

**Summary: H.908 as Passed the House with Senate Proposals of Amendment**  
**An Act Relating to the Administrative Procedure Act**

Office of Legislative Council May 3, 2018

**Sec. 1: Purpose.** This section states the following purposes for the bill:

- Improve public participation and access to the rulemaking process and adopted rules.
- Increase the efficiency of the rulemaking process.
- Ensure rules are authorized, reasonable, and subject to thorough regulatory analysis.
- *The Senate does not propose to amend Sec. 1.*

**Sec. 2: This section amends the Administrative Procedure Act (APA). It organizes the APA into three subchapters: General Provisions, Contested Cases, and Rulemaking.**

Statute	Summary	
	Subchapter 1: General Provisions	
	<b>As Passed House</b>	<b>Senate Proposal of Amendment</b>
3 V.S.A. § 800: purpose	The bill adds the following to the existing “purpose” section of the APA: <ul style="list-style-type: none"> <li>• Writing rules so they are clear and accessible to the public.</li> <li>• Subjecting rules to thorough regulatory analysis.</li> </ul>	<i>No change proposed</i>
3 V.S.A. § 801: definitions	The bill amends the existing “definitions” section of the APA to: <ul style="list-style-type: none"> <li>• Clarify the existing definition of “procedure,” and add new definitions of “guidance document” and “index.” <ul style="list-style-type: none"> <li>○ Procedures and guidance documents are written documents issued by administrative agencies that do not go through rulemaking but may affect people outside the agency.</li> <li>○ Later, in § 835, the bill clarifies the legal status of these documents and provides that they need to be indexed</li> </ul> </li> </ul>	<i>Adds exceptions to the definitions of “procedure” and “guidance document,” including</i> <ul style="list-style-type: none"> <li>• <i>statements concerning internal management of an agency or a secure facility</i></li> <li>• <i>intergovernmental or interagency memoranda</i></li> <li>• <i>guidelines or criteria for audits, investigations or inspections</i></li> <li>• <i>other documents</i></li> </ul>

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	<p>and published on the agency's website.</p> <ul style="list-style-type: none"> <li>Define "arbitrary," a term that applied during review of a rule by the Legislative Committee on Administrative Rules (LCAR). The definition is based on Vermont Supreme Court cases interpreting "arbitrary."</li> </ul>	<p><i>Adds a statement that "arbitrary" is to be applied consistently with the prior Vermont Supreme Court decisions on which it is based</i></p>
3 V.S.A. § 806: petitions	<p>The bill amends an existing statute that authorizes members of the public to petition agencies to adopt, amend, or repeal a procedure or a rule. It adds that a person may petition the agency to adopt a guidance document as a rule or to amend or repeal the guidance document.</p>	<p><i>No change proposed</i></p>
<p>Subchapter 2: Contested Cases</p>		
<p>The bill makes one reorganizational, nonsubstantive change regarding "contested cases" under the APA. "Contested cases" are court-like cases conducted by administrative agencies that determine the rights and obligations of an individual party.</p>		
3 V.S.A. § 809 (reorganization)	<p>As part of organizing the APA into three subchapters, the bill moves language into § 809(i) that is currently found in § 849.</p> <ul style="list-style-type: none"> <li>The language concerns the ability of a board or commission member who has heard all or a substantial part of case to remain a member for the purpose of concluding case when the member's term ends or the member retires before the case is completed.</li> <li>The language is moved to this location without change so that it is part of the "contested cases" subchapter.</li> </ul>	<p><i>No change proposed</i></p>
<p>Subchapter 3: Rulemaking; Procedures; Guidance Documents</p>		
3 V.S.A. § 818: centralized rule	<p>The bill adds a new section directing the Secretary of State (SOS) to establish a centralized rule system that is open and</p>	<p><i>No change proposed</i></p>

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system	<p>available to the public.</p> <ul style="list-style-type: none"> <li>• The SOS would design the centralized system to:                             <ul style="list-style-type: none"> <li>○ Facilitate public notice of and access to the rulemaking process.</li> <li>○ Provided the public with greater access to current rules.</li> <li>○ Promote more efficient and transparent filing of rulemaking process and review of proposed rules.</li> </ul> </li> <li>• The SOS is given authority to make the system a digital and online system. In Sec. 4, the effective date of this section is delayed until July 1, 2019 to give the SOS time to set the system up and address how to obtain additional funding, if needed, to create the system electronically.</li> </ul>	
3 V.S.A. § 831: required policy statements and rules	<p>The bill amends an existing statute on “required policy statements and rules” to:</p> <ul style="list-style-type: none"> <li>• Amend an existing requirement to initiate rulemaking to adopt existing practices and procedures as rules when requested by 25 or more persons or LCAR. The amendment adds “guidance document.”</li> <li>• Require an agency to initiate rulemaking to correct a rule within 30 days of discovering that the text of what was submitted to LCAR deviates from what the agency intended to submit, if the period has ended during which the rule can be resubmitted to LCAR.</li> </ul>	<i>Removes the proposed addition of “guidance document”</i>
3 V.S.A. §§ 832a and 832b (reorganization)	<p>These sections concern rules affecting small businesses and school districts. Within the bill, the provisions of these sections are moved without substantive change into 3 V.S.A. § 838, which concerns the filing of proposed rules. They are repealed on pp. 7-9 of the bill but reappear on pp. 16-18.</p>	<i>No change proposed</i>

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3 V.S.A. § 833: style of rules	The bill amends existing law that requires rules and procedures to be written in a clear and coherent manner. It adds a provision authorizing the SOS to issue a guidance document on how to draft rules and procedures in accordance with this section.	
3 V.S.A. § 835: compilations and indices for procedures and guidance documents	<p>The bill amends existing law that requires agencies to compile and index their “procedures,” that is, written practices that may affect people outside the agency but are not adopted as rules. The amendment is based on the model APA published by the Uniform Law Commission. The amendment:</p> <ul style="list-style-type: none"> <li>• Includes guidance documents within the scope of the required compilation and index.</li> <li>• Requires that the compilation and index be placed on the agency website and available to the public.</li> <li>• Clarifies that an agency cannot rely on a procedure or guidance document that is not included in a compilation that complies with statute.</li> <li>• Clarifies that these documents, which are adopted outside of rulemaking, do not have the force of law.</li> <li>• Requires that agencies provide affected persons with an opportunity to contest the legality or wisdom of a position taken in the document.</li> </ul>	<p><i>Delays, until Jan. 1, 2024, the requirement that an agency cannot rely on a procedure or guidance document that is not included in a compilation that complies with this statute</i></p> <p><i>Removes provisions that would require agencies to provide an affected person with an opportunity to contest a position taken in a procedure or guidance document</i></p> <p><i>Retains the clarification that procedures and guidance documents do not have the force of law. Adds a statement that the subsection is not intended to affect the deference that a court may give to such a document</i></p>
3 V.S.A. § 836: procedure for adopting rules	<p>The bill adds subsection (b), under which each agency would have to post information on its website during rulemaking.</p> <ul style="list-style-type: none"> <li>• The information would be on separate page readily accessible from a prominent link on the agency’s main web page, on which proposed rules would be listed by title and topic.</li> <li>• The posted information would include: <ul style="list-style-type: none"> <li>○ The proposed rule</li> </ul> </li> </ul>	

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	<ul style="list-style-type: none"> <li>○ The date for submitting comments and the date and location of any public hearing</li> <li>○ Each comment received</li> <li>○ The final proposed rule and all other documents submitted to LCAR</li> <li>● The agency would have to keep this information on the website until the process for the rulemaking is over.</li> </ul>	
<p>3 V.S.A. § 838: filing of proposed rules</p>	<p>The bill amends existing statute on filing proposed rules to:</p> <ul style="list-style-type: none"> <li>● Put in one place all of the language that affects the content of rulemaking filings.</li> <li>● Specify the information to be included rather than the format of the information.                             <ul style="list-style-type: none"> <li>○ Current law requires paper filings in a particular format.</li> <li>○ The bill would require the same information with format decided by the SOS.</li> <li>○ The purpose is to allow the SOS and the agencies flexibility to implement the centralized rule system, including the potential digital implementation of the system.</li> </ul> </li> <li>● In addition to the currently required economic impact analysis, require an environmental impact analysis.                             <ul style="list-style-type: none"> <li>○ Current law includes a requirement for a greenhouse gas impact statement that has not been useful because most agencies respond with “not applicable.”</li> <li>○ The environmental impact analysis would apply to greenhouse gas impacts as well other issues such as air and water pollution and the ability of the environment to provide benefits such as food and fresh water and the regulation of water flow.</li> </ul> </li> <li>● The bill retains the current ability of an agency, in its rules, to incorporate by reference codes, standards, or rules issued</li> </ul>	<p><i>With respect to the requirement that the economic impact analysis include an evaluation of how a small business can reduce the cost and burden of compliance, inserts the phrase “when appropriate”</i></p> <p><i>With respect to the requirement that a document incorporated by reference must be available for inspection and copying at the agency, states that the requirement to allow copying is subject to the exceptions in the Public Records Act</i></p>

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	<p>by other U.S. jurisdictions or nationally recognized organizations, if repeating the text verbatim would be unduly cumbersome or expensive. The bill would:</p> <ul style="list-style-type: none"> <li>○ Require that the incorporated material must be fully identified in the rule, including where copies are available.</li> <li>○ Require that the incorporated materials must be available for public inspection and copying at the agency and available for free public access online, unless the agency is prevented from provide such access by law.</li> </ul>	
3 V.S.A. § 839: publication of proposed rules	The bill amends the existing statute on the publication of proposed rules to require the publication to include a concise summary “in plain language” and to require newspaper notices to include the Internet address at which the rule can be found.	<i>No change proposed</i>
3 V.S.A. § 841: final proposal	The bill amends the existing statute on the filing of a final proposal, after considering public comments, with LCAR and the SOS. Under the bill, an agency would be required to include a separate and succinct statement on why the final proposal meets each of the LCAR review criteria. The purpose is to expedite LCAR’s review. Currently, LCAR members and staff often have to question an agency to obtain this information.	<i>With respect to the requirement to include a statement on why the LCAR criteria, deletes the provision that the agency must state why the rule is not contrary to legislative intent</i>
3 V.S.A. § 842: LCAR review	<p>The bill amends the existing statute on LCAR review.</p> <ul style="list-style-type: none"> <li>• The primary change is to reorganize all of the grounds under which LCAR may object into subsection (b). Currently, the six potential grounds for objection are spread among subsections (b) (four grounds), (c) (style of rules), and (d) (economic impact statement).</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Adds subsection headers</i></li> <li>• <i>States that an LCAR objection is not admissible evidence in court except to establish the fact of the objection</i></li> </ul>

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	<ul style="list-style-type: none"> <li>• Add that LCAR may object that the environmental impact analysis fails to recognize a substantial environmental impact of the rule. This language is similar to the existing language under which LCAR may object that the economic impact analysis fails to recognize a substantial economic impact of the rule.</li> <li>• Clarify that, when an agency responds to an objection by LCAR, it:               <ul style="list-style-type: none"> <li>○ Must send a copy of that response to the SOS. Currently, the SOS does not receive these filings.</li> <li>○ May propose revisions that seek to cure defects noted by LCAR. This is current practice that is allowed by existing statute, 3 V.S.A. § 843(b).</li> </ul> </li> </ul>	
<p>3 V.S.A. § 843: filing of adopted rules</p>	<p>The bill amends the existing statute on the filing of adopted rules to allow the SOS to accept each of the following:</p> <ul style="list-style-type: none"> <li>• The refiling of a finally adopted rule to conform to the final proposed rule as approved by LCAR, with supporting documentation showing that the refiling is to achieve this conformance. The purpose of this language to address situations that have arisen in which agencies, by mistake, have misfiled finally adopted rules that are not the same as what was approved.</li> <li>• The refiling of a final adopted rule solely for the purpose of correcting one or more typographic errors that do change the substance or effect of the rule.</li> </ul>	<p><i>Adds that, once an agency has responded to an LCAR objection, the agency may adopt the rule without change or may make a germane change in response to the objection</i></p>
<p>3 V.S.A. § 844: emergency rules</p>	<p>The bill amends the existing statute on the filing of emergency rules to:</p> <ul style="list-style-type: none"> <li>• Allow emergency rules to remain in effect for 180 days rather than the current 120 days. The rationale is to allow agencies additional time to complete the regular rulemaking</li> </ul>	<p><i>Adds a new subsection under which an agency may use emergency rulemaking procedures to amend existing rules when they implement a program controlled by federal statute or rule or a multistate entity, and the controlling statute, rule</i></p>

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	<p>process before the emergency rule expires.</p> <ul style="list-style-type: none"> <li>• Allow agencies to make germane changes to an emergency rule in response to expressed concern of LCAR, without having to adopt a new emergency rule. Such a change would not extend the 180-day period.</li> </ul>	<p><i>or entity requires a change to be implemented within 120 days or less. The agency would have to propose a corresponding permanent rule change.</i></p>
3 V.S.A. § 845: effect of rules	<p>The bill amends an existing statute that allows rules to include procedures for granting a waiver or variance of the rule to require that the rule must set forth a process and specific criteria for granting a waiver or variance and the grant must be in writing.</p>	<p><i>No change proposed</i></p>
3 V.S.A. § 847: availability of adopted rules	<p>The bill amends the existing statute on availability of adopted rules to:</p> <ul style="list-style-type: none"> <li>• Require each agency to make each finally adopted rule available to the public online and for physical inspection and copying. The online posting must be on a separate web page readily accessible from a prominent link on its main web page that lists proposed rules by title and topic.</li> <li>• Allow the SOS to use the centralized rule system to satisfy existing legal requirements to keep a permanent register of rules that is open to the public and to publish a code of administrative rules.</li> <li>• Repeal a requirement for the SOS to publish a quarterly bulletin with the text of all new rules filed.</li> </ul>	<p><i>Makes an editorial correction: In one location, the word “proposed” is changed to “adopted” because the section addresses adopted rules</i></p>
3 V.S.A. § 848: rules repeal; amendment of authority	<p>The bill amends an existing statute that addresses what happens when the authority to adopt a rule is repealed by operation of law, amended by the General Assembly, or transferred from one agency to another. The substantive change is to require, in each circumstance, that the agency provide notice to the SOS in such manner as the SOS may prescribe by rule or procedure.</p>	<p><i>No change proposed</i></p>



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3 V.S.A. § 849: retiring board or commission members	As discussed above, the language of this statute is moved into 3 V.S.A. § 809(i) so that it is part of the “contested cases” subchapter.	<i>No change proposed</i>

**Sec. 3: Redesignation.** This section delineates which statutory sections of the APA will go into each of the three newly created subchapters. *The Senate does not propose to amend Sec. 3.*

**Sec. 4: Misfiling of Education Rules.** *The Senate proposes to add this section, which was not in the bill as passed the House. The section proposes to correct a situation that occurred in 2013, when the State Board of Education (SBE) adopted changes to its rule on special education after public hearing, but then filed an incorrect version of the rule for review by LCAR. The same incorrect version was then approved by LCAR and finally adopted by the SBE. Under the Senate proposal, the SBE would now file the correct text of the rule with LCAR for review.*

**Sec. 4 (in House); 5 (in Senate): Effective Dates.** The act will take effect on July 1, 2018, except that the sections on the centralized rule system will take effect on July 1, 2019. *The Senate proposes to renumber this section only.*