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AN AGENCY GUIDE TO RULE-MAKING



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Secretary of State
State of Maine

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CONTENTS

Summary (Introduction)	1
Quick Reference Guide	2
§1. What is a rule	3
§2. Rule-making	
1. The Planning phase	
2. A.P.A. Requirements	4
A. Notice of proposed rules	
(1) The Rule-making Proposal Form (MAPA-3)	
(2) Copy of the Rule (see Section IV)	
(3) The Fact Sheet	5
B. Public participation: Hearings	
C. Adoption	7
D. Filing	8
E. Agency responsibility	
3. Emergency Rules	
4. Required Rules	
5. Citizen Petition for Rule-making	9
§3. Preparation of rules for filing	
1. Cover Sheet	
2. Numbering System	
A. Code of Maine Rules (CMR)	
B. Assigning rule numbers	10
C. Organization of rules	
(1) Chapters	
(2) Sections	
D. Citation of rules	11
E. Reservation of numbers	
3. Number of Copies to be Filed	
4. Filing Format	12
A. Typing requirements	
B. Summary	
C. Descriptive headings	
D. Basis statement	
E. Explanatory material	
F. Authority and effective date	13
5. Amendment of Rules	
6. Incorporation by Reference	
7. Electronic filing	14
§4. The agency regulatory agenda	
Appendix I: Sample Notices of Proposal (MAPA-3) and Adoption (MAPA-4)	15-16
Appendix II: Sample Cover Sheet for Adoptions (MAPA-1)	17
Appendix III: Sample Checklist	18
Appendix IV: Sample Fact Sheet	19
Appendix V: Sample Copy of Rule with Basis Statement, Comments and Responses	20



Summary (Introduction)

In response to a decades-long concern about regulatory activity, the federal government and many other states have adopted administrative procedure acts. The intent has been to improve public access to agency decision-making and to increase awareness of agency rules.

The Maine Administrative Procedure Act (A.P.A.), 5 MRSA §8001 through 11008, was adopted at the First Session of the 108th Legislature, with some amendments since. It applies uniform requirements to state agencies with rule-making power, and sets minimum standards for agencies to follow in adopting and implementing rules.

Very generally, the A.P.A. establishes a uniform, comprehensive set of procedures covering:

- The administrative actions of state agencies, including rule-making, advisory rulings, adjudicatory proceedings, and licensing; and
- Judicial review of those actions.

First is "Quick Reference Guide" to rule-making. Then Sections 1 and 2 describe the rule-making process and the A.P.A. requirements for agencies authorized to adopt rules. Section 3 outlines the rule filing requirements established by the Secretary of State (hereafter cited as "Secretary") under the A.P.A.

Section 4 describes a related but entirely separate process required of each agency, the Annual Regulatory Agenda, in which an agency files a list of expected rule-making for the coming year.

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

This is an interim edition of the Guide pending final formulation, proposal, and adoption of the Secretary of State's rule on electronic (machine readable, word processed) filing of rules.



QUICK REFERENCE GUIDE

1. Proposed rule

1. File 1 copy of the following with the Secretary of State on the Tuesday of the week prior to newspaper publication date:
 - A. **NOTICE OF RULE-MAKING PROPOSAL FORM, MAPA-3** (see Appendix I for a sample copy). Among other purposes, this form determines the text of your newspaper proposal advertisement; all information, including the financial coding and original signature of your relevant official or business person at the bottom of the form (to approve the expenditure for the ads), should be filled in.
 - B. Copy of the **RULE** being proposed (see Appendix V for a sample rule);
 - C. Copy of the **FACT SHEET** (optional; see Appendix IV for a sample).

2. File 20 copies of the following with the Executive Director of Legislative Council within a day or two after filing with Secretary of State:
 - FACT SHEET** (Appendix IV).

2. Adopted rule

1. The adopted rule should contain all of the following:
 - A. **NOTICE OF RULE-MAKING ADOPTION FORM, MAPA-4** (see Appendix I for a sample copy). Among other purposes, this form determines the text of your newspaper adoption advertisement; all information, including the financial coding and original signature of your relevant official or business person at the bottom of the form (to approve the expenditure for the ads), should be filled in.
 - B. **COVER SHEET (MAPA-1)** signed by the agency and the Assistant Attorney General (see Appendix II for a sample);
 - C. Copy of the **RULE** (for a rule amendment, the full text of the current rule with deleted language crossed out and new language underlined);
 - D. **BASIS STATEMENT**;
 - E. **SUMMARY OF COMMENTS** (now must include names of commenters and affiliations);
 - F. **CHECKLIST**;
 - G. Copy of the **FACT SHEET** (Appendix IV); and

2. Signatures and dates on MAPA-1 must show that the rule has been approved by:
 - A. The person authorizing the adoption of the rule (who must sign within 120 days from the comment deadline); this must be an agency head or major policy-influencing position as listed in Title 5, Chapter 71; and
 - B. The Attorney General or assistant (who must sign within 150 days from the comment deadline).

3. The rule must be filed with the Secretary of State (3 copies).
 - A. 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.
 - B. 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.)

§1. What is a rule?

The statutory definition (5 MRSA §8002 sub-§9) is important because it triggers the application of the rule-making procedures as described below. 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."

What an agency calls its pronouncements is not significant. It is the impact, not the terminology, which determines the existence of a rule. 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 also "rules" in the sense that the full provisions of the A.P.A. law apply.

The second part of the statutory 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 of the A.P.A law;
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.

Consult a staff attorney or the Attorney General in cases where the status of agency statements is uncertain.

§2. Rule-making

Rule-making includes all of the steps an agency must follow to give a rule legal effect. The process begins when someone decides 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.

1. The Planning Phase

Prior to beginning the formal process established by the A.P.A., an agency should:

- A. Determine whether the Legislature has granted it authority to make such a rule;
- B. Consider carefully what it wants to accomplish by rule-making;
- C. Read the rule-making provisions of the A.P.A. and this manual;
- D. Review existing rules to avoid duplication, and fit the new rule logically within the body of existing rules; and
- E. Draft the proposed new rule in the format established by the Secretary (see Section IV of this manual).
- F. Consult with the Attorney General's office to be sure that the proposed rule meets with its approval.

2. A.P.A. Requirements

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

A. Notice of Proposed Rule

The Notice of Rule-making Proposal (from MAPA-3) must be published 17-24 days prior to the hearing, if one is scheduled (5 MRSA §8053 sub-§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:

- (1) Rule-making proposal form (MAPA-3; see Appendix I);
- (2) Copy of the rule (see Appendix V for a sample);
- (3) Checklist (see Appendix III); and
- (4) Copy of the fact sheet (see Appendix IV).

The Notice of Rule-making is published in the *Bangor Daily News*, *Kennebec Journal*, *Portland Press Herald*, *Lewiston Sun-Journal* and the *Waterville Morning Sentinel* every Wednesday. All rule-making 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, rule-making notices should be submitted no later than Monday to allow enough time to publish the notices on Wednesday of the next week. The Secretary has the authority to name any day of the week as rule day, even Sunday, and to alter the number of newspapers accordingly. If such a change should happen, we will give you plenty of advance notice.)

Agencies will be billed periodically for their *pro rata* share of the publication expenses. Notice of rule-making 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.

- (1) **The Rule-making Proposal Form--MAPA 3** (see 5 MRSA §8053 sub-§3): The A.P.A. requires that the notice:
 - (a) cite the Maine Law authorizing the agency to adopt the rule;
 - (b) give the time and place of the public hearing on the proposal, if one is planned, or describe how a hearing may be requested;
 - (c) tell how and when comments may be submitted. If no hearing is scheduled, the comment deadline must be at least 30 days after publication;
 - (d) contain a summary of the contents, or the text of the proposal and indicate where a copy may be obtained; and
 - (e) refer to the substantive state or federal law to be implemented by the rules. (See Appendix I for a sample MAPA-3.)
 - (f) Indicate if the rule will have any fiscal impact on municipalities or counties.
- (2) **Copy of the Rule** (see detailed discussion in Section IV below; see also Appendix V for sample).
- (3) **The Fact Sheet** (5 MRSA §8053-A): At time of giving notice of rule-making to the Secretary of State, **twenty** copies of the 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 if 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 Rule-making ad and allowing a thirty day comment period (5 MRSA §8052 sub-§5 ¶B). This new comment deadline also triggers new adoption (120 day) and new Attorney General review (150 day) deadlines.

The fact sheet which is submitted to the Executive Director of the Legislative Council must contain (see 5 MRSA §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;
- (e) an analysis of the rule which describes whether this rule would impose an economic burden on small business; and
- (f) the date, time, and location of the hearing if any, the comment deadline, and the name, address, and phone number of the agency contact person.

Notice of proposed rule-making 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 MRSA §8053):

- (a) Any person specified in the statute authorizing the rule-making;
- (b) any person who has filed within the past year a written request with the agency for notice of rule-making. 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.

B. Public participation

The A.P.A. provides several opportunities for the public to participate in the state's rule-making 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 MRSA §8052 sub-§1). The A.P.A. 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 above.

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

- (1) the hearing room should be large enough to accommodate the number of people who are interested in the rule;
- (2) the building and hearing room must be certified as handicapped accessible by the Department of Human Services (see below);
- (3) the equipment which will be used should allow anyone testifying to be heard by most of the people attending;
- (4) the hearing room should be reasonably comfortable for anyone attending the hearing, and should have space available for the handicapped.
- (5) 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 the Department of Human Services (State House Station 11). The Department has available a published list of approved locations. Before you schedule a hearing in any building, you should check the list or call Ronald Hanson or Brian Trask at 624-5308 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 MRSa c.71 (mainly commissioners, deputies, and bureau chiefs), or a designee who has responsibility over the subject matter to be discussed at the hearing (the designee provision, part of Public Law 1993, c.362, takes effect October 13, 1993).

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

- (1) all persons conducting the hearing should identify themselves and give a brief description of their positions and responsibilities;
- (2) 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);
- (3) the moderator should then explain the procedures to be followed in conducting the hearing:
 - (a) how long each person will have to speak, if any time limit is set at all--15 minutes would seem adequate in most instances;
 - (b) what the format will be and how individuals should pose their questions;
- (4) The moderator may then begin, taking comments from:
 - (a) anyone opposing the rule;
 - (b) anyone approving of the rule;
 - (c) 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 A.P.A. 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.

C. 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 MRSA §8052 sub-§7.) The physical definition of adoption is the dated signature of the agency representative at the certification statement in MAPA-1.

The comment deadline may be extended if notice is published in the state rule-making ad, before the expiration of the previous comment period (5 MRSA §8052 sub-§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 can arrange to have the notice published in time. You might also consider allowing longer than a 10 day comment period after the hearing.

The A.P.A. 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 MRSA §8052 sub-§5). The agency may consolidate similar comments instead of addressing each one individually, but a recent provision of law (Public Law 1993, c.446, affecting 5 MRSA §8052 sub-§5) requires the listing of the names of persons whose comments were received and the organizations they represent, along with summaries of their comments. A record of the vote of agency members in rule-making decisions must be maintained by each agency and available for public inspection (5 MRSA §8056 sub-§5).

The A.P.A. also requires that a checklist be submitted when a rule is adopted. The Secretary of State has the form you should use (see Appendix III; you can copy this or any of the appendices for use as forms if you wish).

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.

More detail is below, but the package you should submit to the Secretary upon rule adoption should contain:

- (1) Notice of Rule-Making Adoption (MAPA-4), including an original signature of a financial officer or other empowered official and the financial coding;
- (2) The cover sheet (MAPA-1) with appropriate original signatures and dates;
- (3) The rule, headed by a summary statement;
- (4) A basis statement;
- (5) Comments, names and organizations of commenters, and agency responses;
- (6) Fact sheet;
- (7) Checklist.

An agency should communicate with the Attorney General concerning legality and the Secretary of State on questions of format prior to proposing a rule to avoid the delay and

expense of having rules, which are already officially adopted, or rejected because of legal or format shortcomings.

D. Filing

Once an agency adopts a rule, the A.P.A. requires that the agency:

- (1) submit a copy to the Attorney General for approval as to form and legality -- such approval takes the form of a dated signature by an assistant attorney general; and
- (2) file a certified copy with the Secretary in a form prescribed by him (5 MRSA §8056 sub-§1); this is MAPA-4, MAPA-1, the rule, basis statement, comments and responses, fact sheet, checklist.

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 MRSA §8056 sub-§§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 is published by the Secretary in the weekly consolidated newspaper ad (5 MRSA §8056 sub-§1 ¶D). The text submitted by the agency on MAPA-4, Notice of Rule Adoption, is used for the notice. Agencies will be billed periodically for their *pro rata* share of the publication expense.

E. Agency responsibility

The A.P.A. 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.

3. Emergency Rules

In emergencies, compliance with the A.P.A. 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 MRSA §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 MRSA §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 A.P.A. is used only for actual emergencies (5 MRSA §8054 sub-§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).

4. Required Rules

In addition to its substantive rules, each agency is required by 5 MRSA §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.

5. Citizen Petition for Rule-making

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 rule-making 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:

- Respond in writing, denying the request and stating its reasons for denial; or
- Initiate rule-making proceedings to consider the proposed change.

§3. PREPARATION OF RULES FOR FILING

Rules must be filed with the Secretary to have legal effect (5 MRSA §8057 sub-§1).

This filing constitutes official notification that the rule has been adopted. Since the procedural details are specified in statute, no aspect should be overlooked or form skipped.

The Secretary has the power to correct non-substantive errors and errors in spelling and format upon notification of the agency, but this power is rarely used; it will be more often employed when the electronic era is fully entered. A better approach to errors is to file a memo signed by the Attorney General's Office noting the uncorrected errors; it will be attached to the rule for public information.

1. Cover Sheet

A cover sheet (MAPA-1) describing each rule must accompany all adopted 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 finally adopted and 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. *A cover sheet (MAPA-1) 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; such rules will be returned to the agency with a statement of explanation. Rules properly filed are 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.

2. Numbering System

A. 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. In general, we follow statutory practice with minor exceptions and omissions.

B. 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 Professional and Financial 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 active among state agencies for various purposes, including rules; 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 at 624-7810.

The second element concerns the subject matter of agency rules and identifies specific statements within each agency's body of rules. The structure is similar to statute: a chapter concentrates on a discrete subject, and within it are sections (§). When most people think of the term "rule," they are thinking of chapters filed under the agency's umbrella/unit number.

C. 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.

(1) 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 four (preferably three) digits or less.

(2) Sections (§ or Sec.) and lesser divisions

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. The only difference between this use of "section" and that of statute is that in rules, section numbers begin anew with each chapter.

Where internal division is further necessary, sections may be divided as follows:

Subsection (sub-§) - within a section, arabic numerals beginning with "1".

Paragraph (¶) - within a subsection, alphabetically in caps beginning with "A."

Sub-paragraph (sub-¶) - within a paragraph, arabic numerals enclosed in parentheses, such as "(1)."

Division - within a sub-paragraph, lower case letters in parentheses beginning with "(a)."

Subdivision - within a division, lower case Roman numerals in parentheses beginning with "(i)."

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

D. 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. Try to avoid this, however.

E. Reservation of numbers

In assigning numbers to chapters and sections, agencies should take into account the likelihood that their body of 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.

3. 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 maintaining a file of all historical copies is extremely important.

Statute also requires the agency to supply the State Librarian (State House Station 64) with 18 copies of complete rules, which are distributed through the Depository Library system -- see 1 MRSA §501-A.

Statute also requires the agency to *"...print and compile and make available to any person, at each of its offices, for inspection at no charge and for copying with or without cost, as the agency shall determine, and for distribution free or at actual cost, complete sets of such rules currently in effect."* (5 MRSA §8056 sub-§2.)

4. 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.

A. 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.

B. 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 should precede the text of the rule.

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.

C. Descriptive headings

The first page and, ideally, every page of the text of the rule should always include a header with the name of the agency, chapter number of the rule, and rule title.

Within the body of rules, chapter and section must carry a concise descriptive heading which allows the reader to scan rules quickly. 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 should also be given headings. The heading should be set off from the text of the subsection, etc., by a period between the heading and the text.

D. Basis statement

5 MRSA §8052 sub-§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 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.

Along with the Basis Statement, the agency must also address all comments, indicating the people who commented and the organization each represents, and explain the reasons for accepting or failing to accept the suggested changes.

E. 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.

F. 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.

5. 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 rule-making and must comply with the rule-making requirements of the A.P.A. **An amendment is any addition to or deletion from the text of the rules.** Additions to the text of the rule must be underlined, deletions must be struck out (~~like this~~). 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 amended portion(s) text of the rule must be attached to the cover sheet and must be in the proper filing format. One of the three copies should be a "clean" copy in which amendments and deletions have been incorporated into the surrounding text (i.e., the underlines are removed from new text, and the struck text no longer appears); this copy could be revised full pages, or the complete chapter itself.

When a rule is suspended or repealed, only a properly completed cover sheet, a basis statement, the fact sheet, and the checklist must be filed indicating that the action being taken is the repeal of an existing rule.

An agency engaging in extensive rule amending and rewriting might find it more convenient to "repeal and replace" an existing rule. A box showing such action is now included for check-off on the Cover Sheet (MAPA-1). The basis statement should indicate repeal and replace situations.

6. 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. At least two copies 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.

7. **Electronic filing**

Modern word processing capabilities obviously recommend themselves to the preparation and dissemination of rules. A goal of the A.P.A. office is to eventually have all rules in machine readable form. As this version of the *Guide* is being written, the Secretary is preparing a rule governing the electronic filing of rules by state agencies, under the authority of 5 MRSA §8056 sub-§7. When the full details of this rule are known, agency liaisons will be notified. Since the Secretary's action will itself be a rule, public comment will be provided just like any other rule. This *Guide* will be revised to reflect any changes caused by the new procedures. We encourage you to file an electronic copy of your rules now, but the paper is the official version; contact the A.P.A. office to discuss electronic filing issues.

§4. **Agency regulatory agenda**

Entirely separate from the above rule-making process is the agency regulatory agenda, addressed in 5 MRSA §§8060 and 8064. From the beginning of a legislative session to 100 days after adjournment, 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 rule-making 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; an amended agenda can be filed when submitting a rule not on a current agenda. Nor does it require an agency to adopt a rule that was listed therein.

If you have any questions on the operation of the Administrative Procedure Act, feel free to call A.P.A. Officer Lucille Weeks at 207/287-4184, or Director of Rules and Commissions Don Wismer at 207/287-6381.

MAPA-3

Notice of Agency Rule-making Proposal

AGENCY:

RULE TITLE OR SUBJECT:

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

CONCISE SUMMARY (UNDERSTANDABLE BY AVERAGE CITIZEN):

THIS RULE WILL __ WILL NOT __ HAVE A FISCAL IMPACT ON MUNICIPALITIES.

STATUTORY AUTHORITY:

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

DEADLINE FOR COMMENTS:

AGENCY CONTACT PERSON:

AGENCY NAME:

ADDRESS:

TELEPHONE:

Please approve bottom portion of this form and
assign appropriate MFASIS number.

APPROVED FOR PAYMENT _____ DATE: _____

Authorized signature

FUND	AGENCY	ORG	APP	JOB	OBJT	AMOUNT
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Notice of Agency Rule-making Adoption

AGENCY:

CHAPTER NUMBER AND TITLE:

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

CONCISE SUMMARY (UNDERSTANDABLE BY AVERAGE CITIZEN):

EFFECTIVE DATE (TO BE FILLED IN BY SECRETARY OF STATE):

AGENCY CONTACT PERSON:

AGENCY NAME:

ADDRESS:

TELEPHONE:

Please approve bottom portion of this form and
assign appropriate MFASIS number.

APPROVED FOR PAYMENT _____ DATE: _____
Authorized signature

FUND	AGENCY	ORG	APP	JOB	OBJT	AMOUNT
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Rule-Making Cover Sheet

TO: Secretary of State
ATTN: Administrative Procedure Officer,
 State House Station 101, Augusta, Maine 04333.

1. **Agency** (name of Department/Bureau or Independent Agency):
2. **Agency umbrella and unit number** (2 digit umbrella and 3 digit unit):
3. **Title of rule:**
4. **Chapter number assigned to the rule** (must be 3 digits or less):
5. **Date(s)/method(s) of notice:**
6. **Date(s)/place(s) of hearing(s):**
7. **Type:** new rule partial amendment(s) of existing rule
 suspension of existing rule repeal of rule emergency rule
 repeal and replace: complete replacement of existing chapter, with former version simultaneously repealed.

8. **Name/phone of agency contact person:**

9. **Certification Statement:** I, _____, hereby certify that the attached is a true copy of the rule(s) described above and lawfully adopted by

_____ on _____.
(name of agency) (date)

Signature (original signature, personally signed by the head of agency): _____

Printed name & title: _____

10. **Approved as to form and legality by the Attorney General on** _____
(date)

Signature (original signature, personally signed by an Assistant Attorney General): _____

Printed Name: _____

Administrative Procedure Act CHECKLIST

Agency: _____

Chapter Number and Title of Rule: _____

1. Was this rule listed on the last regulatory agenda? _____
2. Date of notification of:
 - Anyone on mailing list _____
 - Any trade, industry or professional group _____
 - Any trade publications _____
3. Date Notice of Rulemaking Proposal (MAPA-3) sent to Secretary of State: _____
4. Date Fact Sheet sent to Executive Director of Legislative Council: _____
5. Date of publication in Secretary of State's rule-making ad.: _____
6. Date of hearing: _____ 7. Comment deadline: _____
8. Was comment deadline extended or comment period reopened? _____
 If yes, date of second notice publication in Secretary of State's rule-making ad: _____
9. Is adopted rule consistent with what was proposed? _____
 (If not, please address the changes in the comments and responses section of your filing.)
10. Is the person signing the Certification Statement (MAPA-1, #9) authorized to do so as stated in your statutes or in 5 MRSA, c.71? _____
11. Was the rule adopted within 120 days of the comment deadline? _____
12. Was the rule approved and signed by the Office of the Attorney General within 150 days of the comment deadline? _____
13. Is a Basis Statement included? _____ Is a copy of the Fact Sheet included? _____
 Are comments, with names and organizations, and your responses included? _____

Rule-Making Fact Sheet

(5 M RSA §8057-A)

AGENCY:

NAME, ADDRESS, PHONE NUMBER OF AGENCY CONTACT PERSON:

CHAPTER NUMBER AND RULE TITLE:

STATUTORY AUTHORITY:

DATE AND PLACE OF PUBLIC HEARING:

COMMENT DEADLINE:

PRINCIPAL REASON OR PURPOSE FOR PROPOSING THIS RULE:

ANALYSIS AND EXPECTED OPERATION OF THE RULE:

FISCAL IMPACT OF THE RULE:

FOR RULES WITH FISCAL IMPACT OF \$1 MILLION OR MORE, ALSO INCLUDE:

ECONOMIC IMPACT, WHETHER OR NOT QUANTIFIABLE 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.

05-071 DEPARTMENT OF EDUCATION

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 MRSA §5001 sub-§2.

§1. Procedures and Standards for Equivalent Instruction Programs.

1. Definitions

A. Commissioner. "Commissioner" shall mean the Commissioner of the Department of Education or his designee.

B. 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 MRSA §5001 sub-§2 ¶D.

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

D. 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.

2. 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.

3. Commissioner's review of application for equivalent instruction

A. 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:

- (1) 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,
- (2) a copy of the minutes containing the school board's decision,
- (3) 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,
- (4) any other information which formed the basis of the school board's decision.

B. Review by the Commissioner. The Commissioner, or his designee, 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 MRSA. 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:

Competent instruction by

- (1) a tutor who holds, or is eligible to hold, a certificate as a teacher in the State of Maine, or
- (2) a tutor who will be assisted by a satisfactory support system: the support system shall include one of the following:
 - (a) 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,

- (b) 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,
- (c) 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.

§2. 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.

STATUTORY AUTHORITY: 20-A MRSA §5001 sub-§2 ¶D.

EFFECTIVE DATE (5 days after adoption filing as assigned by the Secretary of State, unless agency sets a later date):

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.

COMMENTS AND RESPONSES

(Note: a law passed in 1993 would add to the following the names and organizations of commenters.)

At a hearing held on June 13, 1984, the Commissioner of Education received comments on a proposed rule to implement the provisions of Title 20-A MRSA §5001 sub-§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 Education 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 superseded through the rule-making process.)