

## **CHAPTER 11**

### **RULEMAKING**

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## CHAPTER 11

### RULEMAKING

**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 rulemaking process required by the APA. It is important to note, however, that the information necessary to conduct rulemaking 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 R1-1001), and the Governor's Regulatory Review Council (GRRC) (A.R.S. §§ 41-1051 through 1057 and A.A.C. R1-6-101 through R1-6-801). A useful resource is the Arizona Rulemaking Manual, which is published by and available on-line from the Secretary of State's Office at [http://www.azsos/public\\_services/rulemakingmanual/manual.htm](http://www.azsos/public_services/rulemakingmanual/manual.htm). The manual contains a flow chart of the rulemaking process, FAQs, numerous sample forms, check lists and helpful advice relating to rulemaking and rule writing. Because there are frequent changes to these sources of rulemaking 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 rulemaking. 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. GRRC plays a role in the appeal of delegation agreements. A.R.S. § 41-1081(F). Any person who filed written comments with the delegating agency objecting to all or part of the proposed delegation agreement may appeal the delegating agency's decision to enter into the delegation agreement to GRRC within thirty days after the agency gives written notice to enter into the delegation agreement. *Id.* If three members of GRRC request that it be put on an agenda, GRRC will determine whether the delegation agreement satisfies the requirements of A.R.S. § 41-1081(A) whether the agency provided adequate notice and an opportunity for comment to the public. A.R.S. § 41-1081(H). GRRC promulgated procedural rules to govern this process. A.A.C. R1-6-401.

**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). *See also Arizona State University v. Arizona State Retirement System* 237 Ariz. 246, 250, 349 P.3d 220, 224 (App. 2015) (holding that barring any exemptions, an agency statement is a rule, subject to the APA’s rulemaking procedure, if it, first, is generally applicable, and, second, implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency.)

The primary purpose of rulemaking 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(19) 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(22).

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 impose 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.* The agency also must list on its website every substantive policy statement currently in use, and, if practicable, the full text of each. A.R.S. § 41-1091.01(2).

#### **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, 101, 223 P.2d 915, 922 (1950); *State v. Arizona Mines Supply Co.*, 107 Ariz. 199, 206, 484 P.2d 619, 626 (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, 114, 252 P.2d 87, 89 (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 adopt 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--904(B)(3)(regarding chiropractic assistants). 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 rulemaking 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 rulemaking 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, 451, 784 P.2d 275, 277 (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 rulemaking procedures.

**11.4.4 Additional Limits on Authority.** Recent administrations have signed Executive Orders placing a moratorium on rulemaking. On February 28, 2018, Governor Ducey signed Executive Order 2018-02, *Internal Review of Administrative Rules; Moratorium to Promote Job Creation and Customer-Service-Oriented Agencies*. The Executive Order places a moratorium on all rulemaking conducted by agencies that are subject to the moratorium. The Executive Order applies to all state agencies except (a) any State agency headed by a single elected State official, (b) the Corporation Commission, or (c) any board or commission established by ballot measure during or after the November 1998 general election. The Executive Order further states that agencies that are not subject to the moratorium are strongly encouraged to voluntarily comply with the Executive Order.

However, the moratorium does provide that agencies *may* initiate rulemaking if the agency receives prior written approval from the Office of the Governor. An exception to the moratorium may be granted when one or more of the following justifications for the rulemaking are present:



1. To fulfill an objective related to job creation, economic development, or economic expansion in this State.
2. To reduce or ameliorate a regulatory burden while achieving the same regulatory objective.
3. To prevent a significant threat to the public health, peace, or safety.
4. To avoid violating a court order or federal law that would result in sanctions by a court or the federal government against an agency for failure to conduct the rulemaking action.
5. To comply with a federal statutory or regulatory requirement if such compliance is related to a condition for the receipt of federal funds or participation in any federal program.
6. To fulfill an obligation related to fees or any other action necessary to implement the State budget that is certified by the Governor's Office of Strategic Planning and Budgeting.
7. To promulgate a rule or other item that is exempt from Title 41, Chapter 6, Arizona Revised Statutes, pursuant to section 41-1005, Arizona Revised Statutes.
8. To address matters pertaining to the control, mitigation, or eradication of waste, fraud, or abuse within an agency or wasteful, fraudulent, or abusive activities perpetrated against an agency.
9. To eliminate rules that are antiquated, redundant or otherwise no longer necessary for the operation of state government.

Prior to initiating any rulemaking, a state agency subject to the moratorium must seek and receive from the Governor's Office an exception to the moratorium. Neither GRRC nor the Attorney General's Office will approve a rulemaking without written approval by the Governor's Office.

The Executive Order expires on December 31, 2018, but all agencies considering rulemaking on or after that date should determine whether the moratorium has been renewed or whether a similar Executive Order has been issued.

Agencies wishing to initiate rulemaking must also consider A.R.S. § 41-1038, which provides in part, that "[N]otwithstanding any other law, an agency may not adopt any new rule that would increase existing regulatory restraints or burdens on the free exercise of property rights or the freedom to engage in an otherwise lawful business or occupation unless the rule is either of the following: (1) a component of a

comprehensive effort to reduce regulatory restraints or burdens or (2) necessary to implement statutes or required by a final court order or decision.”

However, rulemaking is not subject to this prohibition if the rulemaking (1) governs public employees, (2) is necessary to protect public health and safety or (3) is necessary to avoid sanctions that would result from a failure to take rulemaking action pursuant to a court order or federal law. Agencies should note that A.R.S. § 41-1038 narrowly defines the protection of the public health and safety as the immediate need to address or prevent an outbreak of an infectious disease, a disaster or any other catastrophic event.

A person who is subject to a civil or criminal proceeding arising from enforcement of a rule was promulgated in violation of A.R.S. § 41-1038 has an affirmative defense to the enforcement action. *Id.* ¶(C).

Prior to initiating any rulemaking, an agency should consult with its Assistant Attorney General to discuss the impact of the moratorium and A.R.S. § 41-1038.

## **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 rulemaking -- 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 rulemaking 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 Hearings Procedures Act (the UAHP). See *generally* Chapter 10; A.R.S. §§ 41-1092 through -1092.12. The UAHP appears to require agencies conducting administrative adjudications under the UAHP 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(D); Chapter 10, Section 10.4.2. The UAHP 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 UAHP 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 rulemaking 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(19). 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 (9).

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) (2). 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 (9), the APA exempts certain fee-related matters from its rulemaking 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). In addition, "an agency authorized by statute or tribal gaming compact to conduct background checks may charge a fingerprint fee without a statute expressly authorizing the fee." A.R.S. § 41-1008(C). Other exemptions from the APA also affect the requirement of rulemaking 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- 2067(A) ( Board of Psychologist Examiners). 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 rulemaking involving a fee increase by a two-thirds vote of the voting quorum present. A.R.S. § 41-1052(E).

Any fee established or increased through exempt rulemaking under the APA is effective for two years unless an extension is granted by the council. A.R.S. § 41-1008(E). GRRC promulgated a procedural rule to govern requests by an agency for an extension of the expiration date. A.A.C. 1-6-801. After the expiration of this period, the agency cannot charge or receive the fee unless it completes the rulemaking requirements under the APA to establish or increase the fee. A.R.S. § 41-1008(F). A person regulated by the rule, however, may petition GRRC to establish a date that is different than two-year expiration date, but no earlier than two years after the exempt rule is made. A.R.S. § 41-1008(G). The agency must respond to the petition within two weeks after GRRC notifies the agency that the petition has been filed. *Id.* Within sixty days GRRC must grant or deny the petition after considering whether the public interest requires a different date. *Id.* GRRC promulgated a procedural rule to govern requests for an alternate expiration date. A.A.C. R1-6-802.

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 rulemaking 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.*

**11.5.5 Amendment or Repeal of a Prior Rule.** The rulemaking procedures are also used to amend or repeal a rule. A.R.S. §§ 41-1001(20) , -1022(A). The only

exception is expedited rulemaking, which, among other things, 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 A.R.S. § 41-1027; Section 11.9.

**11.6 Exemptions from Rulemaking 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 rulemaking 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 rulemaking 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 rulemaking requirements.

**11.6.1 Section 1005 Exemptions.** Most exemptions from the APA's rulemaking 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 rulemaking 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 and the Governor's Regulatory Review Council. The agency is required to prepare a Notice and follow the formatting guidelines prescribed by the Secretary of State. 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. Recently added A.R.S. § 41-1097(B)(1) defines “Notice of Exempt Rulemaking” as meaning a notice (1) of an exemption pursuant to Section 41-1005, except those exemptions that require notice and an opportunity for public comment, (2) an exemption pursuant to Section 41-1057 and (3) a rule adopted pursuant to an exemption, as provided exclusively to an agency in statute or session law, from all rulemaking requirements. 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 One-Time Legislative Exemptions.** For a rulemaking that was promulgated through a one-time legislative exemption from the rulemaking requirements, the agency is required to review the rule within one year and determine whether the rule should be amended or repealed. A.R.S. § 41-1095. The agency must prepare a report for Council review and approval summarizing its findings and certifying that it is in compliance with A.R.S. § 41-1091 (Substantive Policy Statements; directory). The report must contain a concise analysis of several factors that include the rule’s effectiveness in achieving its objectives, written criticisms of the rule received by the agency, authorization of the rule by existing statute, whether the rule is consistent with statutes or other rules made by the agency and current agency enforcement policy and any analysis submitted to the agency by another person regarding the rule’s impact on Arizona’s business competitiveness as compared to the competitiveness of businesses in other states. Each agency completing this report should review A.R.S. § 41-1095 for a complete list of factors to be analyzed. If an agency fails to submit this report or fails to file an extension prior to the deadline, the rule automatically expires. At least ninety

(90) days before the report and analysis are due, the Council is to send a written notice to the agency head and notify the agency of the rule to be reviewed and the date the report is due.

Pursuant to A.R.S. § 41-1095(C), the Council may require an agency to amend or repeal a rule if the Council determines that the agency's analysis demonstrates that the rule is materially flawed. For instance, the rule may be required to be amended or repealed if it is not authorized by statute, is inconsistent with other statutes or rules or imposes probable costs that significantly exceed the probable benefits of the rule. The agency may seek an extension of the date by which the Council orders the repeal or amendment by stating the reason for the extension request and demonstrating good cause. If the agency does not amend or repeal the rule by the date set by the Council or the date granted by extension, the rule automatically expires. If the agency wishes to re-establish a rule that has expired, it must proceed through the regular rulemaking process.

**11.6.2.2 Attorney General Review of Rules Exempt Under § 41-1057.** The Attorney General is statutorily required to review and approve rules exempted from the regular rulemaking 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 and supporting documentation to determine whether the rule 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 of 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 Rulemaking Procedures.** Unless exempt from rulemaking 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, 128, 692 P.2d 305, 307 (App. 1984) (disapproved on other grounds). These requirements are designed to ensure adequate public participation in the

rulemaking process. 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 Rulemaking Record.** For each rule proposed and noticed in the Administrative Register, the agency must maintain and make available for public inspection a rulemaking 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 rulemaking proceeding. A.R.S. § 41-1029(C). Because the record contains virtually everything filed in connection with a rulemaking proceeding, it is best to begin collecting the record as soon as the agency contemplates initiating the rulemaking process. This can be done by simply starting a notebook or electronic folder in which the agency places everything connected to the rulemaking proceeding.

**11.7.2 The Rulemaking Docket.** For all rules subject to the APA, an agency must “maintain a current, public rulemaking docket for each pending rulemaking proceeding,” which is designed to provide information about the rulemaking. A.R.S. § 41-1021(A). A rulemaking proceeding is pending “from the time the agency begins to consider proposing the rule . . . until any one of the following occurs:” the rulemaking proceeding is terminated; one year after the publication of the notice of rulemaking docket opening (if no notice of the proposed rulemaking is filed); the rule becomes effective; one year after the notice of the proposed rulemaking 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 Rulemaking Docket Opening.** Upon establishing a rulemaking 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 rulemaking 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 Rulemaking Advisory Committees.** If desired, an agency may appoint a formal advisory committee to comment on the subject matter of the proposed rulemaking after filing the notice of rulemaking docket opening, but before filing the notice of proposed rulemaking. 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 and -206, and R1-1-401 to -409 and R1-1-411 to -415. The Secretary of State prescribes almost every aspect of rulemaking 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. R1-1-103(E)(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 Secretary of State codifies the rules as part of 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 rulemaking 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.

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 rulemaking that contains detailed information about the rule and its background at every stage of the rulemaking process. See A.R.S. §§ 41-1001(16)(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. In addition, only the reasons contained in the preamble may be used by any party as justifications for the making of the rule in any proceeding in which its validity is at issue. A.R.S. § 41-1036. The specific requirements for the preamble are set forth in A.R.S. § 41-1001 (16).

The information required in the preamble depends on the type of rulemaking and the stage of the process for which the preamble is prepared. For example, the preamble of a proposed rulemaking explains when and how people may comment on the rule, while the preamble of a final rulemaking 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.

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). 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 assigned 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 GRRC.** GRRC staff does not draft rules for an agency but will review a rule at any time in the rulemaking process to assist an agency to comply with the form and style requirements of the Secretary of State and with substantive legal requirements. A courtesy review by GRRC staff is most useful if done before the rule is published in proposed form.

**11.7.4 Filing the Notice of Proposed Rulemaking.** 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 rulemakings 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 GRRC 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. GRRC then rules on the early review petition. A.A.C. R1-6-701.

**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.

**11.7.6.1 Written Comment Period.** For at least thirty days after the publication in the Register of a notice of proposed rulemaking 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 rulemaking. 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 rulemaking. 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 rulemaking, 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 rulemaking. 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 rulemaking proceedings, including provisions to prevent undue repetition. A.R.S. § 41-1023(F).

Because the primary objective 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 GRRC or the Attorney General (for non-emergency rules) for its approval until the rulemaking 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 rulemaking 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 or the Attorney General, 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).

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

**11.7.9.1 Compiling the Rule Package for GRRRC Consideration.** A rule package submitted to GRRRC must include 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 GRRRC rules for its submission requirements in case any changes have occurred. See A.A.C. R1-6-201.

**11.7.9.1.1 The Preamble.** Subsection § 41-1001(16) 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 rulemaking 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 rulemaking 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 rulemaking 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 rulemaking.
2. An identification of the persons who will be directly affected by, bear the costs of, or directly benefit from the proposed rulemaking.
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 rulemaking. 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 rulemaking.
  - (c) The probable costs and benefits to businesses directly affected by the proposed rulemaking, including any anticipated effect on the revenues or payroll expenditures of employers who are subject to the proposed rulemaking.
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 rulemaking.

5. A statement of the probable impact of the proposed rulemaking on small businesses. The statement shall include:
  - (a) An identification of the small businesses subject to the proposed rulemaking.
  - (b) The administrative and other costs required for compliance with the proposed rulemaking.
  - (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 rulemaking for small businesses.
    - (ii) Establishing less costly schedules or less stringent deadlines for compliance in the proposed rulemaking.
    - (iii) Exempting small businesses from any or all requirements of the proposed rulemaking.
  - (d) The probable cost and benefit to private persons and consumers who are directly affected by the proposed rulemaking.
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 rulemaking, including the monetizing of the costs and benefits for each option and providing the rationale for not using non-selected alternatives.
8. A description of any data on which a rule is based with a detailed explanation of how the data was obtained and why the data is acceptable data. An agency advocating that any data is acceptable data has the burden of proving that the data is acceptable. For the purposes of this paragraph, "acceptable data" means empirical, replicable and testable data as evidenced in supporting documentation, statistics, reports, studies or research. This cost-benefit analysis is required to calculate only the costs and benefits that occur in Arizona. A.R.S. § 41-1055(H). 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(I).

If the agency makes a good faith effort to comply with the requirements prescribed in this article and has explained in writing the methodology used to produce the economic, small business and consumer impact statement, the rule may not be invalidated after it is finalized on the ground that the contents of the economic, small business and consumer impact statement are insufficient or inaccurate or on the ground that the council erroneously approved the rule, except as provided by section 41-1056.01. A.R.S. § 41-1052(J).

An agency may be exempt from the requirements of filing an EIS, small business and consumer impact statement. An agency is not required to prepare these statements and is not required to file a petition requesting an exemption for the following rulemakings:

1. Initial making, but not renewal, of an emergency rule pursuant to A.R.S. § 41-1026.
2. Proposed expedited rulemaking or final expedited rulemaking. A.R.S. § 41-1055(D).

Before filing a proposed rule with the secretary of state, an agency may also petition GRRRC for a determination that the agency is not required to file an economic, small business and consumer impact statement. A.R.S. § 41-1055(E). The petition must demonstrate that the rulemaking decreases monitoring, record keeping, costs or reporting burdens on agencies, political subdivisions, businesses or persons, and does not increase monitoring, record keeping, costs or reporting burdens on persons subject to the proposed rulemaking. *Id.*; A.A.C. R1-6-207.

GRRRC must place the petition on the agenda for its next meeting if at least four council members make such a request of the council chairperson within two weeks after the filing of the petition. A.R.S. § 41-1055(F). The preamble for a rulemaking that is exempt pursuant to subsection D or E of this section shall state that the rulemaking is exempt from the requirements to prepare and file an economic, small business and consumer impact statement.

If the agency is exempt under either of these statutes, it must include language in the preamble stating that the rulemaking is exempt from the requirements to prepare and file an economic, small business and consumer impact statement. A.R.S. § 41-1055(G).

#### **11.7.9.2 Submission for Approval by GRRRC.**

**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 to GRRC two rule packages that meet the requirements set by both GRRC and the Secretary of State. See A.A.C. R1-6 201(B). The package must include a cover letter that supplies specific information about the rulemaking 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. R1-6-201(B). GRRC staff will review this information for compliance with the rules and the standards in the statutes, and suggest changes to the agency if needed.

After the agency makes needed changes, the agency must submit to GRRC one paper copy and one electronic copy of the revised rulemaking document. A.A.C. R1-6-201(C).

Once the final rule package is submitted, GRRC has 120 days to approve or return the rule package, in part or in whole. 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. R1-6-201(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. R1-6-201(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(H); A.A.C. R1-6-104(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.R.S. § 41-1052(I); A.A.C. R1-6-203 (providing for oral testimony and written public comment). The absence of comments pursuant to subsection D, E, F or G of section 1052 does not prevent GRRC from exercising its authority to review the proposed rules and require modifications. A.R.S. § 41-1052(K).

**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 and the agency has

demonstrated that it has selected the alternative that imposes the least burden and costs to persons regulated by the rule, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective.

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 it verifies that the rule complies with the requirements of A.R.S. § 41-1008 and two-thirds of the voting quorum present to approve the rule. A.R.S. § 41-1052(E).

Similarly, GRRC may not approve a rule that contains an immediate effective date unless it verifies that the rule complies with the requirements of A.R.S. § 41-1032 and two-thirds of the voting quorum present to approve the rule. A.R.S. § 41-1052(F).

Under A.R.S. § 41-1052(G), if the proposed rule relies on scientific principles or methods, including a study disclosed pursuant to A.R.S. § 41-1052(D)(8), and a person submits an analysis to GRRC questioning whether the rule is based on valid scientific

or reliable principles or methods, GRRC shall not approve the rule unless it determines that the rule is based on valid scientific or reliable principles or methods that are specific and not of a general nature. In making a determination of reliability or validity, GRRC shall consider the following factors as applicable to the rule:

- (a) The authors of the study, principle or method have subject matter knowledge, skill, experience, training and expertise.
- (b) The study, principle or method is based on sufficient facts or data.
- (c) The study is the product of reliable principles and methods.
- (d) The study and its conclusions, principles or methods have been tested or subjected to peer reviewed publications.
- (e) The known or potential error rate of the study, principle or method has been identified along with its basis.
- (f) The methodology and approach of the study, principle or method are generally accepted in the scientific community.

**11.7.9.2.3 Procedure upon GRRC Approval.** If approved, the agency must submit an agency's final rule package to the Secretary of State, together with scanned copies of GRRC's certificate of approval, the approved notice of final rulemaking, and the approved EIS. A.A.C. R1-6-205(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. GRRC promulgated a rule describing the process of revising the rule package and submitting it to GRRC for staff review. A.A.C. R1-6-204. No other changes may be made to the rule package except those required by GRRC. A.A.C. R1-6-205(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, and must identify the manner in which the rule package fails. A.R.S. § 41-1052(C); A.A.C. R1-6-206. 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 and a showing that the resubmitted rule is not substantially different from the proposed rule pursuant to the standards sets forth A.R.S. § 41-1025. 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, the agency will submit the final rule package to the Secretary of State.



A.A.C. R1-6-205. The agency, however, must supply GRRC within fourteen days after approval information concerning any changes required by GRRC and one paper copy and one electronic copy of the approved rule package. See A.A.C. R1-6-204.

**11.7.11 Termination of Rulemaking Prior to Final Filing.** If an agency chooses not to go forward with a proposed rule at any time during the rulemaking 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 rulemaking.

A rulemaking proceeding will also terminate if certain time limits are not satisfied – e.g., if the agency does not file its notice of proposed rulemaking 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 rulemaking. 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 rulemaking 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 receives approval of the renewal from the Attorney General before the existing 180-day term expires. This is an important change to A.R.S. § 41-1026(D)(5). Previously, the agency was only required to *seek* approval of the renewal prior to the 180 day expiration; now the agency must *receive* approval of the Attorney General prior to the expiration. 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 Rulemaking.** Whether an emergency justifying the use of emergency rulemaking 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 Rulemaking.** When submitting an emergency rulemaking 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(D). The emergency rulemaking package must contain an original and the number of copies specified in A.A.C. R1-1-701(E).

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)(5)(I). 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 rulemaking, the Attorney General will sign an approval form and attach it to the first page of the original Notice of

Emergency Rulemaking. See A.A.C. R1-1-105(C). The Attorney General will then forward the rulemaking package to the Secretary of State. A.A.C. R1-1-701(F). 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 rulemaking, the Attorney General shall prepare a certificate of disapproval and return the package 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 rulemaking, and again obtain the required Attorney General approval. A.R.S. § 41-1026(D); see *also* A.A.C. R1-1-701(H). 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. *Id.*

**11.8.4 Attaining Permanent Status for Emergency Rule.** An emergency rule may be made permanent by following the regular rulemaking procedures. If a permanent rule is made and certified before the emergency rule expires, the permanent rule repeals the emergency rule. A.R.S. § 41-1026(E).<sup>1</sup>

**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

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<sup>1</sup> According to A.R.S. § 41-1026(F), effective August 3, 2018, if no permanent rule is made to replace the emergency rule by the end of the 180 day effective period, the rule that was in place before the emergency rule is restored. This statute's applicability is unclear as not all emergency rules replace existing rules.

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 Expedited Rulemaking Procedures.** The APA allows for an abbreviated rulemaking process in a number of circumstances:

1. The rule amends or repeals rules made obsolete by repeal or supersession of an agency's statutory authority.
2. The rule amends or repeals rules for which the statute on which the rule is authorized has been declared unconstitutional by a court with jurisdiction, there is a final judgment and no statute has been enacted to replace the unconstitutional statute.
3. The rule corrects typographical errors, makes address or name changes or clarifies language of a rule without changing its effect.
4. The rule adopts or incorporates by reference without material change federal statutes or regulations pursuant to section 41-1028, statutes of this state or rules of other agencies of this state
5. The rule reduces or consolidates steps, procedures or processes in the rules.
6. Amends or repeals rules that are outdated, redundant or otherwise no longer necessary for the operation of state government.
7. Implements, without material change, a course of action that is proposed in a five-year review report approved by the council pursuant to section 41-1056 within one hundred eighty days of the date that the agency files the proposed expedited rulemaking with the secretary of state.

8. Adopts, without material change, rules of another agency of this state that has been or imminently will be consolidated into the agency.

An agency conducting an expedited rulemaking is required to deliver a notice of proposed expedited rulemaking to the governor, president of the senate, speaker of the house of representatives, and the council. A.R.S. § 41-1027(B). The notice must contain the name and contact information of the agency person responsible for the rule and the exact wording of the proposed expedited rulemaking as well as an explanation of how the expedited rulemaking achieves the purposes set forth in A.R.S. § 41-1027(A).

After delivery of the notice of proposed expedited rulemaking, the agency must file the notice of the proposed expedited rulemaking with the secretary of state for publication in the next issue of the administrative register. A.R.S. § 41-1027(C). Any person may provide written comment to the agency for at least thirty days after publication in the register. The agency must adequately respond in writing to the comments on the proposed expedited rulemaking. *Id.*

After adequately addressing, in writing, any written objections, an agency must file a request for approval with GRRRC. A.R.S. § 41-1027(E). The request must contain the notice of proposed expedited rulemaking filed with the secretary of state and the agency's responses to any written comments. *Id.* A representative of the agency must attend the council meeting and answer questions about the proposed expedited rulemaking. A.A.C. R1-6-104. GRRRC may provide to the agency its comments on the proposed expedited rulemaking within the scope of A.R.S. § 41-1027(A) and require the agency to respond to its comments or testimony in writing. A.R.S. § 41-1027(E). A person may submit written comments to GRRRC that address matters within the scope of A.R.S. § 41-1027(A). A.R.S. § 41-1027(E).

The agency cannot submit an expedited rule to GRRRC that is substantially different, as defined in A.R.S. § 41-1025(D), from the proposed rule contained in the notice of proposed expedited rulemaking. A.R.S. § 41-1027(F). The agency can terminate the proposed expedited rulemaking and commence a new rulemaking proceeding for the purpose of making a substantially different rule. A.R.S. § 41-1027(D).

The agency may not file a notice of final expedited rulemaking with the secretary of state until GRRRC has approved the rulemaking. A.R.S. § 41-1027(F). GRRRC will only approve the rule if it meets the following requirements:

1. The rule satisfies the criteria for expedited rulemaking pursuant to A.R.S. § 41-1027(A).
2. The rule is clear, concise and understandable.

3. The rule is not illegal, inconsistent with legislative intent or beyond the agency's statutory authority.
4. The agency, in writing, adequately addressed the comments on the proposed rule and any supplementary proposal.
5. If applicable, the permitting requirements comply with A.R.S. § 41-1037.
6. The rule is not a substantial change, considered as a whole, from the proposed rule and any supplementary proposal.
7. The rule imposes the least burden and costs to persons regulated by the rule.

After GRRC approves the rulemaking, the agency must file a notice of final expedited rulemaking and the council's certificate of approval with the secretary of state.

**11.9.1 Effective Date of Expedited Rule.** The proposed expedited rule takes effect immediately upon the filing of the notice of final expedited rulemaking. A.R.S. § 41-1027(H).

**11.10 Effective Date for Rules - Generally.** Non-Emergency 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 effective immediately 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 present. 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.* Under A.R.S. § 41-1091.01, every agency must post on its website:

1. The full text of each rule currently in use or the website address and location of the full text of each rule currently in use.
2. Each substantive policy statement currently in use, including its full text, if practicable.
3. The notice required by A.R.S. § 41-1091(B).

**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 following grounds: (1) The actual economic, small business or consumer impact significantly exceeds that estimated when the rule was made or the actual impact of the rule imposes a significant burden on persons subject to the rule; (2) The actual economic, small business or consumer impact was not estimated in the economic, small business and consumer impact statement submitted during the making of the rule and that actual impact imposes a significant burden on persons subject to the rule; and (3) The agency did not select the alternative that imposes the least burden and costs to persons regulated by the rule, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective. A.R.S. § 41-1056.01(A). This process is not available regarding a rule for which there is a final judgment of a court of competent

jurisdiction based on the grounds of whether the contents of the economic, small business and consumer impact statement were insufficient or inaccurate. A.R.S. § 41-1056.01(H). GRRC promulgated a procedural rule governing this process. A.A.C. R1-6-601.

The burden of proof rests on the petitioner to establish one of the statutory grounds supporting the petition. A.R.S. § 41-1056.01(B). 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 must issue a written summary of the comments received, the agency's response to those comments, and the final decision of the agency on whether to initiate a rulemaking or to amend or repeal the rule. *Id.* If the agency decides to initiate rulemaking, it must do so within forty-five days after publication of its written decision. *Id.*

Any person who is or may be affected by the agency's decision may appeal the decision to GRRC within thirty days after publication of the agency's written decision. 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). If GRRC places the appeal on the agenda, each member will receive a copy of the appeal and a copy of the agency's written summary under A.R.S. § 41-1056.01(C). A.R.S. § 41-1056.01(F). GRRC must provide written notice to the agency that it will consider the appeal. *Id.* GRRC promulgated procedural rules governing the submission and consideration of such appeals in A.A.C. R1-6-601.

If GRRC determines that the appeal establishes any of the grounds under A.R.S. § 41-1056.01(A), it must order the agency to promptly initiate a rulemaking or to amend or repeal the rule or the rule package. A.R.S. § 41-1056.01(G).

### **11.13 Petition for Rulemaking or a Declaration that a Practice Is a Rule.**

Any person may petition an agency to do either of the following:

1. Make, amend or repeal a final rule, or
2. Review an existing agency practice or substantive policy statement that the petitioner alleges constitutes a rule.

An agency is required to prescribe the form of the petition and the procedures for the petition's submission, consideration and disposition. A.R.S. § 41-10336(B).

Within 60 days of the submission of the petition, the agency shall either:

1. Reject the petition, stating its reason(s) for the rejection in writing to the Petitioner;



2. Initiate rulemaking;
3. If otherwise lawful, make a rule.

The agency's response to the petition is a public record subject to public inspection.

If a petition is rejected, the Petitioner has 30 days to appeal to GRRC to review whether the existing agency practice or substantive policy statement constitutes a rule. In addition, a person may petition GRRC to review a final rule the person believes does not meet the requirements of A.R.S. § 41-1030. An agency should refer to A.R.S. § 41-1033(G) for the procedures and timelines for GRRC's review.

Additionally, a person is allowed to petition GRRC directly to request a review of an agency's existing practice, substantive policy statement, final rule or regulatory licensing requirement that is not specifically authorized by statute based on the person's belief that the practice, statement, rule or licensing requirement is unduly burdensome or not necessary to fulfill a public health, safety or welfare concern. The council shall review the agency practice, substantive policy statement, final rule or regulatory licensing requirement if the council determines the practice, policy, rule or regulatory licensing requirement applies to a profession for which the average wage in that profession in this state does not exceed 200% of the Federal Poverty Guidelines for a family of 4. If the council determines that the agency practice, substantive policy statement, final rule or regulatory licensing requirement is unduly burdensome or not necessary to specifically fulfill a public health, safety or welfare concern, the council may modify, revise or declare void any such practice, policy, rule or regulatory licensing requirement. The council shall conduct that review in accordance with A.R.S. § 41-1033. 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, including rules made pursuant to an exemption from the APA or any part of the APA, to determine whether the agency should amend or repeal the rules and must file a written report summarizing its findings and proposed course of action with GRRC. A.R.S. § 41-1056. In addition, GRRC may review rules outside of the statutory five-year review process if requested by at least four council members. A.R.S. § 41-1056(D).

The report must analyze specific topics listed in the statute and many of which mirror the factors considered by GRRC under A.R.S. § 41-1052(D) in approving a rule package. A.R.S. § 41-1056(A). However, the agency must also consider other factors, such as the rule's effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached, written criticisms of the rule received during the previous five years, including any written analyses submitted to the agency questioning whether the rule is based on valid scientific or reliable principles or methods, and a determination that the rule is not more stringent than a corresponding

federal law unless there is statutory authority to exceed the requirements of that federal law *Id.* The agency should carefully review the list of required topics and ensure that it addresses each one in its five-year review report. GRRC promulgated rules governing the formal requirements and procedures related to the consideration of five-year review reports and the agency should ensure that it complies with these requirements. A.A.C. R1-6-301.

The agency can also include in its five-year review report the text of a proposed expedited rulemaking under A.R.S. § 41-1027. A.R.S. § 41-1056(B).

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(L). 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(H); A.A.C. R1-6-302. An agency may request a 120-day extension if it cannot submit the report on the due date and provides a written request that includes the reason for the extension. A.R.S. § 41-1056(I); A.A.C. R1-6-303. The agency must request the extension before the original deadline. A.R.S. § 41-1056(I).

GRRC will then schedule the five-year review report for consideration at a meeting and may approve or return, in whole or in part, the agency's five-year review report. A.R.S. § 41-1056(C). A representative of the agency must appear at the meeting to respond to any questions that arise. A.A.C. R1-6-104. GRRC can only approve an agency's report if it complies with the requirements set forth in A.R.S. § 41-1056(A). *Id.* If GRRC returns an agency's report, in whole or in part, it must inform the agency of the manner in which its report is inadequate and, in consultation with the agency, shall schedule submission of a revised report. *Id.* GRRC promulgated a rule that addresses the procedure taken for re-submitting a report that has been returned. A.A.C. R1-6-305. GRRC may also require that the agency propose an amendment or repeal of the rule by a date no earlier than six months after the date of the meeting at which GRRC considers the agency's report if GRRC determines the agency's analysis under A.R.S. § 41-1056(A) demonstrates that the rule is materially flawed. A.R.S. § 41-1056(E).

If the agency fails to submit the report, including a revised report under A.R.S. § 41-1056(C), within the required or extended deadline, the rules automatically expire. A.R.S. § 41-1056(J). 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 rulemaking process. A.R.S. § 41-1056(K).

Certain members of the public may request that GRRC require an agency to include additional information in its five-year review report. A person who is regulated or could be regulated by an obsolete rule may petition GRRC to require an agency that has the obsolete rule to consider including the rule in the five-year report with a

recommendation for repeal of the rule. A.R.S. § 41-1056(M). GRRC adopted procedural guidelines for this process. A.A.C. 1-6-304. A person who is required to obtain or could be required to obtain a license may petition GRRC to require an agency to consider including a recommendation for reducing a licensing time frame in the five-year report. A.R.S. § 41-1056(N).

**11.15 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 rulemaking, review of existing rules and notice of final rules. Additionally, the agenda should include any rulemaking 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 rulemaking action even if the action was not included in the annually regulatory agenda.