

D R A F T  
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 ~~March 27 to 29 Drafting Committee January 29—February 1, 2009 Style Committee~~  
Meeting

*WITH PREFATORY NOTE AND COMMENTS*

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January 16, 2009

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PROCEDURE ACT**

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**REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT**

**TABLE OF CONTENTS**

Prefatory Note..... 1

**[ARTICLE] 1**

**GENERAL PROVISIONS**

SECTION 101. SHORT TITLE ..... 4  
SECTION 102. DEFINITIONS..... 4  
SECTION 103. APPLICABILITY ..... 11

**[ARTICLE] 2**

**PUBLIC ACCESS TO AGENCY LAW AND POLICY**

SECTION 201. PUBLICATION, COMPILATION, INDEXING, AND PUBLIC INSPECTION  
OF RULEMAKING DOCUMENTS ..... 12  
SECTION 202. REQUIRED AGENCY RULEMAKING AND RECORDKEEPING ..... 16  
SECTION 203. DECLARATORY ORDER ..... ~~181817~~  
SECTION 204. DEFAULT PROCEDURAL RULES ..... ~~201919~~

**[ARTICLE] 3**

**RULEMAKING; ADOPTION AND EFFECTIVENESS OF RULES**

SECTION 301. CURRENT RULEMAKING DOCKET ..... 21  
SECTION 302. AGENCY RECORD IN RULEMAKING PROCEEDING..... 22  
SECTION 303. ADVANCED NOTICE OF PROPOSED RULEMAKING; NEGOTIATED  
RULEMAKING..... 23  
SECTION 304. NOTICE OF PROPOSED RULEMAKING..... 25  
SECTION 305. REGULATORY ANALYSIS..... 26  
SECTION 306. PUBLIC PARTICIPATION ..... ~~282728~~  
SECTION 307. FINAL ADOPTION ..... 29  
SECTION 308. VARIANCE BETWEEN PROPOSED RULE AND ADOPTED RULE . ~~303029~~  
SECTION 309. EMERGENCY RULEMAKING; DIRECT FINAL RULEMAKING ..... ~~313030~~  
SECTION 310. GUIDANCE DOCUMENTS ..... ~~323232~~  
SECTION 311. REQUIRED INFORMATION FOR RULE ..... ~~393838~~  
SECTION 312. CONCISE EXPLANATORY STATEMENT ..... ~~393939~~  
SECTION 313. INCORPORATION BY REFERENCE..... ~~404039~~  
SECTION 314. COMPLIANCE..... 41  
SECTION 315. FILING OF RULES..... ~~414141~~  
SECTION 316. EFFECTIVE DATE OF RULES ..... ~~424241~~  
SECTION 317. PETITION FOR ADOPTION OF RULE ..... ~~434342~~

[ARTICLE] 4

ADJUDICATION IN A CONTESTED CASE

SECTION 401. WHEN ARTICLE APPLIES; CONTESTED CASES ..... 444444  
SECTION 402. PRESIDING OFFICERS ..... 454544  
SECTION 403. CONTESTED CASE PROCEDURE ..... 474747  
SECTION 404. NOTICE ..... 545252  
SECTION 405. AGENCY HEARING RECORD IN CONTESTED CASE ..... 565454  
SECTION 406. EMERGENCY ADJUDICATION PROCEDURE ..... 575554  
SECTION 407. EX PARTE COMMUNICATIONS ..... 595656  
SECTION 408. INTERVENTION ..... 625959  
SECTION 409. SUBPOENAS ..... 636060  
SECTION 410. DISCOVERY ..... 646160  
SECTION 411. DEFAULT ..... 666262  
SECTION 412. ORDERS: FINAL AND RECOMMENDED ..... 676363  
SECTION 413. AGENCY REVIEW OF RECOMMENDED AND INITIAL ORDERS. . 686564  
SECTION 414. RECONSIDERATION ..... 716766  
SECTION 415. STAY ..... 716867  
SECTION 416. AVAILABILITY OF ORDERS; INDEX ..... 726868

[ARTICLE] 4A

INFORMAL ADJUDICATION

SECTION 401A. WHEN ARTICLE APPLIES; INFORMAL ADJUDICATION.

[ARTICLE] 5

JUDICIAL REVIEW

SECTION 501. RIGHT TO JUDICIAL REVIEW; FINAL AGENCY ACTION  
REVIEWABLE ..... 767271  
SECTION 502. RELATION TO OTHER JUDICIAL REVIEW LAW AND RULES ..... 777372  
SECTION 503. TIME FOR SEEKING JUDICIAL REVIEW OF AGENCY ACTION,  
LIMITATIONS ..... 787472  
SECTION 504. STAYS PENDING APPEAL ..... 797473  
SECTION 505. STANDING ..... 797574  
SECTION 506. EXHAUSTION OF ADMINISTRATIVE REMEDIES ..... 807574  
SECTION 507. AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTION ..... 817675  
SECTION 508. SCOPE OF REVIEW ..... 817776

[ARTICLE] 6

OFFICE OF ADMINISTRATIVE HEARINGS

SECTION 601. CREATION OF OFFICE OF ADMINISTRATIVE HEARINGS ..... 848078  
SECTION 602. CHIEF ADMINISTRATIVE LAW JUDGE; APPOINTMENT,

QUALIFICATIONS, TERM, REMOVAL ..... [848078](#)  
SECTION 603. ADMININSTRATIVE LAW JUDGES; APPOINTMENT; ..... [858179](#)  
QUALIFICATIONS, DISCIPLINE. .... [858179](#)

**[ARTICLE] 7**

**RULES REVIEW**

SECTION 701. [LEGISLATIVE RULES REVIEW COMMITTEE] ..... [908584](#)  
SECTION 702. REVIEW BY [RULES REVIEW COMMITTEE] ..... [908584](#)  
SECTION 703. [RULES REVIEW COMMITTEE] PROCEDURE AND POWERS..... [918685](#)

**[ARTICLE] 8**

SECTION 801. EFFECTIVE DATE ..... [958988](#)

## 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 Administrative Procedure Act. They are: Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia,

### **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 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

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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.

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 ~~offer~~ determining ~~of~~ facts or applying ~~of~~  
8 ~~of~~ law pursuant to 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 to make rules or  
11 to adjudicate. The term does not include the Governor, the Legislature, and the Judiciary.

12           (3) “Agency action” means:

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

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

15                   (C) an agency’s performing ~~of~~ or fail ~~ing~~ ure to perform, any duty, function,  
16 or activity or to make any determination required by law.

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

19           (5) “Agency record” means the agency rulemaking record in rulemaking governed by  
20 Section 302, the emergency rulemaking record in rulemaking governed by Section 309(a), the  
21 direct final rulemaking record in rulemaking governed by Section 309(b), the ~~agency~~ hearing  
22 record in an adjudication governed by Section 40~~6~~7, and the agency record in emergency  
23 adjudication governed by Section 40~~7~~6.

1 (6) “Contested case” means an adjudication in which an opportunity for an evidentiary  
2 hearing is required by the federal or state constitution, ~~a federal or state statute, or a federal or~~  
3 state judicial decision.

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

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

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

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

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

14 (12) “Guidance document” means a record developed by an agency that ~~lacks the force~~  
15 ~~of law but~~ states the agency’s current approach to, or opinion of, law, including interpretations  
16 and general statements of policy that describe how and when the agency will exercise  
17 discretionary functions.

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

21 (14) “Initial order” means ~~an the~~ order which is subject to further agency review and is  
22 issued by a presiding officer ~~who has other than the agency head when that presiding officer has~~  
23 final decisional authority ~~but the initial order is subject to further agency review~~.

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

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

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

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

10 (19) "Notify" means to take ~~such~~ steps reasonably required to inform a person in ~~the~~  
11 ordinary course, whether ~~or not~~ that person actually comes to know of it.

12 (20) "Order" means an agency decision that determines or declares the legal rights,  
13 duties, privileges, immunities, or other legal interests of ~~a one or more~~ specific persons.

14 (21) "Party" means the agency taking action, the person against which the action is  
15 directed, and any other person named as a party or permitted to intervene and that does  
16 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 the 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 which 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 ~~A~~ttorney ~~G~~eneral;

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 law violators to avoid detection, facilitate  
19 disregard of requirements imposed by law, or give an improper advantage to persons that are in  
20 an adverse position to the state;

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

23 (F) guidance documents.

1 (28) “Rulemaking” means the adoption of a new rule or the amendment or repeal of an  
2 existing process for adopting, amending, or repealing a rule.

3 (29) “Rulemaking documents” includes materials in written or electronic form that are  
4 related to an agency rulemaking proceeding; or ~~that are~~ guidance documents ~~in written or~~  
5 ~~electronic form.~~

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

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

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

10 (31) “State” means a state of the United States, the District of Columbia, Puerto Rico,  
11 the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction  
12 of the United States.

13 (32) “Written” means inscribed on a tangible medium.

#### 14 **Comment**

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

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

25 **Agency Action.** This definition is added for purposes of identifying those matters subject  
26 to judicial review. Failure to issue an order or rule is not judicially reviewable except as provided  
27 in Section 501(a) of the Act. Failure to issue an order or rule does not include an agency denial  
28 of a petition to initiate rulemaking. See Section 317 of the Act. This definition is taken from  
29 1981 MSAPA Section 1-102(2).  
30  
31  
32

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

4  
5 Contested case. This term is similar to the “contested case” definition of the 1961  
6 MSAPA. Like the 1961 MSAPA, this Act looks to external sources such as statutes to describe  
7 situations in which a party is entitled to a hearing. However, this term differs from the 1961  
8 MSAPA’s term “contested case” because it also includes hearings required by the constitution,  
9 federal or state, and makes provision in Article 4 for the type of hearing to be held in a case  
10 where a constitution creates the right to a hearing. Including constitutionally created rights to a  
11 hearing within the provisions of this Act eliminates the problem of looking outside the Act to  
12 determine the type of hearing required in cases where the right to the hearing is created by  
13 constitution. Hearing rights created by judicial decisions means constitutional decisions by  
14 appellate courts. See *Goldberg v. Kelley*, 397 U.S. 254 (1970), and *Goss v. Lopez* 419 U.S. 565  
15 (1975). Contested cases do not include investigatory hearings, pure administrative process  
16 proceedings such as tests, elections, or inspections, and situations in which a party has a right to  
17 a de novo administrative or judicial hearing. See Section 401 of the Act. An agency may by rule  
18 make all or part of article 4 applicable to adjudication that does not fall within the requirements  
19 of Section 401, including hearing rights conferred by agency regulations. See California  
20 Government Code Section 11410.10. The scope of hearing rights is governed by law other than  
21 this act.

22  
23 Record. Modern electronic-age statutes such as the Uniform Computer Information  
24 Transactions Act and the Uniform Electronic Transactions Act adopt a broad definition of the  
25 term record that includes the term document. This act follows those definitions.

26  
27 Electronic. The term “electronic” refers to the use of electrical, digital, magnetic,  
28 wireless, optical, electromagnetic and similar technologies. It is a descriptive term meant to  
29 include all technologies involving electronic processes. The listing of specific technologies is not  
30 intended to be a limiting one. The definition is intended to assure that this act will be applied  
31 broadly as new technologies develop. For example, biometric identification technologies would  
32 be included if they affect communication and storage of information by electronic means. As  
33 electronic technologies expand and include other competencies, those competencies should also  
34 be included under this definition. The definition of the term “electronic” in this act has the same  
35 meaning as it has in UETA SECTION 2(5) and in the Uniform Real Property Electronic  
36 Recording Act.

37  
38 Electronic Record. This definition is identical to § 2(7) of the Uniform Electronic  
39 Transactions Act. An “electronic record” is a document that is in an “electronic” form.  
40 Documents may be communicated in electronic form; they may be received in electronic form;  
41 they may be recorded and stored in electronic form; and they may be received in paper copies  
42 and converted into an electronic record. This Act does not limit the type of electronic documents  
43 received by the [publisher]. The purpose of defining and recognizing electronic documents is to  
44 facilitate and encourage agency use of electronic communication and maintenance of electronic  
45 records.

1 Emergency Adjudication. This definition is designed to be used with the emergency  
2 adjudication procedures provided by Section 408. The danger to the public health, safety, or  
3 welfare standard requiring immediate action is a strict standard that is defined by law other than  
4 this Act. Federal and state case law have held that in an emergency situation an agency may act  
5 rapidly and postpone any formal hearing without violation, respectively, of federal or state  
6 constitutional law. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Gilbert v. Homar* (1997) 520 U.S.  
7 924; *Dep't of Agric. v. Yanes*, 755 P.2d 611 (OK. 1987).

8  
9 Guidance document. This definition is taken from the Michigan APA, M.C.L.A.  
10 24.203(6), and the Virginia APA, Va. Code Ann. SECTION 2.2-4001. See also the; Idaho I.C.  
11 SECTION 67-5250 and N.Y. McKinneys State Administrative Procedure Act, SECTION 102.  
12 This is a definition intended to recognize that there exist agency statements for the guidance of  
13 staff and the public that differ from, and that do not constitute, rules. Many states recognize such  
14 statements under the label "interpretive statement" or "policy statement." See Wash. Rev. Code,  
15 SECTION 34.05.010(8) & (15). Later sections of this Act will provide for the publication and  
16 availability of this type of record so that they are not "secret" records. See: Michael Asimow,  
17 *Guidance Documents in the States*, 54 Adm. L. Rev. 631 (2002); Michael Asimow, *California*  
18 *Underground Regulations*, 44 Adm. L. Rev. 43 (1992).

19  
20 Index. The definition of index has been added as a guide to agencies, [publisher]s and  
21 editors about their duties to make records available and easily accessible to the public in the form  
22 of an index, as that term is used throughout this act.

23  
24 Internet website. This definition is designed to be used by agencies and publishers to  
25 comply with the requirements of Sections 201, 316, and 419 of this Act. In many states, the  
26 Internet website is maintained by the [publisher], and in some states, like California, the agency  
27 will also maintain its own Internet website.

28  
29 Law. Law includes an executive order that rests on statutory or constitutional  
30 authorization. See Kevin M. Stack, "The Statutory President," 90 Iowa L. Rev. 539, 550-52  
31 (2005); Jim Rossi, "State Executive Law making in Crisis," 56 Duke L. Rev. 237, 261-64  
32 (2006).

33  
34 License. The definition of license is drawn largely from the 1961 MSAPA.

35  
36 Order. Unlike the federal APA which defines rule, but not order, this section provides a  
37 positive definition of order based on case law and agency experience. The key concept is that an  
38 order includes solely agency legal determinations that are addressed to particular, specific,  
39 identified individuals in particular circumstances. An order may be addressed to more than one  
40 person. Further, the definition is consistent with modern law in rejecting the right/privilege  
41 distinction in constitutional law. The addition of the language "or other interests" is intended to  
42 clarify this change and to include entitlements. See also Cal.Gov.Code SECTION 11405.50.

43  
44 Party. This definition includes the agency, any person against whom agency action is  
45 brought and any person who intervenes. Its terms also include any person who may participate  
46 in a rulemaking proceeding, such as someone who offers a comment. This section is not

1 intended to deal with the issue of a person's entitlement to review. Standing and other issues  
2 relating to judicial review of agency action are addressed in Article 5 of this Act.

3  
4 Presiding Officer. This definition includes an agency staff member, an administrative  
5 law judge or one or more members of the agency head when designated to preside at a hearing.

6  
7 Person. The definition of a "person" is the standard definition for that term used in acts  
8 adopted by the National Conference of Commissioners on Uniform State Laws. It includes  
9 individuals, associations of individuals, and corporate and governmental entities.

10  
11 Rule. The essential part of this definition is the requirement of general applicability of  
12 the statement. This criterion distinguishes a rule from an order, which focuses upon particular  
13 applicability to identified parties only. Applicability of a rule may be general, even though at the  
14 time of the adoption of the rule there is only one person or firm affected: persons or firms in the  
15 future who are in the same situation will also be bound by the standard established by such a  
16 rule. It is sometimes helpful to ask in borderline situations what the effect of the statement will  
17 be in the future. If unnamed parties in the same factual situation in the future will be bound by  
18 the statement, then it is a rule. The word "statement" has been used to make clear that, regardless  
19 of the term that an agency uses to describe a declaration or publication and whether it is internal  
20 or external to the agency, if the legal operation or effect of the agency action is the same as a  
21 substantive rule, then it meets this definition. The exceptions to the definition are widely used in  
22 state APAs. Subsection 26(A) is drawn from 1981 Model State APA § 3-116(1). Subsection  
23 26(E) is drawn from 1981 Model State APA § 3-116(9). Subsection 26(F) is drawn from 1981  
24 Model State APA § 3-116(2). Subsection 26(H) is based on 1981 Model State APA § 3-116(7).

25  
26 Written. This definition relates to the definition of record in Section 102(25) in that  
27 written documents are inscribed on a tangible medium. The definition of record in Section  
28 102(25) includes both tangible medium (written) and electronic documents.

29  
30 **SECTION 103. APPLICABILITY.** This [act] applies to each agency unless the  
31 agency is expressly exempted by ~~a statute~~ ~~statutory law~~ of this state.

32 **Comment**

33 This section is intended to define which agencies are subject to the provisions of this act.  
34 Many states have made use of an applicability provision to define the coverage of their  
35 Administrative Procedure Act. See: Iowa, I.C.A. SECTION 17A.23; Kansas, K.S.A. SECTION  
36 77-503; Kentucky, KRS SECTION 13B.020; Maryland, MD Code, State Government,  
37 SECTION 10-203; Minnesota, M.S.A. SECTION 14.03; Mississippi, Miss. Code Ann.  
38 SECTION 25-43-1.103; Washington, West's RCWA 34.05.020.  
39

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 ~~*Legislative Note: throughout this act the drafting committee has used the term [publisher] to*~~  
8 ~~*describe the official or agency to which substantive publishing functions are assigned. All states*~~  
9 ~~*have such an official, but their titles vary. Each state using this act should determine what that*~~  
10 ~~*agency is, then insert its title in place of [publisher] throughout this act. Each state also has an*~~  
11 ~~*[administrative bulletin] and an [administrative code]. The bulletin is similar to the federal*~~  
12 ~~*register, and the code is similar to the code of federal regulations. The names of the*~~  
13 ~~*administrative bulletin and the administrative code vary from state to state. Each state should*~~  
14 ~~*insert the proper title in place of [administrative bulletin], and [administrative code].*~~  
15

16 (b) The [publisher] shall publish all rulemaking documents in [electronic and written]  
17 [electronic or written] [electronic] [written] format. The [publisher] shall prescribe a uniform  
18 numbering system, form, and style for all proposed, adopted, and amended ~~and adopted~~ rules.

19 (c) The [publisher] shall maintain the official record of adoption, amendment, and repeal  
20 for ~~rules that~~ are have been adopted, amended, or repealed, including the text of the rule and any  
21 supporting documents, and filed with the [publisher] by anthe agency. AnThe agency adopting,  
22 amending, or repealing ~~the~~ rule shall maintain the rulemaking record required ~~, as defined in by~~  
23 Section 302(b); for that rule.

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

28 (e) The [administrative bulletin] must be published by the [publisher] at least once each

1 [month].

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

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

5 (1) notices of proposed adoption of ~~a~~the rule prepared so that the text of the  
6 proposed rule shows the text of any existing rule proposed to be changed and the change  
7 proposed;

8 (2) newly filed rules prepared so that the text of ~~a~~the newly filed amended rule  
9 shows the text of ~~the~~any existing rule ~~changed~~ and the change that ~~is~~has been made;

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

12 (4) an index.

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

16 (i) The [publisher] shall make available for public inspection and copying the  
17 [administrative bulletin] and the [administrative code].

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

21 (k) The [publisher] shall make available on the [publisher's] Internet website all of the  
22 documents provided by each agency under subsection (n). The [publisher] may not charge a fee  
23 for access to the [publisher's] Internet website.

1  
2 |           ~~(l)~~ An agency shall make its rules, declaratory orders, guidance documents, and orders  
3 | in contested cases available through electronic distribution unless exempt from disclosure under  
4 | law other than this [act]. An agency shall make these materials available through regular mail  
5 | upon request, for which the agency may charge a reasonable fee.

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

10 |           ~~(n)~~ Each agency shall provide to the [publisher]:

- 11 |           (1) the notice of the adoption, amendment, or repeal of a rule;
- 12 |           (2) a summary of the regulatory analysis required by ~~S~~section 305 for each  
13 | proposed rule;
- 14 |           (3) each adopted, amended, or repealed rule;
- 15 |           (4) each guidance document;
- 16 |           (5) each order in a contested case;
- 17 |           ~~(6) an index of final orders in contested cases~~
- 18 |           ~~(7)~~ each declaratory order; and
- 19 |           ~~(8)~~ any other notice or matter that an agency is required to publish under this

20 | [act].

21 |           ~~(n) The [publisher] shall make available on the [publisher's] Internet website all of the~~  
22 | ~~documents provided by each agency under subsection (m). The [publisher] may not charge a fee~~  
23 | ~~for access to the [publisher's] Internet website.~~

1 *Legislative Note: throughout this act the drafting committee has used the term [publisher] to*  
2 *describe the official or agency to which substantive publishing functions are assigned. All states*  
3 *have such an official, but their titles vary. Each state using this act should determine what that*  
4 *agency is, then insert its title in place of [publisher] throughout this act. Each state also has an*  
5 *[administrative bulletin] and an [administrative code]. The bulletin is similar to the federal*  
6 *register, and the code is similar to the code of federal regulations. The names of the*  
7 *administrative bulletin and the administrative code vary from state to state. Each state should*  
8 *insert the proper title in place of [administrative bulletin], and [administrative code].*  
9

10  
11 **Comment**

12 This section seeks to assure adequate notice to the public of proposed agency action. It  
13 also seeks to assure adequate record keeping and availability of records for the public. Article 2  
14 is intended to provide easy public access to agency law and policy that are relevant to agency  
15 process. Article 2 also adds provisions for electronic publication of the administrative bulletin  
16 and code. Section 201 does not address the issue related to what languages rules should be  
17 published in, nor does it address issues related to translation of information contained in these  
18 documents into languages other than English. Rulemaking documents include materials in  
19 written or electronic form that are related to an agency rulemaking proceeding, or that are  
20 guidance documents in written or electronic form. Subsection (b) provides for publication of  
21 rulemaking documents in alternative written and/or electronic formats. Publishers that administer  
22 the provisions of this subsection must also comply with the applicable provisions of the federal  
23 E-Sign Act (15 U.S.C. Section 7001 to 7031) and the Uniform Electronic Transactions Act  
24 (UETA).  
25

26 The arrival of the Internet and electronic information transfer, which occurred after the  
27 last revision of the Model State Administrative Procedure Act, has revolutionized  
28 communication. It has made available rapid, efficient and low cost communication and  
29 information transfer. Many states as well as the federal agencies have found that it is an ideal  
30 medium for communication between agencies and the public, especially in connection with  
31 rulemaking. Since the last Model Administrative Procedure Act was written, many states have  
32 adopted various types of statutes that permit agencies to use electronic technology to  
33 communicate with the public. The agencies have found this technology particularly useful in  
34 connection with rulemaking.  
35

36 Subsection (c) requires that the [publisher] maintain the official record for adopted rules,  
37 including the text of the rules and any supporting documents, filed by the agency. Subsection (c)  
38 also requires that the agency adopting the rule maintain the rulemaking record for that rule.  
39 Section 302(b) provides the requirements for the rulemaking record.  
40

41 Subsection (d) requires the [publisher] to 1) maintain an Internet website, and 2) publish  
42 all matters required to be published under this act on that website. If a state chooses to use  
43 subsection (d), they will create a centralized website for use by all agencies. Subsection (d) also  
44 requires that the [publisher] publish agency guidance documents filed by the agency with the

1 [publisher]. See section 202(4) and Section 310, below. Subsection (d) does not address issues  
2 related to authentication, preservation and archival storage of electronic documents published on  
3 an Internet website. Subsection (d) does not address the principles for deciding what rules are in  
4 effect and enforceable at a specific point in time.

5  
6 Subsection (f) requires the publisher to provide the administrative bulletin in written form  
7 upon request, for which the publisher may charge a reasonable fee. This requirement can be  
8 satisfied by states making the administrative bulletin available on the Internet, searchable, and  
9 printable.

10  
11 The bracketed text of subsection (g)(1), and (g)(2) is included so that agencies may  
12 utilize redlining or underlining and striking of the text of the proposed or adopted rules so that  
13 changes from the existing text of the rule are clearly delineated. Agencies that are proposing or  
14 adopting new rules or that have some other system for showing changes need not use the  
15 bracketed text.

16  
17 It is possible to go much further in providing for use of the Internet that the publication  
18 adopted here. For example, a state could choose to permit agencies to operate their own  
19 websites, and to accept comments on rules on the website. They could also provide for  
20 maintenance of a database of all comments received that the public could access. These  
21 provisions are extremely useful, but may be quite expensive. The central system adopted here,  
22 means only one Internet website is required. In terms of cost benefit, this is an effective method  
23 of providing for electronic communication and agency access.

24  
25 Subsection (h) requires the publisher to index the administrative code by subject. States  
26 can satisfy this requirement by providing an administrative code that is searchable by word on  
27 the Internet.

28  
29 Subsection (j) provides for a limited non substantive power to edit agency rules provided  
30 that the agency is notified by the rules [publisher] of the changes. Subsection (j) is based on the  
31 Maine Administrative Procedure Act, 5 M.R.S.A. Section 8056(10).

32  
33 Subsections (k) and (l) are drawn from the Washington Administrative Procedure Act.  
34 See WA ST 34.05.260.

35  
36 **SECTION 202. REQUIRED AGENCY RULEMAKING AND**

37 **RECORDKEEPING.** In addition to ~~any other~~ rulemaking requirements imposed by law other  
38 than this [act], each agency shall:

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

1 (2) adopt as a rule the nature and requirements of all formal and informal procedures  
2 available, including a description of all forms and instructions used by the agency;

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

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

8 (5) file with the [publisher] in an electronic format acceptable to the [publisher] the  
9 agency's:

- 10 (A) proposed rules;
- 11 (B) adopted rules, including rules adopted ~~using the emergency process~~ under  
12 Section 309(a) ~~and rules adopted using the direct final process under Section~~  
13 ~~309(b)~~;
- 14 (C) guidance documents;
- 15 (D) notices;
- 16 (E) declaratory orders; ~~and~~
- 17 (F) orders issued in contested cases; and
- 18 (G) indexes of final orders in contested cases; [and]

19 (6) maintain [custody of] the agency's current rulemaking docket required by Section  
20 302(b);]

21 [(7) maintain a separate, official, current, and dated index and compilation of all rules  
22 adopted under [Article] 3, make the index and compilation available at agency offices for public  
23 inspection and copying [and online on the [publisher]'s Internet website], update the index and

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1 compilation at least ~~monthly~~every 30 days, and file the index and the compilation and all  
2 changes to both with the [publisher].

3 **Comment**

4  
5 One object of this section is to make available to the public all procedures followed by  
6 the agency, including especially how to file for a license or benefit. It is modeled on the 1961  
7 Model State Administrative Procedure Act, Sections 2(a) (4) & 2(b), the 1981 Model State APA  
8 Sections 2-104(1),(2), and the Kentucky Administrative Procedure Act, KRS Section 13A.100.  
9 Persons seeking licenses or benefits should have a readily available and understandable reference  
10 sources from the agency. A second reason is to eliminate “secret law” by making all guidance  
11 documents used by the agency available from the agency. Subsections (1),(2),(3), and (4) require  
12 the agency to codify by rule the description of the organization of the agency and the procedures  
13 followed by the agency. Agencies could use direct final rulemaking procedures under Section  
14 309(b) to adopt some of the rules required by subsections (1), (2), (3), and (4). Some states  
15 provide more detail in subsection (1) including contact information for agency officials and  
16 organizational charts.

17  
18 Subsection (5) requires agencies to file guidance documents with the publisher. Section  
19 310(e) requires that agencies publish all current guidance documents. In states where the  
20 publisher has the sole responsibility for publishing agency rules and other documents, including  
21 guidance documents, an agency may satisfy the publication requirement by filing the guidance  
22 document with the publisher under subsection (5).

23  
24 **SECTION 203. DECLARATORY ORDER.**

25 (a) Any interested person may petition an agency for a declaratory order that states  
26 whether or in what manner a rule, guidance document, or order issued by the agency applies to  
27 the petitioner.

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

33 (c) Not later than 60 days after receipt of a petition pursuant to subsection (a), an agency  
34 shall issue a declaratory order in response to the petition, decline to issue a declaratory order, or

1 schedule the matter for further consideration.

2 (d) If an agency declines to consider a petition submitted under subsection (a), it shall  
3 promptly notify in a record the petitioner of its decision and include a brief statement of the  
4 reasons for declining. An agency decision to decline to issue a declaratory order is subject to  
5 judicial review for abuse of discretion.

6 (e) If an agency issues a declaratory order, the order must contain the names of all  
7 parties to the proceeding, the facts on which it is based, and the reasons for the agency's  
8 conclusion. ~~If~~ ~~When~~ needed to protect confidentiality, an agency may redact confidential  
9 information in the declaratory order. A declaratory order has the same status and binding effect  
10 as an order issued in an adjudication, and is subject to judicial review under Section 501.

11 (f) An agency shall publish all ~~currently effective~~-declaratory orders.

12 (g) ~~An~~ agency shall maintain an index of all of its current declaratory orders, file the  
13 index with the [publisher] ~~annually~~ ~~on or before January 1 of each year~~, make the index readily  
14 available for public inspection, and make available for public inspection the full text of all  
15 declaratory orders to the extent inspection is permitted by law other than this [act].

### 16 Comment

17  
18 This section embodies a policy of creating a convenient procedural device that will  
19 enable parties to obtain reliable advice from an agency. Such guidance is valuable to enable  
20 citizens to conform with agency standards as well as to reduce litigation. It is based on the 1981  
21 MSAPA, Section 2-103 and Hawaii Revised Statutes, Section 91-8.

22  
23 Subsection (d) provides that agency decisions to decline to issue a declaratory order are  
24 reviewable for abuse of discretion (See Massachusetts v. EPA 127 S. Ct. 1438 (2007) (EPA  
25 decision to reject rulemaking petition and therefore not to regulate greenhouse gases associated  
26 with global warming was judicially reviewable and decision was arbitrary and capricious.).  
27 limited agency resources may provide a valid basis for an agency to decline to issue a  
28 declaratory order.

29  
30 Subsection (e) is based on the California APA, West's Ann.Cal.Gov.Code Section  
31 11465.60; and the Washington APA, West's RCWA 34.05.240. A declaratory decision issued

1 by an agency is judicially reviewable; is binding on the applicant, other parties to that  
2 declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has  
3 the same precedential effect as other agency adjudications. A declaratory decision, like other  
4 decisions, only determines the legal rights of the particular parties to the proceeding in which it  
5 was issued. The requirement in subdivision (e) that each declaratory decision issued contain the  
6 facts on which it is based and the reasons for its conclusion will facilitate any subsequent judicial  
7 review of the decision's legality. It also ensures a clear record of what occurred for the parties  
8 and for persons interested in the decision because of its possible precedential effect.

9  
10 Subsections (f), and (g) require that an agency publish and index all current declaratory  
11 orders.

12  
13 **SECTION 204. DEFAULT PROCEDURAL RULES.**

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

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

19 (c) An agency may adopt a rule of procedure that differs from the default procedural  
20 rules adopted under subsection (a) by adopting a rule that states with particularity the need and  
21 reasons for the variation from the default procedural rules.†

22 **Comment**

23 This Section is based on Section 2-105 of the 1981 MSAPA. See also the provisions of  
24 the California Administrative Procedure Act, California Government Code Section 11420.20  
25 (adoption of model alternative dispute resolution regulations by California Office of  
26 Administrative Hearings.) One purpose of this provision is to provide agencies with a set of  
27 procedural rules. This is especially important for smaller agencies. Another purpose of this  
28 section is to create as uniform a set of procedures for all agencies as is realistic, but to preserve  
29 the power of agencies to deviate from the common model where necessary because the use of the  
30 model rules is demonstrated to be impractical for that particular agency. This section requires all  
31 agencies to use the model rules as the basis for the rules that they are required to adopt under  
32 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 As used in~~ this section, “rule” does not include a rule adopted using the emergency  
5 process under Section 309(a) or a rule adopted using the direct final process under Section  
6 309(b).

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

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

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

11 (2) notices related to the proposed rule;

12 ~~(3) how comments may be made;~~

13 ~~(3) where comments may be inspected;~~

14 (4) the time within which comments may be made;

15 ~~(5) where comments may be inspected;~~

16 ~~(6)~~ requests for a public hearing;

17 ~~(7)~~ appropriate information about a public hearing, if any, including the names  
18 of the persons making the request;

19 ~~(7) how comments may be made;~~ and

20 (8) the timetable for action.

21 (d) Upon request, the agency shall provide a written rulemaking docket.

22 **Comment**

23  
24 This section is modeled on Minn. M.S.A. Section 14.366. This section and the following  
25 section, Section 302 state the minimum docketing and rulemaking record keeping requirements

1 for all agencies. This section also recognizes that many agencies use electronic recording and  
2 maintenance of dockets and records. However, for smaller agencies, the use of electronic  
3 recording and maintenance may not be feasible. This section therefore permits the use of  
4 exclusively written, hard copy dockets. The current rulemaking docket is a summary list of  
5 pending rulemaking proceedings or an agenda referring to pending rulemaking. This section  
6 includes direct final rules governed by Section 309.

7  
8 **SECTION 302. AGENCY RECORD IN RULEMAKING PROCEEDING.**

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

17 (b) A rulemaking record must contain:

- 18 (1) a copy of all publications in the [administrative bulletin] ~~relating with respect~~  
19 to the rule or the proceeding upon which the rule is based;
- 20 (2) a copy of any ~~part~~portion of the rulemaking docket containing entries relating  
21 to the rule or the proceeding upon which the rule is based;
- 22 (3) a copy or an index of written factual material, studies, and reports relied on or  
23 consulted by agency personnel in formulating the proposed or final rule;
- 24 (4) any official transcript of oral presentations made in the proceeding upon  
25 which the rule is based or, if not transcribed, any audio recording or verbatim transcript of  
26 ~~the~~those presentations, ~~and~~ any memorandum summarizing the contents of those presentations  
27 prepared by the agency official who presided over the hearing, ~~summarizing the contents of~~

1 | ~~those presentations;~~

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

3 | (6) all petitions for any agency action on the rule, except for petitions governed

4 | by Section 203.

5 | **Comment**

6 |  
7 | Several states have adopted this type of agency rule-making record provisions: Az.,  
8 | A.R.S. Section 41-1029; Colo., C.R.S.A. Section 24-4-103; Minn., M.S.A. Section 14.365;  
9 | Miss., Miss. Code Ann. Section 25-43-3.110; Mont., MCA 2-4-402; Okl., 75 Okl.St. Ann.  
10 | Section 302; and Wash., RCWA 34.05.370.

11 |  
12 | The language of subsection (a) is based on Section 3-112(a) of the 1981 Model Act.  
13 | Similar language is found in the Washington Administrative Procedures Act, RCWA Section  
14 | 34.05.370. The requirement of an official agency rulemaking record in subsection (a) should  
15 | facilitate a more structured and rational agency and public consideration of proposed rules. It  
16 | will also aid the process of judicial review of the validity of rules. The requirement of an official  
17 | agency rulemaking record was suggested for the Federal Act in S. 1291, the “Administrative  
18 | Practice and Regulatory Control Act of 1979,” title I, Section 102(d), [5 U.S.C. 553(d) ], 96  
19 | Cong.Rec. S7126 at S7129 (daily ed. Jun. 6, 1979) (Sen. Kennedy). The second sentence of  
20 | subsection (a) is intended to exclude privileged material from disclosure and display. Privileged  
21 | material includes confidential business information and trade secrets, as well as internal advice  
22 | memoranda. The exemptions in the state open records laws would be examples of records and  
23 | materials that are exempt from disclosure and display under law other than this act. The third  
24 | sentence in subsection (a) is intended to enable an agency to decide, for example, that indecent  
25 | material or copyrighted material should be available for inspection in hard copy but not posted  
26 | on the Internet. It is not intended to authorize exclusion from the Internet record of, for example,  
27 | information that reflects adversely on the government.”

28 |  
29 | Subsection (b) requires *all written* submissions made to an agency and *all written*  
30 | materials considered by an agency in connection with a rulemaking proceeding to be included in  
31 | the record. It also requires a copy of any existing record of oral presentations made in the  
32 | proceeding to be included in the rulemaking record. The language in Subsection (b) (3) is based  
33 | on language adopted by the ABA. See ABA Section of Administrative Law and Regulatory  
34 | Practice, “A Blackletter Statement of Federal Administrative Law,” 54 Admin. L. Rev. 1, 34  
35 | (2002)

36 |  
37 | **SECTION 303. ADVANCED NOTICE OF PROPOSED RULEMAKING;**  
38 | **NEGOTIATED RULEMAKING.**

39 | (a) An agency may gather information relevant to the subject matter of ~~possible~~  
40 | rulemaking and may solicit comments and recommendations from the public by publishing an

1 | advanced notice of proposed rulemaking in the [administrative bulletin] and indicating where,  
2 | when, and how persons may comment.

3 | (b) An agency may engage in negotiated rulemaking by appointing a committee to  
4 | comment or make recommendations on the subject matter of a rulemaking under active  
5 | consideration within the agency. The committee, in consultation with one or more agency  
6 | representatives, may attempt to reach a consensus on the terms or substance of a proposed rule.

7 | In making the appointments, the agency shall attempt to establish a balance in representation  
8 | among persons known to have an interest and members of the public. The agency shall publish a  
9 | list of all committees with their membership at least [annually] in the [administrative bulletin].

10 | Notice of a meeting of a committee appointed under this subsection must be published in the  
11 | [administrative bulletin] at least [15 days] before the meeting. A meeting of a committee  
12 | appointed under this section is open to the public.

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

#### 16 | **Comment**

17 |  
18 | This section is based upon the provisions of Section 3-101 of the 1981 MSAPA. Seeking  
19 | advice before proposing a rule frequently alerts the agency to potential serious problems that will  
20 | change the notice of proposed rulemaking and the rule ultimately adopted. This section is  
21 | designed to encourage gathering information. It is not intended to prohibit any type of  
22 | reasonable agency information gathering activities; however, the section seeks to insure that  
23 | agencies act in a fashion that will result in a balance among interested groups from whom  
24 | information is received. The advanced notice of proposed rulemaking under subsection (a) is a  
25 | preliminary step for seeking information and is not the same as the notice of proposed  
26 | rulemaking under Section 304, which begins the rulemaking process.  
27 |

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

1 227.13. Subsection (b) is intended to authorize negotiated rulemaking.  
2

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

10 **SECTION 304. NOTICE OF PROPOSED RULEMAKING.**

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

- 15 (1) a short explanation of the purpose of the proposed action;
- 16 (2) a citation or reference to the specific legal authority authorizing the proposed  
17 action;
- 18 (3) the text of any rule proposed to be adopted, amended, or repealed;
- 19 (4) how a copy of the full text of the regulatory analysis of any rule proposed to  
20 be adopted, amended, or repealed may be obtained;
- 21 (5) where, when, and how a person may comment on the proposed action and  
22 request a hearing; and
- 23 (6) a concise summary of any regulatory analysis prepared under Section 305(d)

24 (b) Not later than three days after publication of the notice of the proposed rulemaking in  
25 the [administrative bulletin], the agency shall mail ~~or send electronically~~ the notice or send it  
26 electronically to each person that makes a timely request to the agency for a mailed or electronic  
27 copy of the notice. An agency may charge a reasonable fee for written mailed copies if the

1 | person ~~makes~~~~has made~~ a request for a mailed copy.

2 | **Comment**

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

11 | **SECTION 305. REGULATORY ANALYSIS.**

12 |  
13 | (a) An agency shall prepare a regulatory analysis for a ~~rule~~ rule proposed to be adopted,  
14 | amended, or repealed ~~proposed to be adopted~~ that has an estimated economic impact of more  
15 | than [\$ \_\_\_\_]. The analysis must be completed before the notice of proposed rulemaking is  
16 | published. A summary of the analysis must be published when the notice of proposed  
17 | rulemaking is given.

18 | (b) If a proposed rulemaking has an economic impact of less than [\$ \_\_\_\_], the ~~An~~ agency  
19 | shall prepare a statement of minimal estimated economic impact. ~~for any rule proposed to be~~  
20 | ~~adopted, amended, or repealed by the agency the adoption, amendment, or repeal of which has~~  
21 | ~~an economic impact of less than [\$ \_\_\_\_].~~

22 | (c) A regulatory analysis must contain:

23 | (1) a description of any class of persons that would be affected by the proposed  
24 | rulemaking~~rule~~ and the cost and benefit to that class of persons;

25 | (2) an estimate of the probable impact of the proposed rulemaking~~rule~~ upon any  
26 | affected class;

27 | (3) a comparison of the probable cost and benefit of the proposed rulemaking~~rule~~  
28 | to the probable cost and benefit of inaction;

1 (4) a determination of whether there are less costly or less intrusive methods for  
2 achieving the purpose of the proposed rulemaking rule; [and]

3 [(5) a citation to and summary of each scientific or statistical study, report, or  
4 analysis that served as a basis for the proposed rulemaking rule, together with an indication of  
5 how the full text may be obtained].

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

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

13  
14 (e) An agency preparing a regulatory analysis under this section shall submit the analysis  
15 to the [~~appropriate state agency~~].

16 (f) If the agency has made a good faith effort to comply with this section, a rule is not  
17 invalid~~may not be invalidated on the ground that solely because~~ the contents of the regulatory  
18 analysis of the rule are insufficient or inaccurate.

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

24  
25

26 **Comment**

27  
28 Regulatory analyses are widely used as part of the rulemaking process in the states. The  
29 subsection also provides for submission to the rules review entity in the state, if the state has one.  
30 States that already have regulatory analysis laws can utilize the provisions of Section 305 to the  
31 extent that this section is not inconsistent with existing law other than this act. Agencies may  
32 rely upon agency staff expertise and information provided by interested stakeholders and  
33 participants in the rulemaking process. Agencies are not required by this act to hire and pay for

1 private consultants to complete regulatory impact analysis. The concise summary of the  
2 regulatory analysis required by subsection (d) means a short statement that contains the major  
3 conclusions reached in the regulatory analysis.

4  
5 Subsection (c)(5) This language is adapted from N.Y. APA § 202-a. This language also  
6 codifies requirements used in federal administrative law. In the federal cases, disclosure of  
7 technical information underlying a rule has been deemed essential to effective use of the  
8 opportunity to comment. See *American Radio Relay League v. FCC*, 2008 WL 1838387 (D.C.  
9 Cir. April 25, 2008); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

### 11 SECTION 306. PUBLIC PARTICIPATION.

12 (a) An agency proposing the adoption, amendment or repeal of a rule shall specify a  
13 public comment period of For at least [30] days after publication of thea notice of proposed  
14 rulemaking for the adoption, amendment, or repeal of a rule—there shall be a public comment  
15 period at during which an agency shall allow a person mayto submit information and comment  
16 on the rule proposed for adoption, amendment, or repeal. The information or comment may be  
17 submitted electronically or in written form.

18 (b) An agency shall consider all information and comment on a rule proposed for  
19 adoption, amendment, or repeal whichthat is submitted within the comment period under  
20 subsection (a).

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

27  
28 (d) A hearing on a rule proposed for adoption, amendment, or repeal may not be held

1 earlier than [30] days after notice of its location, date, and time is published in the  
2 [administrative bulletin]. ~~A hearing on a proposed rule must be held not less than [10] days-~~  
3 ~~before the end of the public comment period.~~

4 (e) An agency representative shall preside at a hearing on a rule proposed for adoption,  
5 amendment, or repeal. If the presiding agency representative is not the agency head, the  
6 representative shall prepare a memorandum summarizing the contents of the presentations made  
7 at the hearing for consideration by the agency head. ~~summarizing the contents of the-~~  
8 ~~presentations made at the hearing.~~

9 *Legislative Note: state laws vary on the length of public comment periods and on*  
10 *whether or not a rulemaking hearing is required. The bracketed number of days in subsections*  
11 *(a), and (d) should be interpreted to require that if a rulemaking hearing is held, it will be held*  
12 *before the end of the public comment period.*  
13

14 **Comment**

15  
16 This section gives discretion to the agency about whether to hold an oral hearing on  
17 proposed rules in the absence of a statutory or constitutional requirement that an oral hearing be  
18 held. The agency representative described in subsection (e) need not be an officer or employee of  
19 the agency unless that is required by law other than this [act]. In some states, an employee of the  
20 state attorney general's office will serve as the agency representative presiding on a hearing  
21 related to rulemaking.  
22

23 **SECTION 307. TIME LIMIT ON FINAL ADOPTION, AMENDMENT, OR**  
24 **REPEAL OF A RULE.**

25 (a) An agency may not adopt, ~~amend, or repeal~~ -a rule until the public comment period  
26 has ~~ended~~ expired.

27 (b) Not later than [180] days after the close of the public comment period ~~or after the-~~  
28 ~~date of any public hearing, whichever is later~~, the agency shall adopt, amend, or repeal the rule  
29 pursuant to the rulemaking proceeding or terminate the proceeding by publication of a notice of

1 | termination in the [administrative bulletin].

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

4 | ~~(de)~~ A rule is void unless it is not adopted, amended, or repealed and filed within the  
5 | time limits set by this section ~~is void~~.

6 | **Comment**

7 | This section codifies the final adoption and filing for publication requirements for  
8 | rulemaking that is subject to the procedures provided in Sections 304 through 308 of this Act.  
9 | Section 702(a) of this act requires that the agency shall file a copy of the adopted amended or  
10 | repealed rule with the rules review committee at the same time it is filed with the publisher.  
11 | Subsection (c) provides that a rule that is not properly adopted and filed for publication has no  
12 | legal effect.  
13 |

14 | **SECTION 308. VARIANCE BETWEEN PROPOSED RULE AND FINAL**

15 | ACTIONADOPTED RULE. An agency may not take action on a rule proposed to be adopted,  
16 | amended, or repealed ~~adopt a rule~~ that differs from the actionrule proposed in the notice of  
17 | proposed rulemakingadoption of a rule on which the rule is based unless the actionrule being  
18 | adopted is the logical outgrowth of the actionrule proposed in the notice.

19 | **Comment**

20 | This section draws upon provisions from several states. See Mississippi Administrative  
21 | Procedure Act, Miss. Code Ann. Section 25-43-3.107 and the Minn. Administrative Procedure  
22 | Act, M.S.A. Section 14.05. The variance test adopted by state and federal courts is the logical  
23 | outgrowth test. If the adopted rule is the logical outgrowth of the proposed rule, no further  
24 | comment period is required. If it is not the logical outgrowth, then a further comment period is  
25 | required. Courts utilize several factors to apply the logical out growth test including: (1) any  
26 | person affected by the adopted rule should have reasonably expected that the published  
27 | proposed rule would affect the person's interest; (2) the subject matter of the adopted rule or the  
28 | issues determined by that rule are different from the subject matter or issues involved in the  
29 | published rule proposed to be adopted; and (3) the effect of the adopted rule differs from the  
30 | effect of the rule proposed to be adopted or amended.  
31 |

32 | The following cases discuss and analyze the logical outgrowth test and these factors .  
33 | These judicial opinions also convey the wide acceptance and use of the logical outgrowth test in  
34 | the states. *First Am. Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008,

1 1015 (D.C.Cir.2000); *Arizona [publisher]. Serv. Co. v. EPA*, 211 F.3d 1280, 1300  
2 (D.C.Cir.2000); *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994);  
3 *Trustees for Alaska v. Dept. Nat. Resources*, \_\_\_AK\_\_\_, 795 P.2d 805 (1990); *Sullivan v.*  
4 *Evergreen Health Care*, 678 N.E.2d 129 (Ind. App. 1997); *Iowa Citizen Energy Coalition v.*  
5 *Iowa St. Commerce Comm.* \_\_\_IA\_\_\_, 335 N.W.2d 178 (1983); *Motor Veh. Mfrs. Ass'n v.*  
6 *Jorling*, 152 Misc.2d 405, 577 N.Y.S.2d 346 (N.Y.Sup.,1991); *Tennessee Envir. Coun. v. Solid*  
7 *Waste Control Bd.*, 852 S.W.2d 893 (Tenn. App. 1992); *Workers' Comp. Comm. v. Patients*  
8 *Advocate*, 47 Tex. 607, 136 S.W.3d 643 (2004); *Dept. Of [publisher]. Svc. re Small Power*  
9 *Projects*, 161 Vt. 97, 632 A.2d 13 73 (1993); *Amer. Bankers Life Ins. Co. v. Div. of Consumer*  
10 *Counsel*, 220 Va. 773, 263 S.E.2d 867 (1980).

11  
12

### SECTION 309. EMERGENCY RULEMAKING; DIRECT FINAL

#### RULEMAKING.

14 (a) If an agency finds that an imminent peril to the public health, safety, or welfare,  
15 including the imminent loss of federal funding for an agency programs, requires the immediate  
16 adoption, amendment, or repeal of a rule and states in a record its reasons for that finding, the  
17 agency, without prior notice or hearing or upon any abbreviated notice and hearing that it finds  
18 practicable, may adopt, amend, or repeal -a rule without complying with Sections 304 through  
19 307. The adoption, amendment, or repeal may be effective for not longer than [180] days  
20 [renewable once up to an additional [180] days]. The adoption, amendment, or repeal does not  
21 preclude the adoption or amendment of an identical rule, or the repeal of the rule, under  
22 Sections 304 through 3088. The agency shall file with the [publisher] a rule adopted-, amended,  
23 or repealed under this subsection not later than [ ] days after the adoption and shall notify  
24 persons who have requested notice of rules related to that subject matter.

25 (b) If an agency proposes to adopt, amend, or repeal a rule the adoption, amendment, or  
26 repeal of which is expected to be ~~that is~~ noncontroversial, it may use a direct final rulemaking  
27 process in accordance with this subsection and without complying with Sections 304 through  
28 307. A rule to be adopted, amended, or repealed under this subsection must be published in the  
29 [administrative bulletin] along with a statement by the agency that it does not expect the

1 ~~action rule~~ to be controversial. If no objection is received, the ~~action rule~~ becomes final under  
2 Section 316(a). If an objection to the use of the direct final rulemaking process is received not  
3 later than within [30— ] days of public notice ~~from any person~~, the agency shall file notice of the  
4 objection with the [publisher] for publication in the [administrative bulletin], and may proceed  
5 with the rulemaking process under Sections 304 through 308.

#### 6 **Comment**

7  
8 This section is taken from the 1961 MSAPA, Section 3(2)(b), and the Virginia  
9 Administrative Procedure Act, Va. Code Ann. Section 2.2-4012.1. Some state courts have  
10 indicated that *any* exemption from rulemaking requirements must be strictly construed to be  
11 limited to an emergency or virtual emergency situation.

12  
13 Subsection (a) can be used to adopt program requirements necessary to comply with  
14 federal funding requirements, or to avoid suspension of federal funds for noncompliance with  
15 program requirements.

16  
17 Subsection (b) is based upon a recommendation from the Administrative Conference of  
18 the United States. Direct final rulemaking has been recommended by the Administrative  
19 Conference of the United States [ACUS Recommendation 95-4, 60 Fed. Reg. 43110 (1995)].  
20 The study that provided the basis for the recommendation was prepared by Professor Ron Levin  
21 and has been published [Ronald M. Levin, “Direct Final Rulemaking” 64 George Washington  
22 Law Review 1 (1995)]. [However, recognizing that there may be a few other justifications for  
23 exemption, this section adopts a broader rule for matters that will be noncontroversial. Thus, a  
24 situation where the agency is merely making a stylistic correction or correcting an error that the  
25 agency believes is noncontroversial may be adopted without formal rulemaking procedures. See  
26 the VA Fast-Track Rule provision at Va. Code Ann. Section 2.2-4012.1.]

27  
28 In order to prevent misuse of this procedural device, noncontroversial rule promulgation  
29 requires the consent of elected officials, and may be prevented by the requisite number of  
30 persons filing objections. The public comment period in subsection (b) provides notice of the  
31 noncontroversial rule and the opportunity to object to the adoption of the rule. If an objection to  
32 the direct final rulemaking process is received within the public comment period, the agency  
33 must give notice of the objection and then the agency may proceed with the normal rulemaking  
34 process, including the public comment provisions of Section 306.

#### 35 **SECTION 310. GUIDANCE DOCUMENTS.**

36  
37 (a) An agency may issue a guidance document without following the procedures set  
38 forth in Sections 304 through 308. A gGuidance documents ~~s do not have the force of law and do~~

1 | does not constitute an exercise of an agency's delegated authority, if any, to establish the rights  
2 | or duties of any person.

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

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

10 | (d) ~~If~~ When an agency proposes to act at variance with a position expressed in a  
11 | guidance document, it shall provide a reasonable explanation for the variance~~departure~~. If an  
12 | affected person may have reasonably relied on the agency's position, the explanation must  
13 | include a reasonable justification for the agency's conclusion that the need for the  
14 | variance~~departure~~ outweighs the affected person's reliance interests.

15 | (e) An agency shall publish all current guidance documents.

16 | (f) An agency shall maintain an index of all of its currently effective ~~current~~ guidance  
17 | documents, file the index with the [publisher] annually~~on or before January 1 of each year~~, make  
18 | the index readily available for public inspection, and make available for public inspection the  
19 | full text of all guidance documents to the extent inspection is permitted by law other than this  
20 | [act]. Upon request, an agency shall make copies of the~~guidance~~ indexes or guidance documents  
21 | available without charge; at cost; or, if authorized by law other than this [act], on payment of a  
22 | reasonable fee. If an agency does not index a guidance document, the agency may not rely on  
23 | that guidance document or cite it as precedent against any party to a proceeding, unless that party

1 has actual and timely notice of the guidance document.

2 (g) A person may petition an agency under Section 317 to adopt a rule in place of a  
3 guidance document ~~under Section 317~~.

4 (h) A person may petition an agency to revise or repeal ~~an existing~~ guidance document.

5 Not later than [60] days after submission of the petition, the agency shall:

6 (1) revise or repeal the guidance document;

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

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

#### 9 **Comment**

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

26  
27 Four states have adopted detailed provisions regulating guidance documents in their  
28 administrative procedure acts. See Ariz. Rev. Stat. Ann. §§ 41-1001, 41-1091; Mich. Comp.  
29 Laws §§ 24.203, 24.224; Va. Code Ann. § 2.2-4008; Wash. Rev. Code Ann. § 34.05.230. This  
30 section draws upon those provisions, and also upon requirements and recommendations issued  
31 by federal authorities and the American Bar Association.

32  
33 Subsection (a) exempts guidance documents from the procedures that are required for  
34 issuance of rules. Many states have recognized the need for this type of exemption in their  
35 administrative procedure statutes. These states have defined guidance documents—or  
36 interpretive rules and policy statements—differently from rules, and have also excused agencies  
37 creating them from some or all of the procedural requirements for rulemaking. See Ala. Code §  
38 41-22-3(9)(c) ("memoranda, directives, manuals, or other communications which do not

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

18  
19 The second sentence of subsection (a) sets forth the fundamental proposition that a  
20 guidance document, in contrast to a rule, lacks the force of law. Many state and federal  
21 decisions recognize the distinction. See, e.g., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d  
22 533  
23 (D.C. Cir. 1986); District of Columbia v. Craig, 930 A.2d 946, 968-69 (D.C. 2007); Clonlara v.  
24 State Bd. of Educ., 501 N.W.2d 88, 94 (Mich. 1993); Penn. Human Relations Comm’n v.  
25 Norristown Area School Dist., 374 A.2d 671, 678 (Pa. 1977).

26  
27 Subsection (b) requires an agency to allow affected persons to challenge the legality or  
28 wisdom of guidance documents when it seeks to rely on these documents to their detriment. In  
29 effect, this subsection prohibits an agency from treating guidance documents as though they  
30 were rules. Because rules have the force of law (i.e., are binding), an agency need not respond to  
31 criticisms of their legality or wisdom during an adjudicative proceeding; the agency would be  
32 obliged in any event to adhere to them until such time as they have been lawfully rescinded or  
33 invalidated. In contrast, a guidance document is not binding. Therefore, when affected persons  
34 seek to contest a position expressed in a guidance document, the agency may not treat the  
35 document as determinative of the issues raised. See Recommendation 120C of the American Bar  
36 Association, 118-2 A.B.A. Rep. 57, 380 (August 1993) (“When an agency proposes to apply a  
37 nonlegislative rule . . . , it [should] provide affected private parties an opportunity to challenge  
38 the wisdom or legality of the rule [and] not allow the fact that a rule has already been made  
39 available to the public to foreclose consideration of [their] positions”).

40  
41 An integral aspect of a fair opportunity to challenge a guidance document is the agency’s  
42 responsibility to respond reasonably to arguments made against the document. Thus, when  
43 affected persons take issue with propositions expressed in a guidance document, the agency  
44 “must be prepared to support the policy just as if the [guidance document] had never been  
45 issued.” Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974); see Center for Auto  
46 Safety v. NHTSA, 452 F.3d 798, 807 (D.C. Cir. 2006); Professionals and Patients for

1 Customized Care v. Shalala, 56 F.3d 592, 596 (5th Cir. 1995); American Mining Cong. v.  
2 MSHA, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

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

28  
29 What constitutes a fair opportunity to contest a policy statement within an agency will  
30 depend on the circumstances. See ACUS Recommendation 92-2, *supra*, ¶ II.B. (“[A]ffected  
31 persons should be afforded a fair opportunity to challenge the legality or wisdom of [a policy  
32 statement] and suggest alternative choices in an agency forum that assures adequate  
33 consideration by responsible agency officials,” preferably “at or before the time the policy  
34 statement is applied to [them]”). Affected persons’ right to a meaningful opportunity to be heard  
35 on the issues addressed in guidance documents must be reconciled with the agency’s interest in  
36 being able to set forth its interpretations and policies for the guidance of agency personnel and  
37 the public without undue impediment. An agency may use its rulemaking authority to set forth  
38 procedures that it believes will provide affected persons with the requisite opportunity to be  
39 heard. To the extent that these procedures survive judicial scrutiny for compliance with the  
40 purposes of this subsection (b), the agency will thereafter be able to rely on established practice  
41 and precedent in determining what hearing rights to afford to persons who may be affected by its  
42 guidance documents. As new fact situations arise, however, courts should be prepared to  
43 entertain contentions that procedures that have been upheld in past cases did not, or will not,  
44 afford a meaningful opportunity to be heard to some persons who may wish to challenge the  
45 legality or wisdom of a particular guidance document.

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

21  
22 Subsection (d) is based on a similar provision in ABA Recommendation No. 120C,  
23 supra. It is in accord with general principles of administrative law, under which an agency’s  
24 failure to reasonably explain its departure from established policies or interpretations renders its  
25 action arbitrary and capricious on judicial review. See § 509(a)(3)(H) [Alternative 2] (court may  
26 grant relief against agency action other than a rule if it is “inconsistent with the agency’s prior  
27 practice or precedent, unless the agency has stated credible reasons sufficient to indicate a fair  
28 and rational basis for the inconsistency”); 1981 MSAPA § 5-116(c)(8)(iii) (equivalent  
29 provision); *Yale-New Haven Hospital v. Leavitt*, 470 F.3d 71, 79-80 (2d Cir. 2006). It has been  
30 said that a guidance document should constrain subsequent agency action in the same manner  
31 that the agency’s adjudicative precedents do. See Peter L. Strauss, “The Rulemaking  
32 Continuum,” 41 *Duke L.J.* 1463, 1472-73, 1486 (1992) (cited with approval on this point in  
33 *United States v. Mead Corp.*, 533 U.S. 218, 232 (2001)); see also Manning, supra, at 934-37.

34  
35 One purpose of this subsection is to protect the interests of persons who may have  
36 reasonably relied on a guidance document. An agency that acts at variance with its past  
37 practices may be held to have acted in an arbitrary and capricious manner if the unfairness to  
38 regulated persons outweighs the government’s interest in applying its new view to those persons.  
39 *Heckler v. Community Health Servs.*, 467 U.S. 51, 61 (1984) (“an administrative agency may  
40 not apply a new [case law] rule retroactively when to do so would unduly intrude upon  
41 reasonable reliance interests”); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007);  
42 *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001); *Microcomputer Tech. Inst. v.*  
43 *Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998). Accordingly, where persons may have justifiably  
44 relied on a guidance document, the agency’s explanation for departing from the position taken in  
45 that document should ordinarily include a reasonable justification for the decision to override  
46 their reliance interests.

1  
2 The first two sentences of subsection (f) are based directly on Va. Code Ann. § 2.2-4008.  
3 Similar provisions have been adopted in Arizona and Washington. See Ariz. Rev. Stat. Ann. §  
4 41-1091; Wash. Rev. Code Ann. § 34.05.230(3)-(4).  
5

6 The last sentence of the subsection is based on the federal APA. See 5 U.S.C. §  
7 552(a)(2); *Smith v. NTSB*, 981 F.2d 1326 (D.C. Cir. 1993). Subject to harmless error principles,  
8 see § 509(b), a court may invoke the sanction prescribed in this section without necessarily  
9 concluding that the party against whom the document is cited has valid objections to the  
10 substance of the document.

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

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

35 The subsection requires an agency to respond to the petition in [sixty] or fewer days. An  
36 agency that is not prepared to revise or repeal the guidance document within that time period  
37 may initiate a proceeding for the purpose of giving the matter further consideration. This  
38 proceeding can be informal; the notice and comment requirements of Sections 304 through 308  
39 are inapplicable to it, because those sections deal with rules rather than guidance documents.  
40 The agency may, however, voluntarily solicit public comments on issues raised by the petition.  
41 Cf. ACUS Recommendation 76-5, *supra*, ¶ 2. This section does not prescribe a time period  
42 within which the agency must complete the proceeding, but judicial intervention to compel  
43 agency action “unlawfully withheld or unreasonably delayed” may be sought in an appropriate  
44 case. § 501(a). If the agency declines to revise or repeal the guidance document, within the  
45 [sixty] day period or otherwise, it must explain its decision. Denials of petitions under this  
46 subsection, like denials of petitions for rulemaking under section 317, are reviewable for abuse

1 of discretion, and the agency’s explanation will provide a basis for any judicial review of the  
2 denial.

3  
4 **SECTION 311. REQUIRED INFORMATION FOR RULE.** ~~A Each~~ rule filed by an  
5 agency with the [publisher] under Section 315 must contain the text of the rule adopted,  
6 amended, or repealed and be accompanied by a record containing:

- 7 (1) the date the agency adopted, amended, or repealed the rule;
- 8 (2) a reference to the specific statutory or other authority authorizing the action;
- 9 (3) any findings required by any provision of law as a prerequisite to adoption or  
10 effectiveness of the action;
- 11 (4) the effective date of the action;
- 12 (5) the concise explanatory statement required by Section 312; and
- 13 (6) ~~the any final~~ regulatory analysis ~~statement~~ required by Section 305.

14 **Comment**

15  
16 Agency action is defined in section 102(4) to include an agency rule or order [(subsection  
17 (4)(a)], and the failure to issue a rule or order [(subsection (4)(b)]. In Section 311(2),(3), and (4),  
18 the term “action” refers to the rulemaking process related to the adoption, amendment or repeal  
19 of a rule. See Section 102(2) definition of adoption of a rule which includes amendment or repeal  
20 of a rule, unless the context clearly indicates otherwise.

21  
22 **SECTION 312. CONCISE EXPLANATORY STATEMENT.** At the time it adopts,   
23 amends, or repeals -a rule, an agency shall issue a concise explanatory statement containing:

- 24 (1) the agency’s reasons for the action, ~~including which must include~~ the agency’s  
25 reasons for not accepting substantial arguments made in testimony and comments; and
- 26 (2) the reasons for any substantial change between the text of the proposed ~~rule~~ adopted  
27 or amended rule contained in the published notice of the proposed adoption or amendment of the  
28 rule and the text of the rule as finally adopted.

29 **Comment**

1  
2 Many states have adopted the requirement of a concise explanatory statement. Arkansas  
3 (A.C.A. Section 25-15-204) and Colorado (C.R.S.A. Section 24-4-103) have similar provisions.  
4 The federal Administrative Procedure Act uses the identical terms in Section 553 (c) (5 U.S.C.A.  
5 Section 553). This provision also requires the agency to explain why it rejected substantial  
6 arguments made in comments. Such explanation helps to encourage agency consideration of all  
7 substantial arguments and fosters perception of agency action as not arbitrary. Subsection (2)  
8 requires a statement of reasons for any substantial change between the text of the proposed rule,  
9 and the text of the adopted rule. Section 308 prohibits adoption of a rule that differs from the  
10 proposed rule unless the adopted rule is the logical outgrowth of the proposed rule. An adopted  
11 rule that contains a substantial change from the proposed rule can be adopted under Section 308  
12 if the logical outgrowth test is satisfied but the agency will have to provide a statement of  
13 reasons under Section 312(2). If the logical outgrowth test is not met, then the rule can not be  
14 adopted under Section 308, and section 312(2) does not apply.  
15

16 Agency action is defined in section 102(4) to include an agency rule or order [(subsection  
17 (4)(a)], and the failure to issue a rule or order [(subsection (4)(b)]. In Section 312(1), the term  
18 “action” refers to the rulemaking process related to the adoption, amendment or repeal of a rule.  
19 See Section 102(2) definition of adoption of a rule which includes amendment or repeal of a rule,  
20 unless the context clearly indicates otherwise.  
21

22 **SECTION 313. INCORPORATION BY REFERENCE.** A rule may incorporate by  
23 reference all or any part of a code, standard, or rule that has been adopted by an agency of the  
24 United States, this state, another state, or by a nationally recognized organization or association,  
25 if:

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

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

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

33 (4) the rule states where copies of the code, standard, or rule are available for a  
34 reasonable charge from the agency adopting the rule and where copies are available from the

1 agency of the United States, this state, another state, or the organization or association originally  
2 issuing the code, standard, or rule; and  
3 (5) the agency maintains a copy of the code, standard, or rule readily available for public  
4 inspection at the agency office.

5 **Comment**

6  
7 Several states have provisions that require the agencies to retain the voluminous  
8 technical codes. See, Alabama, Ala.Code 1975 Section 41-22-9; Michigan, M.C.L.A. 24.232;  
9 and North Carolina, N.C.G.S.A. § 150B-21.6. To avoid the problems created by those retention  
10 provisions, but to assure that these technical codes are available to the public, this section adopts  
11 several specific procedures. One protection is to permit incorporating by reference only codes  
12 that are readily available from the outside promulgator, and that are of limited public interest as  
13 determined by a source outside the agency. See Wisconsin, W.S.A. 227.21. These provisions  
14 will guarantee that important material drawn from other sources is available to the public, but  
15 that less important material that is freely available elsewhere does not have to be retained. The  
16 bracketed language in subsection (2) is based on variations in state law as to whether later  
17 amendments to codes are automatically incorporated into the rule, or whether a new rulemaking  
18 proceeding would be required to include code amendments. This issue is discussed in Jim Rossi,  
19 “Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of  
20 Federally Inspired Regulatory Programs and Standards,” 46 WMMLR 1343 (2005)  
21

22 **SECTION 314. COMPLIANCE .** An action taken under this [article], including the  
23 adoption, amendment, or repeal of a rule ~~adopted using the emergency process~~ under Section  
24 ~~309(a) or the direct final process under Section 309(b),~~ is not valid unless taken in substantial  
25 compliance with the procedural requirements of this [article].

26 **Comment**

27  
28 This section is a slightly modified form of the 1961 Model State Administrative  
29 Procedure Act, section (3)(c). See also section 3-113(a) and section 3-116 of the 1981 Model  
30 State Administrative Procedures Act. Section 504(a) governs the timing of judicial review  
31 proceedings to contest any rule on the ground of noncompliance with the procedural  
32 requirements of this [act]. The scope of challenges permitted under Section 504(a) includes all  
33 applicable requirements of article 3 for the type of rule being challenged.  
34

35 **SECTION 315. FILING OF RULES.** An agency shall file in written and electronic

1 form with the [publisher] each rule it adopts, amends, or repeals, including a rule adopted  
2 .amended, or repealed under ~~under~~ Section 309(a) ~~or direct final (b)~~. The agency shall file thea  
3 rule not later than [ ] days after adoption, amendment, or repeal. The [publisher] shall  
4 maintain~~keep open to public inspection~~ a permanent register of all filed rules and concise  
5 explanatory statements. The [publisher] shall affix to each rule a certification of the time and  
6 date of filing. The [publisher] shall publish the notice of adopted rules in the [administrative  
7 bulletin]. In filing a rule, each agency shall use a standard form prescribed by the [publisher].

#### 8 **Comment**

9 This section is based on the 1961 Model State Administrative Procedure Act, Section  
10 4(a) and its expansion in the 1981 MSAPA, Section 3-114. Section 201(g)(1) provides that the  
11 administrative bulletin must contain newly filed adopted rules. This section provides that the  
12 publisher is responsible for publishing the notice of adopted rules in the administrative bulletin.  
13

#### 14 **SECTION 316. EFFECTIVE DATE OF RULES.**

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

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

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

26 (d) A rule adopted, amended, or repealed using the emergency process under Section

1 | 309(a) becomes effective upon ~~action~~adoption by the agency.

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

6 | **Comment**

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

14 | **SECTION 317. PETITION FOR ADOPTION OF RULE.** Any person may petition  
15 | an agency to adopt a rule. Each agency shall prescribe by rule the form of the petition and the  
16 | procedure for its submission, consideration, and disposition. Not later than [60] days after  
17 | submission of a petition, the agency shall:  
18 |

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

21 | **Comment**

22 | This section is substantially similar to the 1961 MSAPA. See also section 3-117 of the  
23 | 1981 MSAPA. Agency decisions that decline to adopt a rule are judicially reviewable for abuse  
24 | of discretion (See *Massachusetts v. EPA* 127 S. Ct. 1438 (2007) (EPA decision to reject  
25 | rulemaking petition and therefore not to regulate greenhouse gases associated with global  
26 | warming was judicially reviewable and decision was arbitrary and capricious.).  
27 |

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 ~~as defined in section 102(6).~~

5 Legislative note For a statute to create a right to an evidentiary hearing, express use of  
6 the term “evidentiary hearing” is not necessary in the statute. Statutes often use terms like  
7 “appeal” or “proceeding” or “hearing”, but in context it is clear that they mean an evidentiary  
8 hearing. An evidentiary hearing is one in which the resolution of the dispute involves particular  
9 facts and the presiding officer is limited to material in the record in making his decision. Hearing  
10 rights 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.

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13 Comment

14 Article 4 of this Act does not apply to all adjudications but only to those adjudications,  
15 defined in Section 102(6) as a “contested case.” Contested case is the definition of the subset of  
16 adjudications that fall within this section because law as defined in Section 102(164) requires an  
17 evidentiary hearing to resolve particular facts or the application of law to facts. This section is  
18 subject to the exception in Section 4078 for an emergency hearing if the requirements for that  
19 exception under this Article apply. If the requirements for an emergency adjudication under  
20 Section 4078 are met, a hearing in a contested case may be conducted following the procedures  
21 in ~~th~~at ~~ese~~ sections. All contested cases are also subject to Section 402 of this article.  
22

23  
24 ~~For a statute to create a right to an evidentiary hearing, express use of the term~~  
25 ~~“evidentiary hearing” is not necessary in the statute. Statutes often use terms like “appeal” or~~  
26 ~~“proceeding” or “hearing”, but in context it is clear that they mean an evidentiary hearing. An~~  
27 ~~evidentiary hearing is one in which the resolution of the dispute involves particular facts and the~~  
28 ~~presiding officer is limited to material in the record in making his decision.~~

29 -  
30 Hearings that are required by procedural due process guarantees ~~serve to protect~~include  
31 life, liberty and property *interests*, which arise where a statute creates a justified expectation or  
32 legitimate entitlement. This section includes more than what were described as “rights” under  
33 older common law. In cases where the right to an evidentiary hearing is created by due process,  
34 attention is directed to ~~Article 4A, section 401A~~Section 405(2)D ~~infra~~, which may permit an  
35 informal hearing.

36  
37 Section 401, governing contested case hearings, does not apply to investigatory hearings,  
38 a hearing that merely seeks public input or comment, pure administrative process proceedings  
39 such as tests, elections, or inspections, and situations in which a party has a right to a de novo  
40 administrative or judicial hearing. An agency may by rule make all or part of article 4 applicable  
41 to adjudication that does not fall within the requirements of Section 401, including hearing rights

1 conferred by agency regulations, or on the record appeals.

2  
3 This section draws upon the California, (see Cal. Cal.Gov.Code Section 11410.10);  
4 Minnesota, (see Minnesota Statutes Annotated, Section 14.02, subd. 3; Washington (see Revised  
5 Code of Washington, 34.05.413(2) and Kansas (see Kansas Stat. Ann., KS ST Section 77-502(d)  
6 & Kansas Stat. Ann., KS ST Section 77-503).  
7

8 **SECTION 402. PRESIDING OFFICERS.**

9 (a) ~~The~~ presiding officer ~~must~~~~shall~~ be the individual who is the agency head, ~~as~~  
10 ~~defined in Section 102(4) a member of a multi-member body of individuals that is the agency~~  
11 ~~head,~~ or, ~~unless prohibited by law, a~~~~one or more~~ individual ~~s~~ designated by the agency head ,  
12 ~~unless prohibited by law, or a~~~~one or more~~ administrative law judges assigned ~~by the office~~ in  
13 accordance with Section 602.

14 (b) An individual who has served as investigator, prosecutor, or advocate at any stage in  
15 a contested case may not serve as ~~the~~~~a~~ presiding officer or assist or advise ~~the~~~~any~~ presiding  
16 officer in the ~~same contested~~ case. An individual who is subject to the authority, direction, or  
17 discretion of an individual who has served as [investigator,] prosecutor [,] ~~[or]~~ advocate at any  
18 stage in a contested case, including investigation, may not serve as ~~the~~ presiding officer or assist  
19 or advise ~~the~~~~a~~ presiding officer in the same proceeding.

20 (c) ~~The provisions of S~~subsection (b) ~~governing separation of functions as to the~~  
21 ~~presiding officer~~ also governs separation of functions as to the agency head or other person or  
22 body to which the power to hear or decide ~~in~~ the proceeding is delegated.

23 (d) A presiding officer is subject to disqualification for bias, prejudice, financial interest,  
24 ~~ex parte communications as provided in Section 408(h),~~ or any other factor that ~~would~~ provides  
25 reasonable doubts about the impartiality of the presiding officer~~}. A presiding officer, after~~  
26 making a reasonable inquiry, shall disclose to all parties any known facts related to grounds for

1 disqualification that would be material to the impartiality of the presiding officer in the contested  
2 case proceeding.

3 (e) Any party may petition for the disqualification of a presiding officer promptly after  
4 notice that the person will preside, or, if later, promptly upon discovering facts establishing a  
5 grounds for disqualification, ~~whichever is later~~. The ~~party requesting the disqualification of the~~  
6 ~~presiding officer must file a~~ petition ~~must that~~ states with particularity the grounds upon which it  
7 is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule or canon of  
8 practice or ethics that requires disqualification. ~~If grounds for disqualification are discovered at~~  
9 ~~a time later than the beginning of the taking of evidence, a party must request disqualification~~  
10 ~~promptly after discovery~~. The petition may be denied if the party fails to exercise due diligence  
11 in requesting disqualification after discovering a grounds for disqualification.

12 (f) A presiding officer whose disqualification is requested shall determine whether to  
13 grant the petition and state facts and reasons for the determination in writing. A presiding  
14 officer's decision to deny disqualification is not ~~immediately~~ subject to interlocutory judicial  
15 review.

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

- 18 (1) the Governor, if the original presiding officer is an elected official; or  
19 (2) the appointing authority, if the original presiding officer is an appointed  
20 official.

21 (h) If participation of the agency head is necessary to enable the agency to take ~~legally-~~  
22 ~~effective~~ action, ~~the~~ agency head may continue to participate notwithstanding a grounds for  
23 disqualification, or exclusion.

1 **Comment**

2 | Subsection (ab) governs who may be appointed to serve as a presiding officer in a  
3 | disputed case. If the case is heard by more than one presiding officer, as when the agency head  
4 | hears a disputed case en banc, one member of the agency head may serve as chair, but all of the  
5 | persons sitting as judge in the case are collectively the presiding officer.  
6 |

7 | Subsection (ab) confers a limited amount of discretion upon the agency head to determine  
8 | who will preside. The presiding officer may be either the agency head, or one or more members  
9 | of the agency head, or one or more administrative law judges assigned by the Office of  
10 | Administrative Hearings in accordance with Section 603. Without the bracketed language,  
11 | subsection (ab) resembles the law in a group of states that have created a central panel of  
12 | administrative law judges, and have made the use of administrative law judges from the central  
13 | panel mandatory unless the agency head or one or more members of the agency head presides. In  
14 | some states, however, the use of central panel administrative law judges is mandatory only in  
15 | certain enumerated agencies or types of proceedings. If the bracketed language is adopted, the  
16 | agency head, in addition to the preceding options for appointment and unless prohibited by law,  
17 | may designate any one or more “other persons” to serve as presiding officer. This discretion is  
18 | subject to subsections (c) & (d) on separation of functions. This discretion is also limited by the  
19 | phrase “unless prohibited by law,” included in the bracketed language, which prevents the use of  
20 | “other persons” as presiding officers to the extent that the other state law prohibits their use.  
21 | Thus, if this language is adopted by a state that has an existing central panel of administrative  
22 | law judges whose use is mandatory in enumerated types of proceedings, the agencies must  
23 | continue to use the central panel for those proceedings, but may exercise their option to use  
24 | “other persons” for other types of proceedings.  
25 |

26 | Subsection (e) is based on California Government Code Section 11425.30.  
27 |

28 | Subsection (f) is based upon 1981 MSAPA Section 4-202(b). See also California  
29 | Government Code Section 11425.40(a). Disclosure duties under subsection (e) are based on state  
30 | ethics codes governing ethical standards for judges in the judicial branch of the government,  
31 | Section 12 of the 2000 Uniform Arbitration Act, and on state law governing the ethical  
32 | responsibilities of government officials and employees. See Section 410.  
33 |

34 | Subsection (g) is based on 1981 MSAPA Section 4-202(c).  
35 |

36 | Subsection (j) is based on California Government Code Section 11425.40(c).  
37 |

38 | Subsection (k) adopts the rule of necessity for decision makers. See California  
39 | Government Code Section 11512(c) (agency member not disqualified if loss of a quorum would  
40 | result); United States v. Will (1980) 449 U.S. 200 (common law rule of necessity applied to  
41 | U.S. Supreme Court to decide issues before the court relating to compensation all Article III  
42 | judges). Section 408(g) precludes ex parte communications between presiding officers and  
43 | agency heads.  
44 |

45 | **SECTION 403. CONTESTED CASE PROCEDURE.**

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

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

4 ~~(c) The following rules apply in contested cases:-~~

5 ~~(1) Except as otherwise provided by law, the party initiating the agency~~  
6 ~~proceeding shall have the burden of proof. Upon proper objection the presiding officer must~~  
7 ~~exclude evidence that is irrelevant, immaterial, and unduly repetitious or excludable on~~  
8 ~~constitutional, or statutory grounds or on the basis of an evidentiary privilege recognized in the~~  
9 ~~courts of this state. Any other relevant evidence, not privileged, may be received if it is of a type~~  
10 ~~commonly relied upon by reasonably prudent people in the conduct of their affairs. The~~  
11 ~~presiding officer may exclude evidence that is objectionable under the applicable rules of~~  
12 ~~evidence. Evidence may not be excluded solely because it is hearsay.~~

13 **Alternative A**

14 ~~Hearsay evidence may be used for the purpose of supplementing or explaining other evidence~~  
15 ~~except that on timely objection it may not be sufficient in itself to support a finding unless it~~  
16 ~~would be admissible over objection in a civil action.—~~

17 **Alternative B**

18 ~~Hearsay evidence may be sufficient to support fact findings if that evidence constitutes reliable,~~  
19 ~~probative, and substantial evidence.~~

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

1                   ~~(3) Any part of the evidence may be received in written form, if doing so will~~  
2 ~~expedite the hearing without substantial prejudice to the interests of a party. Documentary~~  
3 ~~evidence may be received in the form of copies or excerpts or by incorporation by reference.~~

4                   ~~——(4) All testimony of parties and witnesses must be made under oath or~~  
5 ~~affirmation.~~

6                   ~~(5) All evidence must be made part of the hearing record of the case. No factual~~  
7 ~~information or evidence may be considered in the determination of the case unless it is part of~~  
8 ~~the agency hearing record. If the agency hearing record contains information that is confidential,~~  
9 ~~the presiding officer may conduct a closed hearing to discuss the information, issue necessary~~  
10 ~~protective orders, and seal all or part of the hearing record.~~

11                   ~~(6) The presiding officer may take official notice of all facts of which judicial~~  
12 ~~notice may be taken and of other scientific and technical facts within the specialized knowledge~~  
13 ~~of the 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~~  
15 ~~an opportunity to contest any officially noticed facts before the decision is announced.~~

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

18                   ~~(c)~~ In a contested case, the presiding officer, ~~at appropriate stages of the proceedings,~~  
19 shall give all parties a timely opportunity to file pleadings, motions, and objections. The  
20 presiding officer, ~~at appropriate stages of the proceeding,~~ may give all parties ~~the full~~ opportunity  
21 to file briefs, proposed findings of fact and conclusions of law, and ~~proposed,~~ recommended,  
22 ~~interim,~~ or final orders. The presiding officer ~~may,~~ with the consent of all parties, ~~may~~ refer the  
23 parties in a contested case proceeding to mediation or other dispute resolution procedure.

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

4 |           (e~~g~~) Except as otherwise provided by law other than this [act], the presiding officer may  
5 | conduct all or part of an evidentiary hearing or a prehearing conference by telephone, television,  
6 | video conference, or other electronic means. Each party to the proceeding must be given an  
7 | opportunity to hear, speak, and be heard ~~at~~ the proceeding as it occurs.

8 |           (f~~h~~) Except as otherwise provided in subsection (g), a hearing in a contested case must  
9 | be open to the public. A hearing conducted by telephone, television, video conference, or  
10 | other electronic means is open to the public if members of the public have an opportunity, at  
11 | reasonable times, to hear or inspect the hearing record, and to inspect any transcript obtained by  
12 | the agency.

13 |           (g) ~~A~~ except for a hearing or part of a hearing that the presiding officer may close a  
14 | hearing on a ground on which this state may close a judicial proceeding or pursuant to a statute  
15 | other than this [act]. ~~closes on the same basis and for the same reasons that a court of this state~~  
16 | ~~may close a hearing or closes pursuant to a statutory provision other than this [act] that~~  
17 | ~~authorizes closure. To the extent that a hearing is conducted by telephone, television, video~~  
18 | ~~conference, or other electronic means, and is not closed, a hearing is open if members of the~~  
19 | ~~public have an opportunity, at reasonable times, to hear or inspect the agency's record, and to~~  
20 | ~~inspect any transcript obtained by the agency.~~

21 |           (h~~i~~) Unless prohibited by law other than this [act], ~~at the party's expense, any party, at~~  
22 | the party's expense, may be represented by counsel or may be advised, accompanied, or  
23 | represented by another individual.

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

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

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

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

#### 11 **Comment**

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

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

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

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

1 required under the agency governing statute.

2  
3 Under subsection (d)(1) evidence is unduly repetitious if its probative value is  
4 substantially outweighed by the probability that its admission will necessitate undue  
5 consumption of time. In most states a presiding officer's determination that evidence is unduly  
6 repetitious may be overturned only for abuse of discretion. Under subsection (d)(1), the legal  
7 residuum rule is not adopted and hearsay evidence can be sufficient to support fact findings if the  
8 hearsay evidence is sufficiently reliable. This provision is based on the federal A.P.A. provision,  
9 5 U.S.C. Section 556 (d), *Richardson v. Perales*, (1971) 402 U.S. 389 and the 1981 MSAPA  
10 Section 4-215(d). (reasonably prudent person standard for reliability).

11  
12 Subsection (d)(4) information that is not a public record means information not subject to  
13 disclosure under the applicable public records act in the jurisdiction.

14  
15 Subsection (d)(5) is based on 1981 MSAPA Section 4-212(f). See also California  
16 Government Code Section 11515, and 1961 MSAPA Section 10(4).

17  
18 Subsection (d)(6) is based on 1981 MSAPA Section 4-215(d). See also California  
19 Government Code Section 11425.50(c) which contains the same language.

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

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

39  
40 The subsection (l) written decision requirement is based in part on 1961 MSAPA Section  
41 12, and on 1981 MSAPA Section 4-215(g). See also California Government Code Section  
42 11425.50. See also sections 801, and 802, electronic publication of written decisions, and the  
43 provisions of 15 U.S.C. Section 7004.

44  
45 Section 10 of the 1961 MSAPA contained many similar provisions.  
46

1 **SECTION 404 EVIDENCE IN CONTESTED CASE,**

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2  
3 The following rules apply in contested cases:

4 (1) Except as otherwise provided by law, the party initiating the agency  
5 proceeding has the burden of proof.

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

13 (3)

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14 **Alternative A**

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

18 **Alternative B**

19 Hearsay evidence is sufficient to support fact findings if it constitutes reliable, probative, and  
20 substantial evidence.

21 end of alternatives

22 (4) An objection must be made at the time the evidence is offered. In the absence  
23 of an objection, the presiding officer may exclude evidence at the time it is offered. A party may  
24 make 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  
12 notice may be taken and of other scientific and technical facts within the specialized knowledge  
13 of the 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  
15 an opportunity to contest any officially noticed facts before the decision is announced.

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

18 **Comment**

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19 **SECTION 4054. NOTICE, IN CONTESTED CASE**

20  
21 (a) Except as otherwise provided for an emergency adjudication under Section 4086, an  
22 agency shall give notice as provided in this section.

23 (b) In an actions initiated by a persons other than anthe agency, within a reasonable time  
24 after filing, the agency shall give notice to all parties that an action has been commenced. The

1 notice must include:

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

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

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

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

10 (5) that the person may be represented by an attorney or other individual as  
11 provided in Section 403(h) of the person's choosing.

12 (c) In an action initiated by the agency, the agency ~~must~~ shall give an initial notice to the  
13 party ~~or parties~~ against which the action is brought ~~as provided by law~~. The notice shall include:

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

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

18 (3) a statement of the legal authority ~~and jurisdiction~~ under which the hearing is  
19 held citing the statutes that includes identification of the statutory sections involved;

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

22 (5) the name, official title, mailing address, [e-mail address,] [facsimile  
23 number ~~address~~,] and telephone number of the presiding officer or, if no officer has been

1 appointed at the time the notice is given, the name, official title, mailing address, [e-mail  
2 address,] [facsimile address,] and telephone number of ~~the agency's representative~~  
3 ~~any attorney~~  
4 ~~or employee designated to represent the agency;~~

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

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

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

11 (d) When a prehearing ~~meeting or~~ conference is scheduled, the agency shall give parties  
12 notice ~~at least 14 days before the hearing~~ that contains the information ~~required by~~ ~~contained in~~  
13 subsection (c) ~~at least 14 days before the hearing~~.

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

#### 16 **Comment**

17 This section is taken from: the 1961 Model State Administrative Procedure Act, section 9  
18 and the 1981 Model State Administrative Procedure Act, Section 4-206. See also; Oregon,  
19 O.R.S. Section 183.415; Kansas, K.S.A. Section 77-518; Iowa, I.C.A. Section 17A.12; Montana,  
20 MCA 2-4-601; and Michigan, M.C.L.A. 24.271.  
21

#### 22 **SECTION 4065. ~~AGENCY HEARING RECORD IN CONTESTED CASE.~~**

23 (a) An agency shall maintain ~~an agency~~ hearing record in each contested case.

24 (b) The ~~agency~~ hearing record ~~must contain:~~ ~~consists of the~~

25 ~~(1) a~~ recording of the proceeding; ~~and:~~

26 ~~(2)~~ notices of all proceedings;

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- (32) any pre-hearing order;
- (43) any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
- (54) evidence admitted, received, or considered;
- (65) a statement of matters officially noticed;
- (76) proffers of proof and objections and rulings thereon;
- (87) proposed findings, requested orders, and exceptions;
- (98) any transcript of all or part of the hearing;
- (109) any final order, recommended decision, or order on reconsideration;
- (114) all memoranda, data, or testimony prepared under Section 407; and
- (124) matters placed on the record after an ex parte communication.

(c) The ~~agency~~ hearing record constitutes the exclusive basis for agency action in a contested case and for judicial review of the case.

**Comment**

The recording of an agency hearing can be made by certified shorthand reporter, video or audio recording, or other electronic means.

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**SECTION 4076. EMERGENCY ADJUDICATION PROCEDURE.**

(a) Unless prohibited by law other than this [act], an agency ~~shall~~**must** conduct an emergency adjudication in a contested case ~~under~~ ~~under the procedure provided in~~ this section.

(b) An agency may issue an order under this section only to deal with an imminent danger to the public health, safety, or welfare. The agency may take only action that is necessary to deal with the imminent danger to the public health, safety, or welfare. ~~[The emergency action must be limited to temporary relief.]~~

(c) Before issuing an order under this section, ~~an~~**the** agency, if practicable, shall give

1 notice and an opportunity to be heard to the person to which the agency action is directed. The  
2 notice and hearing may be oral or written and may be communicated by telephone, facsimile, or  
3 other electronic means.

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

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

8 (f) After issuing an order pursuant to this section, an agency shall proceed as soon as  
9 practicable to provide notice and an opportunity for a hearing following ~~the contested case~~  
10 procedure under Section 403 ~~in order to determine~~ resolve the issues underlying the temporary  
11 order relief.

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

#### 14 **Comment**

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

27  
28 Federal and state case law have held that in an emergency situation an agency may act  
29 rapidly and postpone any formal hearing without violation, respectively, of federal or state  
30 constitutional law. FDIC v. Mallen, 486 U.S. 230 (1988); Gilbert v. Homar (1997) 520 U.S.  
31 924; Dep't of Agric. v. Yanes, 755 P.2d 611 (OK. 1987).

32  
33 The generic provision in this section has several advantages over the present divergent

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

6  
7 This section does not apply to an emergency adjudication, cease and desist order, or other  
8 action in the nature of emergency relief issued pursuant to express statutory authority arising  
9 outside of this act.  
10

11 **SECTION 4087. EX PARTE COMMUNICATIONS.**

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

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14 (ba) Except as otherwise provided in subsections (cb) and (de), or unless required for the  
15 disposition of ex parte matters authorized by statute, while a contested case is pending, the  
16 presiding officer and the final decision maker may not make to or receive from any person any  
17 communication regarding any issue in the proceeding without notice and opportunity for all  
18 parties to participate in the communication. For the purpose of this section, a proceeding is  
19 pending from the issuance of the agency's pleading, or from an application for an agency  
20 decision, whichever is earlier.

21 (cb) ~~A~~The presiding officer and the final decision maker may ~~communicate~~make  
22 ~~communications to or receive communications from~~ with an individual a person authorized by  
23 law to provide legal advice to the presiding officer or to the final decision maker and~~or~~ may  
24 communicate on ministerial matters with an individual a person who serves on the  
25 [administrative] [personal] staff of the presiding officer or the staff of the final decision maker if  
26 the person providing legal advice or ministerial information has not served as investigator,  
27 prosecutor, or advocate at any stage of the proceeding, and if the ~~individual staff advisor~~  
28 furnish, augment, diminish, or modify the evidence in the record. ~~When acting as the decision~~

~~maker, the agency head may make communications to or receive communications from a person authorized by law to provide legal advice to the agency if the person providing legal advice has not served as investigator, prosecutor, or advocate at any stage of the proceeding, and if the staff advisor does not furnish, augment, diminish or modify the evidence in the record.~~

(de) An employee or representative may make communications to or receive communications concerning a pending contested case from an agency head sitting as presiding officer or decision maker if:

(1) the communications does not furnish, augment, diminish, or modify the evidence in the record;

~~consist of an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record; and~~

(2) the employee or representative ~~giving the technical explanation~~ has not served as investigator, prosecutor, or advocate at any stage of the proceeding; and

(3) the employee or representative ~~giving the technical explanation~~ does not receive communications that the agency head is prohibited from receiving; and,

~~(4) the technical or scientific term on which explanation is sought is not a contested issue or an issue whose application is central to the decision in the case.~~

~~(d) If the presiding officer receives advice under subsection (c), the advice, if written, must be made part of the agency hearing record. If the advice is oral, a memorandum containing the substance of the advice must be made part of the record and the parties must be notified and informed of the contents of the communication. The parties may respond to the advice of an employee or representative of the agency in a record that is made part of the hearing record.~~

(e) If a presiding officer or the final decision maker makes or receives a communication

1 | in violation of this section, the presiding officer or the final decision maker shall, if the  
2 | communication is:

3 |                   (1) written, shall make the communication a part of the hearing record and  
4 | prepare and make part of the record a memorandum that contains the response of the presiding  
5 | officer and the final decision maker to the communication and the identity of the party or person  
6 | ~~that parties who~~ communicated; or

7 |                   (2) oral, shall prepare a memorandum that contains the substance of the verbal  
8 | communication, the response of the presiding officer and the final decision maker, and the  
9 | identity of the party or person that parties who communicated.

10 |                 (f) If a communication prohibited by this section is made, the presiding officer shall  
11 | notify all parties of the prohibited communication and permit parties to respond in writing within  
12 | 15 days after the notice. Upon good cause shown, the presiding officer may permit additional  
13 | testimony in response to the prohibited communication.

14 |                 (g) ~~If~~When ~~the~~ presiding officer is a member of a multi-member body of individuals  
15 | that is the agency head, ~~a member of an agency head that is a body of persons~~, the presiding  
16 | officer may communicate with the other members of the multi member body~~agency head~~.  
17 | Otherwise, ~~w~~hile a proceeding is pending, there may be no communication, direct or indirect,  
18 | regarding ~~the merits of~~ any issue in the proceeding between the presiding officer and the agency  
19 | head or other person or body to which the power to hear or decide ~~in~~ the proceeding is delegated.

20 |  
21 |                 (h) ~~As a sanction~~, If necessary to eliminate the effect of a communication received in  
22 | violation of this section, a presiding officer and final decision maker may be disqualified under  
23 | the provisions of Sections 402 (d) and (e), the ~~partitions~~ of the record pertaining to the

1 communication may be sealed by protective order, or other appropriate relief may be granted,  
2 including ~~an adverse ruling on the merits of the case or~~ dismissal of the application, ~~or other~~  
3 ~~adverse ruling on the merits.~~

#### 4 **Comment**

5  
6 This section is not intended to be applied to communications made by or to a presiding  
7 officer or personal staff assistant regarding noncontroversial practice and procedure matters such  
8 as number of pleadings, number of copies or type of service. Communications related to  
9 contested procedural issues or motions are covered by Section 409(a). Other communications not  
10 on the merits but related to security or to the credibility of a party or witness are covered by  
11 Section 409(a). See *Matthew Zaheri Corp., Inc. v. New Motor Vehicle Board* (1997) 55 Cal.  
12 App. 4<sup>th</sup> 1305. However, this section goes further in permitting advice to the presiding officer  
13 from staff members on complex technical and scientific matters, but permits parties to reply to  
14 those staff communications.

15  
16 This section also provides another remedy besides disclosure and party reply. In a case  
17 where disclosure and reply are inadequate to cure or eliminate the effect of the ex parte contact, a  
18 protective order may be issued. The intent of authorizing the protective order is to keep the ex  
19 parte material from the successor presiding officer.

20  
21 This section draws in part from the systematic California provisions on ex parte contacts.  
22 See West's Ann.Cal.Gov.Code Section 11430.10 to 11430.80. The California sections address  
23 many of the problems that arise in this area, and attempt to distinguish technical, advisory  
24 contacts from agency staff to presiding officers or agency heads from other kinds of party  
25 contacts.

#### 26 27 **SECTION 4098. INTERVENTION.**

28  
29 (a) A presiding officer shall grant a timely petition for intervention in a contested case if:

30 (1) the petitioner has a statutory right to initiate, or to intervene in, the  
31 proceeding in which intervention is sought; or

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

34 (b) A presiding officer may grant a timely petition for intervention ~~if when~~ the petitioner  
35 has a conditional statutory right to intervene, or ~~if when~~ the petitioner's claim or defense is based  
36 on the same transaction or occurrence as the contested case.

1 (c) ~~When intervention is granted or at any subsequent time, A~~the presiding officer may  
2 impose conditions at any time upon the intervener's participation in the proceedings.

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

5 (e) Upon request by the interveners or existing parties, the presiding officer may hold a  
6 hearing on the intervention petition.

7 (f) ~~The presiding officer, at least [24 hours] before the hearing, shall issue an order~~  
8 ~~granting or denying each pending petition for intervention, specifying any conditions, and stating~~  
9 ~~the reasons for the order. A~~ The presiding officer shall promptly give notice of an order granting,  
10 denying, or revoking intervention to the petitioner for intervention and to all parties. ~~of an order~~  
11 ~~granting, denying, or revoking intervention. The notice must be given at least 24 hours before a~~  
12 hearing on the merits of the case.

#### 13 **Comment**

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

17  
18 Subsection (c) recognizes the normal judicial practice of limiting the participation of  
19 intervenors, especially on cross examination, to their particular interest and taking any other  
20 procedural steps or limitations in order to maintaining an orderly and expeditious hearing.  
21 Mandatory intervention is provided for in subsections (a)(1), and (2). Permissive intervention is  
22 provided for in subsection (b). Subsection (d) recognizes the power of the presiding officer to  
23 dismiss a party who has intervened at any time after intervention has occurred when it appears  
24 that the conditions of this section or the requirements for the intervening party's standing have  
25 not been satisfied. Subsection (f) provides for notice suitable under the circumstances to enable  
26 parties to anticipate and prepare for changes that may be caused by the intervention.  
27

#### 28 **SECTION 41009. SUBPOENAS.**

29 (a) Upon ~~a written~~ request in a record by a party in a contested case, the presiding officer  
30 or any other officer to whom the power is delegated shall issue a subpoena for the attendance of  
31 a witness and the production of books, records, and other evidence upon a showing of general

1 relevance and reasonable scope of the evidence sought for use at the hearing.

2 (b) Unless otherwise provided by law or agency rule, a subpoena ~~so~~ issued under  
3 subsection (a) shall be served and, upon application to the court by a party or the agency,  
4 enforced in the manner provided by law for the service and enforcement of subpoenas in a civil  
5 action.

### 6 **Comment**

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

9  
10 Subsection (b) is based on Arizona administrative procedure act Section 41-1062A.4.

### 11 **SECTION 4110. DISCOVERY.**

12  
13 (a) ~~As used in~~ this section, “statement” includes a records signed by a person of a  
14 person’s his or her written statements signed by a person and a records that summarizes an oral  
15 statements made by a person.

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

18 (1) obtain the names and addresses of witnesses ~~that~~ the disclosing party will  
19 present at the ~~contested case~~ hearing to the extent known to the other party; and

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

22 (A) ~~statements of parties and witnesses a statement relating to the subject~~  
23 ~~matter of the adjudication made by any party to another party or person;~~

24 (B) ~~statements of witnesses~~ then proposed to be called;;

25 (C) all records ~~writings~~, including reports of mental, physical, and blood  
26 examinations, and other evidence ~~things which~~ the party ~~then~~ proposes to offer ~~in evidence~~;

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

3                    ~~(D)~~ (E) statements of expert witnesses ~~then~~ proposed to be called;

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

5                    (F) other materials for good cause shown.

6                    (3) Parties to a contested case proceedings have a duty to supplement responses  
7 provided under subsection (b) to include information thereafter acquired to the extent that  
8 information will be relied upon in the ~~contested case~~ hearing.

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

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

18                    (e) Upon petition and for good cause shown, ~~the~~ presiding officer may issue an order  
19 authorizing discovery by other methods provided by law other than this [act] [the rules of civil  
20 procedure].

#### 21                    **Comment**

22  
23                    Discovery in administrative adjudication is more limited than in civil court proceedings.  
24 Nevertheless discovery is available for the items listed in subsection (b). See California  
25 Government Code Section 11507.6 to 11507.7 (discovery in administrative adjudication).

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

3  
4 **SECTION 412~~1~~. DEFAULT.**

5 (a) Unless otherwise provided by law other than this [act], if a party without good cause  
6 fails to attend or participate in a pre-hearing conference, ~~or hearing, or other stage of in~~ a  
7 contested case, the presiding officer may issue ~~a~~ the default order. ~~If a default order is issued, the~~  
8 ~~presiding officer and~~ may conduct any further proceedings necessary to complete the  
9 adjudication without the defaulting party and shall determine all issues in the adjudication,  
10 including those affecting the defaulting party. A recommended, initial, or final order issued  
11 against a defaulting party may be based on the ~~defaulting absent~~ party's admissions or other  
12 evidence ~~affidavits which can~~ that may be used without notice to the ~~defaulting absent~~ party.  
13 ~~If~~ When the burden of proof is on the defaulting party to establish that ~~the party~~ he or she is  
14 entitled to the agency action sought, the presiding officer may issue a recommended, initial, or  
15 final order without taking evidence.

16 (b) ~~Not later than~~ Within [ ] days after a recommended, initial, or final order is rendered  
17 against a party subject to a default order, that party may petition the presiding officer to vacate  
18 the recommended, initial, or final order. ~~If~~ For good cause is shown for the party's failure to  
19 appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct  
20 another evidentiary hearing. If good cause is not shown for the party's failure to appear, the  
21 presiding officer shall deny the motion to vacate.

22 **Comment**

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

1  
2 Subsection (b) is based in part on 1981 MSAPA Section 4-208 and on California  
3 Government Code Section 11520.

4  
5 **SECTION 4132. ORDERS: FINAL, ~~AND RECOMMENDED~~, INITIAL.**

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

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

14 (c) ~~Unless the time is extended by stipulation, waiver, or upon a showing of good cause,~~  
15 ~~A~~ recommended, ~~or~~ initial, or final order must be served in a record upon each party and the  
16 agency head writing within 90 days after ~~conclusion of~~ the hearing ends, ~~or when~~ the record  
17 closes, or ~~after submission of~~ memos, briefs, or proposed findings are submitted, whichever is  
18 later. The time may be extended by stipulation, waiver, or upon a showing of good cause.

19 (d) A recommended, initial, ~~or~~ final order must include separately stated findings of fact  
20 and conclusions of law on all material issues of fact, law, or discretion, the remedy prescribed,  
21 and, if applicable, the action taken on a petition for stay. A party may submit proposed findings  
22 of fact and conclusions of law. The order must also include a statement of the available  
23 procedures and time limits for seeking reconsideration or other administrative relief, and a  
24 statement of the time limits for seeking judicial review of the agency order. A recommended or  
25 initial order must include a statement of any circumstances under which the ~~recommended~~ order,

1 without further notice, may become a final order.

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

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

6 -  
7 ~~(f) A presiding officer shall notify and provide copies of the recommended or initial~~  
8 ~~order to be delivered to each party and to the agency head within the time limits set in subsection~~  
9 ~~(e).~~

10 ~~(g) When a licensee has made timely and sufficient application for the renewal of a~~  
11 ~~license, the existing license does not expire until the application has been finally acted upon by~~  
12 ~~the agency and, if the application is denied or the terms of the new license are limited, the last~~  
13 ~~day for seeking judicial review of the agency decision is 45 days from the date of the agency~~  
14 ~~decision denying the application or limiting the terms of the new license or a later date fixed by~~  
15 ~~order of the reviewing court.~~

16 **Comment**

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

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24  
25  
26 The third sentence of subsection (d) is taken from the 1961 MSAPA.

27  
28 **SECTION 4143. AGENCY REVIEW OF ~~RECOMMENDED AND INITIAL~~**

1 **ORDERS.**

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

3 (b) A party may petition ~~anthe~~ agency head to review an ~~an recommended or~~ initial order.

4 Upon petition by ~~any~~ party, the agency head may review an initial order ~~and shall review a~~  
5 ~~recommended order~~, except as otherwise provided by law other than this [act].

6 (c) A petition for review of an ~~an initial-recommended~~ order must be filed with the agency  
7 head, or with any person designated for this purpose by ~~agency rule of the agency, not later than~~  
8 ~~within~~ [10] days after the ~~initialrecommended-order order~~ is ~~issuedrendered~~, or ~~the parties are~~  
9 ~~notified of the order, notice of the recommended order is given to the parties~~, whichever is later.

10 ~~-~~ If the agency head decides to review an ~~an initial-recommended~~ order on its own motion, the  
11 agency head shall give ~~written~~ notice ~~in a record~~ of its intention to review the ~~recommended~~  
12 order within [10] days after it is ~~issuedrendered~~, or ~~the parties are notified of the order notice of-~~  
13 ~~the recommended order is given to the parties~~, whichever is later.

14 (d) The [10]-day period ~~in subsection (c)~~ for a party to file a petition; or for the agency  
15 head to ~~notify the parties give notice~~ of its intention to review an ~~an initial-recommended~~ order ~~in-~~  
16 ~~subsection (b)~~, is tolled by the submission of a timely petition ~~under Section 416~~ for  
17 reconsideration of the ~~recommended~~ order ~~pursuant to this section~~. A new [10]-day period  
18 ~~beginsstarts to run~~ upon disposition of ~~theany~~ petition for reconsideration ~~or agency head review~~  
19 ~~under subsection (b)~~. If an ~~recommended~~ order is subject both to a timely petition for  
20 reconsideration and to a petition for ~~appeal or to~~ review by the agency head ~~on its own motion~~,  
21 the petition for reconsideration must be disposed of first, unless the agency head determines that  
22 action on the petition for reconsideration has been unreasonably delayed.

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

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1 ~~(a) e)~~ An agency head shall review a recommended order pursuant to this section

2 ~~(b) When reviewing a~~ An agency head that reviews a recommended order, ~~the agency~~

3 head shall shall exercise all the decision-making power that the agency head would have had if  
4 the agency head had conducted the hearing that produced the ~~recommended~~ order, except to the  
5 extent that the issues subject to review are limited by a provision of law other than this [act] or  
6 by order of the agency head upon notice to all the parties. In reviewing findings of fact in a  
7 recommended orders by the presiding officers, the agency head shall ~~consider~~ give due regard to  
8 the presiding officer's opportunity to observe the witnesses, and to determine the credibility of  
9 witnesses. The agency head shall consider the ~~hearing agency~~ record or parts that are those  
10 ~~portions of it as have been~~ designated by the parties.

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

15 ~~(d) g)~~ A final order or an order remanding the matter for further proceedings ~~under this~~  
16 ~~section~~ must identify any difference between the order and the recommended order and  
17 ~~must shall~~ state the facts of record ~~that which~~ support any difference in findings of fact, ~~state~~ the  
18 source of law ~~that which~~ supports any difference in legal conclusions, and ~~state~~ the policy reasons  
19 ~~that which~~ support any difference in the exercise of discretion. A final order under this section  
20 must include, or incorporate by express reference to the recommended order, all the matters  
21 required by Section ~~413415~~(d). The agency head shall deliver the order ~~cause an order issued~~  
22 ~~under this section to be delivered~~ to the presiding officer and ~~to~~ all parties.

23 **Comment**  
24

1 This section draws upon 1981 MSAPA, which reflects current practice in regard to  
2 recommended orders, initial orders, final orders and review of final orders more accurately than  
3 the 1961 MSAPA. Subsections (b) and (e) draw upon the Washington APA, West's RCWA  
4 34.05.464, and the Kansas APA, K.S.A. § 77-527. The object of subsection (e) is to assure  
5 agency head consideration of the issues tendered in the case.  
6

7 **SECTION 4164. RECONSIDERATION.**

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

12 (b) If a petition for reconsideration is timely filed, and if the petitioner has complied with  
13 ~~an~~the agency's procedural rules for reconsideration, if any, the time for filing a petition for  
14 judicial review does not ~~begin~~commence until the agency disposes of the petition for  
15 reconsideration as provided in Section 5034(d).

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

21 **Comment**

22 This section is based in part on the Washington APA, West's RCWA 34.05.470. This  
23 section creates a general right to seek reconsideration of a recommended or final order.  
24 Subsection (b) must be read concurrently with Section 507(d), which excuses exhaustion to the  
25 extent that a provision of this [act] provides for excuse. See also 1981 MSAPA Section 4-218  
26

27 **SECTION 4175. STAY.** Except as otherwise provided by law other than this [act], a  
28 party, not later than [seven] days after the parties are notified of the order, may request the

1 agency to stay a final order pending judicial review ~~\_- within [seven] days after notice of the~~  
2 ~~order is given to the parties. When an agency finds that justice so requires, T~~ the agency may  
3 grant the request for a stay pending judicial review if an agency finds that justice so requires.  
4 The agency may grant or deny the request for stay of the order ~~either~~ before , on, -or after the  
5 effective date of the order.

### 6 **Comment**

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

### 11 **SECTION 4186. AVAILABILITY OF ORDERS; INDEX.**

12 (a) Except as otherwise provided in subsections (b); and (c), an agency shall create an  
13 index of, all final orders ~~and final written decisions~~ in contested cases and make the index and  
14 all final orders ~~and decisions~~ available for public inspection and copying; at cost, in its principal  
15 offices. ~~The agency must also furnish the index and all final orders and decisions in contested~~  
16 ~~cases online through the [publisher] via the [publisher's] Internet website without charge, or in~~  
17 ~~writing upon request at a reasonable cost to be determined by the agency.~~

18 ~~*Legislative Note. Most states have public records act that require disclosure of government*~~  
19 ~~*documents and records to the public unless particular documents are exempt from disclosure*~~  
20 ~~*under that act. Subsection (b) refers to those acts, and to exempt decisions under those acts.*~~  
21 -

22 (b) Final orders or decisions that are exempt, privileged, or otherwise made confidential  
23 or protected from disclosure by [the public records law of this state] , ~~[the disclosure of which~~  
24 ~~would constitute an unwarranted invasion of privacy or release of trade secrets];~~ are not public  
25 records and may not be indexed.

26 (c) A final order ~~or decision under this section~~ may be excluded from an indexing and  
27 disclosure only by order of the presiding officer with a written statement of reasons attached to  
28

1 the order. If, ~~in the judgment of~~ the presiding officer determines, it is possible to redact ~~for to~~  
2 ~~prepare a generic version of~~ a final order ~~or decision~~ that is exempt, privileged, or otherwise  
3 made confidential or protected from disclosure by [the public records law of this state] so that it  
4 complies with the requirements of that law, the redacted ~~for the generic version of the~~ order ~~or~~  
5 ~~decision~~ may be placed in the indexed and/or published.

6 (d) An agency may not rely on a final order ~~or decision~~ adverse to a party other than the  
7 agency as precedent in future adjudications unless the agency designates the order or  
8 ~~decision has been designated~~ as a precedent ~~by the agency~~, and the order ~~or decision~~ has been  
9 published, placed in an indexed, and made available for public inspection.

#### 10 Comment

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

19 In some states there have been attacks on agency adjudications on the basis that the  
20 proceeding should be conducted under the provisions for rulemaking. In the case of SEC v.  
21 Chenery Corp., 332 U.S. 194 (1947) the United States Supreme Court held that the choice of  
22 whether to proceed by rulemaking or adjudication is left entirely to the discretion of the agency,  
23 because not every principle can be immediately promulgated in the form of a rule. In the words  
24 of the Supreme Court "Some principles must await their own development, while others must be  
25 adjusted to meet particular, unforeseeable situations." Most states follow Chenery. See  
26 Illuminating a Bureaucratic Shadow World: Precedent Decisions under California's Revised  
27 Administrative Procedure Act, 21 J. Nat'l A. Admin. L. Judges 247 (2001) at n. 68.

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

33 *Most states have public records act that require disclosure of government documents and*  
34 *records to the public unless particular documents are exempt from disclosure under that act.*

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1 Subsection (b) refers to those acts, and to exempt decisions under those acts.  
2 -  
3  
4

5 [ARTICLE] 4A

6 ~~ADJUDICATION OTHER THAN CONTESTED CASE ; LICENSING INFORMAL~~

7 ~~ADJUDICATION~~

8 SECTION 401A. ~~WHEN ARTICLE APPLIES; INFORMAL~~ ADJUDICATION

9 ~~OTHER THAN CONTESTED CASE .~~

10 (a) This Article applies to an adjudication in which an opportunity for an evidentiary  
11 hearing is not required.

12 (b) In an adjudication under this article, that is not a contested case, the agency shall  
13 give prompt notice of, and a statement of the ~~the~~ reasons for, its action, to any party to the  
14 adjudication and shall give the party the opportunity to respond (orally or in writing) ~~be heard~~  
15 before an impartial decision maker.-

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16 Comment

17 This section draws on the informal adjudication provisions of several state  
18 Administrative Procedure Acts. See: California Administrative Procedure Act, West's  
19 Ann.Cal.Gov.Code SECTION 11445.40; Va. Administrative Procedure Act, Section 2.2-4019,  
20 Va. Code Ann. § 2.2-4019; and Washington Administrative Procedure Act, Section 34.05.485,  
21 West's RCWA § 34.05.485. The informal hearing may be in the nature of a conference at the  
22 discretion of the presiding officer. The due process requirements for informal adjudication are  
23 detailed in Goss v. Lopez, (1975) 419 U.S. 565, 581-582 (informal due process hearing for  
24 school suspension of ten days or less), and Cleveland Board of Education v. Loudermill (1985)  
25 472 U.S. 532. The four due process elements for an informal adjudication are 1) notice; 2)  
26 statement of reasons; 3) opportunity to respond (orally or in writing); and 4) impartial decision  
27 maker. See Paul Verkuil.

28  
29  
30 SECTION 402A. LICENSING

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31  
32 (a) When an agency decides a license application, the agency shall give prompt notice

1 of its action in response to an application. If the agency denies the application for a license  
2 without the opportunity for an evidentiary hearing, the agency shall include the reasons for the  
3 denial.

4 (b) If a licensee has made timely and sufficient application for the renewal of a license,  
5 the existing license does not expire until the application has been finally acted upon by the  
6 agency and, if the application is denied or the terms of the new license are limited, the last day  
7 for seeking judicial review of the agency decision is 45 days after the date of the agency decision  
8 denying the application or limiting the terms of the new license or a later date fixed by order of  
9 the reviewing court.

10 **Comment**

11 Subsection (b) was taken from the 1961 Model State Administrative Procedure Act,  
12 section 14(b), which has been adopted by many states. See, for example: Alabama, Ala.Code  
13 1975 Section 41-22-19; Tennessee, T. C. A. Section 4-5-320; Michigan, M.C.L.A. 24.291; and  
14 Wisconsin, W.S.A. 227.51.

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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 otherwise qualified under this [article] is entitled to judicial review of  
12 | a final agency action, except as provided in subsection (d).

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

17 | (d) Final agency action is reviewable except to the extent that

18 | (1) a statutes [of this state] other than this [act] precludes judicial review; or

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

20 | ~~(e) Except when judicial review is available under this [article] or under law other than~~  
21 | ~~this [act], final agency action is subject to judicial review in civil or criminal proceedings for~~  
22 | ~~judicial enforcement~~

23 | **Comment**

1 Subsection (a) of this section provides a right of judicial review of final agency action by  
2 appropriate parties. Under this section, the person seeking review must meet all of the  
3 requirements of this article, which include standing, exhaustion of remedies, and time for filing.  
4 The definition of “agency action” is found in Section 102. This section is similar to the judicial  
5 review provisions of Florida (West’s F.S.A. Section 120.68), Iowa (I.C.A. Section 17A.19),  
6 Virginia (Va. Code Ann. Section 2.2-4026) and Wyoming (W.S.1977 Section 16-3-114). Agency  
7 failure to act is not judicially reviewable unless agency action is unlawfully withheld or  
8 unreasonably delayed. This provisions is based on the federal A.P.A., 5 U.S.C. Section 706(1).

9  
10 Subsection (a) also defines final agency action. The definition used here is found in state  
11 and federal cases. See State Bd. Of Tax Comm’rs v. Ispat Inland, 784 N.E.2D 477 (Ind., 2003);  
12 District Intown Properties v. D.C. Dept. Consumer and Regulatory Affairs, 680 A.2d 1373 (Ct.  
13 Apps. D.C. 1996); Texas Utilities Co. v. Public Citizen, Inc. 897 S.W.2d 443 (Tex. App. 1995);  
14 Bennet v. Spear, 520 U.S. 154, 117 S.Ct. 1154 (1997); Mobil Exploration and Producing Inc. v.  
15 Dept. Interior, 180 F.3d 1192, 1197 (10<sup>th</sup> Cir. 1999).

16  
17 Subsection (c) creates a limited right to review of non-final agency action.

18  
19 Subsection (d) is based on Section 701(a)(1),(2) of the federal administrative procedure  
20 act.

21 ~~Subsection (e) is based on Section 703 of the federal administrative procedure act.~~

22  
23 **SECTION 502. RELATION TO OTHER JUDICIAL REVIEW LAW AND RULES. \_**

24  
25 (a) Unless otherwise provided by law other than this [act], judicial review of final agency  
26 action may only be taken as provided by [state] [rules of [appellate] [civil]-procedure] [of this  
27 state] [rules of civil procedure]. The court may grant any type of legal and equitable remedies  
28 that are appropriate.

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

32  
33 **Comment**

34  
35 This section places appeals from final agency action within the existing state rules of  
36 appellate procedure. Such action may be preferred by some states because of constitutional

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

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

## 11 SECTION 503. TIME FOR SEEKING JUDICIAL REVIEW OF AGENCY

### 13 ACTION; LIMITATIONS.

14 (a) Judicial review of ~~any~~ rule on the ground of noncompliance with the procedural  
15 requirements of this [act] must be commenced ~~not later than within~~ [two] years ~~after from~~ the  
16 effective date of the rule. ~~If otherwise available, J~~udicial review of a rule or guidance document  
17 ~~on other grounds~~ may be sought at any time.

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

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

24 (d) A party may not ~~file or~~ petition for judicial review while seeking reconsideration  
25 under Section 4168. During the time ~~that~~ a petition for reconsideration is pending before an  
26 agency, the time for seeking judicial review in subsection (b) is tolled.

### 27 Comment

28 The first sentence of subsection (a) is based on 1961 Model State Administrative  
29 Procedure Act, section (3)(c)., and on Section 3-113(b) of the 1981 Model State Administrative  
30 Procedures Act. The scope of challenges permitted for noncompliance with procedural

1 requirements under Section 314 includes all applicable requirements of article 3 for the type of  
2 rule being challenged.

3  
4 **SECTION 504. STAYS PENDING APPEAL.** ~~A petition for~~ ~~The initiation of~~ judicial  
5 review does not automatically stay an agency decision. An appellant may petition the reviewing  
6 court for a stay upon the same basis as stays are granted under the ~~[state]~~ rules of [appellate]  
7 [civil] procedure [of this state], and the reviewing court may grant a stay regardless of  
8 ~~whether~~ ~~whether or not~~ the appellant first sought a stay from the agency.

9 **Comment**

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

13  
14 **SECTION 505. STANDING.**

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

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

- 21 (1) a person ~~that has eligible for~~ standing under law of this state other than this [act]; and  
22 (2) a person ~~otherwise~~ aggrieved or adversely affected by the agency action.

23 **Comment**

24  
25 Subsection ~~(b)(1)~~ confers standing that arises under any other provision of law.  
26 Examples of this type of standing are statutes that expressly confer standing in general language  
27 such as, for example, "any person may commence a civil suit in his own behalf... to enjoin... an  
28 agency... alleged to be in violation of this chapter. . . . 16 U.S.C.A. § 1540, explained in Bennett  
29 v. Spear, 520 U.S. 154, 117 S.Ct. 1154(1997). Another example is standing recognized in  
30 judicial decision or common law.

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

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

#### 9 | 10 | **SECTION 506. EXHAUSTION OF ADMINISTRATIVE REMEDIES.**

11 | (a) Subject to subsection (e) or a statute of this state other than this [act] ~~which~~  
12 | provides that a person need not exhaust ~~their~~ administrative remedies, a person may file a  
13 | petition for judicial review under this [act] only after exhausting all administrative remedies  
14 | available within the agency ~~the whose~~ action of which is being challenged and within any other  
15 | agency authorized to exercise administrative review.

16 | (b) Filing a petition for reconsideration or a stay of proceedings is not a prerequisite for  
17 | seeking ~~administrative or~~ judicial review.

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

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

#### 23 | **Comment**

24 |  
25 | This section creates a default requirement of exhaustion, which is generally followed in  
26 | the states. However, the section creates several exceptions to the default rule. Subsection (b)  
27 | requires issue exhaustion in appeals from rulemaking for persons who did not participate in the  
28 | challenged rulemaking. It excuses persons seeking judicial review of a rule who were not parties  
29 | before the agency from the exhaustion requirement; but, if the issue that they seek to raise was  
30 | not raised and considered in the rulemaking proceeding that they challenge, then they must first  
31 | petition the agency to conduct another rulemaking to consider the issue. If the agency refuses to  
32 | do so or if the agency conducts a second rulemaking that is adverse to the petitioner on the issue  
33 | or issues raised in his petition for rulemaking, then the petitioner may seek judicial review.

1 Subsection (d) recognizes the judicially created exception to the exhaustion requirement where  
2 agency relief would be inadequate or would result in irreparable harm. In some states courts  
3 have held that irreparable harm that is a sufficient condition to excuse exhaustion exists only if it  
4 outweighs the public interest in exhaustion. State courts are free under this section to engage in  
5 that weighing test.

6  
7

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

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

13  
14

**Comment**

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

22  
23

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

29

**SECTION 508. SCOPE OF REVIEW.**

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

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

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

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

3 (A) the agency erroneously interpreted the law; ~~or acted in excess of its~~  
4 authority ~~under the law;~~

5 (B) the agency committed an error of procedure;

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

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

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

12 (b) In making ~~the~~ determinations under this section, the court shall review the whole  
13 agency record, or ~~these~~ parts designated by the parties; and shall take due account of the rule of  
14 harmless error.

15 **Comment**

16 One view is that scope of review is notoriously difficult to capture in verbal formulas,  
17 and its application varies depending on context. For that reason, some members urge return to  
18 shorter, skeletal formulations of the scope of review, similar to the 1961 MSAPA. See Ronald  
19 M. Levin, *Scope of Review Legislation*, 31 Wake Forest L. Rev. 647 (1996) at 664-66. William  
20 D. Araiza, *In Praise of a Skeletal APA*, 56 Admin. L. Rev. 979 (2004). (Judiciary, not  
21 legislature, appropriate body to evolve specific standards for review, because of great variety of  
22 agency action and contexts, and inability to describe how general standards of review should  
23 apply to many of them). Alternative 1 reflects this view.  
24  
25

26 The other view is that judicial review is sometimes almost perfunctory, and more detailed  
27 standards will result in closer judicial scrutiny. A related view strongly argued in drafting  
28 committee meetings was that scope of review is a device by which the judiciary assists the  
29 legislature to keep the agencies within the bounds set by the legislature, helps to assure agency  
30 action consistent with the intent of the legislature, and protects citizens from agency error. More  
31 detailed scope of review provisions also make the task of the judiciary easier because they  
32 provide clearer instructions from the legislature about how to review agency decisions. More

1 detailed scope of review provisions lead to more intense judicial review, and that is an approach  
2 that legislatures welcome for the same reason that they have embraced regulatory review: it  
3 controls agency action. Alternative 2, which draws heavily on the Iowa provisions on scope of  
4 review ( I.C.A. 17. A.19(10)), represents this position.  
5

6 Judicial review is essential and exists in all states. Subsections (a) (1) & (2) describe the  
7 general burdens on the appellant and the approach under this Act. They are substantially similar  
8 to the general scope of review provisions of the Federal APA, 5 U.S.C. Section 706.  
9

10 Subsections (a)[(3) alternative 1](A) & (B) identify the courts' power to decide questions  
11 of law and procedure. Subsection (a)[(3) alternative 1](A) includes, but is not limited to,  
12 violations of constitutional or statutory provisions and actions that are in excess of statutory  
13 authority from Section 15(g) of the 1961 MSAPA, and includes subsections (c) (1), (2) and (4)  
14 of the 1981 MSAPA. The section thus includes challenges to the facial or applied  
15 constitutionality of a statute, challenges to the jurisdiction of the agency, erroneous interpretation  
16 of the law, and may include erroneous application of the law. This section is not intended to  
17 preclude courts from according deference to agency interpretations of law, where such deference  
18 is appropriate.  
19

1 [ARTICLE] 6

2 OFFICE OF ADMINISTRATIVE HEARINGS

3 SECTION 601. CREATION OF OFFICE OF ADMINISTRATIVE HEARINGS.

4 (a) ~~As used in~~ in this [article], office means the [Office of Administrative Hearings].

5 (b) The [Office of Administrative Hearings] is created in the executive branch of state  
6 government [within the [ ] agency] ~~for the purpose of separating the adjudication function~~  
7 ~~from the investigative, prosecutorial, or policy-making function of agencies in the executive~~  
8 ~~branch of state government.~~

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9  
10  
11 Comment

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

18  
19 SECTION 602. CHIEF ADMINISTRATIVE LAW JUDGE; APPOINTMENT;  
20 QUALIFICATIONS; TERM; REMOVAL.

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

23 (b) A chief administrative law judge ~~shall~~ serves a term of [~~five~~5] years, ~~and~~ -until a  
24 successor is appointed and qualifies for office, ~~in entitled to~~ ~~shall receive~~ the salary provided by  
25 law, and may be reappointed.

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

1 (d) A chief administrative law judge:

2 (1) must take the oath of office required by law ~~before beginning prior to the~~  
3 ~~commencement of the~~  
4 ~~-~~duties of the office;

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

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

9 (e) A chief administrative law judge may be removed from office ~~prior to the end of a~~  
10 ~~term~~ only for cause and only after notice and an opportunity for a contested case hearing.

11 **Comment**

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

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

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

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

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

1 (cd) An administrative law judge:  
2 (1) ~~shall~~~~must~~ take the oath of office required by law ~~before beginning prior to~~  
3 ~~commencement of~~ duties as an administrative law judge;  
4  
5 ~~as an administrative law judge;~~  
6 (2) is subject to the code of conduct for administrative law judges adopted  
7 pursuant to Section 604(7);  
8 (3) ~~is entitled to~~~~shall receive~~ the compensation provided by law; and  
9 (4) may not perform any act inconsistent with the duties and responsibilities of an  
10 administrative law judge.

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11 (de) An administrative law judge:  
12 (1) is subject to the supervision of the chief administrative law judge;  
13 (2) may be disciplined pursuant to the [state merit system law];  
14  
15 (3) ~~Except as otherwise provided in paragraph (4), may be removed from office~~  
16  
17 ~~only for cause and only after notice and an opportunity for a contested case hearing ; and~~  
18  
19 (4) ~~is~~ subject to a reduction in force ~~on~~ in accordance with the [state merit  
20 system law].  
21 ~~law]; and~~  
22  
23 (4) ~~may be removed from office only for cause and only after notice and an~~  
24  
25 ~~opportunity for a contested case hearing [may be removed pursuant to the [state~~  
26 ~~merit~~  
27 ~~system law].~~  
28  
29

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

4  
5 **Comment**  
6

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

10 **SECTION 604. CHIEF ADMINISTRATIVE LAW JUDGE; POWERS; DUTIES.**

11  
12 The chief administrative law judge has the powers and duties specified in this section. The chief  
13 administrative law judge:

14 (1) shall supervise and manage the office;

15 (2) shall assign randomly administrative law judges in any case referred to the office,  
16 taking into account administrative law judge expertise;

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

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

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

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

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

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

1 (9) ~~when necessary~~, shall discipline administrative law judges who do not meet  
2 appropriate standards of conduct and competence;

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

4 (11) may contract with other public agencies for the services of the office.  
5

6 **Comment**

7 Section 604 is based upon Section 1-5 of the Model Act Creating a State Central Hearing  
8 Agency (Office of Administrative Hearings) adopted by the house of delegates of the American  
9 Bar Association (February 2, 1997).  
10

11 **SECTION 605. COOPERATION OF AGENCIES.**

12 (a) All agencies shall cooperate with the chief administrative law judge in the discharge  
13 of the duties of the office, ~~including providing information and coordinating schedules for~~  
14 ~~contested case hearings.~~  
15

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

18 **Comment**

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

26 -

26 **SECTION 606. ADMINISTRATIVE LAW JUDGES; POWERS; DUTIES;**

27 **DECISION MAKING AUTHORITY.**

28 (a) [Except as otherwise provided in subsection (de), ~~unless~~ ~~[Unless]~~ ~~[U]nless~~ the  
29 agency head elects to conduct the hearing, in which case the agency head shall render a final  
30 order under Section ~~413(a)~~415, in a contested case, an administrative law judge shall be assigned

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1 to be the presiding officer. The administrative law judge shall issue a recommended or  
2 ~~initial~~~~interim~~ order to the agency head in the contested case pursuant to Section ~~413415~~.

3 (b) Except as provided by law other than this [act], if a matter is referred to the office by  
4 an agency, the agency may not take ~~no~~ further action with respect to the proceeding, except as a  
5 party, until a recommended or ~~initial~~~~interim~~ order is issued. [This subsection does not prevent an  
6 appropriate interlocutory review by the agency or an appropriate termination or modification of  
7 the proceeding by the agency when authorized by law other than this [act].]

8 ~~\_(e) Unless the agency head elects to conduct the hearing, an administrative law judge~~  
9 ~~shall be the presiding officer and shall issue a recommended or interim order in any adjudication~~  
10 ~~involving any agency except the following agencies: (1)[list agencies to be exempted from~~  
11 ~~central panel requirements].-~~

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

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

16  
17 **Comment**

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

21

1 [ARTICLE] 7

2 RULES REVIEW

3 ~~[NOTE: A state may choose the legislative rule review process stated in this article.]~~

4  
5 SECTION 701. [LEGISLATIVE RULES REVIEW COMMITTEE]. There is

6 created a ~~joint~~ standing ~~[rules review committee]~~ of the legislature designated the [rules review  
7 committee].

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

16  
17 SECTION 702. REVIEW BY [RULES REVIEW COMMITTEE].

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

21 (b) The [rules review committee] may examine ~~currently effective~~ rules in effect and  
22 newly adopted, amended, or repealed rules to determine whether the:

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

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

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

27 (4) rule is a reasonable implementation of the law as it applies to any affected  
28 class of persons ~~affects persons particularly affected by the rule~~; and

29 (5) ~~agency rule~~ complies with the regulatory analysis requirements of Section

1 305 and ~~the analysis properly reflects the effect of the rule, properly determines the factors under~~  
2 ~~Section 305(e).~~

3 (c) The [rules review committee] may request from an agency ~~such~~ information ~~as is~~  
4 necessary to ~~exercise its power~~~~carry out its duties~~ under subsection (b). The [rules review  
5 committee] shall consult with standing committees of the Legislature with subject matter  
6 jurisdiction over the subjects of the rule under examination.

7 (d) The [rules review committee]:

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

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

#### 10 **Comment**

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

#### 21 **SECTION 703. [RULES REVIEW COMMITTEE] PROCEDURE AND POWERS.**

22  
23 ~~Legislative Note: the 30 day time period in subsection (a) is the same as the 30 day time period~~  
24 ~~in section 316(a).~~

25  
26 (a) Not later than [30] days after receiving ~~a copy of the notice of~~ an adopted, amended,  
27 or repealed rule from an agency under Section ~~702307~~, the [rules review committee] may:

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

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

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

2 (b) If the [rules review committee] approves ~~an~~the adopted, amended, or repealed rule or  
3 does not disapprove and propose ~~an~~ amendment under subsection (a)(2) or disapprove under  
4 subsection (a)(3), the adopted, amended, or repealed rule becomes effective on the date specified  
5 for the ~~original~~ rule ~~in~~under Section 316.

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

17 ~~Legislative Note: state constitutions vary as to whether or not a joint resolution is a valid way~~  
18 ~~of disapproving an agency rule. In some states, the legislature must use the bill process with~~  
19 ~~approval by the governor. In other states the joint resolution process is proper. States should use~~  
20 ~~the alternative that complies with their state constitution.~~

21 (d) If the [rules review committee] disapproves the adoption, amendment, or repeal of a  
22 rule under subsection (a)(3), the adopted, amended, or repealed rule becomes effective upon  
23 adjournment of the next regular session of the legislature unless before the adjournment the  
24 legislature [adopts a [joint] ~~[ concurrent ]~~ resolution] ~~[enacts a bill]~~ sustaining the action of the  
25 committee.  
26

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

7 *Legislative Note: the 30 day time period in subsection (a) is the same as the 30 day time period*  
8 *in section 316(a).*  
9

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

#### 23 24 **Comment**

25  
26 This is a type of veto that provides for cooperation between the Legislature and the  
27 Governor, and attempts to avoid the **I.N.S. v. Chadha (1983)** 462 U.S. 919, 103 S.Ct. 2764.  
28 problem of unconstitutionality by delaying the effective date of the rule until the legislature has  
29 the opportunity to enact legislation to annul or modify it. The governor may veto the act by  
30 which the legislature seeks to annul or modify the rule. This type of veto provision is widely  
31 used in the states. For disapproval of a rule to be effective, the legislature as a whole must adopt  
32 a joint resolution, and in many states the governor must be presented with the joint resolution for  
33 approval or disapproval. While the rules review committee can recommend disapproval, the  
34 committee recommendation must be approved by the legislature by joint resolution. In some  
35 states, the legislature must comply with the legislative process for enacting a bill including  
36 presentation to the governor to exercise the power of legislative veto over an agency regulation.  
37 In at least one state use of a joint resolution without the governor's participation violates the  
38 state constitution. *State v. A.L.I.V.E. Voluntary (Alaska, 1980)* 606 P.2d 769. The rules review  
39 committee has the power to temporarily suspend an agency rule pending enactment of a

1 permanent suspension by action of both houses of the state legislature, and presentation to the  
2 governor. *Martinez v. Department of Industry, Labor, & Human Relations* (Wisconsin, 1992)  
3 165 W.2d 687, 478 N.W.2d 582 (temporary suspension statute held not to violate state  
4 constitution separation of powers doctrine).  
5

1 [ARTICLE] 8

2 APPLICABILITY; EFFECTIVE DATE

3 ~~SECTION 801. APPLICABILITYEFFECTIVE DATE. This [act] takes effect on~~

4 ~~[date] and~~ governs all agency proceedings, and all proceedings for judicial review or civil

5 enforcement of agency action, commenced after ~~[the effective date of this [act]]that date.~~

6 ~~ThisThe~~-[act] does not govern an adjudications for which notice was given ~~beforeprior to~~ that

7 date under Section 403 and ~~all~~ rulemaking proceedings for which notice was given or a petition

8 filed before that date.

9  
10 **Comment**

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

15  
16  
17 SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL  
18 AND NATIONAL COMMERCE ACT.

19  
20 This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and  
21 National Commerce Act, 15 U.S.C. Section 7001 et. seq., but does not modify, limit, or  
22 supersede Section 101 (c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery  
23 of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

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

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

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

27 (c)

28  
29  
30 SECTION 804. EFFECTIVE DATE This [act] takes effect on [date]

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