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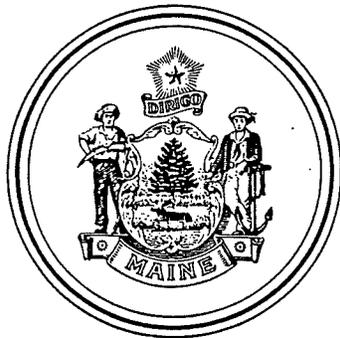
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A Guide to the Rulemaking Process for State Agencies



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Secretary of State
State of Maine

1990

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I. INTRODUCTION

In response to a growing concern about regulatory activity, the federal government and many other states have since 1978 adopted administrative procedures acts. The objective of these initiatives has been to enhance public access to the agency decision-making process and to promote awareness of agency rules.

The Maine Administrative Procedure Act (APA), 5 M.R.S.A. § 8001 through 11008, was adopted by the First Session of the 108th Legislature and later amended. It applies uniform requirements to state agencies with rulemaking powers, and sets minimum standards for agencies to follow in adopting and implementing rules.

Very generally, the APA establishes a uniform, comprehensive set of procedures covering:

- * the administrative actions of state agencies, including rulemaking, advisory rulings, adjudicatory proceedings, and licensing; and
- * judicial review of those actions.

Section I of the following is a "Quick Reference Guide" to rulemaking. Sections II and III describe the rulemaking process and the APA requirements for agencies authorized to adopt new rules. Section IV outlines the rule filing requirements established by the Secretary of State (hereafter cited as "Secretary") under the APA.

Section V describes a related but entirely separate process required of each agency, the Annual Regulatory Agenda, in which an agency files a list of expected rulemaking for the coming year.

Finally, five appendices show examples of the various forms, and of a filed rule.

QUICK REFERENCE GUIDE**I. PROPOSED RULE:**

- A. File 1 copy of the following with the Secretary of State on the Tuesday of the week prior to publication date:
 - 1. Notice of Rulemaking Proposal Form, MAPA-3 (see Appendix I for a sample copy);
 - 2. Copy of the rule being proposed (see Appendix V for a sample rule);
 - 3. Checklist (see Appendix III for a sample);
 - 4. Copy of the Fact Sheet (optional) (see Appendix IV for a sample).
- B. File 20 copies of the following with the Executive Director of Legislative Council within a day or two after filing with Secretary of State:
 - 1. Fact Sheet; and
 - 2. Notice of Rulemaking Proposal Form.

II. ADOPTED RULE:

- A. The adopted rule should contain all of the following:
 - 1. Cover Sheet (MAPA-1) signed by the agency and the Assistant Attorney General (see Appendix II for a sample);
 - 2. Copy of the rule (with deleted language crossed out and new language in brackets);
 - 3. Basis Statement;
 - 4. Summary of Comments;
 - 5. Checklist;
 - 6. Copy of the Fact Sheet (see requirement of Section I (B)(1) above); and
 - 7. Brief summary which can be used in the adoption notice; this should give a brief description of the rule.
- B. The rule should be approved by:
 - 1. The person authorizing the adoption of the rule (this must be done within 120 days from the comment deadline); and
 - 2. The Attorney General or his designee (this must be done within 150 days from the comment deadline).
- C. The rule must be filed with the Secretary of State (3 copies).
 - 1. The Secretary of State reviews the rule and stamps it as "Accepted for Filing". The Secretary of State will keep two (2) copies and will return one copy to the contact person or whoever is designated to receive the rule.
 - 2. The rule will become effective no less than five days after the rule is Accepted for Filing by the Secretary of State. (The agency may designate an effective date anytime after that).

II. WHAT IS A RULE?

The statutory definition (5 M.R.S.A. § 8002 (9)) is important because it triggers the application of the rulemaking procedures as described in Section III. There are two parts to the definition of "rule". The first describes a "rule" in broadly inclusive terms:

"...the whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency."

The generality of the words "the agency statement" indicates that what an agency calls its pronouncements is not significant. It is the impact, not the terminology, which determines what a rule is. If the statement:

- (1) applies generally to persons outside the agency;
- (2) is intended to have the same legal force as a statute, so that compliance could be compelled; and
- (3) implements the law administered by the agency or describes its procedures,

then it is a rule. Since amendment, suspension or repeal of a rule may have as important an effect as the adoption of a new rule, these actions are included within the definition.

The second part of the definition is a series of exclusions designed to clarify the broader concept. The term "rule" does not include:

- (1) Policies or memoranda concerning only the internal management of an agency and not judicially enforceable;
- (2) Advisory rulings issued under sub-chapter III;
- (3) Decisions issued in adjudicatory proceedings; or
- (4) any form, instruction or explanatory statement of policy which is not judicially enforceable, intended solely as advice to persons in determining, exercising or complying with their rights, duties, or privileges.

Thus rulings, final or advisory, rendered in a specific case on a specific set of circumstances; internal management policies; and forms or instructions not judicially enforceable, are not rules. Consult a staff attorney or the Attorney General in cases where the status of agency statements is uncertain.

III. RULEMAKING

Rulemaking includes all of the steps an agency must follow to give a rule legal effect. The process begins when someone develops a concern that a rule is needed. The process is completed when,

after the agency has properly performed all the intervening steps, the Secretary accepts the rule for filing.

A. The Planning Phase

Prior to beginning the formal process established by the APA, an agency should:

- (1) Determine whether the Legislature has granted it authority to make such a rule;
- (2) Consider carefully what it wants to accomplish by rulemaking;
- (3) Read the rulemaking provisions of the APA and this manual;
- (4) Review existing rules to avoid duplication, and fit the new rule logically within the body of existing rules; and
- (5) Draft the proposed new rule in the format established by the Secretary (see Section IV of this manual).

B. APA Requirements

Subchapter II of the APA describes the steps an agency must take to adopt rules.

1. Notice of Proposed Rule

The Notice of Rulemaking Proposal must be published 17-24 days prior to the hearing, if one is scheduled (5 M.R.S.A. § 8053 (5)). If no hearing is scheduled, you must allow at least 30 days from the publication date for the public to submit comments.

To accomplish this, you must submit to the Secretary of State 1 copy of the following:

- a. Rulemaking proposal form--MAPA-3 (see Appendix I);
- b. Copy of the rule (see Appendix V for a sample);
- c. Checklist (see Appendix III); and
- d. Copy of the fact sheet (see Appendix IV).

The Notice of Rulemaking is published in the Bangor Daily News, Biddeford Journal Tribune, Brunswick Times-Record, Kennebec Journal, Portland Press Herald, Lewiston Sun-Journal and the Waterville Morning Sentinel every Wednesday. All rulemaking notices must be received by the Secretary of State on **Tuesday of the week prior to the publication date**. (Note: for weeks containing legal holidays, rulemaking notices should be submitted no later than Monday to allow enough time to publish the notices on Wednesday of the next week.)

Agencies will be billed periodically for their pro rata share of the publication expenses. Notice of rulemaking proposals which are less than statewide in impact may be published in fewer than the 5 designated newspapers. If that is the case, notify the Secretary's office at the time the MAPA-3 is filed.

- a. **The Rulemaking Proposal Form--MAPA 3** (see 5 M.R.S.A. § 8053 (3)): The APA requires that the notice:
1. cite the Maine Law authorizing the agency to adopt the rule;
 2. give the time and place of the public hearing on the proposal, if one is planned, or describe how a hearing may be requested;
 3. tell how and when comments may be submitted. If no hearing is scheduled, the comment deadline must be at least 30 days after publication;
 4. contain a summary of the contents, or the text of the proposal and indicate where a copy may be obtained; and
 5. refer to the substantive state or federal law to be implemented by the rules. (See Appendix I for a sample MAPA-3.)
- b. **Copy of the Rule** (see detailed discussion in Section IV below; see also Appendix V for sample).
- c. **The Checklist** (5 M.R.S.A. § 8056 (A) (1)): When an agency proposes or adopts a rule, a checklist is attached; see the sample in Appendix III. When proposing the rule, the top portion (sections 1 through 7) shall be completed. When the rule is finally adopted, the checklist shall be completely filled out. If you have not sent copies to the people on your mailing list or to the Executive Director of the Legislative Council at the time you submit the proposed rule to the Secretary of State, answer sections 2 and 4 estimating when those copies will be sent.
- d. **The Fact Sheet** (5 M.R.S.A. § 8053 (A)): At time of giving notice of rulemaking to the Secretary of State, twenty copies of the rulemaking notice and fact sheet must also be sent to the Executive Director of the Legislative Council (State House Station 115). When adopting an emergency rule a fact sheet shall be drafted and twenty copies shall be sent to the Executive Director of the Legislative Council within 10 days following the adoption of the emergency rule. A copy must also be submitted to the Secretary of State with the adopted rule. See Appendix IV for a sample.

After comments have been received and the rule which the agency intends to adopt is substantially different from what was proposed, twenty copies of a revised fact sheet must be submitted to the Executive Director (Sec. 8053-A). The agency will also solicit comments from the public on the proposed changes by publishing a notice in the Secretary of State's Rulemaking ad and allowing a thirty day comment period (5 M.R.S.A. § 8052 (5) (B)).

The fact sheet which is submitted to the Executive Director of the Legislative Council must contain (see 5 M.R.S.A. § 8057 (A)):

- a. a citation of the statutory authority for the adoption of the rule;
- b. a concise statement of the principal reasons for the rule;
- c. a comprehensive but concise description which accurately reflects the purpose and operation of the rule;
- d. an estimate of the fiscal impact of the rule; and
- e. an analysis of the rule which describes whether this rule would impose an economic burden on small business.

Notice of proposed rulemaking must be given to the following at least 20 days before the hearing or before the deadline for comments, if no hearing is scheduled (see 5 M.R.S.A. § 8053):

- a. Any person specified in the statute authorizing the rulemaking;
- b. any person who has filed within the past year a written request with the agency for notice of rulemaking. Notice must be by mail to the last address provided to the agency by the person and should include copies of the proposal, if requested. The agency may charge a fee reasonably related to the cost of this service; and
- c. any trade, industry, professional interest group or regional publication that the agency deems effective in reaching affected persons.

Copies of the proposed rule itself must be available for public distribution at least 20 days prior to the hearing or 20 days prior to the comment deadline, if no hearing is held.

2. Public participation

The APA provides several opportunities for the public to participate in the state's rulemaking process. When an agency proposes to adopt, amend, suspend or repeal a rule, interested persons must have a chance to submit comments for consideration.

Hearings

Interested persons may also submit comments at a public hearing. When required by other statutes or when requested by 5 persons, an agency must hold a hearing on its proposed rules (5 M.R.S.A. § 8052 (1)). The APA itself does not otherwise require a hearing; however, an agency always may hold one if it wishes. Since public access and input are

major goals of the law, a hearing may be a very useful method of informing and educating the public and for receiving public response.

Notice that the hearing will take place must be provided according to the procedures listed at the end of III.B.1 noted above.

In deciding where a hearing is to be held, here are some suggested factors to be considered:

- a. the hearing room should be large enough to accommodate the number of people who are interested in the rule;
- b. the building and hearing room must be certified as handicapped accessible by Ron Hanson or Brian Trask (see below);
- c. the equipment which will be used should allow anyone testifying to be heard by most of the people attending;
- d. the hearing room should be reasonably comfortable for anyone attending the hearing, and should have space available for the handicapped.
- e. arrangements should be made so that handicapped individuals can testify.

Governor's Executive Order #4 of 1981, which mandates that state public meetings be accessible to the physically handicapped, requires the notice to inform handicapped persons of the manner in which they may notify agencies to arrange for special services. The Secretary of State will arrange for all items to appear in the weekly consolidated ad. If notice is given through other means, all these elements must be presented.

You should also be aware that as of January 1, 1990, state government agencies shall not hold any conferences, meetings, etc. involving state employees in any building which has not been certified by Ronald Hanson or Brian Trask. Before you schedule a hearing in any building, you should check with Ronald Hanson or Brian Trask at 289-3485 to see if that building is certified as being handicapped accessible.

A hearing can only be conducted by someone who is in a "major policy-influencing position" as listed in 5 M.R.S.A. Ch. 71. The people on this list are mainly board and commission members, commissioners, deputy commissioners, and bureau directors. The agency should refer to this list to be certain that the person conducting the hearing is authorized to do so.

Although the APA does not have any requirements regarding the conduct of the hearing, the Secretary of State suggests the following:

- a. all persons conducting the hearing should identify themselves and give a brief description of their positions and responsibilities;
- b. the moderator should then give the background of the proposed rule, and state when the hearing was advertised and how (i.e., in which newspapers advertisements appeared, and which groups were notified by mail);
- c. The moderator should then explain the procedures to be followed in conducting the hearing:
 1. how long each person will have to speak, if any time limit is set at all--15 minutes would seem adequate in most instances;
 2. what the format will be and how individuals should pose their questions;
- d. The moderator may then begin, taking comments from:
 1. anyone opposing the rule;
 2. anyone approving of the rule;
 3. anyone else who neither opposes nor approves of the rule.

The moderator should have adequate knowledge and information available to be able to answer any and all questions that might arise. If a question is posed that no one present can answer, the department should send a written reply within a reasonable time after the hearing.

When a hearing is held, the APA requires the agency to accept comments for at least 10 days thereafter. Following the opportunity for hearing, an agency must consider available relevant information, including public comments, before adoption.

3. Adoption

After complying with notice and hearing requirements and after considering the information available, an agency makes a formal decision on the proposed rule. Adoption, if that is the decision, must be by official action of the agency and must take place within 120 days from the comment deadline. (See 5 M.R.S.A. § 8052 (7).)

The comment deadline may be extended if notice of doing so is published in the state rulemaking ad, before the expiration of the previous comment period (5 M.R.S.A. § 8052 (7)). If you feel that you may have to extend the comment deadline, you should notify the Secretary of State as soon as possible so we could arrange to have the notice published in time. You might also consider allowing longer than a 10 day comment period after the hearing for the same reason.

The APA requires an agency, at the time of adoption, to file with the Secretary of State a written statement explaining

the factual and policy basis for the rule. When adopting a rule the agency shall also address all comments received and state its rationale for adoption or failing to adopt suggested changes (5 M.R.S.A. § 8052 (5)). The agency may consolidate similar comments instead of addressing each one individually. A record of the vote of agency members in rulemaking decisions must be maintained by each agency and available for public inspection (5 M.R.S.A. § 8056 (5)).

The APA also requires that a checklist be submitted when a rule is proposed and when it is adopted. The Secretary of State has the forms you should use. The top portion should be filled out when the rule is proposed and the complete form should be filled out when filing the adopted rule.

Agencies are also required to file another copy of the fact sheet when the adopted rule is filed with the Secretary of State. This fact sheet should be a copy of what was submitted to the Executive Director of Legislative Council when the rule was proposed. If a rule is substantially different than what was proposed and a revised fact sheet was sent to the Executive Director, that should be submitted also.

An agency should communicate with the Attorney General concerning legality and the Secretary on questions of format prior to adoption to avoid the delay and expense of having rules, which are already officially adopted, or rejected because of legal or format shortcomings.

4. Filing

Once an agency adopts a rule, the APA requires that the agency:

- a. submit a copy to the Attorney General for approval as to form and legality; and
- b. file a certified copy with the Secretary in a form prescribed by him 5 M.R.S.A. § 8056 (1). See section IV for discussion of that form.

Rules are not effective until an agency has complied with these provisions.

In addition, an agency must supply free or at cost, a copy of each rule adopted to anyone who has filed within the past year a written request for the agency's rules (5 M.R.S.A. § 8056 (2,4)). This requirement is intended to aid the general public and the legal community by providing greater access to current agency rules.

After filing, a notice of rule adoption will be published by the Secretary in the weekly consolidated newspaper ad (5 M.R.S.A. § 8056 (1) (D)). Agencies should submit a brief summary which states the purpose of the rule for this publication. Agencies will be billed periodically for their pro rata share of the publication expense.

5. Agency responsibility

The APA does not relieve an agency of any requirement imposed by other statutes to provide more detailed notice, to hold a public hearing or to file with or gain approval from other designated persons. Each agency must be aware of such additional requirements.

C. Emergency Rules

In emergencies, compliance with the APA requirements of notice and hearing prior to adoption might result in a dangerous delay, preventing the rules from having the necessary effect. The provisions of 5 M.R.S.A. § 8054 allow an agency to modify those requirements to avoid an immediate threat to public health, safety and welfare, but only to the minimum extent necessary.

Emergency rules are subject to the filing requirement of 5 M.R.S.A. § 8056 discussed in Section IV below. They may be effective for 90 days or less and must include a statement of findings of the adopting agency describing the emergency. These findings are subject to judicial review to insure that this exception to the APA is used only for actual emergencies (5 M.R.S.A. § 8054 (2)). Within 10 days from the adoption of the emergency rule, twenty copies of a fact sheet must be sent to the Executive Director of the Legislative Council (Stn. 115).

D. Required Rules

In addition to its substantive rules, each agency is required by 5 M.R.S.A. § 8051 to also adopt rules of practice governing the conduct of adjudicatory proceedings, licensing proceedings and the rendering of advisory rulings by the agency, unless such rules are provided by statute. They indicate what one needs to know in order to present a case before the agency or to obtain an advisory opinion. Rules of practice must be adopted and filed in the same manner as other rules.

E. Citizen Petition for Rulemaking

Anyone may petition an agency to adopt or change a rule. When a petition is submitted by 150 or more registered voters of the State, the agency must begin rulemaking proceedings within 60 days. The circulator must verify the petitions before a Notary Public and the appropriate registrar(s) of voters must certify that the signatures are of registered voters. It is the responsibility of the petitioners to insure that the requirements are met. An agency need not accept an incomplete

or defective petition. The individual should obtain blank copies of the petition forms from the agency. You may also contact the Secretary of State for copies of the standard forms.

When fewer than 150 registered voters petition, the agency has an option. Within 60 days, it must either:

- a. respond in writing, denying the request and stating its reasons for denial; or
- b. initiate rulemaking proceedings to consider the proposed change.

IV. PREPARATION OF RULES FOR FILING

Rules must be filed with the Secretary to have legal effect (5 M.R.S.A. § 8057 (1)). The Secretary may prescribe the form in which agencies file their rules (5 M.R.S.A. § 8057 (1) (B)). Rules not presented in that form will not be accepted for filing and will have no legal effect. The purpose of requiring agencies to follow a universal format is to facilitate central filing, indexing, retrieval and publication of rules, thereby enhancing public access.

Filing constitutes official notification that the rule has been adopted. Therefore, the material filed must be an accurate and complete copy of the rule as adopted and must be certified as such.

Typographic and other technical errors may be corrected only by formal amendment adopted through the rulemaking process. A memo signed by the Attorney General's Office noting the uncorrected errors may be filed and will be attached to the rule for public information.

A. Cover Sheet

A cover sheet describing each rule must accompany all rules presented for filing with the Secretary. The rule title on the cover sheet should be the same as when the rule was proposed, and should accurately reflect what is being filed. Appendix II is a sample cover sheet with explanations of the information required. When additional cover sheets are needed, agencies may reproduce their own or request copies from the Secretary. In order to facilitate filing and retrieval of rules, **a cover sheet should be submitted for each chapter filed.**

The rules will be considered filed on the date received by the Secretary unless the rules do not comply with the filing format. Rules which do not comply will be returned to the agency with a statement of explanation. Rules properly filed will be stamped with the date received and become effective 5 calendar days later unless a later date is specified in the rule or is required by statute. Emergency rules may be effective immediately upon filing for a period of 90 days. Three copies of the rule and cover sheet should be submitted. One copy will be stamped and returned to the contact person listed on the cover sheet as notification of receipt and acceptance. Agencies

which submit rules by mail and do not receive a response in a reasonable time should contact the Secretary of State.

B. Numbering System

1. Code of Maine Rules (CMR)

It is the intent of the Secretary to maintain a complete set of current rules in his office for public use and to arrange for their codification and publication. Within the Code, a uniform system of numbering is essential to provide a logical method of arrangement, cross indexing and referencing within the Code, and uniform citation.

2. Assigning rule numbers

Prior to filing, each agency must number its rules using the system established in this manual. The system, which will be used to cite specific rules and to organize agency rules, consists of two elements. The first identifies the adopting agency by using the umbrella unit numbering system for state agencies developed by the Bureau of Budget and described in the latest Maine State Government Manual. Each umbrella (in most cases, a state department) is identified by two digits and each organizational unit (usually a bureau or independent agency) is identified by three digits. For example, the Department of Business, Occupational and Professional Regulation is identified by the umbrella number 02. Among the organizational units included under that umbrella are the Bureau of Banking (029) and the Real Estate Commission (039). When filed, each rule must bear the umbrella and unit number of the agency, such as 02-029 for the Bureau of Banking. (Under the new MFASIS accounting system, each agency is assigned another code, replacing the umbrella/unit numbers. However, the umbrella/unit system remains for various purposes; see the Maine State Government Annual Report, for example. If you have any questions about your number, consult the Annual Report, or call the Bureau of the Budget (289-2931) or the Secretary of State (289-4184).)

The second element concerns the subject matter of agency rules and identifies specific statements within each agency's body of rules. The basic number will be a decimal identifying chapter and section. To allow for computerization, the chapter must have four digits or less. For example, section seven of chapter 100 of an agency's rules would be numbered 100.7.

3. Organization of rules

Each agency must, at a minimum, number its rules by chapter and section and arrange them in numerical order by chapter number. These mechanisms are designed to be flexible enough

to insure a logical arrangement of rules covering a variety of topics which have been promulgated by agencies varying greatly in size and organizational complexity.

a. Chapters

An agency's body of rules will commonly be arranged in chapters each consisting of a unified body of statements applying to a specific function or covering a specific subject. Chapters must be numbered using Arabic numerals throughout each agency's body of rules and they must be three digits or less.

b. Sections

Chapters will normally be divided into sections. Sections govern conduct or define terms in specific areas under the control of the agency. Sections must be numbered using Arabic numerals throughout and must be two digits or less. Where internal division is necessary, sections may be divided as follows:

Subsection - within a section, lettered alphabetically beginning with "A".

Paragraph - within a subsection, numbered consecutively in Arabic numerals beginning with "1".

Sub-paragraph - within a paragraph, lettered alphabetically beginning with "a".

Division - within a sub-paragraph, numbered consecutively beginning with "i".

Subdivision - within a division, lettered alphabetically beginning with "AA".

Please note that citation to a division or subdivision may be confusing. Try to avoid extensive breakdowns.

4. Citation of rules

Citation of agency rules will identify both the adopting agency and the specific statement within its body of rules. The agency identification number will be placed in front of the abbreviation for Code of Maine Rules (CMR). The number of the statement will be placed after the CMR. For instance, 04-061 CMR 1.1 identifies section one of chapter one of the rules of the Land Use Regulation Commission within the Department of Conservation.

Citation to rule breakdown below section level is possible by using the appropriate number(s) or letter(s) identifying the breakdown. The number or letter must be enclosed in parenthesis. For example, 04-061 CMR 1.1(A)(1)(a)(i)(AA).

5. Reservation of numbers

In assigning numbers to chapters and sections, agencies

should take into account the likelihood that their body or rules may expand and to anticipate where expansion may be necessary. Initially, agencies may exercise a great deal of discretion in organizing its rules. Later, however, their options will be limited by the framework which they have established and within which they must work.

C. Number of Copies to be Filed

Three clear and legible copies must be filed. The Secretary of State will keep two and the third will be stamped with the date of when the rule was "Accepted for Filing" by the Secretary of State and returned to the Agency. Since this is official proof of the validity of the rule, this copy should remain in the format that it was filed and should remain as a permanent record in the office. It may be necessary several years after the rule is filed to defend the validity of the rule, so record-keeping is important.

D. Filing Format

To promote uniformity among the rules of various agencies, each agency is required to file its rule in the form described below. See Appendix V for a sample format for filed rules.

1. Typing requirements

All rules filed with the Secretary, except those incorporated by reference, must be typewritten, on white 8 1/2 x 11 inch paper with appropriate margins, numbers and headings.

2. Summary

A summary of the rule, which is a brief descriptive statement explaining to the reader the nature of the rule's contents, should be attached to all rules filed with the Secretary. It may precede the text of the rule or be filed as a separate sheet attached to the rule. The summary will be used by the Secretary to publish the required notice of adoption.

The summary is not part of the rule and need not be formally adopted. However, if a rule is amended changing its content, the summary statement should be amended to reflect the change and should be filed with the Secretary along with the amendment.

3. Descriptive headings

Within the body of rules, chapter and section must carry a concise descriptive heading which allows the reader to scan rules quickly. The part and chapter headings preceded by their assigned numbers must be set out on a separate line preceding the text. To allow for computerization, the length of the chapter heading must not exceed 80 letters and spaces. Section headings must be underlined. The section heading should indicate the specific subject matter covered by the

section. Non-descriptive terms such as "general" or "miscellaneous" should be avoided since they only hinder a user in search of a specific item. Breakdowns below sections may be given a descriptive heading if the adopting agency feels they would be helpful in arranging its rules. If one element is given a heading, all other elements at that level may be placed at the beginning of the first line of the text and must not be underlined. The heading should be set off from the text of the subsection, etc., by a period between the heading and the text. Headings are not part of the rule, and need not be formally adopted.

4. Basis statement

5 M.R.S.A. § 8052 (5) requires each agency to adopt a written statement explaining the factual and policy basis for each rule adopted. This statement is not part of the rule but is intended to inform readers of the agency's rationale in adopting the rule and to assist them in conforming with its intent. It is not meant to be a statement such as: "The basis for this rule is (title and section of statutes authorizing the rule)". Instead the adopting agency should briefly explain why it was necessary or desirable to adopt this particular rule. The basis statement must also address representative comments received during the comment period and explain reasons for adopting or failing to adopt suggested changes. The basis statement must be included in the material filed with the Secretary, must follow the text of the rule, and should be set off from the preceding and succeeding materials.

5. Explanatory materials

When an agency files a rule, it may include brief notes, examples or other explanatory material intended to help a reader understand the rule. Such non-regulatory material may be set forth after the appropriate part of the text and clearly distinguished from the rule by use of the word NOTE. It does not need to be formally adopted.

6. Authority and effective date

At the end of each chapter, the adopting agency must specify the legal authority under which that chapter was adopted and the effective date if later than 5 days after the filing. The authority is the specific title and section of the Maine Revised Statutes Annotated authorizing the agency to adopt the rule. The agency must also refer with particularity to any underlying federal or state law or regulation which serves as the basis of the rule. When part of a rule is amended, suspended or repealed the agency must cite the authority for its action when it files the amended part. If the space for the effective date is left blank the Secretary will fill in the earliest possible date, which is 5 days after filing.

When an emergency rule is adopted, the agency must specify the period during which the rule will be in effect. That period must not exceed 90 days.

E. Amendment of Rules

The whole or any part of an existing rule may be amended, suspended or repealed by the adopting agency. Such action constitutes rulemaking and must comply with the rulemaking requirements of the APA. An amendment is any addition to or deletion from the text of the rules. When filing an amended rule, an agency should indicate the rule number on the cover sheet, and check the box labeled "amendment to existing rule". Three copies of the complete text of the rule as amended must be attached to the cover sheet and must be in the proper filing format. Additions to the text of the rule must be placed in brackets, deletions must be struck out. When a rule is suspended or repealed, only a properly completed cover sheet and a basis statement must be filed indicating that the action being taken is the repeal of an existing rule.

F. Incorporation by Reference

Occasionally an agency may wish to incorporate into its own body of rules certain rules, standards, codes, etc., which have been promulgated by the federal government, technical societies or other organizations of recognized standing. In such cases, the agency must adopt and file with the Secretary, in the prescribed format, a rule stating that such material is being adopted by the agency as part of its own rules. A copy of the material incorporated by reference must accompany the filing. In addition, the agency must maintain at its office a copy of such rules, standards or codes.

Adoption of outside material in this manner is merely the adoption of that material as it exists at the time the state agency adopts it. Agencies may not adopt by reference documents as they may be amended in the future. Amendments to the original material may be incorporated by amending the original rule incorporating the material. Should an agency wish to make an exception, delete any provision, or add any rule, such actions must be written as part of the rule which incorporated the material by reference.

V. AGENCY REGULATORY AGENDA

Entirely separate from the above rulemaking process is the Agency Regulatory Agenda, addressed in 5 M.R.S.A. § 8060. Within 100 days after each session of the legislature adjourns, each agency should submit 20 copies of its regulatory agenda to the Executive Director of the Legislative Council, and 1 copy to the Secretary of State. Copies should also be available to any interested parties. The regulatory agenda must contain:

1. a list of rules the agency expects to propose during the coming year, up to the next due date for a new regulatory agenda;

2. statutory authority;
3. the purpose of the proposed rules;
4. the expected schedule for adoption of the rules;
5. identification and listing of potentially benefitted and regulated parties; and
6. a list of all emergency rules adopted since the previous agenda due date.

If the agency does not anticipate any rulemaking activity during the coming year, the agency should send a statement or letter to that effect to the Executive Director of the Legislative Council and to the Secretary of State.

None of this prohibits an agency from adopting any rules that were not prelisted in a regulatory agenda. Nor does it require an agency to adopt a rule that was listed therein.

NOTICE OF AGENCY RULE-MAKING PROPOSAL

AGENCY:

RULE TITLE OR SUBJECT:

PROPOSED RULE NUMBER: (LEAVE BLANK - ASSIGNED BY SECRETARY OF STATE)

CONCISE SUMMARY: (SHOULD BE UNDERSTANDABLE BY AVERAGE CITIZEN)

STATUTORY AUTHORITY:

PUBLIC HEARING: (IF ANY, GIVE DATE, TIME AND LOCATION)

DEADLINE FOR COMMENTS:

AGENCY CONTACT PERSON:

NAME:

ADDRESS

PHONE NUMBER:

ADMINISTRATIVE PROCEDURES ACT

CHECKLIST

AGENCY:

CHAPTER # AND TITLE OF RULE:

PROPOSED RULE

1. Was this rule listed on the last or previous regulatory agendas? _____
2. Date of Notification of:
 - Anyone on mailing list _____
 - Any trade, industry or professional group _____
 - Any trade publications _____
3. Date Notice of Rulemaking Proposal sent to Secretary of State _____
4. Date fact sheet sent to Exec. Dir. of Legislative Council _____
5. Date of Publication in Secretary of State's Rulemaking Ad _____
6. Date of Hearing: _____ 7. Comment Deadline: _____

ADOPTED RULE:

8. Is rule consistent with what was proposed? _____
 (If not, please address the changes in the Summary of Comments).
9. Was hearing continued? _____ 9a. Was Comment Deadline extended? _____
10. Was the comment period reopened because of numerous changes to the proposed rule? _____
11. Was a second notice published in the Rulemaking Ad? _____ When? _____
12. Is the person signing Certification Statement (MAPA-1 #9) authorized by statute to adopt the rule for the department? _____
13. Was rule adopted within 120 days from comment deadline? _____
14. Was the rule approved & signed by the Attorney General's Office? _____
 Within 150 days from comment deadline? _____
15. Is Basis Statement included? _____ Is Summary of Comments included? _____
 Is a copy of fact sheet included? _____ Or submitted with proposed rule? _____

RULEMAKING FACT SHEET
(5 M.R.S.A., Section 8057-A)

AGENCY:

CHAPTER NUMBER AND RULE TITLE:

STATUTORY AUTHORITY:

PRINCIPAL REASON FOR PROPOSING TO ADOPT THE RULE:

PURPOSE AND OPERATION OF THE RULE:

ANALYSIS OF THE RULE:

FISCAL IMPACT OF THE RULE:

FOR RULES WITH FISCAL IMPACT OF \$1,000,000. ALSO INCLUDE:

ECONOMIC IMPACT (INCLUDING EFFECT NOT QUANTIFIED IN MONETARY TERMS):

INDIVIDUALS OR GROUPS AFFECTED AND HOW THEY WILL BE AFFECTED:

BENEFITS OF THE RULE:

NOTE: If necessary, additional pages may be used.

Appendix V: **Sample Rule**

Sample Filing Format for Filing Rules

05-071 DEPARTMENT OF EDUCATIONAL AND CULTURAL SERVICES

COMMISSIONER OF EDUCATIONAL AND CULTURAL SERVICES

Chapter 130 RULES FOR EQUIVALENT INSTRUCTION PROGRAMS

SUMMARY: This chapter outlines the procedures and standards governing the Commissioner's review of proposed equivalent instruction programs, commonly referred to as "homeschooling," pursuant to 20-A M.R.S.A. § 5001(2)(L)(D).

1. Procedures and Standards for Equivalent Instruction Programs.

A. DEFINITIONS

1. Commissioner: "Commissioner" shall mean the Commissioner of the Department of Educational and Cultural Services or his designee.

2. Equivalent instruction: "Equivalent instruction" shall mean an alternative program of instruction approved under this chapter designed to fulfill the requirements of the compulsory school attendance law as an equivalent to attendance at a public school or an approved private school, as authorized by 20-A M.R.S.A. § 5001(2)(D).

3. School: "School" shall mean any regular instructional program conducted for purposes of the compulsory attendance law which enrolls two or more unrelated students.

4. Tutor: "Tutor" shall mean the parent(s) or other person(s) who acts or will act as the primary teacher of the student(s) in an equivalent instruction program.

B. SCHOOL BOARD RULES

The school board of every school administrative unit shall adopt rules governing the application for and review of equivalent instruction programs as alternatives to attendance in the regular public day school program. These rules shall govern all alternative programs of instruction beginning in the school year starting July 1, 1985.

A current copy of the rules shall be filed with the Commissioner. Copies shall be printed and be made available to all interested individuals upon request.

The rules shall include notice of the requirement that equivalent instruction programs be approved by local school officials and the Commissioner and shall further include notice of the right to appeal any denial of an application to the Commissioner.

An equivalent instruction program is subject to annual approval by the school board of the administrative unit where the student(s) reside.

The rules shall be consistent with and shall be implemented in conformity with the requirements of this chapter.

C. COMMISSIONER'S REVIEW OF APPLICATION FOR EQUIVALENT INSTRUCTION

1. Local school responsibility: Upon approval of an application of equivalent instruction, the superintendent of the school unit shall, within five working days, forward to the Commissioner the following:

(a) a copy of the parent's application and a description of the equivalent instruction plan which meets the needs of the student(s) and includes all statutory requirements set for thin Title 20-A and rules promulgated thereto,

(b) a copy of the minutes containing the school board's decision,

(c) a copy of any report and recommendations prepared for the school board by the instructional or administrative staff of the school unit, including any Pupil Evaluation Team recommendations, and,

(d) any other information which formed the basis of the school board's decision.

2. Review by the Commissioner: The Commissioner, or his de-signee, shall review all relevant material forwarded by the school unit to determine if the student(s) will be provided equivalent instruction within the meaning of 20-A M.R.S.A. § (2)(D). In making a determination that equivalent instruction is available, the determination that equivalent instruction is available, the Commissioner shall consider whether the plan includes the following:

(a) competent instruction by

(i) a tutor who holds, or is eligible to hold, a certificate as a teacher in the State of Maine, or

(ii) a tutor who will be assisted by a satisfactory support system: the support system shall include one of the following:

(aa) provision for a certified teacher to work with the tutor on a regular basis, at a minimum of four times during the school year; or,

(bb) provision for the tutor to receive regular assistance, at a minimum of four times during the school year, from a public school or an approved private school; or,

(cc) provision for the tutor to receive regular assistance and supervision, at a minimum of four times during the school year, from another, approved, home instruction program which has been in operation for a minimum of one school year.

D. DETERMINATION OF EQUIVALENT INSTRUCTION

The Commissioner shall appoint a state level advisory board to review all materials submitted by the school unit and the parent. The process shall operate as follows:

1. The Commissioner shall appoint one individual from the department, to chair the advisory board, one individual from the administration of a school administrative unit, and three individuals who are currently conducting approved equivalent instruction programs;
2. The state level advisory board may hold a fact-finding hearing to hear from the parents and school representatives on the appeal; shall make a finding of facts and shall forward those findings along with its recommendation to the Commissioner; and
3. The Commissioner shall inform both parent(s) and the superintendent in writing as to the final decision of his office; if the appeal is denied, the decision shall be deemed a final agency action, within the meaning of the Maine Administrative Procedure Act, and appealable to the superior Court; if the appeal is granted, the school unit shall treat the student as properly excused from public school attendance.

BASIS STATEMENT:

These standards were adopted to allow greater flexibility in the means by which children receive an education, and to meet the unique circumstances and needs of individuals.

AUTHORITY: 20-A M.R.S.A. § 5001 (2) (D).

EFFECTIVE DATE:

COMMISSIONER OF EDUCATIONAL AND CULTURAL SERVICES

Comments and Responses to Comments on Proposed Rules Governing Equivalent Instruction Programs.

At a hearing held on June 13, 1984, the Commissioner of Educational and Cultural Services received comments on a proposed rule to implement the provisions of Title 20-A M.R.S.A. § 5001 (2) (D), equivalent instruction programs.

The hearing, held before a packed state house hearing room, brought many challenges to the proposed rules from home-schoolers from all across the state. In addition home school specialists were in attendance from Vermont, New Hampshire, and the state of Washington. Physicians, attorneys, practicing homeschoolers, and professional educators testified in opposition to the proposed rules as written.

The major items of objection were: (1) teacher qualifications, (2) the overall rigidity required; i.e., 5 hour day, weekly schedule, 180 day year, and (3) student assessment. Questions of constitutional rights versus the states compelling interests were voiced.

Comments by two school superintendents present generally favored the proposed rules. Several speakers supported the concept of the state's compelling interest but asked for modification of the rules, while some home-schoolers felt the present rules were adequate.

In summary, the hearing consumed over three hours with thirty two speakers presenting their comments. Written testimony was received at the time of the hearing and for ten additional days. Over 60 written letters of testimony were received. Those comments have been reviewed and are the basis for many changes in the proposed rule. The comments and the rulemakers' responses are explained here to fulfill the requirements of the Maine Administrative Procedure Act and to provide assistance in future interpretations of the rules.

Following the hearing, Commissioner Boose formed an ad-hoc committee made up of four school superintendents, four home-school specialists, and department staff. The commissioner was involved in the several meetings that followed. The mission of the ad hoc committee was to find that middle ground of approval between the state's compelling interest in the education of its youth and the parents' rights about that education.

A feature of the rules included in the appeals process at the state level is the formation of a state level advisory board. This board, called by the commissioner, will consist of three home-schoolers, one Department of Educational and Cultural Services staff, and a public school administrator. After a review of the information pertaining to an appeal, the board will advise the commissioner of their findings.

The major objections voiced at the hearing and in written comments have been responded to in the new rules.

(Note: this is only a sample. This particular rule has since been superceded through the rulemaking process.)