

CHAPTER 11

RULE-MAKING

Table of Contents

Section 11.1	Scope of This Chapter
11.1.1	Delegation Agreements Excluded from This Chapter
Section 11.2	Definition and Function of Rules
11.2.1	Activity Excluded from the APA's Definition of a Rule
Section 11.3	Distinguishing a "Rule" from Other Types of Agency Policy Guidelines
11.3.1	Substantive Policy Statements and Internal Policy Documents
11.3.2	Filing and Publication of Substantive Policy Statements
Section 11.4	Authority to Adopt Rules
11.4.1	Requirement of Legislative Grant of Authority
11.4.2	Mandatory and Discretionary Rules
11.4.3	Limits on Authority
Section 11.5	Types of Rules - Frequently Addressed Subject Matters
11.5.1	Rules of Practice
11.5.2	Forms and Their Instructions
11.5.3	Rules Establishing Fees
11.5.4	Licensing Time Frames
11.5.5	Amendment or Repeal of a Prior Rule
Section 11.6	Exemptions from Rule-making Procedures
11.6.1	Section 1005 Exemptions

- 11.6.1.1 Procedures for Publication of Rules Exempt Under Section 1005
- 11.6.2 Section 1057 Exemptions
 - 11.6.2.1 Attorney General Review of Rules Exempt Under § 41-1057
- Section 11.7 Regular Rule-making Procedures
 - 11.7.1 Creating and Maintaining the Rule-making Record
 - 11.7.2 The Rule-making Docket
 - 11.7.2.1 Opening the Docket - - Filing the Notice of Rule-making Docket Opening
 - 11.7.3 Developing the Rule Proposal
 - 11.7.3.1 Formal Rule-making Advisory Committees
 - 11.7.3.2 Drafting the Rule
 - 11.7.3.2.1 Format Requirements
 - 11.7.3.2.2 Codification Requirements
 - 11.7.3.2.3 Drafting Guidelines
 - 11.7.3.2.4 Incorporation by Reference
 - 11.7.3.3 Crafting the Preamble
 - 11.7.3.4 Rules Affecting Small Business and the Statement of Effect on Small Business and Economic Impact Statement
 - 11.7.3.5 Informal and Courtesy Reviews
 - 11.7.3.5.1 Informal Review by the Attorney General
 - 11.7.3.5.2 Courtesy Review by GRRC
 - 11.7.4 Filing the Notice of Proposed Rule-making
 - 11.7.5 Early Review Petitions

- 11.7.6 Public Comment Periods
 - 11.7.6.1 Written Comment Period
 - 11.7.6.2 Conduct and Record of the Oral Proceeding
 - 11.7.6.2.1 Timing of the Oral Proceeding
 - 11.7.6.2.2 Conducting the Oral Proceeding
- 11.7.7 Close of the Record
- 11.7.8 Modifications to the Rule After Public Comment
 - 11.7.8.1 Effect of Substantial Changes to the Rule
 - 11.7.8.2 Options if Substantial Changes to the Rule Occur
- 11.7.9 Final Document Preparation and Filing the Rule with GRRC for Approval
 - 11.7.9.1 Compiling the Rule Package for GRRC Consideration
 - 11.7.9.1.1 The Preamble
 - 11.7.9.1.2 The Economic, Small Business, Consumer Impact Statement (EIS)
 - 11.7.9.2 Submission for Approval by GRRC
 - 11.7.9.2.1 Procedures for GRRC Approval
 - 11.7.9.2.2 Standards for GRRC Approval
 - 11.7.9.2.3 Procedure upon GRRC Approval
 - 11.7.9.2.4 Procedure upon GRRC Return of Rule
- 11.7.10 Final Filing with the Secretary of State
- 11.7.11 Termination of Rule-making Prior to Final Filing
- Section 11.8 Emergency Adoption of Rules
 - 11.8.1 Standards for Emergency Rule-making

11.8.2	Procedures for Emergency Rule-making
11.8.3	Effective Dates and Renewal of Emergency Rule
11.8.4	Attaining Permanent Status for Emergency Rule
11.8.5	Emergency Adoption of a Delegation Agreement
Section 11.9	Summary Rule-making Procedures
11.9.1	Effective Date of Summary Rule
Section 11.10	Effective Date for Rules - Generally
Section 11.11	Publication of Directory for Rules and Substantive Policy Statements
Section 11.12	Post-Rule Challenge to Economic Impact Statement
Section 11.13	Petition for Rule-making or a Declaration that a Practice Is a Rule
Section 11.14	Five-Year Review Reports
Section 11.15	Important Dates for Submission of Reports to GRRC
Section 11.16	Annual Regulatory Report

CHAPTER 11

RULE-MAKING

11.1 Scope of This Chapter. This Chapter discusses administrative rules and the procedures for making rules established by the Administrative Procedure Act (APA), A.R.S. §§ 41-1001 to -1092.12. This Chapter provides the general background necessary to guide a state agency through the rule-making process required by the APA. It is important to note, however, that the information necessary to conduct rule-making is found not only in the APA, but also in the organic statutes of the agency, the statutes and rules that govern the Secretary of State (A.R.S. §§ 41-121 through -133, 41-1011 through 1013, and A.A.C. R1-1-101 through R1-114), and the Governor's Regulatory Review Council (GRRC) (A.R.S. §§ 41-1051 through 1057 and A.A.C. R1-6-101 through R1-6-401). A useful resource is the Arizona Rulemaking Manual, which is published by and available from the Secretary of State's Office. The Rulemaking Manual is also available on-line at http://www.azsos/public_services/rulemakingmanual/manual.htm. The manual contains a flow chart of the rule-making process, FAQs, numerous sample forms, check lists and helpful advice relating to rule-making and rule writing. Because there are frequent changes to these sources of rule-making information, it is important that an agency makes certain it uses the most recent information when making a rule.

11.1.1 Delegation Agreements Excluded from This Chapter. A delegation agreement is a contract between an agency and a political subdivision that authorizes the subdivision to exercise certain powers or duties of the agency. A.R.S. § 41-1001(6). Many of the procedural requirements for delegation agreements are similar to the requirements for rule-making. However, with the exception of a few references, this Chapter does not describe those requirements in detail. If an agency wishes to create a delegation agreement, the agency should contact its assigned Assistant Attorney General.

11.2 Definition and Function of Rules. The APA defines a "rule" as "an agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency." The definition goes on to state that a "rule" includes "prescribing fees or the amendment or repeal of a prior rule." A.R.S. § 41-1001(18).

Thus, the term "rule" covers a broad spectrum of policy statements, standards, guidelines, and directives that apply generally to a segment of the public in the future. *Havasu Heights Ranch & Dev. Corp. v. Land Dep't*, 158 Ariz. 552, 559, 764 P.2d 37, 44 (App. 1988) (to be a "rule" under the APA, a statement must be one of general applicability and future effect).

The primary purpose of rule-making is to give notice to the public of the substantive or procedural requirements that an agency has established for activities falling within its statutory authority. To ensure that the public is made aware of the agency's requirements, a state agency should create rules that establish in advance its policies, regulations, and procedures of general applicability, rather than generating policy in a piecemeal fashion through "ad hoc" determinations and adjudications. *Shelby School v. Arizona State Bd. of Educ.*, 192 Ariz. 156, 164, 962 P.2d 230, 238 (App. 1998); *Anderson v. State*, 135 Ariz. 578, 663 P.2d 570 (App. 1982).

11.2.1 Activity Excluded from the APA's Definition of a Rule. Several types of policy statements are expressly excluded from the definition of "rule" for purposes of the APA. For example, A.R.S. § 41-1001(18) provides that a "rule" does not include "intraagency memoranda that are not delegation agreements." A rule does not include matters "concerning only the internal management of an agency which do not directly and substantially affect the procedural or substantive rights or duties of any segment of the public." A.R.S. § 41-1005(A)(4).

11.3 Distinguishing a "Rule" from Other Types of Agency Policy Guidelines.

11.3.1 Substantive Policy Statements and Internal Policy Documents. The APA specifically accounts for two types of policy statements apart from rules – the substantive policy statement and the internal policy document. A.R.S. § 41-1001(21).

A substantive policy statement is defined as "a written expression which informs the general public of an agency's current approach to, or opinion of, the requirements of the federal or state constitution, federal or state statute, administrative rule or regulation, or final judgment of a court of competent jurisdiction, including, where appropriate, the agency's current practice, procedure or method of action based upon that approach or opinion." *Id.* Because a substantive policy statement is not a rule, it is not binding and is "advisory" only. *Id.* An example of this sort of statement might be a regulatory board's disciplinary guidelines, designed to guide a board member in deciding what type of sanction to use for a particular type of violation.

An internal policy document is defined by the APA as a statement "which only affect[s] the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties, confidential information or rules made in accordance with [the APA]." *Id.* An example of this type of statement might be an agency's sexual harassment policy.

An individual who believes that a substantive policy statement or an agency practice is a "rule" in disguise may seek to have the practice declared void under A.R.S. § 41-1033. This process is described fully in Section 11.13.

11.3.2 Filing and Publication of Substantive Policy Statements. The APA requires an agency to identify and summarize all substantive policy statements and to file that information with the Secretary of State for publication in the register. A.R.S. § 41-1091(A). An agency's substantive policy statement is to include a specific notice to the public. The required language of the notice is found at A.R.S. §41-1091(B). Also, each agency must maintain and update at least every year a directory summarizing the subject matter of all currently applicable rules and substantive policy statements. The agency is required to keep this directory at one location. *Id.* § (C). The directory, rules, substantive policy statements, and any material incorporated by reference in the directory must be open to the public for inspection at the office of the agency's director. *Id.* Every year, each agency must certify to GRRC that the agency is in compliance with these requirements. *Id.* § (D).

11.4 Authority to Adopt Rules.

11.4.1 Requirement of Legislative Grant of Authority. In making rules, an administrative agency exercises powers that have been delegated to it by the Legislature. Consequently, an agency may make an administrative rule only when it is either authorized expressly to do so by statute or when its authority may be reasonably and necessarily implied from a statute. *Canon School Dist. No. 50 v. W.E.S. Const. Co., Inc.*, 177 Ariz. 526, 530, 869 P.2d 500, 504 (1994).

The Legislature establishes policy and enacts standards to guide the agency. The legislative standards within which the agency may act may be stated in broad and general terms. *Haggard v. Indust. Comm'n*, 71 Ariz. 91, 223 P.2d 915 (1950); *State v. Arizona Mines Supply Co.*, 107 Ariz. 199, 484 P.2d 619 (1971). However, a statute that grants unlimited regulatory authority to an administrative agency, without any restraints or standards to direct the agency's action, offends the Arizona Constitution as an unlawful delegation of the Legislature's power. *State v. Marana Plantations, Inc.*, 75 Ariz. 111, 252 P.2d 87 (1953).

An agency must make rules when the Legislature mandates their adoption. See Section 11.4.2. The Legislature may also grant discretionary authority to an agency to make rules. *Id.* In either case, an agency's rules must be consistent with the Legislature's standards.

11.4.2 Mandatory and Discretionary Rules. Mandatory rules are those that the agency is required by statute to make. For example, an agency may be required by statute to prescribe reasonable educational and professional experiences for a licensee. See, e.g., A.R.S. § 32-3605(B)(4) (Board of Appraisal). Another example is a statute requiring an agency to establish water quality standards for all navigable waters. See A.R.S. § 49-221(A).

Discretionary rules are those that the agency may make, although it is not required to do so. A common statute providing discretionary rule-making authority is one that authorizes an agency to make "such rules as may be necessary" to carry out the purposes of the statutes pertaining to the agency. See, e.g., A.R.S. § 36-554(C)(6) (authorizing the Director of the Department of Developmental Disabilities to "make and amend rules from time to time as deemed necessary for the proper administration of programs and services. . .").

11.4.3 Limits on Authority. Within the permissible scope of rule-making activities, there are limits on what an agency may do. An agency's action may not be arbitrary or unreasonable. *Stoffel v. Dep't of Econ. Sec.*, 162 Ariz. 449, 784 P.2d 275 (App. 1989). An agency may not make a rule that deprives any person of constitutional rights. *Id.* An agency's actions must also comply with statutory requirements concerning the rule-making procedures.

11.5 Types of Rules - Frequently Addressed Subject Matters.

11.5.1 Rules of Practice. The APA expressly provides that each agency shall make rules that establish the nature and procedural requirements of all formal proceedings. A.R.S. § 41-1003. This law embraces a primary goal of rule-making -- to inform the public in advance of the requirements that an agency will impose in its formal proceedings. See Section 11.2. Pursuant to this law, agencies must make rules related to all of its formal proceedings, including licensing procedures, adjudicatory proceedings, and even rule-making itself, which usually involves public notice and participation.

There is some question whether an agency must make rules of procedure for administrative adjudications after the Legislature created a comprehensive set of laws that govern such proceedings for most agencies -- the Uniform Administrative Appeals Procedures Act (the UAAP). See *generally* Chapter 10; A.R.S. §§ 41-1092 through -1092.12. The UAAP appears to require agencies conducting administrative adjudications under the UAAP to use the rules of procedure created by the Office of Administrative Hearings (OAH), even when OAH does not conduct the formal hearing for the agency. See A.R.S. § 41-1092.02(B); Chapter 10, Section 10.4.2. (*This accurately describes the mandate of the APA.*) The UAAP makes clear that, when it applies to an agency's administrative adjudications, its requirements supersede all other statutes and rules unless expressly exempted. A.R.S. § 41-1092.02(D). Of course, if an agency or a particular proceeding is exempt from the UAAP, the agency must make rules of procedure to govern such proceedings so the public has advance notice of the agency's requirements. A.R.S. § 41-1003.

11.5.2 Forms and Their Instructions. The APA exempts from its application a "[f]orm whose contents or substantive requirements are prescribed by rule or statute, and instructions for the execution or use of the form." A.R.S. § 41-1005(A)(8). This exemption

exists to allow flexibility for the formatting of forms. If the format of a form is made as a rule, it cannot be changed except through another rule-making proceeding. On the other hand, a rule that merely specifies the substance of a form, but not its exact format, allows an agency to change the format as necessary. Thus, an agency may, but is not required to, place a form in a rule. Regardless of whether a form is included in a rule, matters of substance cannot be added to a form if that substance has not been included in an existing rule or statute.

11.5.3 Rules Establishing Fees. The APA's definition of "rule" specifically includes prescribing a fee. A.R.S. § 41-1001(18). A fee is defined to include any charge prescribed by an agency for an inspection or for obtaining a license. A.R.S. § 41-1001(8).

Under A.R.S. § 41-1008, an agency shall not charge or receive a fee, or make a rule establishing a fee, unless the fee for the specific activity is expressly authorized by statute or a tribal state gaming compact. An agency cannot establish a fee in a rule that is based only on a statute that generally authorizes an agency to recover its costs or accept gifts or donations. A.R.S. § 41-1008(A)(1). An agency must include the specific reference to the statute or tribal state gaming compact that authorizes a fee directly on the documents related to the collection of that fee. *Id.* at § (B).

In addition to defining the term "fee" narrowly in A.R.S. § 41-1001(8), the APA exempts certain fee-related matters from its rule-making requirements. For example, the APA exempts a rule that "only establishes specific prices to be charged for particular goods or services sold by the agency." A.R.S. § 41-1005(A)(5). This exemption applies to charges such as copying or the cost of a directory for an agency. Other specific exemptions for fee setting by particular agencies are contained in A.R.S. § 41-1005(A), including certain fees prescribed by A.R.S. § 6-125 (Department of Financial Institutions); A.R.S. § 3-1086 (Cotton Research and Protection Council); A.R.S. §§ 41-2144 and -2189 (Board of Manufactured Housing); A.R.S. § 32-2067 (Board of Psychologist Examiners); A.R.S. § 32-2132 (Real Estate Department); A.R.S. § 5-111(A) (Arizona Racing Commission); A.R.S. § 41-511.05 (Arizona State Parks Board); A.R.S. § 36-3409 (Department of Health Services); and A.R.S. § 32-1527 (Naturopathic Physicians Board of Medical Examiners). Other exemptions from the APA also affect the requirement of rule-making related to fees. See Section 11.6.

Certain statutes authorize an agency to "establish fees not more than," or to set a fee "not to exceed" a specified amount. See, e.g., A.R.S. § 32-2029 (Board of Physical Therapy); A.R.S. § 32-3027(A)(1); (Board for Private Postsecondary Education). Statutes may also include a direction to establish the fees "by formal vote" at a particular meeting of a Board. See, e.g., A.R.S. § 32-1826 (Osteopathic Board). When a statute involving an inspection or obtaining a license does not set the amount of the fee, the statute inherently gives the board discretion to set the fee up to a certain amount. In such cases, the agency should set the fee in a rule. See, e.g., A.A.C. R4-24-107 (Board of Physical Therapy);

A.A.C. R4-39-201 (Board for Private Postsecondary Education). GRRC must approve any rule-making involving a fee increase by a two-thirds vote. A.R.S. § 41-1052(E).

Of course, the language used for fee-setting by the Legislature varies from agency to agency, and exemptions to this rulemaking requirement may apply. Any agency or board that is considering whether to set or change fees involving inspections or licensing activity should seek advice from its Assistant Attorney General to determine if rule-making is required.

11.5.4 Licensing Time Frames. All agencies that issue licenses are required to have rules that establish licensing time frames. See A.R.S. §§ 41-1072 through -1079. The time frames must establish an “overall time frame” within which the agency must either grant or deny the license. Within the overall time frame, the agency must establish an “[a]dministrative completeness review time frame,” within which the agency must notify an applicant that the application for a license contains all components and information required, and a “substantive review time frame,” within which the agency must determine if the information the applicant supplies meets all the substantive requirements for the license. See A.R.S. §§ 41-1072 and -1073. Exceptions exist for licenses issued under tribal state gaming compacts, within seven days after receipt of the initial application, or by lottery method. A.R.S. § 41-1073(E).

Any agency that fails to comply with established time frames may suffer financial consequences. See A.R.S. § 41-1077. For example, if the overall time frame is not met, the agency must continue to process the application, but must refund all fees charged for reviewing and acting on the application, and shall excuse any fees not yet paid. *Id.* Also, the agency is required to pay a penalty to the general fund for each month after the time frame expired that the license is not granted or denied. *Id.*

Every year, by September 1, each agency that issues licenses must report to GRRC its compliance level with its overall time frames. A.R.S. § 41-1078.

11.5.5 Amendment or Repeal of a Prior Rule. The rule-making procedures are also used to amend or repeal a rule. A.R.S. §§ 41-1001(18), -1022(A). The only exception is summary rule-making, which involves the repeal of a rule that has been rendered obsolete or the making, amendment and repeal of rules that repeat verbatim existing statutory authority granted to the agency. See Section 11.9.

11.6 Exemptions from Rule-making Procedures. The APA applies to all agencies and proceedings not expressly exempted. A.R.S. § 41-1002. There are two statutes that provide most of the exemptions from the APA’s rule-making requirements -- A.R.S. §§ 41-1005 and 41-1057. Additional isolated exemptions are found either in the APA itself (see, e.g., A.R.S. § 41-1001(1) (exempting the legislature, the courts, and the governor from the APA)), or in laws governing a particular agency. See, e.g., A.R.S. § 16-

956 (C) (exempting the Citizens Clean Election Commission from regular rule-making procedures). Most exemptions establish other procedures for public notice and comment. See, e.g., A.R.S. § 16-956(C). If so, the alternate procedures must be followed carefully. Because many of these exemptions are very specific, it is important to study carefully not only the APA, but also an agency's organic laws to determine whether the particular subject in question is exempt from the rule-making requirements.

11.6.1 Section 1005 Exemptions. Most exemptions from the APA's rule-making requirements are contained in A.R.S. § 41-1005. The list of exemptions relates both to specific agencies and certain general activities. For example, the APA does not apply to a "[r]ule concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public." A.R.S. § 41-1005(A)(4). The APA does not apply to a rule that "only establishes certain prices to be charged for particular goods and services sold by an agency," or to a rule "concerning only the physical servicing, maintenance or care of agency owned or operated facilities or property." *Id.* § (A)(5) and (6). The APA does not apply to any rule made by the State Department of Corrections, or to a "[r]ule or substantive policy statement concerning inmates or committed youths of a correctional or detention facility or patients admitted to a hospital, if made by the state department of corrections, the department of juvenile corrections, the board of executive clemency or the department of health services . . ." *Id.* § (A)(7). The rule-making articles of the APA do not apply to the Arizona Board of Regents or institutions under its jurisdiction. *Id.* § (D).

There are more than 25 exemptions created by this section of the APA, which the Legislature regularly amends. It is therefore important to review the statute before any rule-making to ensure that the subject of the proposed rule is not exempt under A.R.S. § 41-1005.

11.6.1.1 Procedures for Publication of Rules Exempt Under Section 1005. Although a rule may be exempt from the notice and comment and oversight requirements of the APA by A.R.S. § 41-1005, it still must be filed with the Secretary of State. Thus, when a rule exempt under A.R.S. § 41-1005 is adopted, the agency is required to file a copy of the rule with the Secretary of State for publication. A.R.S. § 41-1005(C). The rule should be submitted to the Secretary of State with a "Notice of Exempt Rulemaking" as required by A.A.C. R1-1-902 and R1-1-602. The rule must be submitted to the Secretary of State within 120 days of the close of the record. A.A.C. R1-1-601(B).

11.6.2 Section 1057 Exemptions. Several exemptions from the APA are found in A.R.S. § 41-1057, including:

1. An agency which is a unit of state government headed by a single elected official.

2. The corporation commission, which shall adopt substantially similar rule review procedures, including the preparation of an economic impact statement and a statement of the effect of the rule on small business.
3. The industrial commission of Arizona when incorporating by reference the federal occupational safety and health standards as published in 29 Code of Federal Regulations parts 1904, 1910, 1926 and 1928.
4. The Arizona state lottery if making rules that relate only to the design, operation or prize structure of a lottery game.

11.6.2.1 Attorney General Review of Rules Exempt Under § 41-1057. The Attorney General is statutorily required to review and approve rules exempted from the regular rule-making process by A.R.S. § 41-1057. See A.R.S. § 41-1044. The rule must be submitted to the Attorney General within 120 days of the close of the record. A.A.C. R1-1-601(C). The rule package must conform to the requirements of all final rule packages in A.A.C. R1-1-602. See A.A.C. R1-1-901(B). Agencies submitting an exempt rule package for review and approval by the Attorney General should mail them directly to the Attorney General or file them with the Attorney General's administration receptionist. The package should be prepared as a "Notice of Exempt Rulemaking" as required by the Secretary of State's rules A.A.C. R1-1-902 and R1-1-602. The Attorney General must approve or disapprove non-emergency rule packages within sixty days of receipt. A.R.S. § 41-1044(D).

The Attorney General conducts an in-depth review and analysis of the rule to determine whether it is (a) within the agency's authority to make; (b) consistent with the enacted legislative standards; (c) clear, concise, understandable, and in proper form; and (d) made in compliance with appropriate procedures. A.R.S. § 41-1044(B). If the rule package is not approved, the Attorney General endorses the disapproval on the rule package, states the reasons for the disapproval, and returns the rule package to the submitting agency. *Id.* § (E). If the rule package is approved, the Attorney General notifies the submitting agency and files the package with the Secretary of State.

11.7 Regular Rule-making Procedures. Unless exempt from rule-making procedures, a rule is valid only if it is made in substantial compliance with the APA or other statutory procedures applicable to the agency. See A.R.S. § 41-1030; *Oliver v. Land Dep't*, 143 Ariz. 126, 692 P.2d 305 (App. 1984). These requirements are designed to ensure adequate public participation in the rule-making process. Precise compliance with all statutory requirements will help ensure that a rule will be approved and withstand possible court challenges.

11.7.1 Creating and Maintaining the Rule-making Record. For each rule proposed and noticed in the Administrative Register, the agency must maintain and make available for public inspection a rule-making record. A.R.S. § 41-1029 (A). The record not only must be available to the public, but must be available if there is a judicial review of the rule-making proceeding. A.R.S. § 41-1029(C). Because the record contains virtually everything filed in connection with a rule-making proceeding, it is best to begin collecting the record when the rule-making proceeding begins. This can be done by simply starting a notebook, in which the agency places everything connected to the rule-making proceeding.

11.7.2 The Rule-making Docket. For all rules subject to the APA, an agency must “maintain a current, public rule-making docket for each pending rule-making proceeding,” which is designed to provide information about the rule-making. A.R.S. § 41-1021(A). A rule-making proceeding is pending “from the time the agency begins to consider proposing the rule . . . until any one of the following occurs:” the rule-making proceeding is terminated; one year after the publication of the notice of rule-making docket opening (if no notice of the proposed rule-making is filed); the rule becomes effective; one year after the notice of the proposed rule-making is published in the register (if the agency has not submitted the rule to GRRC for review and approval); or publication of a notice of termination. *Id.*

The docket must contain the twelve items listed in A.R.S. § 41-1021(B):

1. The subject matter of the proposed rule.
2. A citation to all published notices relating to the proceeding.
3. The name and address of agency personnel with whom persons may communicate regarding the rule.
4. Where written submissions on the proposed rule may be inspected.
5. The time during which written submissions may be made and the time and place where oral comments may be made.
6. Where a copy of the economic, small business and consumer impact statement and the minutes of the pertinent council meeting may be inspected.
7. The current status of the proposed rule.

8. Any known timetable for agency decisions or other action in the proceeding.
9. The date the rule was sent to the council.
10. The date of the rule's filing and publication.
11. The date the rule was approved by the council.
12. When the rule will become effective.

11.7.2.1 Opening the Docket -- Filing the Notice of Rule-making Docket Opening. Upon establishing a rule-making docket, the agency must file a "Notice of Rulemaking Docket Opening" with the Secretary of State for publication in the register. A.R.S. § 41-1021(C). The notice must contain the information required by A.R.S. § 41-1021(B)(1), (2), (3), (5), and (8). See Section 11.7.2. The Secretary of State format for the notice is provided in A.A.C. R1-1-205.

11.7.3 Developing the Rule Proposal. Once the docket is open, an agency should begin to draft the proposed rule so the public notice and comment can begin. This is a key stage in the rule-making proceeding, as careful drafting of the initial rule may reduce the likelihood of difficulties in later stages of the process. For example, the agency may solicit language or other input on the proposed rule from those who will be affected by the rule. A.R.S. § 41-1023(A). The agency must pay close attention to the format and drafting requirements set by the Secretary of State, which are discussed below.

11.7.3.1 Formal Rule-making Advisory Committees. If desired, an agency may appoint a formal advisory committee to comment on the subject matter of the proposed rule-making after filing the notice of rule-making docket opening, but before filing the notice of proposed rule-making. A.R.S. § 41-1021(D). If this is done, the membership of the committee must be published at the time of the committee's formation, and annually thereafter if necessary. *Id.* This is done by filing a "Notice of Formal Rulemaking Advisory Committee" with the Secretary of State in accordance with A.A.C. R1-1-206.

11.7.3.2 Drafting the Rule.

11.7.3.2.1 Format Requirements. The agency's proposed rule must conform with the form and style required by the Secretary of State. See A.A.C. R1-1-103 to -105, R1-1-205 to -210, and R1-1-401 to -415. The Secretary of State prescribes almost every aspect of rule-making format, including the font size (A.A.C. R1-1-103(C)), the numbering system (A.A.C. R1-1-403), the division of rules (A.A.C. R1-1-402 and A.A.C. R1-1-408), the

use of underlining and strike-outs A.A.C. R1-1-502), page numbering (A.A.C. R1-1-403(6)), and citation form (A.A.C. R1-1-409).

"The secretary of state shall reject rules [that] are not in compliance with the [Secretary of State's] prescribed numbering system, form and style." A.R.S. § 41-1011(B). Thus, an agency's rule writers should review carefully the Secretary of State's rules before drafting begins.

11.7.3.2.2 Codification Requirements. The codification of rules is done by the Secretary of State in connection with the publication of the Arizona Administrative Code. A.R.S. § 41-1011. The general organization of the code is found at A.A.C. R1-1-102. An agency must obtain title and chapter assignments from the Secretary of State, and must notify the Secretary of State when adding a new article or when a new chapter is needed. See A.A.C. R1-1-501.

11.7.3.2.3 Drafting Guidelines. Rules must be "clear, concise and understandable" before they can be approved by GRRC or the Attorney General. A.R.S. § 41-1052(D)(4) and A.R.S. §41-1044(B)(2). To meet that standard, virtually every word in a rule must be clear, concise and understandable. General writing guidelines are provided in the paragraphs that follow.

Under A.R.S. § 1-213, words and phrases are construed according to the common and approved use of the language. Technical words and phrases and those that have acquired a special meaning in the law are construed according to their technical or special legal meaning. *Id.* Any word that an agency uses in a rule to mean something other than its common and approved (dictionary) use or its special meaning in the law must be defined specifically in the rule. Terms that are defined by statute have the same meaning in a relevant rule and should not be redefined.

To meet the APA requirement that a rule be clear, concise, and understandable, the rule must prescribe or proscribe conduct with words that establish an objectively ascertainable standard. Words and phrases such as "when appropriate," "if necessary," "when proper," unless further defined in the rule, fail to establish an objectively ascertainable standard.

One of the primary purposes of rule-making is to inform the public of the agency's standards, its procedures, and the criteria upon which it will exercise its discretion. Rules that contain statements such as "unless waived by the agency" or "unless approved by the director" fail to set a clear standard. These terms are acceptable only if the rule contains the criteria for obtaining a waiver or approval.

A rule must not contain words or terms such as "should," or "to the extent possible." These terms are vague and unenforceable.

The following are specific examples of proposed rules that fail to meet the standard of "clear, concise and understandable":

Proposal: Environmental laboratories shall have a safety plan.

Problems: The rule must prescribe the requirements of the safety plan; use of passive voice; need to state who is responsible.

Proposal: A laboratory shall design laboratory and storage areas such that the potential for sample contamination is minimized.

Problems: The rule must prescribe an objective minimum standard for sample contamination; avoid use of passive voice and clearly state who is responsible for the activity -- a laboratory is inanimate and incapable of designing areas; inappropriate use of "such."

Proposal: The Department may issue a provisional license when its investigation identifies deficiencies, but the number and nature of deficiencies do not pose a significant risk to public health and safety.

Problems: The rule must define what constitutes a significant risk in objective or measurable terms. The rule must also define or delineate "deficiencies" and should set the standards the department will use to decide whether to exercise its discretion.

Proposal: Eye wash equipment shall be inspected and tested at *regular intervals*.

Problems: Once a week, once a year, and once every ten years are all "regular intervals." The rule must define what regular interval the agency requires or establish a maximum length of time between inspections (and tests). The rule should identify who is responsible for ensuring that the equipment is inspected and tested.

Proposal: Supervisors shall successfully complete a cyanide safety course approved by the director, or show proof of completing an approved course within the past twelve months.

Problems: Unless another rule or statute specifies what courses are approved, the rule must either specify the approved courses or prescribe the contents or subjects required to be covered in cyanide safety courses, qualifications of instructors, and minimum hours of instruction and prescribe

procedures for obtaining the director's approval. How does "successfully complete a cyanide safety course" differ from "completing an approved course?"

Proposal: All lines and valves in cyanide circuits shall be adequately identified.

Problems: The rule must specify the manner in which the lines and valves shall be identified and identify who is responsible to ensure that this is done. What is adequate to one person may be inadequate to another. The agency may want labels affixed to the lines and valves in a particular manner, at specified intervals, with a particular size lettering or with certain words, etc.

There are other guidelines that can ensure that a rule is clear, concise, and understandable, some of which are required by the Secretary of State. Examples include:

1. The heading of each "division" of a rule must clearly describe the subject of that subdivision of the rule. A.A.C. R1-1-402(B).
2. Each numbered rule should encompass one subject only.
3. Rules must be divided into divisions at logical breaks in the subject matter for convenient reference and in accordance with the Secretary of State's numbering system at A.A.C. R1-1-403.
4. Use the word "shall" when an action is mandatory and the word "may" when an action is discretionary; if "may" is used, the rule must contain criteria for the exercise of discretion.
5. Do not use terms such as "should," "will," "ought to," "if feasible," or "if possible."
6. References to statutes or other rules must be current and accurate.
7. Do not propose a rule that merely quotes or paraphrases statutory language or requirements.
8. Do not include extraneous matters in the text of the rule, such as a statement of purpose or authority, or a "severability" or "effective date" provision. If it is necessary to, for example, express a delayed effective date (see A.R.S. § 41-1032(B)), that should be separately stated.

9. Do not use unnecessary verbiage such as "two (2)" or "rules and regulations."
10. Use the active voice.
11. Use the present tense.
12. Be consistent. Always use the same word or phrase to convey a particular meaning. Avoid synonyms, homonyms, and words that have more than one meaning.
13. Use singular nouns and pronouns instead of plural nouns and pronouns when possible.
14. Use definitions to explain the meaning of a frequently repeated word or phrase. Avoid definitions that are counterintuitive or substantively or syntactically mismatched.
15. Use gender-neutral language.
16. If you have more than two conditions in a rule, create a list. If any item in the list contains a comma, use semi-colons to separate the items in the list. Otherwise, use commas to separate the items in the list. End the list with a period.
17. Adhere to all principles of English grammar.

11.7.3.2.4 Incorporation by Reference. An agency may adopt by reference all or part of a rule, standard, or code that has been developed by another agency or entity if including the text in the body of the rules would be "unduly cumbersome, expensive or otherwise inexpedient." A.R.S. § 41-1028(A). The rule must clearly identify the material being incorporated, including its date and the date of any amendments to the material being incorporated, "and shall state that the rule does not include any later amendments or editions of the incorporated matter." *Id.* § (B). An agency can only incorporate by reference materials that are made available to the public for inspection and reproduction by the entity originally issuing the materials. *Id.* § (D). Future amendments or editions of the material cannot be incorporated by reference without amending the rule by complying with the APA. *Id.* § (E). An agency that makes a rule incorporating material by reference must state where a copy of the material is available from the agency. A.A.C. R1-1-414.

11.7.3.3 Crafting the Preamble. A preamble is a document prepared in connection with virtually every type of rule-making that contains detailed information about the rule and its background at every stage of the rule-making process. See A.R.S. §§ 41-

1001(15)(a), -1022(A)(1), -1024(E)(1), and (G). The purposes of the preamble are to explain the administrative history of the rule, to summarize the purpose of the rule, to provide citations to statutory authority, and to list prior notices published in the Register. The specific requirements for the preamble are set forth in A.R.S. § 41-1001(15).

The information required in the preamble depends on the type of rule-making and the stage of the process for which the preamble is prepared. For example, the preamble of a proposed rule-making explains when and how people may comment on the rule, while the preamble of a final rule-making contains the agency's response to public comments and a description of changes between the proposed and final rule. The Secretary of State's Office has developed forms for preambles in the *Arizona Rulemaking Manual*. It is important to address each question listed on the forms even if the answer is "not applicable."

11.7.3.4 Rules Affecting Small Business and the Statement of Effect on Small Business and Economic Impact Statement. An agency must determine whether a proposed rule may impact small businesses and, if so, must reduce the impact to the extent possible by using one of the following methods:

1. Establish less stringent compliance or reporting requirements in the rule for small businesses.
2. Establish less stringent schedules or deadlines in the rule for compliance or reporting requirements for small businesses.
3. Consolidate or simplify the rule's compliance or reporting requirements for small businesses.
4. Establish performance standards for small businesses to replace design or operational standards in the rule.
5. Exempt small businesses from any or all requirements of the rule.

A.R.S. § 41-1035. Thus, when drafting a rule, the agency must take these matters into account.

Also, when a rule package is submitted to GRRC or the Attorney General for approval, the package must include a statement of the effect of the rule on small businesses and an economic impact statement. A.R.S. §§ 41-1052(A), -1055. The required contents of this statement are listed in A.R.S. § 41-1055. The agency should

begin collecting the information necessary for this statement when the rule is being drafted. See Section 11.7.9.1.2 for a discussion of what the final statement requires.

11.7.3.5 Informal and Courtesy Reviews.

11.7.3.5.1 Informal Review by the Attorney General. The Attorney General's staff does not draft rules for an agency. After preparing a draft of the proposed rules, the agency should consult its Assistant Attorney General for advice and guidance. The Assistant Attorney General will review the rule for appropriate form and style, and will also assist the agency in determining whether the rules meet the statutory requirements for approval.

11.7.3.5.2 Courtesy Review by GRRRC. GRRRC staff does not draft rules for an agency but will review a rule at any time in the rule-making process to assist an agency to comply with the form and style requirements of the Secretary of State and with substantive legal requirements. An agency will find that a courtesy review by GRRRC staff is most useful if done before the rule is published in proposed form.

11.7.4 Filing the Notice of Proposed Rule-making. Once the rule is drafted, the agency must notify members of the public of the proposed rule so the public may comment on the rule. This is done by filing a "Notice of Proposed Rulemaking," with the Secretary of State and by sending individual notice to each person who has requested notification of rule-makings from the agency. A.R.S. § 41-1022(A) and (C). The contents of the notice are prescribed by A.R.S. § 41-1022(A) and A.A.C. R1-1-502.

11.7.5 Early Review Petitions. Under A.R.S. § 41-1052(B), at any time after the notice of proposed rulemaking is published, a person who would be adversely affected by an agency's proposed rule may file with GRRRC an early review petition alleging that the rule fails to meet the criteria in A.R.S. § 41-1052(D). The agency may respond to the early review petition to demonstrate its compliance with the requirements of the APA. GRRRC then rules on the early review petition.

11.7.6 Public Comment Period. Following publication of the notice of proposed rule-making, an agency must provide the public with a reasonable opportunity to comment on the proposed rule. A.R.S. § 41-1023. Comments may be written, oral, or both. *Id.*

11.7.6.1 Written Comment Period. For at least thirty days after the publication in the Register of a notice of proposed rule-making an agency must afford an opportunity to submit written statements, arguments, data, and views on the proposed rule. A.R.S. § 41-1023(B); A.A.C. R1-1-503.

11.7.6.2 Conduct and Record of the Oral Proceeding. An agency must conduct an oral proceeding if requested by any one person within thirty days after publication of the

notice of proposed rule-making. A.R.S. § 41-1023(C); A.A.C. R1-1-504. An agency may schedule an oral proceeding without a request. The agency must choose a time and location for the oral proceeding that affords the public a reasonable opportunity to participate. A.R.S. § 41-1023(D).

11.7.6.2.1 Timing of the Oral Proceeding. The oral proceeding cannot be held earlier than thirty days after publication of a notice in the Register of its location and time. A.R.S. § 41-1023(D).

An agency may include the notice of oral proceeding in the preamble to the notice of proposed rule-making. See A.A.C. R1-1-504. An agency that wishes to expeditiously make a rule should schedule an oral proceeding without waiting for a written request so the oral proceeding can be held immediately after the written comment period.

If an agency does not include the notice of oral proceedings in the preamble to the notice of proposed rule-making, and later receives a request for an oral proceeding, the agency must set a time and place for the oral proceeding and file the required copies of a "Notice of Public Hearing on Proposed Rulemaking" with the Secretary of State for publication in the Register. A.A.C. R1-1-504. Enough lead time must be included so that the public hearing does not occur until thirty days after the notice is published in the Register.

11.7.6.2.2 Conducting the Oral Proceeding. An agency must conduct the oral proceeding in a manner that allows adequate discussion of the substance and form of the proposed rule. A.R.S. § 41-1023(D). Thus, the agency must hold the proceeding at a location that is easily accessible and provides adequate space to accommodate those in attendance. The notice and accommodations must satisfy the Americans With Disabilities Act (ADA). See Chapter 15. See *also* Chapter 7 for procedures required of agencies subject to the Open Meeting Law.

The oral proceeding may be presided over by the members of the agency who must ultimately decide on adoption of the rule, a member of the agency, or another presiding officer designated by the agency. A.R.S. § 41-1023 (E). If the members of the agency who must ultimately decide on adoption of the rule do not preside, the presiding officer must prepare a memorandum summarizing the contents of the presentations made at the proceeding. *Id.*

At the outset of the oral proceeding, the presiding officer should present a statement of the reasons for proposing the rule. This statement should identify the issues that necessitated the rulemaking and the statutory basis for the rule. The presiding officer should also announce any changes that the agency has considered after publication of the notice of proposed rulemaking.

An oral proceeding is not an adversarial proceeding, and for that reason, those making statements need not be placed under oath. The purpose of an oral proceeding is to allow for questions by the public about the rule and to allow the submission of argument, data, and views that may guide the agency in its rule-making. A.R.S. § 41-1023(D). Because the public is allowed to seek information about the rule at the proceeding, the agency should have available those individuals who have information about the subject of the rule.

To ensure a fair and efficient oral proceeding, the presiding officer must enforce proper conduct. The presiding officer should officially recognize a person before he or she speaks. An agency may take action necessary to maintain order, rule on motions and procedural questions arising during the oral proceeding, call recesses or adjourn the oral proceeding, recognize speakers and allot time for their presentations, question speakers, and grant extensions of the deadline for submitting comments. Each person who speaks at the oral proceeding, when recognized, may make a statement limited to the subject of the oral proceeding. After the statement is concluded, the presiding officer or other agency members may question the speaker.

Agencies may make rules for the conduct of oral rule-making proceedings, including provisions to prevent undue repetition. A.R.S. § 41-1023(F).

Because the primary object of the oral proceeding is to gather relevant information to help determine policy, the presiding officer should ensure that someone maintains a list of all physical and documentary material submitted in connection with the proceeding. The presiding officer should also ensure that each exhibit is clearly identified and marked.

All oral proceedings must be recorded by stenographic or other means. A.R.S. § 41-1023(E). The presiding officer should keep a list of persons who present statements at the oral proceeding, consisting of each speaker's name, address and, if applicable, the name of the entity the person represents. The list should record whether the speaker testified in favor of or in opposition to the proposed rule and other appropriate information. *See id.* A person wishing to testify without being identified is entitled to do so, unless the agency is subject to the Open Meeting law, in which case the person must provide a name for the minutes. A.R.S. § 38-431.01(B)(4). All rulings of the presiding officer should be made a matter of record.

A person making or voting on the making of a rule who was not in attendance throughout the oral proceedings must review the record before making or voting on the making of the rule. See A.R.S. § 41-1024(C).

11.7.7 Close of the Record. An agency may not submit a rule to GRRRC or the Attorney General (for non-emergency rules) for its approval until the rule-making record is closed. A.R.S. § 41-1024(A); A.A.C. R1-1-505. The close of the record occurs on the date

that the agency chooses as the last date it will accept public comments. A.A.C. R1-1-505. The APA has no time limit for closing the record; however, the record must be complete and closed within a reasonable time from the oral proceedings or deadline for submitting written public comment. Furthermore, no longer than one year may elapse between the time of the publication of the notice of proposed rule-making and submission of the rule to GRRC for approval. A.R.S. § 41-1021(A)(2).

11.7.8 Modifications to the Rule After Public Comment. Before submitting a rule to GRRC, the agency must consider the written submissions, the oral submissions (or the summary memorandum from an oral proceeding), and the economic, small business and consumer impact statement. A.R.S. § 41-1024(C). After considering the public comments, the agency must adequately address each comment, which may cause the agency to modify the rule. The agency should use its experience, technical competence, specialized knowledge, and judgment in making the rule. *Id.* § (D). A person adopting or voting on the adoption of a rule who was not in attendance throughout the oral proceedings must review the record before adopting or voting on the adoption of the rule. See A.R.S. § 41-1024(C).

11.7.8.1 Effect of Substantial Changes to the Rule. If a rule is modified, and the modified rule is not "substantially different from the proposed rule," the rule-making process may continue. A.R.S. § 41-1025(A). The agency must consider the following criteria to determine whether the modified rule is substantially different from the proposed rule:

1. The extent to which all persons affected by the rule should have understood that the published proposed rule would affect their interests.
2. The extent to which the subject matter of the rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule.
3. The extent to which the effects of the rule differ from the effects of the published proposed rule. . . .

Id. § (B).

11.7.8.2 Options if Substantial Changes to the Rule Occur. If the agency decides that changes make a rule substantially different from what was proposed, the agency may do one of two things. First, it may prepare and file with the Secretary of State a "Notice of Supplemental Proposed Rulemaking," and provide for additional public comment under A.R.S. § 41-1023. See A.R.S. § 41-1022(E). The Secretary of State's requirements for a supplemental notice are contained in A.A.C. R1-1-507.

Second, an agency may file a Notice of Termination of Rule-making Proceeding with the Secretary of State and comply anew with all requirements of the APA. A.R.S. § 41-1025(A). The required submission for a termination notice is at A.A.C. R1-1-506.

11.7.9 Final Document Preparation and Filing the Rule with GRRC for Approval.

Before filing a rule with the Secretary of State, an agency must receive GRRC's approval of the rule, the preamble, and the economic, small business, and consumer impact statement. A.R.S. § 41-1052. Once the record is closed, an agency has 120 days to prepare the final documents and submit them to GRRC for approval. A.R.S. § 41-1024(B). *See also id.* § (H) (in regular rule-making, a rule cannot be filed with the Secretary of State without the prior approval of GRRC).

11.7.9.1 Compiling the Rule Package for GRRC Consideration. The APA specifies that a rule package be compiled and submitted to GRRC with the following items: (1) the preamble; (2) the exact words of the rule; and (3) the economic, small business, and consumer impact statement. A.R.S. § 41-1024(E). Remember to check GRRC rules for its submission requirements in case any changes have occurred. See Section 11.7.8.2.

11.7.9.1.1 The Preamble. Subsection § 41-1001(15) lists the information that must be included in the preamble. This Chapter discusses the preamble at Section 11.7.3.3.

11.7.9.1.2 The Economic, Small Business, Consumer Impact Statement (EIS). The EIS is a document designed to explain the economic impact of a rule. Nearly all rule-making has some impact on the economy. For example, even the act of repealing an out-of-date rule may have economic impact by reducing litigation or clarifying regulatory requirements.

It is important to distinguish the impact of the rule from the impact of the legislation underlying the rule. Only the impact of the rule itself should be dealt with in the EIS.

Because the drafting and public comment stages of the rule-making process may reveal information for the EIS, it is important to begin the process of collecting information in connection with the EIS from the start of the rule-making process. Typical topics addressed by the EIS are fee adjustments; restrictions on entry into a profession or occupation; giving or withholding permission to the general public; timeframes for licenses or grants of permission; or problems that the regulated community may want addressed. An EIS might address:

1. Who is being helped or hurt by the rule?
2. What does the rule do to the affected community? What effects are projected?

3. Where is the population of the affected community located?
4. Why is the rule being created? Does it address a problem raised by other rules?
5. When will the rules be effective?

A.R.S. §41-1055(A) requires an agency to provide an economic, small business and consumer impact *summary* in the preamble. The summary need not restate the EIS verbatim, or even comprehensively address all of the information in the EIS. See A.R.S. § 41-1055(A).

The summary must include all of the following:

1. The conduct and its frequency of occurrence that the rule is designed to change.
2. The harm resulting from the conduct the rule is designed to change and the likelihood it will continue to occur if the rule is not changed.
3. The estimated change in frequency of the targeted conduct expected from the rule change.
4. A brief summary of the information included in the economic, small business and consumer impact statement.
5. If the economic, small business and consumer impact summary accompanies a proposed rule or a proposed summary rule, the name and address of agency employees who may be contacted to submit or request additional data on the information included in the economic, small business and consumer impact statement.

There is no format required of an EIS. Agencies, however, should follow the outline in A.R.S. § 41-1055 (B), which requires:

1. An identification of the proposed rule-making.
2. An identification of the persons who will be directly affected by, bear the costs of, or directly benefit from the proposed rule-making.
3. A cost benefit analysis of the following:

(a) The probable costs and benefits to the implementing agency and other agencies directly affected by the implementation and enforcement of the proposed rule-making. The probable costs to the implementing agency shall include the numbers of new full-time employees necessary to implement and enforce the proposed rule. The preparer of the economic, small business and consumer impact statement shall notify the joint legislative budget committee of the number of new full-time employees necessary to implement and enforce the rule before the rule is approved by the council.

(b) The probable costs and benefits to any political subdivision directly affected by the implementation and enforcement of the proposed rule-making.

(c) The probable costs and benefits to businesses directly affected by the proposed rule-making, including any anticipated effect on the revenues or payroll expenditures of employers who are subject to the proposed rule-making.

4. A general description of the probable impact on private and public employment in businesses, agencies and political subdivisions of this state directly affected by the proposed rule-making.
5. A statement of the probable impact of the proposed rule-making on small businesses. The statement shall include:
 - (a) An identification of the small businesses subject to the proposed rule-making.
 - (b) The administrative and other costs required for compliance with the proposed rule-making.
 - (c) A description of the methods that the agency may use to reduce the impact on small businesses. These methods may include:
 - (i) Establishing less costly compliance requirements in the proposed rule-making for small businesses.
 - (ii) Establishing less costly schedules or less stringent deadlines for compliance in the proposed rule-making.

- (iii) Exempting small businesses from any or all requirements of the proposed rule-making.
 - (d) The probable cost and benefit to private persons and consumers who are directly affected by the proposed rule-making.
- 6. A statement of the probable effect on state revenues.
- 7. A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule-making, including the monetizing of the costs and benefits for each option and providing the rationale for not using non-selected alternatives.

This cost-benefit analysis is required to calculate only the costs and benefits that occur in Arizona. However, it is important to note that if a person submits an analysis to the agency that compares the rule's impact on the competitiveness of businesses in Arizona to the impact on businesses in other states, the agency is required to consider that analysis. A.R.S. § 41-1055(G).

11.7.9.2 Submission for Approval by GRRC.

11.7.9.2.1 Procedures for GRRC Approval. Once an agency compiles the required rule package, the agency must submit the documentation to GRRC in a two-step process. Initially, the agency must prepare and deliver two rule packages that meet the requirements set by both GRRC and the Secretary of State. See A.A.C. R1-6-104(A). The package must include a cover letter that supplies specific information about the rule-making history, and the documents comprising the rule package must be presented in the order specified in the rule. *Id.* In addition, the agency must supply one copy of all written comments received concerning the proposed rule, and all materials incorporated by reference. A.A.C. R1-6-104(B). GRRC staff will review this information for compliance with the rules and the standards in the statutes, and suggest changes to the agency.

After the agency makes needed changes, the agency must submit to GRRC four paper copies of the rule package and a computer disk containing the complete rule package. A.A.C. R1-6-104(C).

Once the final rule package is submitted, GRRC has 120 days to approve or return the rule package. A.R.S. § 41-1052(C). When the package is initially sent to GRRC, the rule will be placed on an agenda for an upcoming meeting of GRRC for consideration. A.A.C. R1-6-104(C). The time for the meeting at which the rule package will be considered depends on when a rule is submitted to GRRC. If an agency has a specific timing

requirement, the agency should contact GRRC staff to obtain a schedule so the rule package can be timely scheduled. An agency head can request that a rule be moved to a later meeting of GRRC. A.A.C. R1-6-104(D).

GRRC will consider the rule package at a meeting open to the public. An agency representative must appear at a public meeting of GRRC (usually held the first Tuesday of each month) to respond to questions of the members of GRRC. A.R.S. § 41-1052(F)(6); A.A.C. R1-6-110(A). Additionally, because GRRC's process is open and allows public written and oral comment, it may be necessary for the agency representative to respond to the comments of others. See A.A.C. R1-6-111(providing for public comment).

11.7.9.2.2 Standards for GRRC Approval. GRRC cannot approve a rule unless:

1. The economic, small business and consumer impact statement contains the information, data, and analysis prescribed by [the APA] and is generally accurate.
2. The probable benefits of the rule outweigh the probable costs of the rule.
3. The rule is clear, concise, and understandable.
4. The rule is not illegal, inconsistent with the legislative intent, or beyond the agency's statutory authority.
5. The agency adequately addresses the comments on the proposed rule and any supplemental proposals.
6. The rule is not a substantial change, considered as a whole, from the proposed rule and any supplemental proposals.
7. The preamble discloses a reference to any study relevant to the rule that the agency reviewed and either did or did not rely on in the agency's evaluation of or justification for the rule.
8. The rule is not more stringent than a corresponding federal law unless there is statutory authority to exceed the requirements of the federal law.

9. If a rule requires a permit, the permitting requirement complies with A.R.S. § 41-1037.

A.R.S. § 41-1052(D).

GRRC may not approve a rule that contains a fee increase unless two-thirds of the voting quorum of GRRC votes to approve the rule. A.R.S. § 41-1052(E).

11.7.9.2.3 Procedure upon GRRC Approval. If approved, GRRC will submit an agency's final rule packet to the Secretary of State. A.A.C. R1-6-108(A). If the approval by GRRC is contingent upon the agency making changes to any part of the rule package, the agency shall submit the revised rule package documents, and the GRRC staff shall ensure that all changes are made prior to submission to the Secretary of State. *Id.* § B. No other changes may be made to the rule package except those required by GRRC. *Id.* § C.

11.7.9.2.4 Procedure upon GRRC Return of Rule. GRRC may vote to return a rule if it does not comply with the statutory requirements, identifying the manner in which the rule package fails. A.R.S. § 41-1052(C); A.A.C. R1-6-109. If a rule is returned by GRRC, the agency may resubmit the rule after consultation with GRRC staff. *Id.* Any changes to the rule made prior to resubmission must be clearly identified, together with an explanation of how the changes ensure that the rule package complies with the statutory requirements for GRRC approval. An agency representative must be present when GRRC considers the resubmitted rule.

11.7.10 Final Filing with the Secretary of State. If GRRC approves the rule package, GRRC will submit the final rule package to the Secretary of State. A.A.C. R1-6-108. The agency, however, must supply GRRC within fourteen days after approval information concerning any changes required by GRRC and an original and three copies of the approved rule package along with a computer disk containing all of the required documentation. See A.A.C. R1-6-107.

11.7.11 Termination of Rule-making Prior to Final Filing. If an agency chooses not to go forward with a proposed rule at any time during the rule-making process, or the agency wishes to make a rule that is substantially different from a proposed rule, it must file a "Notice of Termination of Rulemaking" with the Secretary of State. A.R.S. §§ 41-1021(A), -1025(A); A.A.C. R1-1-506. The notice must attach a copy of the original notice of proposed rule-making.

A rule-making proceeding will also terminate if certain time limits are not satisfied – e.g., if the agency does not file its notice of proposed rule-making within one year of the filing of the notice of docket opening, or if the agency does not submit a rule for approval by GRRC within one year after the filing of the notice of proposed rule-making. A.R.S. § 41-1021(A).

11.8 Emergency Adoption of Rules.

If an agency makes a specific finding that a rule is necessary as an emergency measure, a rule may be made, amended, or repealed as an emergency measure without the public notice and comment requirements of A.R.S. §§ 41-1021 and -1022, and without the approval of GRRC. A.R.S. § 41-1026. However, an agency making, amending, or repealing a rule under the emergency rule-making procedures must obtain prior approval of the rule from the Attorney General. A.R.S. § 41-1026(A).

An emergency rule is valid for only 180 days. *Id.* § (D). An emergency certification may be renewed for one more 180-day period if the agency determines the emergency situation still exists and the agency seeks approval of the renewal from the Attorney General before the existing 180-day term expires. The same procedures for emergency certification are followed for a renewal. *Id.* Therefore, for any renewal the Attorney General must reevaluate the facts surrounding the adoption of the rule as an emergency measure.

11.8.1 Standards for Emergency Rule-making. Whether an emergency justifying the use of emergency rule-making procedures exists is typically within the discretion of the agency. The Attorney General, however, is prohibited from approving an emergency rule if the emergency situation is created due to the agency's delay or inaction and the emergency situation could have been averted by timely compliance with the notice and public participation provisions of the APA, unless the agency submits substantial evidence that the rule is necessary to do any of the following:

1. Protect the public health, safety or welfare.
2. Comply with deadlines in amendments to an agency's governing law or federal programs.
3. Avoid the violation of any federal law or regulation or other state law.
4. Avoid an imminent budget reduction.
5. Avoid serious prejudice to the interests of the public or the parties concerned.

A.R.S. § 41-1026(A). Thus, the Attorney General will closely scrutinize the facts supporting emergency certification to decide whether a bona fide emergency exists. *Id.*

11.8.2 Procedures for Emergency Rule-making. When submitting an emergency rule-making package to the Attorney General for approval, the agency should comply with

the Secretary of State's format requirements in A.A.C. R1-1-701. The Secretary of State requires that a "Notice of Emergency Rulemaking" contain very specific information in the "Preamble." *Id.* § (A). The package should also include an agency certification as prescribed at A.A.C. R1-1-105. See A.A.C. R1-1-701(B).

One of the requirements of the notice is an explanation of the situation justifying the rule's adoption as an emergency rule. A.A.C. R1-1-701(A)(11). This section provides the agency an opportunity to explain its finding of emergency.

Under A.R.S. § 41-1026(B), the Attorney General has sixty days to review the emergency and is required to determine if the rule complies with the standards prescribed in A.R.S. § 41-1044(B), including whether the rule:

1. Is in the correct form;
2. Is clear, concise, and understandable;
3. Is within the agency's power and the enacted legislative standards; and
4. Is made in compliance with the appropriate procedures.

If the Attorney General approves the emergency rule-making, the Attorney General will sign an approval form and attach it to the first page of the original Notice of Emergency Rulemaking. The Attorney General will then forward the original and two copies of the notice to the Secretary of State. A.A.C. R1-1-701(C). The Secretary of State will then publish the rule in the Register as provided in A.R.S. § 41-1013. A.R.S. § 41-1026(C).

If the Attorney General does not approve the emergency rule-making, the package will be returned to the agency.

11.8.3 Effective Dates and Renewal of Emergency Rule. Any rule adopted as an emergency rule is effective from the date it is filed with the Secretary of State, and will expire after 180 days, unless it is timely renewed. A.R.S. § 41-1026(D).

An emergency rule may be renewed for one additional 180-day period if the agency determines that the emergency situation still exists and again obtains the Attorney General's approval using the procedures above *prior* to the expiration of the 180-day period. A.R.S. § 41-1026(D). In addition, before a renewal may be obtained, the agency must first issue the rule as a proposed rule or as an alternative proposed rule under A.R.S. § 41-1022. *Id.* To obtain a renewal of an emergency rule, the agency must prepare a notice using the same format required for the original emergency rule-making, and again obtain the required Attorney General approval. A.R.S. § 41-1026(D); *see also* A.A.C. R1-1-701(F). If the renewal is approved, it will be forwarded to the Secretary of State for publication in the

Register. *Id.* If the text of the renewed emergency rule differs from the text of the previous emergency rule, the agency shall submit a list of every change made with the notice of renewal. A.A.C. R1-1-701(E).

11.8.4 Attaining Permanent Status for Emergency Rule. An emergency rule may be made permanent by following the regular rule-making procedures. If a permanent rule is made and certified before the emergency rule expires, the permanent rule must expressly state that it repeals the emergency rule if it has not expired. A.R.S. § 41-1026(E).

11.8.5 Emergency Adoption of a Delegation Agreement. The APA also provides for the emergency adoption of a delegation agreement if an agency makes a written finding that the agreement is "necessary for immediate preservation of the public health, safety or welfare, and the public notice and participation requirements of this article are impracticable." A.R.S. § 41-1026.01(D). An agency is prohibited from using the emergency process "if the emergency situation is created due to the agency's delay or inaction and the emergency situation could have been averted by timely compliance with the public notice and participation provisions of [the APA], unless the agency can present substantial evidence that failure to adopt, amend or terminate the delegation agreement as an emergency measure will result in imminent substantial peril to the public health, safety or welfare." A.R.S. § 41-1026.01(A).

The adoption of an emergency delegation agreement does not require the approval of the Attorney General. Instead, the agency simply files with the Secretary of State a summary of the emergency delegation agreement, which is then published in the next Register. A.R.S. § 41-1026.01(B). The emergency delegation agreement is valid for 180 days, and may be renewed for one or two more 180-day periods if the agency determines that the emergency situation still exists, the agency follows the statutory renewal procedures, the agency has begun the public comment process, and the agency files a notice of renewal with the Secretary of State.

A.R.S. § 41-1026.01(C). The renewal must be accomplished prior to expiration of the preceding 180-day emergency period. *Id.*

11.9 Summary Rule-making Procedures. The APA allows for an abbreviated rule-making process in three very narrow circumstances -- (1) to repeal a rule that is obsolete because of changes to the authorizing statutes; (2) to make, amend, or repeal rules that repeat verbatim the statutes authorizing the rule and (3) repeal of other obsolete rules or rules deemed by the agency to be ineffective as long as the repeal does not increase the cost of compliance or reduce procedural rights of the persons regulated. A.R.S. § 41-1027(A).

To initiate the summary rule-making process, an agency must prepare and file with both the Secretary of State and GRRC a "Notice of Proposed Summary Rulemaking."

A.R.S. § 41-1027(B). See also A.A.C. R1-1-801 and A.A.C. R1-6-105. The notice must contain a preamble. A.R.S. § 41-1027(B). The format for the notice filing with the Secretary of State is specified at A.A.C. R1-1-801. The requirements for submission to GRRC are contained in A.A.C. R1-6-105.

Within ninety days after publication of the Notice of Proposed Summary Rulemaking in the Register, and after consideration of any comments, the agency shall submit to GRRC four paper copies of the "Notice of Final Summary Rulemaking," the preamble, the concise explanatory statement, and the economic, small business and consumer impact statement, together with one copy of any comments received on the summary rule-making and a computer disk containing all required documentation. A.R.S. § 41-1027(E); A.A.C. R1-6-106; A.A.C. R1-1-801(C). GRRC will then place the summary rule on the consent agenda for approval unless a member of GRRC requests a hearing. A.R.S. § 41-1053(A). GRRC can at any time disapprove the summary rule-making and order the agency to comply with regular rule-making procedures. *Id.* § (D).

After approval, GRRC will file the summary rule with the Secretary of State. To accomplish this, within fourteen days of GRRC's approval of the summary rule-making, the agency must submit an original and three copies of the "Notice of Final Summary Rulemaking" for filing with the Secretary of State. A.A.C. R1-6-107. Section 11.7.9 provides more information about supplying documents to GRRC for final filing with the Secretary of State.

11.9.1 Effective Date of Summary Rule. The proposed summary rule takes effect upon the publication of the notice of proposed summary rule-making in the Register. A.R.S. § 41-1027(D). The interim effectiveness of the proposed summary rule-making is revoked if GRRC disapproves the summary rule. A.R.S. § 41-1053(D).

11.10 Effective Date for Rules - Generally. Rules become effective sixty days after filing with the Secretary of State. A.R.S. § 41-1032. However, there are two exceptions:

1. When the agency includes in the preamble sufficient information demonstrating that the rule needs to be effective immediately upon the filing with the Secretary of State. A rule may be immediately effective only for any of the following reasons:
 - a. To preserve the public peace, health or safety.
 - b. To avoid a violation of federal law or regulation or state law, if the need for an immediate effective date is not created due to the agency's delay or inaction.

- c. To comply with deadlines in amendments to an agency's governing statute or federal programs, if the need for an immediate effective date is not created due to the agency's delay or inaction.
 - d. To provide a benefit to the public and a penalty is not associated with a violation of the rule.
 - e. To adopt a rule that is less stringent than the rule that is currently in effect and that does not have an impact on the public health, safety, welfare or environment, or that does not affect the public involvement and public participation process.
2. The agency may specify an effective date more than sixty days after the filing of the rule with the Secretary of State if the agency determines good cause exists and the public interest will not be harmed by the later effective date.

A.R.S. §41-1032(A) and (B). In its review of the proposed rules, GRRC and the Attorney General's Office will review the sufficiency of the information provided by the agency justifying an immediate effective date. To approve a rule with an immediate effective date requires a two-thirds vote from GRRC's voting quorum. A.R.S. §41-1052(F).

11.11 Publication of Directory for Rules and Substantive Policy Statements.

The APA requires each agency to publish at least every year a directory summarizing the subject matter of all currently applicable rules and substantive policy statements. A.R.S. § 41-1091(C). The agency is required to keep this publication at one location. *Id.* The directory, rules, substantive policy statements, and any material incorporated by reference, must be open to the public for inspection at the office of the agency's director. *Id.* Every June 30, each agency head must inform GRRC that the agency is in compliance with this requirement. *Id.* § (D).

11.12 Post-Rule Challenge to Economic Impact Statement. Within two years after a rule is finalized, any person who is or may be affected by the rule may file a written petition with the agency objecting to all or part of the rule on the grounds that the actual economic, small business or consumer impact significantly exceeds that estimated when the rule was made or that the actual impact of the rule imposes a significant burden on persons subject to the rule. A.R.S. § 41-1056.01. Within thirty days of the petition, the agency must reevaluate the rule and file a notice in the register concerning the petition. A.R.S. § 41-1056.01(C). After a public comment period, the agency must decide whether to amend or repeal the rule. *Id.* The agency's decision may be appealed to GRRC. If three members of GRRC request within two weeks after the appeal is filed that the matter be

heard by the council, the appeal will be placed on GRRC's agenda. A.R.S. § 41-1056.01(E). The procedures for GRRC consideration of the appeal are contained in A.R.S. § 41-1056.01(E), (F), (G), and A.A.C. R1-6-401.

11.13 Petition for Rule-making or a Declaration that a Practice Is a Rule. Any person who believes that an agency has an existing practice or substantive policy statement that is in reality a "rule" may seek a declaration of that fact in two ways:

1. By petitioning the agency to turn the practice or policy into a rule, with an appeal of any refusal to GRRC, or
2. By seeking a declaration in superior court.

A.R.S. §§ 41-1033, -1034. A person may first petition the agency for a rulemaking, appeal to GRRC, and then file a declaratory judgment action in superior court, or go straight to superior court. *Id.*

The form and procedural requirements for GRRC's handling of an appeal from the denial of a petition for rulemaking is at A.A.C. R1-6-302. The sole issue in an appeal to GRRC is whether the agency practice or substantive policy statement constitutes a rule. A.R.S. § 41-1033(B). If GRRC finds that the practice does constitute a rule, the practice is considered void. A.R.S. § 41-1033(C). If GRRC finds the practice is not a rule, the affected party may then seek declaratory relief pursuant to A.R.S. § 41-1034. A.R.S. § 41-1033(D).

11.14 Five-Year Review Reports. At least once every five years, each agency must review all of its rules to determine whether the agency should amend or repeal the rules and file a written report summarizing its findings and proposed course of action with GRRC. A.R.S. § 41-1056. GRRC maintains a schedule for the review of all rules published by each agency and must notify the agency at least ninety days prior to the agency's deadline. A.R.S. § 41-1056(G). GRRC may reschedule the review of a rule if it has been made or substantially revised within the last two years. A.R.S. § 41-1056(C); A.A.C. R1-6-113. An agency may request a 120-day extension if it cannot submit the report on the due date. A.R.S. § 41-1056(D). The agency must request the extension before the original deadline and explain the reason for the extension.

If the agency fails to submit the report within the required or extended deadline, the rules automatically expire. A.R.S. § 41-1056(E). GRRC notifies the Secretary of State and the agency of the expiration, and causes a notice to be published in the next Register that states the rules have expired and are unenforceable. *Id.* To reestablish an expired rule, the agency must go through the regular rule-making process. A.R.S. § 41-1056(F).

By June 30 of each year, an agency is required to report to GRRC the agency's progress toward completion of the course of action established in all five-year review reports submitted to GRRC during the previous five years. A.R.S. § 41-1056(H).

11.15 Important Dates for Submission of Reports to GRRC. The APA establishes several annual deadlines for the submission of reports to GRRC, who must generally pass the information on to the Legislature. The reports must be submitted by the agency head. These include:

June 30 – Certification of compliance with the substantive policy statement directory requirement. See A.R.S. § 41-1091(D).

June 30 – Report on progress toward completion of five-year review report course of action. A.R.S. § 41-1056(H).

September 1 – Report on compliance with time-frame rules. See A.R.S. § 41-1078.

11.16 Annual Regulatory Report. Pursuant to A.R.S. § 41-1021.02, on or before December 1, of each year, every agency, except for self-supporting agencies, is required to prepare and make available for public inspection a regulatory agenda that the agency expects to follow during the next calendar year. The agenda is to include a notice of docket openings, notices of proposed rule-making, review of existing rules and notice of final rules. Additionally, the agenda should include any rule-making terminated during the calendar year and disclose any privatization option and nontraditional regulatory approach being considered by the agency. An agency may still undertake a rule-making action even if the action was not included in the annually regulatory agenda.