2410.03 Administrative Procedures Act

Issued: January 1, 1994
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PURPOSE

To ensure consistent application of the requirements of the Act.

APPLICATION

Executive Branch Departments and Sub-units.

CONTACT AGENCY

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SUMMARY

The Administrative Procedures Act ("Act" or APA), Public Act 306 of 1969, MCL 24.201 et seq., addresses the effect, processing, promulgation, publication, and inspection of state agency determinations, guidelines, and rules. It also provides for publication and dissemination of the Michigan Register, the conduct of administrative hearings, and related matters.

The Act contains many specific provisions. This description covers guidelines, form contracts, rules and regulations, and administrative hearings, which are the basic items most applicable to state agency operations. Specifically excluded from this discussion are those provisions in MCL 24.275a governing hearings where the witness testifies as an alleged victim of sexual, physical, or psychological abuse, and MCL 24.315, setting out exemptions from the application of the Act. However, one should refer to the statute and consult with the Attorney General regarding interpretation or application of those provisions in a particular instance. This section is intended to be informational and advisory only and does not supersede any provision of the APA or other controlling statute or legal authority.

APPLICABLE FORMS

Request for Rulemaking

Regulatory Impact Statement Form & Cost Benefit Analysis

Notice of Public Hearing

Joint Committee on Administrative Rules Report

Instruction A: Guidelines

A guideline is an agency statement or declaration of policy that is binding only on the agency and does not have the force or effect of law. Before it can be adopted, notice of the proposed guideline must be given to all of the following:

- Joint Committee on Administrative Rules (the Committee), which in turn shall provide electronic notice of the proposed guideline, no later than the business day after its receipt, to the members of the Committee and to the members of the House and Senate standing committees that deal with the subject matter of the proposed guideline.
- Michigan Office of Administrative Hearings and Rules (MOAHR).
- Each person who requested the agency in writing or electronically for advance notice of a proposed action that might affect the person.

Notices are to be given electronically to the Committee, MOAHR, and to any member of any executive or legislative agency. Notice to other persons who requested notice of a change that might affect that person shall be given by mail or electronically transmitted to the person at the last address provided by the person to the agency. Requests for notice are renewable each December. Each notice must contain:

- A statement of the terms or substance of the proposed guideline.
- A description of the subjects and issues involved.
- The proposed effective date of the guideline.
- A statement that the addressee may express any views or arguments regarding the proposed guideline or the guideline's effect on a person.
- The address to which written comments may be sent.
- The date by which comments shall be mailed or electronically transmitted, which shall not be less than 35 days from the mailing or electronic transmittal of the notice.
- A reference to the specific statutory provision as to which the proposed guideline states a policy.

When a guideline has been adopted, it is a public record. Copies of the guideline must be given to all of the following:

- The Committee.
- MOAHR.
- Each person who requested the agency in writing for notice of a proposed action that might affect them.

Guidelines may not be adopted in lieu of a rule.

Guidelines adopted after December 22, 1986 are not valid unless processed in accordance with the requirements of the Act, except if the guideline was

otherwise processed appropriately, inadvertent failure to provide notice to a person who requested advance notice does not invalidate the guideline.

Proceedings to contest a guideline on the grounds that the promulgating procedures were not followed must be initiated within 2 years after the effective date of the guideline.

Instruction B: Standard Form Contracts

A standard form contract is generally exempt from rulemaking requirements, but there are procedural requirements for their adoption. The agency must give electronic notice of the proposed standard form contract or policy to MOAHR and to the Committee; the Committee, in turn, shall forward electronic copies of this notice in the same manner as it would notice of a guideline, as described above. The electronic notice shall contain the following:

- A statement of the substantive terms of the proposed standard form contract or policy, a description of the subjects and issues it involves, and its proposed effective date.
- A statement that the recipient may express any views regarding the proposed standard form contract or policy or on its effect on a person.
- The address to which comments are to be sent and the date by which they must be mailed or electronically submitted, which shall be at least 35 days from the transmittal of the notice.
- An electronic copy of the proposed standard form contract, if the proposed contract has a value of 10 million dollars or more. If the value of the proposed standard form contract is less than 10 million dollars, a paper or electronic copy shall be provided to any legislator requesting one.

Instruction C: Rules

General Information

- Rules must be promulgated in accordance with the requirements of the APA.
- A rule is any agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies laws that an agency enforces or administers, or which prescribes the organization, procedure, or practice of any agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency, and which was not in effect before July 1, 1970.
- There are a variety of exceptions that can be found in the definition of “Rule” in the Act’s Glossary (MCL 24.207).
- Rules, or exceptions to rules, may not discriminate in favor of or against any person.
- Persons affected by rules are entitled to the same benefits as any other persons under the same or similar circumstances.

- An agency cannot create a criminal violation or penalty by rule, but violation of a rule is a crime if provided by a statute.
- Generally applicable statutory definitions and rules of construction apply to a rule, unless the rule clearly states otherwise.
- Rescission of a rule does not revive a previously rescinded rule.
- The amendment or rescission of a valid rule does not defeat or impair a right accrued, or affect a penalty incurred, under the rule.
- Except in cases of amendments of rules regarding inmates, a rule may be amended or rescinded in another rule which constitutes the whole or a part of a filing of rules, or as a result of an Act of the Legislature.
- An agency may adopt by reference in its rule, without publishing the adopted matter in full, all or part of a code, standard, or regulation that has been adopted by an agency of the United States or by a nationally recognized organization or association.
    - The reference shall identify fully the adopted matter, by date and other identifying information, and is not to cover any subsequent amendments or additions.
    - Subsequently amended materials must be adopted by the agency in the same manner as was the original material.
    - The agency must have copies of the adopted matter available for inspection and distribution to the public at cost, and the rule shall state where copies of the matter may be obtained from the agency and from the agency or national organization or association, and its cost as of the time of the adoption of the rule.

Rules Regarding Agency Organization and Procedures

- An agency shall promulgate rules describing the agency's organization, including the general course and method of its operations, which may include relevant forms and instructions. Rules of this type are, pursuant to MCL 24.233(1), exempt from the usual notice and public hearing requirements of the Act.
- An agency shall promulgate rules describing agency procedures available to the public, and the ways in which the public may obtain information and submit requests.
- An agency may promulgate rules prescribing procedures for contested case hearings, so long as they are not inconsistent with the provisions of the Act or other applicable statutes.

Requests to an Agency to Promulgate a Rule

- Within 90 calendar days of the filing of a request by an individual, the agency must either:
    - Initiate processing of a rule, or

- Issue a concise statement of its principal reasons for denying the request.
    - The denial is not subject to judicial review.

Adoption of a Rule

- Before initiating changes or additions to rules, an agency must electronically file a request for rulemaking (RFR) with MOAHR in a format prescribed by MOAHR and the request must contain the following:
    - The state or federal statutory or regulatory basis for the rule.
    - The problem the rule intends to address.
    - An assessment of the significance of the problem being addressed.
    - If applicable, the decision record (described below).
- If an agency receives recommendations or comments by an advisory committee or entity created by statute regarding a RFR, the advisory committee or entity shall issue a decision record to the agency.
- The agency shall not proceed with processing a rule unless MOAHR approves the request.
- MOAHR shall record all RFRs on the internet and make electronic or paper copies of approved RFRs available to the public on request.
- MOAHR shall:
    - Immediately make electronic copies of RFRs submitted to it available to the Committee.
    - Every week, electronically provide the Committee a list of all RFRs it has approved or denied that week.
    - Mail or electronically transmit a copy of the proposed rule or rule change to any legislator who annually sends MOAHR a written or electronic request for such copies.
- The Committee shall electronically provide copies of approved and denied RFRs by the next business day after it receives them to members of the Committee and to members of House and Senate committees dealing with the subject matter of the proposed rule.
- MOAHR, upon granting approval to hold a public hearing on a rule, shall immediately provide copies of the proposed rules to the Committee, which in turn shall provide copies no later than the next business day to its members and to members of the House and Senate committees dealing with the subject matters of the rules.

Notice Process

- Before a rule is adopted, an agency must give notice of a public hearing and provide persons with the opportunity to present data, views, questions, and arguments. Notice of public hearing shall not be published until MOAHR gives the agency approval to proceed with a public hearing.

- Notice must be published in the following manner, unless otherwise provided by statute:
    - Published not less than 10 days and not more than 60 days before the date of the public hearing, in at least three newspapers of general circulation in different parts of the state, one of which shall be in the Upper Peninsula.
    - Employ additional methods, as appropriate, including publication in trade, industry, governmental, or professional publications, or posting on the MOAHR or agency website. These methods may be employed by the agency or by MOAHR.
    - Electronically submit a copy of the notice to MOAHR for publication in the Michigan Register, which shall be published before the public hearing.
    - Within 7 days of receiving the notice, MOAHR shall electronically transmit a copy of the notice to the Committee, and electronically provide notice through publicly-accessible internet media.
    - By the next business day after receiving the notice, the Committee shall electronically transmit copies of the notice to each of its members and to members of the House and Senate standing committees dealing with the subject of the rule. The Committee may then meet to consider the proposed rule, take testimony, and give the agency the Committee's informal response to it.
- The notice must contain:
    - A reference to the statutory authority under which the rule is proposed.
    - The time and place of the public meeting.
    - A statement of the manner in which data, views, questions, and arguments may be submitted to the agency at a time other than the public hearing.
    - A statement of the terms or substance of the proposed rule.
    - A description of the subjects and issues involved.
    - The proposed effective date of the rule.
- The agency or MOAHR shall send, by mail or electronically, a copy of the hearing notice to any person who has requested (electronically or in writing) advance notice of any proposed action that may affect the person, at the person's last known address.
- Conformity with notice requirements is not required for a rule that the Legislative Service Bureau states, in its certificate of approval of the rule, is (1) an amendment or rescission of an obsolete or superseded rule, or (2) obviously needed to conform to a new or amended statute, or (3) some other purely formal purpose.

- Conformity with notice requirements is also not required for a state OSHA rule that is substantially identical to a federal OSHA rule, as determined by MOAHR. However, notice of such a proposed rule shall be published in the Michigan Register at least 35 days before the rule is filed with the Secretary of State, and written or electronic comments on it may be submitted within a reasonable period (of 21 days or less) after publication.
- Otherwise, if the notice requirements are not followed, the rule is not valid, unless it is an emergency rule. A proceeding to challenge a rule based on noncompliance with the notice requirements must be brought within 2 years after the rule's effective date.

Public Hearing

- The public hearing must comply with any applicable statute, but is not subject to the provisions regarding contested case hearings.
- The head of the promulgating agency, or one or more persons designated by the head who have knowledge of the subject matter of the hearing, shall be present at the public hearing and shall participate in discussion of the proposed rule.
- At least 28 days before the public hearing is held, the agency must electronically transmit a regulatory impact statement (described below) to MOAHR, and MOAHR must review and approve the statement. The agency shall also electronically transmit a copy of the statement to the Committee before the hearing, and must make copies of it available to the public at the public hearing.
- The agency shall publish the regulatory impact statement on its website not less than 10 days before the date of the public hearing.

Legislative Service Bureau

- The proposed rule must be approved by the Legislative Service Bureau and MOAHR.
    - The rule must be submitted by MOAHR to the Legislative Service Bureau electronically.
    - The Legislative Service Bureau shall promptly issue a certificate of approval indicating whether the proposed rule is proper in all matters of form, classification, and arrangement.
    - If the Legislative Service Bureau does not issue the certificate of approval within 21 calendar days after its submission for formal certification, MOAHR may issue a certificate of approval of the rule. However, if the Legislative Service Bureau returns the proposed rule to the agency within 21 days of receipt, the 21-day period is tolled until the rule is resubmitted by the agency; the Legislative Service Bureau then has either 6 calendar days or the remainder of the 21-day period, whichever is longer, in which to consider the rule's formal certification.

- MOAHR may approve the proposed rule if it determines it to be legal.

Agency Report

- After the various notices have been provided and before adopting the rule, the agency must prepare and submit to MOAHR an agency report containing a synopsis of comments in the public hearing record, a copy of a regulatory impact statement (as described below), and a description of any changes the agency made to the proposed rule after the agency hearing. Limited exceptions to this requirement, including emergency rules, are set out in MCL 24.245(6).
- MOAHR shall then transmit the following to the Committee by notice of transmittal and electronically:
  - Copies of the proposed rule.
  - A copy of the RFR.
  - A copy of the regulatory impact statement.
  - A copy of the JCAR Report, and
  - Certificates of approval from the Legislative Service Bureau and MOAHR.

Small Business and Regulatory Impact Statement

There are special requirements for reducing any disproportionate impact a rule may have on a small business, unless the rule is required by federal law. These requirements are set out in MCL 24.240. “Small business” is defined in MCL 24.207a.

As set forth in MCL 24.245(3), the regulatory impact statement must contain all of the following information:

- A comparison of the proposed rule to any existing parallel federal rules or standards set by a state or national licensing agency or accrediting association.
- If requested by MOAHR or the Committee, a comparison of the proposed rules to standards in similarly situated states, based on geographic location, topography, natural resources, commonalities, or economic similarities.
- Identification of the behavior the rule is designed to change and the frequency of such behavior.
- Identification of the harm that results from such behavior and the likelihood that it will occur unless the rule is adopted.
- An estimate of the change in the frequency of such behavior that the rule is expected to accomplish.
- An identification of the businesses, groups, or individuals who will be directly affected by the rule, bear its costs, or directly benefit from it.

- An identification of any reasonable alternatives to the rule that could achieve its objectives.
- A discussion of the feasibility of establishing a regulatory program similar to that proposed in the rule that would operate through market-based mechanisms.
- An estimate of the cost of the rule imposition on the agency proposing the rule.
- An estimate of the actual statewide compliance costs on individuals of the proposed rule.
- An estimate of the actual statewide compliance costs on businesses and other groups of the proposed rule.
- An identification of any disproportionate impact the rule may have on small businesses because of their size.
- An identification of the nature and estimated cost of reports compliance with the rule will require small businesses to prepare.
- An estimate of the cost of compliance for all small businesses affected by the proposed rule, including costs of equipment, supplies, labor, and increased administrative costs.
- An identification of the nature and estimated costs of any legal consulting and accounting services compliance with the rule will require small businesses to incur.
- An estimate of the ability of small businesses to absorb any costs the rule will entail without suffering economic harm and without adversely affecting market competition.
- An estimate of the cost, if any, to the agency of administering or enforcing a rule that exempts or sets lower compliance standards for small businesses.
- An identification of the impact on the public interest of an exemption or lower compliance standards for small businesses.
- A statement describing how the agency reduced the economic impact of the rule on small businesses or explaining why such a reduction was not feasible.
- A statement describing whether and how the agency involved small businesses in the development of the rule.
- An estimate of the primary and direct benefits of the rule.
- An estimate of any cost reductions to businesses, individuals, groups of individuals, or government units of the rule.
- An estimate of any revenue increases to state or local government units from the rule.
- An estimate of any secondary or indirect benefits of the rule.

- An identification of sources the agency relied on in compiling the regulatory impact statement.
- A detailed recitation of the efforts of the agency to comply with the mandate to reduce the disproportionate impact of the rule on small businesses.
- Any other information required by MOAHR.

The Committee shall electronically transmit to the Senate and House fiscal agencies copies of every rule and regulatory impact statement filed with it, as well as an agenda of proposed rules the Committee is to consider. The fiscal agencies shall analyze each rule for fiscal implications that would result in additional appropriations in the current fiscal year or commit the Legislature to an appropriation in a future fiscal year. The fiscal agencies shall electronically transmit these findings to the Committee and to the Senate and House appropriations committees before the date on which the Committee considers the rule.

The Joint Committee on Administrative Rules (the Committee)

Structure

- The Committee consists of five members of the Senate and five members of the House of Representatives, appointed in the same manner as standing committees are appointed, for terms of 2 years.
- Three members from each house shall be of the majority party and two from the minority party.
- The chairperson alternates between houses each year.
- Members serve without compensation, but do receive reimbursement for relevant expenses.
- The Committee is to report its activities and recommendations to the Legislature at each regular session.

Procedures

- Action taken by the Committee shall be by concurring majorities of the members of each house.
- The Committee may hold hearings on rules transmitted to the Committee, any rule previously filed with the Secretary of State, or any matter the Committee considers appropriate. If it does so, it shall electronically notify the chair of the House and Senate standing committees that deal with the subject of the rule, and all of the members of these committees may participate in the hearings. The chair or a designated member of the standing committee should attend the hearing, but the absence of this person does not affect the validity of the hearing.
- The Committee must notify the appropriate standing committee of each house when rules have been transmitted to it by the Secretary of State.

Review of Rules

- The Committee has 15 session days (defined as a day in which both the House of Representatives and Senate convene in session and a quorum is recorded) after receipt of a notice of transmittal from MOAHR (described above) to consider the rule. It may, by a concurrent majority, waive the remaining session days and, if so, its clerk shall promptly send MOAHR electronic notice of the waiver.
- During these 15 session days, the Committee may do one of the following:
    - Object to the proposed rule by filing a notice of objection with MOAHR that is approved by a concurrent majority of Committee members.
    - Propose that the rule be changed.
    - Introduce bills under MCL 24.245a(5) to enact the subject of the rule into law.
    - Waive any remaining session days. The Committee must promptly notify MOAHR of the waiver by electronic transmission.

Objection

- The Committee may approve a notice of objection only if it determines, by concurrent majority, that one or more of the following conditions exists:
    - The agency lacks statutory authority for the rule.
    - The agency is exceeding the scope of its rulemaking authority.
    - A public health, safety, or welfare emergency warrants disapproval of the rule.
    - The rule conflicts with state law.
    - Circumstances have changed substantially since the enactment of the law on which the rule is based.
    - The rule is arbitrary or capricious.
    - The rule is unduly burdensome to the public or to a licensee licensed by the rule.
- If the Committee does not file a notice of objection, propose that the rule be changed, or decide to introduce bills under MCL 24.245a(5) within the 15 session days, or if it waives this time period by concurrent majority:
    - MOAHR may immediately file the rule, along with the required certificate of approval, with the Secretary of State. The rule shall then immediately take effect, unless the rule itself sets a later date for it to take effect.

- If the Committee files a timely notice of objection to the proposed rule:
    - A member of the Committee shall cause bills to be introduced simultaneously in both chambers of the Legislature, and each chamber shall then place the bill or bills directly on its calendar. The bill or bills must contain one or more of the following:
        - A rescission of a rule on its effective date.
        - A repeal of the statutory provision under which the rule was authorized.
        - A stay of the effective date of the rule for up to one year.
- If a notice of objection to the rule is filed, MOAHR is stayed from filing the rule with the Secretary of State until the earlier of the following dates:
    - Fifteen session days after the filing of the notice of objection, or
    - A rescission of the notice of objection, approved by a concurrent majority of members of the Committee; if this occurs, the clerk of the Committee shall promptly send MOAHR electronic notice of the rescission.
- If the bill filed pursuant to the notice of objection is defeated by either chamber of the Legislature and is not reconsidered pursuant to the rules of the chamber, or if the bill is not passed by both houses within 15 session days, MOAHR may file the rule with the Secretary of State, at which point the rule takes immediate effect, unless the rule itself specifies a later date.
- If the Legislature does enact the bill embodying the notice of objection and transmits it to the Governor within the 15 session days, the rule does not become effective unless the Governor vetoes the bill.
- If the Governor vetoes the bill, MOAHR may file the rule immediately, and it takes effect 7 days after its filing, unless the rule itself sets a later effective date.
- Failure of the Committee to send out the notices provided for in the APA does not invalidate a rule, guideline, or standard form contract.

Decide to Introduce Bills Under MCL 24.245a(5)

- As soon as the bills have been prepared, the Committee chair and alternate chair shall introduce or cause to be introduced in both chambers of the Legislature bills to enact into law the subject of the proposed rule. The Legislative Service Bureau shall give priority to the preparation of the bills.

- If the Committee introduces bills under subsection (5), MOAHR shall not file the rule with the Secretary of State until 270 days after the bills are introduced.
- If the bill filed pursuant to subsection (5) is defeated by either chamber of the Legislature and is not reconsidered pursuant to the rules of the chamber, or if the bills are not adopted by both chambers within 270 days, MOAHR may file the rule with the Secretary of State. The rule takes effect immediately on being filed with the Secretary of State unless a later date is specified in the rule.
- If the Legislature does enact the bill introduced under subsection (5) and it is presented to the Governor within the 270 days, the rule does not take effect unless the bill is vetoed by the Governor. If the Governor vetoes the legislation, MOAHR may immediately file the rule with the Secretary of State, and it takes effect 7 days after filing unless a later date is specified in the rule.

Withdrawal of a Rule

- An agency may withdraw a proposed rule from the Committee under one of the following conditions:
  - With permission of the Committee chair and alternate chair, the agency may withdraw the rule to change the rule and resubmit it as changed. If permission to withdraw is granted, the 15-session-day period is tolled until the rule is resubmitted. The Committee must have at least 6 session days after resubmission to consider the resubmitted rule. If necessary, the 15-session-day review period is extended to give the Committee the 6 days.
  - Without permission of the Committee chair and alternate chair, the agency may withdraw the rule to change the rule and resubmit it as changed. A new 15-session-day review period begins when the rule is resubmitted as changed to the Committee.
- On even-numbered years, agencies must withdraw any rules pending before the Committee at the final adjournment of regular session and resubmit the rule. A new 15-session-day review period begins on resubmission of the rule to the Committee.

Promulgation of a Rule

- To promulgate a rule, MOAHR shall file three copies of the rule with the Secretary of State bearing the required certificates of approval and adoption, true copies of the rule without the certificates, and one electronic copy.
- Except for emergency rules and other rules as to which limited exceptions are set out in MCL 24.246(1), MOAHR shall not file a rule

with the Secretary of State until the time periods for Committee and legislative consideration set out above have elapsed.

- Filing of a rule pursuant to the APA raises a rebuttable presumption that the rule was adopted, filed with the Secretary of State, and made available for public inspection, as required by the APA.
- Publication of a rule in the Michigan Register, the Michigan Administrative Code, or the annual supplement to the Code, raises a rebuttable presumption that:
    - The rule was adopted, filed with the Secretary of State, and made available for public inspection, as required by the APA.
    - The rule printed in the publication is a true and correct copy of the promulgated rule; and
    - All requirements of the APA pertaining to the rule were complied with.
- Courts must take judicial notice of rules made effective under the APA.

Effective Dates of Rules

- Typically, rules take effect immediately after filing with the Secretary of State, unless otherwise indicated in the rules.
- Rules adopted under MCL 24.233, 24.244, or 24.245a(9) become effective 7 days after filing or later.
- Rules may also become effective on a future date specified in the rules or after a time period specified in the rules.

Emergency Rules

- An agency may determine that preservation of the public health, safety, or welfare requires the issuance of an emergency rule.
- The Governor must concur in the finding of an emergency.
- The agency may issue an emergency rule, which is effective when filed and remains in effect until a date fixed in the rule or 6 months after the date of filing. Copies must be filed with the Secretary of State, as prescribed for other rules, with the additional requirements that the copies must be endorsed as an emergency rule, and that certificates of approval from the Legislative Service Bureau and the Governor's certificate concurring in the finding of emergency must be attached to three of the filed copies. The emergency rule shall be published in the Michigan Register.
- The rule may be extended for one additional 6-month period by the filing of a Governor's certificate of the need for the extension prior to the expiration of the initial 6-month period.
- Emergency rules are not numbered or included in the Michigan Administrative Code, but are to be noted in the annual supplement to the Code and published in the Michigan Register.

- Emergency rules may be rescinded by concurrent resolutions of the Legislature.

Amendment and Rescission of Rules

- The Committee, an appropriate standing committee, or a member of the Legislature, upon a belief that a promulgated rule or any part of such a rule is unauthorized, is not within legislative intent, or is inexpedient, may introduce a bill at a regular session, or special session if included in the Governor's message, which in effect amends or rescinds the rule.

Suspension of Rules

- If authorized by a concurrent resolution of the Legislature, the Committee may suspend a rule or part of a rule promulgated when the Legislature is not in session.
- The suspension remains in effect through the end of the next regularly scheduled legislative session.
- The Committee sends electronic notification of the suspension to the agency, MOAHR, and the Secretary of State; and the rule is not published in the Michigan Register or in the Michigan Administrative Code while it is suspended.

Annual Regulatory Plan

- Each agency must prepare an annual regulatory plan that reviews its rules and electronically transmit it to MOAHR by July 1 of each year.
- These plans are advisory only and do not bind the agency or prevent any additional action.
- In completing the plan, the agency must identify the rules it expects to review, process, and rescind in the next year, along with the mandatory statutory rule authority it has not exercised.
- First priority for reviewing rules for the plan must be given to rules that directly affect the greatest number of businesses, groups, and individuals and those that have the greatest actual statewide compliance costs. A review of those rules must state the following:
    - Whether there is a continued need for the rules.
    - A summary of any complaints or comments received from the public concerning the rules.
    - The complexity of complying with the rules.
    - Whether the rules conflict with or duplicate similar rules or regulations adopted by the federal government or local units of government; and
    - The date of the last evaluation of the rules and the degree, if any, to which technology, economic conditions, or other factors have changed regulatory activity covered by the rules.

Declaratory Rulings

- Upon request of an interested person, an agency may issue a declaratory ruling on the applicability to an actual state of facts of a statute administered by the agency, or a rule or order of the agency.
- Agencies shall prescribe, by rule, the form for such a request and the procedure for its submission, consideration, and disposition.
- A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court.
- Any agency may not retroactively change a declaratory ruling, but may prospectively change a declaratory ruling.
- Declaratory rulings are subject to judicial review in the same manner as an agency final decision or order in a contested case.

Declaratory Judgments

- Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment in circuit court.
- In order to issue a ruling, the circuit court must find that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the person bringing the action.
- The action must be filed in the circuit court of the county where the person resides or has their principal place of business, or in Ingham County.
- The agency that promulgates the rule shall be made a party to the action.
- Prior to filing the action, a person must first have sought a declaratory ruling from the agency, and the agency must either have denied the request or failed to act on it expeditiously.
- The statutory authorization for declaratory judgment actions to determine the validity or applicability of a rule does not prevent a court from determining a rule's validity or application in other legal proceedings in which the rule is asserted to be invalid or inapplicable.

Michigan Office of Administrative Hearings and Rules (MOAHR)

- In 2011, the ORR was established within the Department of Licensing and Regulatory Affairs by Executive Order No. 2011-5 and retained all of the authority and functions formerly performed by the State Office of Administrative Hearings and Rules.
- In 2016, the Office of Performance and Transformation (OPT) was created within the Department of Technology, Management and Budget by Executive Reorganization Order No. 2016-2. The Office of Regulatory Reinvention (ORR) was transferred from the Michigan Administrative

Hearing System to OPT. All authority, powers, duties, functions, responsibilities, and rulemaking authorities vested in ORR under Executive Order 2011-5 were transferred to OPT.

- In 2019, MOAHR was established as a Type I agency within the Department of Licensing and Regulatory Affairs by Executive Order No. 2019-6. MOAHR retains all of the authority, powers, duties, functions, and responsibilities of the OPT that were transferred to OPT from the Office of Regulatory Reinvention (ORR).
- MOAHR may prescribe procedures and standards consistent with the APA and other statues for drafting and distribution of rules and publication of required notices, and for processing of rules within the Executive Branch. MOAHR shall publish and distribute to state departments and to the Committee, in reasonable numbers, a manual setting out these procedures and standards.
- In reviewing and evaluating promulgated and proposed rules, MOAHR considers a number of factors set out in detail in Executive Order 2011-5, including:
    - Health or safety benefits.
    - Cost of compliance.
    - The constitutional or statutory mandate for the rule, and its conformity with similar state and federal regulations.
    - Changes in circumstances since adoption of existing rules.
    - Recommendations from agencies charged with implementation or enforcement of the rule.
    - Public comments.
- MOAHR annually publishes an electronic supplement to the Michigan Administrative Code, containing all promulgated rules (except for emergency rules) published in the Michigan Register that year. The supplement also contains a numerical listing of rule changes, (i.e., amendments, additions and rescissions) that have been made since the last compilation of the Michigan Administrative Code was printed, and a cumulative alphabetical index of rules and rule changes. The supplement is published at the earliest practicable date. Cost of publication of the supplement may be charged to agencies, based on the proportion of the supplement for which each is responsible.
- MOAHR performs the editorial work for the Michigan Register, the Michigan Administrative Code, and the annual supplement to the Code. MOAHR's editorial work includes, but is not limited to, the following:
    - Classification, arrangement and indexing of the rules shall be uniform and conform as closely as possible to those used in the Michigan Complied Laws.
    - MOAHR may correct obvious errors in rules when the promulgating agency asks it to.

- MOAHR may omit from the Michigan Register, the Michigan Administrative Code, and the annual supplement any rule that is too long or expensive to print in them. The Michigan Register and the Michigan Administrative Code publication shall describe the general subject of the rule and how a copy of it may be obtained; the rule shall be available in print or reproduced from the agency that promulgated the rule.
- MOAHR may publish all or part of the Michigan Administrative Code in a bound volume, a pamphlet, electronically, or in loose-leaf form. However, a legislator may also provide a copy or reproduction of a rule to a member of the general public.
- The Michigan Administrative Code shall be arranged so that it is easy to publish separately, in pamphlets or electronic form, parts dealing with different agencies. Agencies may order such pamphlets and shall pay for them.
- An agency may request MOAHR to prepare reproduction proofs or negatives of the agency's rules, or portions of them, and shall reimburse MOAHR for them.
- MOAHR shall publish the Michigan Register, the Michigan Administrative Code, and the annual supplement to it on its internet website, free of charge. It may also publish these documents in printed or other electronic format for public subscription for a fee. The Department of Technology, Management and Budget (DTMB) shall determine the amount of the fee, which shall be calculated to cover but not exceed the cost of publication and distribution. Money DTMB collects from subscriptions is deposited in the General Fund.

Michigan Register

- MOAHR publishes the Michigan Register twice a month, on the 1st and 15th of every month.
- MOAHR publishes a cumulative index to the Michigan Register and makes the Register available for public subscription at a fee reasonably calculated to cover its publication and distribution costs.
- Agencies electronically transmit copies of proposed rules and notices of public hearings to MOAHR for publication in the Michigan Register.
- The Michigan Register contains:
  - Executive orders and executive reorganization orders.
  - On a cumulative basis, numbers and subject matter of enrolled Senate and House bills signed into law by the Governor that calendar year, with their Public Act numbers.
  - On a cumulative basis, numbers and subject matter of enrolled Senate and House bills vetoed by the Governor that calendar year.
  - Proposed administrative rules.

    - Notices of public hearings on proposed administrative rules.
    - Administrative rules and emergency rules filed with the Secretary of State.
    - Notice of proposed and adopted agency guidelines.
    - Attorney General opinions.
    - Various determinations relating to public health set out in MCL 24.207(m).
    - Other information MOAHR considers necessary or appropriate.
- If a proposed rule or guidelines or a public health determination is too long or expensive to include in the Michigan Register, MOAHR may publish a brief synopsis of it, including information on how to obtain a complete free copy from the promulgating agency.

Legislative Service Bureau

- Approves proposed rule if it deems the rule proper as to all matters of form, classification, arrangement, and numbering.

Secretary of State

The Secretary of State's role consists of the following:

- Endorses the date and hour of filing of the rule on three copies bearing certificates true copies of the rule without certificates, and one electronic copy. The Secretary of State retains one copy for public inspection.
- Causes rules to be arranged and bound with their attached certificates and publishes as a supplement to the Michigan Administrative Code, as often as he or she deems advisable.
- Certifies under their hand and seal that each volume contains all rules for a specified period.
- Keeps a copy of the bound version of the rules in their office and makes them available for public inspection.
- Transmits copies of filed rules to:
    - The secretary of the Committee and MOAHR, by a paper copy, on which the day and hour of filing are endorsed.
    - The secretary of the Senate and clerk of the House, electronically, for distribution to each member and for presentation to the Senate and to the House. If the Legislature is not in session, or when it will not meet within 10 days of transmission of the rule to the secretary and clerk, the secretary and clerk mill or electronically transmit a copy of the rule to all legislators at their home addresses.

Instruction D: Contested Case Hearings

Opportunity and Notice

- Parties shall be given an opportunity for a hearing without undue delay.
- Parties shall be given reasonable notice of the hearing. The notice shall include:
    - The date, hour, place and nature of the hearing. The hearing shall be held at the principal office of the agency unless otherwise specified.
    - The legal authority and jurisdiction under which the hearing is to be held, including a reference to appropriate statutory rule sections.
    - A short and plain statement of the matters asserted and the issues involved.
- A member of the Legislature is privileged from service of notice or other process only on a day when there is a scheduled meeting of the house of which he or she is a member unless the legislator is served by certified mail, return receipt requested.

Contested Cases

- A party who has been served with notice of a hearing may file a written answer before the date set for the hearing.
- If a party fails to appear after proper service of notice and no adjournment is granted, the hearing may proceed and the agency may make a decision in the absence of the party.
- The parties shall be given an opportunity to:
    - Present oral and written arguments on issues of law and policy.
    - Present evidence and argument on issues of fact.
    - Cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered into evidence.
    - Submit rebuttal evidence.
    - Object to offers of evidence.
- A party may file a petition in the circuit court in Ingham County or the county in which the hearing is held, to force compliance with a subpoena issued on their behalf by an agency.
- The parties may, by stipulation, agree upon facts in controversy, which stipulations shall be used as evidence at the hearing and be binding upon the parties to the stipulation. Parties are requested to agree upon facts in this matter when practicable.
- The parties may, by written stipulation or at the hearing, waive the requirement for the issuance of a proposal for decision.

- The parties may resolve a case by stipulation, agreed settlement, consent order, waiver, default or other method agreed on by the parties, except as otherwise provided by law.
- The parties may seek judicial review of the results of a contested case hearing, including final action taken by a presiding officer regarding the award of fees and costs.
- When authorized by statute, an agency may, upon the written request of a party, issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents under the possession or control of the person to whom the subpoena is issued.
- An agency shall revoke a subpoena, if so requested in writing, if the evidence requested does not relate to a matter in issue, if the subpoena does not sufficiently describe the requested information or if for any other reason the subpoena is invalid.
- An agency shall require witness fees to be paid in accordance with § 2552 of Public Act 236 of 1961, as amended (MLC 600.2552).
- An agency may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.
- An agency shall make statements or reports with respect to the subject matter at issue made by an agency witness available to other parties for use in cross-examination.
- An agency shall promptly make identifiable agency records concerning disputed material facts available to parties upon request by a party, except records related solely to the internal procedures of the agency, or which are exempt from disclosure by law.
- The rules of evidence applicable to non-jury civil trials in circuit court will apply as far as practicable, but an agency may admit and give probative effective to evidence of a type commonly relied upon by prudent persons in the conduct of their affairs.
- Irrelevant, immaterial or unduly repetitious evidence may be excluded.
- Effect shall be given to the rules of privilege recognized by law.
- Evidence presented in a contested case shall be offered and made part of the record, including records and documents possessed by an agency of which it desires to avail itself. Other factual information or evidence shall not be considered, except for judicially cognizable facts as to which official notice is permitted.
- Documentary evidence may be received in the form of a copy or an excerpt if the original is not readily available, or may be incorporated by reference if the material so incorporated is available for inspection by parties.
- An agency may take official notice of judicially cognizable facts, and general, technical, or scientific facts within the agency's specialized

knowledge. The agency shall notify parties at the earliest practicable time of any officially noticed fact which pertains to a material disputed issue. Upon timely before issuance of a final decision, the parties shall be provided an opportunity to dispute the fact or its materiality.

- An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.
- Upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, an agency shall determine the matter as part of the record in the case.
    - This determination is subject to judicial review at the conclusion of the proceeding.
    - If the presiding officer is disqualified or is unable to continue a hearing, another presiding officer may be assigned to continue with the case unless substantial prejudice to the party will result.
- An agency shall prepare an official record of a hearing, which shall include:
    - Notices, pleadings, motions and intermediate rulings.
    - Questions and offers of proof, objections and rulings thereon.
    - Evidence presented.
    - Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.
    - Proposed findings and exceptions.
    - Any decision, opinion, order or report by the presiding officer and the agency.
- Oral proceedings at which evidence is presented must be recorded, but need not be transcribed unless requested by a party who shall pay for the transcription, unless otherwise provided by law.
- An agency may order a rehearing on its own motion or upon request of another party.
    - Requests shall be made within 60 days after the date of mailing of the final decision.
    - The rehearing shall be noticed and conducted in the same manner as the original hearing.
    - Evidence received at the rehearing shall be included in the record for agency and judicial review.

Presiding Officers

- The Presiding Officer in a contested case may be:
    - An agency (e.g., a commission).
    - One or more members of an agency.

    - A person designated by statute.
    - Hearing officers designated and authorized by an agency.
- Presiding Officers:
    - May administer oaths or affirmations.
    - Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of documentary evidence, as so designated by the agency and applicable law.
    - May provide for testimony to be taken by deposition.
    - May regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.
    - May direct the parties to appear and confer to consider simplification of the issues by consent of the parties.
    - May act upon an application for award of costs and fees.
    - Shall hold hearings only on legislative non-meeting days when a party is a member of the Legislature. (“Non-meeting day” is a day on which no legislative body of which the legislator is a member, including committees and caucuses, is scheduled to meet.)
    - Shall postpone the testimony of a witness who is a legislator to the earliest practicable non-legislative meeting day.
    - May grant continuances, and must notify all parties and their attorneys of any such continuance granted.
    - Shall award to a prevailing party, other than an agency, upon a motion properly filed, the costs and fees incurred by a party if there is a finding that the position of the agency was frivolous. To determine whether an agency position was frivolous, the presiding officer must find that at least 1 or the following conditions was met:
        - The agency’s primary purpose in initiating the action was to harass, embarrass or injure the prevailing party.
        - The agency had no reasonable basis to believe that the facts underlying its legal position were true.
        - The agency’s legal position was devoid of arguable legal merit.
    - Shall hold a hearing concerning the awarding of fees if the parties do not agree on the awarding of costs and fees, where the party seeking the fees must show the following:
        - That the position of the agency was frivolous.
        - That the party prevailed.
        - The amount of costs and fees sought with an itemized statement from any attorney, agency or expert witness

showing the rate at which the costs and fees were computed.

- That the party is eligible to receive an award under the limitations set out in MCL 24.322(3). (Financial records submitted to show eligibility are exempt from public disclosure if requested by the party when the records are submitted pursuant to MCL 24.323).
- That a final order has been entered in the contested case, and that it is not subject to further appeal, other than judicial review of the costs and fees.

- May reduce the amount of costs and fees awarded, or deny such an award, to the extent the party seeking the award engaged in conduct which unduly and unreasonably protracted the contested case.
- Shall provide written findings of their action regarding an award of costs and fees and the reasons for the findings.
- Shall not delay the entry of a final order in a contested case because of an application for costs and fees.

- NOTE: The fee provisions do not apply to:
  - Any agency in its role of hearing or adjudicating a case.
  - An agency acting on behalf of a non-agency person who has a private interest in a matter.
  - An agency required by law to commence a case upon the action or request of another non-agency person.
  - An agency that has a minor role as a part in relation to other non-prevailing parties so as to make its liability for costs and fees unreasonable, unjust or unfair.
- NOTE: A party that recovers costs and fees in a contested case through these provisions is not permitted to recover the same costs for the contested case under any other law.

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- Annually, must report to the Legislature the amount of fees and costs paid by the state under this Act for the preceding fiscal year. The report shall include the number, nature and amount of the award; the claims involved; and any other relevant information to help the Legislature evaluate the scope of the awards.

Proposals for Decision

- Where the official or a majority of the officials who are to make the final decision have not heard the evidence or read the record in a contested case, no decision shall be made that is adverse to a party other than the agency until a proposal for decision is served on the parties and each

party has an opportunity to file exceptions and present written arguments to the officials who are to make the final decision at the administrative level.

- Oral argument may be permitted with consent of the agency.
- The proposal for decision must be prepared by a person who conducted the hearing or who has read the record and must contain a statement of the reasons for the conclusions reached and each issue of fact and law necessary to the proposed decision.
- Without further proceedings being required, the proposal for decision will become the final decision of the agency, unless exceptions are filed, or the agency takes action to review the proposal for decision within the time permitted by the applicable rule.
- On appeal from or review of a proposal for decision, an agency has all the powers it would have if it had presided at the hearing.
- Provisions regarding proposals for decisions may be waived by the parties by written stipulation or at the hearing.

Final Decisions or Orders

- Final Decisions or Orders issued shall:
    - Be made, in writing or stated in the record, within a reasonable period of time after the issuance of the proposal for decision or the end of the hearing if no proposal is prepared.
    - Be based upon the whole record or portion thereof as may be cited by a party and supported by and in accordance with competent, material and substantial evidence.
    - Include findings of fact and conclusions of law separated into sections captioned or entitled “findings of fact” and “conclusions of law,” respectively.
    - Include findings of fact based exclusively on the evidence and on matters officially noticed and, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts which support them.
    - Include a ruling upon each proposed finding of fact proposed by a party.
    - Contain conclusions of law, each of which shall be supported by authority or reasoned opinion.
    - Be mailed or delivered immediately to each party and to their attorney of record.

Instruction E: Licenses

NOTE: The prior section governing contested case hearings applies ONLY where a licensing action (defined as the grant, denial, renewal, suspension,

revocation, annulment, withdraw, recall, cancellation or amendment of a license) required notice and opportunity for a hearing.

Expiration of License

- When a licensee makes timely and sufficient application for renewal of a license or a new license with reference to an activity of a continuing nature, the existing license does not expire until:
    - A decision on the application is finally made by the agency, or
    - If the application is denied or the terms modified, until the last day for applying for judicial review or a later date established by the court.
- These provisions do not affect valid agency action then in effect summarily suspending a license, as discussed below.

Agency

- Shall give notice to the licensee, personally or by mail, of facts or conduct that warrant the commencement of any proceeding for suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license.
- Shall provide the licensee with the opportunity to show compliance with lawful requirements for the retention of the license, except as otherwise provided by statute.
- May order summary suspension of a license if it finds that the public health, safety or welfare requires emergency action and incorporates such findings in its order.
    - Summary suspension is effective on the date specified in the order or on service of a certified copy of the order on the licensee, whichever is later, and remains in effect while proceedings continue.
- Shall promptly commence a proceeding and make a determination after issuance of a summary suspension.

Instruction F: Judicial Review

- Parties must be aggrieved by a final decision or order in a contested case and must exhaust all administrative remedies available within an agency prior to seeking judicial review. Parties do not have to file a motion or application for rehearing unless agency rules require that filing prior to filing for judicial review.
- Ordinarily, preliminary, procedural or intermediate agency actions or ruling are not immediately reviewable, but a court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy to a party.
- Judicial review shall be in accordance with applicable statutes and general court rules.

- In the absence of a specific statutory provision, petitions for judicial review shall be filed in the circuit court for the county where the petitioner resides or has their principal place of business in this state, or in Ingham County.
- Petitions for judicial review shall be filed in the court within 60 days after the date of mailing notice of the final decision or order of the agency, or, if rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order on the rehearing petition.
    - Filing of a petition does not stay enforcement of the agency action, but the agency, or the court, may grant a stay.
- Within 60 calendar days after service of the petition or such further time allowed by the court, the agency shall transmit to the court the original or certified copy of the entire record of the proceedings unless the parties stipulate otherwise.
    - Parties unreasonably refusing to stipulate may be subject to taxation by the court for the additional costs.
    - The court may permit subsequent corrections to the record.
- Judicial reviews shall be conducted without a jury and confined to the record.
- The court may, upon request, hear oral argument and receive written briefs, and may take proofs of alleged irregularity in procedure before the agency if the alleged irregularity is not shown from the record.
- The court may grant timely requests for leave to present additional evidence if it can be shown that an inadequate record was made at the agency level or that the additional evidence is material, and there were good reasons for failing to present it in the agency proceeding.
    - The agency may modify its findings, decision or order based on this new evidence, and shall file the additional evidence and any new finding, decision or order with the court.
- Unless an applicable statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside an agency decision or order if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
    - In violation of the constitution or a statute.
    - In excess of the statutory authority or jurisdiction of an agency.
    - Made upon unlawful procedure resulting in material prejudice to a party.
    - Not supported by competent, material and substantial evidence on the whole record.
    - Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
    - Affected by other substantial and material error of law.

- The court may affirm, reverse or modify the decision or order, or remand the case for further proceedings.
- In matters concerning the awarding of fees or costs, the court may modify a final action taken by a presiding officer only if there is a finding that the failure to make an award, or the making of the award, was an abuse of discretion or that the calculation of the amount was not based on substantial evidence.

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