

Key Elements of the Model APA

ALEC’s model Administrative Procedures Act (APA) was adopted in September 2018. It includes best practices gleaned from several states and free-market regulatory scholars to significantly improve core areas of regulatory law and agency procedure. The model APA provides important safeguards against regulatory excess and enhances legislative control over the rulemaking process. While some elements of the model law reinforce each other, almost every element could be enacted separately and improve a state’s regulatory laws and procedures.

Agency Rulemaking

Under the model APA, agencies promulgating regulations must follow detailed procedures to ensure that new rules are necessary, efficient, and consistent with legislative intent. The required procedures include a careful regulatory analysis, executive branch review, public comment, and final legislative review.

Review at different stages ensures compliance with the authorizing law, regulatory procedures, and legislative intent; it also reduces conflict with other policies. For example, an executive oversight agency reviews draft regulations for alignment with the law, the Governor’s priorities, and other agencies’ policies. § 12. The Legislature’s broader mandate permits it to use expedited procedures to reject rules that are in conflict with law, depart from legislative intent, or are arbitrary and capricious, among other grounds. § 6.d. The model APA’s drafting notes provide an alternative provision that authorizes a Joint Committee of Administrative Rules (JCAR) to reject rules on its own, without requiring action by the full Legislature. Drafting Note 3.

Before a proposed rule is formulated, the agency must undertake a detailed regulatory impact analysis, which discusses the need for the rule, its legal basis, various types of costs and benefits, regulatory alternatives (including market-based alternatives), and impacts on individual liberties and small businesses. § 5.i. To protect the public from unfair surprise, the final regulation issued may not be substantially different from the proposed rule. § 7.a.5.

The model APA also addresses regulatory dark matter—agency statements, such as guidance documents, that have not been issued with full regulatory procedures. These statements no longer may be used to expand the reach of the law or regulations in a coercive manner. The model APA provides that such guidance documents “do not bind people nor may the agency use them in such a way” against a regulated party. § 4.b. However, individuals charged with violating a regulation may raise their compliance with guidance as a safe-harbor defense. § 10.c.

Centralized Review of Rules in the Executive Branch

The model APA assigns new regulatory review responsibilities to an entity that already exists in most states. § 12. Drafting Note 1 mentions Indiana’s State Budget Agency and Arizona’s

Governor's Regulatory Review Council as two examples, but such functions could be given to a new Office of Administrative Hearings or a component of the Governor's Office.

The centralized review responsibilities include providing guidance to regulatory agencies on the issuance of rules and overseeing each agency's proposed regulatory actions to ensure they "are consistent with applicable law and the Governor's priorities, and do not conflict with the policies or actions of another agency." § 12.b.ii.

Legislative Joint Committee on Administrative Rules

Borrowing from the best practices of several state legislatures and the operation of the Congressional Review Act, the model APA establishes the JCAR with members appointed from each house to jointly conduct the review of near-final agency rules. § 6.a. No rule may go into effect until it has been submitted to the JCAR and a period of review has elapsed.

The joint committee would have 90 days after a rule is submitted (excluding days either house is adjourned for more than 3 days) to "void" the rule. If the Legislature votes to void the rule (or in the alternative proposal, the JCAR does so), the rule is treated as if it had never been promulgated or taken effect.

Regulatory Enforcement Protections

The model APA restores the common law requirement that agencies may not seek criminal punishments without proof that the defendant acted knowingly and willfully as to each element of the offense. § 4.c. Similarly, it requires agencies pursuing civil monetary penalties to prove the individual acted knowingly or with gross negligence, depending on the amount sought. § 4.d.

The bill also provides other procedural protections for individuals and other parties. Before an agency may take an enforcement action, it must provide the subject of enforcement with 60 days' notice. Outside of a formal proceeding, an agency may issue subpoenas or otherwise demand information only with probable cause.

Agency Adjudications and Judicial Review

The model APA includes a successful idea from Texas by creating a separate Office of Adjudication with administrative law judges who are independent of the regulatory agencies that investigate and bring civil charges for regulatory violations. §§ 8, 11. The Chief Administrative Law Judge is appointed by the Governor and confirmed by the Senate (or other legislative body) and ensures the hiring and independence of administrative law judges who hear regulatory agency adjudications.

The bill provides for robust judicial review of new regulations and agency enforcement actions. § 9.d. Importantly, the model APA requires courts to make legal determinations independently, without deferring to the agency's interpretation. § 9.g.3. Furthermore, where a statute or regulation is ambiguous, the language must be construed in favor of the party challenging it. § 9.g.4.