

DRAFT  
FOR DISCUSSION ONLY

# REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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For October 16 – 18, 2009 Drafting Committee Meeting~~MEETING IN ITS ONE HUNDRED-~~  
~~AND EIGHTEENTH YEAR~~  
~~SANTA FE, NEW MEXICO~~  
~~JULY 9 – JULY 16, 2009~~

# ~~REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT~~

~~WITH PREFATORY NOTE AND COMMENTS~~

*With Prefatory Note and Comments*

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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~~June 3~~  
September 30, 2009

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# REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

## Prefatory Note

### **The 1946 Model State Administrative Procedure Act**

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

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

### **The 1961 Model State Administrative Procedure Act**

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

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<sup>1</sup> 1946 Model State Administrative Procedure Act preface at 200.

<sup>2</sup> Id. at 200

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

<sup>4</sup> Preface to 1961 Model State Administrative Procedure Act.

<sup>5</sup> Uniform Laws Annotated at 357 (1980 Master Edition) catalogued numerous states that used the 1961 Model State



## **The 1981 Model State Administrative Procedure Act**

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

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

## **The Present Revision**

There are several reasons for revision of the 1981 Act. It has been more than twenty-seven years since the Act was last revised. There now exists a substantial body of legislative action, judicial opinion and academic commentary that explain, interpret and critique the 1961 and 1981 Acts and the Federal Administrative Procedure Act. In the past two decades state legislatures, dissatisfied with agency rulemaking and adjudication, have enacted statutes that modify administrative adjudication and rulemaking procedure. The American Bar Association has recently undertaken a major study of the Federal Administrative Procedure Act and has

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Administrative Procedure Act. They are: Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

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

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

<sup>7</sup> For example, the 1961 Model State Administrative Procedure Act contained nineteen sections; the 1981 Model State Administrative Procedure Act contained more than eighty sections divided among five different articles.

<sup>8</sup> Some of those states are: Florida, Iowa, Kansas, California, Mississippi and Montana.

recommended revision of some provisions of that act. Since some sections of the Model State Administrative Procedure Act are similar to the Federal Act, the ABA study furnishes useful comparisons for the Act. The emergence of the Internet, which did not exist at the time of the last revision of the Act, is another event that the Model Administrative Procedure Act must address. Finally, since the 1981 Act, approximately thirty states have adopted central panel administrative law judge provisions. What has been learned from the experience in those states can be used to improve this Act.

1                   **REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT**

2                                   **[ARTICLE] 1**

3                                   **GENERAL PROVISIONS**

4                   **SECTION 101. SHORT TITLE.** This [act] may be cited as the [state] Administrative  
5 Procedure Act.

6                   **SECTION 102. DEFINITIONS.** In this [act]:

7                   (1) “Adjudication” means the process for determining facts or applying law pursuant to  
8 which an agency formulates and issues an order.

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

13                   (3) “Agency action” means:

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

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

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

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

20                   (5) “Agency record” means the agency rulemaking record required by Section 302, the  
21 emergency rulemaking record in rulemaking governed by Section 309(a), the direct final  
22 rulemaking record in rulemaking governed by Section 309(b), the hearing record in adjudication  
23 required by Section 406, the hearing record in an emergency adjudication record under Section

407, and the hearing record in an informal adjudication record under Section 401A.

(6) “Contested case” means an adjudication in which an opportunity for an evidentiary hearing is required by the federal constitution or a federal statute or the constitution or a statute of this state.

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

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

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

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

(11) “Final order” means the order issued by the agency head sitting as the presiding officer in a contested case.

~~(12)~~ “Guidance document” means a record of general applicability developed by an agency that lacks the force of law but states the agency’s current approach to, or interpretation of, law, or general statements of policy that describe how and when the agency will exercise discretionary functions. The term does not include records described in subsections (27) (A), (B), (C), and (D).

(13) “Index” means a searchable list of items by subject and caption in a record with a page number, hyperlink, or any other connector that links the list with the record to which it refers.

(14) “Initial order” means an order that is subject to further agency review and is issued

1 by a presiding officer with final decisional authority.

2 (15) "Internet website" means a website on the Internet that permits the public to search  
3 a database that archives materials required to be published with the [publisher] under this [act].

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

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

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

11 (19) "Notify" means to take steps reasonably required to inform a person, whether that  
12 person actually comes to know of it.

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

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

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

20 (23) "Presiding officer" means an individual who presides over the evidentiary hearing  
21 in a contested case.

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

1 investigation.

2 (25) “Recommended order” means an order issued by a presiding officer other than the  
3 agency head when that presiding officer does not have final decisional authority and the order is  
4 subject to review by the agency head.

5 (26) “Record” means information that is inscribed on a tangible medium or that is stored  
6 in an electronic or other medium and is retrievable in perceivable form.

7 (27) “Rule” means the whole or a part of an agency statement of general applicability  
8 that implements, interprets, or prescribes law or policy or the organization, procedure, or practice  
9 requirements of an agency and has the force of law. The term does not include:

10 | (A) statements concerning only the internal management of an agency and not  
11 affecting private rights or procedures available to the public;

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

14 | (C) an opinion of the Attorney General;

15 | (D) a statement that establishes criteria or guidelines to be used by the staff of an  
16 agency in performing audits, investigations, or inspections, settling commercial disputes,  
17 negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if  
18 disclosure of the criteria or guidelines would enable persons violating the law to avoid detection,  
19 facilitate disregard of requirements imposed by law, or give an improper advantage to persons  
20 that are in an adverse position to the state;

21 | - (E) forms developed by an agency to implement or interpret agency law or  
22 policy; or

23 (F) guidance documents.

(28) “Rulemaking” means the process for adoption of a new rule or the amendment or repeal of an existing rule.

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

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

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

-(30) “Written” means inscribed on a tangible medium.

### **Comment**

**Adjudication.** This definition gives the general meaning of adjudication that distinguishes it from rulemaking. See California Government Code Section 11405.20. This Act and the definitions in this Section also identify some categories of adjudication that require procedure specified in this Act to be used to reach a decision. For example, the term contested case, defines a subset of adjudications that must be conducted as prescribed in Article 4 of this Act.

**Agency.** The object of this definition is to subject as many state actors as possible to this definition. See 1981 MSAPA Section 1-102(1). The exception for the governor means the governor personally. The term “agency” includes the Office of Administrative Hearings provided in Article 6.

**Agency Action.** This definition is added for purposes of identifying those matters subject to judicial review. Failure to issue an order or rule is not judicially reviewable except as provided in Section 501(a) of the Act. Failure to issue an order or rule does not include an agency denial of a petition to initiate rulemaking. See Section 317 of the Act. This definition is taken from 1981 MSAPA Section 1-102(2).

**Agency Head.** This definition differentiates between the agency as an organic whole and the particular persons (commissioners, board members or the like) in whom final authority is vested. This definition is taken from 1981 MSAPA Section 1-102(3).

**Contested case.** This term is similar to the “contested case” definition of the 1961 MSAPA. Like the 1961 MSAPA, this Act looks to external sources such as statutes to describe situations in which a party is entitled to a hearing. However, this term differs from the 1961 MSAPA’s term “contested case” because it also includes hearings required by the constitution, federal or state, and makes provision in Article 4 for the type of hearing to be held in a case where a constitution creates the right to a hearing. Including constitutionally created rights to a hearing within the provisions of this Act eliminates the problem of looking outside the Act to

1 determine the type of hearing required in cases where the right to the hearing is created by  
2 constitution. Hearing rights created by judicial decisions means constitutional decisions by courts  
3 in that state. See *Goldberg v. Kelley*, 397 U.S. 254 (1970), and *Goss v. Lopez* 419 U.S. 565  
4 (1975). Contested cases do not include investigatory hearings, pure administrative process  
5 proceedings such as tests, elections, or inspections, and situations in which a party has a right to  
6 a de novo administrative or judicial hearing. See Section 401 of the Act. An agency may by rule  
7 make all or part of article 4 applicable to adjudication that does not fall within the requirements  
8 of Section 401, including hearing rights conferred by agency regulations. See California  
9 Government Code Section 11410.10. The scope of hearing rights is governed by law other than  
10 this act.

11  
12 Record. Modern electronic-age statutes such as the Uniform Computer Information  
13 Transactions Act and the Uniform Electronic Transactions Act adopt a broad definition of the  
14 term record that includes the term document. This act follows those definitions.

15  
16 Electronic. The term “electronic” refers to the use of electrical, digital, magnetic,  
17 wireless, optical, electromagnetic and similar technologies. It is a descriptive term meant to  
18 include all technologies involving electronic processes. The listing of specific technologies is not  
19 intended to be a limiting one. The definition is intended to assure that this act will be applied  
20 broadly as new technologies develop. For example, biometric identification technologies would  
21 be included if they affect communication and storage of information by electronic means. As  
22 electronic technologies expand and include other competencies, those competencies should also  
23 be included under this definition. The definition of the term “electronic” in this act has the same  
24 meaning as it has in UETA SECTION 2(5) and in the Uniform Real Property Electronic  
25 Recording Act.

26  
27 Electronic Record. This definition is identical to § 2(7) of the Uniform Electronic  
28 Transactions Act. An “electronic record” is a document that is in an “electronic” form.  
29 Documents may be communicated in electronic form; they may be received in electronic form;  
30 they may be recorded and stored in electronic form; and they may be received in paper copies  
31 and converted into an electronic record. This Act does not limit the type of electronic documents  
32 received by the [publisher]. The purpose of defining and recognizing electronic documents is to  
33 facilitate and encourage agency use of electronic communication and maintenance of electronic  
34 records.

35  
36 Emergency Adjudication. This definition is designed to be used with the emergency  
37 adjudication procedures provided by Section 408. The danger to the public health, safety, or  
38 welfare standard requiring immediate action is a strict standard that is defined by law other than  
39 this Act. Federal and state case law have held that in an emergency situation an agency may act  
40 rapidly and postpone any formal hearing without violation, respectively, of federal or state  
41 constitutional law. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Gilbert v. Homar* (1997) 520 U.S.  
42 924; *Dep’t of Agric. v. Yanes*, 755 P.2d 611 (OK. 1987).

43  
44 Guidance document. This definition is taken from the Michigan APA, M.C.L.A.  
45 24.203(6), and the Virginia APA, Va. Code Ann. SECTION 2.2-4001. See also the; Idaho I.C.



1 SECTION 67-5250 and N.Y. McKinneys State Administrative Procedure Act, SECTION 102.  
2 This is a definition intended to recognize that there exist agency statements for the guidance of  
3 staff and the public that differ from, and that do not constitute, rules. Many states recognize such  
4 statements under the label “interpretive statement” or “policy statement.” See Wash. Rev. Code,  
5 SECTION 34.05.010(8) & (15). Later sections of this Act will provide for the publication and  
6 availability of this type of record so that they are not “secret” records. See: Michael Asimow,  
7 Guidance Documents in the States, 54 Adm. L. Rev. 631 (2002); Michael Asimow, California  
8 Underground Regulations, 44 Adm. L. Rev. 43 (1992).

9  
10 Index. The definition of index has been added as a guide to agencies, [publisher]s and  
11 editors about their duties to make records available and easily accessible to the public in the form  
12 of an index, as that term is used throughout this act. States can satisfy the requirement of an  
13 index by providing a record that is searchable by Word on the Internet, unless a hard copy index  
14 is required.

15  
16 Internet website. This definition is designed to be used by agencies and publishers to  
17 comply with the requirements of Sections 201, 316, and 419 of this Act. In many states, the  
18 Internet website is maintained by the [publisher], and in some states, like California, the agency  
19 will also maintain its own Internet website.

20  
21 Law. Law includes an executive order that rests on statutory or constitutional  
22 authorization. See Kevin M. Stack, “The Statutory President,” 90 Iowa L. Rev. 539, 550-52  
23 (2005); Jim Rossi, “State Executive Law making in Crisis,” 56 Duke L. Rev. 237, 261-64  
24 (2006).

25  
26 License. The definition of license is drawn largely from the 1961 MSAPA.

27  
28 Order. Unlike the federal APA which defines rule, but not order, this section provides a  
29 positive definition of order based on case law and agency experience. The key concept is that an  
30 order includes solely agency legal determinations that are addressed to particular, specific,  
31 identified individuals in particular circumstances. An order may be addressed to more than one  
32 person. Further, the definition is consistent with modern law in rejecting the right/privilege  
33 distinction in constitutional law. The addition of the language “or other interests” is intended to  
34 clarify this change and to include entitlements. See also Cal.Gov.Code SECTION 11405.50.

35  
36 Party. This definition includes the agency, any person against whom agency action is  
37 brought and any person who intervenes. Its terms also include any person who may participate  
38 in a rulemaking proceeding, such as someone who offers a comment. This section is not  
39 intended to deal with the issue of a person’s entitlement to review. Standing and other issues  
40 relating to judicial review of agency action are addressed in Article 5 of this Act.

41  
42 Presiding Officer. This definition includes an agency staff member, an administrative  
43 law judge or one or more members of the agency head when designated to preside at a hearing.

44  
45 Person. The definition of a “person” is the standard definition for that term used in acts

adopted by the National Conference of Commissioners on Uniform State Laws. It includes individuals, associations of individuals, and corporate and governmental entities.

Rule. The essential part of this definition is the requirement of general applicability of the statement. This criterion distinguishes a rule from an order, which focuses upon particular applicability to identified parties only. Applicability of a rule may be general, even though at the time of the adoption of the rule there is only one person or firm affected: persons or firms in the future who are in the same situation will also be bound by the standard established by such a rule. It is sometimes helpful to ask in borderline situations what the effect of the statement will be in the future. If unnamed parties in the same factual situation in the future will be bound by the statement, then it is a rule. The word “statement” has been used to make clear that, regardless of the term that an agency uses to describe a declaration or publication and whether it is internal or external to the agency, if the legal operation or effect of the agency action is the same as a substantive rule, then it meets this definition. The exceptions to the definition are widely used in state APAs. Subsection 26(A) is drawn from 1981 Model State APA § 3-116(1). Subsection 26(E) is drawn from 1981 Model State APA § 3-116(9). Subsection 26(F) is drawn from 1981 Model State APA § 3-116(2). Subsection 26(H) is based on 1981 Model State APA § 3-116(7).

Written. This definition relates to the definition of record in Section 102(25) in that written documents are inscribed on a tangible medium. The definition of record in Section 102(25) includes both tangible medium (written) and electronic documents.

**SECTION 103. APPLICABILITY.** This [act] applies to each agency unless the agency is expressly exempted by a statute of this state.

### Comment

This section is intended to define which agencies are subject to the provisions of this act. Many states have made use of an applicability provision to define the coverage of their Administrative Procedure Act. See: Iowa, I.C.A. SECTION 17A.23; Kansas, K.S.A. SECTION 77-503; Kentucky, KRS SECTION 13B.020; Maryland, MD Code, State Government, SECTION 10-203; Minnesota, M.S.A. SECTION 14.03; Mississippi, Miss. Code Ann. SECTION 25-43-1.103; Washington, West's RCWA 34.05.020.

1 [ARTICLE] 2

2 PUBLIC ACCESS TO AGENCY LAW AND POLICY

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

5 (a) The [publisher] shall administer this section and other sections of this [act] that  
6 require publication.

7 | (b) The [publisher] shall publish all rulemaking-related documents listed in this  
8 subsection (n) (1), (2), (3), and (4) in [electronic and written] [electronic or written] [electronic]  
9 [written] format. The [publisher] shall prescribe a uniform numbering system, form, and style for  
10 all proposed, adopted, and amended rules.

11 (c) The [publisher] shall maintain the official record of the adoption, amendment, and  
12 repeal of rules, including the text of the rule and any supporting documents, filed with the  
13 [publisher] by an agency. An agency adopting, amending, or repealing a rule shall maintain the  
14 rulemaking record required by Section 302(b) for that rule.

15 (d) The [publisher] shall create and maintain an Internet website [or other appropriate  
16 technology] on which it maintains a searchable database. The [administrative bulletin and  
17 administrative code] and any guidance document filed with the [publisher] by an agency must be  
18 made available on the Internet website [or other appropriate technology].

19 | (e) The [administrative bulletin] must be published by the [publisher] at least once [each  
20 month].

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

23 (g) The [administrative bulletin] must contain:

1 (1) notices of the proposed adoption, amendment, or repeal of a rule prepared so  
2 that the text of the proposed rule shows the text of any existing rule proposed to be changed and  
3 the change proposed;

4 (2) newly filed rules prepared so that the text of a newly filed amended rule  
5 shows the text of the existing rule and the change that is made;

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

8 (4) an index.

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

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

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

17 (k) The [publisher] shall make available on the [publisher's] Internet website, at no  
18 charge, all of the documents provided by each agency under subsection (n).

19 | ~~(l)~~ Unless a particular record is exempt from disclosure under law other than this [act],  
20 an agency shall publish on its website and, for a reasonable charge, make available through the  
21 regular mail upon request, each notice of proposed rulemaking under Section 304, each rule filed  
22 under Section 315, each summary of regulatory analysis required by Section 305, each  
23 declaratory order issued under Section 203, the index of declaratory orders prepared pursuant to

1 Section 203(g), each guidance document issued pursuant to Section 310, the index of currently  
2 effective guidance documents prepared pursuant to Section 310(f), each final order in a contested  
3 case issued pursuant to Section 418, and the index of final orders in contested cases prepared  
4 pursuant to Section 418(a).

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

9 (n) Each agency shall file with the [publisher] in an electronic format acceptable to the  
10 [publisher]:

- 11 (1) the notice of the adoption, amendment, or repeal of a rule;  
12 (2) a summary of the regulatory analysis required by Section 305 for each  
13 proposed rule;  
14 (3) each adopted, amended, or repealed rule;  
15 (4) an index of currently effective guidance documents under Section 310(f);  
16 (5) any other notice or matter that an agency is required to publish under this  
17 [act].

18 **Legislative Note:** Throughout this act the drafting committee has used the term [publisher] to  
19 describe the official or agency to which substantive publishing functions are assigned. All states  
20 have such an official, but their titles vary. Each state using this act should determine what that  
21 agency is, then insert its title in place of [publisher] throughout this act. Each state also has an  
22 [administrative bulletin] and an [administrative code]. The bulletin is similar to the federal  
23 register, and the code is similar to the code of federal regulations. The names of the  
24 administrative bulletin and the administrative code vary from state to state. Each state should  
25 insert the proper title in place of [administrative bulletin], and [administrative code].  
26

## 27 Comment

28

1 This section seeks to assure adequate notice to the public of proposed agency action. It  
2 also seeks to assure adequate record keeping and availability of records for the public. Article 2  
3 is intended to provide easy public access to agency law and policy that are relevant to agency  
4 process. Article 2 also adds provisions for electronic publication of the administrative bulletin  
5 and code. Section 201 does not address the issue related to what languages rules should be  
6 published in, nor does it address issues related to translation of information contained in these  
7 documents into languages other than English. Rulemaking documents include materials in  
8 written or electronic form that are related to an agency rulemaking proceeding, or that are  
9 guidance documents in written or electronic form. Subsection (b) provides for publication of  
10 rulemaking documents in alternative written and/or electronic formats. Publishers that administer  
11 the provisions of this subsection must also comply with the applicable provisions of the federal  
12 E-Sign Act (15 U.S.C. Section 7001 to 7031) and the Uniform Electronic Transactions Act  
13 (UETA).

14  
15 The arrival of the Internet and electronic information transfer, which occurred after the  
16 last revision of the Model State Administrative Procedure Act, has revolutionized  
17 communication. It has made available rapid, efficient and low cost communication and  
18 information transfer. Many states as well as the federal agencies have found that it is an ideal  
19 medium for communication between agencies and the public, especially in connection with  
20 rulemaking. Since the last Model Administrative Procedure Act was written, many states have  
21 adopted various types of statutes that permit agencies to use electronic technology to  
22 communicate with the public. The agencies have found this technology particularly useful in  
23 connection with rulemaking.

24  
25 Subsection (c) requires that the [publisher] maintain the official record for adopted rules,  
26 including the text of the rules and any supporting documents, filed by the agency. Subsection (c)  
27 also requires that the agency adopting the rule maintain the rulemaking record for that rule.  
28 Section 302(b) provides the requirements for the rulemaking record.

29  
30 Subsection (d) requires the [publisher] to 1) maintain an Internet website, and 2) publish  
31 all matters required to be published under this act on that website. If a state chooses to use  
32 subsection (d), they will create a centralized website for use by all agencies. Subsection (d) also  
33 requires that the [publisher] publish agency guidance documents filed by the agency with the  
34 [publisher]. See section 202(4) and Section 310, below. Subsection (d) does not address issues  
35 related to authentication, preservation and archival storage of electronic documents published on  
36 an Internet website. Subsection (d) does not address the principles for deciding what rules are in  
37 effect and enforceable at a specific point in time. Providing a hypertext link on an internet  
38 website will satisfy the publication requirements for agencies and publishers.

39  
40 Subsection (f) requires the publisher to provide the administrative bulletin in written form  
41 upon request, for which the publisher may charge a reasonable fee. This requirement can be  
42 satisfied by states making the administrative bulletin available on the Internet, searchable, and  
43 printable.

44  
45 The bracketed text of subsection (g)(1) and (g)(2) is included so that agencies may utilize

1 redlining or underlining and striking of the text of the proposed or adopted rules so that changes  
2 from the existing text of the rule are clearly delineated. Agencies that are proposing or adopting  
3 new rules or that have some other system for showing changes need not use the bracketed text.  
4

5 It is possible to go much further in providing for use of the Internet that the publication  
6 adopted here. For example, a state could choose to permit agencies to operate their own  
7 websites, and to accept comments on rules on the website. They could also provide for  
8 maintenance of a database of all comments received that the public could access. These  
9 provisions are extremely useful, but may be quite expensive. The central system adopted here,  
10 means only one Internet website is required. In terms of cost benefit, this is an effective method  
11 of providing for electronic communication and agency access.  
12

13 Subsection (h) requires the publisher to index the administrative code by subject. States  
14 can satisfy this requirement by providing an administrative code that is searchable by word on  
15 the Internet.  
16

17 Subsection (j) provides for a limited non substantive power to edit agency rules provided  
18 that the agency is notified by the rules [publisher] of the changes. Subsection (j) is based on the  
19 Maine Administrative Procedure Act, 5 M.R.S.A. Section 8056(10).  
20

21 Subsections (k) and (l) are drawn from the Washington Administrative Procedure Act.  
22 See WA ST 34.05.260.  
23

## 24 **SECTION 202. REQUIRED AGENCY RULEMAKING AND**

25 **RECORDKEEPING.** In addition to rulemaking requirements imposed by law other than this  
26 [act], each agency shall:

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

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

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

(4) adopt rules for the conduct of public hearings [if the default procedural rules adopted under Section 204 do not include provisions for the conduct of public hearings]; [and]

~~-(5) maintain [custody of] the agency’s current rulemaking docket required by Section 302(b)[; and~~

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

#### Comment

One object of this section is to make available to the public all procedures followed by the agency, including especially how to file for a license or benefit. It is modeled on the 1961 Model State Administrative Procedure Act, Sections 2(a) (4) & 2(b), the 1981 Model State APA Sections 2-104(1), (2), and the Kentucky Administrative Procedure Act, KRS Section 13A.100. Persons seeking licenses or benefits should have a readily available and understandable reference sources from the agency. A second reason is to eliminate “secret law” by making all guidance documents used by the agency available from the agency. Subsections (1), (2), (3), and (4) require the agency to codify by rule the description of the organization of the agency and the procedures followed by the agency. Agencies could use direct final rulemaking procedures under Section 309(b) to adopt some of the rules required by subsections (1), (2), (3), and (4). Some states provide more detail in subsection (1) including contact information for agency officials and organizational charts.

Subsection (5) requires agencies to file guidance documents with the publisher. Section 310(e) requires that agencies publish all current guidance documents. In states where the publisher has the sole responsibility for publishing agency rules and other documents, including guidance documents, an agency may satisfy the publication requirement by filing the guidance document with the publisher under subsection (5).

#### SECTION 203. DECLARATORY ORDER.

(a) Any interested person may petition an agency for a declaratory order that interprets or applies the statute administered by the agency or states whether or in what manner a rule,



1 guidance document, or order issued by the agency applies to the petitioner.

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

7 (c) Not later than 60 days after receipt of a petition pursuant to subsection (a), an agency  
8 shall issue a declaratory order in response to the petition, decline to issue a declaratory order, or  
9 schedule the matter for further consideration.

10 (d) If an agency declines to issue a declaratory order as requested under subsection (a), it  
11 shall promptly notify the petitioner in a record of its decision and include a brief statement of the  
12 reasons for declining. An agency decision to decline to issue a declaratory order is subject to  
13 judicial review for abuse of discretion.

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

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

21 (g) An agency shall maintain an index of all of its current declaratory orders, file the  
22 index with the [publisher] [annually], make the index readily available for public inspection, and  
23 make available for public inspection and, at a reasonable cost, copying of the full text of all

1 declaratory orders to the extent inspection is permitted by law other than this [act].

## 2 **Comment**

3  
4 This section embodies a policy of creating a convenient procedural device that will  
5 enable parties to obtain reliable advice from an agency. Such guidance is valuable to enable  
6 citizens to conform with agency standards as well as to reduce litigation. It is based on the 1981  
7 MSAPA, Section 2-103 and Hawaii Revised Statutes, Section 91-8.

8  
9 Subsection (d) provides that agency decisions to decline to issue a declaratory order are  
10 reviewable for abuse of discretion (See Massachusetts v. EPA 127 S. Ct. 1438 (2007) (EPA  
11 decision to reject rulemaking petition and therefore not to regulate greenhouse gases associated  
12 with global warming was judicially reviewable and decision was arbitrary and capricious.).  
13 limited agency resources may provide a valid basis for an agency to decline to issue a declaratory  
14 order.

15  
16 Subsection (e) is based on the California APA, West's Ann.Cal.Gov.Code Section  
17 11465.60; and the Washington APA, West's RCWA 34.05.240. A declaratory decision issued  
18 by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory  
19 proceeding, and the agency, unless reversed or modified on judicial review; and has the same  
20 precedential effect as other agency adjudications. A declaratory decision, like other decisions,  
21 only determines the legal rights of the particular parties to the proceeding in which it was issued.  
22 The requirement in subdivision (e) that each declaratory decision issued contain the facts on  
23 which it is based and the reasons for its conclusion will facilitate any subsequent judicial review  
24 of the decision's legality. It also ensures a clear record of what occurred for the parties and for  
25 persons interested in the decision because of its possible precedential effect.

26  
27 Subsections (f), and (g) require that an agency publish and index all current declaratory  
28 orders.

## 29 **SECTION 204. DEFAULT PROCEDURAL RULES.**

30  
31 (a) The [governor] [attorney general] [designated state agency] shall adopt default  
32 procedural rules for use by agencies. The default rules must provide for the procedural functions  
33 and duties of as many agencies as is practicable.

34 (b) Except as otherwise provided in subsection (c), an agency shall use the default  
35 procedural rules published under subsection (a).

36 (c) An agency may adopt a rule of procedure that differs from the default procedural  
37 rules adopted under subsection (a) by adopting a rule that states with particularity the need and

1 reasons for the variation from the default procedural rules.

2 **Comment**

3 This Section is based on Section 2-105 of the 1981 MSAPA. See also the provisions of  
4 the California Administrative Procedure Act, California Government Code Section 11420.20  
5 (adoption of model alternative dispute resolution regulations by California Office of  
6 Administrative Hearings.) One purpose of this provision is to provide agencies with a set of  
7 procedural rules. This is especially important for smaller agencies. Another purpose of this  
8 section is to create as uniform a set of procedures for all agencies as is realistic, but to preserve  
9 the power of agencies to deviate from the common model where necessary because the use of the  
10 model rules is demonstrated to be impractical for that particular agency. This section requires all  
11 agencies to use the model rules as the basis for the rules that they are required to adopt under  
12 Section 202. An agency may deviate from the model rules only for impracticability.

1 [ARTICLE] 3

2 RULEMAKING; ADOPTION AND EFFECTIVENESS OF RULES

3 SECTION 301. CURRENT RULEMAKING DOCKET.

4 (a) In this section, “rule” does not include a rule adopted using the emergency process  
5 under Section 309(a) or a rule adopted using the direct final process under Section 309(b).

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

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

9 (1) the subject matter of the proposed rule;

10 (2) notices related to the proposed rule;

11 (3) how comments may be submitted;

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

13 (5) where comments may be inspected;

14 (6) requests for a public hearing;

15 (7) appropriate information about a public hearing, if any, including the names of  
16 the persons making the request; and

17 (8) the timetable for action.

18 (d) Upon request, the agency shall provide, at a reasonable cost, a written rulemaking  
19 docket.

20 **Comment**

21  
22 This section is modeled on Minn. M.S.A. Section 14.366. This section and the following  
23 section, Section 302 state the minimum docketing and rulemaking record keeping requirements  
24 for all agencies. This section also recognizes that many agencies use electronic recording and  
25 maintenance of dockets and records. However, for smaller agencies, the use of electronic  
26 recording and maintenance may not be feasible. This section therefore permits the use of

1 exclusively written, hard copy dockets. The current rulemaking docket is a summary list of  
2 pending rulemaking proceedings or an agenda referring to pending rulemaking. This section  
3 includes direct final rules governed by Section 309.  
4

5 **SECTION 302. AGENCY RECORD IN RULEMAKING PROCEEDING.**

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

14 (b) A rulemaking record must contain:

15 (1) a copy of all publications in the [administrative bulletin] relating to the rule or  
16 the proceeding upon which the rule is based;

17 (2) a copy of any part of the rulemaking docket containing entries relating to the  
18 rule or the proceeding upon which the rule is based;

19 (3) a copy or an index of written factual material, studies, and reports relied on or  
20 consulted by agency personnel in formulating the proposed or final rule;

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

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

(6) all petitions for any agency action on the rule, except for petitions governed by Section 203.

### Comment

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

The language of subsection (a) is based on Section 3-112(a) of the 1981 Model Act. Similar language is found in the Washington Administrative Procedures Act, RCWA Section 34.05.370. The requirement of an official agency rulemaking record in subsection (a) should facilitate a more structured and rational agency and public consideration of proposed rules. It will also aid the process of judicial review of the validity of rules. The requirement of an official agency rulemaking record was suggested for the Federal Act in S. 1291, the "Administrative Practice and Regulatory Control Act of 1979," title I, Section 102(d), [5 U.S.C. 553(d) ], 96 Cong.Rec. S7126 at S7129 (daily ed. Jun. 6, 1979) (Sen. Kennedy). The second sentence of subsection (a) is intended to exclude privileged material from disclosure and display. Privileged material includes confidential business information and trade secrets, as well as internal advice memoranda. The exemptions in the state open records laws would be examples of records and materials that are exempt from disclosure and display under law other than this act. The third sentence in subsection (a) is intended to enable an agency to decide, for example, that indecent material or copyrighted material should be available for inspection in hard copy but not posted on the Internet. It is not intended to authorize exclusion from the Internet record of, for example, information that reflects adversely on the government.

Subsection (b) requires *all written* submissions made to an agency and *all written* materials considered by an agency in connection with a rulemaking proceeding to be included in the record. It also requires a copy of any existing record of oral presentations made in the proceeding to be included in the rulemaking record. The language in Subsection (b) (3) is based on language adopted by the ABA. See ABA Section of Administrative Law and Regulatory Practice, "A Blackletter Statement of Federal Administrative Law," 54 Admin. L. Rev. 1, 34 (2002)

## **SECTION 303. ADVANCE NOTICE OF RULEMAKING; NEGOTIATED RULEMAKING.**

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

comment.

(b) An agency may engage in negotiated rulemaking by appointing a committee to comment or make recommendations on the subject matter of a rulemaking under active consideration within the agency. The committee, in consultation with one or more agency representatives, may attempt to reach a consensus on the terms or substance of a proposed rule. In making appointments, the agency shall ~~attempt~~make reasonable efforts to establish a balance in representation among ~~persons~~members of the public known to have an interest ~~and members in~~the subject matter of the ~~public rulemaking~~. The agency shall publish a list of all committees with their membership at least [annually] in the [administrative bulletin]. Notice of a meeting of a committee appointed under this subsection must be published in the [administrative bulletin] at least [15 days] before the meeting. A meeting of a committee appointed under this section is open to the public.

(c) This section does not prohibit an agency from obtaining information and opinions from members of the public on the subject of the rulemaking by any other method or procedure used in rulemaking.

#### **Comment**

This section is based upon the provisions of Section 3-101 of the 1981 MSAPA. Seeking advice before proposing a rule frequently alerts the agency to potential serious problems that will change the notice of proposed rulemaking and the rule ultimately adopted. This section is designed to encourage gathering information. It is not intended to prohibit any type of reasonable agency information gathering activities; however, the section seeks to insure that agencies act in a fashion that will result in a balance among interested groups from whom information is received. The advanced notice of proposed rulemaking under subsection (a) is a preliminary step for seeking information and is not the same as the notice of proposed rulemaking under Section 304, which begins the rulemaking process.

Several states have enacted provisions of this type in their APAs. Some of them merely authorize agencies to seek informal input before proposing a rule; several of them indicate that the purpose of this type of provision is to promote negotiated rulemaking. Those states are Idaho,

1 I.C. ‘ 67-5220; Minnesota, M.S.A. § 14.101; Montana, MCA 2-4-304; and Wisconsin, W.S.A.  
2 227.13. Subsection (b) is intended to authorize negotiated rulemaking.  
3

4 Subsection (c) authorizes agencies to use other methods to obtain information and  
5 opinions. Under subsection (c), agencies may meet informally with specific stakeholders to  
6 discuss issues raised in the negotiated rulemaking process. Negotiated rulemaking under  
7 subsection (b) is an option for agency use but is not required to be used prior to starting a  
8 rulemaking proceeding. Negotiated rulemaking committees are also used in federal  
9 administrative law. See the federal Negotiating Rulemaking Act, 5 U.S.C. Sections 561 to 570.  
10

#### 11 **SECTION 304. NOTICE OF PROPOSED RULEMAKING.**

12 (a) Not later than [30] days before the adoption, amendment, or repeal of a rule, an  
13 agency shall file notice of the proposed action with the [publisher] for publication in the  
14 [administrative bulletin]. The publisher shall publish the notice in the next issue of the  
15 [administrative bulletin]. The notice must include:

- 16 (1) a short explanation of the purpose of the proposed action;
- 17 (2) a citation or reference to the specific legal authority authorizing the proposed  
18 action;
- 19 (3) the text of any rule proposed to be adopted, amended, or repealed;
- 20 (4) how a copy of the full text of the regulatory analysis of any rule proposed to  
21 be adopted, amended, or repealed may be obtained;
- 22 (5) where, when, and how a person may comment on the proposed action and  
23 request a hearing;
- 24 (6) a citation to and summary of each scientific or statistical study, report, or  
25 analysis that served as a basis for the proposed rulemaking, together with an indication of how  
26 the full text may be obtained; and
- 27 (7) a concise summary of any regulatory analysis prepared under Section 305(d).

28 (b) Not later than three days after publication of the notice of the proposed rulemaking in



1 the [administrative bulletin], the agency shall mail the notice or send it electronically to each  
2 person that makes a timely request to the agency for a mailed or electronic copy of the notice. An  
3 agency may charge a reasonable fee for written mailed copies if the person makes a request for a  
4 mailed copy.

#### 5 **Comment**

6  
7 Many states have similar provisions to provide notice of proposed rulemaking to the  
8 public. This section is based upon the provisions of Section 3-103 of the 1081 MSAPA.  
9 Rulemaking is defined in Section 102(28). The publisher has the responsibility to publish a  
10 notice of proposed rulemaking under Section 201(g)(1). Subsection (b) requires that individual  
11 notice of the proposed rulemaking be provided in written or electronic form to each individual  
12 who has made a timely request to the agency. To be timely under this subsection, the request  
13 would have to be made prior to the publication of the notice of proposed rulemaking.  
14

15 Subsection (a)(6) This language is adapted from N.Y. APA § 202-a. This language also  
16 codifies requirements used in federal administrative law. In the federal cases, disclosure of  
17 technical information underlying a rule has been deemed essential to effective use of the  
18 opportunity to comment. See *American Radio Relay League v. FCC*, 2008 WL 1838387 (D.C.  
19 Cir. April 25, 2008); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).  
20

#### 21 **SECTION 305. REGULATORY ANALYSIS.**

22 (a) An agency shall prepare a regulatory analysis for a rule proposed to be adopted,  
23 amended, or repealed that has an estimated economic impact of more than [\$ ]. The analysis  
24 must be completed before the notice of proposed rulemaking is published. A summary of the  
25 analysis must be published when the notice of proposed rulemaking is given.

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

28 (c) A regulatory analysis must contain:

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

31 (2) a determination whether:

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

2 (B) the rule will achieve the objectives of the authorizing statute in a more

3 cost effective manner, or with greater net benefits, than other regulatory alternatives.

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

6 | -(e) An agency preparing a regulatory analysis under this section shall submit the  
7 analysis to the [appropriate state agency].

8 | (f) If the agency has made a good faith effort to comply with this section, a rule is not  
9 invalid solely because the contents of the regulatory analysis of the rule are insufficient or  
10 inaccurate.

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

15  
16 **Comment**

17  
18 Regulatory analyses are widely used as part of the rulemaking process in the states.  
19 States should set the dollar amount of estimated economic impact for triggering the regulatory  
20 analysis requirement of this section at a fairly high dollar amount as they deem appropriate or by  
21 other approach make the choice to prepare regulatory analyses carefully so that the number of  
22 regulatory analyses prepared by any agency are limited in number. The subsection also provides  
23 for submission to the rules review entity in the state, if the state has one. States that already have  
24 regulatory analysis laws can utilize the provisions of Section 305 to the extent that this section is  
25 not inconsistent with existing law other than this act. Agencies may rely upon agency staff  
26 expertise and information provided by interested stakeholders and participants in the rulemaking  
27 process. Agencies are not required by this act to hire and pay for private consultants to complete  
28 regulatory impact analysis. The concise summary of the regulatory analysis required by  
29 subsection (d) means a short statement that contains the major conclusions reached in the  
30 regulatory analysis.

31  
32 **SECTION 306. PUBLIC PARTICIPATION.**

33 (a) An agency proposing the adoption, amendment, or repeal of a rule shall specify a

1 public comment period of at least [30] days after publication of the notice of proposed  
2 rulemaking during which a person may submit information and comment on the rule proposed  
3 for adoption, amendment, or repeal. The information or comment may be submitted  
4 electronically or in written form.

5 (b) An agency shall consider all information and comment on a rule proposed for  
6 adoption, amendment, or repeal which is submitted within the comment period under subsection  
7 (a).

8 (c) Unless a hearing is required by law other than this [act], an agency is not required to  
9 hold a hearing on a rule proposed for adoption, amendment, or repeal. If an agency holds a  
10 hearing, the agency may allow a person to make an oral presentation with information and  
11 comment about the rule. Hearings must be open to the public and must be recorded. A hearing on  
12 a rule proposed to be adopted, amended, or repealed must be held not later than [10] days before  
13 the end of the public comment period.

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

17 (e) An agency representative shall preside at a hearing on a rule proposed for adoption,  
18 amendment, or repeal. If the presiding agency representative is not the agency head, the  
19 representative shall prepare a memorandum summarizing the contents of the presentations made  
20 at the hearing for consideration by the agency head.

21 **Legislative Note:** state laws vary on the length of public comment periods and on whether or not  
22 a rulemaking hearing is required. The bracketed number of days in subsections (a), and (d)  
23 should be interpreted to require that if a rulemaking hearing is held, it will be held before the  
24 end of the public comment period. In that case, the minimum time period would be 50 days  
25 rather than 30 days.

1  
2 **Comment**  
3

4 This section gives discretion to the agency about whether to hold an oral hearing on  
5 proposed rules in the absence of a statutory or constitutional requirement that an oral hearing be  
6 held. The agency representative described in subsection (e) need not be an officer or employee of  
7 the agency unless that is required by law other than this [act]. In some states, an employee of the  
8 state attorney general's office will serve as the agency representative presiding on a hearing  
9 related to rulemaking.  
10

11 **SECTION 307. TIME LIMIT ON ADOPTION, AMENDMENT, OR REPEAL OF**  
12 **A RULE.**

13 (a) An agency may not adopt, amend, or repeal a rule until the public comment period  
14 has ended.

15 | ~~-(b)~~ Not later than [two years] after the notice of proposed rulemaking, the agency shall  
16 adopt, amend, or repeal the rule pursuant to the rulemaking proceeding or terminate the  
17 proceeding by publication of a notice of termination in the [administrative bulletin]. [The agency  
18 may extend the period of time for adopting, amending or repealing the rule for an additional  
19 period of [two years] by filing a statement of good cause for the extension in the rulemaking  
20 record, but must provide for additional public participation as provided in Section 306 prior to  
21 adopting, amending or repealing the rule.]

22 | ~~(c)~~ An agency shall file rules adopted, amended, or repealed with the [publisher] not  
23 later than [ ] days after the date of adoption of the rule.

24 (d) A rule is void unless it is adopted, amended, or repealed and filed within the time  
25 limits set by this section.

26 **Comment**

27 This section codifies the final adoption and filing for publication requirements for  
28 rulemaking that is subject to the procedures provided in Sections 304 through 308 of this Act.

1 Section 702(a) of this act requires that the agency shall file a copy of the adopted amended or  
2 repealed rule with the rules review committee at the same time it is filed with the publisher.  
3 Subsection (d) provides that a rule that is not properly adopted and filed for publication has no  
4 legal effect.  
5

6 **SECTION 308. VARIANCE BETWEEN PROPOSED AND FINAL ACTION.** An  
7 agency may not take action on a rule proposed to be adopted, amended, or repealed that differs  
8 from the action proposed in the notice of proposed rulemaking on which the rule is based unless  
9 the action is ~~the~~ logical outgrowth of the action proposed in the notice.

#### 10 **Comment**

11  
12 This section draws upon provisions from several states. See Mississippi Administrative  
13 Procedure Act, Miss. Code Ann. Section 25-43-3.107 and the Minn. Administrative Procedure  
14 Act, M.S.A. Section 14.05. The variance test adopted by state and federal courts is the logical  
15 outgrowth test. If the adopted rule is the logical outgrowth of the proposed rule, no further  
16 comment period is required. If it is not the logical outgrowth, then a further comment period is  
17 required. Courts utilize several factors to apply the logical outgrowth test including: (1) any  
18 person affected by the adopted rule should have reasonably expected that the published proposed  
19 rule would affect the person's interest; (2) the subject matter of the adopted rule or the issues  
20 determined by that rule are different from the subject matter or issues involved in the published  
21 rule proposed to be adopted; and (3) the effect of the adopted rule differs from the effect of the  
22 rule proposed to be adopted or amended.  
23

24 The following cases discuss and analyze the logical outgrowth test and these factors.  
25 These judicial opinions also convey the wide acceptance and use of the logical outgrowth test in  
26 the states. *First Am. Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008,  
27 1015 (D.C.Cir.2000); *Arizona [publisher]. Serv. Co. v. EPA*, 211 F.3d 1280, 1300  
28 (D.C.Cir.2000); *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994);  
29 *Trustees for Alaska v. Dept. Nat. Resources*, ~~\_\_\_AK\_\_\_~~, 795 P.2d 805 (1990); *Sullivan v.*  
30 *Evergreen Health Care*, 678 N.E.2d 129 (Ind. App. 1997); *Iowa Citizen Energy Coalition v.*  
31 *Iowa St. Commerce Comm.* \_\_\_IA\_\_\_, 335 N.W.2d 178 (1983); *Motor Veh. Mfrs. Ass'n v.*  
32 *Jorling*, 152 Misc.2d 405, 577 N.Y.S.2d 346 (N.Y.Sup.,1991); *Tennessee Envir. Coun. v. Solid*  
33 *Waste Control Bd.*, 852 S.W.2d 893 (Tenn. App. 1992); *Workers' Comp. Comm. v. Patients*  
34 *Advocate*, 47 Tex. 607, 136 S.W.3d 643 (2004); *Dept. Of [publisher]. Svc. re Small Power*  
35 *Projects*, 161 Vt. 97, 632 A.2d 13 73 (1993); *Amer. Bankers Life Ins. Co. v. Div. of Consumer*  
36 *Counsel*, 220 Va. 773, 263 S.E.2d 867 (1980).

1  
2           **SECTION 309. EMERGENCY RULEMAKING; DIRECT FINAL**

3   **RULEMAKING.**

4           (a) If an agency finds that an imminent peril to the public health, safety, or welfare,  
5 including the imminent loss of federal funding for an agency program, requires the immediate  
6 adoption, amendment, or repeal of a rule and states in a record its reasons for that finding, the  
7 agency, without prior notice or hearing or upon any abbreviated notice and hearing that it finds  
8 practicable, may adopt, amend, or repeal a rule without complying with Sections 304 through  
9 307. The adoption, amendment, or repeal may be effective for not longer than [180] days  
10 [renewable once up to an additional [180] days]. The adoption, amendment, or repeal does not  
11 preclude the adoption or amendment of an identical rule, or the repeal of the rule, under Sections  
12 304 through 308. The agency shall file with the [publisher] a rule adopted, amended, or repealed  
13 under this subsection as soon as practicable given the nature of the emergency, shall publish the  
14 rule on its website, and shall notify persons who have requested notice of rules related to that  
15 subject matter. Nothing in this section prohibits the adoption of a new emergency rule if at the  
16 end of the effective period of the original emergency rule, the agency finds that the imminent  
17 peril to the public health, safety, or welfare still exists.

18           (b) If an agency proposes to adopt, amend, or repeal a rule the adoption, amendment, or  
19 repeal of which is expected to be noncontroversial, it may use the direct final rulemaking process  
20 authorized by this subsection and must comply with Section 304 (a)(1), (2), (3), (5), (b); and  
21 Section 312(1).

22           The rule to be adopted, amended, or repealed must be published in the [administrative  
23 bulletin] along with a statement by the agency that it does not expect the action to be

1 controversial, and that the rule shall become effective upon publication after 30 days if no  
2 objection is received. If no objection is received, the agency shall publish the rule and the action  
3 becomes final under Section 316(e). If an objection to the use of the direct final rulemaking  
4 process is received from any person within [ ] days of the public notice, the rule shall not become  
5 final. The agency shall file notice of the objection with the [publisher] for publication in the  
6 [administrative bulletin], and may proceed with the rulemaking process under Sections 304  
7 through 308.

### 8 **Comment**

9  
10 This section is taken from the 1961 MSAPA, Section 3(2)(b), and the Virginia  
11 Administrative Procedure Act, Va. Code Ann. Section 2.2-4012.1. Some state courts have  
12 indicated that *any* exemption from rulemaking requirements must be strictly construed to be  
13 limited to an emergency or virtual emergency situation.

14  
15 Subsection (a) can be used to adopt program requirements necessary to comply with  
16 federal funding requirements, or to avoid suspension of federal funds for noncompliance with  
17 program requirements. When an emergency rule has the effect of repealing an existing rule, the  
18 impact of the end of the emergency on the repealed rule, whether the repealed rule comes back  
19 into existence, is not governed by the provisions of Section 309(a) but would be governed by law  
20 of this state other than this act, such as the governing statute that delegates rulemaking authority  
21 to the agency that issued the emergency rule.

22  
23 Subsection (b) is based upon a recommendation from the Administrative Conference of  
24 the United States. Direct final rulemaking has been recommended by the Administrative  
25 Conference of the United States [ACUS Recommendation 95-4, 60 Fed. Reg. 43110 (1995)].  
26 The study that provided the basis for the recommendation was prepared by Professor Ron Levin  
27 and has been published [Ronald M. Levin, "Direct Final Rulemaking" 64 George Washington  
28 Law Review 1 (1995)]. [However, recognizing that there may be a few other justifications for  
29 exemption, this section adopts a broader rule for matters that will be noncontroversial. Thus, a  
30 situation where the agency is merely making a stylistic correction or correcting an error that the  
31 agency believes is noncontroversial may be adopted without formal rulemaking procedures. See  
32 the VA Fast-Track Rule provision at Va. Code Ann. Section 2.2-4012.1.]

33  
34 In order to prevent misuse of this procedural device, noncontroversial rule promulgation  
35 requires the consent of elected officials, and may be prevented by the requisite number of  
36 persons filing objections. The public comment period in subsection (b) provides notice of the  
37 noncontroversial rule and the opportunity to object to the adoption of the rule. If an objection to  
38 the direct final rulemaking process is received within the public comment period, the agency

1 must give notice of the objection and then the agency may proceed with the normal rulemaking  
2 process, including the public comment provisions of Section 306.

3  
4 **SECTION 310. GUIDANCE DOCUMENTS.**

5 (a) An agency may issue a guidance document without following the procedures set forth  
6 in Sections 304 through 308. ~~A guidance document does not have the force of law.~~

7 (b) An agency that proposes to rely on a guidance document to the detriment of a person  
8 in any administrative proceeding must afford the person a fair opportunity to contest the legality  
9 or wisdom of positions taken in the document. The agency may not use a guidance document to  
10 foreclose consideration of issues raised in the document.

11 (c) A guidance document may contain binding instructions to agency staff members if at  
12 an appropriate stage in the administrative process, the agency's procedures provide affected  
13 persons an adequate opportunity to contest positions taken in the document.

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

19 ~~(f)e~~ An agency shall maintain an index of all of its currently effective guidance  
20 documents, publish the index on its website, make all guidance documents available to the public  
21 as provided in Section 201(l), and file the index with the [publisher] [annually] as required by  
22 Section 201(n). The agency may not rely on a guidance document or cite it as precedent against  
23 any party to a proceeding, unless the guidance document is published on the agency website as  
24 required by Section 201(l).



1 | ~~(e)f~~ A guidance document may be considered by a presiding officer or final decision  
2 | maker in an agency adjudication but it does not bind the presiding officer and the final decision  
3 | maker in the exercise of discretion.

4 | ~~(h)g~~ A person may petition an agency under Section 317 to adopt a rule in place of a  
5 | guidance document.

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

8 | (1)    revise or repeal the guidance document;

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

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

#### 11 | **Comment**

12 |  
13 | This section seeks to encourage an agency to advise the public of its current opinions,  
14 | approaches, and likely courses of action by using guidance documents (also commonly known as  
15 | interpretive rules and policy statements). The section also recognizes agencies' need to  
16 | promulgate such documents for the guidance of both its employees and the public. Agency law  
17 | often needs interpretation, and agency discretion needs some channeling. The public needs to  
18 | know the agency's opinion about the meaning of the law and rules that it administers. Increasing  
19 | public knowledge and understanding reduces unintentional violations and lowers transaction  
20 | costs. See Michael Asimow, "California Underground Regulations," 44 Admin. L. Rev. 43  
21 | (1992); Peter L. Strauss, "Publication Rules in the Rulemaking Spectrum: Assuring Proper  
22 | Respect for an Essential Element," 53 Admin. L. Rev. 803 (2001). This section strengthens  
23 | agencies' ability to fulfill these legitimate objectives by excusing them from having to comply  
24 | with the full range of rulemaking procedures before they may issue these nonbinding statements.  
25 | At the same time, the section incorporates safeguards to ensure that agencies will not use  
26 | guidance documents in a manner that would undermine the public's interest in administrative  
27 | openness and accountability.

28 |  
29 | Four states have adopted detailed provisions regulating guidance documents in their  
30 | administrative procedure acts. See Ariz. Rev. Stat. Ann. §§ 41-1001, 41-1091; Mich. Comp.  
31 | Laws §§ 24.203, 24.224; Va. Code Ann. § 2.2-4008; Wash. Rev. Code Ann. § 34.05.230. This  
32 | section draws upon those provisions, and also upon requirements and recommendations issued  
33 | by federal authorities and the American Bar Association.

34 |  
35 | Subsection (a) exempts guidance documents from the procedures that are required for

1 issuance of rules. Many states have recognized the need for this type of exemption in their  
2 administrative procedure statutes. These states have defined guidance documents—or  
3 interpretive rules and policy statements—differently from rules, and have also excused agencies  
4 creating them from some or all of the procedural requirements for rulemaking. See Ala. Code §  
5 41-22-3(9)(c) (“memoranda, directives, manuals, or other communications which do not  
6 substantially affect the legal rights of, or procedures available to, the public”); Colo. Rev. Stat. §  
7 24-4-102(15), 24-4-103(1) (exception for interpretive rules or policy statements “which are not  
8 meant to be binding as rules”); *AMAX, Inc. v. Grand County Bd. of Equalization*, 892 P.2d 409,  
9 417 (Colo. Ct. App. 1994) (assessors’ manual is interpretive rule); Ga. Code Ann. § 50-13-4  
10 (“Prior to the adoption, amendment, or repeal of any rule, *other than interpretive rules or*  
11 *general statements of policy*, the agency shall [follow notice-and-comment procedure]”) (emphasis added); Mich. Comp. Laws § 24.207(h) (defining “rule” to exclude “[a] form with  
12 instructions, an interpretive statement, a guideline, an informational pamphlet, or other material  
13 that in itself does not have the force and effect of law but is merely explanatory”); Wyo. Stat.  
14 Ann. § 16-3-103 (“Prior to an agency’s adoption, amendment or repeal of all rules *other than*  
15 *interpretative rules or statements of general policy*, the agency shall . . .”) (emphasis added); *In*  
16 *re GP*, 679 P.2d 976, 996-97 (Wyo. 1984). See also Michael Asimow, “Guidance Documents in  
17 the States: Toward a Safe Harbor,” 54 Admin. L. Rev. 631 (2002) (estimating that more than  
18 thirty states have relaxed rulemaking requirements for agency guidance documents such as  
19 interpretive and policy statements). The federal Administrative Procedure Act draws a similar  
20 distinction. See 5 U.S.C. § 553(b)(A) (exempting “interpretative rules [and] general statements  
21 of policy” from notice-and-comment procedural requirements).  
22  
23

24 | ~~—The second sentence of subsection (a) sets forth the fundamental proposition that a~~ A guidance doc  
25 (D.C. Cir. 1986); *District of Columbia v. Craig*, 930 A.2d 946, 968-69 (D.C. 2007); *Clonlara v.*  
26 *State Bd. of Educ.*, 501 N.W.2d 88, 94 (Mich. 1993); *Penn. Human Relations Comm’n v.*  
27 *Norristown Area School Dist.*, 374 A.2d 671, 678 (Pa. 1977).  
28

29 Subsection (b) requires an agency to allow affected persons to challenge the legality or  
30 wisdom of guidance documents when it seeks to rely on these documents to their detriment. In  
31 effect, this subsection prohibits an agency from treating guidance documents as though they were  
32 rules. Because rules have the force of law (i.e., are binding), an agency need not respond to  
33 criticisms of their legality or wisdom during an adjudicative proceeding; the agency would be  
34 obliged in any event to adhere to them until such time as they have been lawfully rescinded or  
35 invalidated. In contrast, a guidance document is not binding. Therefore, when affected persons  
36 seek to contest a position expressed in a guidance document, the agency may not treat the  
37 document as determinative of the issues raised. See Recommendation 120C of the American Bar  
38 Association, 118-2 A.B.A. Rep. 57, 380 (August 1993) (“When an agency proposes to apply a  
39 nonlegislative rule . . . , it [should] provide affected private parties an opportunity to challenge  
40 the wisdom or legality of the rule [and] not allow the fact that a rule has already been made  
41 available to the public to foreclose consideration of [their] positions”).  
42

43 An integral aspect of a fair opportunity to challenge a guidance document is the agency’s  
44 responsibility to respond reasonably to arguments made against the document. Thus, when  
45 affected persons take issue with propositions expressed in a guidance document, the agency

1 “must be prepared to support the policy just as if the [guidance document] had never been  
2 issued.” *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974); see *Center for Auto*  
3 *Safety v. NHTSA*, 452 F.3d 798, 807 (D.C. Cir. 2006); *Professionals and Patients for*  
4 *Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995); *American Mining Cong. v.*  
5 *MSHA*, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

6  
7 An agency may not, therefore, treat its prior promulgation of a guidance document as a  
8 justification for not responding to arguments against the legality or wisdom of the positions  
9 expressed in such a document. *Flagstaff Broadcasting Found. v. FCC*, 979 F.2d 1566 (D.C. Cir.  
10 1992); *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992); *Giant Food Stores, Inc. v.*  
11 *Commonwealth*, 713 A.2d 177, 180 (Pa. Cmwlth. 1998); *Agency Policy Statements,*  
12 *Recommendation 92-2 of the Admin. Conf. of the U.S. (ACUS)*, 57 Fed. Reg. 30,103 (1992), ¶  
13 II.B. An agency may, however, refer to a guidance document during a subsequent administrative  
14 proceeding and rely on its reasoning, if it also recognizes that it has leeway to depart from the  
15 positions expressed in the document. See, e.g., *Steeltech, Ltd. v. USEPA*, 273 F.3d 652, 655-56  
16 (6th Cir. 2001) (upholding decision of ALJ who “expressly stated that the [guidance document]  
17 was not a rule and that she had the discretion to depart from [it], if appropriate,” but who adhered  
18 to the document upon determining “that the present case does not present circumstances that  
19 raise policy issues not accounted for in the [document]”); *Panhandle Producers & Royalty*  
20 *Owners Ass’n v. Econ. Reg. Admin.*, 847 F.2d 1168, 1175 (5th Cir. 1988) (agency “responded  
21 fully to each argument made by opponents of the order, without merely relying on the force of  
22 the policy statement,” but was not “bound to ignore [it] altogether”); *American Cyanamid Co. v.*  
23 *State Dep’t of Envir. Protection*, 555 A.2d 684, 693 (N.J. Super. 1989) (rejecting contention that  
24 agency had treated a computer model as a rule, because agency afforded opposing party a  
25 meaningful opportunity to challenge the model’s basis and did not apply the model uniformly in  
26 every case). See generally John F. Manning, “Nonlegislative Rules,” 72 *Geo. Wash. L. Rev.*  
27 893, 933-34 (2004); Ronald M. Levin, “Nonlegislative Rules and the Administrative Open  
28 Mind,” 41 *Duke L.J.* 1497 (1992). The relevance of a guidance document to subsequent  
29 administrative proceedings has been compared with that of the agency’s adjudicative precedents.  
30 See subsection (d) *infra*.

31  
32 What constitutes a fair opportunity to contest a policy statement within an agency will  
33 depend on the circumstances. See ACUS Recommendation 92-2, *supra*, ¶ II.B. (“[A]ffected  
34 persons should be afforded a fair opportunity to challenge the legality or wisdom of [a policy  
35 statement] and suggest alternative choices in an agency forum that assures adequate  
36 consideration by responsible agency officials,” preferably “at or before the time the policy  
37 statement is applied to [them]”). Affected persons’ right to a meaningful opportunity to be heard  
38 on the issues addressed in guidance documents must be reconciled with the agency’s interest in  
39 being able to set forth its interpretations and policies for the guidance of agency personnel and  
40 the public without undue impediment. An agency may use its rulemaking authority to set forth  
41 procedures that it believes will provide affected persons with the requisite opportunity to be  
42 heard. To the extent that these procedures survive judicial scrutiny for compliance with the  
43 purposes of this subsection (b), the agency will thereafter be able to rely on established practice  
44 and precedent in determining what hearing rights to afford to persons who may be affected by its  
45 guidance documents. As new fact situations arise, however, courts should be prepared to

1 entertain contentions that procedures that have been upheld in past cases did not, or will not,  
2 afford a meaningful opportunity to be heard to some persons who may wish to challenge the  
3 legality or wisdom of a particular guidance document.

4  
5 Subsection (c) permits an agency to issue mandatory instructions to agency staff  
6 members, typically those who deal with members of the public at an early stage of the  
7 administrative process, provided that affected persons will have a fair opportunity to contest the  
8 positions taken in the guidance document at a later stage. See Office of Management and  
9 Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (2007), §  
10 II(2)(h) (significant guidance documents shall not “contain mandatory language . . . unless . . .  
11 the language is addressed to agency staff and will not foreclose agency consideration of positions  
12 advanced by affected private parties”); ACUS Recommendation 92-2, *supra*, ¶ III (an agency  
13 should be able to “mak[e] a policy statement which is authoritative for staff officials in the  
14 interest of administrative uniformity or policy coherence”). For example, an agency manual  
15 might prescribe requirements that are mandatory for low-level staff, leaving to higher-ranking  
16 officials the discretion to depart from the interpretation or policy stated in the manual. The  
17 question of what constitutes an adequate opportunity to be heard may vary among agencies or  
18 programs. In some programs, centralization of discretionary authority may be a necessary  
19 concession to “administrative uniformity or policy coherence”; in other programs, the obligation  
20 to proceed through multiple stages of review might be considered so burdensome as to deprive  
21 members of the public of a meaningful opportunity to obtain agency consideration of whether the  
22 guidance document should apply to their particular situations. The touchstone in every case is  
23 whether the opportunity to be heard prescribed by subsection (b) remains realistically available  
24 to affected persons.

25  
26 Subsection (d) is based on a similar provision in ABA Recommendation No. 120C, *supra*.  
27 It is in accord with general principles of administrative law, under which an agency’s failure to  
28 reasonably explain its departure from established policies or interpretations renders its action  
29 arbitrary and capricious on judicial review. See § 509(a)(3)(H) [Alternative 2] (court may grant  
30 relief against agency action other than a rule if it is “inconsistent with the agency’s prior practice  
31 or precedent, unless the agency has stated credible reasons sufficient to indicate a fair and  
32 rational basis for the inconsistency”); 1981 MSAPA § 5-116(c)(8)(iii) (equivalent provision);  
33 *Yale-New Haven Hospital v. Leavitt*, 470 F.3d 71, 79-80 (2d Cir. 2006). It has been said that a  
34 guidance document should constrain subsequent agency action in the same manner that the  
35 agency’s adjudicative precedents do. See Peter L. Strauss, “The Rulemaking Continuum,” 41  
36 *Duke L.J.* 1463, 1472-73, 1486 (1992) (cited with approval on this point in *United States v.*  
37 *Mead Corp.*, 533 U.S. 218, 232 (2001)); see also Manning, *supra*, at 934-37. Subsection (d)  
38 refers only to official acts of the agency (compare the definition of “agency action” in Section  
39 102(3)), not to informal acts of agency staff, such as inspections. The latter types of conduct are  
40 frequently not accompanied by a written statement at all, so it would be outside the scope of  
41 requirements imposed by subsection (d) to require these government personnel to “explain” a  
42 departure from the position taken in a guidance document.

43  
44 One purpose of this subsection is to protect the interests of persons who may have  
45 reasonably relied on a guidance document. An agency that acts at variance with its past practices

1 may be held to have acted in an arbitrary and capricious manner if the unfairness to regulated  
2 persons outweighs the government's interest in applying its new view to those persons. Heckler  
3 v. Community Health Servs., 467 U.S. 51, 61 (1984) ("an administrative agency may not apply a  
4 new [case law] rule retroactively when to do so would unduly intrude upon reasonable reliance  
5 interests"); Miguel-Miguel v. Gonzales, 500 F.3d 941, 951 (9th Cir. 2007); Epilepsy Found. v.  
6 NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001); Microcomputer Tech. Inst. v. Riley, 139 F.3d  
7 1044, 1050 (5th Cir. 1998). Accordingly, where persons may have justifiably relied on a  
8 guidance document, the agency's explanation for departing from the position taken in that  
9 document should ordinarily include a reasonable justification for the decision to override their  
10 reliance interests.

11  
12 The first two sentences of subsection (f) are based directly on Va. Code Ann. § 2.2-4008.  
13 Similar provisions have been adopted in Arizona and Washington. See Ariz. Rev. Stat. Ann. §  
14 41-1091; Wash. Rev. Code Ann. § 34.05.230(3)-(4).

15  
16 The last sentence of the subsection is based on the federal APA. See 5 U.S.C. §  
17 552(a)(2); Smith v. NTSB, 981 F.2d 1326 (D.C. Cir. 1993). Subject to harmless error principles,  
18 see § 509(b), a court may invoke the sanction prescribed in this section without necessarily  
19 concluding that the party against whom the document is cited has valid objections to the  
20 substance of the document.

21  
22 Subsection (g) is based on Wash. Rev. Code Ann. § 34.05.230(2), which provides for  
23 petitions "requesting the conversion of interpretive and policy statements into rules." However,  
24 it is phrased more generally than the Washington provision, because an agency that receives a  
25 rulemaking petition will not necessarily wish to "convert" the existing guidance document into a  
26 rule without any revision. Knowing that it will now be speaking with the force of law, in a  
27 format that would be more difficult to alter than a guidance document is, the agency might prefer  
28 to adopt a rule that is narrower than, or otherwise differently phrased than, the guidance  
29 document that it would replace. In any event, the agency will, as provided in section 317, need  
30 to explain any rejection of the petition, whether in whole or in part, and such a rejection will be  
31 judicially reviewable to the same extent as other actions taken under that section.

32  
33 Subsection (h) extends the principles of section 317 by allowing interested persons to  
34 petition an agency to revise or repeal an existing guidance document. Thus, while this Act does  
35 not require an agency to obtain the views of the public before issuing a guidance document, this  
36 subsection provides a procedure by which members of the public may bring their views  
37 regarding an existing guidance document to the agency's attention and request that the agency  
38 take account of those views. This process may be of particular importance to persons who are  
39 indirectly affected by a guidance document (such as persons who stand to benefit from the  
40 underlying regulatory program) but are unlikely to be the targets of an enforcement action in  
41 which they could challenge the legality or wisdom of the document under subsection (b). See  
42 Nina A. Mendelson, "Regulatory Beneficiaries and Informal Agency Policymaking," 92 Cornell  
43 L. Rev. 397, 438-44 (2007); see also ACUS Recommendation No. 76-5, 41 Fed. Reg. 56,769  
44 (1976) (noting that section 553(e) of the federal APA "allow[s] any person to petition at any time  
45 for the amendment or repeal of . . . an interpretive rule or statement of general policy").

1  
2 The subsection requires an agency to respond to the petition in [sixty] or fewer days. An  
3 agency that is not prepared to revise or repeal the guidance document within that time period  
4 may initiate a proceeding for the purpose of giving the matter further consideration. This  
5 proceeding can be informal; the notice and comment requirements of Sections 304 through 308  
6 are inapplicable to it, because those sections deal with rules rather than guidance documents.  
7 The agency may, however, voluntarily solicit public comments on issues raised by the petition.  
8 Cf. ACUS Recommendation 76-5, *supra*, ¶ 2. This section does not prescribe a time period  
9 within which the agency must complete the proceeding, but judicial intervention to compel  
10 agency action “unlawfully withheld or unreasonably delayed” may be sought in an appropriate  
11 case. § 501(a). If the agency declines to revise or repeal the guidance document, within the  
12 [sixty] day period or otherwise, it must explain its decision. Denials of petitions under this  
13 subsection, like denials of petitions for rulemaking under section 317, are reviewable for abuse  
14 of discretion, and the agency’s explanation will provide a basis for any judicial review of the  
15 denial.

16 When an agency grants a petition to revise or repeal a guidance document in part, and  
17 denies the petition in part, the agency should explain the partial denial to comply with the  
18 requirements of Section 310(i)(3).  
19

20 **SECTION 311. REQUIRED INFORMATION FOR RULE.** A rule filed by an  
21 agency with the [publisher] under Section 315 must contain the text of the rule adopted,  
22 amended, or repealed and be accompanied by a record containing:

- 23 (1) the date the agency adopted, amended, or repealed the rule;  
24 (2) a reference to the specific statutory or other authority authorizing the action;  
25 (3) any findings required by any provision of law as a prerequisite to adoption or  
26 effectiveness of the action;  
27 (4) the effective date of the action; and  
28 (5) the concise explanatory statement required by Section 312.

### 29 **Comment**

30

31 Agency action is defined in section 102(4) to include an agency rule or order [(subsection  
32 (4)(a)], and the failure to issue a rule or order [(subsection (4)(b))]. In Section 311(2), (3), and (4),  
33 the term “action” refers to the rulemaking process related to the adoption, amendment or repeal  
34 of a rule. See Section 102(2) definition of adoption of a rule which includes amendment or repeal  
35 of a rule, unless the context clearly indicates otherwise.  
36



(1) repeating verbatim the text of the code, standard, or rule in the rule would be unduly cumbersome, expensive, or otherwise inexpedient;

(2) the reference in the rule fully identifies the incorporated code, standard, or rule by citation, place of inspection, and date[, and states whether the rule includes any later amendments or editions of the incorporated code, standard, or rule];

(3) the code, standard, or rule is readily available to the public in written or electronic form;

(4) the rule states where copies of the code, standard, or rule are available for a reasonable charge from the agency adopting the rule and where copies are available from the agency of the United States, this state, another state, or the organization or association originally issuing the code, standard, or rule; and

(5) the agency maintains a copy of the code, standard, or rule readily available for public inspection at the agency office.

#### **Comment**

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

**SECTION 314. COMPLIANCE.** An action taken under this [article], including the



1 adoption, amendment, or repeal of a rule under Section 309, is not valid unless taken in  
2 substantial compliance with the procedural requirements of this [article].

3 **Comment**  
4

5 This section is a slightly modified form of the 1961 Model State Administrative  
6 Procedure Act, section (3)(c). See also section 3-113(a) and section 3-116 of the 1981 Model  
7 State Administrative Procedures Act. Section 504(a) governs the timing of judicial review  
8 proceedings to contest any rule on the ground of noncompliance with the procedural  
9 requirements of this [act]. The scope of challenges permitted under Section 504(a) includes all  
10 applicable requirements of article 3 for the type of rule being challenged.  
11

12 **SECTION 315. FILING OF RULES.** An agency shall file in written and electronic  
13 form with the [publisher] each rule it adopts, amends, or repeals, including a rule adopted,  
14 amended, or repealed under Section 309. The agency shall file the rule not later than [ ] days  
15 after adoption, amendment, or repeal. The [publisher] shall maintain a permanent register of all  
16 filed rules and concise explanatory statements. The [publisher] shall affix to each adopted,  
17 amended, or repealed rule a certification of the time and date of filing. The [publisher] shall  
18 publish the notice of adopted, amended, or repealed rules in the [administrative bulletin]. In  
19 filing an adopted, amended, or repealed rule, each agency shall use a standard form prescribed by  
20 the [publisher].

21 **Comment**

22 This section is based on the 1961 Model State Administrative Procedure Act, Section 4(a)  
23 and its expansion in the 1981 MSAPA, Section 3-114. Section 201(g)(1) provides that the  
24 administrative bulletin must contain newly filed adopted rules. This section provides that the  
25 publisher is responsible for publishing the notice of adopted rules in the administrative bulletin.  
26

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

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

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

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

(d) A rule adopted, amended, or repealed using the emergency process under Section 309(a) becomes effective upon action by the agency.

(e) A rule adopted, amended, or repealed using the direct final rulemaking process under Section 309(b) to which no objection is made becomes effective [30] days after the close of the public comment period unless the agency specifies a later effective date.

8	Comment
---	---------

This is a substantially revised version of the 1961 Model State Administrative Procedure Act, Section 4 (b) & (c) and 1981 Model State Administrative Procedure Act, Section 3-115. Most of the states have adopted provisions similar to both the 1961 Model State Administrative Procedure Act and the 1981 Model State Administrative Procedure Act, although they may differ on specific time periods. Some rules may have retroactive application or effect provided that there is express statutory authority for the agency to adopt retroactive rules. See *Bowen v. Georgetown University Hospital* 488 U.S. 204 (1988).

27 **SECTION 317. PETITION FOR ADOPTION OF RULE.** Any person may petition

1 an agency to adopt a rule. Each agency shall prescribe by rule the form of the petition and the  
2 procedure for its submission, consideration, and disposition. Not later than [60] days after  
3 submission of a petition, the agency shall:

- 4 (1) deny the petition in a record and state its reasons for the denial; or  
5 (2) initiate rulemaking proceedings in accordance with this [act].

6 **Comment**

7 This section is substantially similar to the 1961 MSAPA. See also section 3-117 of the  
8 1981 MSAPA. Agency decisions that decline to adopt a rule are judicially reviewable for abuse  
9 of discretion (See Massachusetts v. EPA 127 S. Ct. 1438 (2007) (EPA decision to reject  
10 rulemaking petition and therefore not to regulate greenhouse gases associated with global  
11 warming was judicially reviewable and decision was arbitrary and capricious.)). When an agency  
12 grants a rulemaking petition in part, and denies the petition in part, the agency should explain the  
13 partial denial to comply with the requirements of Section 317(1).  
14

1 [ARTICLE] 4

2 ADJUDICATION IN A CONTESTED CASE

3 SECTION 401. WHEN ARTICLE APPLIES; CONTESTED CASES. This [article]

4 applies to an adjudication made by an agency in a contested case.

5 *Legislative Note: For a statute to create a right to an evidentiary hearing, express use of the*  
6 *term “evidentiary hearing” is not necessary in the statute. Statutes often use terms like “appeal”*  
7 *or “proceeding” or “hearing”, but in context it is clear that they mean an evidentiary hearing.*  
8 *An evidentiary hearing is one in which the resolution of the dispute involves particular facts and*  
9 *the presiding officer is limited to material in the record in making his decision. Hearing rights*  
10 *are created by statutes that establish an agency and delegate powers to the agency (agency*  
11 *enabling acts). The provisions of this [act] do not create hearing rights.*

12  
13 **Comment**

14  
15 Article 4 of this Act does not apply to all adjudications but only to those adjudications,  
16 defined in Section 102(6) as a “contested case.” Contested case is the definition of the subset of  
17 adjudications that fall within this section because law as defined in Section 102(16) requires an  
18 evidentiary hearing to resolve particular facts or the application of law to facts. This section is  
19 subject to the exception in Section 407 for an emergency hearing if the requirements for that  
20 exception under this Article apply. If the requirements for an emergency adjudication under  
21 Section 407 are met, a hearing in a contested case may be conducted following the procedures in  
22 that section. All contested cases are also subject to Section 402 of this article.

23  
24 Hearings that are required by procedural due process guarantees serve to protect life,  
25 liberty and property *interests*, which arise where a statute creates a justified expectation or  
26 legitimate entitlement. This section includes more than what were described as “rights” under  
27 older common law. In cases where the right to an evidentiary hearing is created by due process,  
28 attention is directed to Article 4A, section 401A which may permit an informal hearing.

29  
30 Section 401, governing contested case hearings, does not apply to investigatory hearings,  
31 a hearing that merely seeks public input or comment, pure administrative process proceedings  
32 such as tests, elections, or inspections, and situations in which a party has a right to a de novo  
33 administrative or judicial hearing. An agency may by rule make all or part of article 4 applicable  
34 to adjudication that does not fall within the requirements of Section 401, including hearing rights  
35 conferred by agency regulations, or on the record appeals.

36  
37 This section draws upon the California, (see Cal. Cal.Gov.Code Section 11410.10);  
38 Minnesota, (see Minnesota Statutes Annotated, Section 14.02, subd. 3; Washington (see Revised  
39 Code of Washington, 34.05.413(2) and Kansas (see Kansas Stat. Ann., KS ST Section 77-502(d)  
40 & Kansas Stat. Ann., KS ST Section 77-503).

1           **SECTION 402. PRESIDING OFFICERS.**

2           -(a) A presiding officer must be the individual who is the agency head, a member of a  
3 multi-member body of individuals that is the agency head, an individual designated by the  
4 agency head, unless prohibited by law other than this [act], or an administrative law judge  
5 assigned in accordance with Section 602.

6           -(b) An individual who has served as investigator, prosecutor, or advocate at any stage in  
7 a contested case may not serve as the presiding officer or assist or advise the presiding officer in  
8 the case. An individual who is subject to the authority, direction, or discretion of an individual  
9 who has served as [investigator,] prosecutor[,] [or] advocate at any stage in a contested case,  
10 including investigation, may not serve as the presiding officer or assist or advise the presiding  
11 officer in the same proceeding.

12           (c) Subsection (b) also governs separation of functions as to the agency head or other  
13 person or body to which the power to hear or decide the proceeding is delegated.

14           (d) A presiding officer is subject to disqualification for bias, prejudice, financial interest,  
15 ex parte communications as provided in Section 408(h), or any other factor that provides  
16 reasonable doubt about the impartiality of the presiding officer. A presiding officer, after  
17 making a reasonable inquiry, shall disclose to all parties any known facts related to grounds for  
18 disqualification that would be material to the impartiality of the presiding officer in the contested  
19 case proceeding.

20           (e) Any party may petition for the disqualification of a presiding officer promptly after  
21 notice that the person will preside or, if later, promptly upon discovering facts establishing a  
22 ground for disqualification. The petition must state with particularity the ground upon which it is  
23 claimed that a fair and impartial hearing cannot be accorded or the applicable rule or canon of

1 practice or ethics that requires disqualification. The petition may be denied if the party fails to  
2 exercise due diligence in requesting disqualification after discovering a ground for  
3 disqualification.

4 (f) A presiding officer whose disqualification is requested shall determine whether to  
5 grant the petition and state facts and reasons for the determination in writing. A presiding  
6 officer's decision to deny disqualification is not subject to interlocutory judicial review.

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

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

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

12 | ~~(h)~~ If participation of the agency head is necessary to enable the agency to take action,  
13 the agency head may continue to participate notwithstanding a ground for disqualification or  
14 exclusion.

15 ***Legislative Note:*** The last alternative under subsection (a) would be applicable in states that  
16 have adopted central panel hearing offices but would not apply to states that do not have central  
17 panel hearing offices. Article 6 governs central panel hearing offices under this act.

#### 18 **Comment**

19  
20  
21 Subsection (a) governs who may be appointed to serve as a presiding officer in a disputed  
22 case. If the case is heard by more than one presiding officer, as when the agency head hears a  
23 disputed case en banc, one member of the agency head may serve as chair, but all of the persons  
24 sitting as judge in the case are collectively the presiding officer.

25  
26 Subsection (a) confers a limited amount of discretion upon the agency head to determine  
27 who will preside. The presiding officer may be either the agency head, or one or more members  
28 of the agency head, or one or more administrative law judges assigned by the Office of  
29 Administrative Hearings in accordance with Section 603. Without the bracketed language,  
30 subsection (a) resembles the law in a group of states that have created a central panel of  
31 administrative law judges, and have made the use of administrative law judges from the central

1 panel mandatory unless the agency head or one or more members of the agency head presides. In  
2 some states, however, the use of central panel administrative law judges is mandatory only in  
3 certain enumerated agencies or types of proceedings. If the bracketed language is adopted, the  
4 agency head, in addition to the preceding options for appointment and unless prohibited by law,  
5 may designate any one or more “other persons” to serve as presiding officer. This discretion is  
6 subject to subsections (c) & (d) on separation of functions. This discretion is also limited by the  
7 phrase “unless prohibited by law,” included in the bracketed language, which prevents the use of  
8 “other persons” as presiding officers to the extent that the other state law prohibits their use.  
9 Thus, if this language is adopted by a state that has an existing central panel of administrative  
10 law judges whose use is mandatory in enumerated types of proceedings, the agencies must  
11 continue to use the central panel for those proceedings, but may exercise their option to use  
12 “other persons” for other types of proceedings.

13  
14 Subsection (e) is based on California Government Code Section 11425.30.

15  
16 Subsection (f) is based upon 1981 MSAPA Section 4-202(b). See also California  
17 Government Code Section 11425.40(a). Disclosure duties under subsection (e) are based on state  
18 ethics codes governing ethical standards for judges in the judicial branch of the government,  
19 Section 12 of the 2000 Uniform Arbitration Act, and on state law governing the ethical  
20 responsibilities of government officials and employees. See Section 410.

21  
22 Subsection (g) is based on 1981 MSAPA Section 4-202(c).

23  
24 Subsection (j) is based on California Government Code Section 11425.40(c).

25  
26 Subsection (k) adopts the rule of necessity for decision makers. See California  
27 Government Code Section 11512(c) (agency member not disqualified if loss of a quorum would  
28 result); *United States v. Will* (1980) 449 U.S. 200 (common law rule of necessity applied to U.S.  
29 Supreme Court to decide issues before the court relating to compensation all Article III judges).  
30 Section 408(g) precludes ex parte communications between presiding officers and agency heads.

### 31 32 **SECTION 403. CONTESTED CASE PROCEDURE.**

33 (a) This section does not apply to emergency adjudications.

34 (b) An agency shall make available to the person to which an agency action is directed a  
35 copy of the agency procedures governing the case.

36 (c) In a contested case, the presiding officer shall give all parties a timely opportunity to  
37 file pleadings, motions, and objections. The presiding officer may give all parties the opportunity  
38 to file briefs, proposed findings of fact and conclusions of law, and recommended, interim, or

1 final orders. The presiding officer, with the consent of all parties, may refer the parties in a  
2 contested case proceeding to mediation or other dispute resolution procedure.

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

6 (e) Except as otherwise provided by law other than this [act], when compelling  
7 circumstances make the appearance of witnesses impracticable and the credibility of testimony  
8 can otherwise be determined, the presiding officer may conduct all or part of an evidentiary  
9 hearing or a prehearing conference by telephone, television, video conference, or other electronic  
10 means. Each party to the proceeding must be given an opportunity to attend, hear, speak, and be  
11 heard at the proceeding as it occurs. Nothing in this subsection prevents an agency from  
12 providing for telephone hearings by rule.

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

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

20 (h) Unless prohibited by law other than this [act], a party, at the party's expense, may be  
21 represented by a lawyer.

22 | (i) A party may exercise the right to self representation in a contested case, and the  
23 presiding officer may explain contested case procedures to the self represented party.



1 (j) A presiding officer must record the hearing to provide a transcript of the hearing. The  
2 transcript of the hearing may be recorded by stenographic reporter, video recording, audio  
3 recording, or other means.

4 (k) The decision in a contested case must be written, based on the hearing record, and  
5 include a statement of the factual and legal bases of the decision.

6 (l) Subject to Section 204, the rules by which an agency conducts a contested case may  
7 include provisions more protective of the rights of the person to which the agency action is  
8 directed than the requirements of this section.

#### 9 **Comment**

10  
11 This section specifies the minimum hearing requirements that must be met in disputed  
12 cases under this act. This section applies to all agencies whether or not an agency rule provides  
13 for a different procedure; this procedure is excused only if a statute expressly provides otherwise.  
14 This section does not prevent an agency from adopting more stringent procedures than those in  
15 this section. This section does not supersede conflicting state or federal statutes.

16  
17 There are several interrelated purposes for this procedural provision: 1) to create a  
18 minimum fair hearing procedure; and 2) to attempt to make that minimum procedure applicable  
19 to all agencies. In many states, individual agencies have lobbied the legislature to remove various  
20 requirements of the state Administrative Procedure Act from them. The result in a considerable  
21 number of states is a multitude of divergent agency procedures. This lack of procedural  
22 uniformity creates problems for litigants, the bar and the reviewing courts. This section attempts  
23 to provide a minimum, universally applicable procedure in all disputed cases. The important goal  
24 of this section is to protect citizens by a guarantee of minimum fair procedural protections. The  
25 procedures required here are only for actions that fit the definition of a disputed case and fall  
26 within the provisions of Section 401. Thus, they do not spread quasi judicial procedures widely,  
27 and do not create any significant agency loss of efficiency or increased cost.

28  
29 This section is modeled in part on the Arizona Regulatory Bill of Rights, see A.R.S.  
30 Section 41-1001.01 and the California Administrative Adjudication Bill of Rights, see West  
31 Ann.Cal.Gov.Code Section 11425.10.

32  
33 Under subsection (c), agency procedures governing the case refers to rules of practice  
34 adopted under Section 202, or default procedural rules adopted under Section 204, or procedures  
35 required under the agency governing statute.

36  
37 Under subsection (d)(1) evidence is unduly repetitious if its probative value is

1 substantially outweighed by the probability that its admission will necessitate undue  
2 consumption of time. In most states a presiding officer's determination that evidence is unduly  
3 repetitious may be overturned only for abuse of discretion. Under subsection (d)(1), the legal  
4 residuum rule is not adopted and hearsay evidence can be sufficient to support fact findings if the  
5 hearsay evidence is sufficiently reliable. This provision is based on the federal A.P.A. provision,  
6 5 U.S.C. Section 556 (d), Richardson v. Perales, (1971) 402 U.S. 389 and the 1981 MSAPA  
7 Section 4-215(d). (reasonably prudent person standard for reliability).

8  
9 Subsection (d)(4) information that is not a public record means information not subject to  
10 disclosure under the applicable public records act in the jurisdiction.

11  
12 Subsection (d)(5) is based on 1981 MSAPA Section 4-212(f). See also California  
13 Government Code Section 11515, and 1961 MSAPA Section 10(4).

14  
15 Subsection (d)(6) is based on 1981 MSAPA Section 4-215(d). See also California  
16 Government Code Section 11425.50(c) which contains the same language.

17  
18 Under subsection (g) hearings in contested cases can be conducted using the telephone,  
19 television, video conferences, or other electronic means. Subsection (g) is based in part on  
20 California Government Code Section 11440.30. Due process of law may require live in person  
21 hearings. See Whiteside v. State, (2001) 20 P. 3d 1130 (Supreme Court of Alaska) (due process  
22 of law violated with telephone hearing in driver's license revocation hearing when driver's  
23 credibility was material to the hearing, and the driver was not offered an in person hearing); But  
24 see Bancroft v. Employment Division (1985) 72 Or. App. 486, 696 P. 2d 19, 21 (telephone  
25 hearings do not violate due process of law in hearings in which the credibility of a party is at  
26 issue because audible indicia of a witness's demeanor are sufficient for credibility).

27  
28 Subsection (k) provides for a right of self representation for parties in contested case  
29 proceedings. Subsection (k) also allows presiding officers to accommodate pro se litigant's  
30 unfamiliarity with agency procedures in contested cases by explaining those procedures to the  
31 pro se litigant to the extent consistent with fair hearing and impartial decision maker  
32 requirements. Goldberg v. Kelley (1970) 397 U.S. 254 (impartial decision-making is essential to  
33 due process of law). The fair hearing limits would be exceeded if the presiding officer violated  
34 impartial decision maker requirements by improperly assisting one party in presenting that  
35 parties case at the hearing.

36  
37 The subsection (l) written decision requirement is based in part on 1961 MSAPA Section  
38 12, and on 1981 MSAPA Section 4-215(g). See also California Government Code Section  
39 11425.50. See also sections 801, and 802, electronic publication of written decisions, and the  
40 provisions of 15 U.S.C. Section 7004.

41  
42 Section 10 of the 1961 MSAPA contained many similar provisions.

43  
44 **SECTION 404. EVIDENCE IN CONTESTED CASE.** The following rules apply in

1 contested cases:

2 (1) Except as otherwise provided by law, when the agency initiates the adjudicative  
3 proceeding, the agency has the burden of proof. When a party other than the agency initiates the  
4 adjudicative proceeding, that party has the burden of proof.

5 (2) Upon proper objection, the presiding officer shall exclude evidence that is irrelevant,  
6 immaterial, unduly repetitious, excludable on constitutional or statutory grounds, or excludable  
7 on the basis of an evidentiary privilege recognized in the courts of this state. Any other relevant  
8 evidence may be received if it is of a type commonly relied upon by reasonably prudent  
9 individuals in the conduct of their affairs. The presiding officer may exclude evidence that is  
10 objectionable under the applicable rules of evidence, but evidence may not be excluded solely  
11 because it is hearsay.

12 | ~~(3)~~

13 **Alternative A**

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

17 **Alternative B**

18 | (3) Hearsay evidence is sufficient to support fact findings if it constitutes reliable,  
19 probative, and substantial evidence.

20 **End of Alternatives**

21 (4) An objection must be made at the time the evidence is offered. In the absence of an  
22 objection, the presiding officer may exclude evidence at the time it is offered. A party may make  
23 an offer of proof when evidence is objected to or before the presiding officer's decision to

1 exclude evidence.

2 (5) Evidence may be received in written form if doing so will expedite the hearing  
3 without substantial prejudice to a party. Documentary evidence may be received in the form of  
4 copies or excerpts or by incorporation by reference.

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

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

11 (8) The presiding officer may take official notice of all facts of which judicial notice may  
12 be taken and of other scientific and technical facts within the specialized knowledge of the  
13 agency. Parties must be notified at the earliest practicable time of the facts proposed to be  
14 noticed and their source, including any staff memoranda or data. The parties must be afforded an  
15 opportunity to contest any officially noticed facts before the decision is announced.

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

#### 18 **SECTION 405. NOTICE IN CONTESTED CASE.**

19 (a) Except as otherwise provided for an emergency adjudication under Section 408, an  
20 agency shall give notice as provided in this section.

21 (b) In an action initiated by a person other than an agency, within a reasonable time after  
22 filing, the agency shall give notice to all parties that an action has been commenced. The notice  
23 must include:

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

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

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

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

9                   (5) that the person has the right to be represented by a lawyer as provided in  
10 Section 403(h).

11               (c) In an action initiated by the agency, the agency must give an initial notice to the party  
12 against which the action is brought. The notice shall include:

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

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

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

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

20                   (5) the name, official title, mailing address, [e-mail address,] [facsimile number,]  
21 and telephone number of the presiding officer or, if no officer has been appointed at the time the  
22 notice is given, the name, official title, mailing address, [e-mail address,] [facsimile address,] and  
23 telephone number of the agency's representative;

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

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

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

7 (d) When a hearing or a prehearing conference is scheduled, the agency shall give parties  
8 notice that contains the information required by subsection (c) at least 14 days before the hearing  
9 or prehearing conference.

10 (e) Notice may include other matters that the presiding officer considers desirable to  
11 expedite the proceedings.

### 12 **Comment**

13  
14 This section is taken from: the 1961 Model State Administrative Procedure Act, section 9  
15 and the 1981 Model State Administrative Procedure Act, Section 4-206. See also; Oregon,  
16 O.R.S. Section 183.415; Kansas, K.S.A. Section 77-518; Iowa, I.C.A. Section 17A.12; Montana,  
17 MCA 2-4-601; and Michigan, M.C.L.A. 24.271.

### 18 **SECTION 406. HEARING RECORD IN CONTESTED CASE.**

19  
20 (a) An agency shall maintain a hearing record in each contested case.

21 (b) The hearing record must contain:

22 (1) a recording of the proceeding;

23 (2) notices of all proceedings;

24 (3) any pre-hearing order;

25 (4) any motions, pleadings, briefs, petitions, requests, and intermediate rulings;

26 (5) evidence admitted, received, or considered;

- 1 (6) a statement of matters officially noticed;
- 2 (7) proffers of proof and objections and rulings thereon;
- 3 (8) proposed findings, requested orders, and exceptions;
- 4 (9) any transcript of all or part of the hearing;
- 5 (10) any ~~final order~~, recommended decision, final order, or order on  
6 reconsideration; and
- 7 (11) matters placed on the record after an ex parte communication under Section  
8 408(e).

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

#### 11 **Comment**

12  
13 The recording of an agency hearing can be made by certified shorthand reporter, video or  
14 audio recording, or other electronic means. Judicial review under Section 507 is limited to  
15 matters in the agency hearing record.  
16

#### 17 **SECTION 407. EMERGENCY ADJUDICATION PROCEDURE.**

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

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

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

26 (d) An order issued under this section must briefly explain the factual and legal reasons

1 for making the decision using emergency adjudication procedures.

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

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

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

#### 10 **Comment**

11  
12 This section is based upon the 1961 Model State Administrative Procedure Act, section  
13 14(c) and the 1981 Model State Administrative Procedure Act, Section 4-501. The procedure of  
14 this section is intended permit immediate agency emergency adjudication, but also to provide  
15 minimal protections to parties against whom such action is taken. Emergencies regularly occur  
16 that immediately threaten public health, safety or welfare: licensed health professionals may  
17 endanger the public; developers may act rapidly in violation of law; or restaurants may create a  
18 public health hazard. In these cases the agencies must possess the power to act rapidly to curb  
19 the threat to the public. On the other hand, when the agency acts in such a situation, there should  
20 be some modicum of fairness, and the standards for invoking this remedy must be clear, so that  
21 the emergency label may be used only in situations where it fairly can be asserted that rapid  
22 action is necessary to protect the public.

23  
24 Federal and state case law have held that in an emergency situation an agency may act  
25 rapidly and postpone any formal hearing without violation, respectively, of federal or state  
26 constitutional law. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Gilbert v. Homar* (1997) 520 U.S.  
27 924; *Dep't of Agric. v. Yanes*, 755 P.2d 611 (OK. 1987).

28  
29 The generic provision in this section has several advantages over the present divergent  
30 approaches to emergency agency action. First, all agencies have the needed power to act without  
31 delay, but there is provision for some type of brief hearing, if feasible. Second, this article limits  
32 the agency to action of this type only in a genuine, defined emergency. Third, there are pre and  
33 post deprivation protections. This section seeks to strike an appropriate balance between public  
34 need and private fairness.

35  
36 This section does not apply to an emergency adjudication, cease and desist order, or other



1 action in the nature of emergency relief issued pursuant to express statutory authority arising  
2 outside of this act.

3  
4 **SECTION 408. EX PARTE COMMUNICATIONS.**

5 | (a) For purposes of this section, “final decision maker” means the agency head or  
6 another person or body to which the power to decide the proceeding is delegated.

7 | (b) Except as otherwise provided in subsections (c) and (d), or unless required for the  
8 disposition of ex parte matters authorized by statute, while a contested case is pending, the  
9 presiding officer and the final decision maker may not make to or receive from any person any  
10 communication concerning a pending contested case other than uncontested procedural issues  
11 without notice and opportunity for all parties to participate in the communication. For the  
12 purpose of this section, a proceeding is pending from the issuance of the agency’s pleading, or  
13 from an application for an agency decision, whichever is earlier.

14 | (c) A presiding officer and the final decision maker may communicate with an individual  
15 authorized by law to provide legal advice to the presiding officer or to the final decision maker  
16 and may communicate on ministerial matters with an individual who serves on the  
17 [administrative] [personal] staff of the presiding officer or the staff of the final decision maker if  
18 the person providing legal advice or ministerial information has not served as investigator,  
19 prosecutor, or advocate at any stage of the proceeding, and if the individual does not furnish,  
20 augment, diminish, or modify the evidence in the record.

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

1 (1) the employee or representative:

2 (A) has not served as an investigator, prosecutor, or advocate at any stage  
3 of the contested case, and has not communicated with any such person about the case; and

4 (B) has not otherwise made or received communications about the case  
5 that the agency head is prohibited from making or receiving; and

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

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

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

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

15 (e) If a presiding officer or the final decision maker makes or receives a communication  
16 in violation of this section, the presiding officer or the final decision maker, if the  
17 communication is:

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

22 (2) oral, shall prepare a memorandum that contains the substance of the verbal  
23 communication, the response of the presiding officer and the final decision maker, and the

1 identity of the party or person that communicated.

2 (f) If a communication prohibited by this section is made, the presiding officer or the  
3 final decision maker shall notify all parties of the prohibited communication and permit parties to  
4 respond in writing within 15 days after the notice. Upon good cause shown, the presiding officer  
5 or the final decision maker may permit additional testimony in response to the prohibited  
6 communication.

7 (g) If a presiding officer is a member of a multi-member body of individuals that is the  
8 agency head, the presiding officer may communicate with the other members of the multi  
9 member body. Otherwise, while a proceeding is pending, there may be no communication, direct  
10 or indirect, regarding any issue in the proceeding between the presiding officer and the agency  
11 head or other person or body to which the power to hear or decide the proceeding is delegated.

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

### 17 **Comment**

18  
19 This section is not intended to be applied to communications made by or to a presiding  
20 officer or personal staff assistant regarding noncontroversial practice and procedure matters such  
21 as number of pleadings, number of copies or type of service. Communications related to  
22 contested procedural issues or motions are covered by Section 409(a). Other communications not  
23 on the merits but related to security or to the credibility of a party or witness are covered by  
24 Section 409(a). See *Matthew Zaheri Corp., Inc. v. New Motor Vehicle Board* (1997) 55 Cal.  
25 App. 4<sup>th</sup> 1305. However, this section goes further in permitting advice to the presiding officer  
26 from staff members on complex technical and scientific matters, but permits parties to reply to  
27 those staff communications.

28  
29 This section also provides another remedy besides disclosure and party reply. In a case

1 where disclosure and reply are inadequate to cure or eliminate the effect of the ex parte contact, a  
2 protective order may be issued. The intent of authorizing the protective order is to keep the ex  
3 parte material from the successor presiding officer.

4  
5 This section draws in part from the systematic California provisions on ex parte contacts.  
6 See West's Ann.Cal.Gov.Code Section 11430.10 to 11430.80. The California sections address  
7 many of the problems that arise in this area, and attempt to distinguish technical, advisory  
8 contacts from agency staff to presiding officers or agency heads from other kinds of party  
9 contacts.

#### 10 11 **SECTION 409. INTERVENTION.**

12  
13 (a) A presiding officer shall grant a timely petition for intervention in a contested case if:

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

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

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

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

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

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

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

1 **Comment**

2  
3 Section 408 is based in part of 1981 MSAPA Section 4-209. See also Federal Rule of  
4 Civil Procedure Rule 24 (intervention of right under Rule 24(a), and permissive intervention  
5 under Rule 24(b)).  
6

7 Subsection (c) recognizes the normal judicial practice of limiting the participation of  
8 intervenors, especially on cross examination, to their particular interest and taking any other  
9 procedural steps or limitations in order to maintaining an orderly and expeditious hearing.  
10 Mandatory intervention is provided for in subsections (a)(1), and (2). Permissive intervention is  
11 provided for in subsection (b). Subsection (d) recognizes the power of the presiding officer to  
12 dismiss a party who has intervened at any time after intervention has occurred when it appears  
13 that the conditions of this section or the requirements for the intervening party's standing have  
14 not been satisfied. Subsection (f) provides for notice suitable under the circumstances to enable  
15 parties to anticipate and prepare for changes that may be caused by the intervention.  
16

17 **SECTION 410. SUBPOENAS.**

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

22 | ~~(b)~~ Unless otherwise provided by law or agency rule, a subpoenas issued under  
23 subsection (a) shall be served and, upon application to the court by a party or the agency,  
24 enforced in the manner provided by law for the service and enforcement of subpoenas in a civil  
25 action.

26 **Comment**

27 Section 409 is based in part on 1981 MSAPA Section 4-210. See also California  
28 Government Code sections 11450.05 to 11450.50 (subpoenas in administrative adjudication).  
29

30 Subsection (b) is based on Arizona administrative procedure act Section 41-1062A.4.  
31

32 **SECTION 411. DISCOVERY.**

33 (a) In this section, "statement" includes a record of a person's written statement signed

1 by a person and a record that summarizes an oral statement made by a person.

2 (b) Except in an emergency hearing under Section 408, a party, upon written notice to  
3 another party at least [ ] days before an evidentiary hearing, may:

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

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

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

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

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

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

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

15 (F) other materials for good cause shown.

16 (3) Parties to a contested case proceeding have a duty to supplement responses  
17 provided under subsection (b) to include information thereafter acquired to the extent that  
18 information will be relied upon in the hearing.

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

or expense to any person or party.

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

(e) Upon petition and for good cause shown, the presiding officer may issue an order authorizing discovery by other methods provided by law other than this [act].

#### **Comment**

Discovery in administrative adjudication is more limited than in civil court proceedings. Nevertheless discovery is available for the items listed in subsection (b). See California Government Code Section 11507.6 to 11507.7 (discovery in administrative adjudication).

Section 410 is based on Section 11507.6. 1981 MSAPA Section 4-210 also provides for discovery in administrative proceedings.

#### **SECTION 412. DEFAULT.**

(a) Unless otherwise provided by law other than this [act], if a party without good cause fails to attend or participate in a prehearing conference or hearing in a contested case, the presiding officer may issue a default order. If a default order is issued, the presiding officer may conduct any further proceedings necessary to complete the adjudication without the defaulting party and shall determine all issues in the adjudication, including those affecting the defaulting party. A recommended, initial, or final order issued against a defaulting party may be based on the defaulting party's admissions or other evidence that may be used without notice to the defaulting party. If the burden of proof is on the defaulting party to establish that the party is entitled to the agency action sought, the presiding officer may issue a recommended, initial, or final order without taking evidence.

(b) Not later than [ ] days after a recommended, initial, or final order is rendered against

1 a party subject to a default order, that party may petition the presiding officer to vacate the  
2 recommended, initial, or final order. If good cause is shown for the party's failure to appear, the  
3 presiding officer shall vacate the decision and, after proper service of notice, conduct another  
4 evidentiary hearing. If good cause is not shown for the party's failure to appear, the presiding  
5 officer shall deny the motion to vacate.

#### 6 **Comment**

7 Under this section the presiding officer has the power to impose a default judgment.  
8 However, the default decision must be based upon prima facie evidence. Among the other laws  
9 that modify the presiding officer's discretion are the [state] rules of civil procedure. The section  
10 thus authorizes a presiding officer to issue a default judgment for the same reasons as contained  
11 in the state rules of civil procedure. This section is based on 1981 MAPA Section 4-208.

12  
13 Subsection (b) is based in part on 1981 MSAPA Section 4-208 and on California  
14 Government Code Section 11520.

#### 15 16 **SECTION 413. ORDERS: FINAL, RECOMMENDED, INITIAL.**

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

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

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



waiver, or upon a showing of good cause.

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

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

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

#### **Comment**

See Section 102(11) for the definition of “final order” Section 102(14) for the definition of initial order, and section 102 (24) of this act for the definition of “recommended order”. This section draws upon useful provisions from several states. E.g. see: Alabama, Ala.Code 1975 Section 41-22-16; Iowa, I.C.A. Section 17A.15; Kansas, K.S.A. Section 77-526; Michigan, M.C.L.A. 24.281; Montana, MCA 2-4-623; Washington, RCWA 34.05.461. This section is also based upon 1981 MSAPA Section 4-215. Emergency orders are issued under the provisions of Section 408, not this section.

The third sentence of subsection (d) is taken from the 1961 MSAPA.

#### **SECTION 414. AGENCY REVIEW OF INITIAL ORDER.**

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

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

1 party, the agency head may review an initial order, except as otherwise provided by law other  
2 than this [act].

3 (c) A petition for review of an initial order must be filed with the agency head, or with  
4 any person designated for this purpose by agency rule not later than [10] days after the initial  
5 order is issued, or the parties are notified of the order, whichever is later. If the agency head  
6 decides to review an initial order on its own motion, the agency head shall give notice in a record  
7 of its intention to review the order within [10] days after it is issued, or the parties are notified of  
8 the order, whichever is later.

9 (d) The [10]-day period in subsection (c) for a party to file a petition or for the agency  
10 head to notify the parties of its intention to review an initial order, is tolled by the submission of  
11 a timely petition under Section 416 for reconsideration of the order. A new [10]-day period  
12 begins upon disposition of the petition for reconsideration. If an order is subject both to a timely  
13 petition for reconsideration and to a petition for review by the agency head, the petition for  
14 reconsideration must be disposed of first, unless the agency head determines that action on the  
15 petition for reconsideration has been unreasonably delayed.

16 **SECTION 415. AGENCY REVIEW OF RECOMMENDED ORDER.**

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

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

determine the credibility of witnesses. The agency head shall consider the hearing record or parts that are designated by the parties.

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

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

#### **Comment**

This section draws upon 1981 MSAPA, which reflects current practice in regard to recommended orders, initial orders, final orders and review of final orders more accurately than the 1961 MSAPA. Subsections (b) and (e) draw upon the Washington APA, West's RCWA 34.05.464, and the Kansas APA, K.S.A. § 77-527. The object of subsection (e) is to assure agency head consideration of the issues tendered in the case.

#### **SECTION 416. RECONSIDERATION.**

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

(b) If a petition for reconsideration is timely filed, and if the petitioner has complied with

1 an agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial  
2 review does not begin until the agency disposes of the petition for reconsideration as provided in  
3 Section 503(d).

4 (c) If a petition is filed under subsection (a), the presiding officer shall issue a written  
5 order not later than [20] days after the filing denying the petition, granting the petition and  
6 dissolving or modifying the final order, or granting the petition and setting the matter for further  
7 proceedings. The petition may be granted only if the presiding officer states findings of facts,  
8 conclusions of law, and the reasons for granting the petition.

9 **Comment**

10 | -This section is based in part on the Washington APA, West's RCWA 34.05.470. This  
11 section creates a general right to seek reconsideration of a recommended or final order.  
12 Subsection (b) must be read concurrently with Section 507(d), which excuses exhaustion to the  
13 extent that a provision of this [act] provides for excuse. See also 1981 MSAPA Section 4-218.  
14

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

20 **Comment**

21 The 1961 MSAPA § 15 contained a provision for a stay. Stays are sometimes necessary  
22 to preserve the status quo pending agency review or judicial review. This section is based in part  
23 of 1981 MSAPA Section 4-217. The second sentence of this section is based on Section 705 of  
24 the federal administrative procedure act.  
25

26 **SECTION 418. AVAILABILITY OF ORDERS; INDEX.**

27 (a) Except as otherwise provided in subsections (b) and (c), an agency shall create an  
28 index of all final orders in contested cases and make the index and all final orders available for

public inspection and copying, at cost, in its principal offices.

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

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

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

### Comment

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

In some states there have been attacks on agency adjudications on the basis that the proceeding should be conducted under the provisions for rulemaking. In the case of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) the United States Supreme Court held that the choice of whether to proceed by rulemaking or adjudication is left entirely to the discretion of the agency, because not every principle can be immediately promulgated in the form of a rule. In the words of the Supreme Court “Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.” Most states follow *Chenery*. See *Illuminating a Bureaucratic Shadow World: Precedent Decisions under California’s Revised*

1 Administrative Procedure Act, 21 J. Nat'l A. Admin. L. Judges 247 (2001) at n. 68.

2  
3 This section makes clear that the choice between rulemaking and adjudication is entirely  
4 in the discretion of the agency. However, in order to prevent law to which the public does not  
5 have access from constituting the basis for decision, final orders must be indexed and available  
6 to the public. See also the California administrative procedure act at West's Ann. Cal. Gov.  
7 Code, § 11425.60  
8

9 Most states have public records act that require disclosure of government documents and  
10 records to the public unless particular documents are exempt from disclosure under that act.  
11 Subsection (b) refers to those acts, and to exempt decisions under those acts.  
12

1 [ARTICLE] 4A

2 ADJUDICATION OTHER THAN CONTESTED CASE; LICENSING

3 SECTION 401A. ADJUDICATION OTHER THAN CONTESTED CASE.

4 (a) This [article] applies to an adjudication in which an opportunity for an evidentiary  
5 hearing is not required.

6 (b) In an adjudication under this [article], the agency shall give prompt notice of, and a  
7 statement of the reasons for, its action, to any party to the adjudication and shall give the party  
8 the opportunity to respond (orally or in writing) before an impartial decision maker.

9 Comment

10  
11 This section draws on the informal adjudication provisions of several state  
12 Administrative Procedure Acts. See: California Administrative Procedure Act, West's  
13 Ann.Cal.Gov.Code SECTION 11445.40; Va. Administrative Procedure Act, Section 2.2-4019,  
14 Va. Code Ann. § 2.2-4019; and Washington Administrative Procedure Act, Section 34.05.485,  
15 West's RCWA § 34.05.485. The informal hearing may be in the nature of a conference at the  
16 discretion of the presiding officer. The due process requirements for informal adjudication are  
17 detailed in Goss v. Lopez, (1975) 419 U.S. 565, 581-582 (informal due process hearing for  
18 school suspension of ten days or less), and Cleveland Board of Education v. Loudermill (1985)  
19 472 U.S. 532. The four due process elements for an informal adjudication are 1) notice; 2)  
20 statement of reasons; 3) opportunity to respond (orally or in writing); and 4) impartial decision  
21 maker. See Paul Verkuil,  
22

23 SECTION 402A. LICENSING.

24 (a) For purposes of this article, a license applicant does not have the right to notice and  
25 an opportunity to be heard to challenge an agency license application decision. When an agency  
26 decides a license application, the agency shall give prompt notice of its action in response to an  
27 application. If the agency denies the application for a license without the opportunity for an  
28 evidentiary hearing, the agency shall include the reasons for the denial.

29 (b) If a licensee has made timely and sufficient application for the renewal of a license,  
30 the existing license does not expire until the application has been finally acted upon by the

1 agency and, if the application is denied or the terms of the new license are limited, the last day  
2 for seeking judicial review of the agency decision is 45 days after the date of the agency decision  
3 denying the application or limiting the terms of the new license or a later date fixed by order of  
4 the reviewing court.

#### 5 **Comment**

6 Many licensing decisions by administrative agencies can be challenged by the license  
7 holder who has the right to notice and an opportunity to be heard. Challenges to those decisions  
8 would be considered contested cases governed by the provisions of Article 4. If the license  
9 applicant does not have the right to notice and an opportunity to be heard to challenge an agency  
10 licensing decision, then the provisions of Article 4A apply to that licensing decision. Subsection  
11 (b) was taken from the 1961 Model State Administrative Procedure Act, section 14(b), which has  
12 been adopted by many states. See, for example: Alabama, Ala.Code 1975 Section 41-22-19;  
13 Tennessee, T. C. A. Section 4-5-320; Michigan, M.C.L.A. 24.291; and Wisconsin, W.S.A.  
14 227.51.  
15



1 [ARTICLE] 5

2 JUDICIAL REVIEW

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

5 (a) As used in this [article], agency action is final when it imposes an obligation, grants  
6 or denies a right, confers a benefit, or determines a legal relationship as a result of an  
7 administrative process. Agency action that is a failure to act is not judicially reviewable except  
8 that a reviewing court shall compel agency action that is unlawfully withheld or unreasonably  
9 delayed. Final agency action includes a final order in a contested case and a final rule.

10 (b) Except as otherwise provided in subsection (d), a person who meets the other  
11 requirements of this [article] is entitled to judicial review of a final agency action.

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

16 (d) Final agency action is reviewable except to the extent that:

17 (1) a statute [of this state] other than this [act] precludes judicial review; or

18 (2) agency action is committed to agency discretion by law.

19 Comment

20 Subsection (a) of this section provides a right of judicial review of final agency action by  
21 appropriate parties. Under this section, the person seeking review must meet all of the  
22 requirements of this article, which include standing, exhaustion of remedies, and time for filing.  
23 The definition of “agency action” is found in Section 102. This section is similar to the judicial  
24 review provisions of Florida (West’s F.S.A. Section 120.68), Iowa (I.C.A. Section 17A.19),  
25 Virginia (Va. Code Ann. Section 2.2-4026) and Wyoming (W.S.1977 Section 16-3-114). Agency  
26 failure to act is not judicially reviewable unless agency action is unlawfully withheld or

unreasonably delayed. This provisions is based on the federal A.P.A., 5 U.S.C. Section 706(1).

Subsection (a) also defines final agency action. The definition used here is found in state and federal cases. See *State Bd. Of Tax Comm’rs v. Ispat Inland*, 784 N.E.2D 477 (Ind., 2003); *District Intown Properties v. D.C. Dept. Consumer and Regulatory Affairs*, 680 A.2d 1373 (Ct. Apps. D.C. 1996); *Texas Utilities Co. v. Public Citizen, Inc*, 897 S.W.2d 443 (Tex. App. 1995); *Bennet v. Spear*, 520 U.S. 154, 117 S.Ct. 1154 (1997); *Mobil Exploration and Producing Inc. v. Dept. Interior*, 180 F.3d 1192, 1197 (10<sup>th</sup> Cir. 1999).

Subsection (c) creates a limited right to review of non-final agency action.

Subsection (d) is based on Section 701(a)(1), (2) of the federal administrative procedure act.

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

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

(b) Except when judicial review is available under this [article] or under law other than this [act], final agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

### **Comment**

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

Subsection (b) is based on Section 703 of the federal administrative procedure act. See also 1981 MSAPA Sections 5-201 to 5-205.

1  
2           **SECTION 503. TIME FOR SEEKING JUDICIAL REVIEW OF AGENCY**

3   **ACTION; LIMITATIONS.**

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

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

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

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

17                           **Comment**

18           The first sentence of subsection (a) is based on 1961 Model State Administrative  
19 Procedure Act, section (3)(c), and on Section 3-113(b) of the 1981 Model State Administrative  
20 Procedures Act. The scope of challenges permitted for noncompliance with procedural  
21 requirements under Section 314 includes all applicable requirements of article 3 for the type of  
22 rule being challenged.

23  
24           **SECTION 504. STAYS PENDING APPEAL.** A petition for judicial review does not  
25 automatically stay an agency decision. An appellant may petition the reviewing court for a stay  
26 upon the same basis as stays are granted under the rules of [appellate] [civil] procedure [of this

state], and the reviewing court may grant a stay regardless of whether the appellant first sought a stay from the agency.

### Comment

This provision for stay permits a party appealing agency final action to seek a stay of the agency decision in the court. This is similar to the 1961 MSAPA. See also 1981 MSAPA Section 5-111.

### SECTION 505. STANDING.

(a) For purposes of this section, a person is aggrieved if the agency action has caused, or is expected to cause, injury to that person [distinct from any injury caused to the public generally] [if the asserted interests of the person are not inconsistent with or completely unrelated to those the agency is required to consider when it makes the decision].

(b) The following persons have standing to obtain judicial review of a final agency action:

(1) a person that has standing under law of this state other than this [act]; and

(2) a person aggrieved or adversely affected by the agency action.

### Comment

Subsection (b)(1) confers standing that arises under any other provision of law.

Examples of this type of standing are statutes that expressly confer standing in general language such as, for example, “any person may commence a civil suit in his own behalf... to enjoin... an agency... alleged to be in violation of this chapter. . . .” 16 U.S.C.A. § 1540, explained in *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154(1997). Another example is standing recognized in judicial decision or common law.

Subsection (b) (2) uses the term person “aggrieved or adversely affected”. This term is based in part on the provisions of the federal A.P.A., 5 U.S.C. Section 702. These words have become terms of art used to describe types of injury that were not recognized at common law. An example of a person entitled to standing who is intended to be included under subsection (2) is a competitor. These terms have also been used to recognize standing based on non-economic values, such as aesthetic or environmental injuries.

1 Subsection (a) uses a definition for the term aggrieved that is taken from Section 101 of  
2 the ABA Model Statute for Local Land Use Processes, adopted by the ABA in August, 2008.

3  
4 **SECTION 506. EXHAUSTION OF ADMINISTRATIVE REMEDIES.**

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

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

12 (c) A petitioner for judicial review of a rule need not have participated in the rulemaking  
13 proceeding upon which the rule is based.

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

17 **Comment**  
18

19 This section creates a default requirement of exhaustion, which is generally followed in  
20 the states. However, the section creates several exceptions to the default rule. Subsection (b)  
21 requires issue exhaustion in appeals from rulemaking for persons who did not participate in the  
22 challenged rulemaking. It excuses persons seeking judicial review of a rule who were not parties  
23 before the agency from the exhaustion requirement; but, if the issue that they seek to raise was  
24 not raised and considered in the rulemaking proceeding that they challenge, then they must first  
25 petition the agency to conduct another rulemaking to consider the issue. If the agency refuses to  
26 do so or if the agency conducts a second rulemaking that is adverse to the petitioner on the issue  
27 or issues raised in his petition for rulemaking, then the petitioner may seek judicial review.  
28 Subsection (d) recognizes the judicially created exception to the exhaustion requirement where  
29 agency relief would be inadequate or would result in irreparable harm. In some states courts  
30 have held that irreparable harm that is a sufficient condition to excuse exhaustion exists only if it  
31 outweighs the public interest in exhaustion. State courts are free under this section to engage in  
32 that weighing test.

**SECTION 507. AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTION.**

Judicial review of adjudication and rulemaking is confined to the agency record or matters arising from the record except insofar as the petitioner alleges procedural error arising from matters outside the agency record or alleges matters that are not evident from the record that involve new evidence or changed circumstances. The record may be opened only to avoid manifest injustice.

### Comment

This section establishes a default closed record for judicial review of adjudication and rulemaking. It is well established in most states and in federal administrative procedure that, in case of adjudication, judicial review is based upon that evidence which was before the agency on the record. Otherwise, the standards of judicial review could be subverted by the introduction of additional evidence to the court that was not before the agency. See *Western States Petroleum Ass'n v. Superior Court*, 888 P.2d 1268 (Cal. 1995). For rulemaking, the record for judicial review is defined in Section 302 of this Act.

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

## SECTION 508. SCOPE OF REVIEW.

(a) In judicial review of an agency action, the following rules apply:

(1) Except as provided by law other than this [act], the burden of demonstrating the invalidity of agency action is on the party asserting invalidity.

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

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

- 1 (A) the agency erroneously interpreted the law of this or another state;  
2 (B) the agency committed an error of procedure;  
3 (C) the agency action is arbitrary, capricious, an abuse of discretion, or  
4 otherwise not in accordance with law;  
5 (D) an agency determination of fact is not supported by substantial  
6 evidence in the record as a whole; or  
7 (E) to the extent that the facts are subject to trial de novo by the reviewing  
8 court, the action was unwarranted by the facts.  
9 (b) In making determinations under this section, the court shall review the whole agency  
10 record, or the parts designated by the parties and shall take due account of the rule of harmless  
11 error.

### 12 **Comment**

13  
14 One view is that scope of review is notoriously difficult to capture in verbal formulas,  
15 and its application varies depending on context. For that reason, some members urge return to  
16 shorter, skeletal formulations of the scope of review, similar to the 1961 MSAPA. See Ronald  
17 M. Levin, Scope of Review Legislation, 31 Wake Forest L. Rev. 647 (1996) at 664-66. William  
18 D. Araiza, In Praise of a Skeletal APA, 56 Admin. L. Rev. 979 (2004). (Judiciary, not  
19 legislature, appropriate body to evolve specific standards for review, because of great variety of  
20 agency action and contexts, and inability to describe how general standards of review should  
21 apply to many of them). Alternative 1 reflects this view.  
22

23 The other view is that judicial review is sometimes almost perfunctory, and more detailed  
24 standards will result in closer judicial scrutiny. A related view strongly argued in drafting  
25 committee meetings was that scope of review is a device by which the judiciary assists the  
26 legislature to keep the agencies within the bounds set by the legislature, helps to assure agency  
27 action consistent with the intent of the legislature, and protects citizens from agency error. More  
28 detailed scope of review provisions also make the task of the judiciary easier because they  
29 provide clearer instructions from the legislature about how to review agency decisions. More  
30 detailed scope of review provisions lead to more intense judicial review, and that is an approach  
31 that legislatures welcome for the same reason that they have embraced regulatory review: it  
32 controls agency action. Alternative 2, which draws heavily on the Iowa provisions on scope of  
33 review ( I.C.A. 17. A.19(10)), represents this position.  
34

1           Judicial review is essential and exists in all states. Subsections (a) (1) & (2) describe the  
2 general burdens on the appellant and the approach under this Act. They are substantially similar  
3 to the general scope of review provisions of the Federal APA, 5 U.S.C. Section 706.  
4

5           Subsections (a)[(3) alternative 1](A) & (B) identify the courts' power to decide questions  
6 of law and procedure. Subsection (a)[(3) alternative 1](A) includes, but is not limited to,  
7 violations of constitutional or statutory provisions and actions that are in excess of statutory  
8 authority from Section 15(g) of the 1961 MSAPA, and includes subsections (c) (1), (2) and (4) of  
9 the 1981 MSAPA. The section thus includes challenges to the facial or applied constitutionality  
10 of a statute, challenges to the jurisdiction of the agency, erroneous interpretation of the law, and  
11 may include erroneous application of the law. This section is not intended to preclude courts  
12 from according deference to agency interpretations of law, where such deference is appropriate.  
13



1 | **[ARTICLE] 6**

2 | **OFFICE OF ADMININISTRATIVE HEARINGS**

3 | **SECTION 601. CREATION OF OFFICE OF ADMINISTRATIVE HEARINGS.**

4 |  
5 | (a) In this [article], office means the [Office of Administrative Hearings].

6 |  
7 | (b) The [Office of Administrative Hearings] is created in the executive branch of state  
8 | government [within the [ ] agency].

9 | **Comment**

10 | Section 601 is based upon Section 1-2(a) of the Model Act Creating a State Central  
11 | Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the  
12 | American Bar Association (February 2, 1997). Thirty states (including the District of Columbia)  
13 | have established central panel agencies. Representative state statutes creating a central panel  
14 | include Alaska statutes, section 44.64.010, California Government Code Section 11370.2,  
15 | Louisiana: statutes, Section 49.991, and Washington Administrative Procedure Act, Section  
16 | 34.12.010.

17 |  
18 | **SECTION 602. CHIEF ADMINISTRATIVE LAW JUDGE; APPOINTMENT;**  
19 | **QUALIFICATIONS; TERM; REMOVAL.**

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

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

25 | (c) At the time of appointment, the chief administrative law judge must have been  
26 | admitted to the practice of law in this state for at least five years and have substantial experience  
27 | in administrative law.

28 | (d) A chief administrative law judge:

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

1 office;

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

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

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

8 **Comment**  
9

10 Section 602 is based upon Section 1-4 of the Model Act Creating a State Central Hearing  
11 Agency (Office of Administrative Hearings) adopted by the house of delegates of the American  
12 Bar Association (February 2, 1997).  
13

14 **SECTION 603. ADMININSTRATIVE LAW JUDGES; APPOINTMENT;**  
15 **QUALIFICATIONS, DISCIPLINE.**

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

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

21 | ~~-(c)~~ An administrative law judge:

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

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

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

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

3 (d) An administrative law judge:

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

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

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

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

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

### 13 **Comment**

14  
15 Section 603 is based upon Sections 1-2(b), and 1-6 of the Model Act Creating a State  
16 Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates  
17 of the American Bar Association (February 2, 1997).

### 18 **SECTION 604. CHIEF ADMINISTRATIVE LAW JUDGE; POWERS; DUTIES.**

19  
20 The chief administrative law judge has the powers and duties specified in this section. The chief  
21 administrative law judge:

22 | (1) \_shall supervise and manage the office;

23 | (2) \_ shall assign randomly administrative law judges in any case referred to the office,  
24 taking into account administrative law judge expertise;

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

26 (4) shall establish and implement standards for equipment, supplies, and technology for

1 administrative law judges;

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

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

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

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

7 (9) shall discipline administrative law judges who do not meet appropriate standards of  
8 conduct and competence;

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

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

#### 12 **Comment**

13 Section 604 is based upon Section 1-5 of the Model Act Creating a State Central Hearing  
14 Agency (Office of Administrative Hearings) adopted by the house of delegates of the American  
15 Bar Association (February 2, 1997).  
16

#### 17 **SECTION 605. COOPERATION OF AGENCIES.**

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

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

#### 22 **Comment**

23 Section 605 is based upon Section 1-7(a) of the Model Act Creating a State Central  
24 Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the  
25 American Bar Association (February 2, 1997). There are similar provisions in Alaska statutes,  
26 section 44.64.080. Agencies should cooperate with the office of administrative hearings by  
27 providing information and coordinating schedules for contested case hearings.  
28 -  
29

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

(a) [Except as otherwise provided in subsection (d), unless] [Unless] the agency head elects to conduct the hearing, in which case the agency head shall render a final order under Section 413(a), in a contested case, an administrative law judge shall be assigned to be the presiding officer. The administrative law judge shall issue a recommended or initial order to the agency head in the contested case pursuant to Section 413.

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

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

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

### Comment

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

1 [ARTICLE] 7

2 RULES REVIEW

3 SECTION 701. [LEGISLATIVE RULES REVIEW COMMITTEE]. There is

4 created a standing committee of the Legislature designated the [rules review committee].

5 *Legislative Note: States that have existing rules review committees can incorporate the*  
6 *provisions of Sections 701, and 702, using the existing number of members of their current rules*  
7 *review committee. Because state practice varies as to how these committees are structured, and*  
8 *how many members of the legislative body serve on this committee, as well as how they are*  
9 *selected, the act does not specify the details of the legislative review committee selection process.*  
10 *Details of the committee staff and adoption of rules to govern the rules review committee staff*  
11 *and organization are governed by law other than this act including the existing law in each state.*  
12

13 ~~SECTION 702. REVIEW BY [RULES REVIEW COMMITTEE].~~

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

17 (b) The [rules review committee] may examine rules in effect and newly adopted,  
18 amended, or repealed rules to determine whether the:

- 19 (1) rule is a valid exercise of delegated legislative authority;  
20 (2) statutory authority for the rule has expired or been repealed;  
21 (3) rule is necessary to accomplish the apparent or expressed intent of the specific  
22 statute that the rule implements;  
23 (4) rule is a reasonable implementation of the law as it applies to any affected  
24 class of persons; and  
25 (5) agency complied with the regulatory analysis requirements of Section 305  
26 and the analysis properly reflects the effect of the rule.

27 (c) The [rules review committee] may request from an agency information necessary to

1 exercise its powers under subsection (b). The [rules review committee] shall consult with  
2 standing committees of the Legislature with subject matter jurisdiction over the subjects of the  
3 rule under examination.

4 (d) The [rules review committee]:

5 (1) shall maintain oversight over agency rulemaking; and

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

7 **Comment**

8 This section adopts a rules review committee process that is widely followed in state  
9 administrative law as a method for legislative review of agency rules. Subsection (b) allows the  
10 legislative rules review committee to review currently effective rules and newly adopted rules.  
11 The rules review committee may establish priorities for rules review including review of newly  
12 adopted or amended rules, and may manage the rules review process consistent with committee  
13 staff and budgetary resources. If the content of the rule changes because of legislative  
14 amendments, the agency will be required to file the amended rule with the publisher, and the  
15 amended rule will replace the original rule that was filed with the publisher. The rules review  
16 process applies to rules adopted following the requirements of Sections 304 to 308. This process  
17 does not apply to emergency rules adopted under Section 309(a).

18  
19 **SECTION 703. [RULES REVIEW COMMITTEE] PROCEDURE AND POWERS.**

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

22 (1) approve the adopted, amended, or repealed rule;

23 (2) disapprove the rule and propose an amendment to the adopted, amended, or  
24 repealed rule; or

25 (3) disapprove the adopted, amended, or repealed rule.

26 (b) If the [rules review committee] approves an adopted, amended, or repealed rule or  
27 does not disapprove and propose an amendment under subsection (a)(2) or disapprove under  
28 subsection (a)(3), the adopted, amended, or repealed rule becomes effective on the date specified

1 for the rule in Section 316.

2 | (c) If the [rules review committee] proposes an amendment to the adopted or amended  
3 rule under subsection (a)(2), the agency may make the amendment and resubmit the rule, as  
4 amended, to the [rules review committee]. The amended rule must be one that the agency could  
5 have adopted on the basis of the record in the rulemaking proceeding and the legal authority  
6 granted to the agency. The agency shall provide an explanation for the amended rule as provided  
7 in Section 312. An agency is not required to hold a hearing on an amendment made under this  
8 subsection. If the agency makes the amendment, it shall also give notice to the [publisher] for  
9 publication of the rule, as amended, in the [administrative bulletin]. The notice must include the  
10 text of the rule as amended. If the [rules review committee] does not disapprove the rule, as  
11 amended, or propose a further amendment, the rule becomes effective on the date specified for  
12 the rule under Section 316.

13 (d) If the [rules review committee] disapproves the adoption, amendment, or repeal of a  
14 rule under subsection (a)(3), the adopted, amended, or repealed rule becomes effective upon  
15 adjournment of the next regular session of the legislature unless before the adjournment the  
16 legislature [adopts a [joint] [ concurrent] resolution] [enacts a bill] sustaining the action of the  
17 committee. The [rules review committee] disapproval power expires at the adjournment o the  
18 session or after the legislature has been in session for a total of 90 days, whichever comes first.

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



1 amendment, or repeal.

2 **Legislative Note:** *The 30 day time period in subsection (a) is the same as the 30 day time period*  
3 *in section 316(a).*

4 |  
5 *State constitutions vary as to whether or not a joint resolution is a valid way of*  
6 *disapproving an agency rule. In some states, the legislature must use the bill process with*  
7 *approval by the governor. In other states the joint resolution process is proper. States should use*  
8 *the alternative that complies with their state constitution. State constitutions vary on the federal*  
9 *constitutional issue decided by the U.S. Supreme Court in I.N.S. v. Chadha (1983) 462 U.S. 919,*  
10 *103 S.Ct. 2764. The U.S. Supreme Court held that the one house legislative veto provided for in*  
11 *section 244(c)(2) violated the Article I requirement that legislative action requires passage of a*  
12 *law by both houses of congress (bicameralism) and presentation to the president for signing or*  
13 *veto (presentation requirement). Those state constitutions that require presentation to the*  
14 *governor need an additional step, presentation of the joint resolution to the governor for*  
15 *approval or disapproval. With state constitutions that do not require presentation to the*  
16 *governor the rules review process can be completed with legislative adoption of a joint*  
17 *resolution.*

#### 18 19 **Comment**

20  
21 |        This is a type of veto that provides for cooperation between the Legislature and the  
22 | Governor, and attempts to avoid the I.N.S. v. Chadha (1983) 462 U.S. 919, 103 S.Ct. 2764.  
23 | problem of unconstitutionality by delaying the effective date of the rule until the legislature has  
24 | the opportunity to enact legislation to annul or modify it. The governor may veto the act by  
25 | which the legislature seeks to annul or modify the rule. This type of veto provision is widely  
26 | used in the states. For disapproval of a rule to be effective, the legislature as a whole must adopt  
27 | a joint resolution, and in many states the governor must be presented with the joint resolution for  
28 | approval or disapproval. While the rules review committee can recommend disapproval, the  
29 | committee recommendation must be approved by the legislature by joint resolution. In some  
30 | states, the legislature must comply with the legislative process for enacting a bill including  
31 | presentation to the governor to exercise the power of legislative veto over an agency regulation.  
32 | In at least one state use of a joint resolution without the governor's participation violates the state  
33 | constitution. State v. A.L.I.V.E. Voluntary (Alaska, 1980) 606 P.2d 769. The rules review  
34 | committee has the power to temporarily suspend an agency rule pending enactment of a  
35 | permanent suspension by action of both houses of the state legislature, and presentation to the  
36 | governor. Martinez v. Department of Industry, Labor, & Human Relations (Wisconsin, 1992)  
37 | 165 W.2d 687, 478 N.W.2d 582 (temporary suspension statute held not to violate state  
38 | constitution separation of powers doctrine).—

1 [ARTICLE] 8

2 APPLICABILITY; EFFECTIVE DATE

3 SECTION 801. APPLICABILITY. This [act] governs all agency proceedings, and all  
4 proceedings for judicial review or civil enforcement of agency action, commenced after [the  
5 effective date of this [act]]. This [act] does not govern an adjudication for which notice was given  
6 before that date under Section 403 and rulemaking proceedings for which notice was given or a  
7 petition filed before that date.

8 Comment

9  
10 Section 801 is based on Section 1-108 of the 1981 MSAPA. See Also California  
11 Government Code Sections 11400.10, and 11400.20 (operative date of California APA  
12 revisions). Agency proceedings on remand following judicial review after the act takes effect  
13 are governed by the prior law.  
14

15 SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL  
16 AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal  
17 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et. seq.,  
18 but does not modify, limit, or supersede Section 101 (c) of that act, 15 U.S.C. Section 7001(c), or  
19 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15  
20 U.S.C. Section 7003(b).

21 SECTION 803. REPEALS. The following acts and parts of acts are repealed:

22 (a) [the 1961 Model State Administrative Procedure Act]

23 (b) [the 1981 Model State Administrative Procedure Act]

24 (c)

25 SECTION 804. EFFECTIVE DATE. This [act] takes effect on [date].