



# Arizona's Administrative Procedure Act: The Role of GRRC

Part 1 (October 30, 2018)



# The Arizona Administrative Procedure Act A.R.S. Title 41, Chapter 6

## **Today's Subject: *Article 5 - Governor's Regulatory Review Council***

- 41-1051: **Governor's regulatory review council; membership; terms; compensation; powers**
- 41-1052: **Council review and approval**
- 41-1053: **Council review of expedited rules (not covered in this presentation)**
- 41-1055: **Economic, small business and consumer impact statement**
- 41-1056: **Review by agency**
- 41-1056.01: **Impact statements; appeals (not covered in this presentation)**
- 41-1057: **Exemptions**

**From this point forward, all of the text in this presentation comes directly from these statutes.**



## Title 41, Chapter 6, Article 5 - A.R.S. 41-1051

A. The governor's regulatory review council is established consisting of six members who are appointed by the governor pursuant to section 38-211 and who are subject to sections 38-291 and 38-295 and the director of the department of administration or the assistant director of the department of administration who is responsible for administering the council. The director or assistant director is an ex officio member and chairperson of the council. The council shall elect a vice-chairperson to serve as chairperson in the chairperson's absence. The governor shall appoint at least one member who represents the public interest, at least one member who represents the business community, at least one member who is a small business owner, one member from a list of three persons who are not legislators submitted by the president of the senate and one member from a list of three persons who are not legislators submitted by the speaker of the house of representatives. At least one member of the council shall be an attorney licensed to practice law in this state. The governor shall appoint the members of the council for staggered terms of three years. A vacancy occurring during the term of office of any member shall be filled by appointment by the governor for the unexpired portion of the term in the same manner as provided in this section.



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- B.** The council shall meet at least once a month at a time and place set by the chairperson and at other times and places as the chairperson deems necessary.
- C.** Members of the council are eligible to receive compensation in an amount of two hundred dollars for each day on which the council meets and reimbursement of expenses pursuant to title 38, chapter 4, article 2.
- D.** The chairperson, subject to chapter 4, article 4 and, as applicable, articles 5 and 6 of this title, shall employ, determine the conditions of employment of and specify the duties of administrative, secretarial and clerical employees as the chairperson deems necessary.
- E.** The council may make rules pursuant to this chapter to carry out the purposes of this chapter.
- F.** The council shall make a list of agency rules approved or returned pursuant to sections 41-1027 and 41-1052 and section 41-1056, subsection C for the previous twelve-month period available to the public on request and on the council's website.



## Title 41, Chapter 6, Article 5 - A.R.S. 41-1052

- A.** Before filing a final rule subject to this section with the secretary of state, an agency shall prepare, transmit to the council and the committee and obtain the council's approval of the rule and its preamble and economic, small business and consumer impact statement that meets the requirements of section 41-1055. The office of economic opportunity shall prepare the economic, small business and consumer impact statement.
- B.** The council shall accept an early review petition of a proposed rule, in whole or in part, if the proposed rule is alleged to violate any of the criteria prescribed in subsection D of this section and if the early petition is filed by a person who would be adversely impacted by the proposed rule. The council may determine whether the proposed rule, in whole or in part, violates any of the criteria prescribed in subsection D of this section.
- C.** Within one hundred twenty days after receipt of the rule, preamble and economic, small business and consumer impact statement, the council shall review and approve or return, in whole or in part, the rule, preamble or economic, small business and consumer impact statement. An agency may resubmit a rule, preamble or economic, small business and consumer impact statement if the council returns the rule, economic, small business and consumer impact statement or preamble, in whole or in part, to the agency.



# Title 41, Chapter 6, Article 5 - A.R.S. 41-1052

D. The council shall not approve the rule unless:

1. The economic, small business and consumer impact statement contains information from the state, data and analysis prescribed by this article.
2. The economic, small business and consumer impact statement is generally accurate.
3. The probable benefits of the rule outweigh within this state 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.
4. The rule is written in a manner that is clear, concise and understandable to the general public.
5. The rule is not illegal, inconsistent with legislative intent or beyond the agency's statutory authority and meets the requirements prescribed in section 41-1030.
6. The agency adequately addressed, in writing, the comments on the proposed rule and any supplemental proposals.
7. The rule is not a substantial change, considered as a whole, from the proposed rule and any supplemental notices.
8. 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.
9. The rule is not more stringent than a corresponding federal law unless there is statutory authority to exceed the requirements of that federal law.
10. If a rule requires a permit, the permitting requirement complies with section 41-1037.



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- E. The council shall verify that a rule with new fees does not violate section 41-1008. The council shall not approve a rule that contains a fee increase unless two-thirds of the voting quorum present votes to approve the rule.
- F. The council shall verify that a rule with an immediate effective date complies with section 41-1032. The council shall not approve a rule with an immediate effective date unless two-thirds of the voting quorum present votes to approve the rule.
- G. If the rule relies on scientific principles or methods, including a study disclosed pursuant to subsection D, paragraph 8 of this section, and a person submits an analysis to the council questioning whether the rule is based on valid scientific or reliable principles or methods, the council shall not approve the rule unless the council 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, the council shall consider the following factors as applicable to the rule:
1. The authors of the study, principle or method have subject matter knowledge, skill, experience, training and expertise.
  2. The study, principle or method is based on sufficient facts or data.
  3. The study is the product of reliable principles and methods.
  4. The study and its conclusions, principles or methods have been tested or subjected to peer reviewed publications.
  5. The known or potential error rate of the study, principle or method has been identified along with its basis.
  6. The methodology and approach of the study, principle or method are generally accepted in the scientific community.



## Title 41, Chapter 6, Article 5 - A.R.S. 41-1052

- H. The council may require a representative of an agency whose rule is under examination to attend a council meeting and answer questions. The council may also communicate to the agency its comments on any rule, preamble or economic, small business and consumer impact statement and require the agency to respond to its comments in writing.
- I. At any time during the thirty days immediately following receipt of the rule, a person may submit written comments to the council that are within the scope of subsection D, E, F or G of this section. The council may permit testimony at a council meeting within the scope of subsection D, E, F or G of this section.
- J. 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.
- K. The absence of comments pursuant to subsection D, E, F or G of this section or article 4.1 of this chapter does not prevent the council from acting pursuant to this section.
- L. The council shall review and approve or reject a notice of proposed expedited rulemaking pursuant to section 41-1027.





# Title 41, Chapter 6, Article 5 - A.R.S. 41-1055(B)

B. The economic, small business and consumer impact statement shall include:

1. An identification of the proposed rule making.
2. An identification of the persons who will be directly affected by, bear the costs of or directly benefit from the proposed rule making.
3. A cost benefit analysis of the following:
  - (a) The probable costs and benefits to the implementing agency and other agencies directly affected by the implementation and enforcement of the proposed rule making. The probable costs to the implementing agency shall include the number 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 a political subdivision of this state directly affected by the implementation and enforcement of the proposed rule making.
  - (c) The probable costs and benefits to businesses directly affected by the proposed rule making, including any anticipated effect on the revenues or payroll expenditures of employers who are subject to the proposed rule making.
4. A general description of the probable impact on private and public employment in businesses, agencies and political subdivisions of this state directly affected by the proposed rule making.



# Title 41, Chapter 6, Article 5 - A.R.S. 41-1055(B)

5. A statement of the probable impact of the proposed rule making on small businesses. The statement shall include:

(a) An identification of the small businesses subject to the proposed rule making.

(b) The administrative and other costs required for compliance with the proposed rule making.

(c) A description of the methods prescribed in section 41-1035 that the agency may use to reduce the impact on small businesses, with reasons for the agency's decision to use or not to use each method.

(d) The probable cost and benefit to private persons and consumers who are directly affected by the proposed rule making.

6. A statement of the probable effect on state revenues.

7. A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule making, including the monetizing of the costs and benefits for each option and providing the rationale for not using nonselected 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.



## Title 41, Chapter 6, Article 5 - A.R.S. 41-1056(A)-(G)

**A.** At least once every five years, each agency shall review all of its rules, including rules made pursuant to an exemption from this chapter or any part of this chapter, to determine whether any rule should be amended or repealed. The agency shall prepare and obtain council approval of a written report summarizing its findings, its supporting reasons and any proposed course of action. The report shall contain a certification that the agency is in compliance with section 41-1091. For each rule, the report shall include a concise analysis of all of the following:

1. The rule's effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached.
2. 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.
3. Authorization of the rule by existing statutes.
4. Whether the rule is consistent with statutes or other rules made by the agency and current agency enforcement policy.
5. The clarity, conciseness and understandability of the rule.



## Title 41, Chapter 6, Article 5 - A.R.S. 41-1056(A)-(G)

6. The estimated economic, small business and consumer impact of the rules as compared to the economic, small business and consumer impact statement prepared on the last making of the rules.
7. Any analysis submitted to the agency by another person regarding the rule's impact on this state's business competitiveness as compared to the competitiveness of businesses in other states.
8. If applicable, that the agency completed the previous five-year review process.
9. A determination that the probable benefits of the rule outweigh within this state the probable costs of the rule, and the rule 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.
10. 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.
11. For rules adopted after July 29, 2010 that require the issuance of a regulatory permit, license or agency authorization, whether the rule complies with section 41-1037.



## Title 41, Chapter 6, Article 5 - A.R.S. 41-1056(A)-(G)

**B.** An agency may also include as part of the report the text of a proposed expedited rule pursuant to section 41-1027.

**C.** The council shall schedule the periodic review of each agency's rules and shall approve or return, in whole or in part, the agency's report on its review. The council may grant an agency an extension from filing an agency's report. If the council returns an agency's report, in whole or in part, the council shall 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. The council shall not approve a report unless the report complies with subsection A of this section.

**D.** The council may review rules outside of the five-year review process if requested by at least four council members.



## Title 41, Chapter 6, Article 5 - A.R.S. 41-1056(A)-(G)

**E.** The council may require the agency to propose an amendment or repeal of the rule by a date no earlier than six months after the date of the meeting at which the council considers the agency's report on its rule if the council determines the agency's analysis under subsection A of this section demonstrates that the rule is materially flawed, including that the rule:

1. Is not authorized by statute.
2. Is inconsistent with other statutes, rules or agency enforcement policies and the inconsistency results in a significant burden on the regulated public.
3. Imposes probable costs, including costs to the regulated person, that significantly exceed the probable benefits of the rule within this state.
4. Is more stringent than a corresponding federal law and there is no statutory authority to exceed the requirements of federal law.
5. Is not clear, concise and understandable.
6. Does not use general permits if required under section 41-1037.
7. Does not impose the least burden to persons regulated by the rule as necessary to achieve the underlying regulatory objective of the rule.
8. Does not rely on valid scientific or reliable principles and methods, including a study, if the rule relies on scientific principles or methods, and a person has submitted an analysis under subsection A of this section questioning whether the rule is based on valid scientific or reliable principles or methods. In making a determination of validity or reliability, the council shall consider the factors listed in section 41-1052, subsection G.



## Title 41, Chapter 6, Article 5 - A.R.S. 41-1056(A)-(G)

**F.** An agency may request an extension of no longer than one year from the date specified by the council pursuant to subsection E of this section by sending a written request to the council that:

1. Identifies the reason for the extension request.
2. Demonstrates good cause for the extension.

**G.** The agency shall notify the council of an amendment or repeal of a rule for which the council has set an expiration date under subsection E of this section. If the agency does not amend or repeal the rule by the date specified by the council under subsection E of this section or the extended date under subsection F of this section, the rule automatically expires. The council shall file a notice of rule expiration with the secretary of state and notify the agency of the expiration of the rule.



## Title 41, Chapter 6, Article 5 - A.R.S. 41-1057

**A.** In addition to the exemptions stated in section 41-1005, this article does not apply to:

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.

**B.** An agency exempt under subsection A of this section may elect to follow the requirements of this article instead of section 41-1044 for a particular rule making. The agency shall include with a final rule making filed with council a statement that the agency has elected to follow the requirements of this article.