OTHER GENERIC RULEMAKING STATUTES: N/A
RULEMAKING ADMINISTRATIVE CODES: Texas Administrative Code, Title 1, Part 4, Chapter 91.

ANYTHING ELSE YOU WANT TO ADD:
* The APA provides a procedure for rules to be referred to standing committees for review. In practice, this provision is rarely (if ever) implemented.
** The APA provides for judicial review, but probably not applicable in this context. It describes how a court may render a declaratory judgment to invalidate or remand and rule when an agency is sued in district court.

*** The APA directs agencies to self review their rules every four years to determine if the justification for their adoption is still valid. The goal is to repeal obsolete rules.

[thanks to Ken Hansen for these responses]

7. Utah: Legislative and executive review

1. DOES YOUR STATE HAVE A FORMAL (I.E., STATUTORY OR CONSTITUTIONAL) RULES REVIEW FUNCTION?

UT: Yes. Utah Code Section 63-46a-11 creates an Administrative Rules Review Committee (ARRC). Additionally, an executive order dated 3/22/1988 establishes executive review of rules by the Governor's Office of Planning and Budget (GOPB).

2. IS IT AN EXECUTIVE, LEGISLATIVE, JUDICIAL, OR COMBINED FUNCTION OR AGENCY?

UT: Legislative (statutory) and executive (executive order).

3. IS IT BEFORE OR AFTER THE FINAL RULE IS ADOPTED BY THE RULEMAKING AGENCY?

UT: The ARRC has statutory authority to review proposed and effective rules. GOPB reviews proposed rules.

4. DOES IT - THE RULES REVIEW - APPLY TO A REVIEW OF:

PERMANENT PROPOSED RULES -- UT: Yes

TEMPORARY PROPOSED RULES -- UT: N/A, Utah doesn't have anything called a temporary proposed rule.

EMERGENCY PROPOSED RULES -- UT: Yes

5. DOES YOUR REVIEWING ENTITY (INCLUDING THE CODE PUBLISHER) HAVE THE AUTHORITY TO MAKE OR REQUIRE:

TECHNICAL, STYLISTIC, GRAMMATICAL, NON-SUBSTANTIVE CHANGES -- UT: No

SUBSTANTIVE CHANGES TO THE CONTENT OF THE RULES -- UT: No

UT: HOWEVER, the ARRC must prepare legislation to reauthorize administrative rules each year. Using that bill, the Legislature may decide to not reauthorize a rule or part of a rule, as it did this year -- see S.B. 122 (2007) at http://le.utah.gov/~2007/htmdoc/sbillhtm/sb0122.htm where the Legislature did not

reauthorize Section R277-437-1. This process was crafted in 1989, post-Chadha. The process is codified at Utah Code Section 63-46a-11.5

DOES YOUR REVIEWING ENTITY HAVE THE AUTHORITY TO PREVENT A RULE FROM TAKING EFFECT?

UT: No. However, both the ARRC and GOPB may exercise a good deal of political pressure if they believe something should be changed.

PLEASE GIVE ANY STATUTORY OR ADMINISTRATIVE CODE REFERENCES TO YOUR:

APA: UT: Utah Code Title 63, Chapter 46b (Utah's APA addresses only adjudication)

OTHER GENERIC RULEMAKING STATUTES: UT: Utah Code Title 63, Chapter 46a (this is the Utah Administrative Rulemaking Act)

RULEMAKING ADMINISTRATIVE CODES: UT: Not certain what you're looking for here. The citation requiring the creation of the Utah Administrative Code is Utah Code Subsection 63-46a-10(1)(e). The UAC's structure is defined at Section 63-46a-9.6. Judicial notice is required at Section 63-46a-16.

ANYTHING ELSE YOU WANT TO ADD:

UT: A copy of the Utah Administrative Rulemaking Act is available online at http://www.rules.utah.gov/main/index.php?module=Pagesetter&func=viewpub&tid=1&pid=12 . The 1988 Governor's Executive Order is available online at http://www.rules.utah.gov/main/index.php?module=Pagesetter&func=viewpub&tid=1&pid=22 .

[thanks to Gary Poulson for these responses]

8. Wisconsin

DOES YOUR STATE HAVE A FORMAL (I.E., STATUTORY OR CONSTITUTIONAL) RULES REVIEW FUNCTION? Yes

IS IT AN EXECUTIVE, LEGISLATIVE, JUDICIAL, OR COMBINED FUNCTION OR AGENCY? Legislative

IS IT BEFORE OR AFTER THE FINAL RULE IS ADOPTED BY THE RULEMAKING AGENCY? Both

DOES IT – THE RULES REVIEW – APPLY TO A REVIEW OF:

PERMANENT PROPOSED RULES -- Yes

TEMPORARY PROPOSED RULES -- NA

EMERGENCY PROPOSED RULES -- Published emergency rules

DOES YOUR REVIEWING ENTITY (INCLUDING THE CODE PUBLISHER) HAVE THE AUTHORITY TO MAKE OR REQUIRE:

TECHNICAL, STYLISTIC, GRAMMATICAL, NON-SUBSTANTIVE CHANGES -- Yes the revisor has authority under s. 13.93 (2m) (b), Wis. Stats.

SUBSTANTIVE CHANGES TO THE CONTENT OF THE RULES -- The Legislative committees can stongly "suggest" substantive changes to the agency to consider during legislative review of proposed rules. Final rules can only be suspended in whole or part, not revised

DOES YOUR REVIEWING ENTITY HAVE THE AUTHORITY TO PREVENT A RULE FROM TAKING EFFECT? Yes

PLEASE GIVE ANY STATUTORY OR ADMINISTRATIVE CODE REFERENCES TO YOUR:

APA: Chapter 227, Wis. Stats

OTHER GENERIC RULEMAKING STATUTES:

RULEMAKING ADMINISTRATIVE CODES: s.35.93 Wis.Stats.

ANYTHING ELSE YOU WANT TO ADD:

9. Wyoming: Legislative Review

DOES YOUR STATE HAVE A FORMAL (I.E., STATUTORY OR CONSTITUTIONAL) RULES REVIEW FUNCTION?
Yes, found in 29A-3-10 (http://www.wvsos.com/adlaw/rulemaking/wvcapa.htm)
Legislative Rule Making Review Committee (LRMRC)

IS IT AN EXECUTIVE, LEGISLATIVE, JUDICIAL, OR COMBINED FUNCTION OR AGENCY?
Legislative

IS IT BEFORE OR AFTER THE FINAL RULE IS ADOPTED BY THE RULEMAKING AGENCY?
Before for Legislative rules

DOES IT – THE RULES REVIEW – APPLY TO A REVIEW OF:

PERMANENT PROPOSED RULES -- We have 3 types of permanent rules, Legislative, Procedural & Interpretive. Only Legislative go through LRMRC .

TEMPORARY PROPOSED RULES -- No temporary rules

EMERGENCY PROPOSED RULES -- Emergency rules are approved by the Secretary of State. An emergency rule may be effective for a total of 15 months. This is the condition of a Legislative rule only, and cannot be filed without a companion Legislative rule with it.

DOES YOUR REVIEWING ENTITY (INCLUDING THE CODE PUBLISHER) HAVE THE AUTHORITY TO MAKE OR REQUIRE:

TECHNICAL, STYLISTIC, GRAMMATICAL, NON-SUBSTANTIVE CHANGES --

SUBSTANTIVE CHANGES TO THE CONTENT OF THE RULES --

LRMRC may ask for all of the above changes. If changes are accepted, the Agency files a "Modified" rule, which is then submitted to the entire Legislature. It is given both a House and Senate bill number and sent to at least one committee, sometimes 2 committees & sometimes 3 committees. The rules always end up in the Judiciary Committee. There the rules are "bundled" together, (such as all Environmental rules will be bundled together) and then passed. The Legislature may approve the rule as submitted to them, they may make significant changes or they may disapprove the rule altogether. After the rules bill passes, the Governor signs, the Agency final files the rule & establishes an effective date (unless mandated by the rules bill).

DOES YOUR REVIEWING ENTITY HAVE THE AUTHORITY TO PREVENT A RULE FROM TAKING EFFECT? The code says:

(c) After reviewing the legislative rule, the committee shall recommend that the Legislature:
(1) Authorize the promulgation of the legislative rule; or
(2) Authorize the promulgation of part of the legislative rule; or
(3) Authorize the promulgation of the legislative rule with certain amendments; or
(4) Recommend that the proposed rule be withdrawn.
The committee shall file notice of its action in the state register and with the agency proposing the rule: *Provided,* That when the committee makes the recommendations of subdivision (2), (3) or (4) of this subsection, the notice shall contain a statement of the reasons for such recommendation.

PLEASE GIVE ANY STATUTORY OR ADMINISTRATIVE CODE REFERENCES TO YOUR:

APA: http://www.wvsos.com/adlaw/rulemaking/wvcapa.htm
OTHER GENERIC RULEMAKING STATUTES:
RULEMAKING ADMINISTRATIVE CODES:

9. Section 801 to 802 issues memo

I. [Section 801 to 802] Should the MSAPA mandate electronic publication [Section 802] or encourage electronic publication [Section 801], or provide alternatives, either section 801 or Section 802? Do any states not have electronic publication capability in 2007?

1. California law mandates electronic publication of the California Code of Regulations. The Office of Administrative Law has the responsibility for electronic publication [California Government Code Section 11344(a)].

A. California Government Code Section 11340.1

(a) The Legislature therefore declares that it is in the public interest to establish an Office of Administrative Law which shall be charged with the orderly review of adopted regulations. It is the intent of the Legislature that the purpose of such review shall be to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted. It is the intent of the Legislature that agencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome, and that this substitution shall be considered during the course of the agency rulemaking process. It is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations. It is the intent of the Legislature that while the Office of Administrative Law will be part of the executive branch of state government, that the office work closely with, and upon request report directly to, the Legislature in order to accomplish regulatory reform in California.

(b) It is the intent of the Legislature that the California Code of Regulations made available on the Internet by the office pursuant to Section 11344 include complete authority and reference citations and history notes.

B. California Government Code Section 11344

§ 11344. Code of regulations; publication; internet; updating

The office shall do all of the following:

(a) Provide for the official compilation, printing, and publication of adoption, amendment, or repeal of regulations, which shall be known as the California Code of Regulations. On and after July 1, 1998, the office shall make available on the Internet, free of charge, the full text of the California Code of Regulations, and may contract with another state agency or a private entity in order to provide this service.

(b) Provide for the compilation, printing, and publication of weekly updates of the California Code of Regulations. This publication shall be known as the California Code of Regulations Supplement and shall contain amendments to the code.

(c) Provide for the publication dates and manner and form in which regulations shall be printed and distributed and ensure that regulations are available in printed form at the earliest practicable date after filing with the Secretary of State.

(d) Ensure that each regulation is printed together with a reference to the statutory authority pursuant to which it was enacted and the specific statute or other provision of law which the regulation is implementing, interpreting, or making specific.
B. California Government Code Section 11340.85

C. California Government Code Section 11340.85

§ 11340.85. Electronic communications

(a) As used in this section, "electronic communication" includes electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication.

(b) Notwithstanding any other provision of this chapter that refers to mailing or sending, or to oral or written communication:

(1) An agency may permit and encourage use of electronic communication, but may not require use of electronic communication.

(2) An agency may publish or distribute a document required by this chapter or by a regulation implementing this chapter by means of electronic communication, but shall not make that the exclusive means by which the document is published or distributed.

(3) A notice required or authorized by this chapter or by a regulation implementing this chapter may be delivered to a person by means of electronic communication if the person has expressly indicated a willingness to receive the notice by means of electronic communication.

(4) A comment regarding a regulation may be delivered to an agency by means of electronic communication.

(5) A petition regarding a regulation may be delivered to an agency by means of electronic communication if the agency has expressly indicated a willingness to receive a petition by means of electronic communication.

(c) An agency that maintains an Internet Web site or other similar forum for the electronic publication or distribution of written material shall publish on that Web site or other forum information regarding a proposed regulation or regulatory repeal or amendment, that includes, but is not limited to, the following:

(1) Any public notice required by this chapter or by a regulation implementing this chapter.

(2) The initial statement of reasons prepared pursuant to subdivision (b) of Section 11346.2.

(3) The final statement of reasons prepared pursuant to subdivision (a) of Section 11346.9.
(4) Notice of a decision not to proceed prepared pursuant to Section 11347.
(5) The text of a proposed action or instructions on how to obtain a copy of the text.
(6) A statement of any decision made by the office regarding a proposed action.

(7) The date a rulemaking action is filed with the Secretary of State.
(8) The effective date of a rulemaking action.
(9) A statement to the effect that a business or person submitting a comment regarding a proposed action has the right to request a copy of the final statement of reasons.

(10) The text of a proposed emergency adoption, amendment, or repeal of a regulation pursuant to Section 11346.1 and the date it was submitted to the office for review and filing.

(d) A document that is required to be posted pursuant to subdivision (c) shall be posted within a reasonable time after issuance of the document, and shall remain posted until at least 15 days after (1) the rulemaking action is filed with the Secretary of State, or (2) notice of a decision not to proceed is published pursuant to Section 11347. Publication under subdivision (c) supplements any other required form of publication or distribution. Failure to comply with this section is not grounds for disapproval of a proposed regulation. Subdivision (c) does not require an agency to establish or maintain a Web site or other forum for the electronic publication or distribution of written material.

(e) Nothing in this section precludes the office from requiring that the material submitted to the office for publication in the California Code of Regulations or the California Regulatory Notice Register be submitted in electronic form.

(f) This section is intended to make the regulatory process more user-friendly and to improve communication between interested parties and the regulatory agencies.

CREDIT(S)

(Added by Stats.2000, c. 1060 (A.B.1822), § 4. Amended by Stats.2001, c. 59 (S.B.561), § 2; Stats.2002, c. 389 (A.B.1857), § 2; Stats.2006, c. 713 (A.B.1302), § 1.)

LAW REVISION COMMISSION COMMENTS
2000 Addition

Section 11340.85 is new. Subdivision (b) authorizes the use of electronic communications in adopting a regulation under this chapter.

Subdivision (c) requires electronic publication of certain rulemaking documents by an agency that maintains a website or similar electronic communication forum. Provisions requiring a "public notice" as defined in paragraph (1) include Sections 11346.4 (notice of proposed action), 11346.8(a) (notice of hearing), and 11346.8(b) (notice of continuance or postponement of hearing), and Section 44 of Title 1 of the California Code of Regulations (notice of changes to proposed regulation).

Use of electronic communications pursuant to this section supplements other required forms of publication or distribution. See subdivisions (b)(2) & (d). See also Section

11342(b) ("office" means Office of Administrative Law). [30 Cal.L.Rev.Comm.Reports 725 (2000)]. …….

2. Missouri requires electronic publication state publications

V.A.M.S.

181.110. State publications to be indexed and published--cost of publication to be stated--distribution

1. For the purpose of providing the services described in this section, each agency shall have the following responsibilities and powers:
(1) To submit to the state library electronically each publication created by the agency in a manner consistent with the state's enterprise architecture;
(2) To determine the format used to publish;
(3) For those publications which the agency determines shall be printed and published in paper, to supply the number of copies for participating libraries as determined by the secretary of state;
(4) To assign a designee as a contact for the state publications access program and forward this information to the secretary of state annually.

2. For the purpose of providing the services described in this section, the secretary of state shall have the following responsibilities:
(1) The secretary, through the state library, shall provide a secure electronic repository of state publications. Access to the state publications in the repository shall be provided through multiple methods of access, including the statewide online library catalog and a publicly accessible electronic network;

(2) The secretary shall create, in administrative rule, the criteria for selection of participating libraries and the responsibilities incumbent upon those libraries in serving the citizens of Missouri;

(3) The secretary shall set by administrative rule the electronic formats acceptable for submission of publications to the electronic repository;

(4) The secretary may issue and promulgate rules to enforce, implement and effectuate the powers and duties established in sections 181.100 to 181.130.

3. For the purpose of providing the services described in this section, the state library shall have the following responsibilities, all to be performed in a manner consistent with e-government:

(1) The state library shall administer the electronic repository of state publications for access by the citizens of Missouri, and receive and distribute publications in other formats, which will be housed and made available to the public by the participating

libraries;

(2) The state library shall ensure the organization and classification of state publications regardless of formats and the distribution of materials in additional formats to participating libraries;

(3) The state library shall publish regularly a list of all publications of the agencies, regardless of format.

4. For the purpose of providing the services described in this section, the participating libraries shall have the following responsibilities:

(1) To ensure citizens who come to the library will be able to access publications electronically;

(2) To maintain paper copies of those state publications that agencies publish in paper that are designated by the secretary of state to be included in the Missouri state publications access program;

(3) To maintain a collection of older state publications published by the agencies in paper and designated by the secretary of state to be included in the Missouri state publications access

10. Section 901 issues memo

I. [Section 901] Should the MSAPA effective date language include agency adjudications conducted by an agency following a remand from a court or another agency after the effective date? [See Section 901 issues memo].

II. [Section 901] Should the MSAPA effective date language include authority for agencies to adopt interim regulations to govern adjudicative proceedings under the Act? See Section 901 issues memo].

III. The California Administrative Procedures act was substantially revised in the mid 1990's. The operative (effective date) of the provisions of the new act (which primarily addressed adjudication not rulemaking) is set forth below.

A. California Government Code Section 11400.10 Operative Date

(a) This chapter is operative on July 1, 1997.
(b) This chapter is applicable to an adjudicative proceeding commenced on or after July 1, 1997.
(c) This chapter is not applicable to an adjudicative proceeding commenced before July 1, 1997, except an adjudicative proceeding conducted on a remand from a court or another agency on or after July 1, 1997.

CREDIT(S)
(Added by Stats.1995, c. 938 (S.B.523), § 21, operative July 1, 1997.)
LAW REVISION COMMISSION COMMENTS
1995 Addition

Section 11400.10 provides a deferred operative date to enable state agencies to make any necessary preparations for operation under this chapter. [25 Cal.L.Rev.Comm. Reports 55 (1995)]

B. California Government Code Section 11400.20 Adoption of Regulations

(a) Before, on, or after July 1, 1997, an agency may adopt interim or permanent regulations to govern an adjudicative proceeding under this chapter or Chapter 5 (commencing with Section 11500). Nothing in this section authorizes an agency to adopt regulations to govern an adjudicative proceeding required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, except to the extent the regulations are otherwise authorized by statute.
(b) Except as provided in Section 11351:
(1) Interim regulations need not comply with Article 5 (commencing with Section 11346) or Article 6 (commencing with Section 11349) of Chapter 3.5, but are governed by Chapter 3.5 (commencing with Section 11340) in all other respects.
(2) Interim regulations expire on December 31, 1998, unless earlier terminated or replaced by or readopted as permanent regulations under paragraph (3). If on December 31, 1998, an agency has completed proceedings to replace or readopt interim regulations and has submitted permanent regulations for review by the Office of Administrative Law, but permanent regulations have not yet been filed with the Secretary of State, the interim regulations are extended until the date permanent regulations are filed with the Secretary of State or March 31, 1999, whichever is earlier.

(3) Permanent regulations are subject to all the provisions of Chapter 3.5 (commencing with Section 11340), except that if by December 31, 1998, an agency has submitted the regulations for review by the Office of Administrative Law, the regulations are not subject to review for necessity under Section 11349.1 or 11350.

CREDIT(S)

(Added by Stats.1995, c. 938 (S.B.523), § 21, operative July 1. 1997. Amended by Stats.1996, c. 390 (S.B.794), § 5, eff. Aug. 19, 1996, operative July 1, 1997.)

LAW REVISION COMMISSION COMMENTS

1995 Addition

Subdivision (a) of Section 11400.20 makes clear that an agency may act to adopt regulations under this division after enactment but before the division becomes operative.

This will enable the agency to have any necessary regulations in place on the operative date. It should be noted that revisions of regulations that merely conform to the new law may be adopted by simplified procedures under the rulemaking provisions of the Administrative Procedure Act pursuant to 1 California Code of Regulations Section 100.

Under subdivision (b), an agency may adopt interim procedural regulations without the normal notice and hearing and Office of Administrative Law review processes of the Administrative Procedure Act. However, this does not excuse compliance with the other provisions of the Administrative Procedure Act, including but not limited to the requirements that (1) regulations be consistent and not in conflict with statute and reasonably necessary to effectuate the purpose of the statute (Section 11342.2), (2) regulations be filed and published (Sections 11343-11344.9), and (3) regulations are subject to judicial review (Section 11350). Compliance with these provisions is not required for agencies exempted by statute. See Section 11351.

Interim regulations are only valid through December 31, 1998. They may be replaced by or readopted as permanent regulations before then, through the standard administrative rulemaking process. In case permanent regulations are pending on December 31, 1998, interim regulations may be extended up to three months.

Subdivision (b)(3) makes clear that permanent regulations governing administrative adjudication are subject to normal rulemaking procedures, other than review for necessity under Sect tion 11349.1 (Office of Administrative Law) or 11350 (declaratory relief) in the case of permanent regulations promulgated during the transitional period. [25 Cal.L.Rev.Comm. Reports 55 (1995)]