

D R A F T

FOR DISCUSSION ONLY

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For February 12 – 14, 2010 Drafting Committee Meeting

With Prefatory Note and Comments

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January 25, 2010

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REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

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REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

Prefatory Note

The 1946 Model State Administrative Procedure Act

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

The 1946 Act incorporated basic principles with only enough elaboration of detail to support essential features¹ 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.² By about 1960, twelve states had adopted the 1946 Act.³

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.⁴ 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.⁵

¹ 1946 Model State Administrative Procedure Act preface at 200.

² *Id.* at 200

³ 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.

⁴ Preface to 1961 Model State Administrative Procedure Act.

⁵ 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, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma,

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 1961.⁶ The 1981 Act, when completed, consisted of ninety-four sections⁷. 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.⁸

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 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

Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁶ 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.

⁷ 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.

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

address. Finally, since the 1981 Act, approximately thirty states have adopted central panel administrative law judge provisions. What has been learned from the experience in those states can be used to improve this Act.

1 **REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

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

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

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

9 (2) “Adoption of a rule” means not only the adoption of a rule but also the amendment of
10 a rule or the repeal of a rule unless the text of a section otherwise specifies.

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

14 (4) “Agency action” means:

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

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

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

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

21 (6) “Agency record” means the agency rulemaking record required by Section 302, the
22 emergency rulemaking record in rulemaking conducted under Section 309(a), the direct final
23 rulemaking record in rulemaking conducted under Section 309(b), the hearing record in

1 adjudication required by Section 406, and the hearing record in an emergency adjudication under
2 Section 407 .

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

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

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

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

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

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

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

20 (14) “Index” means a searchable list of subjects and titles in a record with page numbers,
21 hyperlinks, or other connectors that link the index entries with the text to which they refer.

22 (15) “Informal adjudication” means an adjudication that is not a contested case.

23 (16) “Initial order” means an order that is issued by a presiding officer with final

1 decisional authority if the order is subject to discretionary review by the agency.

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

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

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

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

11 (21) “Notify” means to take steps reasonably required to inform a person, whether or not
12 that person actually comes to know of the information.

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

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

17 (24) “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 (25) “Presiding officer” means an individual who presides over the evidentiary hearing
21 in a contested case.

22 (26) “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 (27) “Proposed rule” means a rule proposed to be adopted, amended or repealed by an
3 agency.

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

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

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

12 (A) a statement that concerns only the internal management of an agency and that
13 does not affect private rights or procedures available to the public;

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

16 (C) an opinion of the Attorney General;

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

23 (E) a form developed by an agency to implement or interpret agency law or

1 policy; or

2 (F) a guidance document.

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

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

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

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

9 (33) “Written” means inscribed on a tangible medium.

10 **Comment**

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

17
18 Agency. The object of this definition is to subject as many state actors as possible to this
19 definition. See 1981 MSAPA Section 1-102(1). The exception for the governor means the
20 governor personally. The term “agency” includes the Office of Administrative Hearings provided
21 in Article 6.

22
23 Agency Action. This definition is added for purposes of identifying those matters subject
24 to judicial review. Failure to issue an order or rule is not judicially reviewable except as provided
25 in Section 501(a) of the Act. Failure to issue an order or rule does not include an agency denial
26 of a petition to initiate rulemaking. See Section 317 of the Act. This definition is taken from
27 1981 MSAPA Section 1-102(2).

28
29 Agency Head. This definition differentiates between the agency as an organic whole and
30 the particular persons (commissioners, board members or the like) in whom final authority is
31 vested. This definition is taken from 1981 MSAPA Section 1-102(3).

32
33 Contested case. This term is similar to the “contested case” definition of the 1961
34 MSAPA. Like the 1961 MSAPA, this Act looks to external sources such as statutes to describe
35 situations in which a party is entitled to a hearing. However, this term differs from the 1961
36 MSAPA’s term “contested case” because it also includes hearings required by the constitution,

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

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

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

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

38
39 Emergency Adjudication. This definition is designed to be used with the emergency
40 adjudication procedures provided by Section 408. The danger to the public health, safety, or
41 welfare standard requiring immediate action is a strict standard that is defined by law other than
42 this Act. Federal and state case law have held that in an emergency situation an agency may act
43 rapidly and postpone any formal hearing without violation, respectively, of federal or state
44 constitutional law. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Gilbert v. Homar* (1997) 520 U.S.
45 924; *Dep’t of Agric. v. Yanes*, 755 P.2d 611 (OK. 1987).

1 Evidentiary Hearing. This definition describes the process for an evidentiary hearing.
2 The opportunity for an evidentiary hearing is defined by the definition of a contested case,
3 Section 102(6), and by Section 401. See also Section 403(k) decision in contested case.
4

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

16 Index. The definition of index has been added as a guide to agencies, [publisher]s and
17 editors about their duties to make records available and easily accessible to the public in the form
18 of an index, as that term is used throughout this act. States can satisfy the requirement of an
19 index by providing a record that is searchable by Word on the Internet, unless a hard copy index
20 is required.
21

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

27 Law. Law includes an executive order that rests on statutory or constitutional
28 authorization. [Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 188-89 \(1999\)](#)
29 ; [Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 \(1952\)](#) . See also Kevin M. Stack,
30 “The Statutory President,” 90 Iowa L. Rev. 539, 550-52 (2005); Jim Rossi, “State Executive
31 Law making in Crisis,” 56 Duke L. Rev. 237, 261-64 (2006). For example, a Governor’s
32 declaration of a state of emergency would fall within the category of an executive order with
33 statutory or constitutional authorization. See, e.g., New Mexico Executive Order 2005-040
34 (2005).
35

36 License. The definition of license is based upon 1981 MSAPA Section 102(4).
37

38 Licensing. The definition of licensing is based on 1961 MSAPA section 14(a).
39

40 Notify. The definition of notify is based on due process of law requirements for methods
41 of notifying persons. *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 314-316
42 (1950); *Goldberg v. Kelley*, 397 U.S. 254, 267-268 (1970); *Dusenberry v. United States*, 534
43 U.S. 161, 168-170 (2002); See *Ho v. Donovan* 569 F.3d 677, 680-681 (7th. Cir.,2009). This
44 definition is similar to the definition of notice in Section 2(a) of the Uniform Arbitration Act, and
45 in Section 1-202(d) of the Uniform Commercial Code.
46

1 Order. Unlike the federal APA which defines rule, but not order, this section provides a
2 positive definition of order based on case law and agency experience. The key concept is that an
3 order includes solely agency legal determinations that are addressed to particular, specific,
4 identified individuals in particular circumstances. An order may be addressed to more than one
5 person. Further, the definition is consistent with modern law in rejecting the right/privilege
6 distinction in constitutional law. The addition of the language “or other interests” is intended to
7 clarify this change and to include entitlements. See also Cal.Gov.Code SECTION 11405.50.
8

9 Party. This definition includes the agency, any person against whom agency action is
10 brought and any person who intervenes. Its terms also include any person who may participate
11 in a rulemaking proceeding, such as someone who offers a comment. This section is not
12 intended to deal with the issue of a person’s entitlement to review. Standing and other issues
13 relating to judicial review of agency action are addressed in Article 5 of this Act.
14

15 Presiding Officer. This definition includes an agency staff member, an administrative
16 law judge or one or more members of the agency head when designated to preside at a hearing.
17

18 Person. The definition of a “person” is the standard definition for that term used in acts
19 adopted by the National Conference of Commissioners on Uniform State Laws. It includes
20 individuals, associations of individuals, and corporate and governmental entities.
21

22 Rule. The essential part of this definition is the requirement of general applicability of
23 the statement. This criterion distinguishes a rule from an order, which focuses upon particular
24 applicability to identified parties only. Applicability of a rule may be general, even though at the
25 time of the adoption of the rule there is only one person or firm affected: persons or firms in the
26 future who are in the same situation will also be bound by the standard established by such a
27 rule. It is sometimes helpful to ask in borderline situations what the effect of the statement will
28 be in the future. If unnamed parties in the same factual situation in the future will be bound by
29 the statement, then it is a rule. The word “statement” has been used to make clear that, regardless
30 of the term that an agency uses to describe a declaration or publication and whether it is internal
31 or external to the agency, if the legal operation or effect of the agency action is the same as a
32 substantive rule, then it meets this definition. The exceptions to the definition are widely used in
33 state APAs. Subsection 27(A) is drawn from 1981 Model State APA § 3-116(1). Subsection
34 26(C) is drawn from 1981 Model State APA § 3-116(9). Subsection 26(D) is drawn from 1981
35 Model State APA § 3-116(2). Subsection 26(E) is based on 1981 Model State APA § 3-116(7).
36

37 Written. This definition relates to the definition of record in Section 102(25) in that
38 written documents are inscribed on a tangible medium. The definition of record in Section
39 102(25) includes both tangible medium (written) and electronic documents.
40

41 **SECTION 103. APPLICABILITY.** This [act] applies to each agency unless the
42 agency is expressly exempted by a statute of this state.
43

1 **Comment**

2 This section is intended to define which agencies are subject to the provisions of this act.
3 Many states have made use of an applicability provision to define the coverage of their
4 Administrative Procedure Act. See: Iowa, I.C.A. SECTION 17A.23; Kansas, K.S.A. SECTION
5 77-503; Kentucky, KRS SECTION 13B.020; Maryland, MD Code, State Government,
6 SECTION 10-203; Minnesota, M.S.A. SECTION 14.03; Mississippi, Miss. Code Ann.
7 SECTION 25-43-1.103; Washington, West's RCWA 34.05.020. States vary widely as to what
8 state agencies are subject to the APA, and what agencies are exempt from the APA. The issue of
9 what agencies are exempt from the APA will be decided by each state using its own legislative
10 process. Some states list the agencies or agency proceedings that are exempt from the
11 requirements of the APA. See Washington, West's RCWA 34.05.30. This section provides a way
12 to resolve those issues.
13

1 [ARTICLE] 2

2 PUBLIC ACCESS TO AGENCY LAW AND POLICY

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

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

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

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

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

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

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

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

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

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

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

8 (4) an index of the contents.

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

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

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

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

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

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

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

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

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

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

26
27 **Comment**

28
29 This section seeks to assure adequate notice to the public of proposed agency action. It

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

13
14 The arrival of the Internet and electronic information transfer, which occurred after the
15 last revision of the Model State Administrative Procedure Act, has revolutionized
16 communication. It has made available rapid, efficient and low cost communication and
17 information transfer. Many states as well as the federal agencies have found that it is an ideal
18 medium for communication between agencies and the public, especially in connection with
19 rulemaking. Since the last Model Administrative Procedure Act was written, many states have
20 adopted various types of statutes that permit agencies to use electronic technology to
21 communicate with the public. The agencies have found this technology particularly useful in
22 connection with rulemaking.

23
24 Subsection (c) requires that the [publisher] maintain the official record for adopted rules,
25 including the text of the rules and any supporting documents, filed by the agency. Subsection (c)
26 also requires that the agency adopting the rule maintain the rulemaking record for that rule.
27 Section 302(b) provides the requirements for the rulemaking record.

28
29 Subsection (d) requires the [publisher] to 1) maintain an Internet website, and 2) publish
30 all matters required to be published under this act on that website. If a state chooses to use
31 subsection (d), they will create a centralized website for use by all agencies. Subsection (d) also
32 requires that the [publisher] publish agency guidance documents filed by the agency with the
33 [publisher]. See section 202(4) and Section 310, below. Subsection (d) does not address issues
34 related to authentication, preservation and archival storage of electronic documents published on
35 an Internet website. Subsection (d) does not address the principles for deciding what rules are in
36 effect and enforceable at a specific point in time. Providing a hypertext link on an internet
37 website will satisfy the publication requirements for agencies and publishers.

38
39 Subsection (f) requires the publisher to provide the administrative bulletin in written form
40 upon request, for which the publisher may charge a reasonable fee. This requirement can be
41 satisfied by states making the administrative bulletin available on the Internet, searchable, and
42 printable.

43
44 The bracketed text of subsection (g)(1) and (g)(2) is included so that agencies may utilize
45 redlining or underlining and striking of the text of the proposed or adopted rules so that changes
46 from the existing text of the rule are clearly delineated. Agencies that are proposing or adopting

1 new rules or that have some other system for showing changes need not use the bracketed text.

2
3 It is possible to go much further in providing for use of the Internet that the publication
4 adopted here. For example, a state could choose to permit agencies to operate their own
5 websites, and to accept comments on rules on the website. They could also provide for
6 maintenance of a database of all comments received that the public could access. These
7 provisions are extremely useful, but may be quite expensive. The central system adopted here,
8 means only one Internet website is required. In terms of cost benefit, this is an effective method
9 of providing for electronic communication and agency access.

10
11 Subsection (h) requires the publisher to index the administrative code by subject. States
12 can satisfy this requirement by providing an administrative code that is searchable by word on
13 the Internet.

14
15 Subsection (j) provides for a limited non substantive power to edit agency rules provided
16 that the agency is notified by the rules [publisher] of the changes. Subsection (j) is based on the
17 Maine Administrative Procedure Act, 5 M.R.S.A. Section 8056(10).

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

24
25 Subsections (k) and (l) are drawn from the Washington Administrative Procedure Act.
26 See WA ST 34.05.260.

27
28 **SECTION 202. REQUIRED AGENCY PUBLICATION AND RECORDKEEPING.**

29 Each agency shall:

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

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

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

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

3 (5) maintain [custody of] the agency’s current rulemaking docket required by Section
4 302(b)[; and

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

10 **Comment**

11
12 One object of this section is to make available to the public all procedures followed by
13 the agency, including especially how to file for a license or benefit. It is modeled on the 1961
14 Model State Administrative Procedure Act, Sections 2(a) (4) & 2(b), the 1981 Model State APA
15 Sections 2-104(1), (2), and the Kentucky Administrative Procedure Act, KRS Section 13A.100.
16 Persons seeking licenses or benefits should have a readily available and understandable reference
17 sources from the agency. Subsections (1), (2), (3), and (4) require the agency to publish the
18 description of the organization of the agency and the procedures followed by the agency.
19 Agencies could use direct final rulemaking procedures under Section 309(b) to adopt some of the
20 rules required by subsections (1), (2), (3), and (4). Some states provide more detail in subsection
21 (1) including contact information for agency officials, organizational charts, and hours of
22 operations for agency offices. The term methods of operation in subsection (1) refers to
23 information about how the agency carries out its responsibilities that would be helpful to the
24 public. Subsection (2) is not intended to require publication of internal procedures available to
25 and applicable to employees only, and that are of no real interest to the public. Subsection (3)
26 requires publication of a description of application processes that are appropriate to the agency.
27 For social welfare agencies, the publication would include available benefits administered by
28 that agency.

29
30 Subsection (6) requires the publisher to maintain the official version of the index and
31 rules compilation. The publisher is the repository of the official language of the rules. If
32 questions arise about authentication of agency rules, the publisher is the source for the official
33 version of the rule in question.

34
35 **SECTION 203. DECLARATORY ORDER.**

36 (a) Any interested person may petition an agency for a declaratory order that interprets

1 or applies the statute administered by the agency or states whether or in what manner a rule,
2 guidance document, or order issued by the agency applies to the petitioner.

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

8 (c) Not later than 60 days [or at the next regularly scheduled meeting of the agency] after
9 receipt of a petition pursuant to subsection (a), an agency shall issue a declaratory order in
10 response to the petition, decline to issue a declaratory order, or schedule the matter for further
11 consideration. [If the agency fails to act within the applicable time deadline, the agency is
12 deemed to have declined to issue a declaratory order.]

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

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

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

1 (g) An agency shall maintain an index of all of its currently effective declaratory orders,
2 file the index with the [publisher] [annually], make the index readily available for public
3 inspection, and make available for public inspection and, at a reasonable cost, copying of the full
4 text of all declaratory orders to the extent inspection is permitted by law other than this [act].

5 **Comment**

6
7 This section embodies a policy of creating a convenient procedural device that will
8 enable parties to obtain reliable advice from an agency. Such guidance is valuable to enable
9 citizens to conform with agency standards as well as to reduce litigation. It is based on the 1981
10 MSAPA, Section 2-103 and Hawaii Revised Statutes, Section 91-8. The term “interested person”
11 in Subsection (a) is broader than the term aggrieved person for judicial review in Article 5, and is
12 also broader than the term person toward whom agency action is directed in adjudication under
13 Article 4. The term is narrower than the term any member of the public used in Section 303.
14 Ripeness and standing requirements that restrict court issued declaratory judgments do not apply
15 to declaratory orders issued by administrative agencies. Subsection (a) refers to declaratory
16 orders that interpret or apply the statute administered by the agency. In states that have
17 constitutional agencies, the term statute would include the entire body of law, including
18 constitutional provisions, that the agency is responsible for enforcing.

19
20 Subsection (d) provides that agency decisions to decline to issue a declaratory order are
21 reviewable for abuse of discretion (See Massachusetts v. EPA 127 S. Ct. 1438 (2007) (EPA
22 decision to reject rulemaking petition and therefore not to regulate greenhouse gases associated
23 with global warming was judicially reviewable and decision was arbitrary and capricious.).
24 limited agency resources may provide a valid basis for an agency to decline to issue a declaratory
25 order. The term notify in subsection (d) incorporates the definition of notify in section 102(19)
26 (reasonable steps to inform a person). Mailing [or e-mailing] a copy of the notice to the
27 petitioner at the address last known to the agency would satisfy the requirement to notify the
28 person.

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

40
41 Subsections (f), and (g) require that an agency publish and index all current declaratory
42 orders. Subsection (f) requires publication of currently effective declaratory orders. This would

1 include all declaratory orders issued by the agency that are currently being relied upon by the
2 agencies, and this would exclude declaratory orders that have been amended, repealed, or
3 replaced by later orders.

4
5 **SECTION 204. DEFAULT PROCEDURAL RULES.**

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

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

11 (c) An agency may adopt a rule of procedure that differs from the default procedural
12 rules adopted under subsection (a) by adopting a rule that states with particularity the reasons for
13 the variation from the default procedural rules.

14 **Comment**

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

1 [ARTICLE] 3

2 RULEMAKING; ADOPTION AND EFFECTIVENESS OF RULES

3 SECTION 301. CURRENT RULEMAKING DOCKET.

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

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

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

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

10 (2) notices related to the proposed rule;

11 (3) how comments may be submitted;

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

13 (5) where comments may be inspected;

14 (6) requests for a public hearing;

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

17 (8) the timetable for action.

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

20 **Comment**

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

1 pending rulemaking proceedings or an agenda referring to pending rulemaking. This section
2 includes direct final rules governed by Section 309.

3
4 **SECTION 302. AGENCY RECORD IN RULEMAKING PROCEEDING.**

5 (a) An agency shall maintain a rulemaking record for each rule it proposes to adopt.

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

13 (b) A rulemaking record must contain:

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

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

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

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

24 (5) a copy of all comments received by the agency in response to the notice of
25 proposed rulemaking;

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

2 (7) all petitions for any agency action on the rule, except for petitions governed

3 by Section 203.

4 **Comment**

5
6 Several states have adopted this type of agency rule-making record provisions: Az.,
7 A.R.S. Section 41-1029; Colo., C.R.S.A. Section 24-4-103; Minn., M.S.A. Section 14.365;
8 Miss., Miss. Code Ann. Section 25-43-3.110; Mont., MCA 2-4-402; Okl., 75 Okl.St. Ann.
9 Section 302; and Wash., RCWA 34.05.370.

10
11 The language of subsection (a) is based on Section 3-112(a) of the 1981 Model Act.
12 Similar language is found in the Washington Administrative Procedures Act, RCWA Section
13 34.05.370. The requirement of an official agency rulemaking record in subsection (a) should
14 facilitate a more structured and rational agency and public consideration of proposed rules. It
15 will also aid the process of judicial review of the validity of rules. The requirement of an official
16 agency rulemaking record was suggested for the Federal Act in S. 1291, the “Administrative
17 Practice and Regulatory Control Act of 1979,” title I, Section 102(d), [5 U.S.C. 553(d)], 96
18 Cong.Rec. S7126 at S7129 (daily ed. Jun. 6, 1979) (Sen. Kennedy). The second sentence of
19 subsection (a) is intended to exclude privileged material from disclosure and display. Privileged
20 material includes confidential business information and trade secrets, as well as internal advice
21 memoranda. The exemptions in the state open records laws would be examples of records and
22 materials that are exempt from disclosure and display under law other than this act. The third
23 sentence in subsection (a) is intended to enable an agency to decide, for example, that indecent
24 material or copyrighted material should be available for inspection in hard copy but not posted
25 on the Internet. It is not intended to authorize exclusion from the Internet record of, for example,
26 information that reflects adversely on the government.

27
28 Subsection (b) requires *all written* submissions made to an agency and *all written*
29 materials considered by an agency in connection with a rulemaking proceeding to be included in
30 the record. It also requires a copy of any existing record of oral presentations made in the
31 proceeding to be included in the rulemaking record. The language in Subsection (b) (3) is based
32 on language adopted by the ABA. See ABA Section of Administrative Law and Regulatory
33 Practice, “A Blackletter Statement of Federal Administrative Law,” 54 Admin. L. Rev. 1, 34
34 (2002)

35
36 **SECTION 303. ADVANCE NOTICE OF RULEMAKING; NEGOTIATED**

37 **RULEMAKING.**

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

1 comment.

2 (b) An agency may engage in negotiated rulemaking by appointing a committee to
3 comment or make recommendations on the subject matter of a rulemaking under active
4 consideration within the agency. The committee, in consultation with one or more agency
5 representatives, may attempt to reach a consensus on the terms or substance of a proposed rule.
6 In making appointments to the committee, the agency shall make reasonable efforts to establish a
7 balance in representation among members of the public known to have an interest in the subject
8 matter of the rulemaking. At least annually the agency shall publish in the [administrative
9 bulletin] a list of all committees with their membership . Notice of a meeting of a committee
10 appointed under this subsection must be published in the [administrative bulletin] at least [15
11 days] before the meeting. A meeting of a committee appointed under this section is open to the
12 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 [30] days before the adoption of a rule, an agency shall file notice of
12 the proposed rulemaking with the [publisher] for publication in the [administrative bulletin]. The
13 publisher shall publish the notice in the next issue of the [administrative bulletin]. The notice
14 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;

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 rule and
22 request a hearing;

23 (6) a citation to and summary of each scientific or statistical study, report, or
24 analysis that served as a basis for the proposed rulemaking, together with an indication of how
25 the full text may be obtained; and

26 (7) a concise summary of any regulatory analysis prepared under Section 305(d).

27 (b) Not later than three days after publication of the notice of the proposed rulemaking in
28 the [administrative bulletin], the agency shall mail the notice or send it electronically to each

1 person that has made a timely request to the agency for a mailed or electronic copy of the notice.
2 An agency may charge a reasonable fee for a written mailed copy requested by a person.

3 **Comment**
4

5 Many states have similar provisions to provide notice of proposed rulemaking to the
6 public. Most states have an administrative bulletin that is published regularly. If a state does not
7 have an administrative bulletin, it will still have to comply with the publication requirement. This
8 section is based upon the provisions of Section 3-103 of the 1081 MSAPA. Rulemaking is
9 defined in Section 102(28). The publisher has the responsibility to publish a notice of proposed
10 rulemaking under Section 201(g)(1). Subsection (b) requires that individual notice of the
11 proposed rulemaking be provided in written or electronic form to each individual who has made
12 a timely request to the agency. To be timely under this subsection, the request would have to be
13 made prior to the publication of the notice of proposed rulemaking.
14

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

21 **SECTION 305. REGULATORY ANALYSIS.**

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

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

28 (c) A regulatory analysis must contain:

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

31 (2) a determination whether:

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

1 (B) the rule will achieve the objectives of the authorizing statute in a more
2 cost effective manner, or with greater net benefits, than other regulatory alternatives.

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

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

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

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

15 **Comment**

16
17 Regulatory analyses are widely used as part of the rulemaking process in the states.
18 States should set the dollar amount of estimated economic impact for triggering the regulatory
19 analysis requirement of this section at a fairly high dollar amount as they deem appropriate or by
20 other approach make the choice to prepare regulatory analyses carefully so that the number of
21 regulatory analyses prepared by any agency are limited in number. The subsection also provides
22 for submission to the rules review entity in the state, if the state has one. States that already have
23 regulatory analysis laws can utilize the provisions of Section 305 to the extent that this section is
24 not inconsistent with existing law other than this act. Agencies may rely upon agency staff
25 expertise and information provided by interested stakeholders and participants in the rulemaking
26 process. Agencies are not required by this act to hire and pay for private consultants to complete
27 regulatory impact analysis. The concise summary of the regulatory analysis required by
28 subsection (d) means a short statement that contains the major conclusions reached in the
29 regulatory analysis.
30

31 **SECTION 306. PUBLIC PARTICIPATION.**

32 (a) An agency proposing the adoption of a rule shall specify a public comment period of
33 at least [30] days after publication of the notice of proposed rulemaking during which a person
34 may submit information and comment on the proposed rule. The information or comment may

1 be submitted in an electronic or written format.

2 (b) An agency shall consider all information and comment on a proposed rule which is
3 submitted within the comment period under subsection (a).

4 (c) Unless a hearing is required by law other than this [act], an agency is not required to
5 hold a hearing on a proposed rule. If an agency holds a hearing, the agency may allow a person
6 to make an oral presentation with information and comment about the rule. Hearings must be
7 open to the public and must be recorded. A hearing on a proposed rule must be held not later
8 than [10] days before the end of the public comment period.

9 (d) A hearing on a proposed rule may not be held earlier than [20] days after notice of its
10 location, date, and time is published in the [administrative bulletin].

11 (e) An agency representative shall preside at a hearing on a proposed rule. If the
12 presiding agency representative is not the agency head, the representative shall prepare a
13 memorandum summarizing the contents of the presentations made at the hearing for
14 consideration by the agency head.

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

20

21

22 **Comment**

23

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

30

31

1 required. Courts utilize several factors to apply the logical outgrowth test including: (1) any
2 person affected by the adopted rule should have reasonably expected that the published proposed
3 rule would affect the person's interest; (2) the subject matter of the adopted rule or the issues
4 determined by that rule are different from the subject matter or issues involved in the published
5 rule proposed to be adopted; and (3) the effect of the adopted rule differs from the effect of the
6 rule proposed to be adopted or amended.

7
8 The following cases discuss and analyze the logical outgrowth test and these factors.
9 These judicial opinions also convey the wide acceptance and use of the logical outgrowth test in
10 the states. *First Am. Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008,
11 1015 (D.C.Cir.2000); *Arizona [publisher]. Serv. Co. v. EPA*, 211 F.3d 1280, 1300
12 (D.C.Cir.2000); *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994);
13 *Trustees for Alaska v. Dept. Nat. Resources*, 795 P.2d 805 (1990); *Sullivan v. Evergreen Health*
14 *Care*, 678 N.E.2d 129 (Ind. App. 1997); *Iowa Citizen Energy Coalition v. Iowa St. Commerce*
15 *Comm.* ___IA___, 335 N.W.2d 178 (1983); *Motor Veh. Mfrs. Ass'n v. Jorling*, 152 Misc.2d 405,
16 577 N.Y.S.2d 346 (N.Y.Sup.,1991); *Tennessee Envir. Coun. v. Solid Waste Control Bd.*, 852
17 S.W.2d 893 (Tenn. App. 1992); *Workers' Comp. Comm. v. Patients Advocate*, 47 Tex. 607, 136
18 S.W.3d 643 (2004); *Dept. Of [publisher]. Svc. re Small Power Projects*, 161 Vt. 97, 632 A.2d 13
19 73 (1993); *Amer. Bankers Life Ins. Co. v. Div. of Consumer Counsel*, 220 Va. 773, 263 S.E.2d
20 867 (1980).

21
22 **SECTION 309. EMERGENCY RULEMAKING; DIRECT FINAL**

23 **RULEMAKING.**

24 (a) If an agency finds that an imminent peril to the public health, safety, or welfare,
25 including the imminent loss of federal funding for an agency program, requires the immediate
26 adoption of a rule and states in a record its reasons for that finding, the agency, without prior
27 notice or hearing or upon any abbreviated notice and hearing that it finds practicable, may adopt
28 a rule without complying with Sections 304 through 307. The adoption may be effective for not
29 longer than [180] days [renewable once up to an additional [180] days]. The adoption of an
30 emergency rule does not preclude the adoption of a rule under Sections 304 through 308. The
31 agency shall file with the [publisher] a rule adopted under this subsection as soon as practicable
32 given the nature of the emergency, shall publish the rule on its website, and shall notify persons
33 who have requested notice of rules related to that subject matter. Nothing in this section prohibits
34 the adoption of a new emergency rule if at the end of the effective period of the original

1 emergency rule, the agency finds that the imminent peril to the public health, safety, or welfare,
2 including the imminent loss of federal funding for an agency program, still exists.

3 (b) If an agency proposes to adopt a rule the adoption of which is expected to be
4 noncontroversial, it may use the direct final rulemaking process authorized by this subsection
5 and must comply with Section 304 (a)(1), (2), (3), (5), and (b) and Section 312(1). The rule to be
6 adopted must be published in the [administrative bulletin] along with a statement by the agency
7 that it does not expect the action to be controversial, and that the rule shall become effective
8 upon publication after 30 days if no objection is received. If no objection is received, the agency
9 shall publish the rule and the action becomes final under Section 316(e). If an objection to the
10 use of the direct final rulemaking process is received from any person within [] days of the
11 public notice, the rule shall not become final. The agency shall file notice of the objection with
12 the [publisher] for publication in the [administrative bulletin], and may proceed with the
13 rulemaking process under Sections 304 through 308.

14 **Comment**
15

16 This section is taken from the 1961 MSAPA, Section 3(2)(b), and the Virginia
17 Administrative Procedure Act, Va. Code Ann. Section 2.2-4012.1. Some state courts have
18 indicated that *any* exemption from rulemaking requirements must be strictly construed to be
19 limited to an emergency or virtual emergency situation.
20

21 Subsection (a) can be used to adopt program requirements necessary to comply with
22 federal funding requirements, or to avoid suspension of federal funds for noncompliance with
23 program requirements. When an emergency rule has the effect of repealing an existing rule, the
24 impact of the end of the emergency on the repealed rule, whether the repealed rule comes back
25 into existence, is not governed by the provisions of Section 309(a) but would be governed by law
26 of this state other than this act, such as the governing statute that delegates rulemaking authority
27 to the agency that issued the emergency rule.
28

29 Subsection (b) is based upon a recommendation from the Administrative Conference of
30 the United States. Direct final rulemaking has been recommended by the Administrative
31 Conference of the United States [ACUS Recommendation 95-4, 60 Fed. Reg. 43110 (1995)].
32 The study that provided the basis for the recommendation was prepared by Professor Ron Levin
33 and has been published [Ronald M. Levin, "Direct Final Rulemaking" 64 George Washington

1 Law Review 1 (1995)]. [However, recognizing that there may be a few other justifications for
2 exemption, this section adopts a broader rule for matters that will be noncontroversial. Thus, a
3 situation where the agency is merely making a stylistic correction or correcting an error that the
4 agency believes is noncontroversial may be adopted without formal rulemaking procedures. See
5 the VA Fast-Track Rule provision at Va. Code Ann. Section 2.2-4012.1.]
6

7 In order to prevent misuse of this procedural device, noncontroversial rule promulgation
8 requires the consent of elected officials, and may be prevented by the requisite number of
9 persons filing objections. The public comment period in subsection (b) provides notice of the
10 noncontroversial rule and the opportunity to object to the adoption of the rule. If an objection to
11 the direct final rulemaking process is received within the public comment period, the agency
12 must give notice of the objection and then the agency may proceed with the normal rulemaking
13 process, including the public comment provisions of Section 306.
14

15 **SECTION 310. GUIDANCE DOCUMENTS.**

16 (a) An agency may issue a guidance document without following the procedures set forth
17 in Sections 304 through 308.

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

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

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

30 (e) An agency shall maintain an index of all of its currently effective guidance

1 documents, publish the index on its website, make all guidance documents available to the public
2 as provided in Section 201(l), and file the index with the [publisher] [annually] as required by
3 Section 201(n). The agency may not rely on a guidance document or cite it as precedent against
4 any party to a proceeding, unless the guidance document is published on the agency website as
5 required by Section 201(l).

6 (f) A guidance document may be considered by a presiding officer or final decision
7 maker in an agency adjudication but it does not bind the presiding officer and the final decision
8 maker in the exercise of discretion.

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

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

- 13 (1) revise or repeal the guidance document;
14 (2) initiate a proceeding for the purpose of considering a revision or repeal; or
15 (3) deny the petition in a record and state its reasons for the denial.

16 **Comment**

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

1 openness and accountability.
2

3 Four states have adopted detailed provisions regulating guidance documents in their
4 administrative procedure acts. See Ariz. Rev. Stat. Ann. §§ 41-1001, 41-1091; Mich. Comp.
5 Laws §§ 24.203, 24.224; Va. Code Ann. § 2.2-4008; Wash. Rev. Code Ann. § 34.05.230. This
6 section draws upon those provisions, and also upon requirements and recommendations issued
7 by federal authorities and the American Bar Association.
8

9 Subsection (a) exempts guidance documents from the procedures that are required for
10 issuance of rules. Many states have recognized the need for this type of exemption in their
11 administrative procedure statutes. These states have defined guidance documents—or
12 interpretive rules and policy statements—differently from rules, and have also excused agencies
13 creating them from some or all of the procedural requirements for rulemaking. See Ala. Code §
14 41-22-3(9)(c) (“memoranda, directives, manuals, or other communications which do not
15 substantially affect the legal rights of, or procedures available to, the public”); Colo. Rev. Stat. §
16 24-4-102(15), 24-4-103(1) (exception for interpretive rules or policy statements “which are not
17 meant to be binding as rules”); AMAX, Inc. v. Grand County Bd. of Equalization, 892 P.2d 409,
18 417 (Colo. Ct. App. 1994) (assessors’ manual is interpretive rule); Ga. Code Ann. § 50-13-4
19 (“Prior to the adoption, amendment, or repeal of any rule, *other than interpretive rules or*
20 *general statements of policy*, the agency shall [follow notice-and-comment procedure]”)
21 (emphasis added); Mich. Comp. Laws § 24.207(h) (defining “rule” to exclude “[a] form with
22 instructions, an interpretive statement, a guideline, an informational pamphlet, or other material
23 that in itself does not have the force and effect of law but is merely explanatory”); Wyo. Stat.
24 Ann. § 16-3-103 (“Prior to an agency’s adoption, amendment or repeal of all rules *other than*
25 *interpretative rules or statements of general policy*, the agency shall . . .”) (emphasis added); In
26 re GP, 679 P.2d 976, 996-97 (Wyo. 1984). See also Michael Asimow, “Guidance Documents in
27 the States: Toward a Safe Harbor,” 54 Admin. L. Rev. 631 (2002) (estimating that more than
28 thirty states have relaxed rulemaking requirements for agency guidance documents such as
29 interpretive and policy statements). The federal Administrative Procedure Act draws a similar
30 distinction. See 5 U.S.C. § 553(b)(A) (exempting “interpretative rules [and] general statements
31 of policy” from notice-and-comment procedural requirements).
32

33 A guidance document, in contrast to a rule, lacks the force of law. Many state and federal
34 decisions recognize the distinction. See, e.g., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d
35 533 (D.C. Cir. 1986); District of Columbia v. Craig, 930 A.2d 946, 968-69 (D.C. 2007); Clonlara
36 v. State Bd. of Educ., 501 N.W.2d 88, 94 (Mich. 1993); Penn. Human Relations Comm’n v.
37 Norristown Area School Dist., 374 A.2d 671, 678 (Pa. 1977).
38

39 Subsection (b) requires an agency to allow affected persons to challenge the legality or
40 wisdom of guidance documents when it seeks to rely on these documents to their detriment. In
41 effect, this subsection prohibits an agency from treating guidance documents as though they were
42 rules. Because rules have the force of law (i.e., are binding), an agency need not respond to
43 criticisms of their legality or wisdom during an adjudicative proceeding; the agency would be
44 obliged in any event to adhere to them until such time as they have been lawfully rescinded or
45 invalidated. In contrast, a guidance document is not binding. Therefore, when affected persons
46 seek to contest a position expressed in a guidance document, the agency may not treat the

1 document as determinative of the issues raised. See Recommendation 120C of the American Bar
2 Association, 118-2 A.B.A. Rep. 57, 380 (August 1993) (“When an agency proposes to apply a
3 nonlegislative rule . . . , it [should] provide affected private parties an opportunity to challenge
4 the wisdom or legality of the rule [and] not allow the fact that a rule has already been made
5 available to the public to foreclose consideration of [their] positions”).
6

7 An integral aspect of a fair opportunity to challenge a guidance document is the agency’s
8 responsibility to respond reasonably to arguments made against the document. Thus, when
9 affected persons take issue with propositions expressed in a guidance document, the agency
10 “must be prepared to support the policy just as if the [guidance document] had never been
11 issued.” *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974); see *Center for Auto
12 Safety v. NHTSA*, 452 F.3d 798, 807 (D.C. Cir. 2006); *Professionals and Patients for
13 Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995); *American Mining Cong. v.
14 MSHA*, 995 F.2d 1106, 1111 (D.C. Cir. 1993).
15

16 An agency may not, therefore, treat its prior promulgation of a guidance document as a
17 justification for not responding to arguments against the legality or wisdom of the positions
18 expressed in such a document. *Flagstaff Broadcasting Found. v. FCC*, 979 F.2d 1566 (D.C. Cir.
19 1992); *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992); *Giant Food Stores, Inc. v.
20 Commonwealth*, 713 A.2d 177, 180 (Pa. Cmwlth. 1998); *Agency Policy Statements,
21 Recommendation 92-2 of the Admin. Conf. of the U.S. (ACUS)*, 57 Fed. Reg. 30,103 (1992), ¶
22 II.B. An agency may, however, refer to a guidance document during a subsequent administrative
23 proceeding and rely on its reasoning, if it also recognizes that it has leeway to depart from the
24 positions expressed in the document. See, e.g., *Steeltech, Ltd. v. USEPA*, 273 F.3d 652, 655-56
25 (6th Cir. 2001) (upholding decision of ALJ who “expressly stated that the [guidance document]
26 was not a rule and that she had the discretion to depart from [it], if appropriate,” but who adhered
27 to the document upon determining “that the present case does not present circumstances that
28 raise policy issues not accounted for in the [document]”); *Panhandle Producers & Royalty
29 Owners Ass’n v. Econ. Reg. Admin.*, 847 F.2d 1168, 1175 (5th Cir. 1988) (agency “responded
30 fully to each argument made by opponents of the order, without merely relying on the force of
31 the policy statement,” but was not “bound to ignore [it] altogether”); *American Cyanamid Co. v.
32 State Dep’t of Envir. Protection*, 555 A.2d 684, 693 (N.J. Super. 1989) (rejecting contention that
33 agency had treated a computer model as a rule, because agency afforded opposing party a
34 meaningful opportunity to challenge the model’s basis and did not apply the model uniformly in
35 every case). See generally John F. Manning, “Nonlegislative Rules,” 72 *Geo. Wash. L. Rev.*
36 893, 933-34 (2004); Ronald M. Levin, “Nonlegislative Rules and the Administrative Open
37 Mind,” 41 *Duke L.J.* 1497 (1992). The relevance of a guidance document to subsequent
38 administrative proceedings has been compared with that of the agency’s adjudicative precedents.
39 See subsection (d) *infra*.
40

41 What constitutes a fair opportunity to contest a policy statement within an agency will
42 depend on the circumstances. See ACUS Recommendation 92-2, *supra*, ¶ II.B. (“[A]ffected
43 persons should be afforded a fair opportunity to challenge the legality or wisdom of [a policy
44 statement] and suggest alternative choices in an agency forum that assures adequate
45 consideration by responsible agency officials,” preferably “at or before the time the policy
46 statement is applied to [them]”). Affected persons’ right to a meaningful opportunity to be heard

1 on the issues addressed in guidance documents must be reconciled with the agency’s interest in
2 being able to set forth its interpretations and policies for the guidance of agency personnel and
3 the public without undue impediment. An agency may use its rulemaking authority to set forth
4 procedures that it believes will provide affected persons with the requisite opportunity to be
5 heard. To the extent that these procedures survive judicial scrutiny for compliance with the
6 purposes of this subsection (b), the agency will thereafter be able to rely on established practice
7 and precedent in determining what hearing rights to afford to persons who may be affected by its
8 guidance documents. As new fact situations arise, however, courts should be prepared to
9 entertain contentions that procedures that have been upheld in past cases did not, or will not,
10 afford a meaningful opportunity to be heard to some persons who may wish to challenge the
11 legality or wisdom of a particular guidance document.

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

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

1 102(3)), not to informal acts of agency staff, such as inspections. The latter types of conduct are
2 frequently not accompanied by a written statement at all, so it would be outside the scope of
3 requirements imposed by subsection (d) to require these government personnel to “explain” a
4 departure from the position taken in a guidance document.
5

6 One purpose of this subsection is to protect the interests of persons who may have
7 reasonably relied on a guidance document. An agency that acts at variance with its past practices
8 may be held to have acted in an arbitrary and capricious manner if the unfairness to regulated
9 persons outweighs the government’s interest in applying its new view to those persons. *Heckler*
10 *v. Community Health Servs.*, 467 U.S. 51, 61 (1984) (“an administrative agency may not apply a
11 new [case law] rule retroactively when to do so would unduly intrude upon reasonable reliance
12 interests”); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007); *Epilepsy Found. v.*
13 *NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001); *Microcomputer Tech. Inst. v. Riley*, 139 F.3d
14 1044, 1050 (5th Cir. 1998). Accordingly, where persons may have justifiably relied on a
15 guidance document, the agency’s explanation for departing from the position taken in that
16 document should ordinarily include a reasonable justification for the decision to override their
17 reliance interests.
18

19 The first two sentences of subsection (f) are based directly on Va. Code Ann. § 2.2-4008.
20 Similar provisions have been adopted in Arizona and Washington. See *Ariz. Rev. Stat. Ann.* §
21 41-1091; *Wash. Rev. Code Ann.* § 34.05.230(3)-(4).
22

23 The last sentence of the subsection is based on the federal APA. See 5 U.S.C. §
24 552(a)(2); *Smith v. NTSB*, 981 F.2d 1326 (D.C. Cir. 1993). Subject to harmless error principles,
25 see § 509(b), a court may invoke the sanction prescribed in this section without necessarily
26 concluding that the party against whom the document is cited has valid objections to the
27 substance of the document.
28

29 Subsection (g) is based on *Wash. Rev. Code Ann.* § 34.05.230(2), which provides for
30 petitions “requesting the conversion of interpretive and policy statements into rules.” However,
31 it is phrased more generally than the Washington provision, because an agency that receives a
32 rulemaking petition will not necessarily wish to “convert” the existing guidance document into a
33 rule without any revision. Knowing that it will now be speaking with the force of law, in a
34 format that would be more difficult to alter than a guidance document is, the agency might prefer
35 to adopt a rule that is narrower than, or otherwise differently phrased than, the guidance
36 document that it would replace. In any event, the agency will, as provided in section 317, need
37 to explain any rejection of the petition, whether in whole or in part, and such a rejection will be
38 judicially reviewable to the same extent as other actions taken under that section.
39

40 Subsection (h) extends the principles of section 317 by allowing interested persons to
41 petition an agency to revise or repeal an existing guidance document. Thus, while this Act does
42 not require an agency to obtain the views of the public before issuing a guidance document, this
43 subsection provides a procedure by which members of the public may bring their views
44 regarding an existing guidance document to the agency’s attention and request that the agency
45 take account of those views. This process may be of particular importance to persons who are
46 indirectly affected by a guidance document (such as persons who stand to benefit from the

1 underlying regulatory program) but are unlikely to be the targets of an enforcement action in
2 which they could challenge the legality or wisdom of the document under subsection (b). See
3 Nina A. Mendelson, “Regulatory Beneficiaries and Informal Agency Policymaking,” 92 Cornell
4 L. Rev. 397, 438-44 (2007); see also ACUS Recommendation No. 76-5, 41 Fed. Reg. 56,769
5 (1976) (noting that section 553(e) of the federal APA “allow[s] any person to petition at any time
6 for the amendment or repeal of . . . an interpretive rule or statement of general policy”).
7

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

22 When an agency grants a petition to revise or repeal a guidance document in part, and
23 denies the petition in part, the agency should explain the partial denial to comply with the
24 requirements of Section 310(i)(3).
25

26 **SECTION 311. REQUIRED INFORMATION FOR RULE.** A rule filed by an
27 agency with the [publisher] under Section 315 must contain the text of the rule adopted and be
28 accompanied by a record containing:

- 29 (1) the date the agency adopted the rule;
30 (2) a reference to the specific statutory or other authority authorizing the action;
31 (3) any findings required by any provision of law as a prerequisite to adoption or
32 effectiveness of the action;
33 (4) the effective date of the action; and
34 (5) the concise explanatory statement required by Section 312.

35 **Comment**

36 Agency action is defined in section 102(4) to include an agency rule or order [(subsection
37

1 (4)(a)], and the failure to issue a rule or order [(subsection (4)(b)]. In Section 311(2), (3), and (4),
2 the term “action” refers to the rulemaking process related to the adoption, amendment or repeal
3 of a rule. See Section 102(2) definition of adoption of a rule which includes amendment or repeal
4 of a rule, unless the context clearly indicates otherwise.

5
6 **SECTION 312. CONCISE EXPLANATORY STATEMENT.** At the time it adopts, a

7 rule, an agency shall issue a concise explanatory statement containing:

8 (1) the agency’s reasons for the action, including the agency’s reasons for not accepting
9 substantial arguments made in testimony and comments; and

10 (2) subject to Section 308, the reasons for any change between the text of the proposed
11 rule contained in the published notice of the proposed adoption of the rule and the text of the
12 rule as finally adopted.

13 (3) The summary of any regulatory analysis prepared under Section 305.

14 **Comment**

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

29
30 Agency action is defined in section 102(4) to include an agency rule or order [(subsection
31 (4)(a)], and the failure to issue a rule or order [(subsection (4)(b)]. In Section 312(1), the term
32 “action” refers to the rulemaking process related to the adoption, amendment or repeal of a rule.
33 See Section 102(2) definition of adoption of a rule which includes amendment or repeal of a rule,
34 unless the context clearly indicates otherwise.

35
36 **SECTION 313. INCORPORATION BY REFERENCE.** A rule may incorporate by

37 reference all or any part of a code, standard, or rule that has been adopted by an agency of the

1 United States, this state, another state, or by a nationally recognized organization or association,
2 if:

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

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

8 (3) the code, standard, or rule is readily available to the public in written or electronic
9 form at no charge or for a reasonable charge;

10 (4) the rule states where copies of the code, standard, or rule are available from the
11 agency adopting the rule, whether a charge must be paid, and where copies are available from
12 the agency of the United States, this state, another state, or the organization or association
13 originally issuing the code, standard, or rule; and

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

16 **Comment**

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

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

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

7 (d) A rule adopted using the emergency process under Section 309(a) becomes effective
8 upon action by the agency.

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

12 **Comment**

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

20
21 **SECTION 317. PETITION FOR ADOPTION OF RULE.** Any person may petition
22 an agency to adopt a rule. Each agency shall prescribe by rule the form of the petition and the
23 procedure for its submission, consideration, and disposition. Not later than [60] days after
24 submission of a petition, the agency shall:

25 (1) deny the petition in a record and state its reasons for the denial; or

26 (2) initiate rulemaking proceedings in accordance with this [act].

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Comment

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

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. An agency may conduct a
5 proceeding in an adjudication that is not a contested case notwithstanding this article.

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

13
14 **Comment**

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

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

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

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

1 **SECTION 402. PRESIDING OFFICERS.**

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

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

10 (c) A presiding officer is subject to disqualification for bias, prejudice, financial interest,
11 ex parte communications as provided in Section 408(h), or any other factor that would cause a
12 reasonable person to question the impartiality of the presiding officer. A presiding officer, after
13 making a reasonable inquiry, shall disclose to all parties any known facts related to grounds for
14 disqualification that would be material to the impartiality of the presiding officer in the contested
15 case proceeding.

16 (d) Any party may petition for the disqualification of a presiding officer promptly after
17 notice that the person will preside or, if later, promptly upon discovering facts establishing a
18 ground for disqualification. The petition must state with particularity the ground upon which it is
19 claimed that a fair and impartial hearing cannot be accorded or the applicable rule or canon of
20 practice or ethics that requires disqualification. The petition may be denied if the party fails to
21 exercise due diligence in requesting disqualification after discovering a ground for
22 disqualification.

23 (e) A presiding officer whose disqualification is requested shall determine whether to

1 grant the petition and state facts and reasons for the determination in a record. A presiding
2 officer’s decision to deny disqualification is not subject to interlocutory judicial review.

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

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

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

8 (g) If participation of the agency head is necessary to enable the agency to take action,
9 the agency head may continue to participate notwithstanding a ground for disqualification or
10 exclusion.

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

14
15
16

Comment

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

21

22 Subsection (a) confers a limited amount of discretion upon the agency head to determine
23 who will preside. The presiding officer may be either the agency head, or one or more members
24 of the agency head, or one or more administrative law judges assigned by the Office of
25 Administrative Hearings in accordance with Section 603. Without the bracketed language,
26 subsection (a) resembles the law in a group of states that have created a central panel of
27 administrative law judges, and have made the use of administrative law judges from the central
28 panel mandatory unless the agency head or one or more members of the agency head presides. In
29 some states, however, the use of central panel administrative law judges is mandatory only in
30 certain enumerated agencies or types of proceedings. If the bracketed language is adopted, the
31 agency head, in addition to the preceding options for appointment and unless prohibited by law,
32 may designate any one or more “other persons” to serve as presiding officer. This discretion is
33 subject to subsections (b) on separation of functions.

34

35 Subsection (b) prohibits agency employees from serving as presiding officers in a
36 specific contested case if they have served in the same case as a staff adversary or advocate, or of

1 they are subject to supervision by a staff advocate or adversary in the same case. These
2 employees are subject to the ex parte communication prohibitions contained in section 408.

3
4 This discretion is also limited by the phrase “unless prohibited by law,” included in the
5 bracketed language, which prevents the use of “other persons” as presiding officers to the extent
6 that the other state law prohibits their use. Thus, if this language is adopted by a state that has an
7 existing central panel of administrative law judges whose use is mandatory in enumerated types
8 of proceedings, the agencies must continue to use the central panel for those proceedings, but
9 may exercise their option to use “other persons” for other types of proceedings.

10
11 Subsection (e) is based on California Government Code Section 11425.30.

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

18
19 Subsection (g) is based on 1981 MSAPA Section 4-202(c).

20
21 Subsection (j) is based on California Government Code Section 11425.40(c).

22
23 Subsection (k) adopts the rule of necessity for decision makers. See California
24 Government Code Section 11512(c) (agency member not disqualified if loss of a quorum would
25 result); *United States v. Will* (1980) 449 U.S. 200 (common law rule of necessity applied to U.S.
26 Supreme Court to decide issues before the court relating to compensation all Article III judges).
27 Section 408(g) precludes ex parte communications between presiding officers and agency heads.

28
29 **SECTION 403. CONTESTED CASE PROCEDURE.**

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

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

33 (c) In a contested case, the presiding officer shall give all parties a timely opportunity to
34 file pleadings, motions, and objections. The presiding officer may give all parties the opportunity
35 to file briefs, proposed findings of fact and conclusions of law, and recommended, interim, or
36 final orders. The presiding officer, with the consent of all parties, may refer the parties in a
37 contested case proceeding to mediation or other dispute resolution procedure.

1 (d) In a contested case, to the extent necessary for full disclosure of all relevant facts and
2 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) 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. The hearing may be conducted by telephone (or
7 other method by which the witnesses may not be seen) only if the parties consent [or the
8 presiding officer find that this method will not impair reliable determination of the credibility of
9 testimony]. Each party to the proceeding must be given an opportunity to attend, hear, speak, and
10 be heard at the proceeding as it occurs. Nothing in this subsection prevents an agency from
11 providing for electronic hearings by rule.

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

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

19 (h) A presiding officer must ensure that a hearing record is created.

20 (i) The decision in a contested case must be prepared electronically or, upon request, in
21 writing, based on the hearing record, and include a statement of the factual and legal bases of the
22 decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise
23 and explicit statement of the underlying facts supporting the findings.

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

4 (k) Unless precluded by law, an agency may make an informal disposition of any
5 contested case by stipulation, agreed settlement, consent order, or default.

6 **Comment**

7
8 This section specifies the minimum hearing requirements that must be met in disputed
9 cases under this act. This section applies to all agencies whether or not an agency rule provides
10 for a different procedure; this procedure is excused only if a statute expressly provides otherwise.
11 This section does not prevent an agency from adopting more stringent procedures than those in
12 this section. This section does not supersede conflicting state or federal statutes.

13
14 There are several interrelated purposes for this procedural provision: 1) to create a
15 minimum fair hearing procedure; and 2) to attempt to make that minimum procedure applicable
16 to all agencies. In many states, individual agencies have lobbied the legislature to remove various
17 requirements of the state Administrative Procedure Act from them. The result in a considerable
18 number of states is a multitude of divergent agency procedures. This lack of procedural
19 uniformity creates problems for litigants, the bar and the reviewing courts. This section attempts
20 to provide a minimum, universally applicable procedure in all disputed cases. The important goal
21 of this section is to protect citizens by a guarantee of minimum fair procedural protections. The
22 procedures required here are only for actions that fit the definition of a disputed case and fall
23 within the provisions of Section 401. Thus, they do not spread quasi judicial procedures widely,
24 and do not create any significant agency loss of efficiency or increased cost.

25
26 This section is modeled in part on the Arizona Regulatory Bill of Rights, see A.R.S.
27 Section 41-1001.01 and the California Administrative Adjudication Bill of Rights, see West
28 Ann.Cal.Gov.Code Section 11425.10.

29
30 Under subsection (c), agency procedures governing the case refers to rules of practice
31 adopted under Section 202, or default procedural rules adopted under Section 204, procedures
32 required under the agency governing statute, or agency procedural rules adopted by the agency.

33
34 Under subsection (e) hearings in contested cases can be conducted using the telephone,
35 television, video conferences, or other electronic means. Subsection (e) is based in part on
36 California Government Code Section 11440.30. Due process of law may require live in person
37 hearings. See *Whiteside v. State*, (2001) 20 P. 3d 1130 (Supreme Court of Alaska) (due process
38 of law violated with telephone hearing in driver's license revocation hearing when driver's
39 credibility was material to the hearing, and the driver was not offered an in person hearing); But
40 see *Bancock v. Employment Division* (1985) 72 Or. App. 486, 696 P. 2d 19, 21 (telephone
41 hearings do not violate due process of law in hearings in which the credibility of a party is at

1 issue because audible indicia of a witness's demeanor are sufficient for credibility). Telephone
2 hearings are widely used in high volume short hearing dockets such as unemployment
3 compensation hearings.

4
5 The subsection (i) written decision requirement is based in part on 1961 MSAPA Section
6 12, and on 1981 MSAPA Section 4-215(g). See also California Government Code Section
7 11425.50. See also sections 801, and 802, electronic publication of written decisions, and the
8 provisions of 15 U.S.C. Section 7004.

9
10 Subsection (k) is based on Section 9(d) of the 1961 MSAPA.

11
12 Section 9 of the 1961 MSAPA contained many similar provisions.

13
14 **SECTION 404. EVIDENCE IN CONTESTED CASE.** The following rules apply in
15 contested cases:

16 (1) Except as otherwise provided by law, when the agency initiates a contested case, the
17 agency has the burden of proof. When a party other than the agency initiates a contested case,
18 that party has the burden of proof.

19 (2) Upon proper objection, the presiding officer shall exclude evidence that is irrelevant,
20 immaterial, unduly repetitious, excludable on constitutional or statutory grounds, or excludable
21 on the basis of an evidentiary privilege recognized in the courts of this state. Any other relevant
22 evidence [including hearsay evidence] may be received if it is of a type commonly relied upon
23 by reasonably prudent individuals in the conduct of their affairs.

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

28 (4) Evidence may be received in written form if doing so will expedite the hearing
29 without substantial prejudice to a party. Documentary evidence may be received in the form of
30 excerpts or copies if the original is not readily available or by incorporation by reference. Upon

1 request, parties shall be given an opportunity to compare the copy with the original.

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

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

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

13 (8) The experience, technical competence, and specialized knowledge of the presiding
14 officer may be used in the evaluation of the evidence in the hearing record.

15 **Comment**

16 Under subsection (2) evidence is unduly repetitious if its probative value is substantially
17 outweighed by the probability that its admission will necessitate undue consumption of time. In
18 most states a presiding officer's determination that evidence is unduly repetitious may be
19 overturned only for abuse of discretion. The term statutory in subsection (2) evidence rules that
20 are codified by statute in states with an evidence code (See California Evidence code). Under
21 subsection (3), the legal residuum rule is not adopted and hearsay evidence can be sufficient to
22 support fact findings if the hearsay evidence is sufficiently reliable. This provision is based on
23 the federal A.P.A. provision, 5 U.S.C. Section 556 (d), Richardson v. Perales, (1971) 402 U.S.
24 389 and the 1981 MSAPA Section 4-215(d). (reasonably prudent person standard for reliability).

25
26 Subsection (5) is based on Section 10(1),(2) of the 1961 MSAPA, and Section 4-
27 212(d),(e), of the 1981 MSAPA.

28
29 Subsection (d)(5) is based on 1981 MSAPA Section 4-212(f). See also California
30 Government Code Section 11515, and 1961 MSAPA Section 10(4).

31

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

3
4 **SECTION 405. NOTICE IN CONTESTED CASE.**

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

7 (b) In a contested case initiated by a person other than an agency, within a reasonable
8 time after filing, the agency shall give notice to all parties that an action has been commenced.

9 The notice must include:

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

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

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

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

18 (c) In a contested case initiated by the agency, the agency must give an initial notice to
19 the party against which the action is brought. The notice shall include:

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

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

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

- 1 (4) the official file or other reference number and the name of the proceeding;
- 2 (5) the name, official title, mailing address, [e-mail address,] [facsimile number,]
3 of the presiding officer and the name, official title, mailing address, [e-mail address,] [facsimile
4 address,] and telephone number of the agency's representative;
- 5 (6) a statement that a party that fails to attend or participate in any subsequent
6 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 hearing or a prehearing conference is scheduled, the agency shall give parties
12 notice that contains the information required by subsection (c) at least 14 days before the hearing
13 or prehearing conference.

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

16 **Comment**

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

22 **SECTION 406. HEARING RECORD IN CONTESTED CASE.**

23
24 (a) An agency shall maintain the hearing record created by the presiding officer under
25 Section 403(h) in each contested case.

26 (b) The hearing record must contain:

27 (1) a recording of the proceeding;

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

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

14 **Comment**

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

19 20 **SECTION 407. EMERGENCY ADJUDICATION PROCEDURE.**

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

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

25 (c) Before issuing an order under this section, an agency, if practicable, shall give notice
26 and an opportunity to be heard to the person to which the agency action is directed. The notice

1 and hearing may be oral or written and may be communicated by telephone, facsimile, or other
2 electronic means.

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

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

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 procedure under
10 Section 403 to determine the issues underlying the temporary order.

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

13 **Comment**

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

26
27 Federal and state case law have held that in an emergency situation an agency may act
28 rapidly and postpone any formal hearing without violation, respectively, of federal or state
29 constitutional law. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Gilbert v. Homar* (1997) 520 U.S.
30 924; *Dep't of Agric. v. Yanes*, 755 P.2d 611 (OK. 1987).

31
32 The generic provision in this section has several advantages over the present divergent
33 approaches to emergency agency action. First, all agencies have the needed power to act without
34 delay, but there is provision for some type of brief hearing, if feasible. Second, this article limits

1 the agency to action of this type only in a genuine, defined emergency. Third, there are pre and
2 post deprivation protections. This section seeks to strike an appropriate balance between public
3 need and private fairness.

4
5 This section does not apply to an emergency adjudication, cease and desist order, or other
6 action in the nature of emergency relief issued pursuant to express statutory authority arising
7 outside of this act.

8
9 **SECTION 408. EX PARTE COMMUNICATIONS.**

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

12 (b) Except as otherwise provided in subsections (c), (d), and (e), while a contested case
13 is pending, the presiding officer and the final decision maker may not make to or receive from
14 any person any communication concerning a pending contested case without notice and
15 opportunity for all parties to participate in the communication. For the purpose of this section, a
16 proceeding is pending from the issuance of the agency’s pleading, or from an application for an
17 agency decision, whichever is earlier.

18 (c) A presiding officer or final decision maker may communicate about a pending
19 contested case with any person if the communication is required for the disposition of ex parte
20 matters authorized by statute or concerns an uncontested procedural issue.

21 (d) A presiding officer and the final decision maker may communicate about a pending
22 contested case with an individual authorized by law to provide legal advice to the presiding
23 officer or to the final decision maker and may communicate on ministerial matters with an
24 individual who serves on the [administrative] [personal] staff of the presiding officer or the staff
25 of the final decision maker if the person providing legal advice or ministerial information has not
26 served as investigator, prosecutor, or advocate at any stage of the contested case, and if the
27 communication does not augment, diminish, or modify the evidence in the record.

1 (e) An agency head who is the presiding officer or final decision maker in a pending
2 contested case may communicate about that case with an employee or representative of the
3 agency if:

4 (1) the employee or representative:

5 (A) has not served as an investigator, prosecutor, or advocate at any stage
6 of the contested case; and

7 (B) has not otherwise had a communication with any person about the
8 case other than a communication a presiding officer or decision maker is permitted to make or
9 receive under subsection (c) or (d) or a communication of the type permitted by paragraph (2);
10 and

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

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

15 (B) an explanation of the precedent, policies, or procedures of the agency;
16 or

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

20 (f) If a presiding officer or the final decision maker makes or receives a communication
21 in violation of this section, the presiding officer or the final decision maker, if the
22 communication is:

23 (1) written, shall make the communication a part of the hearing record and

1 prepare and make part of the record a memorandum that contains the response of the presiding
2 officer and the final decision maker to the communication and the identity of the party or person
3 that communicated; or

4 (2) oral, shall prepare a memorandum that contains the substance of the verbal
5 communication, the response of the presiding officer and the final decision maker, and the
6 identity of the party or person that communicated.

7 (g) If a communication prohibited by this section is made, the presiding officer or the
8 final decision maker shall notify all parties of the prohibited communication and permit parties to
9 respond in writing within 15 days after the notice. Upon good cause shown, the presiding officer
10 or the final decision maker may permit additional testimony in response to the prohibited
11 communication.

12 (h) If a presiding officer is a member of a multi-member body of individuals that is the
13 agency head, the presiding officer may communicate with the other members of the body when
14 sitting as the presiding officer and final decision maker. Otherwise, while a proceeding is
15 pending, there may be no communication, direct or indirect, regarding any issue in the
16 proceeding between the presiding officer and the agency head or other person or body to which
17 the power to hear or decide the proceeding is delegated.

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

23
24

1 **Comment**

2
3 This section is not intended to be applied to communications made by or to a presiding
4 officer or personal staff assistant regarding noncontroversial practice and procedure matters such
5 as number of pleadings, number of copies or type of service. Communications related to
6 contested procedural issues or motions are covered by Section 409(a). Other communications not
7 on the merits but related to security or to the credibility of a party or witness are covered by
8 Section 409(a). See *Matthew Zaheri Corp., Inc. v. New Motor Vehicle Board* (1997) 55 Cal.
9 App. 4th 1305. However, this section goes further in permitting advice to the presiding officer
10 from staff members on complex technical and scientific matters, but permits parties to reply to
11 those staff communications.

12
13 This section also provides another remedy besides disclosure and party reply. In a case
14 where disclosure and reply are inadequate to cure or eliminate the effect of the ex parte contact, a
15 protective order may be issued. The intent of authorizing the protective order is to keep the ex
16 parte material from the successor presiding officer.

17
18 This section draws in part from the systematic California provisions on ex parte contacts.
19 See West's Ann.Cal.Gov.Code Section 11430.10 to 11430.80. The California sections address
20 many of the problems that arise in this area, and attempt to distinguish technical, advisory
21 contacts from agency staff to presiding officers or agency heads from other kinds of party
22 contacts.

23 Under subsection (h) when the presiding officer is a member of a multimember body of
24 individuals that is the agency head, the members may communicate with each other for the
25 purpose of deciding the contested case before that body.

26
27 **SECTION 409. 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 under law other than this act to initiate or to
31 intervene in the proceeding in which intervention is sought; or

32 (2) the petitioner has an interest that may be adversely affected by the outcome
33 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 the petitioner has a
35 permissive statutory right under law other than this act to intervene or if the petitioner's claim or
36 defense is based on the same transaction or occurrence as the contested case.

37 (c) A presiding officer may impose conditions at any time upon the intervener's

1 participation in the proceedings.

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

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

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

9 **Comment**

10

11 Section 409 is based in part of 1981 MSAPA Section 4-209. See also Federal Rule of
12 Civil Procedure Rule 24 (intervention of right under Rule 24(a), and permissive intervention
13 under Rule 24(b)). Under subsection (a) a petition for intervention must be timely. Under
14 ordinary circumstances a timely petition would be filed far enough in advance of the contested
15 case hearing so that the intervenor would be able to prepare for that hearing, and the existing
16 parties would have time to respond to the intervenor's petition.

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 410. SUBPOENAS.**

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

33 (b) Unless otherwise provided by law or agency rule, a subpoenas issued under

1 subsection (a) shall be served and, upon application to the court by a party or the agency,
2 enforced in the manner provided by law for the service and enforcement of subpoenas in a civil
3 action.

4 **Comment**

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

7
8 Subsection (b) is based on Arizona administrative procedure act Section 41-1062A.4.

9
10 **SECTION 411. DISCOVERY.**

11 (a) In this section, “statement” includes a record of a person’s written statement signed
12 by a person and a record that summarizes an oral statement made by a person.

13 (b) Except in an emergency hearing under Section 408, a party, upon written notice to
14 another party at least [] days before an evidentiary hearing, and a showing of need unless
15 otherwise provided by agency rule may:

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

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

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

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

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

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

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

1 (F) other materials for good cause shown.

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

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

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

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

16 **Comment**

17
18 Discovery in administrative adjudication is more limited than in civil court proceedings.
19 Nevertheless discovery is available for the items listed in subsection (b). See California
20 Government Code Section 11507.6 to 11507.7 (discovery in administrative adjudication).Section
21 410 is based on Section 11507.6. 1981 MSAPA Section 4-210 also provides for discovery in
22 administrative proceedings. Discovery as provided for in Section 411 is not appropriate for all
23 agency administrative hearings. In high volume, short duration hearings such as unemployment
24 compensation hearings, no discovery is provided except for exchange of documents or witness
25 lists. Under subsection (b), agencies have the option of adopting rules governing the applicability
26 of the discovery provisions of section 411 to their agency hearings.

27

28 **SECTION 412. DEFAULT.**

29 (a) Unless otherwise provided by law other than this [act], if a party without good cause

1 fails to attend or participate in a prehearing conference or hearing in a contested case, the
2 presiding officer may issue a default order. If a default order is issued, the presiding officer may
3 conduct any further proceedings necessary to complete the adjudication without the defaulting
4 party and shall determine all issues in the adjudication, including those affecting the defaulting
5 party. A recommended, initial, or final order issued against a defaulting party may be based on
6 the defaulting party's admissions or other evidence that may be used without notice to the
7 defaulting party. If the burden of proof is on the defaulting party to establish that the party is
8 entitled to the agency action sought, the presiding officer may issue a recommended, initial, or
9 final order without taking evidence.

10 (b) Not later than [] days after the date of notifying a party subject to a default order that
11 a recommended, initial, or final order has been rendered against that party, that party may
12 petition the presiding officer to vacate the recommended, initial, or final order. If good cause is
13 shown for the party's failure to appear, the presiding officer shall vacate the decision and, after
14 proper service of notice, conduct another evidentiary hearing. If good cause is not shown for the
15 party's failure to appear, the presiding officer shall deny the motion to vacate.

16 **Comment**

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

22
23 Subsection (b) is based in part on 1981 MSAPA Section 4-208 and on California
24 Government Code Section 11520.

25
26 **SECTION 413. ORDERS: FINAL, RECOMMENDED, INITIAL.**

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

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

7 (c) A recommended, initial, or final order must be served in a record upon each party and
8 the agency head within 90 days after the hearing ends, the record closes, or memos, briefs, or
9 proposed findings are submitted, whichever is later. The time may be extended by stipulation,
10 waiver, or upon a showing of good cause.

11 (d) A recommended, initial, or final order must include separately stated findings of fact
12 and conclusions of law on all material issues of fact, law, or discretion, the remedy prescribed,
13 and, if applicable, the action taken on a petition for stay. At the discretion of the presiding
14 officer under Section 403(c), a party may submit proposed findings of fact and conclusions of
15 law. The order must also include a statement of the available procedures and time limits for
16 seeking reconsideration or other administrative relief, and a statement of the time limits for
17 seeking judicial review of the agency order. A recommended or initial order must include a
18 statement of any circumstances under which the order, without further notice, may become a
19 final order.

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

22 **Alternative A**

23 (e) Hearsay evidence may be used to supplement or explain other evidence, but on

1 timely objection, is not sufficient by itself to support a fact finding unless it would be admissible
2 over objection in a civil action.

3 **Alternative B**

4 (e) Hearsay evidence is sufficient to support fact findings if it constitutes reliable,
5 probative, and substantial evidence.

6 **End of Alternatives**

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

9 **Comment**

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

17
18 The third sentence of subsection (d) is taken from the 1961 MSAPA.

19
20 **SECTION 414. AGENCY REVIEW OF INITIAL ORDER.**

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

22 (b) A party may petition an agency head to review an initial order. Upon petition by a
23 party, the agency head may review an initial order, except as otherwise provided by law other
24 than this [act].

25 (c) A petition for review of an initial order must be filed with the agency head, or with
26 any person designated for this purpose by agency rule not later than [15] days after the initial
27 order is issued, or from the date that the parties are notified of the order, whichever is later. If
28 the agency head decides to review an initial order on its own motion, the agency head shall give

1 notice in a record of its intention to review the order within [15] days after it is issued, or the
2 parties are notified of the order, whichever is later.

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

10 (e) When reviewing an initial order, the agency head shall exercise all the decision-
11 making power that the agency head would have had if the agency head had conducted the
12 hearing that produced the order, except to the extent that the issues subject to review are limited
13 by a provision of law other than this [act] or by order of the agency head upon notice to all the
14 parties. In reviewing findings of fact in an initial order by the presiding officer, the agency head
15 shall consider the presiding officer's opportunity to observe the witnesses and to determine the
16 credibility of witnesses. The agency head shall consider the hearing record or parts that are
17 designated by the parties.

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

22 (g) A final order or an order remanding the matter for further proceedings must identify
23 any difference between the order and the initial order and must state the facts of record that

1 support any difference in findings of fact, the source of law that supports any difference in legal
2 conclusions, and the policy reasons that support any difference in the exercise of discretion.
3 Findings of fact must be based exclusively on the evidence in the hearing record in the contested
4 case and on matters officially noticed. A final order under this section must include, or
5 incorporate by express reference to the initial order, all the matters required by Section 413(d).
6 The agency head shall deliver the order to the presiding officer and all parties.

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

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

9 (b) When reviewing a recommended order, the agency head shall exercise all the
10 decision-making power that the agency head would have had if the agency head had conducted
11 the hearing that produced the order, except to the extent that the issues subject to review are
12 limited by a provision of law other than this [act] or by order of the agency head upon notice to
13 all the parties. In reviewing findings of fact in a recommended order by the presiding officer, the
14 agency head shall consider the presiding officer's opportunity to observe the witnesses and to
15 determine the credibility of witnesses. The agency head shall consider the hearing record or
16 parts that are designated by the parties.

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

21 (d) A final order or an order remanding the matter for further proceedings must identify
22 any difference between the order and the recommended order and must state the facts of record
23 that support any difference in findings of fact, the source of law that supports any difference in

1 legal conclusions, and the policy reasons that support any difference in the exercise of discretion.
2 Findings of fact must be based exclusively on the evidence in the hearing record in the contested
3 case and on matters officially noticed. A final order under this section must include, or
4 incorporate by express reference to the recommended order, all the matters required by Section
5 413(d). The agency head shall deliver the order to the presiding officer and all parties.

6 **Comment**
7

8 This section draws upon 1981 MSAPA, which reflects current practice in regard to
9 recommended orders, initial orders, final orders and review of final orders more accurately than
10 the 1961 MSAPA. Subsections (b) and (e) draw upon the Washington APA, West's RCWA
11 34.05.464, and the Kansas APA, K.S.A. § 77-527. The object of subsection (e) is to assure
12 agency head consideration of the issues tendered in the case.
13

14 **SECTION 416. RECONSIDERATION.**

15 (a) Any party, not later than [] days after the date of notification to the parties that a
16 final order has been issued, may file a petition for reconsideration that states the specific grounds
17 upon which relief is requested. The place of filing and other procedures, if any, must be
18 specified by agency rule and must be stated in the final order.

19 (b) If a petition for reconsideration is timely filed, and if the petitioner has complied with
20 an agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial
21 review does not begin until the agency disposes of the petition for reconsideration as provided in
22 Section 503(d).

23 (c) If a petition is filed under subsection (a), the decision maker shall issue a written
24 order not later than [20] days after the filing denying the petition, granting the petition and
25 dissolving or modifying the final order, or granting the petition and setting the matter for further
26 proceedings. If the decision maker does not respond to the petition within [30] days after filing,
27 or a longer period agreed to by the parties, the petition is deemed denied. The petition may be

1 granted only if the decision maker states findings of facts, conclusions of law, and the reasons for
2 granting the petition.

3 **Comment**

4 This section is based in part on the Washington APA, West's RCWA 34.05.470. This
5 section creates a general right to seek reconsideration of a recommended or final order.
6 Subsection (b) must be read concurrently with Section 507(d), which excuses exhaustion to the
7 extent that a provision of this [act] provides for excuse. See also 1981 MSAPA Section 4-218.
8

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

14 **Comment**

15 The 1961 MSAPA § 15 contained a provision for a stay. Stays are sometimes necessary
16 to preserve the status quo pending agency review or judicial review. This section is based in part
17 of 1981 MSAPA Section 4-217. The second sentence of this section is based on Section 705 of
18 the federal administrative procedure act.
19

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

21 (a) Except as otherwise provided in subsections (b) and (c), an agency shall create an
22 index of all final orders in contested cases and make the index and all final orders available for
23 public inspection and copying, at cost, in its principal offices.

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

27 (c) A final order may be excluded from an index and disclosure only by order of the
28 presiding officer with a written statement of reasons attached to the order. If the presiding

1 officer determines it is possible to redact a final order that is exempt, privileged, or otherwise
2 made confidential or protected from disclosure by [the public records law of this state] so that it
3 complies with the requirements of that law, the redacted order may be placed in the index and
4 published.

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

8 **Comment**
9

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

18
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
29 This section makes clear that the choice between rulemaking and adjudication is entirely
30 in the discretion of the agency. However, in order to prevent law to which the public does not
31 have access from constituting the basis for decision, final orders must be indexed and available
32 to the public. See also the California administrative procedure act at West’s Ann. Cal. Gov.
33 Code, § 11425.60

34
35 Most states have public records act that require disclosure of government documents and
36 records to the public unless particular documents are exempt from disclosure under that act.
37 Subsection (b) refers to those acts, and to exempt decisions under those acts.
38

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 to the extent that a statute other than this act limits or precludes judicial
11 review, a person who meets the other requirements of this [article] is entitled to judicial review
12 of a final agency action.

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

17 Comment

18 Subsection (a) of this section provides a right of judicial review of final agency action by
19 appropriate parties. Under this section, the person seeking review must meet all of the
20 requirements of this article, which include standing, exhaustion of remedies, and time for filing.
21 The definition of “agency action” is found in Section 102. This section is similar to the judicial
22 review provisions of Florida (West’s F.S.A. Section 120.68), Iowa (I.C.A. Section 17A.19),
23 Virginia (Va. Code Ann. Section 2.2-4026) and Wyoming (W.S.1977 Section 16-3-114). Agency
24 failure to act is not judicially reviewable unless agency action is unlawfully withheld or
25 unreasonably delayed. This provisions is based on the federal A.P.A., 5 U.S.C. Section 706(1).
26

27 Subsection (a) also defines final agency action. The definition used here is found in state
28 and federal cases. See State Bd. Of Tax Comm’rs v. Ispat Inland, 784 N.E.2D 477 (Ind., 2003);
29 District Intown Properties v. D.C. Dept. Consumer and Regulatory Affairs, 680 A.2d 1373 (Ct.

1 App. D.C. 1996); Texas Utilities Co. v. Public Citizen, Inc, 897 S.W.2d 443 (Tex. App. 1995);
2 Bennet v. Spear, 520 U.S. 154, 117 S.Ct. 1154 (1997); Mobil Exploration and Producing Inc. v.
3 Dept. Interior, 180 F.3d 1192, 1197 (10th Cir. 1999).

4
5 Subsection (c) creates a limited right to review of non-final agency action.

6
7 **SECTION 502. RELATION TO OTHER JUDICIAL REVIEW LAW AND**
8 **RULES.**

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

12 (b) This [article] does not limit utilization of or the scope of judicial review available
13 under other means of review, redress, relief, or trial de novo provided by a statute other than this
14 [act]. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is
15 available under this [article] or under law other than this act, final agency action is subject to
16 judicial review in civil or criminal proceedings for judicial enforcement

17 **Comment**

18
19 This section places appeals from final agency action within the existing state rules of
20 appellate procedure. Such action may be preferred by some states because of constitutional
21 provisions or because of the existence of rules of appellate procedure that the legislature may not
22 wish to change. This practice was followed under the 1961 MSAPA, and is followed in a
23 number of states today. See e.g.: Alaska (AS 44.62.560), California (West's Ann.Cal.Gov.Code
24 Section 11523), Delaware (29 Del.C. Section 10143), Florida (West's F.S.A. Section 120.68),
25 Iowa (I.C.A. § 17A.20), Michigan (M.C.L.A. 24.302), Minnesota (M.S.A. § 14.63) (Appeal
26 integrated with state appellate rules), Virginia (Va. Code Ann. Section 2.2-4026), Wyoming
27 (W.S.1977 § 16-3-114).

28
29 Subsection (b) is based on Section 15a of the 1961 MSAPA.

30
31 **SECTION 503. TIME FOR SEEKING JUDICIAL REVIEW OF AGENCY**
32 **ACTION; LIMITATIONS.**

33 (a) Judicial review of a rule on the ground of noncompliance with the procedural

1 requirements of this [act] must be commenced not later than [two] years after the effective date
2 of the rule. Judicial review of a rule or guidance document on other grounds may be sought at
3 any time.

4 (b) Judicial review of an order or other final agency action other than a rule or guidance
5 document must be commenced not later than [30] days after the date the parties are notified of
6 the order or other agency action.

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

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

13 **Comment**

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

19
20 **SECTION 504. STAYS PENDING APPEAL.** A petition for judicial review does not
21 automatically stay an agency decision. An appellant may petition the reviewing court for a stay
22 upon the same basis as stays are granted under the rules of [appellate] [civil] procedure [of this
23 state], and the reviewing court may grant a stay regardless of whether the appellant first sought a
24 stay from the agency.

25 **Comment**

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

1 Section 5-111.

2

3

SECTION 505. STANDING.

4

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

5

action:

6

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

7

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

8

9

Comment

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

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

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

26

27

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29

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

30

SECTION 506. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

31

(a) Subject to subsection (d) or a statute of this state other than this [act] which provides

32

that a person need not exhaust administrative remedies, a person may file a petition for judicial

33

review under this [act] only after exhausting all administrative remedies available within the

34

agency the action of which is being challenged and within any other agency authorized to

35

exercise administrative review.

36

(b) Filing a petition for reconsideration or a stay of proceedings is not a prerequisite for

1 seeking judicial review.

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

4 (d) The court may relieve a petitioner of the requirement to exhaust any or all
5 administrative remedies to the extent the administrative remedies are inadequate or would result
6 in irreparable harm.

7 **Comment**
8

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

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

25 (a) Judicial review of adjudication and rulemaking is confined to the agency record or
26 matters arising from the record except when the party seeking judicial review makes allegations
27 of procedural error arising from matters outside the agency record or as necessary to avoid
28 manifest injustice.

29 (b) In an adjudication that is not a contested case, judicial review is based on the hearing
30 record in informal adjudication [governed by Section 421].

31 **Comment**
32

33 This section establishes a default closed record for judicial review of adjudication and

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

7
8 The section contains an exception to the closed record on review where petitioner alleges
9 error, such as ex parte contacts, that does not appear in or is not evident from the record. Other
10 examples of error that do not appear or are not evident from the record are: improper constitution
11 of the decision making body, grounds for disqualification of a decision maker, or unlawful
12 procedure. However, the standard for opening the record on appeal is high.

13
14 **SECTION 508. SCOPE OF REVIEW.**

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

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

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

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

22 (A) the agency erroneously interpreted the law;

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

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

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

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

30 (b) In making determinations under this section, the court shall review the whole agency

1 record, or the parts designated by the parties and shall take due account of the rule of harmless
2 error.

3 **Comment**

4
5 One view is that scope of review is notoriously difficult to capture in verbal formulas,
6 and its application varies depending on context. For that reason, some members urge return to
7 shorter, skeletal formulations of the scope of review, similar to the 1961 MSAPA. See Ronald
8 M. Levin, *Scope of Review Legislation*, 31 *Wake Forest L. Rev.* 647 (1996) at 664-66. William
9 D. Araiza, *In Praise of a Skeletal APA*, 56 *Admin. L. Rev.* 979 (2004). (Judiciary, not
10 legislature, appropriate body to evolve specific standards for review, because of great variety of
11 agency action and contexts, and inability to describe how general standards of review should
12 apply to many of them). Alternative 1 reflects this view.

13
14 The other view is that judicial review is sometimes almost perfunctory, and more detailed
15 standards will result in closer judicial scrutiny. A related view strongly argued in drafting
16 committee meetings was that scope of review is a device by which the judiciary assists the
17 legislature to keep the agencies within the bounds set by the legislature, helps to assure agency
18 action consistent with the intent of the legislature, and protects citizens from agency error. More
19 detailed scope of review provisions also make the task of the judiciary easier because they
20 provide clearer instructions from the legislature about how to review agency decisions. More
21 detailed scope of review provisions lead to more intense judicial review, and that is an approach
22 that legislatures welcome for the same reason that they have embraced regulatory review: it
23 controls agency action. Alternative 2, which draws heavily on the Iowa provisions on scope of
24 review (I.C.A. 17. A.19(10)), represents this position.

25
26 Judicial review is essential and exists in all states. Subsections (a) (1) & (2) describe the
27 general burdens on the appellant and the approach under this Act. They are substantially similar
28 to the general scope of review provisions of the Federal APA, 5 U.S.C. Section 706.

29
30 Subsections (a)[(3) alternative 1](A) & (B) identify the courts' power to decide questions
31 of law and procedure. Subsection (a)[(3) alternative 1](A) includes, but is not limited to,
32 violations of constitutional or statutory provisions and actions that are in excess of statutory
33 authority from Section 15(g) of the 1961 MSAPA, and includes subsections (c) (1), (2) and (4) of
34 the 1981 MSAPA. The section thus includes challenges to the facial or applied constitutionality
35 of a statute, challenges to the jurisdiction of the agency, erroneous interpretation of the law, and
36 may include erroneous application of the law. This section is not intended to preclude courts
37 from according deference to agency interpretations of law, where such deference is appropriate.
38

1 [ARTICLE] 6

2 OFFICE OF ADMINISTRATIVE HEARINGS

3 SECTION 601. CREATION OF OFFICE OF ADMINISTRATIVE HEARINGS.

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

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

9 Comment

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

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

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

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

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

28 (d) A chief administrative law judge:

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

1 office;

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

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

6 **Comment**

7 Section 602 is based upon Section 1-4 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 603. ADMININSTRATIVE LAW JUDGES; APPOINTMENT;**
12 **QUALIFICATIONS, DISCIPLINE.**

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

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

18 (c) An administrative law judge:

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

21 (2) is subject to the code of conduct for administrative law judges adopted
22 pursuant to Section 604(7);

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

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

26 (d) An administrative law judge:

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

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

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

6 (4) is subject to a reduction in force in accordance with the [state merit system
7 law].

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

11 **Comment**

12
13 Section 603 is based upon Sections 1-2(b), and 1-6 of the Model Act Creating a State
14 Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates
15 of the American Bar Association (February 2, 1997).

16 17 **SECTION 604. CHIEF ADMINISTRATIVE LAW JUDGE; POWERS; DUTIES.**

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

20 (1) shall supervise and manage the office;

21 (2) shall assign administrative law judges in any case referred to the office ;

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

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

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

- 1 (6) shall adopt rules pursuant to this [act] to implement this [article];
2 (7) shall adopt a code of conduct for administrative law judges;
3 (8) shall monitor the quality of adjudications conducted by administrative law judges;
4 (9) shall discipline [pursuant to the [state merit system law] administrative law judges
5 who do not meet appropriate standards of conduct and competence;
6 (10) may accept grants and gifts for the benefit of the office; and
7 (11) may contract with other public agencies for the services of the office.
8

9 **Comment**

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

14 **SECTION 605. COOPERATION OF AGENCIES.**

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

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

19 **Comment**

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

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

28 (a) [Except as otherwise provided in subsection (d), unless] [Unless] [the agency head
29 elects to conduct the hearing, in which case the agency head shall render a final order under

1 Section 413(a), in a contested case,] an administrative law judge shall be assigned to be the
2 presiding officer. The administrative law judge shall issue a recommended or initial order to the
3 agency head in the contested case pursuant to Section 413.

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

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

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

13 **Comment**

14
15 Section 606(b) is based upon Section 1-10(c) of the Model Act Creating a State Central
16 Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the
17 American Bar Association (February 2, 1997).

18
19

1 [ARTICLE] 7

2
3 RULES REVIEW

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

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

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

14 SECTION 702. REVIEW BY [RULES REVIEW COMMITTEE].

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

18 (b) The [rules review committee] may examine rules in effect and newly adopted rules to
19 determine whether the:

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

21 (2) statutory authority for the rule has expired or been repealed;

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

24 (4) rule is a reasonable implementation of the law as it applies to any affected
25 class of persons; and

26 (5) agency complied with the regulatory analysis requirements of Section 305
27 and the analysis properly reflects the effect of the rule.

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

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

4 (d) The [rules review committee]:

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

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

7 **Comment**

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

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

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

21 (1) approve the adopted rule;

22 (2) disapprove the rule and propose an amendment to the adopted rule; or

23 (3) disapprove the adopted rule.

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

27 (c) If the [rules review committee] proposes an amendment to the adopted rule under
28 subsection (a)(2), the agency may make the amendment and resubmit the rule, as amended, to the
29

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

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

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

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

23
24 *State constitutions vary as to whether or not a joint resolution is a valid way of*
25 *disapproving an agency rule. In some states, the legislature must use the bill process with*
26 *approval by the governor. In other states the joint resolution process is proper. States should use*

1 *the alternative that complies with their state constitution. State constitutions vary on the federal*
2 *constitutional issue decided by the U.S. Supreme Court in I.N.S. v. Chadha (1983) 462 U.S. 919,*
3 *103 S.Ct. 2764. The U.S. Supreme Court held that the one house legislative veto provided for in*
4 *section 244(c)(2) violated the Article I requirement that legislative action requires passage of a*
5 *law by both houses of congress (bicameralism) and presentation to the president for signing or*
6 *veto (presentation requirement). Those state constitutions that require presentation to the*
7 *governor need an additional step, presentation of the joint resolution to the governor for*
8 *approval or disapproval. With state constitutions that do not require presentation to the*
9 *governor the rules review process can be completed with legislative adoption of a joint*
10 *resolution.*

11 **Comment**

12
13
14 This is a type of veto that provides for cooperation between the Legislature and the
15 Governor, and attempts to avoid the I.N.S. v. Chadha (1983) 462 U.S. 919, 103 S.Ct. 2764.
16 problem of unconstitutionality by delaying the effective date of the rule until the legislature has
17 the opportunity to enact legislation to annul or modify it. The governor may veto the act by
18 which the legislature seeks to annul or modify the rule. This type of veto provision is widely
19 used in the states. For disapproval of a rule to be effective, the legislature as a whole must adopt
20 a joint resolution, and in many states the governor must be presented with the joint resolution for
21 approval or disapproval. While the rules review committee can recommend disapproval, the
22 committee recommendation must be approved by the legislature by joint resolution. In some
23 states, the legislature must comply with the legislative process for enacting a bill including
24 presentation to the governor to exercise the power of legislative veto over an agency regulation.
25 In at least one state use of a joint resolution without the governor's participation violates the state
26 constitution. State v. A.L.I.V.E. Voluntary (Alaska, 1980) 606 P.2d 769. The rules review
27 committee has the power to temporarily suspend an agency rule pending enactment of a
28 permanent suspension by action of both houses of the state legislature, and presentation to the
29 governor. Martinez v. Department of Industry, Labor, & Human Relations (Wisconsin, 1992)
30 165 W.2d 687, 478 N.W.2d 582 (temporary suspension statute held not to violate state
31 constitution separation of powers doctrine).
32

1 [ARTICLE] 8

2 APPLICABILITY; EFFECTIVE DATE

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

8 Comment

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

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

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

- 22 (a) [the 1961 Model State Administrative Procedure Act]
- 23 (b) [the 1981 Model State Administrative Procedure Act]
- 24 (c)

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