

# **Michigan Law Revision Commission**

**TWENTY-FOURTH ANNUAL REPORT  
1989**

**MICHIGAN  
LAW REVISION COMMISSION**

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## TABLE OF CONTENTS

Letter of Transmission from the Michigan Law Revision Commission to the Legislature .....	1
Recommendations of the Law Revision Commission to the Legislature:	
Condemnation Provisions Inconsistent with the Uniform Condemnation Act .....	15
The Proposed Administrative Procedures Act:	
Draft of Proposed Act .....	27
Commentary on Proposed Act .....	65
Summary of Revisions .....	113
Conversion Table I .....	119
Comparative Analysis I .....	127
Conversion Table II .....	181
Comparative Analysis II .....	189
Study Report on the Michigan State Law Implications of the United States-Canada Free Trade Agreement .....	241
Biographies of Commission Members and Staff .....	363

**MICHIGAN LAW REVISION COMMISSION**  
**Twenty-Fourth Annual Report to the Legislature**

**To the Members of the Michigan Legislature:**

The Michigan Law Revision Commission hereby presents its twenty-fourth annual report pursuant to Section 403 of Act No. 268 of the Public Acts of 1986, MCL 4.1403.

The Commission, created by Section 401 of that Act, MCL 4.1401, consists of: two members of the Senate, with one from the majority and one from the minority party, appointed by the Majority Leader of the Senate; two members of the House of Representatives, with one from the majority and one from the minority party, appointed by the Speaker of the House; the Director of the Legislative Service Bureau or his or her designee, who serves as an ex-officio member; and four members appointed by the Legislative Council. Terms of the members appointed by the Legislative Council are staggered. The Legislative Council designates the Chairman of the Commission. The Vice Chairman is elected by the Commission.

**Membership**

The legislative members of the Commission during 1989 were Senator Rudy Nichols of Waterford, Senator Virgil C. Smith, Jr. of Detroit, Representative Perry Bullard of Ann Arbor, and Representative David Honigman of West Bloomfield. As Director of the Legislative Service Bureau, Elliott Smith was the ex-officio Commission member. The appointed members of the Commission were Anthony Derezinski, David Lebenbom, Richard McLellan, and Richard C. Van Dusen. Mr. McLellan served as Chairman. Mr. Derezinski served as Vice Chairman. Professor Jerold Israel of the University of Michigan Law School served as Executive Secretary. Gary Gulliver served as the liaison between the Legislative Service Bureau and the

Commission. Brief biographies of the current Commission members and staff are located at the end of this report.

### The Commission's Work in 1989

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and to recommend needed reform.
2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association, and other learned bodies.
3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers and the public generally as to defects and anachronisms in the law.
4. To recommend, such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.
5. To encourage the faculty and students of the law schools of this state to participate in the work of the Commission.
6. To cooperate with the law revision commissions of other states and Canadian provinces.
7. To issue an annual report.

The problems to which the Commission directs its studies are largely identified through an examination by the Commission members and the Executive Secretary of the statutes and case law of Michigan, the reports of learned bodies and commissions from other jurisdictions, and legal literature. Other subjects are brought to the attention of the Commission by various organizations and individuals, including members of the Legislature.

The Commission's efforts during the past year have been devoted primarily to three areas. First, Commission members provided information to legislative committees relating to various proposals previously recommended by the Commission. Second, the Commission examined suggested legislation proposed by various groups involved in law revision activity. These proposals included legislation advanced by the Council of State Governments, the National Conference of Commissioners on Uniform State Laws, and the law revision commissions of various jurisdictions within and without the United States (e.g., California, New York, and British Columbia). Finally, the Commission considered various problems relating to special aspects of current Michigan law suggested by its own review of Michigan decisions and the recommendations of others.

As in previous years, the Commission studied various proposals that did not lead to legislative recommendations. In the case of certain uniform or model acts, the Commission found that the subjects treated had been considered by the Michigan legislature in recent legislation. In other instances, uniform or model acts were not pursued because similar legislation was currently pending before the Legislature upon the initiation of legislators having a special interest in the particular subject.

The Commission decided to make no recommendation in relation to one of the topics studied but to present a study report on that topic. That study report was prepared by a Wayne State Law School team (under the direction of Professor John E. Mogk), and addresses the subject of the "Michigan State Law Implications of the United States-Canada Free Trade Agreement."

Two of the topics studied by the Commission have resulted in specific legislative recommendations. Those are:

- (1) **Condemnation Provisions Inconsistent With The Uniform Condemnation Procedure Act**
- (2) **A Revision Of The Administrative Procedure Act**

Recommendations and proposed statutes on these two topics also accompany this Report. The recommendation, proposed statute, and commentary concerning the Administrative Procedures Act were the result of the work of Professor Don LeDuc of Thomas M. Cooley Law School.

## Proposals for Legislative Consideration in 1990

In addition to our new recommendations, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 1989.

(1) Uniform Transfers to Minors Act — S.B. 302. See Recommendations of the 1984 Annual Report, page 17.

(2) Amendment of the Assumed Names Act (limited partnership) — H.B. 4168, passed by the House. See Recommendations of the 1984 Annual Report, page 11.

(3) Uniform Law on Notarial Acts. Passed by the Senate in 1988 (S.B. 77). See Recommendations of the 1985 Annual Report, page 17.

(4) Elimination of References to Abolished Courts. H.B. 4752 to 4759, 4787 to 4792, passed by the House; S.B. 402 to 405, 409, 410, 414-415, and 417, passed by the Senate; and S.B. 407, 411, 413, and 416. See Recommendations of the 1985 Annual Report, page 12; 1986 Annual Report, pages 125 and 127; 1987 Annual Report, page 79; and 1988 Annual Report, page 149.

(5) Uniform Determination of Death Act, 1987 Annual Report, page 13.

(6) Uniform Fraudulent Transfer Act, 1988 Annual Report, page 13.

(7) Consolidated Receivership Statute, 1988 Annual Report, page 72.

## Current Study Agenda

Topics on the current study agenda of the Commission are:

- (1) Assumed Names (Statewide Registration by Individuals and Partnership)
- (2) Contribution Among Joint Tortfeasors
- (3) Usury Statutes

- (4) Medical Practice Privileges in Hospitals (Procedures for Granting and Withdrawal)
- (5) Legislative Distinctions Based on City Population in Excess of 1,000,000
- (6) Health Care Consent for Minors
- (7) Health Care Information, Access and Privacy
- (8) Public Officials — Conflict of Interest and Misuse of Office
- (9) Reproduction Technology
- (10) Elimination of References to Abolished Courts
- (11) Uniform Anatomical Gift Act
- (12) Uniform Premarital Agreement Act
- (13) Uniform Trade Secrets Act
- (14) Uniform Real Estate Tax Apportionment Act
- (15) Uniform Statutory Power of Attorney
- (16) Uniform Putative and Unknown Fathers Act
- (17) Uniform Custodial Trust Act
- (18) Uniform Commercial Code — Proposed Amendments for Articles 2A, 4A and 6

The Commission continues to operate with its sole staff member, the part-time Executive Secretary, whose offices are in the University of Michigan Law School, Ann Arbor, Michigan 48109-1215. By using faculty members at the several Michigan law schools as consultants and law students as researchers, the Commission has been able to operate at a budget substantially lower than that of similar commissions in other jurisdictions.

The Legislative Service Bureau, through Mr. Gary Gulliver, its Director of Legal Research, has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

#### Prior Enactments

The following Acts have been adopted to date pursuant to recommendations of the Commission and in some cases amendments thereto by the Legislature:

### 1967 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Original Jurisdiction of Court of Appeals	1966, p. 43	65
Corporation Use of Assumed Names	1966, p. 36	138
Interstate and International Judicial Procedures	1966, p. 25	178
Stockholder Action Without Meetings	1966, p. 41	201
Powers of Appointment	1966, p. 11	224
Dead Man's Statute	1966, p. 29	263

### 1968 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Possibilities of Reverter and Right of Entry	1966, p. 22	13
Stockholder Approval of Mortgaging Assets	1966, p. 39	287
Corporations as Partners	1966, p. 34	288
Guardian Ad Litem	1967, p. 53	292
Emancipation of Minors	1967, p. 50	293
Jury Selection	1967, p. 23	326

### 1969 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Access to Adjoining Property	1968, p. 21	55
Recognition of Acknowledgments	1968, p. 61	57
Dead Man's Statute Amendment	1969, p. 29	63
Notice of Tax Assessments	1968, p. 30	115
Antenuptial Agreements	1968, p. 27	139

Anatomical Gifts	1968, p. 39	189
Administrative Procedures Act	1967, p. 11	306
Venue Act	1968, p. 19	333

### 1970 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Land Contract Foreclosures	1967, p. 55	86
Artist-Art Dealer Relationships Act	1969, p. 44	90
Minor Students Capacity to Borrow Act	1969, p. 51	107
Warranties in Sales of Art Act	1969, p. 47	121
Appeals from Probate Court Act	1968, p. 32	143
Circuit Court Commission Power of Magistrates Act	1969, p. 62	238

### 1971 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Revision of Grounds for Divorce	1970, p. 7	75
Civil Verdicts by 5 of 6 Jurors In Retained Municipal Courts	1970, p. 40	158
Amendment of Uniform Anatomical Gift Act	1970, p. 45	186

### 1972 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Summary Proceeding for Possession of Premises	1970, p. 16	120
Interest on Judgments Act	1969, p. 64	135
Business Corporation Act	1970, Supp.	284

Constitutional Amendment  
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1969, p. 60

HJR "M"

1973 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Execution and Levy in Proceedings	1970, p. 51	96
Technical Amendments to Business Corporation Act	1973, p. 8	98

1974 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Venue in Civil Actions Against Non-Resident Corporations	1971, p. 63	52
Model Choice of Forum Act	1972, p. 60	88
Extension of Personal Jurisdiction in Domestic Relations Cases	1972, p. 53	90
Technical Amendments to the General Corporations Act	1973, p. 38	140
Technical Amendments to the Revised Judicature Act	1971, p. 7	297
1974 Technical Amendments to the Business Corporation Act	1974, p. 30	303
Amendment to "Dead Man's" Statute	1972, p. 70	305
Attachment Fees Act	1968, p. 23	306
Contribution Among Joint Tortfeasors Act	1967, p. 57	318
District Court Venue in Civil Actions	1970, p. 42	319
Elimination of Pre-judgment Garnishment	1972, p. 7	371

### 1975 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Amendment of Hit-Run Provisions to Provide Specific Penalty	1973, p. 54	170
Equalization of Income Rights of Husband and Wife in Entirety Property	1974, p. 30	288
Uniform Disposition of Community Property Rights at Death Act	1973, p. 50	289
Insurance Policy in Lieu of Bond Act	1969, p. 54	290
Uniform Child Custody Jurisdiction Act	1969, p. 22	297

### 1976 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Due Process in Replevin Actions	1972, p. 7	79
Qualifications of Fiduciaries	1966, p. 32	262
Revision of Revised Judicature Act Venue Provisions	1975, p. 20	375
Durable Family Power of Attorney	1975, p. 18	376

### 1978 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Study Report on Juvenile Obscenity Law	1975, p. 133	33
Multiple Party Deposits	1966, p. 18	53
Amendment of Telephone and Messenger Service Act		

Amendments	1973, p. 48	63
Elimination of References to Abolished Courts		
a. Township By-Laws	1976, p. 74	103
b. Public Recreation Hall Licenses	1976, p. 74	138
c. Village Ordinances	1976, p. 74	189
d. Home Rule Village Ordinances	1976, p. 74	190
e. Home Rule Cities	1976, p. 74	191
f. Preservation of Property Act	1976, p. 74	237
g. Bureau of Criminal Identification	1976, p. 74	538
h. Fourth Class Cities	1976, p. 74	539
i. Election Law Amendments	1976, p. 74	540
j. Charter Townships	1976, p. 74	553
Amendments of the Plat Act	1976, p. 58	367
Amendments to Article 9 of the Uniform Commercial Code	1975, Supp.	369

#### 1980 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Condemnation Procedures Act	1968, p. 11	87
Technical Revision of the Code of Criminal Procedure	1978, p. 37	506

#### 1981 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Elimination of Reference to the Justice of the Peace: Provision on the Sheriff's Service of Process	1976, p. 74	148

Amendment of R.J.A. Section 308 (Court of Appeals Jurisdiction) in accord with R.J.A. Section 861	1980, p. 34	206
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1982 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Revised Uniform Limited Partnership Act	1980, p. 40	213
Technical Amendments to the Business Corporation Act	1980, p. 8	407
Amendment of Probate Code as to Interest on Judgments	1980, p. 37	412

1983 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Elimination of Various Statutory References to Abolished Courts	1979, p. 9	87
Uniform Federal Lien Registration Act	1979, p. 26	102

1984 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Study Report on Legislative Privilege		
a. Immunity in Civil Actions	1983, p. 14	27
b. Limits of Immunity in Contested Cases	1983, p. 14	28
c. Amendments to R.J.A. for Legislative Immunity	1983, p. 14	29

Disclosure of Treatment Under the Psychologist/Psychiatrist- Patient Privilege	1978, p. 28	362
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1986 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Amendments to the Uniform Limited Partnership Act	1983, p. 9	100

1987 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Amendment to Article 8 of the U.C.C.	1984, p. 97	16
Disclosure in the Sale of Visual Art Object Produced in Multiples	1981, p. 57	40, 53, 54

1988 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Repeal of M.C.L. §764.9 Uniform Statutory Rule Against Perpetuities	1982, p. 9	113
Uniform Transboundary Pollution Reciprocal Access Act	1986, p. 10	417, 418
	1984, p. 11	517

The Commission continues to welcome suggestions for improvement of its program and proposals.

Respectfully submitted,

Richard D. McLellan, Chairman  
Anthony Derezinski, Vice Chairman  
David Lebenbom  
Richard C. Van Dusen  
Sen. Rudy Nichols  
Sen. Virgil C. Smith, Jr.  
Rep. Perry Bullard  
Rep. David Honigman  
Elliott Smith

Date: January 31, 1990

## CONDEMNATION PROCEDURES INCONSISTENT WITH THE UNIFORM CONDEMNATION PROCEDURES ACT

The Uniform Condemnation Procedures Act (UCPA), P.A. 1980 No. 87 (M.C.L. §§213.51-213.77), provides procedures for the acquisition of property through condemnation. Until the passage of the UCPA in 1980, condemnation actions by different governing bodies were controlled by separate provisions in state law; the result was what the 1968 Report of the Law Revision Commission called a "confusing array of statutes."

With a few temporary exceptions, the UCPA was intended to govern all actions for the acquisition of property by an agency under the power of eminent domain. M.C.L. §213.75(1). The temporary exceptions to the general application of the UCPA to condemnation acts included: M.C.L. §§213.21-213.41, M.C.L. §§486.251-486.254, and M.C.L. §§213.361-213.391. (See M.C.L. §213.75(3),(4)). As of April 1, 1985, the last of the temporary exceptions have expired. At present, every condemnation proceeding conducted by an agency under the power of eminent domain in the State of Michigan must be commenced pursuant to the UCPA.

Although the Uniform Condemnation Procedures Act governs all condemnation proceedings, sections of acts inconsistent with the provisions of the UCPA remain in the Michigan Compiled Laws. No Michigan court has had occasion to state that these provisions have no continuing legal effect, having been preempted by the UCPA. However, an advisory opinion by the Michigan Attorney General concluded that the Uniform Condemnation Procedures Act repealed by implication the sections of the Drain Code of 1956 which provided procedures different from those in the UCPA. 1985-86 Op. Att'y Gen. 6336 (Jan. 17, 1986). In that opinion, the Attorney General noted that: (1) Section 25 of the UCPA (M.C.L. §213.75) specifically provided exceptions to the application of the UCPA, and the Drain Code was not included in that limited list; (2) the legislative history implied that the acts listed in M.C.L. §213.75 were the only acts to be excluded; and (3) the UCPA was a complete act in itself and did not confuse or mislead, and thus could repeal by implication acts that were inconsistent. The same would be true of all other acts containing provisions inconsistent with the UCPA, as well as inconsistent provisions in the now expired exceptions.

The proposals that follow seek to clear out the "dead wood" in the current condemnation provisions. The proposals would not repeal any act. The UCPA does not grant to an agency any authority to exercise condemnation powers. Thus, provisions defining such authority and setting forth steps to be taken to exercise that authority must be retained. However, all procedural provisions would be deleted from the various acts. The deletions would not be limited to those procedures specifically outlined in the UCPA, such as the content of the complaint, proof of necessity, and the vesting of title. A major function of the UCPA was to make applicable to condemnation proceedings the general rules governing civil litigation. The UCPA provides in section 2 (M.C.L. §213.52) that "all laws and court rules applicable to civil actions shall apply to condemnation proceedings except as otherwise provided in this act" (emphasis added). Thus, provisions in other acts dealing with subjects governed by the general law applicable to civil actions — such as provisions on proof of agency actions, the recording of judgments, and the payment of witnesses — are superseded by the UCPA, although the UCPA itself does not have separate provisions on these subjects. The UCPA also governs the purchase of property through negotiation prior to condemnation (see section 5, M.C.L. §213.55) and insofar as current provisions on purchase deal with purchase in that context, they also are replaced by the UCPA. Substituted for the deleted procedural provisions would be a reference to the UCPA as setting forth the applicable condemnation procedure.

A discussion follows of the necessary amendments of nineteen different acts. Each proposal discusses all substantive changes that will be made to bring the particular act into accord with the UCPA. Specific bills are not attached at this point because additional stylistic changes will be needed in the various acts to bring them into accord with current drafting practices. There is also the possibility of combining some proposals in a single bill.

## PROPOSAL I

### I. Chapter XIII of Act No. 3 of the Public Acts of 1895 (M.C.L. §§73.1-73.36).

This Act provides villages with eminent domain powers to acquire property for general public uses. In section 2, authorizing a condemnation action, a cross reference to the UCPA is substituted for the current general reference to the condemnation laws. Section 3, dealing with the village

council's resolution, also is amended to delete procedural references inconsistent with the UCPA. Sections 4 to 29 are repealed. Those sections treat such subjects as the form of the complaint, establishing prima facie evidence of the resolution, the use of summonses, jury selection, the rendering of the verdict, and appeals (both as to Justice of the Peace and Circuit Court actions). Such matters are either specifically governed by the UCPA (e.g., filing in the circuit court, and jury trial) or the provision in the UCPA [M.C.L. §213.52(1)] rendering applicable "all laws and court rules applicable to civil actions except as otherwise provided in this act." For the same reasons, the proposal also would repeal section 32 (governing the payment of the judgment), section 33 (governing witness fees), and section 34 (governing proof of ownership). Section 31 is retained, however, because it provides for the possible use of a special assessment to pay the condemnation award. Section 35 similarly is retained because it relates to the calculation of the assessment (providing that a building on the property shall be sold and the amount received credited to the special assessment). Section 36 is also retained. It notes that the chapter shall not bar acquisition of property for public uses through negotiation and purchase. M.C.L. §213.55 governs negotiation for purchase of property subject to condemnation, and implicitly recognizes thereby the agency's authority to purchase. However, since it could be argued that M.C.L. §213.55 does so only where condemnation (including the appropriate necessity determination) would apply, there may be some value in retaining section 36, which arguably has broader language.

## PROPOSAL II

### II. Section 26 of Act No. 278 of the Public Acts of 1909 (M.C.L. §78.26).

Section 26 of this Act states that "no village shall have power" and then proceeds to list in its subsections a series of actions (e.g., to repudiate a debt by charter change) that the village may not take. For some unknown reason, however, subsection (g) deals with an affirmative grant of power — that of condemnation — rather than a prohibition. Rather than amend subsection (g) to bring its procedures into line with the UCPA, that provision is moved to a new section. That new section, numbered 24b, restates the basic power authorized in subsection (g), deletes references to specific condemnation procedures, and adds a cross reference to the UCPA.

### PROPOSAL III

III. Chapter XXV of Act No. 215 of the Public Acts of 1895 (M.C.L. §§105.1-105.29).

This Act — the Fourth Class Cities Act — contains condemnation provisions somewhat similar to those in the Villages Act (see Proposal I supra). While fourth class cities become home rule cities in 1980 under M.C.L. §81.1(c), where a charter has not been adopted, this Act becomes, in effect, the home rule charter for that city. See 1979 Atty.Gen.Op. 5525. The condemnation provisions of the Act therefore may still have practical significance.

The proposed changes are similar to those advanced for villages in Proposal I supra. Section 2 (granting the condemnation power) is amended to provide a cross reference to the UCPA and to delete inconsistent procedures. Inconsistent procedural references in section 3 (dealing with the city council's resolution) are deleted by amendment. Sections 4 to 22, governing the contents of the petition, evidence of the resolution, summons, juries verdicts, costs, and appeals (both as to circuit and probate court proceedings), are repealed. So too, sections 23, 25, 26, and 27, dealing with the record of the judgment, payment of the judgment, payment of jurors and witnesses, and proof of ownership, are repealed. All of these subjects are either dealt with specifically in the UCPA or the general provisions governing civil proceedings (made applicable under the UCPA). Sections 24 and 26 are retained because they deal with the use of special assessments to cover the condemnation award, and section 29 is retained because it recognizes the city's authority to otherwise acquire property through purchase.

### PROPOSAL IV

IV. Act No. 5 of the Public Acts of the Extra Session of 1870 (M.C.L. §§123.111-123.130).

This Act grants authority to municipal governments with respect to the water supply of the municipality. Sections 1 to 6 deal with bonding authority, investment in a water company, etc. Section 7 authorizes condemnation and that section is amended to include a cross reference to the UCPA. Also, the provision noting that condemnation should be utilized only after negotiation

fails is deleted, as M.C.L. §213.55 provides for initial negotiation. Repealed are sections dealing with the filing of the condemnation complaint and its contents (§8), notice (§9), evidence of judgment (§12), payment of judgment (§13), recording of judgment (§14), acquisition of title (§15), right of survey (§16), and juror competency of local freeholders (§18). All of these subjects are governed by the UCPA specifically or the general laws relating to civil proceedings (made applicable by the UCPA). Sections 17 (on the use of highways), and 19 (misdemeanor of willful interference), are retained.

## PROPOSAL V

### V. Act No. 185 of the Public Acts of 1957 (M.C.L. §§123.731-123.786).

This public works statute contains in Chapter III (sections 41 to 56) (M.C.L. §§123.771 to 123.776) various provisions relating to condemnation authority and procedure. Section 41, setting forth the county's condemnation authority, is retained. Section 41 is amended, however, to make a cross reference to the UCPA. The remaining sections are repealed. They deal with such subjects as the filing of the complaint, notice, defaults, court commissioner procedure in determining necessity and just compensation, fees for witnesses and attorneys, appeals, and evidence of ownership. Such procedures are either replaced by specific provisions of the UCPA or are covered by the general provisions governing civil actions (made applicable by the UCPA).

## PROPOSAL VI

### VI. Section 10 of Act No. 18 of the Public Acts of the Extra Session of 1933 (M.C.L. §125.660).

Section 10 of this Act grants counties eminent domain powers to acquire land for projects recommended by the municipal housing commission. This section would be amended by merely substituting a reference to the UCPA for the current language, which provides for eminent domain "in accordance with the laws of the state, and/or provisions of the local charter relative to condemnation."

## PROPOSAL VII

### VII. Act No. 272 of the Public Acts of 1909 (M.C.L. §§128.151-128.164).

This Act authorizes townships to provide burial grounds. Section 1, authorizing the use of condemnation, is amended to include a cross reference to the UCPA and to delete obsolete provisions relating to the content of the petition, circuit court jurisdiction, and jury determination of just compensation (all matters now covered in the UCPA). Sections 2 to 14 are repealed. They deal with such subjects as the summoning of jurors (§2), providing notice (§3), juror duties (§4), subpoena power (§5), collection of judgment (§6), unknown owners of property (§7), vesting of fee (§8), taking possession (§9), adjournments (§10), parties to the suit (§11), payment of the award (§12), replacement of the judge (§13), and fees (§14). All of these matters are dealt with in specific UCPA provisions or the general provisions governing civil proceedings (made applicable by the UCPA).

## PROPOSAL VIII

### VIII. Act No. 236 of the Public Acts of 1911 (M.C.L. §§213.1-213.4).

This Act grants state agencies condemnation authority. Section 1 is amended to delete reference to circuit court jurisdiction as that matter is now covered by the UCPA at M.C.L. §213.55. Section 2 provides for initiation of proceedings where authorized by section 1. It is amended to delete language describing the form and content of the petition and to state that the proceedings shall be pursuant to the UCPA. Sections 3 and 4, dealing with jury trial proceedings on the issues of necessity and compensation, are repealed. The deleted provisions in section 2 and the repealed provisions of sections 3 and 4 refer to matters governed by the specific provisions of the UCPA or the general provisions for civil proceedings (made applicable by the UCPA).

## PROPOSAL IX

### IX. Act No. 149 of the Public Acts of 1911 (M.C.L. §§213.21-213.25).

This Act gives general condemnation powers to state agencies, counties, villages, and other governmental units. The UCPA's section 25(2) (M.C.L. §213.75(3)) provided that acquisition of property under this Act would be governed by the UCPA effective April 1st, 1983. Most of the superfluous procedural provisions in this Act, found in its sections 6 to 41 (M.C.L. §§213.26 to 213.41), were repealed in 1980. The deletions did not eliminate, however, all provisions dealing with matter covered by the UCPA. This proposal would do that. It would repeal section 5 as that section deals primarily with the content of the petition and the authority of the attorney to file in the name of agency (covered by the Court Rules and M.C.L. §213.55). Section 2 would be amended to delete the reference to the now repealed condemnation provisions in the Act (i.e., former sections 6 to 41). Section 4 is amended to delete the jurisdictional provision and to note that the proceedings authorized by resolution are to be brought pursuant to the UCPA. While the UCPA so provides in its section 25(3), a cross reference in this Act might be helpful to the reader.

#### PROPOSAL X

X. Act No. 119 of the Public Acts of 1919 (M.C.L. §213.111-213.134).

This Act allows cities with a population exceeding 25,000 to take certain utilities for public use. Section 1, which is retained, states the basic authority. Section 2, specifying the necessary resolution, is amended to delete the reference to circuit court jurisdiction, now controlled by UCPA at M.C.L. §213.55. Stylistic changes are also made to focus on the resolution rather than the initiation of the civil action. Section 3, which deals with the initiation of the actual condemnation proceedings, is amended to delete provisions relating to the content of the petition and substitute a direction that the proceedings be pursuant to the UCPA. Sections 4 to 25 are repealed. Those sections deal with such subjects as the content of the petition, issuance and service of summons, jury selection, determination of the award, jury functions, new trials, appeals, and judgment procedures. All of these subjects are governed by specific provisions in the UCPA or the general laws relating to civil proceedings (made applicable by the UCPA).

#### PROPOSAL XI

XI. Act No. 215 of the Public Acts of 1925 (M.C.L. §213.151-213.153).

This Act grants the state highway commissioner the authority to obtain property of railroads or public utilities for improvement of trunk line highways. This may be done by the purchase of the property, by the exchange of property, and by condemnation. Section 2 offered the commissioner a choice of utilizing condemnation procedures designated for county road commissioners or procedures designated for state agencies. That language is deleted and new language inserted stating that the proceedings authorized under section 1 will be under the UCPA. This will include the purchase of property insofar as M.C.L. §213.55 governs.

## PROPOSAL XII

### XII. Act No. 352 of the Public Acts of 1925 (M.C.L. §§213.171-213.199).

This Act deals with the acquisition of property by county road commissioners and the state highway commissioner. Arguably the authority it establishes could also be exercised under M.C.L. §213.21 (see Proposal IX). However, since the grant of authority in section 1 of this Act is more specific, the Act is retained. No changes are made in the several provisions granting the authority to purchase or take property. Those are section 1(a)-(h) (listing a variety of purposes for which the property may be "secured from the owners," e.g., property needed for "highway right of way, for a change in the channel of a water course, or for off-street parking), section 1(i) (authorizing the "taking" of property upon proper resolution) and section 23 (authorizing the "taking" or purchase of property from a cemetery association). A new section 1a is added to provide a cross reference to the UCPA, which will govern condemnation proceedings authorized by the above provisions.

Section 24, authorizing the sale of excess property obtained under section 23 through purchase or condemnation, also is retained. While the UCPA's section 22 (M.C.L. §213.72) refers to the lease or sale of excess property, it is limited to property obtained by condemnation. For the same reason, section 2 is retained, including its provision on fluid mineral and gas rights. While that provision largely restates the content of §3 of the UCPA (M.C.L. §213.53), the UCPA applies only to "acquired" property (i.e., that taken by "involuntary appropriation"), while section 2 applies to property purchased apart from condemnation authority.

A primary purpose of this Act was to establish an alternative procedure for condemnation through a commission's determination. That

procedure is set forth in sections 4 to 22 and 27 to 29 of the Act. Those sections are repealed since the UCPA is exclusive.

### PROPOSAL XIII

**XIII. Act No. 295 of the Public Acts of 1966 (M.C.L. §§213.361-213.391).**

This Act authorizes cities, villages, townships, drainage districts, counties, county road commissions, and the state highway commission to use eminent domain power for a variety of public purposes relating to highways, housing rehabilitation, and waterworks construction. The Act originally provided its own condemnation procedures. Those procedures were excepted from the general application of the UCPA until April 1, 1983. M.C.L. §213.75(3). At that time, a repealer was adopted eliminating most of those procedural provisions (M.C.L. §§213.366-213.390). However, the repealer was not complete. Section 5 contains a provision establishing a duty to acquire the whole of the particular parcel where its utility is destroyed, which merely duplicates the UCPA's §213.54. That provision is deleted and a cross reference to the application of the UCPA is made by a new section 2a.

### PROPOSAL XIV

**XIV. Act No. 40 of the Public Acts of 1956 (M.C.L. §280.1-280.630).**

This Act — known as the Drain Act — has various provisions relating to condemnation. Sections 75 to 88 established an elaborate procedure for condemnation to construct county drains. Most of those sections are repealed, but a few are retained. Section 75 would be amended to note the applicability of the UCPA and to delete provisions dealing primarily with the content of the petition. Section 85 is retained as it provides for the owner's use of land where a right of way has been obtained. Section 87 is retained since it encompasses documents that relate to the drain commissioner's actions taken pursuant to sections 72 to 74. The remaining provisions (sections 76 to 84, 86, and 88) are repealed as they have been replaced by the UCPA.

Sections 128 and 129 provide a counterpart authority and procedure as to intercounty drains. Section 128 is amended to delete the reference to that procedure and to substitute a reference to the UCPA. Section 129 is repealed as its provisions are replaced by the UCPA.

Section 246 deals with the compensation of the probate court and its special condemnation commissioners. Those provisions are deleted, leaving only the provision as to newspapers (prescribing compensation for advertisements relating to meetings).

Section 470 provides for condemnation for intercounty drains by use of the procedures applicable to state agencies or the procedures for condemnation of county drains previously noted in the Act. This section is amended to delete the reference to those procedures and to substitute a reference to the UCPA. A similar amendment is made in section 522 which deals with condemnation for intercounty drains.

#### PROPOSAL XV

XV. Section 15 of Act No. 146 of the Public Acts of 1961 (M.C.L. §281.75).

Section 15 of this Act — the Inland Lake Level Act -- provides for condemnation proceedings under the procedures used for highway purposes. That section is amended by deleting that provision and substituting a provision stating that the UCPA applies.

#### PROPOSAL XVI

XVI. Part 27 of Article 2 of Act No. 451 of the Public Acts of 1976 (M.C.L. §§380.1621-380.1634).

This Act — the School Code — gives school boards eminent domain authority and sets forth specified procedures, now replaced by the UCPA. All of those provisions are repealed except for the initial section authorizing the use of eminent domain. That section, §1621, as currently phrased, mixes procedure and substantive authority. The proposed amendment deletes the current language and substitutes a statement of authority based on the substantive content of the current provision. It also adds a reference to the application of the UCPA. The deleted provisions in section 1621 treat the contents of the complaint, prima facie evidence of necessity, and circuit court jurisdiction. The repealed provisions — sections 1622 to 1634 — deal with summons authority of the circuit court, notice to the owner, hearing procedures, jury selection, determination of compensation and necessity,

judgment and collection, and the vesting of title. All of these matters are treated by specific UCPA provisions or the general law governing civil suits (made applicable to condemnation proceedings by the UCPA).

## PROPOSAL XVII

### XVII. Sections 17 to 26 of Article II of Act No. 198 of the Public Acts of 1873 (M.C.L. §§464.17-464.26).

This Act, governing railroads, includes several provisions on condemnation powers. In section 17 (M.C.L. §464.17), the basic authorization of condemnation authority is retained, a cross reference to the condemnation procedures otherwise used by railroads is deleted, and procedural provisions on the initiation of proceedings are deleted. A new subsection 2 is added, making a cross reference to the UCPA. In section 19 (M.C.L. §464.19), another cross reference to the statute governing railroad condemnation proceedings is deleted. Section 23-a empowers the state highway commissioner to condemn property for the purpose of exchanging it with a railroad company. That authority is retained, but the provisions relating to procedures are deleted.

Sections 18, 20 to 23, and 24 to 25 (M.C.L. §§464.18, 464.20-464.23, and 464.24-464.25) specify condemnation procedures formerly employed under the Act. Since the UCPA now governs, those provisions are repealed.

## PROPOSAL XVIII

### XVIII. Act No. 238 of the Public Acts of 1923 (M.C.L. §486.251-486.254).

This Act governs the formation of gas and electrical utility companies. It previously included its own condemnation procedures, which continued to apply under the UCPA until April 1, 1985. Those provisions (M.C.L. §§486.252a-486.252j) were repealed as of that date. However, section 2, in its sixth paragraph, continues to include various provisions relating to the filing of the petition and the contents of the petition. The UCPA should now govern both as to jurisdiction (in the circuit court, rather than the probate court) and as to pleadings (governed by the general Court Rules and section 5 of the UCPA). Those procedural provisions have been deleted from section 2. Insofar as the provisions relating to the contents of the petition set forth

substantive requirements for the exercise of the corporation's condemnation authority, those requirements have been retained. In addition, a new section 2a, providing a cross reference to the UCPA, has been added.

## PROPOSAL XIX

### XIX. Act No. 244 of the Public Acts of 1881 (M.C.L. §§471.1-471.47).

Sections 6 through 14 (M.C.L. §§471.6-471.14) of this Act provide condemnation powers and procedures for Union Depot Companies (corporations set up for the construction and maintenance of train depots). The procedures specified include court appointment of a special commission to decide the usual condemnation issues of necessity and compensation. All the procedures are now covered by the UCPA (especially M.C.L. §213.55) or by the laws applicable to civil actions (made applicable by the UCPA). A reference to the UCPA would be inserted in section 6 (M.C.L. §471.6), which grants Union Depot Companies the power to condemn property. The remaining sections, 7 through 14, would be repealed.

# THE PROPOSED ADMINISTRATIVE PROCEDURES ACT

## Chapter 1. General Provisions

Sec. 1. This act shall be known and may be cited as the "administrative procedures act of 1990."

Sec. 2. For the purposes of this act:

(a) "Adjudication" means the agency process for the formulation of an order.

(b) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.

(c) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority, or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branches of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.

(d) "Agency action" means the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or the failure to act.

(e) "Agency proceeding" means rulemaking, adjudication, or licensing, including ratemaking and contested cases.

(f) "Approval of a rule" means the actions described in chapter 3 regarding the action of the legislature required to approve substantive rules through the committee or through concurrent resolution.

(g) "Committee" means the joint committee on administrative rules.

(h) "Contested case" means an adjudication, including ratemaking, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by statute to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency

and an appeal is taken to another agency, the hearing and the appeal are deemed to be a continuous adjudication as though before a single agency.

(i) "Court" means the circuit court unless otherwise indicated.

(j) "Housekeeping rule" means a rule which describes the internal organization, operation, management, and practices of an agency, including instructions or guidelines to employees regarding the scope and exercise of their functions.

(k) "Interpretive rule" means a rule which expresses the formal opinion of an agency of the meaning of a statute or of another rule, which meaning the agency intends to follow in the execution or administration of its designated functions.

(l) "License" means the whole or part of an agency permit, certificate, approval, registration, charter, franchise, or similar form of permission required by law, but does not include a license solely for revenue purposes, or a license or registration issued under Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws.

(m) "Licensing" means agency process involving the grant, denial, renewal suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license.

(n) "Michigan administrative code" means the compilation of rules required to be kept pursuant to Act No. 193 of the Public Acts of 1970, being sections 8.41 to 8.48 of the Michigan Compiled Laws.

(o) "Michigan register" means the publication described in section 21.

(p) "Order" means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking, including licensing and ratemaking. This definition shall apply regardless of the denomination or characterization of the action by the agency.

(q) "Party" means a person or agency named, admitted, or properly seeking and entitled of right to be admitted, as a party in a contested case, including a person or agency admitted for a limited purpose or under limited conditions.

(r) "Person" means an individual, partnership, association, corporation governmental subdivision, or public or private organization or authority of any kind other than the agency engaged in the particular proceeding.

(s) "Procedural rule" means a rule which establishes the methods by which the agency will execute its designated functions in regard to the contact it has with persons and describes the procedures, practices, forms, applications, guidelines, instructions, and other requirements which persons must follow in the execution or administration of its designated functions.

(t) "Processing of a rule" means the action required or authorized by this act regarding a rule which is to be promulgated, including the rule's adoption, and ending with the rule's promulgation.

(u) "Promulgation of a rule" means that step in the processing of a rule consisting of the filing of a rule with the secretary of state.

(v) "Relief" means (i) a grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (ii) the recognition of a claim, right, immunity, privilege, exemption, or exception; or (iii) the taking of other action on the application or petition of, and beneficial to, a person.

(w) "Rule" means an agency regulation, statement, standard, policy, guideline, ruling, or instruction of general applicability, which implements or applies law enforced or administered by the agency; interprets a statute or rule of the agency; prescribes the procedure, practice, or external requirements of the agency; or describes the internal organization, operation, management, and practices of the agency. A rule includes the amendment, suspension, or rescission thereof, but does not include the following:

(i) A resolution or order of the state administrative board.

(ii) A formal opinion of the attorney general or any embodiment of legal advice provided by the attorney general to an agency or its employees.

(iii) A rule or order establishing or fixing rates or tariffs.

(iv) A rule or order pertaining to game and fish and promulgated under Act No. 230 of the Public Acts of 1925, being sections 300.1 to 300.5 of the Michigan Compiled Laws; the Michigan sportsmen fishing law, Act No. 165 of the Public Acts of 1929, being sections 301.1 to 306.3 of the Michigan Compiled Laws; and the game law of 1929, Act No. 286 of the Public Acts of 1929, being sections 311.1 to 315.5 of the Michigan Compiled Laws.

(v) A rule relating to the use of streets or highways the substance of which is indicated to the public by means of signs or signals.

(vi) A determination, decision, or order in a contested case.

(vii) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication which does not affect the rights of, or procedures and practices available to, the public.

(viii) Any informal material not included within the definitions of substantive, interpretive, procedural, or housekeeping rules.

(ix) A declaratory order or other disposition of a particular matter as applied to a specific set of facts involved.

(x) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.

(xi) Unless another statute requires a rule to be promulgated under this act, a rule or policy which only concerns the inmates of a state correctional facility or those committed to the custody of the state corrections commission and does not directly affect the public.

(xii) All of the following, after final approval by the certificate of need commission or the statewide health coordinating council under section 22215 or 22217 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.22215 and 333.22217 of the Michigan Compiled Laws:

- (A) The designation, deletion, or revision of covered medical equipment and covered clinical services.
- (B) Certificate of need review standards.
- (C) Data reporting requirements and criteria for determining health facility viability.
- (D) Standards used by the department of public health in designating a regional certificate of need review agency.
- (E) The modification of the 100 licensed bed limitation for short-term nursing care programs set forth in section 22210 of Act No. 368 of the Public Acts of 1978, being section 333.22210 of the Michigan Compiled Laws.

(x) "Rulemaking" means the agency process for formulating, amending, or rescinding a rule.

(y) "Sanction" means (i) the prohibition, requirement, limitation, or other condition affecting the freedom of a person; (ii) the withholding of relief; (iii) the imposition of penalty or fine; (iv) the destruction, taking, seizure, or withholding

of property; (v) the assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (vi) the requirement, revocation, or suspension of a license; or (vii) the taking of other compulsive or restrictive action.

(z) "Substantive rule" means a rule which establishes a standard of conduct, which implements law enforced by or administered by the agency, and which affects private rights and obligations.

Sec. 3. This act shall not be construed to repeal or prohibit additional requirements imposed by statute.

Sec. 4. (1) Rules which became effective before July 1, 1990, continue in effect until amended or rescinded.

(2) When a law authorizing or directing an agency to promulgate rules is repealed and substantially the same rulemaking power or duty is vested in the same or a successor agency by a new provision of law or the function of the agency to which the rules are related is transferred to another agency, by law or executive order, the existing rules of the original agency relating thereto continue in effect until amended or rescinded, and the agency or successor agency may rescind any rule relating to the function. When a law creating an agency or authorizing or directing it to promulgate rules is repealed or the agency is abolished and substantially the same rulemaking power or duty is not vested in the same or a successor agency by a new provision of law and the function of the agency to which the rules are related is not transferred to another agency, the existing applicable rules of the original agency are automatically rescinded as of the effective date of the repeal of such law or the abolition of the agency.

(3) The rescission of a rule does not revive a rule which was previously rescinded.

(4) The amendment or rescission of a valid rule does not defeat or impair a right accrued, or affect a penalty incurred, under the rule.

(5) A rule may be amended or rescinded by another rule which constitutes the whole or a part of a filing of rules or as a result of an act of the legislature.

Sec. 5. (1) Definitions of words and phrases and rules of construction prescribed in any statute, and which are made applicable to all statutes of this state, also apply to rules unless clearly indicated to the contrary.

(2) A rule or exception to a rule shall not unlawfully discriminate in favor of or against any person, and a person affected by a rule is entitled to the same benefits as any other person under the same or similar circumstances.

(3) The violation of a rule is a crime when so provided by statute. A rule shall not make an act or omission to act a crime or prescribe a criminal penalty for violation of a rule.

(4) An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard, or regulation which has been adopted by an agency of the state or of the United States or by a nationally recognized organization or association. The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule, it shall amend the rule or promulgate a new rule therefor. The agency shall have available copies of the adopted matter for inspection and distribution to the public at cost. The rules shall state where copies of the adopted matter are available from the agency and from the agency of the United States or the national organization or association and the cost thereof as of the time the rule is adopted.

(5) The filing of a rule under this act raises a rebuttable presumption that the rule was adopted, filed with the secretary of state, and made available for public inspection as required by this act.

(6) The publication of a rule in the Michigan register, the Michigan administrative code, or in an annual supplement to the code raises a rebuttable presumption that:

(a) The rule was adopted, filed with the secretary of state, and made available for public inspection as required by this act.

(b) The rule printed in the publication is a true and correct copy of the promulgated rule.

(c) All requirements of this act relative to the rule have been complied with.

(7) The courts shall take judicial notice of a rule which becomes effective under this act.

**Sec. 6.** Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws, is repealed.

**Sec. 7.** A reference in any other law to Act No. 88 of the Public Acts of 1943, Act No. 197 of the Public Acts of 1952, or Act No. 306 of the Public Acts of 1969 is deemed to be a reference to this act.

**Sec. 8.** This act is effective July 1, 1990, and except as to proceedings then pending applies to all agencies and agency proceedings not expressly exempted.

**Sec. 9.** When an agency has completed any or all of the processing of a rule pursuant to Act No. 306 of the Public Acts of 1969, before July 1, 1990, similar processing required by this act need not be completed and the balance of the processing and the publication of the rule shall be completed pursuant to this act.

**Sec. 10. (1)** Chapters 4, 5, and 6 shall not apply to proceedings conducted under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, being sections 418.101 to 418.941 of the Michigan Compiled Laws.

**(2)** Chapter 4 shall not apply to a hearing conducted by the department of corrections pursuant to chapter IIIA of Act No. 232 of the Public Acts of 1953, being sections 791.251 to 791.255 of the Michigan Compiled Laws.

## Chapter 2. Register and Administrative Code

**Sec. 21. (1)** The legislative service bureau shall publish the Michigan register each month. The Michigan register shall contain all of the following:

**(a)** Executive orders and executive reorganization orders.

**(b)** On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills signed into law by the governor during the calendar year and the corresponding public act numbers.

**(c)** On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills vetoed by the governor during the calendar year.

- (d) Proposed rules.
  - (e) Notices of public hearings on proposed rules.
  - (f) Substantive rules filed with the secretary of state.
  - (g) Emergency rules filed with the secretary of state.
  - (h) Interpretive, procedural, and housekeeping rules adopted by an agency.
  - (i) Other official information considered necessary or appropriate by the legislative service bureau.
  - (j) Formal attorney general opinions.
  - (k) All of the items listed in section 2(w)(xii) after final approval of the certificate of need commission or the statewide health coordinating council.
- (2) The legislative service bureau shall publish a cumulative index for the Michigan register.
- (3) The Michigan register shall be available for public subscription at a fee reasonably calculated to cover publication and distribution costs.
- (4) An agency shall transmit a copy of a proposed rule and notice of the public hearing to the legislative service bureau for publication in the Michigan register.
- (5) If publication of an agency's proposed rule would be unreasonably expensive or lengthy, the legislative service bureau may publish a brief synopsis of the proposed rule and include information on how to obtain a complete copy of the proposed rule from the agency at no cost.

Sec. 22. (1) The legislative service bureau annually shall publish a supplement to the Michigan administrative code. The annual supplement shall contain all promulgated substantive rules and adopted procedural and interpretive rules published in the Michigan register during the current year, except emergency rules, a cumulative numerical listing of amendments, additions to, and rescissions of rules since the last compilation of the code, and a cumulative alphabetical index.

(2) The Michigan administrative code and the annual supplements shall be made available for public subscription at a fee reasonably calculated to cover publication and distribution costs.

**Sec. 23.** (1) The legislative service bureau shall perform the editorial work for the Michigan register and the Michigan administrative code and its annual supplement. The classification, arrangement, numbering, and indexing of rules shall be uniform and shall conform as nearly as practicable to the classification, arrangement, numbering, and indexing of the compiled laws. The bureau may correct in the publications obvious errors in rules when requested by the promulgating agency to do so. The bureau may provide for publishing all or any part of the Michigan administrative code in bound volume, pamphlet, or loose-leaf form.

(2) An annual supplement to the Michigan administrative code shall be published at the earliest practicable date.

**Sec. 24.** (1) The legislative service bureau may omit from the Michigan register, the Michigan administrative code, and the code's annual supplement, any rule, the publication of which would be unreasonably expensive or lengthy if the rule in printed or reproduced form is made available on application to the promulgating agency, and if the code publication and the Michigan register contain a notice stating the general subject of the omitted rule and how a copy of the rule may be obtained.

(2) The cost of publishing and distributing annual supplements to the Michigan administrative code and proposed rules, notices of public hearings on proposed rules, rules, and emergency rules filed with the secretary of state in the Michigan register shall be prorated by the legislative service bureau on the basis of the volume of these materials published for each agency in the Michigan register and annual supplement to the Michigan administrative code, and the cost of publishing and distribution shall be paid out of appropriations to the agencies. The legislative service bureau may arrange to provide to agencies copies or plates of the rules, and to provide special compilations of rules, for which it shall be reimbursed for its costs by the agencies.

**Sec. 25.** (1) The legislative service bureau shall print or order printed a sufficient number of copies of the Michigan register, the Michigan administrative code, and the annual supplement to the code to meet the requirements of this

section. The department of management and budget shall deliver or mail copies as follows:

(a) To the secretary of the senate, a sufficient number to supply each senator, standing committee, and the secretary.

(b) To the clerk of the house of representatives, a sufficient number to supply each representative, standing committee, and the clerk.

(c) To each member of the legislature, 1 copy at the member's home address.

(d) To the legislative service bureau, 1 copy for each attorney on the bureau's staff.

(e) To the department of the attorney general, 1 copy for each division.

(f) To each other state department, 3 copies.

(g) To each county law library, bar association library, and law school library in this state, 1 copy.

(h) To other libraries throughout this state, 1 copy, upon request.

(i) Additional copies to an officer or agency of this state and other governmental officers, agencies, and libraries approved by the legislative service bureau; and additional copies of the Michigan register for persons who subscribe to the publication as provided in subsection (3).

(2) The copies of the Michigan register, the Michigan administrative code, and the annual code supplement are for official use only by the agencies and persons prescribed in subsection (1), and they shall deliver them to their successors, except that members of the legislature may retain copies of the Michigan register and the Michigan administrative code sent to their home address. The department of management and budget shall send to the home address of a new member of the legislature the current volume of the Michigan register and a complete copy of the Michigan administrative code. The department of management and budget shall deliver to the state library the Michigan register, the Michigan administrative code, and the annual supplement when requested by the state library sufficient for the library's use and for exchanges. The department of management and budget shall hold additional copies for sale at a price not less than the publication and distribution costs which shall be determined by the legislative service bureau. Copies shall be made available in both printed and electronic form.

(3) A person may subscribe to the Michigan register. The legislative service bureau shall determine a subscription price which shall not be more than the publication and distribution costs.

### Chapter 3. Procedures in Rulemaking

Sec. 31. An agency shall adopt housekeeping rules insofar as practicable. In adopting housekeeping rules, an agency is governed by the terms of this section, but the other procedures contained in this chapter shall not apply. When adopted, a housekeeping rule is a public record and shall be made available by the agency for public inspection. Copies of housekeeping rules shall be sent to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them. Housekeeping rules shall not be included in the Michigan administrative code.

Sec. 32. (1) An agency shall adopt procedural rules, including procedural rules prescribing the methods by which the public may obtain information and submit requests. In adopting procedural rules an agency is governed by the terms of this section and by sections 41 and 42, but the other procedures contained in this chapter shall not apply. When adopted, a procedural rule is a public record and shall be made available by the agency for public inspection. Copies of procedural rules shall be sent to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them. Procedural rules adopted by an agency shall be published in the Michigan register and shall take effect on the date of publication in the register unless a later time is stated in the rules. Procedural rules shall be included in the Michigan administrative code.

(2) A procedural rule adopted after the effective date of this section is not valid unless processed in substantial compliance with this section. However, inadvertent failure to give notice to any person as required does not invalidate a procedural rule which was otherwise processed in substantial compliance with this section.

(3) A proceeding to contest a procedural rule on the grounds of noncompliance with this section shall be commenced within 2 years after the effective date of the procedural rule.

(4) An agency may adopt procedural rules, not inconsistent with this act or other applicable statutes, prescribing procedures for contested cases.

(5) Procedural rules shall be clearly labelled as such and shall include a statement that they are not intended to have substantive effect.

**Sec. 33. (1)** An agency may adopt interpretive rules. In adopting interpretive rules, an agency is governed by the terms of this section and by sections 41 and 42, but the other provisions contained in this chapter shall not apply. When adopted, an interpretive rule is a public record and shall be made available by the agency for public inspection. Copies of interpretive rules shall be sent to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them. Interpretive rules adopted by an agency shall be published in the Michigan register and shall take effect on the date of publication in the register unless a later time is stated in the rules. Interpretive rules shall be included in the Michigan administrative code.

(2) An interpretive rule adopted after the effective date of this section is not valid unless processed in substantial compliance with this section. However, inadvertent failure to give notice to any person as required does not invalidate an interpretive rule which was otherwise processed in substantial compliance with this section.

(3) A proceeding to contest an interpretive rule on the grounds of noncompliance with this section shall be commenced within 2 years after the effective date of the interpretive rule.

(4) Interpretive rules shall be clearly labelled as such and shall include a statement that they are not intended to have substantive effect and that they do not have the force and effect of law.

**Sec. 34.** The joint committee on administrative rules is created and consists of 7 members of the senate and 7 members of the house of representatives appointed in the same manner as standing committees are appointed for terms of 2 years. Members of the committee shall serve without compensation but shall be reimbursed for expenses incurred in the business of the committee. The expenses of the members of the senate shall be paid from appropriations to the senate and the expenses of the members of the house shall be paid from appropriations to the house of representatives. The committee may meet during a session of the legislature and

during an interim between sessions. The committee may hold a hearing on a substantive rule transmitted to the committee. Action by the committee, including action taken under section 52, shall be by concurring majorities of the members from each house. The committee shall report its activities and recommendations to the legislature at each regular session.

**Sec. 35.** The joint committee on administrative rules may prescribe procedures and standards not inconsistent with this act or other applicable statutes, for the drafting, processing, publication, and distribution of interpretive, procedural, and substantive rules. The procedures and standards shall be included in a manual which the legislative service bureau shall publish and distribute in reasonable quantities to the state departments.

**Sec. 36.** A person may request an agency to adopt an interpretive, procedural, or substantive rule. Within 90 days after the filing of a request, the agency shall initiate the processing of a rule or issue a concise written statement of its principal reasons for denial of the request. The denial of a request is not subject to judicial review.

**Sec. 41. (1)** Before the adoption of an interpretive, procedural, or substantive rule, an agency shall give notice of a public hearing. The notice shall be given within the time prescribed by any applicable statute, or if none, not less than 30 days nor more than 90 days before the public hearing. The notice shall include all of the following:

(a) A reference to the statutory authority under which the action is proposed.

(b) The time and place of the public hearing and a statement of the manner in which data, views, and arguments may be submitted to the agency at other times by a person.

(c) A statement of the terms or substance of the proposed rule, a description of the subjects and issues involved, and the proposed effective date of the rule.

(2) The agency shall publish the notice of public hearing as prescribed in any applicable statute, or if none, in a manner selected by the agency as best calculated to give notice to persons likely to be affected by the proposed rule. Methods that may be employed by the agency, depending upon the circumstances, include publication of the notice in 1 or more newspapers of general circulation or, if appropriate, in trade, industry, governmental, or professional publications. If the

persons likely to be affected by the proposed rule are unorganized or diffuse in character and location, the agency shall publish the notice as a display advertisement in at least 3 newspapers of general circulation in different parts of the state, 1 of which shall be published in the Upper Peninsula.

(3) In addition to the requirements of subsection (1), the agency shall submit a copy of the notice to the legislative service bureau for publication in the Michigan register. An agency's notice shall be published in the Michigan register not less than 30 days nor more than 90 days before the public hearing.

(4) The agency shall transmit copies of the notice to the joint committee on administrative rules, the legislative service bureau, the office of the governor, the department of attorney general, and each person who requested the agency in writing for advance notice of proposed action which may affect the person. The notice shall be by mail, in writing, to the last address specified by the person. A request for notice shall be renewed each December.

(5) Prior to the scheduled date of hearing, the committee may determine by concurring majorities of the members from each house that a proposed procedural or interpretive rule is substantive as defined in section 2(z). The committee shall provide to the agency a detailed explanation of its conclusion and the agency shall not adopt the rule without complying with sections 45 and 46. The agency may proceed to adopt the rule, if the committee takes no action or states its agreement with the agency's characterization of the rule.

Sec. 42. (1) The public hearing required in section 41 shall comply with any applicable statute, but is not subject to the provisions of this act governing contested cases. An agency which is subject to section 41 shall adopt procedural rules for the conduct of public hearings called for in section 41 within two years after the effective date of this act.

(2) The public hearing shall be open to the public. A person shall have the opportunity to present data, views, and argument, both in writing and orally, but the agency may limit the time available to each person for oral presentation. The head of the promulgating agency or 1 or more persons designated by the head of the agency, who has knowledge of the subject matter of the proposed substantive rule, shall be present at the public hearing and shall participate in the discussion of the proposed rule.

Sec. 43. (1) A substantive rule hereafter promulgated is not valid unless processed in substantial compliance with sections 41 and 42. However, inadvertent

failure to give the notice to any person as required by section 41 does not invalidate a rule processed thereunder.

(2) A proceeding to contest a substantive rule on the ground of noncompliance with the procedural requirements of sections 41 and 42 shall be commenced within 2 years after the effective date of the rule.

Sec. 44. Sections 41 and 42 do not apply to an amendment or rescission of a rule which is obsolete or superseded, or which is required to make obviously needed corrections to make the rule conform to an amended or new statute or to accomplish any other solely formal purpose, if a statement to such effect is included in the legislative service bureau certificate of approval of the rule.

Sec. 45. (1) The legislative service bureau promptly shall approve a proposed substantive rule, if the bureau considers the proposed rule to be proper as to all matters of form, classification, arrangement, and numbering. The department of the attorney general promptly shall approve a proposed substantive rule, if the department considers the proposed rule to be legal.

(2) After the legislative service bureau and attorney general have approved a proposed substantive rule, and after publication of the proposed rule in the Michigan register as provided in this act, but within 2 years after the date of the last public hearing on the proposed rule, unless the proposed rule is resubmitted under subsection (8), and before the agency has formally adopted the rule, the agency shall transmit by letter copies of the rule bearing certificates of approval and copies of the rule without certificates to the committee.

(3) After its receipt of the agency's letter of transmittal, the committee shall have 2 months in which to consider the rule. If the committee by a majority vote determines that added time is needed to consider proposed rules, the committee may extend the time it has to consider a particular proposed rule by 1 month to a total of not longer than 3 months. This subsection and subsection (2) do not apply to an emergency rule promulgated under section 48.

(4) If the committee approves the proposed rule within the time period provided by subsection (3), the committee shall attach a certificate of its approval to all copies of the rule bearing certificates except 1 and transmit those copies to the agency.

(5) If, within the time period provided by subsection (3), the committee disapproves the proposed rule or the committee chairperson certifies an impasse

after votes for approval and disapproval have failed to receive concurrent majorities, the committee shall immediately report that fact to the legislature and return the rule to the agency. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:

(a) The legislature adopts a concurrent resolution approving the rule within 60 days after the committee report has been received by, and read into the respective journal of, each house.

(b) The committee subsequently approves the rule.

(6) If the time permitted by this section expires and the committee has not taken action under either subsection (4) or (5), then the committee shall return the proposed rules to the agency. The chairperson and alternate chairperson shall cause concurrent resolutions approving the rule to be introduced in both houses simultaneously. The concurrent resolutions shall be placed directly on the calendar of each house. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:

(a) The legislature adopts a concurrent resolution approving the rule within 60 days after introduction by record roll call vote. The adoption of the concurrent resolution shall require a majority of the members elected to and serving in each house.

(b) The agency resubmits the proposed rule to the committee and the committee approves the rule within the time permitted by this section.

(7) An agency may withdraw a proposed rule by leave of the committee. An agency may resubmit a rule so withdrawn or returned under subsection (6) with minor modification or with changes suggested by the committee following a committee meeting on the proposed rule. A resubmitted rule is a new filing and subject to this section but is not subject to further notice and hearing as provided in sections 41 and 42.

(8) If the committee approves the proposed rule within the time period provided by subsection (3), or the legislature adopts a concurrent resolution approving the rule, the agency, if it wishes to proceed, shall formally adopt the rule, pursuant to any applicable statute, and make a written record of the adoption. Certificates of approval and adoption shall be attached to at least 6 copies of the rule.

**Sec. 46. (1) To promulgate a substantive rule, an agency shall file in the office of the secretary of state 3 copies of the rule bearing the required certificates of approval and adoption and true copies of the rule without the certificates. An agency shall not file a rule, except an emergency rule under section 48, until at least 10 days after the date of the certificate of approval by the committee or after the legislature adopts a concurrent resolution approving the rule. An agency shall transmit a copy of the rule bearing the required certificates of approval and adoption to the office of the governor at least 10 days before it files the rule.**

**(2) The secretary of state shall indorse the date and hour of filing of rules on the 3 copies of the filing bearing the certificates and shall maintain a file containing 1 copy for public inspection.**

**(3) The secretary of state, as often as advisable, shall cause to be arranged and bound in a substantial manner the substantive rules hereafter filed in his or her office with their attached certificates and published in a supplement to the Michigan administrative code. He or she shall certify under his or her hand and seal of the state on the frontispiece of each volume that it contains all of the rules filed and published for a specified period. The rules, when so bound and certified, shall be kept in the office of the secretary of state and no further record thereof is required to be kept. The bound rules are subject to public inspection.**

**Sec. 47. (1) Except in case of a rule processed under section 48, a substantive rule becomes effective on the date fixed in the rule, which shall not be earlier than 15 days after the date of its promulgation, or if a date is not so fixed then on the date of its publication in the Michigan administrative code or a supplement thereto.**

**(2) Except in case of a rule processed under section 48, an agency may withdraw a promulgated rule which has not become effective by a written request stating reasons, (a) to the secretary of state on or before the last day for filing rules for the interim period in which the rules were first filed, or (b) to the secretary of state and the legislative service bureau, within a reasonable time as determined by the bureau, after the last day for filing and before publication of the rule in the next supplement to the code. In any other case an agency may abrogate its rule only by rescission. When an agency has withdrawn a promulgated rule, it shall give notice, stating reasons, to the joint committee on administrative rules that the rule has been withdrawn.**

**Sec. 48. (1) If an agency finds that preservation of the public health, safety, welfare, or financial resources entrusted to the agency requires promulgation of an**

emergency substantive rule without following the notice and participation procedures required by sections 41 and 42 and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by section 46 indorsed as an emergency rule, to 3 of which copies shall be attached the certificates prescribed by section 45 and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier. The rule may be extended once for not more than 6 months by the filing of a governor's certificate of the need for the extension with the office of the secretary of state before expiration of the emergency rule. If an extension is sought the agency shall inform the committee of the status of efforts to develop substantive rules regarding the subject matter of the emergency rules. An emergency rule shall not be numbered and shall not be compiled in the Michigan administrative code, but shall be noted in the annual supplement to the code. The emergency rule shall be published in the Michigan register pursuant to section 21.

(2) An agency may adopt a procedural rule under the provisions of subsection (1), but any procedural rule so adopted shall be effective for no more than 120 days.

(3) If the agency desires to promulgate an identical or similar rule with an effectiveness beyond the final effective date of an emergency rule, the agency shall comply with the procedures prescribed by this act for the processing of a rule which is not an emergency rule. The rule shall be published in the Michigan register and in the code.

(4) The legislature by a concurrent resolution may rescind an emergency rule promulgated pursuant to this section.

Sec. 49. (1) The secretary of state shall transmit or mail forthwith, after copies of substantive rules are filed in his or her office, copies on which the day and hour of such filing have been indorsed, as follows:

(a) To the secretary of the joint committee on administrative rules and the legislative service bureau.

(b) To the secretary of the senate and the clerk of the house of representatives for distribution by them to each member of the senate and the house of representatives. When the legislature is not in session, or is in session but will not meet for more than 10 days after the secretary and clerk have received the rules, the

secretary and clerk shall mail a copy to each member of the legislature at his or her home address.

(2) The secretary of the senate and clerk of the house of representatives shall present the rules to the senate and the house of representatives.

**Sec. 50.** When the legislature is in session, the joint committee shall notify the appropriate standing committee of each house of the legislature when substantive rules have been transmitted to the committee by the secretary of state. If the joint committee determines that a hearing on such rules is to be held, it shall notify the chairpersons of the standing committees and all members of the standing committees may be present and take part in the hearing. The chairperson or a designated member of the standing committee should be present at the hearing, but the absence of the chairperson or designated member does not affect the validity of the hearing.

**Sec. 51.** If the joint committee on administrative rules, an appropriate standing committee, or a member of the legislature believes that a promulgated substantive rule or any part thereof is unauthorized, is not within legislative intent or is inexpedient, the committee or member may do either or both of the following:

(a) Introduce a concurrent resolution at a regular or special session of the legislature expressing the determination of the legislature that the rule should be amended or rescinded. Adoption of the concurrent resolution constitutes legislative disapproval of the rule, but rejection of the resolution does not constitute legislative approval of the rule.

(b) Introduce a bill at a regular session, or special session if included in a governor's message, which in effect amends or rescinds the rule.

**Sec. 52.** If authorized by concurrent resolution of the legislature, the joint committee on administrative rules, acting between regular sessions, may suspend a substantive rule or a part of a rule promulgated during the interim between regular sessions. The committee shall notify the agency promulgating the rule, the secretary of state, the department of management and budget, and the legislative service bureau of any rule or part of a rule the joint committee suspends, and the rule or part of a rule shall not be published in the Michigan register or in the Michigan administrative code while suspended. A rule suspended by the committee continues to be suspended until the end of the next regular session.

## Chapter 4. Procedures in Contested Cases

**Sec. 71. (1)** The parties in a contested case shall be given an opportunity for a hearing without undue delay. A hearing shall be open to the public unless, on the request of a party, the agency finds and includes as a sealed part of the record, that an open hearing would constitute an unwarranted invasion of personal privacy, or would result in the disclosure of trade secrets or proprietary information, which outweighs the public interest in open hearings.

**(2)** A contested case may be commenced by a person filing an administrative complaint or petition for hearing, or by the agency giving notice. The complaint, petition, or notice shall include:

**(a)** The names of all parties.

**(b)** A statement of the legal authority and jurisdiction under which relief or action is sought.

**(c)** A reference to the particular sections of the statutes and rules involved.

**(d)** A short and plain statement of the matters asserted. If the agency or person is unable to state the matter in detail at the time the complaint, petition, or notice is provided, the initial complaint, petition, or notice may state the issues involved. Thereafter on application the agency or other person shall furnish a more definite and detailed statement on the issues.

**(e)** If the matter is commenced by a notice of hearing, a statement of the date, hour, place, and nature of the hearing.

**(f)** Unless otherwise specified by the agency, the hearing shall be held at its principal office.

**(3)** Unless otherwise provided by statute or procedural rule, service of notice shall be by personal service or certified mail upon return receipt. Upon a claim of improper service of notice, the agency may show actual notice of the hearing, provided that the notice actually provided meets all the provisions of subsection (2). If the agency determines that actual notice does not result in material prejudice to a party, the agency may proceed with the hearing.

**(4)** A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which there is a scheduled meeting of the house of which he or she is a member. However, a

member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter on a day on which there is a scheduled meeting of the house of which he or she is a member, if such service of notice or process is executed by certified mail upon return receipt.

(5) A party who has been served with an administrative complaint, petition, or notice of hearing may file a written answer before the date set for hearing.

(6) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party. An agency may by procedural rule establish procedures for the entry of default orders when a party fails to appear or fails to file an answer, if the agency's procedural rules require the filing of an answer. Such procedures shall describe the type of case and the procedures under which default orders may issue, and shall set forth time limits and grounds on which orders entered upon default can be set aside. If a party who has filed an administrative complaint or a petition fails to appear, the case may be dismissed.

(7) An agency may adopt procedural rules allowing for the service of notice, the filing of answers and other pleadings, and the submission of documents related to a contested case to be accomplished by facsimile transmission.

(8) Unless otherwise provided by statute or procedural rule, a party is entitled to appear in person or by or with counsel or other duly qualified representative.

Sec. 72. (1) An agency, 1 or more members of the agency, a person designated by statute, or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases.

(2) A presiding officer in a contested case shall not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency. This subsection shall not apply to the individual who heads the agency or to a member or members of the body which heads the agency.

(3) Hearings shall be conducted in an impartial manner. A presiding officer is subject to disqualification for personal bias, prejudice, interest, or any other cause for which a judge may be disqualified. On the filing in good faith by a party of a timely and sufficient affidavit of disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding.

When a presiding officer is disqualified or it is impractical for the presiding officer to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to a party will result therefrom.

(4) A presiding officer may do all of the following:

(a) Administer oaths and affirmations.

(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses, and the production of books, papers, and other documentary evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

(e) Direct the parties to appear at prehearing conferences and to confer and to consider simplification of the issues by consent of the parties.

(f) Except as otherwise provided by law, dispose of the case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed on by the parties.

(g) Summarily dispose of a case in which there are no contested facts.

(5) The following provisions shall apply to petitions for intervention:

(a) A presiding officer shall grant a petition for intervention if:

(i) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the notice of hearing, at least 7 days before the hearing;

(ii) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

(iii) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention.

(b) A presiding officer may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice, is timely in view of the stage of the proceedings at the time of the petition for intervention, and will not impair the orderly and prompt conduct of the proceedings.

(c) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include (i) limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition; (ii) limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; (iii) requiring 2 or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings; and (iv) limiting participation to the filing of briefs.

(d) A presiding officer, at least 48 hours before the hearing, shall issue an order granting or denying each pending petition for intervention submitted under subsection (5)(a), specifying any conditions and briefly stating the reasons for the order. A presiding officer shall state on the record prior to the commencement of proceeding an order granting or denying each pending petition for intervention submitted under subsection (5)(b), specifying any conditions and briefly stating the reasons for the order. A presiding officer may modify the order at any time, stating reasons for modification. A presiding officer may reverse an order granting intervention at any time, if the presiding officer determines that the facts presented during the course of the proceeding do not substantiate the claims set forth in the petition to intervene. A presiding officer shall promptly give notice of an order granting, denying, modifying, or reversing intervention to the petitioner for intervention and to all parties.

(e) The provisions of this section shall apply to all petitions or other requests to intervene except as these provisions are contrary to the provisions of any statute pertaining to intervention in contested cases conducted under that statute.

(6) In order to assure adequate representation for the people of this state:

(a) When the presiding officer knows that a party in a contested case is a member of the legislature of this state, and the legislature is in session, the contested case shall be continued by the presiding officer to a nonmeeting day.

(b) When the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the

legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.

(c) When the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case need not be continued, but the taking of the legislator's testimony, as a witness, shall be postponed to the earliest practicable nonmeeting day. The presiding officer may also provide that the testimony be taken by deposition.

(7) As used in subsection (6), "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.

Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence, and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, being section 600.2552 of the Michigan Compiled Laws. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

**Sec. 74. (1)** An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts, and take depositions.

**(2)** An agency authorized or required to adjudicate contested cases may adopt procedural rules to govern the administration of its contested case hearings, including procedural rules for discovery and depositions, to the extent and in the manner appropriate to its proceedings.

**(3)** The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto.

**(4)** On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, or by any other law, an agency shall make such records promptly available to a party.

**Sec. 75. (1)** Except as otherwise provided by statute:

**(a)** The proponent of a decision shall have the burden of going forward and the burden of proof. In matters subject to chapter 5, these burdens shall be on the applicant for an initial license, for a new license in regard to activity of a continuing nature, and for reinstatement of a license previously suspended or revoked, and in all other licensing matters, including the denial of the renewal of an existing license, these burdens shall be on the licensing agency.

**(b)** The burden of proof is the preponderance of evidence as applied in civil cases in circuit court. The preponderance may include any evidence admitted under subsection (3) and need not be based solely upon evidence admissible under the Michigan rules of evidence.

**(2)** The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and arguments on issues of fact. The parties may submit rebuttal evidence.

**(3)** In a contested case, the Michigan rules of evidence shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Irrelevant, immaterial, or unduly repetitious evidence may be excluded.

Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by procedural rule for submission of all or part of the evidence in written form.

(4) A deposition may be used in lieu of other evidence when taken in compliance with the Michigan court rules.

(5) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for the use of the agency and offered in evidence.

(6) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of that testimony, shall make such statements or reports available to opposing parties for use on cross-examination.

(7) Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in the determination of the case, except as permitted under subsection (8). Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

(8) An agency in a contested case may take official notice of judicially cognizable facts, and of general, technical, or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it.

Sec. 76. (1) As used in this section:

(a) "Developmental disability" means an impairment of general intellectual functioning or adaptive behavior which meets the following criteria:

- (i) It originated before the person became 18 years of age.
- (ii) It has continued since its origination or can be expected to continue indefinitely.
- (iii) It constitutes a substantial burden to the impaired person's ability to perform normally in society.
- (iv) It is attributable to mental retardation, autism, or any other condition of a person found related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.

(b) "Witness" means an alleged victim under subsection (2) who is either of the following:

- (i) A person under 15 years of age.
- (ii) A person 15 years of age or older with a developmental disability.

(c) "Psychological abuse" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in substantial and protracted, visibly demonstrable manifestations of mental distress.

(2) This section applies only to a contested case where a witness testifies as an alleged victim of sexual, physical, or psychological abuse.

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during the witness's testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and shall give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be served upon all parties to the proceeding. The agency shall rule on any objections to the use of a named support person prior to the date at which the witness desires to use the support person.

(5) In a hearing under this section, all persons not necessary to the proceeding shall be excluded during the witness's testimony.

(6) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

**Sec. 81. (1) When the agency, person, or body authorized to make a final decision by statute or rule was present throughout or presided at the contested case, the agency, person, or body so authorized shall make a final decision. No initial or other preliminary form of decision is required.**

**(2) In all contested cases in which the agency did not preside, the presiding officer shall make an initial decision, which shall become the final decision unless appealed to or reviewed by the agency.**

**(3) A decision in a contested case, whether initial or final, shall be made within a reasonable period, in writing or stated in the record and shall include findings of fact, conclusions of law, and statements of policy supporting the decision, if the decision represents an exercise of the agency's discretion. The decision shall consider the whole record, or such portions of the record as may be cited by the parties to the proceeding as relevant to the decision.**

**(4) Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact set forth in statutory language shall be accompanied by a concise and explicit statement of the underlying facts supporting them. A presiding officer shall have the discretion to permit a party to submit proposed findings of fact and conclusions of law. If proposed findings of fact and conclusions of law are submitted, the decision shall include a ruling on each proposed finding of fact which would control the decision and on each proposed conclusion of law.**

**(5) A copy of each initial or final decision shall be delivered or mailed forthwith to each party and to each attorney of record.**

**(6) Unless required for disposition of an ex parte matter authorized by law, a presiding officer, a member, or employee of an agency assigned to make a decision in a case or to assist the agency in making a decision in a case, and the deciding authority in the agency shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This subsection does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or ratemaking, in a contested case before the financial institutions bureau, the insurance bureau, or the**

public service commission insofar as the case involves ratemaking or financial practices or conditions.

Sec. 82. (1) Except as otherwise provided by statute, an initial decision shall be subject to review by the agency on its own motion or upon appeal by any party. A motion to review or a notice of appeal shall be submitted within 30 days of the date of receipt of the initial decision of the agency, unless the agency adopts a procedural rule establishing a different time limitation.

(2) A party appealing the initial decision shall submit the content of the appeal within 30 days after the submission of the notice of appeal. The appeal shall state all exceptions to the initial decision and such written arguments concerning the findings of fact, conclusions of law, and statements of policy as the appealing party shall choose to present. All other parties wishing to participate in the appeal shall have 30 days following their receipt of the appeal to submit their arguments in writing.

(3) The agency may permit oral argument under such conditions or limitations as it determines.

(4) On review or appeal of an initial decision, the agency shall have all the powers it would have if it had presided at the hearing except that it shall not hear or accept new evidence. If the agency believes that new evidence should be taken or that evidence was improperly excluded at the hearing, the agency shall remand the matter to the presiding officer who shall reopen the hearing for the limited purpose of taking the new testimony and hearing such additional argument of the effect of the new evidence as is appropriate. The presiding officer shall then give the new evidence such consideration as would have been accorded that evidence had it been presented in the original hearing and shall either affirm the original decision or prepare a new or revised initial decision. The agency shall then review the initial decision in light of the exceptions and arguments presented.

(5) The agency shall make a final decision by affirming the initial decision in writing or on the record, or, if not affirming the initial decision, by stating its decision in writing or on the record.

(6) The agency may adopt substantive rules to change the procedures for review of initial decisions.

Sec. 83. (1) An agency shall prepare an official record of a hearing which shall include:

(a) Notices, pleadings, motions, and intermediate rulings.

(b) Questions and offers of proof, objections, and rulings thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

(e) Exceptions and arguments submitted on appeal of the initial decision.

(f) The initial and final decision in the case.

(2) Oral proceedings at which evidence is presented shall be recorded and transcribed unless the agency determines by procedural rule that transcripts shall be available only upon request of a party. The agency may charge to each party requesting a copy of a transcript, or a portion of the transcript, a reasonable fee. If the agency chooses not to have a transcription made, a party may request the transcription at the party's expense, but the agency shall pay for a proportional share of the transcription costs if it requests a copy. An agency required to furnish the transcript of a contested case hearing under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, shall be permitted to charge a reasonable portion of the transcription costs to the requesting person.

Sec. 84. (1) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of final decision by the agency or judicial review, the agency on its own motion or on request of a party shall order a rehearing in whole or in relevant part.

(2) A request for a rehearing shall be filed within the time fixed by this act for instituting judicial review unless a different time is fixed for judicial review by statute, which time shall then control the time for a request. A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.

Sec. 85. On request of an interested person, an agency may issue a declaratory order as to the applicability to an actual state of facts of a statute

administered by the agency or of a rule or order of the agency. An agency shall prescribe by procedural rule the form for such a request, the procedure for its submission, consideration, and disposition and the time limits within which the agency will deny or issue a declaratory order. In the absence of a procedural rule establishing a time limit for action, a request for a declaratory order shall be deemed to be denied 90 days after it is received by the agency. A declaratory order is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory order, but nothing in this section prevents an agency from prospectively changing a declaratory order. A declaratory order is subject to judicial review in the same manner as an agency final decision or order in a contested case. A decision not to issue a declaratory order is not subject to judicial review.

## Chapter 5. Licenses

Sec. 91. (1) When licensing is required by statute or constitution to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply. The agency may, by procedural rule, provide that initial licensing or other activity related to licensing shall be subject to the provisions of this act governing a contested case or to such portions of the provisions governing a contested case as the agency shall in its discretion deem appropriate.

(2) When a licensee makes timely and sufficient application for renewal of a license or a new license with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order or a later date fixed by order of the reviewing court. This subsection does not affect valid agency action then in effect summarily suspending such license under section 93.

(3) When the agency engages in licensing involving competing applications in circumstances where the number of applications exceeds the number of licenses which can be granted, and the statute requires that the licensing be preceded by notice and an opportunity for hearing, the agency shall not grant any license until a review is completed of all competing applications. Where the circumstances so require or permit, a single contested case hearing shall be provided in which all competing applicants are entitled to participate.

(4) An agency may provide by procedural rule that licenses based on applications for license subject to subsection (3) shall be awarded to qualified applicants: (a) in the order of receipt of applications within periods of application determined by the agency; or (b) by lot from all applications received within periods of application determined by the agency. This subsection shall not apply if the statute requires that the license be awarded to the best or better applicant.

(5) The agency may eliminate an application prior to proceedings conducted under subsection (3) or (4) when it finds that the application is incomplete or insufficient, or that the applicant fails to meet the minimum requirements for licensing under the statute or agency rules. Any applicant eliminated prior to the competitive proceedings established in subsection (3) or (4) shall be given an opportunity to exercise its statutory right to notice and hearing prior to the competitive proceedings. If the decision in the hearing under this subsection is that the application meets the minimum qualifications necessary for licensing under the statute, the application shall be included in the proceedings conducted under subsection (3) or (4).

(6) An agency which participates in licensing of competing applicants shall promulgate procedural rules for the administration of the competitive proceedings, including the conduct of the competitive hearing.

Sec. 92. (1) Before the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license:

- (a) The agency shall give written notice, personally or by mail, to the licensee of facts or conduct which warrant the intended action.
- (b) The licensee shall be given an informal opportunity to show or achieve compliance with all lawful requirements for retention of the license. This opportunity need not be on the record, may be conducted by any representative of the agency, including those who conducted the inspection or investigation which forms the basis of the agency's intended action, and may be conducted on the licensee's premises.
- (c) The agency shall provide within a reasonable time a written summary of its determination following the informal opportunity to show compliance, which shall include a concise statement of the facts or conduct which warrant any conclusion that the licensee is not in compliance with the relevant statutes or rules. This statement shall

not be used in lieu of a notice of contested case hearing should the agency decide to commence proceedings.

- (d) An agency which determines that the licensee is not in compliance shall begin its contested case proceedings within a reasonable time after the determination of non-compliance unless the agency and the licensee agree in writing to extend the time to show compliance to a date certain, after which the contested case proceedings shall begin within a reasonable time or the agency shall issue a statement of compliance.

(2) Subsection (1) shall not apply to any licensing in which:

- (a) The provisions set forth in section 93 are invoked.
- (b) The conduct of the licensee threatens the health, safety, or welfare of the public or of any person receiving services, housing, treatment, care, or support from the licensee.
- (c) The conduct of the licensee constitutes a pattern of intentional and deliberate violation of the terms or conditions of the license.
- (d) The conduct of the licensee is of a nature that current or future compliance would be irrelevant to the determination of whether to suspend, revoke, annul, withdraw, recall, cancel, or amend the license.

(3) The agency shall include in the notice of hearing in any ensuing contested case a concise statement of the facts and law justifying its decision to invoke any provision of subsection (2). The determination of the agency to invoke the provisions of subsection (2) shall not be reviewable by any court, but this subsection shall not prohibit judicial review of the failure of an agency to provide the informal opportunity to show or achieve compliance for any other reason.

Sec. 93. If the agency has reasonable grounds to believe that the conduct of the licensee threatens the health, safety, or welfare of the public or of any person receiving services, housing, treatment, care, or support from a licensee, and determines that those grounds justify emergency action, it may summarily suspend a license. Such suspension shall take effect upon the date of the order or the date of service of the order upon the licensee, whichever is later, and shall remain in effect during the course of the proceedings. An order summarily suspending a license shall include a concise statement of the facts and law justifying the order. An

agency decision to proceed summarily may be based upon such facts as it regards to be sufficient to implicate the public health, safety, or welfare, or the health, safety, or welfare of persons receiving services, housing, treatment, care, or support from the licensee. The facts relied upon need not meet the requirements of the rules of evidence provided for contested cases, nor must the decision be based upon a preponderance of evidence. The proceedings shall be promptly commenced and determined. Upon judicial review of a final licensing decision, the court shall not apply the provisions of section 106 (1)(d) to the decision of the agency to proceed under this section.

## Chapter 6. Judicial Review

Sec. 101. (1) Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court for the county of the plaintiff's principal place of business in this state or for the county in which the plaintiff resides or in the circuit court of Ingham county. The agency shall be made a party to the action. An action for declaratory judgment challenging the applicability of a rule may not be commenced under this subsection unless the plaintiff has first requested the agency for a declaratory order under section 85 and the agency has denied the request or failed to act on it expeditiously. This subsection shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted.

(2) When a person has exhausted all administrative remedies available within an agency, and is aggrieved by final agency action as defined in section 2 (d), whether such action is affirmative or negative in form, the agency action is subject to direct review by the courts as provided by law and in the absence of such provision, as provided in this chapter. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural, or intermediate agency action, or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

**Sec. 102.** Judicial review of final agency action shall be by any applicable special statutory review proceeding in any court specified and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with sections 103 to 105.

**Sec. 103. (1)** Except as provided in subsection (2), a petition for review shall be filed in the circuit court for the county of the petitioner's principal place of business in this state or for the county in which the petitioner resides or in the circuit court for Ingham county.

**(2)** As used in this section, "adoptee" means a child who is to be or is adopted. In the case of an appeal from a final determination of the office of youth services within the department of social services regarding an adoption subsidy, a petition for review shall be filed:

**(a)** For an adoptee residing in this state, in the probate court for the county in which the petition for adoption was filed or in which the adoptee was found.

**(b)** For an adoptee not residing in this state, in the probate court for the county in which the petition for adoption was filed.

**(3)** A petition for review shall contain a concise statement of:

**(a)** The nature of the action as to which review is sought.

**(b)** The factual background of the matter.

**(c)** The factual and legal grounds on which relief is sought.

**(d)** The relief sought.

**(4)** The petitioner shall attach to the petition, as an exhibit, a copy of the agency action of which review is sought. If the agency action was not reduced to written form, the petitioner shall attach to the petition, as an exhibit, an affidavit in accordance with the general court rules describing the agency action of which review is sought.

**Sec. 104. (1)** A petition shall be filed in the court within 60 days after the date of mailing notice of the final agency action, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. If the agency action is the failure to act, the petition shall be filed

in the court within 180 days after the date upon which the duty to act arose. The filing of the petition does not stay enforcement of the agency action, but the agency may grant, or the court may order, a stay upon appropriate terms.

(2) Within 60 days after service of the petition, or within such further time as the court allows, the agency shall transmit to the court the original or certified copy of the entire record of the agency action, unless parties to the proceedings for judicial review stipulate that the record be shortened. If the action was not conducted as a hearing on the record, the agency shall transmit to the court an original or certified copy of its entire file relevant to the petition, unless the parties to the proceedings for judicial review stipulate that the record be shortened. A party unreasonably refusing to stipulate to shortening the record may be taxed by the court for the additional costs. The court may permit subsequent corrections to the record.

(3) The review shall be conducted by the court without a jury and shall be confined to the record. In a case of alleged irregularity in procedure before the agency or in review of agency failure to act, not shown in the record, proof thereof may be taken by the court. The court, on request, shall hear oral arguments and receive written briefs.

**Sec. 105.** In review of agency proceedings conducted under chapter 4, if timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that an inadequate record was made at the hearing before the agency or that the additional evidence is material and that there were good reasons for failing to record or present it in the proceeding before the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its findings, decision, or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision, or order, which shall become part of the record.

**Sec. 106.** (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside agency action if substantial rights of the petitioner have been prejudiced because the agency action is any of the following:

(a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency, or short of statutory right.

(c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.

(e) Affected by other substantial and material error of law.

(f) In review of agency proceedings conducted under chapter 4, not supported by competent, material, and substantial evidence on the whole record. The court shall apply the rules of evidence in the same manner as applied in the agency under section 75 and shall not overturn an agency decision solely because the preponderance of the evidence is not wholly constituted of evidence admissible under the Michigan rules of evidence.

(2) The court, as appropriate, may affirm, reverse, or modify the agency action or remand the case for further proceedings. The court shall authorize only such actions as are included within the powers granted to the agency in the underlying statute or statutes on which the agency's decision was based.

# **THE PROPOSED ADMINISTRATIVE PROCEDURES ACT**

## **Commentary to Chapter 1. General Provisions**

This chapter contains new definitions and reflects changes made in the rulemaking, contested case, licensing, and judicial review chapters. Most of these changes are discussed in detail in the chapters dealing with those topics. The commentary for those chapters should be reviewed in conjunction with the changes found here, most of which deal with the definition of terms.

The Michigan Administrative Procedures Act currently lacks a comprehensive scheme of definitions to reflect the multi-faceted nature of modern administrative agencies and their procedures. The federal system contains a better framework of definitions, although it is not without its own weak spots.

Agencies generally proceed through one of two vehicles--rulemaking or adjudication. In Michigan, the only type of adjudication mentioned is the contested case, which generally includes ratemaking and licensing. And, in our state, the act provides only one procedure for rulemaking.

The federal system provides two rulemaking procedures and covers adjudications other than "formal" adjudication, which is the federal equivalent of the contested case. That system provides detailed procedures for both formal and informal rulemaking--procedures which do not track precisely with our rulemaking and which do not involve the legislative branch. But the federal system, which does recognize that both "formal" and "informal" adjudication take place, provides procedures only for the formal setting. Parties are left to due process, the underlying statutes, and the agencies' sense of administration for the structure of informal adjudication.

In the federal system, the act makes provision for appeals from all types of agency action. In Michigan, the act does not. By broadening the definitional base and referring back to the type of action involved, the availability and nature of appellate review is clarified.

The proposed act borrows generously from the federal system, retaining our current language where possible. The definitions become more specific as the type of activity is narrowed. Thus, agency action is broadly defined to cover the outcome of whatever an agency does, whether it is a rule, an order, a license, a sanction, or a form of relief or its equivalent, and also covers outcomes which are denials and outcomes that result from the failure to act. An agency proceeding is

more limited, referring only to the process for rulemaking, adjudication, licensing and ratemaking.

The other definitions are written to describe a product and the process for its formulation. For example, the definition of license is made, then the description of the process related to the license is offered. This is done to some degree in the current act.

The major change in this regard is that the concept of adjudication is introduced into the act. An order is defined as the outcome or final disposition in a matter other than rulemaking. An adjudication is the process for the formulation of an order, and can consist of any procedures contained in the underlying statute, provided by the agency, or called for by due process. The contested case is a special process for the formulation of an order, which is used when the underlying statute requires the adjudication of legal rights pursuant to an evidentiary hearing.

Under any circumstances when the agency decides something finally, such as whether to grant an application for an initial or first license, the agency adjudicates. If the underlying statute provides procedures, those procedures must be followed. If the underlying statute calls for an evidentiary hearing, then the contested case procedures must be followed. In both settings the final disposition is an order and the process for the formulation of the order is an adjudication.

One further correction has been made in the contested case definition. In the current act, the definition states that a contested case includes any proceeding in which the evidentiary hearing is required "by law." The court of appeals has ruled that the due process clause is a law, so any time a state agency affects a due process liberty or property interest, thereby requiring a hearing, the state must provide a contested case hearing. This was probably not the intent of the legislature originally, and it leads to results inconsistent with the current notion that due process is a flexible concept permitting the shaping of procedures to fit the interests of the individual and the state. Applying the full measure of the contested case protections to every due process interest is excessive protection. The definition is changed to require the application of the contested case provisions only when the underlying statute provides a right to a contested case hearing.

The definition of rulemaking in the current act is retained in substantially the same form, but additional definitions have been supplied to differentiate among the various types of rules which agencies devise. These definitions are then used to separate the various procedures which agencies must follow in their creation. In general, the procedures, which are set forth in detail in chapter 3, become more complex as the impact of the rules becomes more significant. The legislative

approval process has been retained for rules that are substantive--those that have the force and effect of a statute.

Provisions currently found in chapter 3 regarding the effect of the revisions in the new act on rules and on the construction of rules have been moved to this chapter. The former chapter 7, containing miscellaneous provisions, has been moved to this chapter.

**While the purpose of some of these definitions is better understood in the context of the particular chapters in which they are used, a brief section by section review of this chapter will provide some insight into the origins of the language.**

## **Section 1**

**The only change is to update the title of the act to reflect the 21-year period since its last revision.**

## **Section 2**

**This section contains all the definitions used in the act. It represents a change in format from the old act where the definitions were arbitrarily split into three sections. Alphabetical order is selected for ease of reference.**

**Subdivision (a) defines "adjudication" as the process for formulating an order, which is the approach taken in the federal system. Adjudication covers all administrative procedures except those used in rulemaking.**

**Subdivision (b) defines "adoption of a rule" in the same language as found in the current act.**

**Subdivision (c) defines "agency" in identical terms to the current act. The courts have consistently resisted attempts to make other entities into state agencies because the entity operated under state mandate or received state funds. The definition appears to have held up well.**

**Subdivision (d) defines "agency action" in broad terms related to the outcome of any sort of agency activity. The language is taken from the federal Administrative Procedures Act.**

Subdivision (e) defines "agency proceeding" as rulemaking, adjudication, or licensing, including ratemaking and contested cases, which parallels the approach in the federal act.

Subdivision (f) introduces a definition of "approval of a rule" intended to reflect the role of the legislature in the current process.

Subdivision (g) defines "committee" in the same language as found in the current act.

Subdivision (h) defines "contested case." The two changes are: (1) the inclusion of the contested case as a form of adjudication, rather than as a "proceeding," as is the case in the current language; and (2) the substitution of the word "statute" for the word "law" in the terminology which triggers the application of the contested case chapter. Under the latter change, due process will not invoke the application of the contested case portion of the Administrative Procedures Act. Only language in an underlying statute will do so. The agency would be free to apply the full provisions of the act if it chose to do so where due process required a hearing of some kind.

Subdivision (i) defines "court" as it is in the current act.

Subdivision (j) defines "housekeeping rules"--those which the agency uses to manage its internal operations. These rules have no direct impact on the public and are intended to govern the day to day operations of the agency.

Subdivision (k) defines "interpretive rules" as those which express the agency's formal opinion of the meaning of an underlying statute or a rule of the agency. This type of rule has no binding legal effect and the agency cannot treat it as if it were a substantive rule--it must apply the underlying statute or the rule it interprets on its own terms when taking action against a person. The word "formal" has been inserted to differentiate the situation where the agency wishes to make its views known in advance as to how it will proceed in regard to a particular statute or rule, when it either lacks rulemaking authority or does not wish to take a position with a binding effect, from those situations in which the agency expresses advice or is proceeding informally.

Subdivision (l) defines "license" with only one change from the current act--the word franchise has been added to the forms of permission which are included in the concept of a license.

Subdivision (m) defines "licensing" virtually the same as the current act.

Subdivision (n) defines "Michigan Administrative Code" according to its source in the compiled laws, since it is referred to frequently in the current act without definition.

Subdivision (o) defines "Michigan Register" in the same language as found in the current act.

Subdivision (p) defines "order" as the outcome of any matter other than rulemaking, which is consistent with the federal definitional scheme. The name given to the action will not control--so long as the agency has not produced a final outcome that is a rule, that final outcome is an order.

Subdivision (q) defines "party" substantially the same as in the current act, but adds language better suited to the intervention provisions which have been introduced in chapter 4.

Subdivision (r) defines "person" substantially the same as in the current act, although the words "or authority" are added to the description of the type of public or private entity which is a person under the act.

Subdivision (s) defines "procedural rule" to include those rules which describe the methods by which the agency executes its statutory responsibilities in the context of its relations to persons. These rules do not establish law. They set forth the ground rules for the process of interaction between the agency and those persons who must deal with it.

Subdivision (t) defines "processing of a rule" in the same language as found in the current act.

Subdivision (u) defines "promulgation of a rule" in the same language as found in the current act.

Subdivision (v) defines "relief" as positive results from agency action, in language taken from the federal act.

Subdivision (w) defines "rule" in generally the same manner as found in the current act. Current subsection 7(h) has been deleted from this lengthy definition, since the types of material identified there have been covered in another definition. In its place, a provision is inserted which states that informal materials not included within any of the further definitions of rules are not rules.

The exception for formal opinions of the attorney general has been expanded to include any statements constituting legal advice that the attorney general may provide to an agency or its employees.

In addition, this subsection exempts from the definition of rule policies and rules relating to inmates in prisons and to those in the custody of the Corrections Commission. This continues an exception in the current act regarding inmates and broadens it slightly to cover any person who is in the custody of the Commission, even if not technically an inmate in a state correctional facility.

Subdivision (x) adds a new provision defining "rulemaking" in a manner similar to the definition found in the federal act.

Subdivision (y) defines "sanction" as negative results from agency action, borrowing from the federal act.

Subdivision (z) is the last of four new sections defining different types of rules. These definitions are taken from the case law and legal writing in the administrative law field. In chapter 3, different procedures are set forth to control the agencies in their production of each type of rule.

"Substantive rules" are the most important, since these are the rules which have the same effect as a statute. If an agency has substantive rulemaking power, the agency can define what the law is, so long as its statement is within the confines of the standards and authority set forth in the underlying statute giving it rulemaking authority. An agency must have specific statutory authority to promulgate substantive rules, and it is this type of rule which is the focus of discussion when reviewing the rulemaking power of agencies. In the federal system, the procedures set forth for rulemaking are almost exclusively for this type of rule. The procedures for the other types of rules are minimal, and the agencies are considered to have the inherent authority to promulgate rules which are other than substantive--procedural, interpretive, and housekeeping rules.

### Section 3

This section is slightly changed from the current language of the act found in section 11. The purpose is to make it clear that a specific statute can add requirements beyond those in the Administrative Procedures Act.

#### Section 4

This section, which covers the continuation, amendment, rescission, and rights accrued or determined by rules, is unchanged from current language. It has been pulled from chapter 3 on rulemaking in order to restrict that chapter to the procedural requirements for rulemaking and to place all the construction references in this chapter.

#### Section 5

This material also comes from the current chapter 3 and is little changed. It covers various rules of construction and other issues relating to the effect of rules, as well as establishing the power of the agency to use incorporation by reference in the adoption of a rule. Under the altered language, an agency may incorporate by reference the rules of another state agency, just as it could the rules of an agency of the United States under the current and proposed acts. The word "unlawfully" has been inserted to describe the prohibition against discrimination imposed on the agency. Presumptions of regularity and the taking of judicial notice are also covered.

#### Sections 6 to 10

These sections consist of the material formerly located in chapter 7, which covers several miscellaneous matters, such as the effective date of the act, the effect of the act on rules in progress and certain exemptions from the provisions of various chapters of the act. Because this material is similar in nature to the material now located in chapter 1, it has been added to that chapter.

Two passages which have become obsolete have been removed. The first covered changes in the notice requirements which occurred when the former act replaced its predecessor. The second related to exemptions from the provisions of chapter 8 on awarding costs and fees in contested cases. Those chapter 8 provisions expired by operation of a sunset limitation in the current act and have not been included in this proposal.

## Commentary to Chapter 2. Register and Administrative Code

As will be discussed in the next chapter, the guidelines chapter has been replaced in its entirety. The miscellaneous provisions of former chapter 7 have been combined with certain miscellaneous and interpretive provisions of former chapters 1 and 3 in the proposed chapter 1. Chapter 2 now contains all material relevant to the publications known as the Michigan Register and the Michigan Administrative Code. Material regarding these two publications was formerly contained in chapters 1 and 3.

There are no substantive changes in the proposal which relate to the operation of the register and the code. Some material has been removed because the related subject or activity has been deleted from the act, making it no longer appropriate for coverage in the register and code. One minor editing change was made in the interest of reducing the number of sections and length of the act. Minimal editing of sentence structure occurred.

Some of the provisions in this section could be eliminated, since their purpose is largely to structure the cost of printing the register and code among the agencies. It has been retained in a slightly abbreviated form.

### Section 21

Subsection (1) is substantially the same as current subsection 8 (1). The provision for the publication of notice of proposed and adopted guidelines has been replaced with a similar requirement for the publication of notice of adoption of interpretive, procedural, and housekeeping rules. The word "administrative" has been dropped as an adjective describing rule where it occurred in the current act. The provision regarding publication of small business impact statements has been eliminated, since that requirement has been removed from the act. A lengthy reference to the underlying statutory sections has been eliminated in (1), since the only material required to be published is that authorized in the exemption from the rule definition in section 2 (w), where the underlying statutes are already cited.

Subsection (2) is current subsection 8 (2).

Subsection (3) is current subsection 8 (3).

Subsection (4) is current subsection 8 (5). The order of the two concluding subsections was changed to reflect the order of events--submission to the service

bureau first, then publication. Reference to the small business impact statement has been eliminated.

Subsection (5) is current subsection 8 (4). In addition to the change in order, references to the small business impact statement and to guidelines have been deleted.

## Section 22

Both subsections of this section are identical to the language in the two subsections of current section 55.

## Section 23

Both subsections of this section are identical to the language in the two subsections of current section 56.

## Section 24

Subsection 24 (1) is identical to current subsection 57 (1).

Subsection 24 (2) includes the language of current subsection 57 (2), except that references to small business impact statements and guidelines have been eliminated. One sentence was added to the end of this section permitting the legislative service bureau to provide to agencies, at cost, copies, special printings, and the plates for their particular rules. This allows the elimination of both subsections of current section 58.

## Section 25

This section contains three subsections and is identical to current section 59 except that provision is made in subsection 25 (2) that the register, code, and supplements be made available in both printed and electronic form.

## Commentary to Chapter 3. Procedures in Rulemaking

In this chapter the Michigan Law Revision Commission introduces its most comprehensive change--a new structure for rulemaking which is modeled after the federal approach. In essence, the current requirement that all rules must be submitted for legislative approval is replaced by a system which requires such approval only of substantive rules, rules which have the force and effect of law and are for most purposes the functional equivalent of statutes. The details are explained in the commentary to this chapter.

The Commission is convinced that the change is a positive step in the development of Michigan's administrative law. The goal is to provide flexibility for the agencies, but discourage attempts to circumvent the rulemaking process. Before presenting these changes, the Commission wishes to emphasize its concern about agency practices which avoid the legislative approval procedures currently in place.

What most troubles the Commission is its perception that administrative agencies routinely resort to various devices to avoid the submission of their practices to the scrutiny of the rulemaking process. This practice not only allows the agencies to escape the checks and balances of legislative oversight, but also robs the regulated parties of the opportunity to submit views and insight into the consequences of proposed administrative controls.

The most frequent current practice which the Commission finds objectionable is the use of guidelines, manuals, bulletins, newsletters, and letters to set policies which have the practical effect of substantive law. This practice means that the agency position is not subjected to legislative review and the regulated entities are deprived of the notice inherent in fair procedures. Guidelines, manuals, bulletins, newsletters, and correspondence are inherently informal in nature. They are subject to the whim and caprice of those who administer, and can be used improperly by agencies as if they were law. They are easily changed to fit current circumstances and pressures, including the pressure of politics and politicians. Such materials are not taken as seriously as are rules formally passed and officially published. On the other hand, material promulgated as official rules is formal, regularly published, and known in advance. The effects of such material can be anticipated and the preparation necessary to comply with the provisions of rules can be planned for and accommodated.

The courts properly tend to find the use of informal materials to replace rules offensive to due process and fairness and decisions are not uncommon which strike down agency action based on the use of guidelines and the like in lieu of rules. The courts rightly look to the effect of the policy, or of the guideline or other

material, rather than its label. Indeed, the decisions invariably apply the definition of rule, rather than the label used by the agency, in analyzing whether the agency's position should be sustained.

Although the courts offer a safeguard from agency abuse of the rulemaking procedures and requirements of the act, the Commission believes that affected parties should not have to depend on the costly and uncertain process of judicial review. Rather, agencies should be compelled to follow the dictates of the administrative procedures act when setting broad policy.

In its deliberations, the Commission considered stronger measures in this regard than appear in its proposal. It adopts the position on the classification of rules with some trepidation. However, the Commission recognizes that the agencies require a measure of flexibility in responding to changing circumstances and conditions, especially those which cannot be anticipated in the legislative process and in statutory language. Further, it also recognizes that Michigan's legislative approval of all rules approach is perhaps the most restrictive on agency discretion in the country.

The difficulties inherent in the legislative approval process no doubt discourage agency compliance and encourage agencies to find innovative ways to avoid the complexities, delays, foibles and pitfalls of rulemaking as currently required in our current act. The approach taken by the Commission is to reserve the legislative approval process to the rules which have substantive effect--that is, the force and effect of law.

These substantive rules have as their primary identifying quality the aspect that they establish a standard of conduct or practice or define a set of circumstances, the violation or existence of which constitute wrongdoing. When such rules are in place under the appropriate statute, the agency need only prove that the rule has been violated in order to establish a violation of law.

For instance, if an agency with substantive rulemaking power operates under a statute which calls for the agency to prohibit "deceptive trade practices," the agency may pass substantive rules which in effect define the term "deceptive" by identifying specific conduct, such as failing to list the octane rating of gasoline on a gas pump or labelling as "regular" gasoline with an octane rating below a specified number. When that agency then proceeds against an alleged violator, it need only prove a violation of the rule at the administrative hearing; it need not further prove that the failure to list is deceptive or that the specific number in the rule is deceptive. Challenges to the validity of the substantive rule or to the consistency of the rule with the statute are made only on judicial review.

Other types of rules do not have the same legal effect. They may describe procedures an agency requires a regulated party to follow, such as forms to use or reports to be kept, or they may offer the agency's opinion on the meaning of a statute's terms or the meaning of one of its own rules, but they do not constitute primary law. Failure to keep required records or use proper forms may itself be reason for an agency to act, but failure to keep the records does not, for instance, constitute a deceptive trade practice. Likewise, if the party acts in a manner which is contrary to an agency's interpretation of a statute or substantive rule, the agency must prove that the conduct violated the statute or substantive rule, not that the conduct was contrary to the opinion in the interpretation. Thus, if the rule in the example above were interpretive rather than substantive, the agency would be required to prove that failing to post the rating or that a rating below the number was deceptive, rather than simply proving that the octane rating had not been posted or that it was too low.

The Commission has attempted to segregate substantive rules from the other types, reserving the current legislative approval process for substantive rules. Different procedures are imposed for other types of rules. Both procedural and interpretive rules are made subject to notice and public hearing, must be published in the Michigan Register and must be included in the Michigan Administrative Code. Further, an agency is required to adopt procedural rules. Only housekeeping rules, those applying to internal management, are not required to be adopted after notice and hearing. Such rules are published in the Register, but are not collected in the Administrative Code.

Thus, legislative approval is retained for those actions of the agencies which are in effect legislative, and that approval is no longer required for rules which have only procedural, interpretive or internal effect. This approach is more restrictive than the federal approach upon which it is modeled, since the federal rulemaking process exempts procedural and interpretive rules from notice and comment altogether.

It is hoped that the agencies will not abuse this system of rule categories by attempting to characterize rules which are substantive as other types. To guard against this, a check is included. Prior to the scheduled public hearing, the Joint Committee on Administrative Rules may overturn the agency's designation of proposed procedural or interpretive rules, if it determines that the rules are substantive. An agency may not avoid the approval process, if the Committee finds the rules to be substantive.

Obviously, clearly drafted statutes reduce the need for administrative rules. And agencies would better serve the public if they developed all policy through the prospective rulemaking process, rather than ad hoc and retroactively through

hearings and court cases. Additionally, policy is preferably articulated through the formal procedures of rulemaking with the coordinate opportunity to participate, than through agency statements contained in unilaterally-developed guidelines, manuals, and other informal materials. Finally, self-enforcement and restraint better serve the public interest than reliance on the courts to stay the arbitrary administrative hand.

The Commission is hopeful that relieving agencies from the difficulties of the legislative approval process for those rules which are not substantive will encourage the agencies to submit all their rules to formality, whether those rules are substantive and require legislative approval or are procedural or interpretive and do not. On the other hand, the Commission believes that the requirement that an agency develop procedural rules and that all interpretive and procedural rules be subject to notice and public hearing will enhance the fairness and acceptability of such rules.

The details of the proposed changes are summarized in the paragraphs which follow.

This chapter combines features of current chapters 2 and 3, which covered guidelines and rulemaking. Provisions of current chapter 3, which informed of the procedural effect of rules and their construction, have been moved to chapter 1. Most provisions dealing with the publication of rules in the Michigan register and administrative code have been moved to chapter 2. Requirements for regulatory and small business impact statements have been eliminated. The provision allowing for declaratory rulings by agencies has been moved to chapter 4, since the ruling is the equivalent of a decision in a contested case.

The current APA use of "guidelines" has proved to be troublesome, especially in light of the provision that a guideline not be used in lieu of a rule. The chapter on rulemaking has become cluttered with detail, much of which instructs the legislative service bureau or details other activity which can be handled internally by the legislative branch. The chapter is oppressively long and complex.

The types of rules are not defined. In addition, there is some lack of clarity as to which provisions of the rulemaking chapter apply to the different kinds of rules.

In chapter 1 the proposed APA defines the types of rules, creating four categories--substantive, interpretive, procedural, and housekeeping. The rulemaking chapter is now structured to describe the procedures which an agency must follow to adopt each of these four types.

The most important rules are substantive, rules which have the same legal effect as statutes and which are used in exactly the same manner as are statutes when the law is being applied to a party. These rules define the law--they become the law--and it is these rules which deserve the scrutiny of the legislature under the current legislative approval process. Since the legislative approval process was only recently passed and is likely to undergo judicial review, no attempt has been made to alter the legislature's role in approving all substantive rules.

The second category of rules is interpretive, those which state the agency's formal opinion of its underlying statute or another rule in a non-binding way. These say what the agency thinks the statute means, but they do not have the force and effect of law. The current system of guidelines is close to the category of interpretive rules, but it is apparently not limited to interpretations of policy, the underlying statute, or other rules. In applying an interpretive rule the agency cannot act solely upon the basis set forth in the interpretive rule; it must apply the statute or other rule directly to the matter. Proof of violation of the interpretive rule does not suffice. Since the interpretive rules do not have the force of law, the procedures imposed for the adoption of interpretive rules resemble those for guidelines in the current act. They do not require legislative approval, but are made subject to the notice and public hearing provisions before adoption.

The third category of rules is procedural, those which describe the manner in which the agency carries out its functions as they affect the public. The agency's external relations are regulated by these rules. They are not subject to legislative approval, but they are subject to notice and public comment before adoption.

The fourth category of rules is housekeeping, those which describe the manner in which the agency carries out its function by the internal management of its activity. The only restriction on the adoption of these rules is that they must be made public upon adoption.

The other major change is a restructuring of the notice and public hearing provisions of the current act. Most of these changes are procedural, but substantive changes are made in the nature of the hearing required.

## Section 31

This section applies to housekeeping rules, newly-defined in chapter 1, which "describe the internal organization, operation, management, and practices of an agency, including instructions or guidelines to employees regarding the scope and exercise of their functions." This type of rule is perhaps alluded to by the language

of current subsection 33 (1), which refers to rules describing the organization and the general course and methods of an agency's operation.

In the current act, this type of rule is not subject to the notice and hearing provisions, but is subject to the approval process. In the proposal the adoption of a housekeeping rule is not subject to any procedural limitations except that it must be made known to the public and to the joint committee on administrative rules, the legislative service bureau, the governor, and interested persons. An interpretive rule is exempt from notice, hearing and approval provisions, and will not be published in the administrative code, but will appear in the register.

## Section 32

This section applies to procedural rules, as defined in chapter 1, which "establish the methods by which the agency will execute its designated functions in regard to the contact it has with persons and describe the procedures, practices, forms, applications, guidelines, instructions and other requirements which persons must follow in the execution or administration of its designated functions." Current subsection 33 (2) refers to rules prescribing procedures.

Under the current system the entire spectrum of rulemaking procedure applies to the procedural rule. The proposal requires that the procedural rule undergo only the notice and hearing process. Legislative approval is not required, since these rules do not prescribe law in the substantive sense, thereby making legislative oversight inappropriate. The same notification of adoption procedures apply as to housekeeping rules, but procedural rules must be clearly labelled, must be published in the Michigan Register to be effective, and will be included in the Michigan Administrative Code.

Subsection (4) of this section retains the authority of the agencies to make rules for procedures in contested cases. Since they are categorized as procedural rules, the legislature will not be involved in the adoption.

Subsection (5) requires that procedural rules include a statement that they are not intended for use as substantive rules.

## Section 33

This section applies to another newly-defined category of rules, interpretive rules: "a rule which expresses the formal opinion of an agency of the meaning of another rule or of a statute, which the agency intends to follow in the execution or

administration of its designated functions." The current APA contemplates this type of rule in its provisions regarding guidelines, although the language seems somewhat broader.

The procedures adopted in the proposal are the same as those for procedural rules. Thus, there will be notice and hearing, publication in the Michigan Register, inclusion in the Michigan Administrative Code, and clear labelling that the rule is interpretive and not intended to have substantive effect, but the approval of the legislature will not be required. Currently, legislative approval is not required, but the agencies and the legislature are at odds over the appropriate use of guidelines. Because the interpretive rule does not have the effect of law, the legislature should have limited involvement in its development. Using the full notice and hearing provision should allow a sufficient oversight role without unduly restricting an agency's flexibility to devise rules to guide those with whom it deals. In settings where the agency wishes to make statements without the full binding effect of substantive rules, the interpretive process offers a middle ground. It is common practice in the federal system.

#### Section 34

This section contains only one change, an expansion of the membership of the joint committee on administrative rules from 12 to 14 members, 7 from each house. The structure of this committee requires that the committee can act only by concurring majorities of members from each house. A rule can be favored by 6 members from one house, but will not be approved where the second house divides evenly. A rule favored 9-3 is defeated by the two-house majority rule, although neither house disapproves of the rule. This is simply too much control in a willful minority.

The proposal avoids the problems created by a tie vote of either house's members. Unless members are absent the stalemate should not occur. The increased number will also make a quorum easier to obtain, a problem which has occurred with this committee on occasion.

#### Section 35

There is no change in this section. The elimination of procedural, interpretive and housekeeping rules from the Legislature's review should ease some of the administrative burdens on the committee.

## Section 36

This section permits a person to request that an agency promulgate a rule. Requests may include those for interpretive, procedural or substantive rules.

## Section 41

This section now contains all language relative to the notice required when an agency engages in rulemaking to adopt a substantive rule. Interpretive and procedural rules are also subject to this section and the section 42 hearing process. There are no substantive changes in the system except that the Department of Attorney General is added to the list of those required to be given notice.

Current subsections (1) and (2) of section 42 have been relocated in section 41, since both relate to notice. Language in current subsection 41 (1) describing the nature of the hearing required has been deleted, since that is now the topic of new section 42.

A check is imposed on the agencies in subsection (5), which allows the Committee to make its own determination of whether the rule is substantive. The Committee may determine that a proposed procedural or interpretive rule is substantive at any time prior to the public hearing. The language makes it clear that the Committee's only basis for action is that it finds that the rule is substantive under the definition in subdivision 2 (z) and requires that the Committee explain its determination to the agency. If the Committee agrees that the rule is interpretive or procedural or it does not act, the agency is free to proceed. If it finds the rule to be substantive, the agency must obtain legislative approval of the rule.

Current section 41a has been deleted. That section allowed an individual legislator to submit a request to the legislative service bureau for copies of proposed or designated rules to be transmitted to the legislator. This can be done internally by the legislature and should not appear in the statute.

## Section 42

The requirements of the hearing called for in substantive rulemaking contain one substantive change. The agency is now required to conduct an oral proceeding; it must hold a hearing at which persons may appear and speak. The power to limit the time available to each speaker is given to the agency, which it can do as part of its procedural rules. The new provision continues the practice of not making the contested case procedures applicable to rulemaking hearings, but requires that the

agency adopt procedural rules for the conduct of rulemaking hearings within two years.

### Section 43

This section is unchanged, although now applicable only to substantive rules.

### Section 44

This section is unchanged.

### Section 45

This is the section which describes the current legislative approval process.

All references to the regulatory impact statement and the small business impact statement have been eliminated. Also, subsection 45(7) of the current act, which provides for referral of proposed rules to the fiscal agencies for review, has been deleted, since it constitutes internal legislative management which does not require statutory authority. Even though these provisions do not appear in the act, the governor by executive order and the legislature through its procedural requirements can assure that consideration is given to the impact of proposed rules on any special group or subject which might be affected. Their presence makes the current act cumbersome and difficult to follow.

The approval process itself has not been altered. The only change is that this section no longer applies to other than substantive rules.

### Section 46

This section is substantially unchanged.

### Section 47

This section is unchanged, although now applicable only to substantive rules.

## Section 48

Two substantive changes are made in this section, which covers emergency rules.

The first includes preservation of the public financial resources entrusted to the agency as a basis for an emergency rule, along with public health, safety and welfare. The intention with the addition is to allow an agency to respond to situations in which the funds allocated to an agency are threatened by events or practices which were unanticipated, such as claims for benefits under an interpretation of the statute which is not consistent with its purpose or which threaten to undermine the integrity of a program administered by an agency. However, it is not intended to apply to the failure of the legislature to appropriate funds or to other situations in which the emergency relates to a general lack of sufficiency of funds appropriated to the agency. Since the reference is to funds already entrusted to the agency, no invocation of this provision would be permitted which attempted to use the lack of funds in an agency or the failure to appropriate funds as justification.

The second allows the use of the emergency rulemaking procedures to adopt procedural rules, but limits the effective time for such rules to a maximum of 120 days.

The Commission considered and rejected a proposal to double the effective time of an emergency rule from 6 to 12 months and to permit an extension for 12 months rather than 6. The basis for the proposal was that the additional time would better accommodate the need for emergency action and for calm deliberation of the permanent rule. It would reflect the need for increased processing time created by the additional procedures added to the current act by the legislative approval process amendment. However, the Commission felt that there was not sufficient justification for this change in light of current practice. Since the emergency rulemaking procedures are extraordinary, the Commission felt the use of those procedures should be as constrained as practicable. A provision was added requiring the agency to inform the Joint Committee of the status of its efforts to develop permanent rules, if the agency seeks to extend the emergency rules for a second six months period.

## Section 49

This section is unchanged, although now applicable only to substantive rules.

## Section 50

This section is substantially unchanged.

## Section 51

This section is unchanged, although now applicable only to substantive rules.

## Section 52

This section is unchanged, although now applicable only to substantive rules.

### Commentary to Chapter 4. Procedures in Contested Cases

This chapter has been substantially rearranged to approximate the order of events in contested cases. Thus, the presiding officer's powers are described early, the prehearing aspects appear before the hearing aspects, the evidentiary provisions have been consolidated, and the decision process has been retained at the close of the chapter.

## Section 71

This section now contains the provisions formerly found in section 71 and part of section 72. The topics now included are notice, answer, and failure to appear after notice. Matters related to evidence have been moved to a more appropriate place.

Subsection (1) includes a new provision which requires that hearings be open unless the agency determines that the interest of a party in privacy outweighs the interest of the public in having an open hearing. It also permits closure if the hearing would result in the disclosure of trade secrets or proprietary information. The current act has no provisions at all regarding whether a hearing should be open. This proposal would permit a party to seek the closure, but not the agency unless it is a party. The reasons for the closure would be part of the record, but would remain sealed.

Subsection (2) is changed. The main focus of the change is to recognize that administrative proceedings are not always started by the agency. The agency may be a forum for other parties or the person affected by agency action may initiate the

hearing by filing a petition or some other form of request for review. This subsection has been restructured to reflect the existence of these variations in the process by which proceedings are begun in agency tribunals. A requirement that the notice or the other forms for initiating proceedings contain the names of all parties has been added.

Another substantive change is to establish in a new subsection (3) that service of notice may be accomplished by personal service or by certified mail, upon return receipt. The act presently contains no provisions regarding the method of service. The alternatives selected are identical to those in current subsection 71 (3), which relates to the service of notice on members of the legislature. Both subsections (3) and (4) make it clear that service is complete when the receipt of service is returned.

In rare circumstances the technical requirements of service may not be met, but the party may in fact have actual notice of all matters included in the notice provisions of subsection (2). Language has been added to authorize that the hearing may proceed if actual notice of the facts and law has been provided. If a party can establish that proceeding on the basis of actual notice would result in material prejudice, the continuation of the hearing is not permitted.

Current subsection 71 (3), dealing with service of notice and other process on legislators, is renumbered as new subsection 71 (4), and contains the slight modification noted above.

The new subsection 71 (5) is the old subsection 72 (2) slightly modified to correspond to the changes in subsection 71 (2). The optional answer provision should logically come before the provision discussing the consequences of failure to appear for hearing.

The first sentence of the new subsection (6) is the first sentence of the old subsection 72 (1), which permits the agency to proceed if a party fails to appear. An alternative to proceeding in the absence of the party has been added, permitting the agency to establish by procedural rule a system of default orders. The proposal sets forth two grounds for default orders. The first is where a party fails to appear for a hearing. The second is where a party fails to file an answer, if the agency has established by its procedural rules that an answer is required to be filed. In the rules the agency would be required to describe the type of case covered by the default system, the procedures under which the default would be taken, the time limits for setting aside defaults, and the grounds on which defaults would be set aside. In those cases started by filing complaints or petitions, the agency may dismiss the action when the person filing the complaint or petition fails to appear for the hearing.

Subsection 71 (7) is new. It allows agencies to adopt procedural rules for handling service of notice, filing of pleadings, and submission or transmittal of documents through facsimile transmission.

Subsection 71 (8) is also new. It confirms that parties in contested cases are entitled to appear with counsel or qualified representative. The proposal recognizes that an underlying statute or agency procedural rule can define representation rights. The language is substantially the same as found in the federal Administrative Procedures Act.

Current subsections (3) and (4) of section 72 have been relocated to new section 75, which addresses evidentiary issues.

## Section 72

The material currently contained in sections 79 and 80, which describes the designation, disqualification, and power of presiding officers, has been moved into the new section 72. The purpose is to describe how the presiding officer is to be selected and define the powers of the officer before defining the evidentiary aspects of hearings. A new provision covering intervention has been added.

Subsection 72 (1) is identical to the first sentence of current section 79, describing the persons who may be designated to act as presiding officers at contested case hearings.

Subsection 72 (2) is new. The provision prohibits the designation of a presiding officer who is responsible to anyone in the agency who carries out an investigative or prosecutorial function. This will assure that the decision-maker is not subject to the control of those involved in the contested case, and introduce some measure of independence. This prohibition does not apply to the head of the agency, whether an individual or a board or commission, since the head of the agency is ultimately responsible for all agency functions. The language is substantially the same as that in section 554 of the federal Administrative Procedures Act.

The first sentence of new subsection 72 (3) is currently the second sentence of section 79. The third sentence of section 79 has been revised to provide a more definitive statement of what will disqualify a presiding officer (currently "personal bias or disqualification"). The new language includes personal bias, prejudice, interest, or other causes which would disqualify a judge, and is similar to the language in the Model State Administrative Procedures Act. The method to challenge the presiding officer and the procedures the agency follows upon

challenge are retained, with the only change being that necessary to have the procedures described in a separate sentence. The last sentence of this subsection is identical to the last sentence of current section 79.

New subsection 72 (4) contains the material from current section 80, with some deletions and additions. The subsection retains all the powers ascribed to the presiding officer in the current contested case chapter. Subsections 72 (4) (a-d) are identical to current subsections 80 (1) (a-d). Subsection 72 (4) (e) changes former subsection 80 (1) (e) slightly, since it inserts the words "prehearing conference" as a forum in which the parties may be directed to appear. Subsection 72 (4) (f) gives to the presiding officer the power to dispose of the case by settlement or other means, which is currently set forth in subsection 78 (2) in general terms unrelated to the presiding officer's powers. New subsection 72 (4) (g) allows the hearing officer to summarily dispose of a case in which there are no contested facts. Finally, the power to award costs and fees found in current subsection 80 (1) (f) has been eliminated, since that power has not been retained under the sunset provisions of the current act.

New subsection 72 (5) describes the process for intervention by those seeking to become parties in a contested case. The APA does not currently cover intervention, even though the issue arises with some frequency. In the absence of a provision for intervention in the underlying statute or agency rules, the decisions of agencies to grant, deny, or condition intervention are handled on an ad hoc, uncontrolled basis.

The language selected is close to that in the Model State Administrative Procedures Act, which introduced an intervention provision in its 1981 version. The commentary is likewise based on the comments of the Commissioners found in the model act.

Two avenues for intervention are created.

The first involves intervention as a matter of right where the party seeking intervention demonstrates that the proceeding will affect the party's legal interests. In this situation the petition must be submitted at least a week before the scheduled date of hearing and the presiding officer must rule on the petition at least two days prior to the hearing, to afford the parties time for preparation and to allow time for possible judicial review of an adverse decision prior to the commencement of proceedings. Even if the petition is timely and the petitioner asserts that a legal interest will be affected, the presiding officer must still determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

The second method places discretion in the presiding officer to grant intervention where the interests of justice so dictate and the decision to do so would not impair the orderly and prompt conduct of the proceedings. An untimely petition under the first method could be granted under the second, but no longer as a matter of right, and the lack of timeliness can be considered by the presiding officer in deciding whether to allow intervention.

The time periods selected are slightly different from those in the model act. Claims of right must be submitted seven days, before the commencement of the proceeding, rather than the suggested 3, and the ruling by the presiding officer must be 48 hours prior to the hearing rather than the suggested 24 hours. The model act states that a petition may be submitted at any time under the discretionary powers of the presiding officer, but contains no separate provision for the presiding officer's response. The apparent intent is to apply the 24-hour limit to this type of petition as well. The proposal allows the petition to come at any time and permits the presiding officer to state the decision on the record prior to the start of the hearing. The lateness of the petition and the potential that a favorable decision would impair the proceedings would be factors the presiding officer could consider in the determination to grant or deny the petition.

The model act allows the presiding officer to condition the intervention in any manner, including limiting the intervener to specific issues; restricting discovery, cross-examination, or other procedures; and requiring interveners to combine their cases. The proposed language also includes limiting participation to the filing of briefs. The balance struck is to provide interveners with reasonable input without unduly burdening the proceedings.

The model act also allows the presiding officer to modify the order at any time. The proposal adds to that power the authority to reverse the original decision, should the claims asserted by the intervenor in the petition appear to be exaggerated or untrue. This allows the presiding officer the ability to remove the intervener where the decision was improvidently made or the intervenor has entered the proceeding through the allegations of facts which are not found to exist based on the testimony.

The APA provisions on intervention will apply except where they are contrary to a provision contained in a statute providing for intervention in the contested cases conducted under that statute.

New subsections 72 (6) and (7) contains the language currently found in subsections 80 (2)-(6). The provisions deal with cases in which a member of the legislature may be involved as party or witness. The only change grants the presiding officer the discretion to order a legislator's testimony by deposition in

situations where the legislator is a witness in a case and the restrictions on his appearance apply. Currently, the presiding officer is compelled to postpone the hearing in such circumstances.

### Section 73

**A separate section on subpoenas has been retained.**

**The Commission gave serious consideration to adding a subsection 73(2) as a new provision which would give subpoena authority in contested cases to those agencies which wish to provide subpoenas to parties. Currently, the act provides no independent subpoena authority, limiting the availability of subpoenas to those situations in which the underlying statute authorizes the agency to issue subpoenas. This constraint creates many problems for those involved as parties in contested cases, since they are unable to compel the attendance of witnesses they deem essential to their case. The agencies have much greater power to force the attendance of witnesses, since they are frequently the employees of the agency. The purpose of such a new provision would be to provide a limited remedy for this situation.**

**Agencies would be able to obtain subpoena power by promulgating substantive rules to that effect. Under the revised rulemaking procedures, legislative approval of substantive rules is required, so the agency would have to satisfy the legislative branch that the authority was necessary for the proper administration of its contested case responsibilities. This would operate as a check on the agencies seeking the power, while permitting the authority to be selectively granted with legislative agreement. The allocation of across the board authority to all agencies currently lacking subpoena power would be avoided.**

**Subpoena power originating by rule would be controlled and implemented in the same manner as the subpoena power directly authorized by statute, according to the language considered. No consideration was given to altering the current controls on the subpoena process, nor to giving to administrative agencies any power of contempt or other authority to enforce their own subpoenas.**

**Because the provision of subpoena power to agencies has engendered considerable debate and has been granted to agencies by the Legislature only on a statute by statute basis, the Commission felt that it should not be included in this major revision of the administrative procedures act, but should be addressed as a separate topic at a later time.**

## Section 74

This section collects prehearing activity related to evidence. Three of the provisions of current section 74 are retained, two are moved to new section 75, and one provision of current section 78 is moved to this section.

**New subsection 74 (1)** is the first sentence of current subsection 74 (1), which gives to agency officers the power to administer oaths, certify to official acts and take depositions.

**New subsection 74 (2)** is an amendment of the third sentence of current subsection 74 (1). The change allows the agency to promulgate procedural rules for all aspects of its contested case hearings. The current language limits this authority to discovery and depositions.

**Current subsection 78 (1)** has been inserted as new subsection 74 (3). It provides for stipulations to be used as evidence. The second sentence, which "requests" that parties agree upon facts, has been eliminated as surplusage. The balance of current section 78, which allows disposition of cases by stipulation, was moved to new subsection 72 (4) (f), which describes the powers of the presiding officer.

**Sentence two** of the current subsection 74 (1) and sentence one of current subsection 74 (2) deal with evidence and have been placed in the new section 75.

**The last sentence** of current subsection 74 (2) is the new subsection 74 (4). This provision requires that identifiable agency records which are material to the hearing be provided to a requesting party. Language has been added to clarify that this provision does not allow disclosure of information exempt from disclosure under the Freedom of Information Act.

## Section 75

The current provisions which relate to the evidentiary aspects of the contested case hearing have been collected in the new section 75. Several substantive changes are made--the insertion of a subsection addressing the burden of going forward and the burden of proof, the inclusion of a definition of the burden of proof as the preponderance of evidence, and a clarification of the use of technically inadmissible evidence in determining the preponderance of evidence.

**New subsection 75 (1)** introduces language allocating the burden of going forward and the burden of proof. The current act contains no language regarding

this topic, which causes considerable practical problems in the regulation of contested cases. The provision first allows for the allocation of both burdens to be established by statute. It next indicates that the proponent has both burdens in the absence of a statutory allocation. Language is included making it clear that in licensing matters the applicant has these burdens when seeking an initial license, a new license when the activity is of a continuing nature, and for reinstatement of a license previously suspended or revoked. All other licensing actions place the burdens on the licensing authority, including those situations in which the agency denies the renewal of an existing license.

The federal act, which includes a provision placing the burden of proof on the proponent of a rule or order in the absence of a statute, is the basis for the approach selected.

This subsection also establishes that the burden of proof will be the preponderance of evidence standard found in civil cases in the absence of a statute setting forth a different standard. The current act makes no provision in this regard. The new provision allows the preponderance to include evidence which would not be admissible under the Michigan rules of evidence. Such evidence is admissible under the current act and continues to be admissible under subsection 75 (3) of the new version. The act currently requires that a decision "shall not be made except upon (the record) and as supported by and in accordance with the competent, material and substantial evidence." This language creates confusion in light of the evidentiary passage permitting the admission of "evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." The new provision and the related language in chapter 6 covering judicial review establish that the preponderance can include the evidence admitted under the relaxed test of admissibility in administrative cases, and make it clear that the decision need not be based solely on legally-admissible evidence.

The so-called legal residuum rule, that the decision cannot rest solely on inadmissible evidence, is rejected. The decision can rest on technically inadmissible evidence, so long as that evidence meets the test of administrative admissibility--that it is of the type that reasonably prudent persons would rely on it in the conduct of their affairs.

Subsection 75 (2) contains the current subsection 72 (3), which describes the nature of the arguments and proofs which can be submitted. The last sentence of current subsection 72 (4), which permits rebuttal evidence, has been moved to this subsection.

The new subsection 75 (3) is substantively the current section 75. This section provides that the rules of evidence "as applied in a nonjury civil case in

circuit court" shall be followed as far as practicable. The section now provides that the Michigan rules of evidence shall be applied as far as practicable, but still allows for the admission of other evidence found to be of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. The reason for the change is that the rules of evidence are applied to all matters in the same way. There is no distinction in the rules or their application for nonjury civil cases. The intent remains to allow other evidence to be admitted. The only purpose of the change is to clarify the reference to the rules of evidence.

Subsection 75 (4) is the second sentence of current subsection 74 (1). This allows the admission of depositions into evidence.

New subsection 75 (5) is the first sentence of current subsection 72 (4), which allows for cross-examination of witnesses and the authors of documents.

The language of current subsection 74 (2) also relates to cross-examination, making the reports of witnesses available to a party for use in cross-examination. The first sentence of that subsection is now subsection 75 (6).

New subsection 75 (7) is current section 76, which requires that all evidence be part of the record and allows for the use of copies in lieu of originals.

New subsection 75 (8), which is the current section 77, permits official notice. Only minor grammatical changes were made.

## Section 76

This is the current section 75a. Some minor corrections have been made, but there is no substantive change. Reference to the effective date of this section has been eliminated, and one term defined in the text was moved to a prior subsection defining terms used in the section.

## Section 81

This section and the three which follow introduce substantive changes which simplify the decision process and strengthen the role of the hearing officer to some degree. The language of the current sections is rearranged so that all provisions dealing with decisions are in a single section, followed by sections dealing with review within the agency, describing the record, and providing for rehearings.

Subsection 81 (1) requires that the agency or other authority with final decision-making power make a final decision in all hearings at which it presides. It eliminates the current authority for an agency which has not presided to read the record and make a final decision without the benefit of a proposal for decision from the hearing officer. The subsection does allow such an authority to make a final decision if the authority was present throughout the hearing, even though a hearing officer actually presided. In this setting, no preliminary or initial form of decision is required.

Subsection 81 (2) requires that the presiding officer make an initial decision in all cases in which the agency did not preside. That initial decision will be the final decision in the case in the absence of appeal to or review by the agency. Proposals for decision are eliminated. The first two subsections of section 81 create a simple bifurcated decision system, the branches of which are followed depending on whether or not the deciding authority in the agency presided or was present at the hearing. Where the authority presides or attends, a final decision will be written by the authority. If the authority neither presides nor attends, the presiding officer will write an initial decision, which will be final unless challenged by the agency or a party. This will also enhance to some degree the position of the presiding officers, since in all instances their opinions will be required and have the potential to be the final decision. Intangible benefits should accrue to the presiding officers in the control and administration of the proceedings they conduct.

Subsection 81 (3) is the first of two subsections which define the content and procedure related to the decision itself. The same requirements are imposed on all decisions; the current act separates requirements for proposals for decisions and final decisions into two different sections. In practice the agencies using the proposal for decision process apply the restrictions applicable to final decisions to their proposed decisions.

The requirement that the decision be made within a reasonable time, currently applicable to final decisions only, is applied to all decisions. A unified content requirement is also established requiring, first, that the decision consider the whole record or those portions cited as relevant by the parties and, second, that the decision include findings of fact, conclusions of law, and statements of policy for the decision where it represents an exercise of the agency's discretion. The current act has slight differences in required content for proposed and final decisions. The requirement that policy reasons be stated is new and was borrowed from the model act. Agencies will set forth policy statements in their conclusion under current practice, but there is no direct compulsion that they do so, and the absence of a requirement that they be given separate treatment tends to obscure the enunciation of policy where the agency does exercise its discretionary authority.

Subsection 81 (4) first adopts the language of sentences two and three of section 85, which require that the decision be based on the evidence and matters officially noticed and that the findings of fact must not merely parrot the statutory language. This requires that the decision reflect the basic facts found, not just the ultimate or statutory facts. The use of proposed findings of facts and conclusions of law is left to the discretion of the presiding officer. Current section 85 does not make clear whether the use of findings of fact is a matter of right which reposes in the parties, and does not mention proposed conclusions of law. Since the presiding officer in a contested case can be the agency, the use of proposed findings of fact is possible in both initial decisions made by hearing officers and final decisions made by the agency, if it presided. The current requirement that the decision include a ruling on each proposed finding of fact that would control the decision is retained, and a similar obligation is imposed to require a ruling on each proposed conclusion of law.

Subsection 81 (5) requires that initial and final decisions be delivered or mailed to the parties and the attorneys. The current language says that proposals for decision are to be served on the parties (subsection 81 (1)) and that final decisions shall be delivered or mailed to the parties and attorneys (section 85).

Subsection 81 (6) contains all the restrictions on ex parte contacts contained in section 82. It also adds the presiding officer to the list of those subject to the restrictions, since that person may not be an employee of the agency, and makes it clear that others assigned to help the decision-maker, such as clerks, are bound.

The Commission discussed one problem at length, but made no changes in the proposed act to reflect that problem. In the current hearing process, the agency is frequently a party to the case. The agency is represented as a party at the hearing by the staff of the Department of Attorney General. After the case is initially decided, the losing party may appeal to the deciding authority in the agency. At that point, the agency may again be represented by the staff of the Attorney General.

In making the final decision in the case, the deciding authority may have legal advice from the Attorney General. Indeed, an agency may rely on advice from the Attorney General or the staff of the Attorney General in deciding whether to order review. In practice a different attorney from the Attorney General's staff may be the advisor to the agency, but that person may well be the supervisor of the attorney who handled the contested case hearing.

This presents a situation in which the same office serves as both advocate and legal advisor to the decision-maker or and offers the potential for conflict and for the appearance of unfairness and improper influence. The basic evenhandedness of the system is suspect.

However, the repercussions of proposed changes in the system of providing legal assistance and advice to the agencies are considerable. The Commission has chosen only to point out the problem and suggest that it become the focus of future consideration.

## Section 82

**This section contains the provisions which relate to review by the agency of the initial decision in a contested case. The language of new subsection (1) makes the initial decision the final decision if no action is undertaken to review it, just as is the case with proposals for decision in the current act.**

**Subsection 82 (1) authorizes the agency to review an initial decision on its own initiative and makes review available to any party by appeal. The current act does not address the situation where the agency may wish to review a decision in the absence of an appeal by a party. The model act includes this power and it has been included to cover a situation which will no doubt arise only infrequently.**

**The current Michigan act contains no time limits for filing exceptions and arguments. The proposal includes a 30-day time limit for filing a notice of appeal, but permits the agency to change the limit by procedural rule.**

**Subsection 82 (2) then gives the appealing party 30 additional days to submit the content of the appeal, which it describes. The appealing party must state all exceptions to the initial decision and such written argument on the findings of fact, conclusions of law, and policy decisions as the appealing party chooses. Other parties wishing to participate in the appeal are given 30 days from the time of the submission of the appeal to submit their arguments in writing. The act now makes no provision for the other parties to participate by way of response to an appeal, nor does it set forth any time limits. The content of the appeal in the proposal is substantially the same as the current act describes, with the addition of permitting argument about the policy statements made in the initial decision. Subsection 81 (3) adds a requirement that the agency set forth all statements of policy for a decision where the agency exercised its discretion.**

**Subsection 82 (3) continues the practice established in subsection 81 (1) of the current act which limits oral argument to those cases where the agency consents. The only change is the inclusion of language allowing the agency to condition or limit oral argument, which is simply conforming the act to reflect current practice.**

Subsection 82 (4) revises the language found in current subsection 81 (3), which gives the agency the powers on review that it would have had if it had presided at the hearing, but limits the power in one way--the agency cannot hear new evidence. In situations where the agency believes that new evidence should be taken or that evidence was improperly excluded, the agency is empowered to remand the case to the presiding officer to reopen the hearing for that limited purpose and to affirm the initial decision or prepare a new or revised initial decision in light of the additional evidence. The agency then reviews the initial decision in light of the exceptions and arguments presented.

**The purpose is to assure fairness to all parties involved in the review of initial decisions. Under current practice new evidence, and, unfortunately, inadmissible evidence is submitted in the review process without adequate notice or opportunity to cross-examine or rebut. This undermines the integrity of the fact-finding process set out in the evidentiary sections of the current act. The appealing party retains the right to argue the significance of evidence in the record of the hearing and to argue that certain evidence should have been included, but the new language does not permit the party to treat the review as a second hearing rather than an appeal.**

Subsection 82 (5) requires the agency to either affirm the initial decision or make its own decision in writing or on the record. The form of the decision is currently set forth in section 81, and this subsection does not alter current practice.

Subsection 82 (6) permits the agency to change the procedures for review of initial decisions by rule, but imposes the requirement that the rule be passed as if it were a substantive rule.

## Section 83

Section 83 is similar to current section 86. The only substantial change relates to the production of transcripts.

Subsection 83 (1) conforms to subsection 86 (1) except to revise the language to accommodate the switch from proposals for decisions to initial decisions.

Subsection 83 (2) covers transcripts. The current language provides that oral proceedings at which evidence is presented shall be recorded, but that a transcript need not be prepared unless requested by a party who shall pay for the transcription of the portion requested. The new language states that a transcription shall be made unless the agency determines not to do so by procedural rule, in which case transcripts will be available only upon the request of a party. In situations where a

party requests a transcription or seeks a copy of a transcript, the agency may charge the party for the costs. If the party seeks the transcript through the Freedom of Information Act, the agency may still charge a reasonable portion of the transcription costs to the requesting party.

## Section 84

Section 84 contains substantially the same provisions for rehearings as found in section 87 of the current act. Some clarifications have been made. There seemed to be no standards by which the agency decided to order a rehearing in its discretion, nor was there a statement that the decision had to be justified. Accordingly, subsections (1) and (2) were combined in a new subsection 84(1), which now requires that there be justifiable reasons for the decision to order rehearing, based on the adequacy of the record for either final agency decision or judicial review.

In subsection 84 (2), a slight change was made in the language of current section 87 (3). The time limit imposed for the request for rehearing is now tied to the time fixed to institute judicial review as provided by underlying statute or, in the absence of a statutory time limit, within the time for judicial review set forth in the act itself.

## Section 85

This is substantially identical to the language in current section 63, which permits declaratory rulings. It is more appropriately located in the contested case section than the rulemaking section. The outcome of the request is now labelled a "declaratory order," rather than a "declaratory ruling." In addition, the statute clarifies that the refusal to issue a declaratory order is not subject to judicial review. However, the party may still bring an action for declaratory judgment in court.

## Commentary to Chapter 5. Licenses

### Subsection 91 (1)

The words "by statute or constitution" have been inserted in the first sentence. The purpose is to make clear that the requirement for a hearing may come from either source. Further, the alternative "by law" has been rejected in

order to limit the source to statutory or constitutional language. Thus, no claim could be made that the agency's rules provide an independent source for the application of the contested case provisions except where the rules explicitly state that a contested case hearing is permitted or required. No claim could be made that the provisions apply should a court find some independent basis for a hearing, such as common law or equity.

A discussion of the significance of the words "required by law" is found in the commentary to the contested case chapter. In brief, the Lawrence case, (Lawrence v Department of Corrections, 88 Mich App 167 (1979)), held that the "by law" reference in the definition of a contested case included the due process clause of the constitution, which in turn meant that a hearing required by due process was a hearing required "by law." That definition has been changed in the contested case revisions, eliminating the possibility that the contested case provisions will be invoked anytime the constitution requires some kind of notice and hearing. Only those hearings required by statute will be governed by the contested case provisions, according to the new definition of a contested case.

Most decisions adversely affecting an existing license will have due process implications since there will be a deprivation of a protected property interest. Some kind of hearing will be required by the constitution, so the only real issue is the scope of the hearing. Since most state licenses involve substantial interests, the use of the contested case procedures does not seem excessively protective when balancing the private and governmental interests.

Initial licenses do not generally involve existing property interests, but the expectation of such an interest. The due process clause does not apply to the determination of the initial license, at least to the extent that a right to hearing is created. In the absence of a statute requiring that the initial license be determined after notice and hearing, the contested case provision will not be followed in determining whether to grant or deny an initial license.

The second sentence of this subsection has been added to clarify that the agency may make applicable by procedural rule all or part of the contested case procedures. If the agency believes that its licensing decisions would be better served by greater formality, it may apply the contested case provisions when the underlying licensing statute and the constitution do not require any hearing at all. The decision to do so should be left entirely to the agency's discretion.

### Subsection 91 (2)

No changes are proposed regarding this subsection except as necessary to reflect a change in a section number created by the new language of this chapter.

### Subsection 91 (3)

This subsection adds to the licensing chapter the language required to place in statutory form the comparative hearing requirements imposed by the decision in the Huron Valley Hospital case, (Huron Valley Hospital, Inc v Department of Public Health, 92 Mich App 175 (1979)), which is known at the federal level as the Ashbacker doctrine (Ashbacker v Federal Communications Comm, 326 US 327 (1945)). Essentially, this doctrine requires that the applicants who compete for a scarce resource, such as a license, be given a fair chance to compete. Under both federal and state decisions, the agency must, where the doctrine is otherwise applicable, assure that the competitors for a limited number of licenses be permitted to partake in a single hearing where the issue is the discovery of the best applicant or applicants for the limited number of licenses. The evil sought to be remedied was the practice of granting some licenses without a hearing, leaving only a meaningless hearing for the remaining applicants.

The act does not currently provide for the comparative hearing process. Subsection 91 (3) defines the circumstances in which a comparative hearing must be provided and establishes the procedures which will apply when the comparative hearing is required. First, the agency must be acting in a situation in which there is a limit on the number of licenses available. Second, the number of applicants competing for the licenses must exceed the number of licenses available. Third, the situation must be one in which the underlying statute requires that the decision be preceded by notice and the opportunity for hearing, thereby invoking the contested case procedures. Fourth, the statute must provide competitive criteria, such as that the license must go to the applicant best suited to serve the public interest, convenience, and necessity or that it must go to the applicant with the greatest resources. In that setting the competition is truly comparative, and the hearing should be used to select the one best applicant or the order of relative merit of the competing applicants.

When the conditions are met, the agency cannot grant a license until the review of all applications is complete. It is obligated to hold a single hearing in which all competitors participate as parties, whenever the circumstances are such that a single proceeding is appropriate. The language chosen says "where the circumstances require or permit," leaving the agencies some discretion to adopt other measures if the single hearing is cumbersome or unsuited to the nature of the

subject matter. Judicial review should provide sufficient protection against abuses by agencies.

Subsection 91 (4) provides alternative methods of selection of successful applicants in situations where the underlying statute does not require that the license go to the best or better applicants. There are situations where the statutory scheme contemplates a limit on the number of licenses and describes a minimal set of qualifications for the license, but does not set forth the concept of comparative merit of the applicants. The situation may also be that an applicant is either qualified or not, comparison to others being irrelevant or inapposite.

In circumstances where the statute does not require or contemplate comparative virtues, the proposed revision offers two alternative methods of selection. The agency may promulgate procedural rules which allow the award to be given in the order of receipt of qualified applicants (first-come, first-awarded). The agency could, for example, set forth in a notice that it would grant an existing license to the first qualified applicant to submit an application for the available license.

The second alternative would be to allow the agency to promulgate procedural rules establishing that the successful applicants will be chosen randomly from the pool of qualified applicants (selected by lot). The agency in this situation could give notice that it would accept applications until a given deadline, at which time the successful applicant or applicants would be drawn by lot among the qualified applicants.

These alternatives are offered because in many settings the statutes are silent or vague as to the criteria for comparison of applications, and because in other situations there is really little to differentiate the qualified applicants. If the selection systems which are used to carry out these alternatives are open and subject to scrutiny, they are fair and probably acceptable to the competitors. Both systems are in use in various situations today and appear in statutes in several states. They would not replace the statutory comparisons required, except perhaps where the comparison revealed no differences between or among the applicants.

Subsection 91 (5) recognizes that not all applications will be deserving of this full consideration. Applications found to be inadequate on a technical basis, such as those in improper form, those not complete on their face, and those not providing the required supporting materials, can be eliminated.

Because the purpose of this doctrine is to promote fairness in the selection process among qualified applicants, the agency may eliminate those applications which do not meet the minimum requirements for the license. Only those which

would be licensed in the absence of competition are entitled to participate in the competition. Any applicants eliminated on this basis are entitled to their statutory hearing on the issue of minimum qualifications prior to the time the agency conducts the competitive review. Those found at the statutory hearing to meet the minimum requirements are then included with the applicants already designated as eligible to compete. This will introduce some element of delay, but the agencies should be able to expedite the hearings in these situations. An erroneous determination should not be permitted to eliminate a qualified applicant from competition.

Subsection 91 (6) requires the agencies which conduct licensing of competing applicants to promulgate procedural rules for the administration of the comparative or competitive review process.

#### Subsection 92 (1)

In this subsection the attempt is made to revise the law in light of the decisions in Rogers v State Board of Cosmetology, 68 Mich App 751 (1976) and Marrs v Board of Medicine, 422 Mich 688 (1985). Agency practices in response to the Rogers case vary considerably. Some go far beyond the informality contemplated in the act, while others still seem to fight the spirit of the act and the case. The attempt is made to return the focus to the original concept in the act, which was to emphasize that compliance is the main focus of regulation, and to integrate the need of the licensee for some notice and mediation with the need of the agencies to dispense with these procedures in certain circumstances.

The first sentence of the former section is unchanged except for the insertion of the word "written" before the word "notice" in the current provision. This retains the requirement of some specific indication by the agency that it intends to proceed with a formal revocation proceeding before the actual notice of hearing in that proceeding. The addition of the requirement that this indication be a written notice is to assure that the licensee has knowledge that any informal period of give and take is over and that the agency does not intend to continue in a completely informal manner. The fundamental point is that licensees become used to the contact with agency personnel and rely on negotiation and rapport to delimit the terms of their responses to the reports and findings of agency inspectors or regulators. By requiring that a written notice be given, the agency and the licensee have a clear signal that the truly informal phase of the regulatory relationship is over.

The second sentence of the former section is changed in two respects. The word "informal" is added to the language describing the method of the licensee's

opportunity and the words "or achieve" are added to the language describing the nature of the licensee's opportunity regarding compliance.

The intent is to continue the focus on the transition from informal regulation with the goal of compliance to formal revocation with the goal of protecting the public. In the great bulk of cases the agency's objective is to achieve compliance with the statute and its own rules and regulations. There is no interest in eliminating the license. The compliance opportunity should serve as a last chance to secure that compliance. Thus, the language used in the federal act which specifies "achieving" compliance is an appropriate addition to the current language of the state act allowing the licensee to demonstrate or "show" compliance. If the overriding concern of the legislative scheme is to secure a level of performance or conduct, the licensing function should be structured and administered with the idea that compliance with the regulations is the major objective.

The greatest problems under Rogers have arisen in determining the nature of the proceeding in which compliance is to be shown. The range of responses in the agencies has apparently run from trying to hide or incorporate the notice and opportunity within an existing contested case notice and hearing system to creating formal systems which in effect make the process the functional equivalent of a two-part contested case. In the latter version the opportunity to show compliance becomes a mini-hearing conducted in a quasi-judicial manner. The problems are exemplified in Weber v Orion Twp, 136 Mich App 689 (1984) and Ron's Last Chance Inc v Liquor Control Commission, 124 Mich App 179 (1983).

In the ordinary situation the steps outlined in Rogers should be followed as modified here--a written notice of the intent to proceed to revocation with the offer of a final opportunity to show or achieve compliance, an informal opportunity to show or achieve compliance, a notice of the results of the attempt to show or achieve compliance, a notice of a contested case hearing to revoke the license, and the hearing to revoke the license.

The original intent of Rogers was to retain the informality of the compliance opportunity. This proposal therefore includes language explicitly retaining the informal nature of this step. In sentence two the word "informal" is inserted. New language is then added detailing the nature of the opportunity, making it clear that it need not be a formal procedure--it need not be on the record, it need not be conducted by someone other than the inspector or investigator involved in the regulatory activity, and it need not be conducted at the agency's headquarters. The informal opportunity can be done at the licensee's premises, which may be the best location if physical conditions are part of the controversy. The use of any representative of the agency allows a flexible response, but permits the use of the employees familiar with the situation. The purposes of this step are to make it clear

to the licensee that the agency is at the final stage of informal procedure to assure compliance and to give the licensee a last opportunity to comply. The purpose is not to provide a quasi-judicial review of the agency's investigatory findings or actions or of any "probable cause" for the agency to proceed with the license revocation.

The agency is next required to provide to the licensee a written statement of its determination whether the licensee has shown or achieved compliance. Currently, the law is not clear whether the agency has an obligation to do this. This determination should not serve as the notice of hearing for a contested case, although there is no reason why it could not be incorporated as part of that notice or that the notice of hearing could not be made contemporaneously with the notice of results of the informal compliance opportunity.

An agency must begin its action under the contested case provisions within a reasonable time after the statement of non-compliance is issued. Currently, no such requirement exists. The agency and the licensee may agree in writing to extend the opportunity to show compliance to a date agreed upon by them, if the agency finds the licensee to be out of compliance, which allows the licensee further opportunity to come into compliance. When this time elapses, the agency must either issue a statement that the licensee is in compliance or proceed with the contested case hearing. This allows some balance between the need to proceed to finality and the need to achieve compliance where possible.

The determination of an agency that the licensee has failed to demonstrate compliance is made unreviewable by any court. The issues are subsumed in any hearing which follows and the licensee suffers no loss unless the agency revokes the license.

#### Subsection 92 (2) and (3)

Although the greater number of cases will involve situations where the overriding objective is to assure the continuing compliance of licensees with the regulations which structure their activities, there are situations in which the circumstances clearly dictate that compliance efforts should be dispensed with. The proposal defines those circumstances, eliminating the need for a written notice and informal opportunity to show or achieve compliance.

The first situation is where the agency determines that an emergency exists sufficient to invoke the summary suspension provisions of new section 93 (formerly included as part of section 92).

The second situation introduces a new concept, allowing the agency in its discretion to forego the compliance step where it feels the circumstances call for the

scheduling of the contested case hearing in an expedited manner. The agency may invoke this provision when it finds that the conduct of the licensee threatens the public health, safety, or welfare or presents a threat to the health, safety, and welfare of persons who receive the benefits provided by the licensee, identifying the benefits as services, housing, treatment, care, or support. Under the current provisions the agency may dispense with the compliance provisions only where it invokes the summary suspension provisions. This proposal creates a middle ground, allowing the licensee to keep the license pending the proceedings, but permitting the agency to move expeditiously where the circumstances so dictate.

The third situation allows the agency to dispense with the compliance proceedings where the conduct of the licensee constitutes a pattern of intentional and deliberate violation of the terms or conditions of the license. The federal act permits this exception where the conduct is willful. The language selected is intended to avoid the lack of certainty inherent in the concept of willfulness, replacing it with a two-part standard. The exception will apply only where the agency finds both intent and a pattern of conduct. In such situations, the licensee is unlikely to have any intention to comply.

The final situation for exception involves conduct which makes any attempt to show compliance meaningless. If the conduct is such that, if proved, it justifies revocation regardless of future correction or promises of future compliance, an opportunity to show compliance has no meaning or purpose. Marrs v Board of Medicine supports this position.

The decision to invoke any of these exceptions is made unreviewable by any court. Where the decision is made the agency must incorporate a brief statement of the factual and legal reasons therefor in its notice of hearing in the ensuing contested case. The decision of the agency to invoke the provisions of subsection 92 (2) is not reviewable. The failure to provide the compliance hearing for any other reason is reviewable.

### Section 93

Summary suspension is currently provided for in section 92 and coordinated with the license expiration provisions in subsection 91 (2). The changes made are to broaden the factors which justify the invocation of summary suspension to include concerns about the health, safety, and welfare of persons subject to the control of the licensee. This may already be implied within the terms of the old provision, but the agencies have expressed some concern with the lack of specificity of the interests of these clients separate from concerns about the general public health, safety, and welfare. The language selected for this section is the same as that in new

section 92 relating to compliance hearings--the health, safety, or welfare of any person receiving services, treatment, housing, care, or support from the licensee.

The new provisions also emphasize that the decision to suspend summarily is prosecutorial in nature, not quasi-judicial. The discretion to so proceed should not be restricted by evidentiary rules or based on a preponderance of evidence. The law probably characterizes the summary suspension decision in that manner today, but the language was inserted to underscore that view. Language eliminating the application of the substantial evidence test in subsection 106 (1)(d) to the decision to summarily suspend a license has been added.

Finally, all language relative to summary suspension has been placed in this separate section rather than spread among the two former subsections. Some clarifications were made, but no substantive changes were contemplated other than those discussed.

#### Commentary to Chapter 6. Judicial Review

The commission considered and rejected a major change in the judicial review of administrative action--to focus review in the court of appeals, rather than in the circuit courts where it now takes place. There are four major reasons advanced for moving review to the court of appeals--uniformity, expertise, speed, and resources.

The current system requires in section 103 that the review take place in the circuit court, offering a petitioner the choice of three counties--"where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham County." This results in forum-shopping, especially where the local circuit court has evidenced some willingness to favor petitioners over the state. An experienced lawyer would certainly take any review action to the forum which, in his judgment, would be more likely to be sympathetic to his client's position. Because the cases appealed to circuit court may not in turn be appealed to the next level, the potential for unequal treatment of like or similar cases is substantial.

The choice of forum also inhibits the development of expertise in the judicial review of agency action. With 55 different courts and many more circuit judges, the ability to develop a body of law with a uniform approach to administrative cases in general and to handle cases consistently under particular agencies and statutes is diminished. Many judges at the circuit level encounter administrative appeals

infrequently and are unlikely to develop sufficient familiarity with the relevant law to insure a high quality of decision-making. The staff and clerking resources available in many circuit courts are limited, further increasing the potential for inexperienced decision-making. The circuit judges are trial judges, accustomed to deciding cases and making factual determinations. Their appellate activity is limited.

The system provides three levels of appeal and puts the primary onus on the court with the greatest workload. The delay in hearing and deciding these administrative appeals tends to diminish the public's interest in the regulatory schemes involved, and frequently works to the disadvantage of petitioners who are unable to act until review is complete. Final resolution is not possible until three appeals are completed, certainly a situation which introduces inefficiency and increases costs.

By structuring the appeal system in the court of appeals, these problems might be diminished. The review of administrative decisions would be undertaken by judges who specialize in appellate review, which in itself would be an asset. A smaller group of judges would review the cases, which would enhance uniformity of decision and create greater expertise. The court of appeals has more available support in the form of clerks and staff attorneys, which would assure that the cases would receive more thorough and competent scrutiny. The court of appeals handles its caseload expeditiously. Assuming that adequate resources were made available, final disposition of administrative appeals would likely occur sooner. Placing the review function in the court which serves as the primary appellate body in the judicial system should underscore the often-misunderstood nature of the administrative tribunal as a quasi-judicial body. This would help to eliminate the notion that the administrative agency proceeding is unimportant, and to dispel the too-frequent idea that the case will be retried in the circuit court.

The circuit courts, especially the Ingham circuit, would be relieved of a substantial burden of cases that never top their list of favored subjects.

Still, the Commission was persuaded that the implications of this far-reaching proposal for change are too serious to permit its recommendation. First, keeping the review mechanism in the circuit courts will continue a familiar and convenient approach to judicial review of agency action. Second, the burden imposed on parties seeking to challenge would be increased, both in terms of actual costs and in the ease of bringing a review action. Third, the parties other than agencies may have greater confidence in the ability or willingness of a local circuit court to protect them from arbitrary administrative action. Fourth, the Commission was unwilling to impose this new load on the court of appeals without intense study of the implications for that court.

While the Commission recognizes that the current system has limitations and weaknesses, it is not convinced that the advantages of review in the court of appeals outweigh these negative aspects. Further study and debate are in order before the Commission would be willing to consider the change.

#### Subsection 101 (1)

The essence of this section is found in current section 64 of the act. It has been moved in order to locate all authority for judicial review in the same chapter. The circuit court venue options are retained in regard to declaratory judgments. The only other changes are technical, reflecting that this is now a subsection and referring back to the section which authorizes declaratory orders (formerly declaratory "rulings") by agencies, since this subsection will no longer immediately follow the declaratory order provision. The subsection retains the sometimes unrecognized distinction regarding the exhaustion of the agency process for declaratory orders. That requirement only applies as to a contest of the applicability of a rule. A plaintiff may challenge the validity of a rule without prior resort to the agency. Since the word rule is used, this subsection applies to any type of rule--interpretive, procedural, or substantive--although the circumstances where a challenge to an interpretive or procedural rule is appropriate for review will be unusual.

#### Subsection 101 (2)

This subsection introduces a new approach to judicial review in the administrative procedures act, which currently provides for judicial review only of agency rules (section 64) and of decisions in contested cases. By reference to the definition of the term "agency action," which is in subdivision 2 (d), the concept of judicial review is broadened to cover all types of agency action and inaction, including the failure of an agency to act. The purpose is two-fold: (1) to make the review of all types of agency action available and (2) to make the mechanism for judicial review more uniform. Currently, review not provided by statute is not available other than for declaratory judgments regarding the validity or applicability of rules or for contested cases. This would assure judicial review, for instance, of an agency's denial of an initial application for a license, even if such review is not provided, in an underlying statute, and even though the decision need not be made after an evidentiary hearing under the contested case provisions. While this will provide for some appeals in situations in which judicial review is not currently available, the number of cases will not be substantial. The fairness of providing appellate review of these previously unreviewable agency actions far

outweighs the imposition of a relatively small increase in the caseload of the circuit courts.

There may be circumstances where certain refusals to act or inaction should not be reviewed by courts. These can best be handled by the application of such judicial doctrines as commitment to agency discretion, ripeness, and standing, as they are in federal law.

## Section 102

This section continues the amendments necessary to carry out the twin goals of simplifying the process of judicial review and making it more broadly available. The current language restricting this section to contested cases is eliminated, and in its stead language making review of all agency action available is inserted. The system provided still recognizes that an underlying statute may control the method of review (statutory review proceeding) and court, but allows the petition for review to be the method where there is no statutory method or that method is inadequate for some reason. Thus, the petition for review becomes the standard method of review in the absence or inadequacy of a specified statutory method.

## Subsection 103 (1)

Section 103 is revised to reflect the increased flexibility of the petition for review. Petitions for review will still be filed in one of the three circuit court venue options--the petitioner's principal place of business, the petitioner's place of residence, or Ingham county--as they are now. Because underlying statutes still control, some review of administrative action is currently provided in the court of appeals, while other action is reviewable in the circuit court by statute.

## Subsection 103 (2)

No changes are made. The act currently includes subsection 103 (2), designating the probate court as the appropriate reviewing body for adoption decisions made by the department of social services. That language is retained, since the probate court has expertise in this area.

### **Subsection 103 (3)**

**This section describes the contents of the petition for review. No change is made in the language of subdivision (3)(a). Minor changes were made in subdivisions (3)(b) and (c) in light of the expanded use of this method of review. The purposes of the changes are to enhance the statement of facts and to require better definition of the factual and legal issues the petitioner wishes to present.**

### **Subsection 103 (4)**

**This subsection is changed to replace the contested case language with agency action language. Since some agency action is denial or failure to act, there may be no document reflecting the action or inaction, or that document may be entirely conclusory. The revision requires that an affidavit describing the agency action be included, if there is no suitable order, license, or rule to attach as an exhibit.**

### **Subsection 104 (1)**

**This subsection is altered to accommodate the change in the use of the petition for all types of agency action. The word "action" replaces the words "decision or order."**

**The greatest difficulty lies in setting the time limit for challenges to agency failure to act, which is a part of the definition of agency action. The operative "trigger" selected was the point at which the duty to act arises. This will present some problems, since the circumstances in which the duty arises are wide-ranging and the point when the duty actually becomes owing to the petitioner will be elusive. This must be left for resolution by the courts on a case by case basis. The time limit selected was one year, since the petitioner will not be as sure of the circumstances or outcome of the relationship with the agency. A time limit for review set at 180 days will be sufficient for a petitioner to realize that positive agency action is not forthcoming, but will still protect the agency from surprise petitions too far after the events.**

### **Subsection 104 (2)**

**This subsection also is altered to fit the new approach to judicial review. In it, the transmittal of the agency record in "informal" agency proceedings is described. In effect, the agency must transmit its file in those actions which are not conducted as a hearing on the record.**

### Subsection 104 (3)

The language in this subsection has been amended to allow the taking of proofs in the reviewing court in those situations where agency failure to act is being challenged. In that setting, the record in the agency may not be sufficient to establish the duty to act or that a reviewable act might result if the agency had acted as required.

### Section 105

In the current act, this section applies only to contested cases. The section retains that limitation, restricting the courts ability to order the taking of evidence to those situations governed by the provisions of chapter 4.

### Subsection 106 (1)

The provisions regarding the scope of review, called grounds for reversal in the heading, are changed. First, the review provision is made applicable to all forms of agency action, not just contested cases. Second, subdivision (1)(b) is amended to make clear that action is unlawful if short of a right established by statute, which will apply when an agency fails to act. Third, the order of the six items is changed--former subdivision (1)(d) is moved to the end of the list, and subdivisions (1)(e) and (f) are redesignated as subdivisions (1)(d) and (e), respectively. Fourth, former subdivision (1)(d), now subdivision (1)(f), the substantial evidence test, is limited to application only in review of contested cases.

Michigan law has never clarified the state's position on the so-called "legal residuum" rule. The concept in its simplest form is that no quasi-judicial administrative decision can rest on a record entirely devoid of evidence which would be admitted in a court applying the rules of evidence. Not all courts have subscribed to this view, allowing decisions to be sustained where the agency finds the evidence to be credible and reliable even though it is inadmissible in the technical sense. Other courts require that there be some legally admissible evidence in the record, not enough to sustain the burden of proof in itself, but sufficient to give credence to the remaining evidence in the record and therefore adequate to sustain the factual findings of the agency under the substantial evidence standard of review.

Because the phrase "competent, material and substantial evidence on the whole record" appears in the current language, it is arguable that the requirement in Michigan is that an agency must sustain every aspect of its burden of proof with

legally-admissible evidence, even though it is authorized to admit evidence into the record that does not meet the requirements of the rules of evidence. Language is provided to make it clear that the type of evidence necessary to sustain the agency's factual findings under the substantial evidence test need not meet the standards of the rules of evidence.

The subsection first requires that the court apply the rules of evidence as set forth in the current language of section 75 of the act, which authorizes the agency to "admit and give probative effect to the type of evidence commonly relied upon by reasonably prudent men in the conduct of their affairs." The purpose of the new language is to give effect to the provisions of section 75, so that the nature of the evidentiary requirement does not change between the administrative forum and the judicial forum.

The subsection also contains language making it clear that the agency's determination of the preponderance of evidence can include the type of evidence provided for in section 75. The purpose is to protect against reversals where the reviewing court finds that the record, eliminating the technically-inadmissible evidence, does not contain sufficient evidence to sustain a finding that the burden of proof was met by "competent, material and substantial" evidence. The court's function is not to make its own findings of fact based on the record, but to determine if the agency's findings regarding the preponderance of evidence are reasonable in light of the record. The court should review those findings on the terms allowed by section 75 of the act.

The court is still free to determine how much inadmissible evidence it is willing to tolerate in a particular case, based on its reading of the whole record. Where it finds that the evidence cannot reasonably sustain the agency's findings, it may reverse. If the court chooses, as have some other courts, to attempt a definition of the "legal residuum," it is free to do so, so long as it does not go so far as to require that the residuum required is the preponderance.

#### Subsection 106 (2)

This section is amended to be consistent with the other sections regarding the review of all agency action. A sentence has been added to the current language of this subsection limiting the court's powers on review to those provided in the underlying statute or statutes on which the agency's action was based. The purpose here is to remind the judiciary that the subject matter is controlled by the legislative scheme. The ordinary constraints of statutory construction should apply.

# THE PROPOSED ADMINISTRATIVE PROCEDURES ACT

## Summary of Revisions

The Michigan Law Revision Commission sought to review and, where necessary, revise the Michigan Administrative Procedures Act. This report is based on the status of the Act as of December 1, 1989; any changes subsequent to that date were not considered. The proposal which follows is the result of that effort.

The aims which governed this undertaking were to improve, clarify, simplify, and restructure. Where necessary procedure was lacking, it has been supplied. The federal and model administrative procedures acts have been relied upon where they offered a viable solution to a problem.

Consideration has been given to practical problems, judicial decisions, and suggestions from those who use the act on a daily basis.

The act has become excessively lengthy and filled with unnecessary clutter. A major objective was to eliminate the provisions which do not add to the procedures essential to proper administrative function.

This summary highlights the major changes introduced. The details of all changes can be found in the commentary which accompanies the proposed statute.

The basic structure of the act is unchanged, but substantial remodeling of that structure has occurred. Five of the eight chapters which existed in the act at the time the study began have been retained--General Provisions, Procedures in Rulemaking, Procedures in Contested Cases, Licenses, and Judicial Review. Three have been eliminated--Guidelines, Miscellaneous Provisions, and the untitled chapter 8, which has been eliminated by operation of a sunset provision. A new chapter has been added--Register and Administrative Code.

### Chapter 1. General Provisions

Chapter 1 now contains all the general and miscellaneous material, the definitions, the provisions describing the interpretation and construction of the act and legal effect of rules, and the exemptions from coverage of the act. It consolidates provisions now scattered in chapters 1, 2, 3, and 7.

The definitions have been expanded to include a broader range of agency activity, such as agency action and agency proceedings. A major change is the inclusion of definitions of different types of rules, to which different rulemaking procedures are ascribed in chapter 3. This definitional framework provides better insight into the nature of agency activity and offers a frame of reference for the application of specific procedures and judicial review requirements.

The definition of a contested case as one which is called for when the law requires a hearing has been amended to mandate a contested case proceeding only when required by underlying statute.

## Chapter 2. Register and Administrative Code

This chapter now contains nearly all references to the Michigan Register and the Michigan Administrative Code. The concept of guidelines has been replaced by the concept of interpretive rules and the coverage of interpretive rules has been placed in the definitions of chapter 1 and the procedures set forth in chapter 3.

The material in this chapter was located in chapters 1 and 3 of the current act. No major substantive changes have been made.

## Chapter 3. Procedures in Rulemaking

This chapter contains both structural and substantive changes.

Provisions regarding interpretations of rules have been moved to chapter 1, material regarding the publication of rules has been moved to chapter 2, provisions dealing with declaratory rulings and declaratory judgments have been moved to chapters 4 and 6, provisions requiring or describing regulatory impact statements and small business impact statements have been eliminated, and provisions which are fundamentally legislative instructions to legislative staff have been deleted as unnecessary.

In an attempt to encourage the development of rules by agencies and to enhance participation in rulemaking by regulated parties and the public in the development of agency policy, changes are made in the procedures for adoption of certain types of rules. The underlying concerns are the failure of agencies to adopt rules in general and the use by agencies of informal materials as if they were rules.

Procedures for the adoption of each of the four types of rules are provided. The legislative approval role is retained for all substantive rules and eliminated for

the other types. Procedural and interpretive rules are required to undergo the notice and hearing process and to be included in the Michigan Administrative Code. Housekeeping rules require only adoption by the agency. The Joint Committee on Administrative Rules is involved in the determination that a rule is properly defined as procedural or interpretive.

The notice and hearing sections have been restructured for topical consistency. The hearing requirement is clarified to assure that an opportunity for oral presentation is included in the hearing phase of rulemaking.

The proposal introduces a change in the voting structure of the Joint Committee on Administrative Rules. By requiring the appointment of an odd number of members from each house, the specter of rules being defeated where one house unanimously supports and the other splits evenly is eliminated. The possibility of a tie vote of one house in the committee is reduced.

The emergency rulemaking power is made explicitly available in situations where the emergency is a threat to the financial resources entrusted to an agency. The act now mentions only public health, safety, and welfare. The effective time for emergency rules remains unchanged, but a provision allowing emergency procedural rules for a period of 120 days has been added.

#### Chapter 4. Procedures in Contested Cases

This chapter has been substantially restructured to place the sections in the same order as the events which occur in contested case hearings.

The hearings are now required to be open in the absence of a request by a party that they be closed in the interests of privacy. The agency must find that the privacy interest outweighs the public interest in openness to grant the request.

The notice provisions have been expanded to include those situations in which parties initiate the proceedings. A detailed provision on the appropriate service of notice is introduced, allowing either personal service or service by certified mail.

Agencies are given the authority to proceed by default in the absence of a properly served party, if they establish appropriate procedural rules.

Additional protection of hearing officer independence is offered by a new provision requiring the separation of functions of investigative and prosecutorial personnel from hearing officers. The definition of disqualification is expanded.

The revision introduces language covering intervention in administrative proceedings. The current act contains no such provisions, despite the increasing frequency with which intervention is sought and granted.

The new version defines the burden of proof, the burden of going forward, and the use of the preponderance of evidence test. The revision also describes the extent to which evidence not technically admissible under the Michigan rules of evidence may be accepted in administrative hearings and used to meet the preponderance of evidence.

The decision-making structure in contested cases is revamped, requiring that a presiding officer make an initial decision in every case unless the agency itself presides. Proposals for decision are eliminated; the initial decision becomes the final decision in the absence of review. The only decision required if the agency head or deciding authority presides is the final decision. The agency is empowered to review a decision even if no party appeals.

The content of the decisions is also changed. The agency must now include statements of all exercises of discretion and policy determination.

Time limits for agency review of decisions in contested cases are introduced. The agency is prohibited from taking evidence on review; it must remand to the presiding officer if it finds the record inadequate or that certain evidence should not have been excluded.

## Chapter 5. Licenses

The licensing chapter contains a number of substantive changes. Provision is made for the comparative hearing situation, known federally as the Ashbacker doctrine. The act currently makes no provision for comparative hearings. The proposal allows for such hearings and offers alternatives where there is a limit on the number of licenses, but the basis of licensing is not the comparison of the applicants' relative qualifications.

The act clarifies the requirements for the opportunity to show compliance, which has become a matter of confusion and complication among the agencies. The informal nature of this process is reestablished. The goal of compliance, which is the normal objective in the routine case, is retained, but situations where the attempt to achieve or show current compliance would be against the public interest are exempted from the provision.

The grounds for emergency license revocation proceedings are expanded to include situations where the threat is to the health, safety, or welfare of those who are under the control of the licensees who are subject to regulation.

## Chapter 6. Judicial Review

The declaratory judgment section, currently found in the rulemaking chapter, is relocated to this section.

The availability of judicial review is increased and simplified by making all final administrative action reviewable by petition unless otherwise provided by law. Since agency action is broadly defined in the act, one form of review is now available in most settings.

The scope of review of the reviewing courts is somewhat restricted by additional language describing the effect of technically inadmissible evidence on the preponderance of evidence requirement and on the substantial evidence test.

## Conversion Table I

This table is a guide to the location of the provisions of the proposed new version of the Michigan Administrative Procedures Act as they appeared in the former act. An asterisk (\*) indicates that minor changes in the language have been made, primarily those which are necessary for style or to make the passage consistent with other passages. A double asterisk (\*\*) indicates that a substantive change has been made; a triple hyphen (---) indicates that the provision is new or contains new substance.

The table cannot be exact, since the reorganization has on occasion split a former passage into parts of several new passages, and the new version contains sections which combine language from several different old sections. The contested case chapter is substantially restructured, so the cross-references in that chapter are the most difficult to follow.

<u>New Michigan APA Section</u>	<u>Current Michigan APA Section</u>
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### Chapter 1. General Provisions

§1	§1*
§2 (a)	---
§2 (b)	§3 (1)
§2 (c)	§3 (2)
§2 (d)	---
§2 (e)	---
§2 (f)	---
§2 (g)	§3 (4)
§2 (h)	§3 (3)*,**
§2 (i)	§3 (5)*
§2 (j)	---
§2 (k)	---
§2 (l)	§5 (1)**
§2 (m)	§5 (2)*
§2 (n)	---
§2 (o)	§5 (3)
§2 (p)	---
§2 (q)	§5 (4)**
§2 (r)	§5 (5)**

Conversion Table I  
Chapter 1 (Continued)

<u>New Michigan APA Section</u>	<u>Current Michigan APA Section</u>
§2 (s)	---
§2 (t)	§5 (6)
§2 (u)	§5 (7)
§2 (v)	---
§2 (w)	§7*,**
§2 (x)	---
§2 (y)	---
§2 (z)	---
§3	§11*
§4 (1)	§31 (1)*
§4 (2)	§31 (2)
§4 (3)	§31 (3)
§4 (4)	§31 (4)
§4 (5)	§31 (5)
§5 (1)	§32 (1)
§5 (2)	§32 (2)*
§5 (3)	§32 (3)
§5 (4)	§32 (4)**
§5 (5)	§61 (1)
§5 (6)	§61 (2)
§5 (7)	§61 (3)
§6	§111*
§7	§112*
§8	§113*
§9	§114*
§10 (1)	§115*
§10 (2)	§115*

## Conversion Table I

### Chapter 2. Register and Administrative Code

<u>New Michigan APA Section</u>	<u>Current Michigan APA Section</u>
§21 (1)	§8 (1)*, **
§21 (2)	§8 (2)
§21 (3)	§8 (3)
§21 (4)	§8 (5)*
§21 (5)	§8 (4)*
§22 (1)	§55 (1)
§22 (2)	§55 (2)
§23 (1)	§56 (1)
§23 (2)	§56 (2)
§24 (1)	§57 (1)
§24 (2)	§57 (2)*; §58*
§25 (1)	§59 (1)
§25 (2)	§59 (2)**
§25 (3)	§59 (3)

### Chapter 3. Procedures for Rulemaking

§31	---; 33(1)**
§32 (1)	§33 (2)**
§32 (2)	§43 (1)*
§32 (3)	§43 (2)*
§32 (4)	§33 (3)*
§32 (5)	---
§33 (1)	---, §25
§33 (2)	§43 (1)*
§33 (3)	§43 (2)*
§33 (4)	---
§34	§35**

## Conversion Table I

### Chapter 3 (Continued)

<u>New Michigan APA Section</u>	<u>Current Michigan APA Section</u>
§35	§36*
§36	§38*
§41 (1)	§41 (1)**
§41 (2)	§42 (1)
§41 (3)	§42 (2)*
§41 (4)	§41 (2)**
§41 (5)	---
§42 (1)	§41 (3)**
§42 (2)	§41 (1)**; §41 (4)**
§43 (1)	§43 (1)*
§43 (2)	§43 (2)*
§44	§44
§45 (1)	§45 (1)*
§45 (2)	§45 (2)**
§45 (3)	§45 (6)*
§45 (4)	§45 (8)*
§45 (5)	§45 (9)*
§45 (6)	§45 (10)*
§45 (7)	§45 (11)*
§45 (8)	§45 (12)*
§46 (1)	§46 (1)*
§46 (2)	§46 (2)
§46 (3)	§46 (3)*
§47 (1)	§47 (1)*
§47 (2)	§47 (2)
§48 (1)	§48 (1)*, **
§48 (2)	---

Conversion Table I

Chapter 3 (Continued)

<u>New Michigan APA Section</u>	<u>Current Michigan APA Section</u>
§48 (3)	§48 (2)
§48 (4)	§48 (3)
§49 (1)	§49 (1)*
§49 (2)	§49 (2)
<b>§50</b>	§50*
<b>§51</b>	§51*
<b>§52</b>	§52*

Chapter 4. Procedures in Contested Cases

§71 (1)	§71 (1)**
§71 (2)	§71 (2)**
§71 (3)	---
§71 (4)	§71 (3)**
§71 (5)	§72 (2)**
§71 (6)	§72 (1)**
§71 (7)	---
§71 (8)	---
§72 (1)	§79
§72 (2)	---
§72 (3)	§79**
§72 (4)	§80 (1)*, **; §78 (2)*
§72 (5)	--- (See Model State APA)
§72 (6), (7)	§80 (2)-(6)*, **
<b>§73</b>	<b>§73</b>
§74 (1)	§74 (1)
§74 (2)	§74 (1)**
§74 (3)	§78 (1)*
§74 (4)	§74 (2)**

## Conversion Table I

### Chapter 4 (Continued)

<u>New Michigan APA Section</u>	<u>Current Michigan APA Section</u>
§75 (1)(a)	---
§75 (1)(b)	---; §85**
§75 (2)	§72 (3)*; §72 (4)*
§75 (3)	§75**
§75 (4)	§74 (1)
§75 (5)	§72 (4)
§75 (6)	§74 (2)
§75 (7)	§76*
§75 (8)	§77
§76	§75a*,**
§81 (1)	§81 (1)**
§81 (2)	§81 (1)**,(2)**; (3)*
§81 (3)	§81 (2)*; §85**; ---
§81 (4)	§85**
§81 (5)	§85*
§81 (6)	§82*,**
§82 (1)	§81 (1)**; ---
§82 (2)	§81 (1)**; ---
§82 (3)	§81 (1)*
§82 (4)	§81 (3)*; ---
§82 (5)	§81 (3)*,**, §85**
§82 (6)	---
§83 (1)	§86 (1)*
§83 (2)	§86 (2)*,**
§84 (1)	§87 (1)**; §87(2)
§84 (2)	§87 (3)**
§85	§63**

## Conversion Table I

### Chapter 5. Licenses

<u>New Michigan APA Section</u>	<u>Current Michigan APA Section</u>
§91 (1)	§91 (1)**
§91 (2)	§91 (2)
§91 (3)	---
§91 (4)	---
§91 (5)	---
§91 (6)	---
§92 (1)	§92**
§92 (2)	---
§92 (3)	---
§93	§92**

### Chapter 6. Judicial Review

§101 (1)	§64*,**
§101 (2)	§101**
§102	§102**
§103 (1)	§103 (1)*
§103 (2)	§103 (2)
§103 (3)	§103 (3)*,**
§103 (4)	§103 (4)*,**
§104 (1)	§104 (1)*,**
§104 (2)	§104 (2)*,**
§104 (3)	§104 (3)**
§105	§105**
§106 (1)	§106 (1)*,**
§106 (2)	§106 (2)*,**

# COMPARATIVE ANALYSIS I

**The proposed Administrative Procedures Act compared to the current act**

*(This comparative analysis is included to assist in ascertaining the proposed changes to the current act. If the language in the comparative analysis varies from the language of the proposed text, the language in the proposed text controls.)*

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p><b>Chapter 1. General Provisions</b></p> <p><b>Sec. 1.</b> This act shall be known and may be cited as the "administrative procedures act of <u>1990</u>."</p> <p><b>Sec. 2.</b> For the purposes of this act:</p> <p>(a) "Adjudication" means the agency process for the formulation of an order.</p> <p>(b) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.</p> <p>(c) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority, or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branches of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.</p> <p>(d) "Agency action" means the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or the failure to act.</p> <p>(e) "Agency proceeding" means rulemaking, adjudication, or licensing, including ratemaking and contested cases.</p> <p>(f) "Approval of a rule" means the actions described in chapter 3 regarding the action of the legislature required to approve substantive rules through the committee or through concurrent resolution.</p> <p>(g) "Committee" means the joint committee on administrative rules.</p> <p>(h) "Contested case" means <u>an adjudication</u>, including ratemaking, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by <u>statute</u> to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal is taken to another agency, the hearing and</p>	<p><b>Sec. 1.</b> This act shall be known and may be cited as the "administrative procedures act of <u>1969</u>".</p> <p><b>NEW</b></p> <p><b>NEW</b></p> <p><b>Sec. 3. (1)</b> "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.</p> <p>(2) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.</p> <p><b>NEW</b></p> <p><b>NEW</b></p> <p><b>NEW</b></p> <p>(4) "Committee" means the joint committee on administrative rules.</p> <p>(3) "Contested case" means <u>a proceeding</u>, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by <u>law</u> to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency,</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>the appeal are deemed to be a continuous <u>adjudication</u> as though before a single agency.</p> <p>(i) "Court" means the circuit court <u>unless otherwise indicated</u>.</p> <p>(j) "Housekeeping rule" means a rule which describes the internal organization, operation, management, and practices of an agency, including instructions or guidelines to employees regarding the scope and exercise of their functions.</p> <p>(k) "Interpretive rule" means a rule which expresses the formal opinion of an agency of the meaning of a statute or of another rule, which meaning the agency intends to follow in the execution or administration of its designated functions.</p> <p>(l) "License" <u>means</u> the whole or part of an agency permit, certificate, approval, registration, charter, franchise, or similar form of permission required by law, but does not include a license solely for revenue purposes, or a license or registration issued under Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws.</p> <p>(m) "Licensing" <u>means</u> agency <u>process</u> involving the grant, denial, renewal, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license.</p> <p>(n) "Michigan administrative code" means the compilation of rules required to be kept pursuant to Act No. 193 of the Public Acts of 1970, being sections 8.41 to 8.48 of the Michigan Compiled Laws.</p> <p>(o) "Michigan register" means the publication described in section 21.</p> <p>(p) "Order" means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking, including licensing and ratemaking. This definition shall apply regardless of the denomination or characterization of the action by the agency.</p> <p>(q) "Party" means a person or agency named, admitted, or properly seeking and entitled of right to be admitted, as a party in a contested case, <u>including a person or agency admitted for a limited purpose or under limited conditions</u>.</p>	<p>the hearing and the appeal are deemed to be a continuous <u>proceeding</u> as though before a single agency.</p> <p>(5) "Court" means the circuit court.</p> <p>NEW</p> <p>NEW</p> <p>Sec. 5. (1) "License" <u>includes</u> the whole or part of an agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but does not include a license <u>required</u> solely for revenue purposes, or a license or registration issued under Act No. 300 of the Public Acts of 1949, <u>as amended</u>, being sections 257.1 to 257.923 of the Michigan Compiled Laws.</p> <p>(2) "Licensing" <u>includes</u> agency <u>activity</u> involving the grant, denial, renewal, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license.</p> <p>NEW</p> <p>(3) "Michigan register" means the publication described in section 8.</p> <p>NEW</p> <p>(4) "Party" means a person or agency named, admitted, or properly seeking and entitled of right to be admitted, as a party in a contested case.</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>(r) "Person" means an individual, partnership, association, corporation, governmental subdivision, or public or private organization or authority of any kind other than the agency engaged in the particular proceeding.</p> <p>(s) "Procedural rule" means a rule which establishes the methods by which the agency will execute its designated functions in regard to the contact it has with persons and describes the procedures, practices, forms, applications, guidelines, instructions, and other requirements which persons must follow in the execution or administration of its designated functions.</p> <p>(t) "Processing of a rule" means the action required or authorized by this act regarding a rule which is to be promulgated, including the rule's adoption, and ending with the rule's promulgation.</p> <p>(u) "Promulgation of a rule" means that step in the processing of a rule consisting of the filing of a rule with the secretary of state.</p> <p>(v) "Relief" means (i) a grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (ii) the recognition of a claim, right, immunity, privilege, exemption, or exception; or (iii) the taking of other action on the application or petition of, and beneficial to, a person.</p> <p>(w) "Rule" means an agency regulation, statement, standard, policy, guideline, ruling, or instruction of general applicability, which implements or applies law enforced or administered by the agency; interprets a statute or rule of the agency; prescribes the procedure, practice, or external requirements of the agency; or describes the internal organization, operation, management, and practices of the agency. A rule includes the amendment, suspension, or rescission thereof, but does not include the following:</p> <p>(i) A resolution or order of the state administrative board.</p> <p>(ii) A formal opinion of the attorney general or any embodiment of legal advice provided by the attorney general to an agency or its employees.</p> <p>(iii) A rule or order establishing or fixing rates or tariffs.</p> <p>(iv) A rule or order pertaining to game and fish and promulgated under Act No. 230 of the Public Acts of 1925, being sections 300.1 to 300.5 of the Michigan</p>	<p>(5) "Person" means an individual, partnership, association, corporation, governmental subdivision, or public or private organization of any kind other than the agency engaged in the particular processing of a rule, declaratory ruling, or contested case.</p> <p>NEW</p> <p>(6) "Processing of a rule" means the action required or authorized by this act regarding a rule which is to be promulgated, including the rule's adoption, and ending with the rule's promulgation.</p> <p>(7) "Promulgation of a rule" means that step in the processing of a rule consisting of the filing of a rule with the secretary of state.</p> <p>NEW</p> <p>Sec. 7. "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission thereof, but does not include the following:</p> <p>(a) A resolution or order of the state administrative board.</p> <p>(b) A formal opinion of the attorney general.</p> <p>(c) A rule or order establishing or fixing rates or tariffs.</p> <p>(d) A rule or order pertaining to game and fish and promulgated under Act No. 230 of the Public Acts of 1925, as amended, being sections 300.1 to 300.5 of</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>Compiled Laws; the Michigan sportsmen fishing law, Act No. 165 of the Public Acts of 1929, being sections 301.1 to 306.3 of the Michigan Compiled Laws; and the game law of 1929, Act No. 286 of the Public Acts of 1929, being sections 311.1 to 315.5 of the Michigan Compiled Laws.</p> <p>(v) A rule relating to the use of streets or highways the substance of which is indicated to the public by means of signs or signals.</p> <p>(vi) A determination, decision, or order in a contested case.</p> <p>(vii) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication <u>which</u> does not affect the rights of, or procedures and practices available to, the public.</p> <p>(viii) <u>Any informal material not included within the definitions of substantive, interpretive, procedural, or housekeeping rules.</u></p> <p>(ix) A declaratory <u>order</u> or other disposition of a particular matter as applied to a specific set of facts involved.</p> <p>(x) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.</p> <p>(xi) Unless another statute requires a rule to be promulgated under this act, a rule or policy <u>which</u> only concerns the inmates of a state correctional facility or <u>those committed to the custody of the state corrections commission</u> and does not directly affect the public.</p> <p>(xii) All of the following, after final approval by the certificate of need commission or the statewide health coordinating council under section 22215 or 22217 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.22215 and 333.22217 of the Michigan Compiled Laws:</p> <p>(A) The designation, deletion, or revision of covered medical equipment and covered clinical services.</p> <p>(B) Certificate of need review standards.</p>	<p>the Michigan Compiled Laws, the Michigan sportsmen fishing law, Act No. 165 of the Public Acts of 1929, <u>as amended</u>, being sections 301.1 to 306.3 of the Michigan Compiled Laws, and the game law of 1929, Act No. 286 of the Public Acts of 1929, <u>as amended</u>, being sections 311.1 to 315.5 of the Michigan Compiled Laws.</p> <p>(e) A rule relating to the use of streets or highways, the substance of which is indicated to the public by means of signs or signals.</p> <p>(f) A determination, decision, or order in a contested case.</p> <p>(g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication <u>that</u> does not affect the rights of, or procedures and practices available to, the public.</p> <p>(h) <u>A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.</u></p> <p>(i) A declaratory <u>ruling</u> or other disposition of a particular matter as applied to a specific set of facts involved.</p> <p>(j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.</p> <p>(k) Unless another statute requires a rule to be promulgated under this act, a rule or policy <u>that</u> only concerns the inmates of a state correctional facility and does not directly affect the public. <u>As used in this subdivision, "state correctional facility" means a facility or institution that houses an inmate population under the jurisdiction of the department of corrections.</u></p> <p>(l) All of the following, after final approval by the certificate of need commission or the statewide health coordinating council under section 22215 or 22217 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.22215 and 333.22217 of the Michigan Compiled Laws:</p> <p>(i) The designation, deletion, or revision of covered medical equipment and covered clinical services.</p> <p>(ii) Certificate of need review standards.</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>(C) Data reporting requirements and criteria for determining health facility viability.</p> <p>(D) Standards used by the department of public health in designating a regional certificate of need review agency.</p> <p>(E) The modification of the 100 licensed bed limitation for short-term nursing care programs set forth in section 22210 of Act No. 368 of the Public Acts of 1978, being section 333.22210 of the Michigan Compiled Laws.</p> <p>(x) "Rulemaking" means the agency process for formulating, amending, or rescinding a rule.</p> <p>(y) "Sanction" means (i) the prohibition, requirement, limitation, or other condition affecting the freedom of a person; (ii) the withholding of relief; (iii) the imposition of penalty or fine; (iv) the destruction, taking, seizure, or withholding of property; (v) the assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (vi) the requirement, revocation, or suspension of a license; or (vii) the taking of other compulsive or restrictive action.</p> <p>(z) "Substantive rule" means a rule which establishes a standard of conduct, which implements law enforced by or administered by the agency, and which affects private rights and obligations.</p> <p>Sec. 3. This act shall not be construed to repeal or <u>prohibit</u> additional requirements imposed by <u>statute</u>.</p> <p>Sec. 4. (1) Rules which became effective before July 1, <u>1990</u>, continue in effect until amended or rescinded.</p> <p>(2) When a law authorizing or directing an agency to promulgate rules is repealed and substantially the same rulemaking power or duty is vested in the same or a successor agency by a new provision of law or the function of the agency to which the rules are related is transferred to another agency, by law or executive order, the existing rules of the original agency relating thereto continue in effect until amended or rescinded, and the agency or successor agency may rescind any rule relating to the function. When a law creating an agency or authorizing or directing it to promulgate rules is repealed or the agency is abolished and substantially the same rulemaking power</p>	<p>(iii) Data reporting requirements and criteria for determining health facility viability.</p> <p>(iv) Standards used by the department of public health in designating a regional certificate of need review agency.</p> <p>(v) The modification of the 100 licensed bed limitation for short-term nursing care programs set forth in section 22210 of Act No. 368 of the Public Acts of 1978, being section 333.22210 of the Michigan Compiled Laws.</p> <p>NEW</p> <p>NEW</p> <p>NEW</p> <p>Sec. 11. This act shall not be construed to repeal additional requirements imposed by <u>law</u>.</p> <p>Sec. 31. (1) Rules which became effective before July 1, <u>1970</u> continue in effect until amended or rescinded.</p> <p>(2) When a law authorizing or directing an agency to promulgate rules is repealed and substantially the same rule-making power or duty is vested in the same or a successor agency by a new provision of law or the function of the agency to which the rules are related is transferred to another agency, by law or executive order, the existing rules of the original agency relating thereto continue in effect until amended or rescinded, and the agency or successor agency may rescind any rule relating to the function. When a law creating an agency or authorizing or directing it to promulgate rules is repealed or the agency is abolished and substantially the same rule-</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>or duty is not vested in the same or a successor agency by a new provision of law and the function of the agency to which the rules are related is not transferred to another agency, the existing applicable rules of the original agency are automatically rescinded as of the effective date of the repeal of such law or the abolition of the agency.</p> <p>(3) The rescission of a rule does not revive a rule which was previously rescinded.</p> <p>(4) The amendment or rescission of a valid rule does not defeat or impair a right accrued, or affect a penalty incurred, under the rule.</p> <p>(5) A rule may be amended or rescinded by another rule which constitutes the whole or a part of a filing of rules or as a result of an act of the legislature.</p> <p>Sec. 5. (1) Definitions of words and phrases and rules of construction prescribed in any statute, and which are made applicable to all statutes of this state, also apply to rules unless clearly indicated to the contrary.</p> <p>(2) A rule or exception to a rule shall not <u>unlawfully</u> discriminate in favor of or against any person, and a person affected by a rule is entitled to the same benefits as any other person under the same or similar circumstances.</p> <p>(3) The violation of a rule is a crime when so provided by statute. A rule shall not make an act or omission to act a crime or prescribe a criminal penalty for violation of a rule.</p> <p>(4) An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard, or regulation which has been adopted by an agency <u>of the state or</u> of the United States or by a nationally recognized organization or association. The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule, it shall amend the rule or promulgate a new rule therefor. The agency shall have available copies of the adopted matter for inspection and distribution to the public at cost. The rules shall state where copies of the adopted matter are available from the agency and from the agency of the United States or the national organization or association and the cost thereof as of the time the rule is</p>	<p>making power or duty is not vested in the same or a successor agency by a new provision of law and the function of the agency to which the rules are related is not transferred to another agency, the existing applicable rules of the original agency are automatically rescinded as of the effective date of the repeal of such law or the abolition of the agency.</p> <p>(3) The rescission of a rule does not revive a rule which was previously rescinded.</p> <p>(4) The amendment or rescission of a valid rule does not defeat or impair a right accrued, or affect a penalty incurred, under the rule.</p> <p>(5) A rule may be amended or rescinded by another rule which constitutes the whole or a part of a filing of rules or as a result of an act of the legislature.</p> <p>Sec. 32. (1) Definitions of words and phrases and rules of construction prescribed in any statute, and which are made applicable to all statutes of this state, also apply to rules unless clearly indicated to the contrary.</p> <p>(2) A rule or exception to a rule shall not discriminate in favor of or against any person, and a person affected by a rule is entitled to the same benefits as any other person under the same or similar circumstances.</p> <p>(3) The violation of a rule is a crime when so provided by statute. A rule shall not make an act or omission to act a crime or prescribe a criminal penalty for violation of a rule.</p> <p>(4) An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or regulation which has been adopted by an agency of the United States or by a nationally recognized organization or association. The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule it shall amend the rule or promulgate a new rule therefor. The agency shall have available copies of the adopted matter for inspection and distribution to the public at cost <u>and</u> the rules shall state where copies of the adopted matter are available from the agency and the agency of the United States or the national organization or association and the cost thereof as of the time the rule is adopted.</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>adopted.</p> <p>(5) The filing of a rule under this act raises a rebuttable presumption that the rule was adopted, filed with the secretary of state, and made available for public inspection as required by this act.</p> <p>(6) The publication of a rule in the Michigan register, the Michigan administrative code, or in an annual supplement to the code raises a rebuttable presumption that:</p> <p>(a) The rule was adopted, filed with the secretary of state, and made available for public inspection as required by this act.</p> <p>(b) The rule printed in the publication is a true and correct copy of the promulgated rule.</p> <p>(c) All requirements of this act relative to the rule have been complied with.</p> <p>(7) The courts shall take judicial notice of a rule which becomes effective under this act.</p> <p>Sec. 6. Act No. <u>306</u> of the Public Acts of <u>1969</u>, being sections <u>24.201</u> to <u>24.328</u> of the <u>Michigan Compiled Laws</u>, is repealed.</p> <p>Sec. 7. A reference in any other law to Act No. 88 of the Public Acts of 1943, Act No. 197 of the Public Acts of 1952, or Act No. <u>306</u> of the Public Acts of <u>1969</u> is deemed to be a reference to this act.</p> <p>Sec. 8. This act is effective July 1, <u>1990</u>, and except as to proceedings then pending applies to all agencies and agency proceedings not expressly exempted.</p> <p>Sec. 9. When an agency has completed any or all of the processing of a rule pursuant to Act No. <u>306</u> of the Public Acts of <u>1969</u>, before July 1, <u>1990</u>, similar processing required by this act need not be completed and the balance of the processing and the publication of the rule shall be completed pursuant to this act.</p>	<p>Sec. 61. (1) The filing of a rule under this act raises a rebuttable presumption that the rule was adopted, filed with the secretary of state, and made available for public inspection as required by this act.</p> <p>(2) The publication of a rule in the Michigan register, the Michigan administrative code, or in an annual supplement to the code raises a rebuttable presumption that:</p> <p>(a) The rule was adopted, filed with the secretary of state, and made available for public inspection as required by this act.</p> <p>(b) The rule printed in the publication is a true and correct copy of the promulgated rule.</p> <p>(c) All requirements of this act relative to the rule have been complied with.</p> <p>(3) The courts shall take judicial notice of a rule which becomes effective under this act.</p> <p>Sec. 111. Act No. <u>88</u> of the Public Acts of <u>1943</u>, as amended, being sections <u>24.71</u> to <u>24.80</u> of the <u>Compiled Laws of 1948</u>, and Act No. <u>197</u> of the <u>Public Acts of 1952</u>, as amended, being sections <u>24.101</u> to <u>24.110</u> of the <u>Compiled Laws of 1948</u>, are repealed.</p> <p>Sec. 112. A reference in any other law to Act No. 88 of the Public Acts of 1943, <u>as amended</u>, or Act No. 197 of the Public Acts of 1952, <u>as amended</u>, is deemed to be a reference to this act.</p> <p>Sec. 113. This act is effective July 1, <u>1970</u>, and except as to proceedings then pending applies to all agencies and agency proceedings not expressly exempted.</p> <p>Sec. 114. When an agency has completed any or all of the processing of a rule pursuant to Act No. <u>88</u> of the Public Acts of <u>1943</u>, as amended, before July 1, <u>1970</u>, similar processing required by this act need not be completed and the balance of the processing and the publication of the rule shall be completed pursuant to this act. <u>An effective date may be added to such a rule although it was not included in the notice of hearing on the rule pursuant to subsection (1) of section 41, when such notice was given before July</u></p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>Sec. 10. (1) Chapters 4, <u>5</u>, and 6 shall not apply to proceedings conducted under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, being sections 418.101 to 418.941 of the Michigan Compiled Laws.</p> <p>(2) Chapter 4 shall not apply to a hearing conducted by the department of corrections pursuant to chapter IIIA of Act No. 232 of the Public Acts of 1953, being sections 791.251 to 791.255 of the Michigan Compiled Laws.</p> <p>Chapter 2. Register and Administrative Code</p> <p>Sec. 21. (1) The legislative service bureau shall publish the Michigan register each month. The Michigan register shall contain all of the following:</p> <p>(a) Executive orders and executive reorganization orders.</p> <p>(b) On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills signed into law by the governor during the calendar year and the corresponding public act numbers.</p> <p>(c) On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills vetoed by the governor during the calendar year.</p> <p>(d) Proposed rules.</p> <p>(e) Notices of public hearings on proposed rules.</p> <p>(f) <u>Substantive</u> rules filed with the secretary of state.</p>	<p><u>L. 1970.</u></p> <p>Sec. 115. Chapters 4 and 6 shall not apply to proceedings conducted under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, <u>as amended</u>, being sections 418.101 to 418.941 of the Michigan Compiled Laws. Chapters 4 and 8 shall not apply to a hearing conducted by the department of corrections pursuant to chapter IIIA of Act No. 232 of the Public Acts of 1953, being sections 791.251 to 791.255 of the Michigan Compiled Laws. <u>Chapter 8 shall not apply to a contested case or other proceeding regarding the granting or renewing of an operator's or chauffeur's license by the secretary of state; the Michigan employment relations commission; worker's disability compensation under Act No. 317 of the Public Acts of 1969; or unemployment compensation under Act No. 1 of the Public Acts of the Extra Session of 1936, being sections 421.1 to 421.73 of the Michigan Compiled Laws; or to department of social services public assistance hearings under section 9 of Act No. 280 of the Public Acts of 1939, being section 400.9 of the Michigan Compiled Laws.</u></p> <p>Sec. 8. (1) The legislative service bureau shall publish the Michigan register each month. The Michigan register shall contain all of the following:</p> <p>(a) Executive orders and executive reorganization orders.</p> <p>(b) On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills signed into law by the governor during the calendar year and the corresponding public act numbers.</p> <p>(c) On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills vetoed by the governor during the calendar year.</p> <p>(d) Proposed <u>administrative</u> rules.</p> <p>(f) Notices of public hearings on proposed <u>administrative</u> rules.</p> <p>(g) <u>Administrative</u> rules filed with the secretary of state.</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>(g) Emergency rules filed with the secretary of state.</p> <p>(h) <u>Interpretive, procedural, and housekeeping rules adopted by an agency.</u></p> <p>(i) Other official information considered necessary or appropriate by the legislative service bureau.</p> <p>(j) <u>Formal</u> attorney general opinions.</p> <p>(k) All of the items listed in section <u>2(w)(xii)</u> after final approval of the certificate of need commission or the statewide health coordinating council.</p> <p>(2) The legislative service bureau shall publish a cumulative index for the Michigan register.</p> <p>(3) The Michigan register shall be available for public subscription at a fee reasonably calculated to cover publication and distribution costs.</p> <p>(4) An agency shall transmit a copy of a proposed rule and notice of the public hearing to the legislative service bureau for publication in the Michigan register.</p> <p>(5) If publication of an agency's proposed rule would be unreasonably expensive or lengthy, the legislative service bureau may publish a brief synopsis of the proposed rule <u>and include</u> information on how to obtain a complete copy of the proposed rule from the agency at no cost.</p>	<p>(h) Emergency rules filed with the secretary of state.</p> <p>(i) <u>Notice of proposed and adopted agency guidelines.</u></p> <p>(j) Other official information considered necessary or appropriate by the legislative service bureau.</p> <p>(k) Attorney general opinions.</p> <p>(l) All of the items listed in section <u>7(l)</u> after final approval by the certificate of need commission or the statewide health coordinating council <u>under section 22215 or 22217 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.22215 and 333.22217 of the Michigan Compiled Laws.</u></p> <p>(2) The legislative service bureau shall publish a cumulative index for the Michigan register.</p> <p>(3) The Michigan register shall be available for public subscription at a fee reasonably calculated to cover publication and distribution costs.</p> <p>(5) An agency shall transmit a copy of the <u>small business economic impact statement, together with the applicable proposed rules and notice of public hearing, to the legislative service bureau for publication in the Michigan register.</u></p> <p>(4) If publication of an agency's proposed rule, <u>guideline, or small business economic impact statement or an item described in subsection (1)(l)</u> would be unreasonably expensive or lengthy, the legislative service bureau may publish a brief synopsis of the proposed rule, <u>guideline, small business impact statement, or item described in subsection (1)(l), including</u> information on how to obtain a complete copy of the proposed rule, <u>guideline, small business impact statement, or item described in subsection (1)(l)</u> from the agency at no cost.</p>
<p>Sec. 22. (1) The legislative service bureau annually shall publish a supplement to the Michigan administrative code. The annual supplement shall contain all promulgated <u>substantive rules and adopted procedural and interpretive rules</u> published in the Michigan register during the current year, except emergency rules, a cumulative numerical listing of amendments, additions to, and rescissions of rules since the last compilation of the code, and a cumulative alphabetical index.</p>	<p>Sec. 55. (1) The legislative service bureau annually shall publish a supplement to the Michigan administrative code. The annual supplement shall contain all promulgated rules published in the Michigan register during the current year, except emergency rules, a cumulative numerical listing of amendments <u>and</u> additions to, and rescissions of rules since the last compilation of the code, and a cumulative alphabetical index.</p>

## COMPARATIVE ANALYSIS I.

### PROPOSED ACT

(2) The Michigan administrative code and the annual supplements shall be made available for public subscription at a fee reasonably calculated to cover publication and distribution costs.

Sec. 23. (1) The legislative service bureau shall perform the editorial work for the Michigan register and the Michigan administrative code and its annual supplement. The classification, arrangement, numbering, and indexing of rules shall be uniform and shall conform as nearly as practicable to the classification, arrangement, numbering, and indexing of the compiled laws. The bureau may correct in the publications obvious errors in rules when requested by the promulgating agency to do so. The bureau may provide for publishing all or any part of the Michigan administrative code in bound volume, pamphlet, or loose-leaf form.

(2) An annual supplement to the Michigan administrative code shall be published at the earliest practicable date.

Sec. 24. (1) The legislative service bureau may omit from the Michigan register, the Michigan administrative code, and the code's annual supplement, any rule, the publication of which would be unreasonably expensive or lengthy if the rule in printed or reproduced form is made available on application to the promulgating agency, and if the code publication and the Michigan register contain a notice stating the general subject of the omitted rule and how a copy of the rule may be obtained.

(2) The cost of publishing and distributing annual supplements to the Michigan administrative code and proposed rules, notices of public hearings on proposed rules, rules, and emergency rules filed with the secretary of state in the Michigan register shall be prorated by the legislative service bureau on the basis of the volume of these materials published for each agency in the Michigan register and annual supplement to the Michigan administrative code, and the cost of publishing and distribution shall be paid out of appropriations to the agencies. The legislative service bureau may arrange to provide to agencies copies or plates of the rules, and to provide special compilations of rules, for which it shall be reimbursed for its costs by the agencies.

### CURRENT LAW

(2) The Michigan administrative code and the annual supplements shall be made available for public subscription at a fee reasonably calculated to cover publication and distribution costs.

Sec. 56. (1) The legislative service bureau shall perform the editorial work for the Michigan register and the Michigan administrative code and its annual supplement. The classification, arrangement, numbering, and indexing of rules shall be uniform and shall conform as nearly as practicable to the classification, arrangement, numbering, and indexing of the compiled laws. The bureau may correct in the publications obvious errors in rules when requested by the promulgating agency to do so. The bureau may provide for publishing all or any part of the Michigan administrative code in bound volume, pamphlet, or loose-leaf form.

(2) An annual supplement to the Michigan administrative code shall be published at the earliest practicable date.

Sec. 57. (1) The legislative service bureau may omit from the Michigan register and the Michigan administrative code, and the code's annual supplement, any rule, the publication of which would be unreasonably expensive or lengthy if the rule in printed or reproduced form is made available on application to the promulgating agency, and if the code publication and the Michigan register contain a notice stating the general subject of the omitted rule and how a copy of the rule may be obtained.

(2) The cost of publishing and distributing annual supplements to the Michigan administrative code and proposed rules, notices of public hearings on proposed rules, small business economic impact statements, administrative rules and emergency rules filed with the secretary of state, notices of proposed and adopted agency guidelines, and the items listed in section 7(D) in the Michigan register shall be prorated by the legislative service bureau on the basis of the volume of these materials published for each agency in the Michigan register and annual supplement to the Michigan administrative code, and the cost of publishing and distribution shall be paid out of appropriations to the agencies.

Sec. 58. (1) When requested by an agency, the legislative service bureau shall prepare reproduction proofs or negatives of the rules, or a portion of the rules, of the agency. The requesting agency shall r

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>Sec. 25. (1) The legislative service bureau shall print or order printed a sufficient number of copies of the Michigan register, the Michigan administrative code, and the annual supplement to the code to meet the requirements of this section. The department of management and budget shall deliver or mail copies as follows:</p> <ul style="list-style-type: none"><li>(a) To the secretary of the senate, a sufficient number to supply each senator, standing committee, and the secretary.</li><li>(b) To the clerk of the house of representatives, a sufficient number to supply each representative, standing committee, and the clerk.</li><li>(c) To each member of the legislature, 1 copy at the member's home address.</li><li>(d) To the legislative service bureau, 1 copy for each attorney on the bureau's staff.</li><li>(e) To the department of the attorney general, 1 copy for each division.</li><li>(f) To each other state department, 3 copies.</li><li>(g) To each county law library, bar association library, and law school library in this state, 1 copy.</li><li>(h) To other libraries throughout this state, 1 copy, upon request.</li><li>(i) Additional copies to an officer or agency of this state and other governmental officers, agencies, and libraries approved by the legislative service bureau; and additional copies of the Michigan register for persons who subscribe to the publication as provided in subsection (3).</li></ul> <p>(2) The copies of the Michigan register, the Michigan administrative code, and the annual code supplement are for official use only by the agencies and persons</p>	<p><u>imburse the legislative service bureau for preparing the reproduction proofs or negatives, and the cost of the preparation shall be paid out of appropriations to the agency.</u></p> <p><u>(2) The Michigan administrative code may be arranged and printed to make convenient the publication in separate pamphlets of the parts of the code relating to different agencies. Agencies may order the separate pamphlets, and the cost of the pamphlets shall be paid out of appropriations to the agencies.</u></p> <p>Sec. 59. (1) The legislative service bureau shall print or order printed a sufficient number of copies of the Michigan register, the Michigan administrative code, and the annual supplement to the code to meet the requirements of this section. The department of management and budget shall deliver or mail copies as follows:</p> <ul style="list-style-type: none"><li>(a) To the secretary of the senate, a sufficient number to supply each senator, standing committee, and the secretary.</li><li>(b) To the clerk of the house of representatives, a sufficient number to supply each representative, standing committee, and the clerk.</li><li>(c) To each member of the legislature, 1 copy at the member's home address.</li><li>(d) To the legislative service bureau, 1 copy for each attorney on the bureau's staff.</li><li>(e) To the department of the attorney general, 1 copy for each division.</li><li>(f) To each other state department, 3 copies.</li><li>(g) To each county law library, bar association library, and law school library in this state, 1 copy.</li><li>(h) To other libraries throughout this state, 1 copy, upon request.</li><li>(i) Additional copies to an officer or agency of this state and other governmental officers, agencies, and libraries approved by the legislative service bureau; and additional copies of the Michigan register for persons who subscribe to the publication as provided in subsection (3).</li></ul> <p>(2) The copies of the Michigan register, the Michigan administrative code, and the annual code supplement are for official use only by the agencies and persons</p>

Side-by-side comparison

## COMPARATIVE ANALYSIS I.

### PROPOSED ACT

prescribed in subsection (1), and they shall deliver them to their successors, except that members of the legislature may retain copies of the Michigan register and the Michigan administrative code sent to their home address. The department of management and budget shall send to the home address of a new member of the legislature the current volume of the Michigan register and a complete copy of the Michigan administrative code. The department of management and budget shall deliver to the state library the Michigan register, the Michigan administrative code, and the annual supplement when requested by the state library sufficient for the library's use and for exchanges. The department of management and budget shall hold additional copies for sale at a price not less than the publication and distribution costs which shall be determined by the legislative service bureau. Copies shall be made available in both printed and electronic form.

(3) A person may subscribe to the Michigan register. The legislative service bureau shall determine a subscription price which shall not be more than the publication and distribution costs.

#### Chapter 3. Procedures in Rulemaking

Sec. 31. An agency shall adopt housekeeping rules insofar as practicable. In adopting housekeeping rules, an agency is governed by the terms of this section, but the other procedures contained in this chapter shall not apply. When adopted, a housekeeping rule is a public record and shall be made available by the agency for public inspection. Copies of housekeeping rules shall be sent to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them. Housekeeping rules shall not be included in the Michigan administrative code.

Sec. 32. (1) An agency shall adopt procedural rules, including procedural rules prescribing the methods by which the public may obtain information and submit requests. In adopting procedural rules an agency is governed by the terms of this section and by sections 41 and 42, but the other procedures contained in this chapter shall not apply. When adopted, a procedural rule is a public record and shall be made available by the agency for public inspection. Copies of procedural rules shall be sent to the joint committee

### CURRENT LAW

prescribed in subsection (1), and they shall deliver them to their successors, except that members of the legislature may retain copies of the Michigan register and the Michigan administrative code sent to their home address. The department of management and budget shall send to the home address of a new member of the legislature the current volume of the Michigan register and a complete copy of the Michigan administrative code. The department of management and budget shall deliver to the state library the Michigan register, the Michigan administrative code, and the annual supplement when requested by the state library sufficient for the library's use and for exchanges. The department of management and budget shall hold additional copies for sale at a price not less than the publication and distribution costs which shall be determined by the legislative service bureau.

(3) A person may subscribe to the Michigan register. The legislative service bureau shall determine a subscription price which shall not be more than the publication and distribution costs.

Sec. 33. (1) An agency shall promulgate rules describing its organization and stating the general course and method of its operations and may include therein forms with instructions. Sections 41 and 42 do not apply to such rules.

Sec. 33. (2) An agency shall promulgate rules prescribing its procedures available to the public and the methods by which the public may obtain information and submit requests.

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p><u>on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them. Procedural rules adopted by an agency shall be published in the Michigan register and shall take effect on the date of publication in the register unless a later time is stated in the rules. Procedural rules shall be included in the Michigan administrative code.</u></p> <p>(2) A procedural rule adopted after the effective date of this section is not valid unless processed in substantial compliance with this section. However, inadvertent failure to give notice to any person as required does not invalidate a procedural rule which was otherwise processed in substantial compliance with this section.</p> <p>(3) A proceeding to contest a procedural rule on the grounds of noncompliance with this section shall be commenced within 2 years after the effective date of the procedural rule.</p> <p>(4) An agency may adopt procedural rules, not inconsistent with this act or other applicable statutes, prescribing procedures for contested cases.</p> <p>(5) Procedural rules shall be clearly labelled as such and shall include a statement that they are not intended to have substantive effect.</p> <p>Sec. 33. (1) <u>An agency may adopt interpretive rules. In adopting interpretive rules, an agency is governed by the terms of this section and by sections 41 and 42, but the other provisions contained in this chapter shall not apply. When adopted, an interpretive rule is a public record and shall be made available by the agency for public inspection. Copies of interpretive rules shall be sent to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them. Interpretative rules adopted by an agency shall be published in the Michigan register and shall take effect on the date of publication in the register unless a later time is stated in the rules. Interpretive rules shall be included in the Michigan administrative code.</u></p> <p>(2) <u>An interpretive rule adopted after the effective date of this section is not valid unless processed in substantial compliance with this section. However,</u></p>	<p>Sec. 43. (1) A rule hereafter promulgated is not valid unless processed in substantial compliance with sections 41 and 42. However, inadvertent failure to give the notice to any person as required by section 41 does not invalidate a rule processed thereunder.</p> <p>(2) A proceeding to contest a rule on the ground of noncompliance with the procedural requirements of sections 41 and 42 shall be commenced within 2 years after the effective date of the rule.</p> <p>Sec. 33. (3) An agency may promulgate rules, not inconsistent with this act or other applicable statutes, prescribing procedures for contested cases.</p> <p>NEW</p> <p>Sec. 25. When adopted, a guideline is a public record. Copies of guidelines shall be sent to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them.</p> <p>Sec. 43. (1) A rule hereafter promulgated is not valid unless processed in substantial compliance with sections 41 and 42. However, inadvertent failure to give</p>

## COMPARATIVE ANALYSIS I.

### PROPOSED ACT

inadvertent failure to give notice to any person as required does not invalidate an interpretive rule which was otherwise processed in substantial compliance with this section.

(3) A proceeding to contest an interpretive rule on the grounds of noncompliance with this section shall be commenced within 2 years after the effective date of the interpretive rule.

(4) Interpretive rules shall be clearly labelled as such and shall include a statement that they are not intended to have substantive effect and that they do not have the force and effect of law.

Sec. 34. The joint committee on administrative rules is created and consists of 7 members of the senate and 7 members of the house of representatives appointed in the same manner as standing committees are appointed for terms of 2 years. Members of the committee shall serve without compensation but shall be reimbursed for expenses incurred in the business of the committee. The expenses of the members of the senate shall be paid from appropriations to the senate and the expenses of the members of the house shall be paid from appropriations to the house of representatives. The committee may meet during a session of the legislature and during an interim between sessions. The committee may hold a hearing on a substantive rule transmitted to the committee. Action by the committee, including action taken under section 52, shall be by concurring majorities of the members from each house. The committee shall report its activities and recommendations to the legislature at each regular session.

Sec. 35. The joint committee on administrative rules may prescribe procedures and standards not inconsistent with this act or other applicable statutes, for the drafting, processing, publication, and distribution of interpretive, procedural, and substantive rules. The procedures and standards shall be included in a manual which the legislative service bureau shall publish and distribute in reasonable quantities to the state departments.

Sec. 36. A person may request an agency to adopt an interpretive, procedural, or substantive rule. Within 90 days after the filing of a request, the agency shall initiate the processing of a rule or issue a concise written statement of its principal reasons for denial of

### CURRENT LAW

the notice to any person as required by section 41 does not invalidate a rule processed thereunder.

(2) A proceeding to contest a rule on the ground of noncompliance with the procedural requirements of sections 41 and 42 shall be commenced within 2 years after the effective date of the rule.

NEW

Sec. 35. The joint committee on administrative rules is created and consists of 6 members of the senate and 6 members of the house of representatives appointed in the same manner as standing committees are appointed for terms of 2 years. Members of the committee shall serve without compensation but shall be reimbursed for expenses incurred in the business of the committee. The expenses of the members of the senate shall be paid from appropriations to the senate and the expenses of the members of the house shall be paid from appropriations to the house of representatives. The committee may meet during a session of the legislature and during an interim between sessions. The committee may hold a hearing on a rule transmitted to the committee. Action by the committee, including action taken under section 52, shall be by concurring majorities of the members from each house. The committee shall report its activities and recommendations to the legislature at each regular session.

Sec. 36. The joint committee on administrative rules may prescribe procedures and standards not inconsistent with this act or other applicable statutes, for the drafting, processing, publication and distribution of rules. The procedures and standards shall be included in a manual which the legislative service bureau shall publish and distribute in reasonable quantities to the state departments.

Sec. 38. A person may request an agency to promulgate a rule. Within 90 days after filing of a request, the agency shall initiate the processing of a rule or issue a concise written statement of its principal reasons for denial of the request. The denial of a request

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>the request. The denial of a request is not subject to judicial review.</p> <p>Sec. 41. (1) Before the adoption of <u>an interpretive, procedural, or substantive</u> rule, an agency shall give notice of a public hearing. The notice shall be given within the time prescribed by any applicable statute, or if none, not less than 30 days nor more than 90 days before the public hearing. The notice shall include all of the following:</p> <p>(a) A reference to the statutory authority under which the action is proposed.</p> <p>(b) The time and place of the public hearing and a statement of the manner in which data, views, and arguments may be submitted to the agency at other times by a person.</p> <p>(c) A statement of the terms or substance of the proposed rule, a description of the subjects and issues involved, and the proposed effective date of the rule.</p> <p>(2) The agency shall publish the notice of public hearing as prescribed in any applicable statute, or if none, in a manner selected by the agency as best calculated to give notice to persons likely to be affected by the proposed rule. Methods that may be employed by the agency, depending upon the circumstances, include publication of the notice in 1 or more newspapers of general circulation or, if appropriate, in trade, industry, governmental, or professional publications. If the persons likely to be affected by the proposed rule are unorganized or diffuse in character and location, the agency shall publish the notice as a display advertisement in at least 3 newspapers of general circulation in different parts of the state, 1 of which shall be published in the Upper Peninsula.</p> <p>(3) In addition to the requirements of subsection (1), the agency shall submit a copy of the notice to the legislative service bureau for publication in the Michigan register. An agency's notice shall be published in the Michigan register not less than 30 days nor more than 90 days before the public hearing.</p> <p>(4) The agency shall transmit copies of the notice to the joint committee on administrative rules, the legislative service bureau, the office of the governor, <u>the department of attorney general</u>, and each person who</p>	<p>is not subject to judicial review.</p> <p>Sec. 41. (1) Before the adoption of a rule, an agency shall give notice of a public hearing <u>and offer a person an opportunity to present data, views, and arguments</u>. The notice shall be given within the time prescribed by any applicable statute, or if none, not less than 30 days nor more than 90 days before the public hearing. The notice shall include all of the following:</p> <p>(a) A reference to the statutory authority under which the action is proposed.</p> <p>(b) The time and place of the public hearing and a statement of the manner in which data, views, and arguments may be submitted to the agency at other times by a person.</p> <p>(c) A statement of the terms or substance of the proposed rule, a description of the subjects and issues involved, and the proposed effective date of the rule.</p> <p>Sec. 42. (1) The agency shall publish the notice of public hearing as prescribed in any applicable statute, or if none, in a manner selected by the agency as best calculated to give notice to persons likely to be affected by the proposed rule. Methods that may be employed by the agency, depending upon the circumstances, include publication of the notice in 1 or more newspapers of general circulation or, if appropriate, in trade, industry, governmental, or professional publications. If the persons likely to be affected by the proposed rule are unorganized or diffuse in character and location, the agency shall publish the notice as a display advertisement in at least 3 newspapers of general circulation in different parts of the state, 1 of which shall be published in the Upper Peninsula.</p> <p>(2) In addition to the requirements of subsection (1), the agency shall submit a copy of the notice to the legislative service bureau <u>pursuant to section 41</u> for publication in the Michigan register. An agency's notice shall be published in the Michigan register not less than 30 days nor more than 90 days before the public hearing.</p> <p>Sec. 41. (2) The agency shall transmit copies of the notice to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and each person who requested the agency in</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>requested the agency in writing for advance notice of proposed action which may affect the person. The notice shall be by mail, in writing, to the last address specified by the person. A request for notice shall be renewed each December.</p> <p>(5) Prior to the scheduled date of hearing, the committee may determine by concurring majorities of the members from each house that a proposed procedural or interpretive rule is substantive as defined in section 2(z). The committee shall provide to the agency a detailed explanation of its conclusion and the agency shall not adopt the rule without complying with sections 45 and 46. The agency may proceed to adopt the rule, if the committee takes no action or states its agreement with the agency's characterization of the rule.</p> <p>Sec. 42. (1) The public hearing <u>required in section 41</u> shall comply with any applicable statute, but is not subject to the provisions of this act governing contested cases. <u>An agency which is subject to section 41 shall adopt procedural rules for the conduct of public hearings called for in section 41 within two years after the effective date of this act.</u></p> <p>(2) <u>The public hearing shall be open to the public. A person shall have the opportunity to present data, views, and argument, both in writing and orally, but the agency may limit the time available to each person for oral presentation.</u> The head of the promulgating agency or 1 or more persons designated by the head of the agency, who has knowledge of the subject matter of the proposed <u>substantive</u> rule, shall be present at the public hearing and shall participate in the discussion of the proposed rule.</p> <p>Sec. 43. (1) A <u>substantive</u> rule hereafter promulgated is not valid unless processed in substantial compliance with sections 41 and 42. However, inadvertent failure to give the notice to any person as required by section 41 does not invalidate a rule processed thereunder.</p> <p>(2) A proceeding to contest a <u>substantive</u> rule on the ground of noncompliance with the procedural requirements of sections 41 and 42 shall be commenced within 2 years after the effective date of the rule.</p>	<p>writing for advance notice of proposed action which may affect the person. The notice shall be by mail, in writing, to the last address specified by the person. A request for notice shall be renewed each December.</p> <p>NEW</p> <p>Sec. 41. (3) The public hearing shall comply with any applicable statute but is not subject to the provisions of this act governing contested cases.</p> <p>Sec. 41. (4) The head of the promulgating agency or 1 or more persons designated by the head of the agency, who has knowledge of the subject matter of the proposed rule, shall be present at the public hearing and shall participate in the discussion of the proposed rule.</p> <p>Sec. 43. (1) A rule hereafter promulgated is not valid unless processed in substantial compliance with sections 41 and 42. However, inadvertent failure to give the notice to any person as required by section 41 does not invalidate a rule processed thereunder.</p> <p>(2) A proceeding to contest a rule on the ground of noncompliance with the procedural requirements of sections 41 and 42 shall be commenced within 2 years after the effective date of the rule.</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>Sec. 44. Sections 41 and 42 do not apply to an amendment or rescission of a rule which is obsolete or superseded, or which is required to make obviously needed corrections to make the rule conform to an amended or new statute or to accomplish any other solely formal purpose, if a statement to such effect is included in the legislative service bureau certificate of approval of the rule.</p> <p>Sec. 45. (1) The legislative service bureau promptly shall approve a proposed substantive rule, if the bureau considers the proposed rule to be proper as to all matters of form, classification, arrangement, and numbering. The department of the attorney general promptly shall approve a proposed substantive rule, if the department considers the proposed rule to be legal.</p> <p>(2) After the legislative service bureau and attorney general have approved a proposed substantive rule, and after publication of the proposed rule in the Michigan register as provided in this act, but within 2 years after the date of the last public hearing on the proposed rule, unless the proposed rule is resubmitted under subsection (8), and before the agency has formally adopted the rule, the agency shall transmit by letter copies of the rule bearing certificates of approval and copies of the rule without certificates to the committee.</p> <p>(3) After its receipt of the agency's letter of transmittal, the committee shall have 2 months in which to consider the rule. If the committee by a majority vote determines that added time is needed to consider proposed rules, the committee may extend the time it has to consider a particular proposed rule by 1 month to a total of not longer than 3 months. This subsection and subsection (2) do not apply to an emergency rule promulgated under section 48.</p>	<p>Sec. 44. Sections 41 and 42 do not apply to an amendment or rescission of a rule which is obsolete or superseded, or which is required to make obviously needed corrections to make the rule conform to an amended or new statute or to accomplish any other solely formal purpose, if a statement to such effect is included in the legislative service bureau certificate of approval of the rule.</p> <p>Sec. 45. (1) The legislative service bureau promptly shall approve a proposed rule if the bureau considers the proposed rule to be proper as to all matters of form, classification, arrangement, and numbering. The department of the attorney general promptly shall approve a proposed rule if the department considers the proposed rule to be legal.</p> <p>(2) After the legislative service bureau and attorney general have approved a proposed rule, and after publication of the proposed rule in the Michigan register as provided in this act, but within 2 years after the date of the last public hearing on the proposed rule, unless the proposed rule is a resubmission under subsection (11), and before the agency has formally adopted the rule, the agency shall transmit by letter copies of the rule bearing certificates of approval and copies of the rule without certificates to the committee. <u>The agency shall include with the letter of transmittal a regulatory impact statement on a 1-page form provided by the committee. The statement shall provide estimates of the impact of the proposed rules upon all of the following:</u></p> <p>(a) <u>The revenues, expenditures, and paper work requirements of the agency proposing the rule.</u></p> <p>(b) <u>The revenues and expenditures of any other state or local government agency affected by the proposed rule.</u></p> <p>(c) <u>The taxpayers, consumers, industry or trade-groups, small business, or other applicable groups affected by the proposed rule.</u></p> <p>(6) After its receipt of the agency's letter of transmittal, the committee shall have 2 months in which to consider the rule. If the committee by a majority vote determines that added time is needed to consider proposed rules, the committee may extend the time it has to consider a particular proposed rule by 1 month to a total of not longer than 3 months. This subsection and subsections (2) to (5) do not apply to an emergency rule.</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>(4) If the committee approves the proposed rule within the time period provided by subsection (3), the committee shall attach a certificate of its approval to all copies of the rule bearing certificates except 1 and transmit those copies to the agency.</p> <p>(5) If, within the time period provided by subsection (3), the committee disapproves the proposed rule or the committee chairperson certifies an impasse after votes for approval and disapproval have failed to receive concurrent majorities, the committee shall immediately report that fact to the legislature and return the rule to the agency. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:</p> <p>(a) The legislature adopts a concurrent resolution approving the rule within 60 days after the committee report has been received by, and read into the respective journal of, each house.</p> <p>(b) The committee subsequently approves the rule.</p> <p>(6) If the time permitted by this section expires and the committee has not taken action under either subsection (4) or (5), then the committee shall return the proposed rules to the agency. The chairperson and alternate chairperson shall cause concurrent resolutions approving the rule to be introduced in both houses simultaneously. The concurrent resolutions shall be placed directly on the calendar of each house. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:</p> <p>(a) The legislature adopts a concurrent resolution approving the rule within 60 days after introduction by record roll call vote. The adoption of the concurrent resolution shall require a majority of the members elected to and serving in each house.</p> <p>(b) The agency resubmits the proposed rule to the committee and the committee approves the rule within the time permitted by this section.</p> <p>(7) An agency may withdraw a proposed rule by leave of the committee. An agency may resubmit a rule so withdrawn or returned under subsection (6) with minor modification or with changes suggested by the committee following a committee meeting on the proposed rule. A resubmitted rule is a new filing and subject to this section but is not subject to further notice and hearing as provided in sections 41 and 42.</p> <p>(8) If the committee approves the proposed rule within the time period provided by subsection (3), or the</p>	<p>(8) If the committee approves the proposed rule within the time period provided by subsection (6), the committee shall attach a certificate of its approval to all copies of the rule bearing certificates except 1 and transmit those copies to the agency.</p> <p>(9) If, within the time period provided by subsection (6), the committee disapproves the proposed rule or the committee chairperson certifies an impasse after votes for approval and disapproval have failed to receive concurrent majorities, the committee shall immediately report that fact to the legislature and return the rule to the agency. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:</p> <p>(a) The legislature adopts a concurrent resolution approving the rule within 60 days after the committee report has been received by, and read into the respective journal of, each house.</p> <p>(b) The committee subsequently approves the rule.</p> <p>(10) If the time permitted by this section expires and the committee has not taken action under either subsection (8) or (9) then the committee shall return the proposed rules to the agency. The chairperson and alternate chairperson shall cause concurrent resolutions approving the rule to be introduced in both houses simultaneously. The concurrent resolutions shall be placed directly on the calendar of each house. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:</p> <p>(a) The legislature adopts a concurrent resolution approving the rule within 60 days after introduction by record roll call vote. The adoption of the concurrent resolution shall require a majority of the members elected to and serving in each house.</p> <p>(b) The agency resubmits the proposed rule to the committee and the committee approves the rule within the time permitted by this section.</p> <p>(11) An agency may withdraw a proposed rule by leave of the committee. An agency may resubmit a rule so withdrawn or returned under subsection (9) with minor modification or with changes suggested by the committee following a committee meeting on the proposed rule. A resubmitted rule is a new filing and subject to this section but is not subject to further notice and hearing as provided in sections 41 and 42.</p> <p>(12) If the committee approves the proposed rule within the time period provided by subsection (6), or</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>legislature adopts a concurrent resolution approving the rule, the agency, if it wishes to proceed, shall formally adopt the rule, pursuant to any applicable statute, and make a written record of the adoption. Certificates of approval and adoption shall be attached to at least 6 copies of the rule.</p>	<p>the legislature adopts a concurrent resolution approving the rule, the agency, if it wishes to proceed, shall formally adopt the rule, pursuant to any applicable statute, and make a written record of the adoption. Certificates of approval and adoption shall be attached to at least 6 copies of the rule.</p>
<p>Sec. 46. (1) To promulgate a <u>substantive</u> rule, an agency shall file in the office of the secretary of state 3 copies of the rule bearing the required certificates of approval and adoption and true copies of the rule without the certificates. An agency shall not file a rule, except an emergency rule under section 48, until at least 10 days after the date of the certificate of approval by the committee or after the legislature adopts a concurrent resolution approving the rule. An agency shall transmit a copy of the rule bearing the required certificates of approval and adoption to the office of the governor at least 10 days before it files the rule.</p>	<p>Sec. 46. (1) To promulgate a rule an agency shall file in the office of the secretary of state 3 copies of the rule bearing the required certificates of approval and adoption and true copies of the rule without the certificates. An agency shall not file a rule, except an emergency rule under section 48, until at least 10 days after the date of the certificate of approval by the committee or after the legislature adopts a concurrent resolution approving the rule. An agency shall transmit a copy of the rule bearing the required certificates of approval and adoption to the office of the governor at least 10 days before it files the rule.</p>
<p>(2) The secretary of state shall indorse the date and hour of filing of rules on the 3 copies of the filing bearing the certificates and shall maintain a file containing 1 copy for public inspection.</p>	<p>(2) The secretary of state shall indorse the date and hour of filing of rules on the 3 copies of the filing bearing the certificates and shall maintain a file containing 1 copy for public inspection.</p>
<p>(3) The secretary of state, as often as advisable, shall cause to be arranged and bound in a substantial manner the <u>substantive</u> rules hereafter filed in his <u>or her</u> office with their attached certificates and published in a supplement to the Michigan administrative code. He <u>or she</u> shall certify under his <u>or her</u> hand and seal of the state on the frontispiece of each volume that it contains all of the rules filed and published for a specified period. The rules, when so bound and certified, shall be kept in the office of the secretary of state and no further record thereof is required to be kept. The bound rules are subject to public inspection.</p>	<p>(3) The secretary of state, as often as <u>he deems it</u> advisable, shall cause to be arranged and bound in a substantial manner the rules hereafter filed in his office with their attached certificates and published in a supplement to the Michigan administrative code. He shall certify under his hand and seal of the state on the frontispiece of each volume that it contains all of the rules filed and published for a specified period. The rules, when so bound and certified, shall be kept in the office of the secretary of state and no further record thereof is required to be kept. The bound rules are subject to public inspection.</p>
<p>Sec. 47. (1) Except in case of a rule processed under section 48, a <u>substantive</u> rule becomes effective on the date fixed in the rule, which shall not be earlier than 15 days after the date of its promulgation, or if a date is not so fixed then on the date of its publication in the Michigan administrative code or a supplement thereto.</p>	<p>Sec. 47. (1) Except in case of a rule processed under section 48, a rule becomes effective on the date fixed in the rule, which shall not be earlier than 15 days after the date of its promulgation, or if a date is not so fixed then on the date of its publication in the Michigan administrative code or a supplement thereto.</p>
<p>(2) Except in case of a rule processed under section 48, an agency may withdraw a promulgated rule which has not become effective by a written request stating reasons, (a) to the secretary of state on or be-</p>	<p>(2) Except in case of a rule processed under section 48, an agency may withdraw a promulgated rule which has not become effective by a written request stating reasons, (a) to the secretary of state on or be-</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>fore the last day for filing rules for the interim period in which the rules were first filed, or (b) to the secretary of state and the legislative service bureau, within a reasonable time as determined by the bureau, after the last day for filing and before publication of the rule in the next supplement to the code. In any other case an agency may abrogate its rule only by rescission. When an agency has withdrawn a promulgated rule, it shall give notice, stating reasons, to the joint committee on administrative rules that the rule has been withdrawn.</p> <p>Sec. 48. (1) If an agency finds that preservation of the public health, safety, welfare, <u>or financial resources entrusted to the agency</u> requires promulgation of an emergency <u>substantive</u> rule without following the notice and participation procedures required by sections 41 and 42 and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by section 46 indorsed as an emergency rule, to 3 of which copies shall be attached the certificates prescribed by section 45 and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier. The rule may be extended once for not more than 6 months by the filing of a governor's certificate of the need for the extension with the office of the secretary of state before expiration of the emergency rule. <u>If an extension is sought the agency shall inform the committee of the status of efforts to develop substantive rules regarding the subject matter of the emergency rules.</u> An emergency rule shall not be numbered and shall not be compiled in the Michigan administrative code, but shall be noted in the annual supplement to the code. The emergency rule shall be published in the Michigan register pursuant to section 21.</p> <p>(2) An agency may adopt a procedural rule under the provisions of subsection (1), but any procedural rule so adopted shall be effective for no more than 120 days.</p> <p>(3) If the agency desires to promulgate an identical or similar rule with an effectiveness beyond the final effective date of an emergency rule, the agency shall comply with the procedures prescribed by this act for the processing of a rule which is not an emergency rule. The rule shall be published in the Michigan register and in the code.</p>	<p>fore the last day for filing rules for the interim period in which the rules were first filed, or (b) to the secretary of state and the legislative service bureau, within a reasonable time as determined by the bureau, after the last day for filing and before publication of the rule in the next supplement to the code. In any other case an agency may abrogate its rule only by rescission. When an agency has withdrawn a promulgated rule, it shall give notice, stating reasons, to the joint committee on administrative rules that the rule has been withdrawn.</p> <p>Sec. 48. (1) If an agency finds that preservation of the public health, safety, <u>or</u> welfare requires promulgation of an emergency rule without following the notice and participation procedures required by sections 41 and 42 and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by section 46 indorsed as an emergency rule, to 3 of which copies shall be attached the certificates prescribed by section 45 and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier. The rule may be extended once for not more than 6 months by the filing of a governor's certificate of the need for the extension with the office of the secretary of state before expiration of the emergency rule. An emergency rule shall not be numbered and shall not be compiled in the Michigan administrative code, but shall be noted in the annual supplement to the code. The emergency rule shall be published in the Michigan register pursuant to section 8.</p> <p><b>NEW</b></p> <p>(2) If the agency desires to promulgate an identical or similar rule with an effectiveness beyond the final effective date of an emergency rule, the agency shall comply with the procedures prescribed by this act for the processing of a rule which is not an emergency rule. The rule shall be published in the Michigan register and in the code.</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>(4) The legislature by a concurrent resolution may rescind an emergency rule promulgated pursuant to this section.</p> <p>Sec. 49. (1) The secretary of state shall transmit or mail forthwith, after copies of <u>substantive</u> rules are filed in his <u>or her</u> office, copies on which the day and hour of such filing have been indorsed, as follows:</p> <p>(a) To the secretary of the joint committee on administrative rules and the legislative service bureau.</p> <p>(b) To the secretary of the senate and the clerk of the house of representatives for distribution by them to each member of the senate and the house of representatives. When the legislature is not in session, or is in session but will not meet for more than 10 days after the secretary and clerk have received the rules, the secretary and clerk shall mail <u>a</u> copy to each member of the legislature at his <u>or her</u> home address.</p> <p>(2) The secretary of the senate and clerk of the house of representatives shall present the rules to the senate and the house of representatives.</p> <p>Sec. 50. When the legislature is in session, the joint committee shall notify the appropriate standing committee of each house of the legislature when <u>substantive</u> rules have been transmitted to the committee by the secretary of state. If the joint committee determines that a hearing on such rules is to be held, it shall notify the <u>chairpersons</u> of the standing committees and all members of the standing committees may be present and take part in the hearing. The <u>chairperson</u> or a designated member of the standing committee should be present at the hearing, but <u>the absence of the chairperson or designated member</u> does not affect the validity of the hearing.</p> <p>Sec. 51. If the joint committee on administrative rules, an appropriate standing committee, or a member of the legislature believes that a promulgated <u>substantive</u> rule or any part thereof is unauthorized, is not within legislative intent or is inexpedient, the committee or member may do either or both of the following:</p> <p>(a) Introduce a concurrent resolution at a regular or special session of the legislature expressing the determination of the legislature that the rule should be amended or rescinded. Adoption of the concurrent</p>	<p>(3) The legislature by a concurrent resolution may rescind an emergency rule promulgated pursuant to this section.</p> <p>Sec. 49. (1) The secretary of state shall transmit or mail forthwith, after copies of rules are filed in his office, copies on which the day and hour of such filing have been indorsed, as follows:</p> <p>(a) To the secretary of the joint committee on administrative rules and the legislative service bureau.</p> <p>(b) To the secretary of the senate and the clerk of the house of representatives for distribution by them to each member of the senate and the house of representatives. When the legislature is not in session, or is in session but will not meet for more than 10 days after the secretary and clerk have received the rules, the secretary and clerk shall mail <u>1</u> copy to each member of the legislature at his home address.</p> <p>(2) The secretary of the senate and clerk of the house of representatives shall present the rules to the senate and the house of representatives.</p> <p>Sec. 50. When the legislature is in session the joint committee shall notify the appropriate standing committee of each house of the legislature when rules have been transmitted to the committee by the secretary of state. If the joint committee determines that a hearing on such rules is to be held it shall notify the <u>chairmen</u> of the standing committees and all members of the standing committees may be present and take part in the hearing. The <u>chairman</u> or a designated member of the standing committee should be present at the hearing but <u>their</u> absence does not affect the validity of the hearing.</p> <p>Sec. 51. If the joint committee on administrative rules, an appropriate standing committee or a member of the legislature believes that a promulgated rule or any part thereof is unauthorized, is not within legislative intent or is inexpedient, the committee or member may do either or both of the following:</p> <p>(a) Introduce a concurrent resolution at a regular or special session of the legislature expressing the determination of the legislature that the rule should be amended or rescinded. Adoption of the concurrent</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>resolution constitutes legislative disapproval of the rule, but rejection of the resolution does not constitute legislative approval of the rule.</p> <p>(b) Introduce a bill at a regular session, or special session if included in a governor's message, which in effect amends or rescinds the rule.</p> <p>Sec. 52. If authorized by concurrent resolution of the legislature, the joint committee on administrative rules, acting between regular sessions, may suspend a <u>substantive rule or a part of a rule promulgated during the interim between regular sessions.</u> The committee shall notify the agency promulgating the rule, the secretary of state, the department of management and budget, and the legislative service bureau of any rule or part of a rule the joint committee suspends, and the rule or part of a rule shall not be published in the Michigan register or in the Michigan administrative code while suspended. A rule suspended by the committee continues to be suspended until the end of the next regular session.</p> <p>Chapter 4. Procedures in Contested Cases</p> <p>Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay. <u>A hearing shall be open to the public unless, on the request of a party, the agency finds and includes as a sealed part of the record, that an open hearing would constitute an unwarranted invasion of personal privacy, or would result in the disclosure of trade secrets or proprietary information, which outweighs the public interest in open hearings.</u></p> <p>(2) <u>A contested case may be commenced by a person filing an administrative complaint or petition for hearing, or by the agency giving notice. The complaint, petition, or notice shall include:</u></p> <p>(a) The names of all parties.</p> <p>(b) A statement of the legal authority and jurisdiction under which <u>relief or action is sought.</u></p> <p>(c) A reference to the particular sections of the statutes and rules involved.</p> <p>(d) A short and plain statement of the matters asserted. If the agency or person is unable to state the matter in detail at the time the <u>complaint, petition, or notice is provided,</u> the initial <u>complaint, petition, or</u></p>	<p>resolution constitutes legislative disapproval of the rule, but rejection of the resolution does not constitute legislative approval of the rule.</p> <p>(b) Introduce a bill at a regular session, or special session if included in a governor's message, which in effect amends or rescinds the rule.</p> <p>Sec. 52. If authorized by concurrent resolution of the legislature, the joint committee on administrative rules, acting between regular sessions, may suspend a rule or a part of a rule promulgated during the interim between regular sessions. The committee shall notify the agency promulgating the rule, the secretary of state, the department of management and budget, and the legislative service bureau of any rule or part of a rule the joint committee suspends, and the rule or part of a rule shall not be published in the Michigan register or in the Michigan administrative code while suspended. A rule suspended by the committee continues to be suspended until the end of the next regular session.</p> <p>Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.</p> <p>(2) <u>The parties shall be given a reasonable notice of the hearing, which</u> notice shall include:</p> <p>NEW</p> <p>(b) A statement of the legal authority and jurisdiction under which <u>the hearing is to be held.</u></p> <p>(c) A reference to the particular sections of the statutes and rules involved.</p> <p>(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is <u>given,</u> the initial notice may state the issues involved. Thereaf-</p>

**COMPARATIVE ANALYSIS I.**

<b>PROPOSED ACT</b>	<b>CURRENT LAW</b>
<p>notice may state the issues involved. Thereafter on application the agency or other <u>person</u> shall furnish a more definite and detailed statement on the issues.</p> <p>(e) <u>If the matter is commenced by a notice of hearing, a statement of the date, hour, place, and nature of the hearing.</u></p> <p>(f) <u>Unless otherwise specified by the agency, the hearing shall be held at its principal office.</u></p> <p>(3) <u>Unless otherwise provided by statute or procedural rule, service of notice shall be by personal service or certified mail upon return receipt. Upon a claim of improper service of notice, the agency may show actual notice of the hearing, provided that the notice actually provided meets all the provisions of subsection (2). If the agency determines that actual notice does not result in material prejudice to a party, the agency may proceed with the hearing.</u></p> <p>(4) <u>A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which there is a scheduled meeting of the house of which he or she is a member. However, a member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter on a day on which there is a scheduled meeting of the house of which he or she is a member, if such service of notice or process is executed by certified mail upon return receipt.</u></p> <p>(5) <u>A party who has been served with an administrative complaint, petition, or notice of hearing may file a written answer before the date set for hearing.</u></p> <p>(6) <u>If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party. An agency may by procedural rule establish procedures for the entry of default orders when a party fails to appear or fails to file an answer, if the agency's procedural rules require the filing of an answer. Such procedures shall describe the type of case and the procedures under which default orders may issue, and shall set forth time limits and grounds on which orders entered upon default can be set aside. If a party who has filed an administrative complaint or a petition fails to appear, the case may be dismissed.</u></p>	<p>ter on application the agency or other party shall furnish a more definite and detailed statement on the issues.</p> <p>(a) A statement of the date, hour, place, and nature of the hearing. . . .</p> <p>(a) . . . Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.</p> <p><b>NEW</b></p> <p>(3) A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which there is a scheduled meeting of the house of which he or she is a member. However, a member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter on a day on which there is a scheduled meeting of the house of which he or she is a member, if such service of notice or process is executed by certified mail, <u>return receipt requested.</u></p> <p>Sec. 72. (2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.</p> <p>Sec. 72. (1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>(7) An agency may adopt procedural rules allowing for the service of notice, the filing of answers and other pleadings, and the submission of documents related to a contested case to be accomplished by facsimile transmission.</p> <p>(8) Unless otherwise provided by statute or procedural rule, a party is entitled to appear in person or by or with counsel or other duly qualified representative.</p> <p>Sec. 72. (1) An agency, 1 or more members of the agency, a person designated by statute, or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases.</p> <p>(2) A presiding officer in a contested case shall not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency. This subsection shall not apply to the individual who heads the agency or to a member or members of the body which heads the agency.</p> <p>(3) Hearings shall be conducted in an impartial manner. <u>A presiding officer is subject to disqualification for personal bias, prejudice, interest, or any other cause for which a judge may be disqualified.</u> On the filing in good faith by a party of a timely and sufficient affidavit of disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impractical for <u>the presiding officer</u> to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to a party will result therefrom.</p> <p>(4) A presiding officer may do all of the following:</p> <p>(a) Administer oaths and affirmations.</p> <p>(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses, and the production of books, papers, and other documentary evidence.</p> <p>(c) Provide for the taking of testimony by deposition.</p>	<p>NEW</p> <p>NEW</p> <p>Sec. 79. An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. . . .</p> <p>NEW</p> <p>Sec. 79. . . . Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of <u>personal bias or disqualification</u> of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for <u>him</u> to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to <u>the party</u> will result therefrom.</p> <p>Sec. 80. (1) A presiding officer may do all of the following:</p> <p>(a) Administer oaths and affirmations.</p> <p>(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence.</p> <p>(c) Provide for the taking of testimony by deposition.</p>

**COMPARATIVE ANALYSIS I.**

<b>PROPOSED ACT</b>	<b>CURRENT LAW</b>
<p>(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.</p>	<p>(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.</p>
<p>(e) Direct the parties to appear <u>at prehearing conferences and to confer and</u> to consider simplification of the issues by consent of the parties.</p>	<p>(e) Direct the parties to appear <u>and confer</u> to consider simplification of the issues by consent of the parties.</p>
<p>(f) Except as otherwise provided by law, <u>dispose of the case</u> by stipulation, agreed settlement, consent order, waiver, default, or other method agreed on by the parties.</p>	<p>Sec. 78. (2) Except as otherwise provided by law, <u>disposition may be made of a contested case</u> by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.</p>
<p>(g) Summarily dispose of a case in which there are no contested facts.</p>	<p>NEW</p>
<p>(5) The following provisions shall apply to petitions for intervention:</p>	<p>NEW</p>
<p>(a) A presiding officer shall grant a petition for intervention if:</p>	
<p>(i) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the notice of hearing, at least 7 days before the hearing;</p>	
<p>(ii) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and</p>	
<p>(iii) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention.</p>	
<p>(b) A presiding officer may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice, is timely in view of the stage of the proceedings at the time of the petition for intervention, and will not impair the orderly and prompt conduct of the proceedings.</p>	<p>NEW</p>
<p>(c) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include: (i) limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated</p>	<p>NEW</p>



## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>continued to a nonmeeting day.</p> <p>(c) When the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case need not be continued, but the taking of the legislator's testimony, as a witness, shall be postponed to the earliest practicable nonmeeting day. <u>The presiding officer may also provide that the testimony be taken by deposition.</u></p> <p>(7) As used in <u>subsection (6)</u>, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.</p> <p>Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence, and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, being section 600.2552 of the <u>Michigan</u> Compiled Laws. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.</p>	<p>legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.</p> <p>(4) <u>In order to assure adequate representation for the people of this state</u>, when the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet the contested case need not be continued, but the taking of the legislator's testimony, as a witness shall be postponed to the earliest practicable nonmeeting day.</p> <p>(5) The presiding officer <u>shall notify all parties to the contested case, and their attorneys, of any continuance granted pursuant to this section.</u></p> <p>(6) As used in <u>this section</u>, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.</p> <p>Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, <u>as amended</u>, being section 600.2552 of the Compiled Laws <u>of 1948</u>. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.</p>

## COMPARATIVE ANALYSIS I.

### PROPOSED ACT

Sec. 74. (1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts, and take depositions.

(2) An agency authorized or required to adjudicate contested cases may adopt procedural rules to govern the administration of its contested case hearings, including procedural rules for discovery and depositions, to the extent and in the manner appropriate to its proceedings.

(3) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto.

(4) On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, or by any other law, an agency shall make such records promptly available to a party.

Sec. 75. (1) Except as otherwise provided by statute:  
(a) The proponent of a decision shall have the burden of going forward and the burden of proof. In matters subject to chapter 5, these burdens shall be on the applicant for an initial license, for a new license in regard to activity of a continuing nature, and for reinstatement of a license previously suspended or revoked, and in all other licensing matters, including the denial of the renewal of an existing license, these burdens shall be on the licensing agency.

(b) The burden of proof is the preponderance of evidence as applied in civil cases in circuit court. The preponderance may include any evidence admitted under subsection (3) and need not be based solely upon evidence admissible under the Michigan rules of evidence.

(2) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence

### CURRENT LAW

Sec. 74. (1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take depositions. . . .

Sec. 74. (1) . . . An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

Sec. 78. (1) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

Sec. 74. (2) . . . On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

NEW

Sec. 85. . . . A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material and substantial evidence. . . .

Sec. 72. (3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evi-

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>and arguments on issues of fact. <u>The parties</u> may submit rebuttal evidence.</p> <p>(3) In a contested case, the <u>Michigan</u> rules of evidence shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent <u>persons</u> in the conduct of their affairs. Irrelevant, immaterial, or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by <u>procedural</u> rule for submission of all or part of the evidence in written form.</p> <p>(4) A deposition may be used in lieu of other evidence when taken in compliance with the <u>Michigan</u> court rules.</p> <p>(5) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for the use of the agency and offered in evidence.</p> <p>(6) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of <u>that</u> testimony, shall make such statements or reports available to opposing parties for use on cross-examination.</p> <p>(7) Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in the determination of the case, except as permitted under <u>subsection (8)</u>. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.</p>	<p>dence and argument on issues of fact.</p> <p>(4) <u>A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.</u></p> <p>Sec. 75. In a contested case the rules of evidence <u>as applied in a nonjury civil case in circuit court</u> shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent <u>men</u> in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.</p> <p>Sec. 74. (1) . . . A deposition may be used in lieu of other evidence when taken in compliance with the <u>general</u> court rules. . . .</p> <p>Sec. 72. (4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. . . .</p> <p>Sec. 74. (2) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of <u>his</u> testimony, shall make such statements or reports available to opposing parties for use on cross-examination. . . .</p> <p>Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under <u>section 77</u>. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.</p>

## COMPARATIVE ANALYSIS I.

### PROPOSED ACT

(8) An agency in a contested case may take official notice of judicially cognizable facts, and of general, technical, or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it.

Sec. 76. (1) As used in this section:

(a) "Developmental disability" means an impairment of general intellectual functioning or adaptive behavior which meets the following criteria:

(i) It originated before the person became 18 years of age.

(ii) It has continued since its origination or can be expected to continue indefinitely.

(iii) It constitutes a substantial burden to the impaired person's ability to perform normally in society.

(iv) It is attributable to mental retardation, autism, or any other condition of a person found related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.

(b) "Witness" means an alleged victim under subsection (2) who is either of the following:

(i) A person under 15 years of age.

(ii) A person 15 years of age or older with a developmental disability.

(c) "Psychological abuse" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in substantial and protracted, visibly demonstrable manifestations of mental distress.

(2) This section applies only to a contested case where a witness testifies as an alleged victim of sexual, physical, or psychological abuse.

### CURRENT LAW

Sec. 77. An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

Sec. 75a. (1) As used in this section:

(a) "Developmental disability" means an impairment of general intellectual functioning or adaptive behavior which meets the following criteria:

(i) It originated before the person became 18 years of age.

(ii) It has continued since its origination or can be expected to continue indefinitely.

(iii) It constitutes a substantial burden to the impaired person's ability to perform normally in society.

(iv) It is attributable to mental retardation, autism, or any other condition of a person found related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.

(b) "Witness" means an alleged victim under subsection (2) who is either of the following:

(i) A person under 15 years of age.

(ii) A person 15 years of age or older with a developmental disability.

(2) . . . "Psychological abuse" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in substantial and protracted, visibly demonstrable manifestations of mental distress.

(2) This section only applies to a contested case where a witness testifies as an alleged victim of sexual, physical, or psychological abuse. . . .

## COMPARATIVE ANALYSIS I.

### PROPOSED ACT

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during the witness's testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and shall give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be served upon all parties to the proceeding. The agency shall rule on any objections to the use of a named support person prior to the date at which the witness desires to use the support person.

(5) In a hearing under this section, all persons not necessary to the proceeding shall be excluded during the witness's testimony.

(6) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

Sec. 81. (1) When the agency, person, or body authorized to make a final decision by statute or rule was present throughout or presided at the contested case, the agency, person, or body so authorized shall make a final decision. No initial or other preliminary form of decision is required.

(2) In all contested cases in which the agency did not preside, the presiding officer shall make an initial decision, which shall become the final decision unless appealed to or reviewed by the agency.

### CURRENT LAW

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and shall give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be served upon all parties to the proceeding. The agency shall rule on any objection to the use of a named support person prior to the date at which the witness desires to use the support person.

(5) In a hearing under this section, all persons not necessary to the proceeding shall be excluded during the witness's testimony.

(6) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a state-

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>(3) A decision in a contested case, whether initial or final, shall be made within a reasonable period, in writing or stated in the record and shall include findings of fact, conclusions of law, and statements of policy supporting the decision, if the decision represents an exercise of the agency's discretion. The decision shall consider the whole record, or such portions of the record as may be cited by the parties to the proceeding as relevant to the decision.</p> <p>(4) Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact set forth in statutory language shall be accompanied by a concise and explicit statement of the underlying facts supporting them. A presiding officer shall have the discretion to permit a party to submit proposed findings of fact and conclusions of law. If proposed findings of fact and conclusions of law are submitted, the decision shall include a ruling on each proposed finding of fact which would control the decision and on each proposed conclusion of law.</p> <p>(5) A copy of each initial or final decision shall be delivered or mailed forthwith to each party and to each attorney of record.</p> <p>(6) Unless required for disposition of an ex parte matter authorized by law, a presiding officer, a member, or employee of an agency assigned to make a decision in a case or to assist the agency in making a decision in a case, and the deciding authority in the agency shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except on</p>	<p><u>ment of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.</u></p> <p><u>(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.</u></p> <p>Sec. 81. (2) <u>The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.</u></p> <p>Sec. 85. A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law. . . . <u>A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material and substantial evidence. . . .</u></p> <p>Sec. 85. . . . Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. <u>If a party submits proposed findings of fact which would control the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. . . .</u></p> <p>Sec. 85. . . . A copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.</p> <p>Sec. 82. Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to <u>make findings of fact and conclusions of law in a contested case</u> shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to partici-</p>

## COMPARATIVE ANALYSIS I.

### PROPOSED ACT

notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This subsection does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or ratemaking, in a contested case before the financial institutions bureau, the insurance bureau, or the public service commission insofar as the case involves ratemaking or financial practices or conditions.

Sec. 82. (1) Except as otherwise provided by statute, an initial decision shall be subject to review by the agency on its own motion or upon appeal by any party. A motion to review or a notice of appeal shall be submitted within 30 days of the date of receipt of the initial decision of the agency, unless the agency adopts a procedural rule establishing a different time limitation.

(2) A party appealing the initial decision shall submit the content of the appeal within 30 days after the submission of the notice of appeal. The appeal shall state all exceptions to the initial decision and such written arguments concerning the findings of fact, conclusions of law, and statements of policy as the appealing party shall choose to present. All other parties wishing to participate in the appeal shall have 30 days following their receipt of the appeal to submit their arguments in writing.

(3) The agency may permit oral argument under such conditions or limitations as it determines.

(4) On review or appeal of an initial decision, the agency shall have all the powers it would have if it had presided at the hearing except that it shall not hear or accept new evidence. If the agency believes that new evidence should be taken or that evidence was improperly excluded at the hearing, the agency shall remand the matter to the presiding officer who shall reopen the hearing for the limited purpose of taking the new testimony and hearing such additional

### CURRENT LAW

pate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or the public service commission insofar as the case involves rate-making or financial practices or conditions.

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

Sec. 81. (1) . . . Oral argument may be permitted with consent of the agency.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p><u>argument of the effect of the new evidence as is appropriate. The presiding officer shall then give the new evidence such consideration as would have been accorded that evidence had it been presented in the original hearing and shall either affirm the original decision or prepare a new or revised initial decision. The agency shall then review the initial decision in light of the exceptions and arguments presented.</u></p> <p>(5) <u>The agency shall make a final decision by affirming the initial decision in writing or on the record, or if not affirming the initial decision, by stating its decision in writing or on the record.</u></p> <p>(6) The agency may adopt substantive rules to change the procedures for review of initial decisions.</p> <p>Sec. 83. (1) An agency shall prepare an official record of a hearing which shall include:</p> <p>(a) Notices, pleadings, motions, and intermediate rulings.</p> <p>(b) Questions and offers of proof, objections, and rulings thereon.</p> <p>(c) Evidence presented.</p>	<p>(3) <u>The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.</u></p> <p><u>Sec. 85. A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submit proposed findings of fact which would control the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material and substantial evidence. A copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record. order, the decision or order shall include a ruling upon each proposed finding.</u></p> <p>NEW</p> <p>Sec. 86. (1) An agency shall prepare an official record of a hearing which shall include:</p> <p>(a) Notices, pleadings, motions and intermediate rulings.</p> <p>(b) Questions and offers of proof, objections and rulings thereon.</p> <p>(c) Evidence presented.</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.</p> <p>(e) <u>Exceptions and arguments submitted on appeal of the initial decision.</u></p> <p>(f) <u>The initial and final decision in the case.</u></p> <p>(2) Oral proceedings at which evidence is presented shall be recorded and transcribed unless the agency determines by procedural rule that transcripts shall be available only upon request of a party. The agency may charge to each party requesting a copy of a transcript, or a portion of the transcript, a reasonable fee. <u>If the agency chooses not to have a transcription made, a party may request the transcription at the party's expense, but the agency shall pay for a proportional share of the transcription costs if it requests a copy. An agency required to furnish the transcript of a contested case hearing under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, shall be permitted to charge a reasonable portion of the transcription costs to the requesting person.</u></p> <p>Sec. 84. (1) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of <u>final decision by the agency or judicial review</u>, the agency on its own motion or on request of a party shall order a rehearing <u>in whole or in relevant part.</u></p> <p>(2) A request for a rehearing shall be filed within the time fixed by this act for instituting judicial review <u>unless a different time is fixed for judicial review by statute, which time shall then control the time for a request.</u> A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.</p> <p>Sec. 85. On request of an interested person, an agency may issue a declaratory <u>order</u> as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An</p>	<p>(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.</p> <p>(e) <u>Proposed findings and exceptions.</u></p> <p>(f) <u>Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.</u></p> <p>(2) Oral proceedings at which evidence is presented shall be recorded, <u>but need not be transcribed unless requested by a party who shall pay for the transcription of the portion requested except as otherwise provided by law.</u></p> <p>Sec. 87. (1) <u>An agency may order a rehearing in a contested case on its own motion or on request of a party.</u></p> <p>(2) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of judicial review, the agency on its own motion or on request of a party shall order a rehearing.</p> <p>(3) A request for a rehearing shall be filed within the time fixed by this act for instituting <u>proceedings for judicial review.</u> A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.</p> <p>Sec. 63. On request of an interested person, an agency may issue a declaratory <u>ruling</u> as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>agency shall prescribe by <u>procedural</u> rule the form for such a request, <u>the procedure for its submission, consideration, and disposition and the time limits within which the agency will deny or issue a declaratory order.</u> <u>In the absence of a procedural rule establishing a time limit for action, a request for a declaratory order shall be deemed to be denied 90 days after it is received by the agency.</u> A declaratory order is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory order, but nothing in this section prevents an agency from prospectively changing a declaratory order. A declaratory order is subject to judicial review in the same manner as an agency final decision or order in a contested case. <u>A decision not to issue a declaratory order is not subject to judicial review.</u></p>	<p>agency shall prescribe by rule the form for such a request <u>and</u> procedure for its submission, consideration and disposition. A declaratory <u>ruling</u> is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory <u>ruling</u>, but nothing in this subsection prevents an agency from prospectively changing a declaratory <u>ruling</u>. A declaratory <u>ruling</u> is subject to judicial review in the same manner as an agency final decision or order in a contested case.</p>
<p>Chapter 5. Licenses</p>	
<p>Sec. 91. (1) When licensing is required <u>by statute or constitution to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply.</u> <u>The agency may, by procedural rule, provide that initial licensing or other activity related to licensing shall be subject to the provisions of this act governing a contested case or to such portions of the provisions governing a contested case as the agency shall in its discretion deem appropriate.</u></p>	<p>Sec. 91. (1) When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply.</p>
<p>(2) When a licensee makes timely and sufficient application for renewal of a license or a new license with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order or a later date fixed by order of the reviewing court. This subsection does not affect valid agency action then in effect summarily suspending such license under section <u>93.</u></p>	<p>(2) When a licensee makes timely and sufficient application for renewal of a license or a new license with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order or a later date fixed by order of the reviewing court. This subsection does not affect valid agency action then in effect summarily suspending such license under section <u>92.</u></p>
<p>(3) When the agency engages in licensing involving competing applications in circumstances where the number of applications exceeds the number of licenses which can be granted, and the statute requires that the licensing be preceded by notice and an opportunity for hearing, the agency shall not grant any license until a review is completed of all competing applications. Where the circumstances so require or permit, a single contested case hearing shall be provided in which all competing applicants are entitled to participate.</p>	<p>NEW</p>

**COMPARATIVE ANALYSIS I.**

<b>PROPOSED ACT</b>	<b>CURRENT LAW</b>
<p>(4) An agency may provide by procedural rule that licenses based on applications for license subject to subsection (3) shall be awarded to qualified applicants: (a) in the order of receipt of applications within periods of application determined by the agency; or (b) by lot from all applications received within periods of application determined by the agency. This subsection shall not apply if the statute requires that the license be awarded to the best or better applicant.</p>	<p>NEW</p>
<p>(5) The agency may eliminate an application prior to proceedings conducted under subsection (3) or (4) when it finds that the application is incomplete or insufficient, or that the applicant fails to meet the minimum requirements for licensing under the statute or agency rules. Any applicant eliminated prior to the competitive proceedings established in subsection (3) or (4) shall be given an opportunity to exercise its statutory right to notice and hearing prior to the competitive proceedings. If the decision in the hearing under this subsection is that the application meets the minimum qualifications necessary for licensing under the statute, the application shall be included in the proceedings conducted under subsection (3) or (4).</p>	<p>NEW</p>
<p>(6) An agency which participates in licensing of competing applicants shall promulgate procedural rules for the administration of the competitive proceedings, including the conduct of the competitive hearing.</p>	<p>NEW</p>
<p>Sec. 92. (1) Before the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license:</p> <p>(a) <u>The agency shall give written notice, personally or by mail, to the licensee of facts or conduct which warrant the intended action.</u></p> <p>(b) <u>The licensee shall be given an informal opportunity to show or achieve compliance with all lawful requirements for retention of the license. This opportunity need not be on the record, may be conducted by any representative of the agency, including those who conducted the inspection or investigation which forms the basis of the agency's intended action, and may be conducted on the licensee's premises.</u></p> <p>(c) <u>The agency shall provide within a reasonable time a written summary of its determination following the informal opportunity to show compliance, which shall include a concise statement of the facts or conduct which warrant any conclusion that the licensee</u></p>	<p>Sec. 92. Before the commencement of proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license, <u>an</u> agency shall give notice, personally or by mail, to the licensee of facts or conduct which warrant the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license. . . .</p> <p>NEW</p>

COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p><u>is not in compliance with the relevant statutes or rules. This statement shall not be used in lieu of a notice of contested case hearing should the agency decide to commence proceedings.</u></p> <p>(d) An agency which determines that the licensee is not in compliance shall begin its contested case proceedings within a reasonable time after the determination of non-compliance unless the agency and the licensee agree in writing to extend the time to show compliance to a date certain, after which the contested case proceedings shall begin within a reasonable time or the agency shall issue a statement of compliance.</p> <p>(2) Subsection (1) shall not apply to any licensing in which:</p> <p>(a) The provisions set forth in section 93 are invoked.</p> <p>(b) The conduct of the licensee threatens the health, safety, or welfare of the public or of any person receiving services, housing, treatment, care, or support from the licensee.</p> <p>(c) The conduct of the licensee constitutes a pattern of intentional and deliberate violation of the terms or conditions of the license.</p> <p>(d) The conduct of the licensee is of a nature that current or future compliance would be irrelevant to the determination of whether to suspend, revoke, annul, withdraw, recall, cancel, or amend the license.</p> <p>(3) The agency shall include in the notice of hearing in any ensuing contested case a concise statement of the facts and law justifying its decision to invoke any provision of subsection (2). The determination of the agency to invoke the provisions of subsection (2) shall not be reviewable by any court, but this subsection shall not prohibit judicial review of the failure of an agency to provide the informal opportunity to show or achieve compliance for any other reason.</p> <p><u>Sec. 93. If the agency has reasonable grounds to believe that the conduct of the licensee threatens the health, safety, or welfare of the public or of any person receiving services, housing, treatment, care, or support from a licensee, and determines that those grounds justify emergency action, it may summarily suspend a license. Such suspension shall take effect upon the date of the order or the date of service of the order upon the licensee, whichever is later, and shall remain in effect during the course of the proceedings. An order summarily suspending a license shall include a concise statement of the facts and law justify-</u></p>	<p>NEW</p> <p>NEW</p> <p>NEW</p> <p>Sec. 92. . . . If the agency finds that the public health, safety or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of a certified copy of the order on the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.</p>

## COMPARATIVE ANALYSIS I.

### PROPOSED ACT

ing the order. An agency decision to proceed summarily may be based upon such facts as it regards to be sufficient to implicate the public health, safety, or welfare, or the health, safety, or welfare of persons receiving services, housing, treatment, care, or support from the licensee. The facts relied upon need not meet the requirements of the rules of evidence provided for contested cases, nor must the decision be based upon a preponderance of evidence. The proceedings shall be promptly commenced and determined. Upon judicial review of a final licensing decision, the court shall not apply the provisions of section 106(1)(d) to the decision of the agency to proceed under this section.

#### Chapter 6. Judicial Review

Sec. 101. (1) Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court for the county of the plaintiff's principal place of business in this state or for the county in which the plaintiff resides or in the circuit court of Ingham county. The agency shall be made a party to the action. An action for declaratory judgment challenging the applicability of a rule may not be commenced under this subsection unless the plaintiff has first requested the agency for a declaratory order under section 85 and the agency has denied the request or failed to act on it expeditiously. This subsection shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted.

(2) When a person has exhausted all administrative remedies available within an agency, and is aggrieved by final agency action as defined in section 2(d), whether such action is affirmative or negative in form, the agency action is subject to direct review by the courts as provided by law and in the absence of such provision, as provided in this chapter. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural, or intermediate agency action or ruling is

### CURRENT LAW

Sec. 64. Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously. This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted.

Sec. 101. When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.</p> <p>Sec. 102. Judicial review of final <u>agency action</u> shall be by any applicable special statutory review proceeding in any court specified and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with sections 103 to 105.</p> <p>Sec. 103. (1) Except as provided in subsection (2), a petition for review shall be filed in the circuit court for the county <u>of the petitioner's principal place of business in this state or for the county in which the petitioner resides</u> or in the circuit court for Ingham county.</p> <p>(2) As used in this section, "adoptee" means a child who is to be or is adopted. In the case of an appeal from a final determination of the office of youth services within the department of social services regarding an adoption subsidy, a petition for review shall be filed:</p> <p>(a) For an adoptee residing in this state, in the probate court for the county in which the petition for adoption was filed or in which the adoptee was found.</p> <p>(b) For an adoptee not residing in this state, in the probate court for the county in which the petition for adoption was filed.</p> <p>(3) A petition for review shall contain a concise statement of:</p> <p>(a) The nature of the <u>action</u> as to which review is sought.</p> <p>(b) <u>The factual background of the matter.</u></p> <p>(c) The <u>factual and legal</u> grounds on which relief is sought.</p> <p>(d) The relief sought.</p> <p>(4) The petitioner shall attach to the petition, as an exhibit, a copy of the agency <u>action</u> of which review is sought. <u>If the agency action was not reduced to</u></p>	<p>may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.</p> <p>Sec. 102. Judicial review of a final <u>decision or order in a contested case</u> shall be by any applicable special statutory review proceeding in any court specified by <u>statute</u> and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with sections 103 to 105.</p> <p>Sec. 103. (1) Except as provided in subsection (2), a petition for review shall be filed in the circuit court for the county <u>where petitioner resides or has his or her principal place of business in this state,</u> or in the circuit court for Ingham county.</p> <p>(2) As used in this subsection, "adoptee" means a child who is to be or who is adopted. In the case of an appeal from a final determination of the office of youth services within the department of social services regarding an adoption subsidy, a petition for review shall be filed:</p> <p>(a) For an adoptee residing in this state, in the probate court for the county in which the petition for adoption was filed or in which the adoptee was found.</p> <p>(b) For an adoptee not residing in this state, in the probate court for the county in which the petition for adoption was filed.</p> <p>(3) A petition for review shall contain a concise statement of:</p> <p>(a) The nature of the <u>proceedings</u> as to which review is sought.</p> <p>(b) <u>The facts on which venue is based.</u></p> <p>(c) The grounds on which relief is sought.</p> <p>(d) The relief sought.</p> <p>(4) The petitioner shall attach to the petition, as an exhibit, a copy of the agency <u>decision or order</u> of which review is sought.</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p><u>written form, the petitioner shall attach to the petition, as an exhibit, an affidavit in accordance with the general court rules describing the agency action of which review is sought.</u></p> <p>Sec. 104. (1) A petition shall be filed in the court within 60 days after the date of mailing notice of the <u>final agency action</u>, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. <u>If the agency action is the failure to act, the petition shall be filed in the court within 180 days after the date upon which the duty to act arose.</u> The filing of the petition does not stay enforcement of the agency action, but the agency may grant, or the court may order, a stay upon appropriate terms.</p> <p>(2) Within 60 days after service of the petition, or within such further time as the court allows, the agency shall transmit to the court the original or certified copy of the entire record of the <u>agency action</u>, unless parties to the proceedings for judicial review stipulate that the record be shortened. <u>If the action was not conducted as a hearing on the record, the agency shall transmit to the court an original or certified copy of its entire file relevant to the petition, unless the parties to the proceedings for judicial review stipulate that the record be shortened.</u> A party unreasonably refusing to stipulate <u>to shortening the record</u> may be taxed by the court for the additional costs. The court may permit subsequent corrections to the record.</p> <p>(3) The review shall be conducted by the court without a jury and shall be confined to the record. In a case of alleged irregularity in procedure before the <u>agency or in review of agency failure to act</u>, not shown in the record, proof thereof may be taken by the court. The court, on request, shall hear oral arguments and receive written briefs.</p> <p>Sec. 105. <u>In review of agency proceedings conducted under chapter 4</u>, if timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that an inadequate record was made at the hearing before the agency or that the additional evidence is material and that there were good reasons for failing to record or present it in the proceeding before the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its findings,</p>	<p>Sec. 104. (1) A petition shall be filed in the court within 60 days after the date of mailing notice of the <u>final decision or order of the agency</u>, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. The filing of the petition does not stay enforcement of the agency action but the agency may grant, or the court may order, a stay upon appropriate terms.</p> <p>(2) Within 60 days after service of the petition, or within such further time as the court allows, the agency shall transmit to the court the original or certified copy of the entire record of the <u>proceedings</u>, unless parties to the proceedings for judicial review stipulate that the record be shortened. A party unreasonably refusing to <u>so</u> stipulate may be taxed by the court for the additional costs. The court may permit subsequent corrections to the record.</p> <p>(3) The review shall be conducted by the court without a jury and shall be confined to the record. In a case of alleged irregularity in procedure before the agency, not shown in the record, proof thereof may be taken by the court. The court, on request, shall hear oral arguments and receive written briefs.</p> <p>Sec. 105. If timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that an inadequate record was made at the hearing before the agency or that the additional evidence is material, and that there were good reasons for failing to record or present it in the proceeding before the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its findings, decision or order because of the additional evidence</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
<p>decision, or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision, or order, which shall become part of the record.</p> <p>Sec. 106. (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside <u>agency action</u> if substantial rights of the petitioner have been prejudiced because the <u>agency action</u> is any of the following:</p> <ul style="list-style-type: none"><li>(a) In violation of the constitution or a statute.</li><li>(b) In excess of the statutory authority or jurisdiction of the agency, <u>or short of statutory right</u>.</li><li>(c) Made upon unlawful procedure resulting in material prejudice to a party.</li><li>(d) Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.</li><li>(e) Affected by other substantial and material error of law.</li><li>(f) <u>In review of agency proceedings conducted under chapter 4, not supported by competent, material, and substantial evidence on the whole record. The court shall apply the rules of evidence in the same manner as applied in the agency under section 75 and shall not overturn an agency decision solely because the preponderance of the evidence is not wholly constituted of evidence admissible under the Michigan rules of evidence.</u></li></ul> <p>(2) The court, as appropriate, may affirm, reverse, or modify the <u>agency action</u> or remand the case for further proceedings. <u>The court shall authorize only such actions as are included within the powers granted to the agency in the underlying statute or statutes on which the agency's decision was based.</u></p>	<p>and shall file with the court the additional evidence and any new findings, decision or order, which shall become part of the record.</p> <p>Sec. 106. (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside <u>a decision or order of an agency</u> if substantial rights of the petitioner have been prejudiced because the <u>decision or order</u> is any of the following:</p> <ul style="list-style-type: none"><li>(a) In violation of the constitution or a statute.</li><li>(b) In excess of the statutory authority or jurisdiction of the agency.</li><li>(c) Made upon unlawful procedure resulting in material prejudice to a party.</li><li>(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.</li><li>(f) Affected by other substantial and material error of law.</li><li>(d) Not supported by competent, material and substantial evidence on the whole record.</li></ul> <p>(2) The court, as appropriate, may affirm, reverse or modify the <u>decision or order</u> or remand the case for further proceedings.</p>

**COMPARATIVE ANALYSIS I.**

<b>PROPOSED ACT</b>	<b>CURRENT LAW</b>
	<p>(Current Administrative Procedures Act provisions with no comparable equivalent in the proposed act)</p> <p>Sec. 3. (6) "Guideline" means an agency statement or declaration of policy which the agency intends to follow, which does not have the force or effect of law, and which binds the agency but does not bind any other person.</p> <p>Sec. 7a. (1) "Small business" means a business concern incorporated or doing business in this state, including the affiliates of the business concern, which is independently owned and operated and which employs fewer than 250 full-time employees or which has gross annual sales of less than \$6,000,000.00.</p> <p>(2) "Small business economic impact statement" means a statement prepared by a state agency which meets the requirements of section 45(3).</p> <p>Sec. 8. (1) (e) Small business economic impact statements on proposed rules as required by section 45.</p> <p>Sec. 24. (1) Before the adoption of a guideline, an agency shall give notice of the proposed guideline to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and each person who requested the agency in writing for advance notice of proposed action which may affect the person. The notice shall be given by mail, in writing, to the last address specified by the person. A request for notice is renewable each December.</p> <p>(2) The notice required by subsection (1) shall include all of the following:</p> <p>(a) A statement of the terms or substance of the proposed guideline, a description of the subjects and issues involved, and the proposed effective date of the guideline.</p> <p>(b) A statement that the addressee may express any views or arguments regarding the proposed guideline or the guideline's effect on a person.</p> <p>(c) The address to which written comments may be sent and the date by which comments shall be mailed, which date shall not be less than 60 days from the date of the mailing of the notice.</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
	<p>(d) A reference to the specific statutory provision about which the proposed guideline states a policy.</p> <p>Sec. 26. An agency shall not adopt a guideline in lieu of a rule.</p> <p>Sec. 27. (1) A guideline adopted after the effective date of this section is not valid unless processed in substantial compliance with sections 24, 25, and 26. However, inadvertent failure to give notice to any person as required by section 24 does not invalidate a guideline which was otherwise processed in substantial compliance with sections 24, 25, and 26.</p> <p>(2) A proceeding to contest a guideline on the grounds of noncompliance with sections 24, 25, and 26 shall be commenced within 2 years after the effective date of the guideline.</p> <p>Sec. 40. (1) When an agency proposes to adopt a rule which will apply to a small business, and the small business economic impact statement discloses that the rule will have a disproportionate impact on small businesses because of the size of those businesses, the agency proposing to adopt the rule shall reduce the economic impact of the rule on small businesses by doing 1 or more of the following when it is lawful and feasible in meeting the objectives of the act authorizing the promulgation of the rule:</p> <p>(a) Establish differing compliance or reporting requirements or timetables for small businesses under the rule.</p> <p>(b) Consolidate or simplify the compliance and reporting requirements for small businesses under the rule.</p> <p>(c) Establish performance rather than design standards, when appropriate.</p> <p>(d) Exempt small businesses from any or all of the requirements of the rule.</p> <p>(2) If appropriate in reducing the disproportionate economic impact on small business of a rule as provided in subsection (1), an agency may use the following classifications of small business:</p> <p>(a) 0-9 full-time employees.</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
	<p>(b) 10-49 full-time employees.</p> <p>(c) 50-249 full-time employees.</p> <p>(3) For purposes of subsection (2), an agency may include a small business with a greater number of full-time employees in a classification that applies to a business with fewer full-time employees.</p> <p>(4) This section and section 45(3) shall not apply to a rule which is required by federal law and which an agency promulgates without imposing standards more stringent than those required by the federal law.</p> <p>Sec. 41a. A member of the legislature may annually submit a written request to the legislative service bureau requesting that a copy of all proposed rules or changes in rules, or any designated proposed rules or changes in rules submitted to the legislative service bureau for its approval, be transmitted to the requesting member upon receipt of the same by the legislative service bureau.</p> <p>Sec. 45. (3) Except as provided in section 40(4), if the regulatory impact statement discloses an impact on small businesses, the agency shall include with the letter of transmittal a small business economic impact statement in a form prescribed by the committee. A small business economic impact statement shall contain all of the following with respect to the proposed rules:</p> <p>(a) The nature of any reports and the estimated cost of their preparation by small businesses which would be required to comply with the proposed rules.</p> <p>(b) An analysis of the costs of compliance for all small businesses affected by the proposed rules, including costs of equipment, supplies, labor, and increased administrative costs.</p> <p>(c) The nature and estimated cost of any legal, consulting, and accounting services which small businesses would incur in complying with the proposed rules.</p> <p>(d) A statement regarding whether the proposed rules will have a disproportionate impact on small businesses because of the size of those businesses.</p> <p>(e) The ability of small businesses to absorb the costs estimated under subdivisions (a) to (c) without suf-</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
	<p>fering economic harm and without adversely affecting competition in the marketplace.</p> <p>(f) The cost, if any, to the agency of administering or enforcing a rule which exempts or sets lesser standards for compliance by small businesses.</p> <p>(g) The impact on the public interest of exempting or setting lesser standards of compliance for small businesses.</p> <p>(h) A statement regarding how the agency reduced the economic impact of the rule on small businesses as required under section 40, or a statement regarding why such reduction was not feasible.</p> <p>(i) A statement regarding whether and how the agency has involved small businesses in the development of the rule.</p> <p>(4) In order to obtain cost information for purposes of subsection (3), an agency may survey a representative sample of affected small businesses or trade associations or adopt any other means considered appropriate by the agency.</p> <p>(5) The agency shall transmit a copy of the small business economic impact statement to the director of the department of commerce at the same time as required in subsection (3) for transmittal to the committee. The director shall review the statement and within 30 days after receipt shall notify the committee of any additional information pertinent to the committee's review.</p> <p>(7) The committee shall furnish the senate fiscal agency and the house fiscal agency with a copy of each rule and regulatory impact statement filed with the committee, as well as a copy of the agenda identifying the proposed rules to be considered by the committee. If requested by the committee, the senate fiscal agency and the house fiscal agency shall analyze each proposed rule for possible fiscal implications which, if adopted, would result in additional appropriations in the current fiscal year, or commit the legislature to an appropriation in a future fiscal year, and report their findings in writing, to the senate and house appropriations committees and the committee before the date of consideration of the proposed rule by the committee.</p> <p>Sec. 53. (1) Each agency shall prepare a plan for the review of the agency's rules that are brought to the</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
	<p>attention of the Michigan business ombudsman. The plan shall be transmitted to the committee and to the director of the department of commerce. The agency shall conduct a review pursuant to the plan.</p> <p>(2) In conducting the review required by this section, the agency shall prepare a small business economic impact statement if the review discloses an impact on small businesses. The agency shall prepare a recommendation based on the review as to whether the rules should be continued without change or should be amended or rescinded. If the small business economic impact statement discloses that an existing rule has a disproportionate impact on small businesses because of the size of those businesses, the agency reviewing the rule shall, if it is lawful and feasible in meeting the objectives of the act authorizing the promulgation of the rule, amend or rescind the rule pursuant to this act to reduce or eliminate the disproportionate impact of the rule on small businesses.</p> <p>(3) The small business economic impact statement and recommendation shall be transmitted to the committee and the director of the department of commerce. The director shall review the statement and shall notify the committee of any additional information pertinent to the committee's review.</p> <p>(4) Four years after its effective date, this section shall not apply.</p> <p>Sec. 75a. (7) This section applies to hearings beginning on or after January 1, 1988.</p> <p>(8) This section shall take effect January 1, 1988.</p> <p>Sec. 80. (1) (f) Act upon an application for an award of costs and fees under sections 121 to 127.</p> <p>Sec. 81. (4) The parties, by written stipulation or at the hearing, may waive compliance with this section.</p> <p>Sec. 121. For the purposes of this chapter, the words and phrases described in section 122 have the meanings ascribed to them in that section.</p> <p>Sec. 122. (1) "Contested case" means a contested case as defined in section 3(3) but does not include a case that is settled or a case in which a consent agree-</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
	<p>ment is entered into or a proceeding for establishing a rate or approving, disapproving, or withdrawing approval of a form.</p> <p>(2) "Costs and fees" means the normal costs incurred, after a party has received notice of an initial hearing under section 71(2), in being a party in a contested case under this act and include all of the following:</p> <p>(a) The reasonable and necessary expenses of expert witnesses as determined by the presiding officer.</p> <p>(b) The reasonable cost of any study, analysis, engineering report, test, or project which is determined by the presiding officer to have been necessary for the preparation of a party's case.</p> <p>(c) Reasonable and necessary attorney or agent fees including those for purposes of appeal.</p> <p>(3) "Party" means a party as defined in section 5(4), but does not include any of the following:</p> <p>(a) An individual whose net worth was more than \$500,000.00 at the time the contested case was initiated.</p> <p>(b) The sole owner of an unincorporated business or any partnership, corporation, association, or organization whose net worth exceeded \$3,000,000.00 at the time the contested case was initiated and which is not either exempt from taxation pursuant to section 501. (c)(3) of the internal revenue code or a cooperative association as defined in section 15(a) of the agricultural marketing act, 12 U.S.C. 1141j(a).</p> <p>(c) The sole owner of an unincorporated business or any partnership, corporation, association, or organization that had more than 250 full-time equivalent employees, as determined by the total number of employees multiplied by their working hours divided by 40, at the time the contested case was initiated.</p> <p>(d) As used in this subsection "net worth" means the amount remaining after the deduction of liabilities from assets as determined according to generally accepted accounting principles.</p> <p>(4) "Presiding officer" means an agency, 1 or more members of the agency, a person designated by statute to conduct a contested case, or a hearing officer designated and authorized by the agency to conduct a contested case.</p>

## COMPARATIVE ANALYSIS I.

<b>PROPOSED ACT</b>	<b>CURRENT LAW</b>
	<p>(5) "Prevailing party" means as follows:</p> <ul style="list-style-type: none"><li>(a) In an action involving several remedies, or issues or counts which state different causes of actions or defenses, the party prevailing as to each remedy, issue, or count.</li><li>(b) In an action involving only 1 issue or count stating only 1 cause of action or defense, the party prevailing on the entire record.</li></ul> <p>Sec. 123. (1) The presiding officer that conducts a contested case shall award to a prevailing party, other than an agency, the costs and fees incurred by the party in connection with that contested case, if the presiding officer finds that the position of the agency to the proceeding was frivolous. To find that an agency's position was frivolous, the presiding officer shall determine that at least 1 of the following conditions has been met:</p> <ul style="list-style-type: none"><li>(a) The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.</li><li>(b) The agency had no reasonable basis to believe that the facts underlying its legal position were in fact true.</li><li>(c) The agency's legal position was devoid of arguable legal merit.</li></ul> <p>(2) If the parties to a contested case do not agree on the awarding of costs and fees under this section, a hearing shall be held if requested by a party, regarding the awarding of costs and fees and the amount thereof. The party seeking an award of costs and fees shall present evidence establishing all of the following:</p> <ul style="list-style-type: none"><li>(a) That the position of the agency was frivolous.</li><li>(b) That the party is a prevailing party.</li><li>(c) The amount of costs and fees sought including an itemized statement from any attorney, agent, or expert witness who represented the party showing the rate at which the costs and fees were computed.</li><li>(d) That the party is eligible to receive an award under this section. Financial records of a party shall be exempt from public disclosure if requested by the party at the time the records are submitted pursuant to this section.</li></ul>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
	<p>(e) That a final order not subject to further appeal other than for the judicial review of costs and fees provided for in section 125 has been entered in the contested case regarding the subject matter of the contested case.</p> <p>(3) The presiding officer may reduce the amount of the costs and fees to be awarded, or deny an award, to the extent that the party seeking the award engaged in conduct which unduly and unreasonably protracted the contested case.</p> <p>(4) The final action taken by the presiding officer under this section in regard to costs and fees shall include written findings as to that action and the basis for the findings.</p> <p>(5) Subject to subsection (6), the amount of costs and fees awarded under this section shall include those reasonable and necessary costs actually incurred by the party and any costs allowed by law or by a rule promulgated under this act. Subject to subsection (6), the amount of fees awarded under this section shall be based upon the prevailing market rate for the kind and quality of the services furnished, subject to the following:</p> <p>(a) The expenses paid for an expert witness shall be reasonable and necessary as determined by the presiding officer.</p> <p>(b) An attorney or agent fee shall not be awarded at a rate of more than \$75.00 per hour unless the presiding officer determines that special circumstances existed justifying a higher rate or an applicable rule promulgated by the agency provides for the payment of a higher rate because of special circumstances.</p> <p>(6) The costs and fees awarded under this section shall only be awarded to the extent and amount that the agency caused the prevailing party to incur those costs and fees.</p> <p>(7) This section does not apply to any agency in its role of hearing or adjudicating a case. Unless an agency has discretion to proceed, this section does not apply to an agency acting ex rel on the information and at the instigation of a nonagency person who has a private interest in the matter nor to an agency required by law to commence a case upon the action or request of another nonagency person.</p> <p>(8) This section does not apply to an agency that has such a minor role as a party in the case in comparison</p>

## COMPARATIVE ANALYSIS I.

PROPOSED ACT	CURRENT LAW
	<p>to other nonprevailing parties so as to make its liability for costs and fees under this section unreasonable, unjust, or unfair.</p> <p>Sec. 124. An application for costs and fees and the awarding thereof under this chapter shall not delay the entry of a final order in a contested case.</p> <p>Sec. 125. (1) A party that is dissatisfied with the final action taken by the presiding officer under section 123 in regard to costs and fees may seek judicial review of that action pursuant to chapter 6.</p> <p>(2) The court reviewing the final action of a presiding officer pursuant to subsection (1) may modify that action only if the court finds that the failure to make an award or the making of an award was an abuse of discretion, or that the calculation of the amount of the award was not based on substantial evidence.</p> <p>(3) An award of costs and fees made by a court under this section shall only be made pursuant to section 2421d of Act No. 236 of the Public Acts of 1961, being section 600.2421d of the Michigan Compiled Laws.</p> <p>Sec. 126. (1) The director of the department of management and budget shall report annually to the legislature regarding the amount of costs and fees paid by the state under this chapter during the preceding fiscal year. The report shall describe the number, nature, and amount of the awards; the claims involved; and any other relevant information which would aid the legislature in evaluating the scope and impact of the awards. Each agency shall provide the director of the department of management and budget with information as is necessary for the director to comply with the requirements of this section.</p> <p>(2) If costs and fees are awarded under this chapter to a prevailing party, the agency or agencies over which the party prevailed shall pay those costs and fees.</p> <p>Sec. 127. If a prevailing party recovers costs and fees under this chapter in a contested case, the prevailing party is not entitled to recover those same costs for that contested case under any other law.</p> <p>Sec. 128. Sections 121 to 127 shall apply to contested cases commenced after September 30, 1984, and shall not apply to contested cases commenced after September 30, 1987.</p>

## Conversion Table II

This table is a guide to the relocation of the provisions of the current Michigan Administrative Procedures Act in the proposed new version. An asterisk (\*) indicates that minor changes in the language have been made, primarily those which are necessary for style or to make the passage consistent with other passages. No indication is shown if the language change refers only to a new section number. A double asterisk (\*\*) indicates that a substantive change has been made; a triple hyphen (---) indicates that the provision has been deleted.

<u>Current Michigan APA Section</u>	<u>New Michigan APA Section</u>
Chapter 1. General Provisions	
§1	§1*
§3 (1)	§2 (b)
§3 (2)	§2 (c)
§3 (3)	§2 (h)*,**
§3 (4)	§2 (g)
§3 (5)	§2 (i)*
§3 (6)	---
§5 (1)	§2 (l)**
§5 (2)	§2 (m)*
§5 (3)	§2 (o)
§5 (4)	§2 (q)**
§5 (5)	§2 (r)**
§5 (6)	§2 (t)
§5 (7)	§2 (u)
§7	§2 (w)**
§7a (1)	---
§7a (2)	---

## Conversion Table II

### Chapter 1 (Continued)

<u>Current Michigan APA Section</u>	<u>New Michigan APA Section</u>
§8 (1)	§21 (1)*,**
§8 (2)	§21 (2)
§8 (3)	§21 (3)
§8 (4)	§21 (5)*
§8 (5)	§21 (4)*
§11	§3*

### Chapter 2. Guidelines

§24 (1)	---
§24 (2)	---
§25	---; §33 (1)**
§26	---
§27 (1)	---
§27 (2)	---

### Chapter 3. Procedures for Processing and Publishing Rules

§31 (1)	§4 (1)*
§31 (2)	§4 (2)
§31 (3)	§4 (3)
§31 (4)	§4 (4)
§31 (5)	§4 (5)
§32 (1)	§5 (1)
§32 (2)	§5 (2)*
§32 (3)	§5 (3)
§32 (4)	§5 (4)**

## Conversion Table II

### Chapter 3 (Continued)

<u>Current Michigan APA Section</u>	<u>New Michigan APA Section</u>
§33 (1)	§31**
§33 (2)	§32 (1)**
§33 (3)	§32 (4)
§35	§34**
§36	§35*
§38	§36*
§40 (1)	---
§40 (2)	---
§40 (3)	---
§40 (4)	---
§41 (1)	§41 (1)**
§41 (2)	§41 (4)**
§41 (3)	§42 (1)*, **
§41 (4)	§42 (2)**
§41a	---
§42 (1)	§41 (2)*
§42 (2)	§41 (3)
§43 (1)	§32 (2)*; §33 (2)*; §43 (1)*
§43 (2)	§32 (3)*; §33 (3)*; §43 (2)
§44	§44
§45 (1)	§45 (1)*
§45 (2)	§45 (2)---
§45 (3)	---
§45 (4)	---

## Conversion Table II

### Chapter 3 (Continued)

<u>Current Michigan APA Section</u>	<u>New Michigan APA Section</u>
§45 (5)	---
§45 (6)	§45 (3)*
§45 (7)	---
§45 (8)	§45 (4)
§45 (9)	§45 (5)*
§45 (10)	§45 (6)*
§45 (11)	§45 (7)
§45 (12)	§45 (8)*
§46 (1)	§46 (1)*
§46 (2)	§46 (2)
§46 (3)	§46 (3)*
§47 (1)	§47 (1)*
§47 (2)	§47 (2)
§48 (1)	§48 (1)*,**
§48 (2)	§48 (3)
§48 (3)	§48 (4)
§49 (1)	§49 (1)*
§49 (2)	§49 (2)
§50	§50*
§51	§51*
§52	§52*
§53 (1)	---
§53 (2)	---
§53 (3)	---
§53 (4)	---

## Conversion Table II

### Chapter 3 (Continued)

<u>Current Michigan APA Section</u>	<u>New Michigan APA Section</u>
§55 (1)	§22 (1)
§55 (2)	§22 (2)
§56 (1)	§23 (1)
§56 (2)	§23 (2)
§57 (1)	§24 (1)
§57 (2)	§24 (2)*
§58 (1)	§24 (2)*
§58 (2)	§24 (2)*
§59 (1)	§25 (1)
§59 (2)	§25 (2)**
§59 (3)	§25 (3)
§61 (1)	§5 (5)
§61 (2)	§5 (6)
§61 (3)	§5 (7)
§63	§85**
§64	§101 (1)*,**

### Chapter 4. Procedures in Contested Cases

§71 (1)	§71 (1)**
§71 (2)	§71 (2)**
§71 (3)	§71 (4)**
§72 (1)	§71 (6)**
§72 (2)	§71 (5)**

## Conversion Table II

### Chapter 4 (Continued)

<u>Current Michigan APA Section</u>	<u>New Michigan APA Section</u>
§72 (3)	§75 (2)
§72 (4)	§75 (5); §75 (2)
§73	§73
§74 (1)	§74 (1); §75 (4); §74 (2)*
§74 (2)	§75 (6); §74 (4)**
§75	§75 (3)*, **
§75a (1)-(6)	§76 (1)-(6)*
§75a (7)-(8)	---
§76	§75 (7)
§77	§75 (8)
§78 (1)	§74 (3)*
§78 (2)	§72 (4)(f)*
§79	§72 (1); §72 (3)**
§80 (1)	§72 (4)(a-e)*, **
§80 (2)-(6)	§72 (6)*, **; §72 (7)*
§81 (1)	§81 (1)**; §81 (2)**; §82 (1)*, **; §82 (2)*; §82 (3)*
§81 (2)	§81 (2)**; §81 (3)*
§81 (3)	§81 (2)*; §82 (4)*; §82 (5)*, **
§81 (4)	§82 (5)* ---
§82	§81 (6)*, **

## Conversion Table II

### Chapter 4 (Continued)

<u>Current Michigan APA Section</u>	<u>New Michigan APA Section</u>
§85	§75 (1)(b)**; §81 (3)*,**; §81(4)*,**; §81 (5)*; §82 (5)*
§86 (1)	§83 (1)*
§86 (2)	§83 (2)*,**
§87 (1)	§84 (1)**
§87 (2)	§84 (1)*
§87 (3)	§84 (2)**

### Chapter 5. Licenses

§91 (1)	§91 (1)**
§91 (2)	§91 (2)
§92	§92 (1)**; §93**

### Chapter 6. Judicial Review

§101	§101 (2)**
§102	§102**
§103 (1)	§103 (1)*
§103 (2)	§103 (2)
§103 (3)	§103 (3)*,**
§103 (4)	§103 (4)*,**
§104 (1)	§104 (1)*,**
§104 (2)	§104 (2)*,**
§104 (3)	§104 (3)**
§105	§105**

Conversion Table II

Chapter 6 (Continued)

<u>Current Michigan APA Section</u>	<u>New Michigan APA Section</u>
§106 (1)	§106 (1)*,**
§106 (2)	§106 (2)*,**

Chapter 7. Miscellaneous Provisions

§111	§6*
§112	§7*
§113	§8*
§114	§9*
§115	§10 (1); §10 (2);*

Chapter 8. (Untitled--deleted by sunset provision)

§121	---
§122 (1)-(5)	---
§123 (1)-(8)	---
§124	---
§125 (1)-(3)	---
§126 (1)-(2)	---
§127	---
§128	---

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## COMPARATIVE ANALYSIS II

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**The current Administrative Procedures Act compared to the proposed act**

*(This comparative analysis is included to assist in ascertaining the proposed changes to the current act. If the language in the comparative analysis varies from the language of the proposed text, the language in the proposed text controls.)*

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p style="text-align: center;"><b>Chapter 1. General Provisions</b></p> <p>Sec. 1. This act shall be known and may be cited as the "administrative procedures act of <u>1969</u>".</p> <p>Sec. 3. (1) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.</p> <p>(2) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.</p> <p>(3) "Contested case" means a <u>proceeding</u>, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by <u>law</u> to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are deemed to be a continuous <u>proceeding</u> as though before a single agency.</p> <p>(4) "Committee" means the joint committee on administrative rules.</p> <p>(5) "Court" means the circuit court.</p> <p>(6) "Guideline" means an agency statement or declaration of policy which the agency intends to follow, which does not have the force or effect of law, and which binds the agency but does not bind any other person.</p> <p>Sec. 5. (1) "License" <u>includes</u> the whole or part of an agency permit, certificate, approval, registration, charter, or similar form of permission required by</p>	<p>Sec. 1. This act shall be known and may be cited as the "administrative procedures act of <u>1990</u>."</p> <p>Sec. 2. <u>For the purposes of this act:</u></p> <p>(b) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.</p> <p>(c) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority, or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branches of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.</p> <p>(h) "Contested case" means an <u>adjudication</u>, including ratemaking, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by <u>statute</u> to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal is taken to another agency, the hearing and the appeal are deemed to be a continuous <u>adjudication</u> as though before a single agency.</p> <p>(g) "Committee" means the joint committee on administrative rules.</p> <p>(i) "Court" means the circuit court <u>unless otherwise indicated</u>.</p> <p style="text-align: center;"><b>DELETED</b></p> <p>(d) "License" <u>means</u> the whole or part of an agency permit, certificate, approval, registration, charter, franchise, or similar form of permission required by</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW
<p>law, but does not include a license <u>required</u> solely for revenue purposes, or a license or registration issued under Act No. 300 of the Public Acts of 1949, <u>as amended</u>, being sections 257.1 to 257.923 of the Michigan Compiled Laws.</p>
<p>(2) "Licensing" <u>includes</u> agency <u>activity</u> involving the grant, denial, renewal, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license.</p>
<p>(3) "Michigan register" means the publication described in section 8.</p>
<p>(4) "Party" means a person or agency named, admitted, or properly seeking and entitled of right to be admitted, as a party in a contested case.</p>
<p>(5) "Person" means an individual, partnership, association, corporation, governmental subdivision, or public or private organization of any kind other than the agency engaged in the particular <u>processing of a rule, declaratory ruling, or contested case.</u></p>
<p>(6) "Processing of a rule" means the action required or authorized by this act regarding a rule which is to be promulgated, including the rule's adoption, and ending with the rule's promulgation.</p>
<p>(7) "Promulgation of a rule" means that step in the processing of a rule consisting of the filing of a rule with the secretary of state.</p>
<p>Sec. 7. "Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability <u>that</u> implements or applies law enforced or administered by the agency, <u>or that</u> prescribes the <u>organization, procedure, or practice</u> of the agency, <u>including</u> the amendment, suspension, or rescission thereof, but does not include the following:</p>
<p>(a) A resolution or order of the state administrative board.</p>
<p>(b) A formal opinion of the attorney general.</p>

PROPOSED ACT
<p>law, but does not include a license solely for revenue purposes, or a license or registration issued under Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws.</p>
<p>(m) "Licensing" <u>means</u> agency <u>process</u> involving the grant, denial, renewal, suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license.</p>
<p>(o) "Michigan register" means the publication described in section 21.</p>
<p>(q) "Party" means a person or agency named, admitted, or properly seeking and entitled of right to be admitted, as a party in a contested case, <u>including a person or agency admitted for a limited purpose or under limited conditions.</u></p>
<p>(r) "Person" means an individual, partnership, association, corporation, governmental subdivision, or public or private organization <u>or authority</u> of any kind other than the agency engaged in the particular <u>proceeding.</u></p>
<p>(t) "Processing of a rule" means the action required or authorized by this act regarding a rule which is to be promulgated, including the rule's adoption, and ending with the rule's promulgation.</p>
<p>(u) "Promulgation of a rule" means that step in the processing of a rule consisting of the filing of a rule with the secretary of state.</p>
<p>(w) "Rule" means an agency regulation, statement, standard, policy, <u>guideline</u>, ruling, or instruction of general applicability, <u>which</u> implements or applies law enforced or administered by the agency; <u>interprets a statute or rule of the agency;</u> prescribes the <u>procedure, practice, or external requirements</u> of the agency; <u>or describes the internal organization, operation, management, and practices of the agency.</u> <u>A rule includes</u> the amendment, suspension, or rescission thereof, but does not include the following:</p>
<p>(i) A resolution or order of the state administrative board.</p>
<p>(ii) A formal opinion of the attorney general <u>or any embodiment of legal advice provided by the attorney general to an agency or its employees.</u></p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>(c) A rule or order establishing or fixing rates or tariffs.</p> <p>(d) A rule or order pertaining to game and fish and promulgated under Act No. 230 of the Public Acts of 1925, <u>as amended</u>, being sections 300.1 to 300.5 of the Michigan Compiled Laws, the Michigan sportsmen fishing law, Act No. 165 of the Public Acts of 1929, <u>as amended</u>, being sections 301.1 to 306.3 of the Michigan Compiled Laws, and the game law of 1929, Act No. 286 of the Public Acts of 1929, <u>as amended</u>, being sections 311.1 to 315.5 of the Michigan Compiled Laws.</p> <p>(e) A rule relating to the use of streets or highways, the substance of which is indicated to the public by means of signs or signals.</p> <p>(f) A determination, decision, or order in a contested case.</p> <p>(g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication <u>that</u> does not affect the rights of, or procedures and practices available to, the public.</p> <p>(h) <u>A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.</u></p> <p>(i) A declaratory <u>ruling</u> or other disposition of a particular matter as applied to a specific set of facts involved.</p> <p>(j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.</p> <p>(k) Unless another statute requires a rule to be promulgated under this act, a rule or policy <u>that</u> only concerns the inmates of a state correctional facility and does not directly affect the public. <u>As used in this subdivision, "state correctional facility" means a facility or institution that houses an inmate population under the jurisdiction of the department of corrections.</u></p> <p>(l) All of the following, after final approval by the certificate of need commission or the statewide health coordinating council under section 22215 or 22217 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.22215 and 333.22217 of the Michigan Compiled Laws:</p>	<p>(iii) A rule or order establishing or fixing rates or tariffs.</p> <p>(iv) A rule or order pertaining to game and fish and promulgated under Act No. 230 of the Public Acts of 1925, being sections 300.1 to 300.5 of the Michigan Compiled Laws; the Michigan sportsmen fishing law, Act No. 165 of the Public Acts of 1929, being sections 301.1 to 306.3 of the Michigan Compiled Laws; and the game law of 1929, Act No. 286 of the Public Acts of 1929, being sections 311.1 to 315.5 of the Michigan Compiled Laws.</p> <p>(v) A rule relating to the use of streets or highways the substance of which is indicated to the public by means of signs or signals.</p> <p>(vi) A determination, decision, or order in a contested case.</p> <p>(vii) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication <u>which</u> does not affect the rights of, or procedures and practices available to, the public.</p> <p>(viii) <u>Any informal material not included within the definitions of substantive, interpretive, procedural, or housekeeping rules.</u></p> <p>(ix) A declaratory <u>order</u> or other disposition of a particular matter as applied to a specific set of facts involved.</p> <p>(x) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.</p> <p>(xi) Unless another statute requires a rule to be promulgated under this act, a rule or policy <u>which</u> only concerns the inmates of a state correctional facility <u>or those committed to the custody of the state corrections commission</u> and does not directly affect the public.</p> <p>(xii) All of the following, after final approval by the certificate of need commission or the statewide health coordinating council under section 22215 or 22217 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.22215 and 333.22217 of the Michigan Compiled Laws:</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>(i) The designation, deletion, or revision of covered medical equipment and covered clinical services.</p> <p>(ii) Certificate of need review standards.</p> <p>(iii) Data reporting requirements and criteria for determining health facility viability.</p> <p>(iv) Standards used by the department of public health in designating a regional certificate of need review agency.</p> <p>(v) The modification of the 100 licensed bed limitation for short-term nursing care programs set forth in section 22210 of Act No. 368 of the Public Acts of 1978, being section 333.22210 of the Michigan Compiled Laws.</p> <p>Sec. 7a. (1) "Small business" means a business concern incorporated or doing business in this state, including the affiliates of the business concern, which is independently owned and operated and which employs fewer than 250 full-time employees or which has gross annual sales of less than \$6,000,000.00.</p> <p>(2) "Small business economic impact statement" means a statement prepared by a state agency which meets the requirements of section 45(3).</p> <p>Sec. 8. (1) The legislative service bureau shall publish the Michigan register each month. The Michigan register shall contain all of the following:</p> <p>(a) Executive orders and executive reorganization orders.</p> <p>(b) On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills signed into law by the governor during the calendar year and the corresponding public act numbers.</p> <p>(c) On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills vetoed by the governor during the calendar year.</p> <p>(d) Proposed <u>administrative</u> rules.</p> <p>(e) Small business economic impact statements on proposed rules as required by section 45.</p> <p>(f) Notices of public hearings on proposed <u>administrative</u> rules.</p>	<p>(A) The designation, deletion, or revision of covered medical equipment and covered clinical services.</p> <p>(B) Certificate of need review standards.</p> <p>(C) Data reporting requirements and criteria for determining health facility viability.</p> <p>(D) Standards used by the department of public health in designating a regional certificate of need review agency.</p> <p>(E) The modification of the 100 licensed bed limitation for short-term nursing care programs set forth in section 22210 of Act No. 368 of the Public Acts of 1978, being section 333.22210 of the Michigan Compiled Laws.</p> <p><b>DELETED</b></p> <p>Sec. 21. (1) The legislative service bureau shall publish the Michigan register each month. The Michigan register shall contain all of the following:</p> <p>(a) Executive orders and executive reorganization orders.</p> <p>(b) On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills signed into law by the governor during the calendar year and the corresponding public act numbers.</p> <p>(c) On a cumulative basis, the numbers and subject matter of the enrolled senate and house bills vetoed by the governor during the calendar year.</p> <p>(d) Proposed rules.</p> <p><b>DELETED</b></p> <p>(e) Notices of public hearings on proposed rules.</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>(g) <u>Administrative</u> rules filed with the secretary of state.</p> <p>(h) Emergency rules filed with the secretary of state.</p> <p>(i) <u>Notice of proposed and adopted agency guidelines.</u></p> <p>(j) Other official information considered necessary or appropriate by the legislative service bureau.</p> <p>(k) Attorney general opinions.</p> <p>(l) All of the items listed in section 7(l) after final approval by the certificate of need commission or the statewide health coordinating council under section 22215 or 22217 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.22215 and 333.22217 of the Michigan Compiled Laws.</p> <p>(2) The legislative service bureau shall publish a cumulative index for the Michigan register.</p> <p>(3) The Michigan register shall be available for public subscription at a fee reasonably calculated to cover publication and distribution costs.</p> <p>(4) If publication of an agency's proposed rule, <u>guideline, or small business economic impact statement or an item described in subsection (1)(l) would be unreasonably expensive or lengthy, the legislative service bureau may publish a brief synopsis of the proposed rule, guideline, small business impact statement, or item described in subsection (1)(l), including information on how to obtain a complete copy of the proposed rule, guideline, small business impact statement, or item described in subsection (1)(l) from the agency at no cost.</u></p> <p>(5) An agency shall transmit a copy of <u>the small business economic impact statement, together with the applicable proposed rules and notice of public hearing,</u> to the legislative service bureau for publication in the Michigan register.</p> <p>Sec. 11. This act shall not be construed to repeal additional requirements imposed by <u>law.</u></p> <p style="text-align: center;">Chapter 2. Guidelines</p> <p>Sec. 24. (1) Before the adoption of a guideline, an</p>	<p>(f) <u>Substantive</u> rules filed with the secretary of state.</p> <p>(g) Emergency rules filed with the secretary of state.</p> <p>(h) <u>Interpretive, procedural, and housekeeping rules adopted by an agency.</u></p> <p>(i) Other official information considered necessary or appropriate by the legislative service bureau.</p> <p>(j) <u>Formal</u> attorney general opinions.</p> <p>(k) All of the items listed in section 2(w)(xii) after final approval of the certificate of need commission or the statewide health coordinating council.</p> <p>(2) The legislative service bureau shall publish a cumulative index for the Michigan register.</p> <p>(3) The Michigan register shall be available for public subscription at a fee reasonably calculated to cover publication and distribution costs.</p> <p>(5) If publication of an agency's proposed rule would be unreasonably expensive or lengthy, the legislative service bureau may publish a brief synopsis of the proposed rule <u>and include</u> information on how to obtain a complete copy of the proposed rule from the agency at no cost.</p> <p>(4) An agency shall transmit a copy of a proposed rule and notice of <u>the public hearing</u> to the legislative service bureau for publication in the Michigan register.</p> <p>Sec. 3. This act shall not be construed to repeal <u>or prohibit</u> additional requirements imposed by <u>statute.</u></p> <p style="text-align: center;"><b>DELETED</b></p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>agency shall give notice of the proposed guideline to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and each person who requested the agency in writing for advance notice of proposed action which may affect the person. The notice shall be given by mail, in writing, to the last address specified by the person. A request for notice is renewable each December.</p> <p>(2) The notice required by subsection (1) shall include all of the following:</p> <p>(a) A statement of the terms or substance of the proposed guideline, a description of the subjects and issues involved, and the proposed effective date of the guideline.</p> <p>(b) A statement that the addressee may express any views or arguments regarding the proposed guideline or the guideline's effect on a person.</p> <p>(c) The address to which written comments may be sent and the date by which comments shall be mailed, which date shall not be less than 60 days from the date of the mailing of the notice.</p> <p>(d) A reference to the specific statutory provision about which the proposed guideline states a policy.</p> <p>Sec. 25. When adopted, a guideline is a public record. Copies of guidelines shall be sent to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them.</p> <p>Sec. 26. An agency shall not adopt a guideline in lieu of a rule.</p> <p>Sec. 27. (1) A guideline adopted after the effective date of this section is not valid unless processed in substantial compliance with sections 24, 25, and 26. However, inadvertent failure to give notice to any person as required by section 24 does not invalidate a guideline which was otherwise processed in substan-</p>	<p>Sec. 33. (1) <u>An agency may adopt interpretive rules. In adopting interpretive rules, an agency is governed by the terms of this section and by sections 41 and 42, but the other provisions contained in this chapter shall not apply. When adopted, an interpretive rule is a public record and shall be made available by the agency for public inspection. Copies of interpretive rules shall be sent to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them. Interpretive rules adopted by an agency shall be published in the Michigan register and shall take effect on the date of publication in the register unless a later time is stated in the rules. Interpretive rules shall be included in the Michigan administrative code.</u></p> <p>DELETED</p> <p>DELETED</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>tial compliance with sections 24, 25, and 26.</p> <p>(2) A proceeding to contest a guideline on the grounds of noncompliance with sections 24, 25, and 26 shall be commenced within 2 years after the effective date of the guideline.</p> <p style="text-align: center;">Chapter 3. Procedures for Processing and Publishing Rules</p> <p>Sec. 31. (1) Rules which became effective before July 1, 1970 continue in effect until amended or rescinded.</p> <p>(2) When a law authorizing or directing an agency to promulgate rules is repealed and substantially the same rule-making power or duty is vested in the same or a successor agency by a new provision of law or the function of the agency to which the rules are related is transferred to another agency, by law or executive order, the existing rules of the original agency relating thereto continue in effect until amended or rescinded, and the agency or successor agency may rescind any rule relating to the function. When a law creating an agency or authorizing or directing it to promulgate rules is repealed or the agency is abolished and substantially the same rule-making power or duty is not vested in the same or a successor agency by a new provision of law and the function of the agency to which the rules are related is not transferred to another agency, the existing applicable rules of the original agency are automatically rescinded as of the effective date of the repeal of such law or the abolition of the agency.</p> <p>(3) The rescission of a rule does not revive a rule which was previously rescinded.</p> <p>(4) The amendment or rescission of a valid rule does not defeat or impair a right accrued, or affect a penalty incurred, under the rule.</p> <p>(5) A rule may be amended or rescinded by another rule which constitutes the whole or a part of a filing of rules or as a result of an act of the legislature.</p> <p>Sec. 32. (1) Definitions of words and phrases and rules of construction prescribed in any statute, and which are made applicable to all statutes of this state, also apply to rules unless clearly indicated to the contrary.</p>	<p>Sec. 4. (1) Rules which became effective before July 1, 1990, continue in effect until amended or rescinded.</p> <p>(2) When a law authorizing or directing an agency to promulgate rules is repealed and substantially the same rulemaking power or duty is vested in the same or a successor agency by a new provision of law or the function of the agency to which the rules are related is transferred to another agency, by law or executive order, the existing rules of the original agency relating thereto continue in effect until amended or rescinded, and the agency or successor agency may rescind any rule relating to the function. When a law creating an agency or authorizing or directing it to promulgate rules is repealed or the agency is abolished and substantially the same rulemaking power or duty is not vested in the same or a successor agency by a new provision of law and the function of the agency to which the rules are related is not transferred to another agency, the existing applicable rules of the original agency are automatically rescinded as of the effective date of the repeal of such law or the abolition of the agency.</p> <p>(3) The rescission of a rule does not revive a rule which was previously rescinded.</p> <p>(4) The amendment or rescission of a valid rule does not defeat or impair a right accrued, or affect a penalty incurred, under the rule.</p> <p>(5) A rule may be amended or rescinded by another rule which constitutes the whole or a part of a filing of rules or as a result of an act of the legislature.</p> <p>Sec. 5. (1) Definitions of words and phrases and rules of construction prescribed in any statute, and which are made applicable to all statutes of this state, also apply to rules unless clearly indicated to the contrary.</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>(2) A rule or exception to a rule shall not discriminate in favor of or against any person, and a person affected by a rule is entitled to the same benefits as any other person under the same or similar circumstances.</p> <p>(3) The violation of a rule is a crime when so provided by statute. A rule shall not make an act or omission to act a crime or prescribe a criminal penalty for violation of a rule.</p> <p>(4) An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or regulation which has been adopted by an agency of the United States or by a nationally recognized organization or association. The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule it shall amend the rule or promulgate a new rule therefor. The agency shall have available copies of the adopted matter for inspection and distribution to the public at cost <u>and</u> the rules shall state where copies of the adopted matter are available from the agency and the agency of the United States or the national organization or association and the cost thereof as of the time the rule is adopted.</p>	<p>(2) A rule or exception to a rule shall not <u>unlawfully</u> discriminate in favor of or against any person, and a person affected by a rule is entitled to the same benefits as any other person under the same or similar circumstances.</p> <p>(3) The violation of a rule is a crime when so provided by statute. A rule shall not make an act or omission to act a crime or prescribe a criminal penalty for violation of a rule.</p> <p>(4) An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard, or regulation which has been adopted by an agency <u>of the state</u> or of the United States or by a nationally recognized organization or association. The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule, it shall amend the rule or promulgate a new rule therefor. The agency shall have available copies of the adopted matter for inspection and distribution to the public at cost. The rules shall state where copies of the adopted matter are available from the agency and from the agency of the United States or the national organization or association and the cost thereof as of the time the rule is adopted.</p>
<p>Sec. 33. (1) An agency shall <u>promulgate rules describing its organization and stating the general course and method of its operations and may include therein forms with instructions. Sections 41 and 42 do not apply to such rules.</u></p>	<p>Sec. 31. An agency shall <u>adopt housekeeping rules insofar as practicable. In adopting housekeeping rules an agency is governed by the terms of this section, but the other procedures contained in this chapter shall not apply. When adopted, a housekeeping rule is a public record and shall be made available by the agency for public inspection. Copies of housekeeping rules shall be sent to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them. Housekeeping rules shall not be included in the Michigan administrative code.</u></p>
<p>(2) An agency shall <u>promulgate rules prescribing its procedures available to the public and the methods by which the public may obtain information and submit requests.</u></p>	<p>Sec. 32. (1) An agency shall <u>adopt procedural rules, including procedural rules prescribing the methods by which the public may obtain information and submit requests. In adopting procedural rules an agency is governed by the terms of this section and by sections 41 and 42, but the other procedures contained in this chapter shall not apply. When adopted, a proced-</u></p>

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

(3) An agency may promulgate rules, not inconsistent with this act or other applicable statutes, prescribing procedures for contested cases.

Sec. 35. The joint committee on administrative rules is created and consists of 6 members of the senate and 6 members of the house of representatives appointed in the same manner as standing committees are appointed for terms of 2 years. Members of the committee shall serve without compensation but shall be reimbursed for expenses incurred in the business of the committee. The expenses of the members of the senate shall be paid from appropriations to the senate and the expenses of the members of the house shall be paid from appropriations to the house of representatives. The committee may meet during a session of the legislature and during an interim between sessions. The committee may hold a hearing on a rule transmitted to the committee. Action by the committee, including action taken under section 52, shall be by concurring majorities of the members from each house. The committee shall report its activities and recommendations to the legislature at each regular session.

Sec. 36. The joint committee on administrative rules may prescribe procedures and standards not inconsistent with this act or other applicable statutes, for the drafting, processing, publication and distribution of rules. The procedures and standards shall be included in a manual which the legislative service bureau shall publish and distribute in reasonable quantities to the state departments.

Sec. 38. A person may request an agency to promulgate a rule. Within 90 days after filing of a request, the agency shall initiate the processing of a rule or issue a concise written statement of its principal rea-

### PROPOSED ACT

ural rule is a public record and shall be made available by the agency for public inspection. Copies of procedural rules shall be sent to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and all persons who have requested the agency in writing for advance notice of proposed action which may affect them. Procedural rules adopted by an agency shall be published in the Michigan register and shall take effect on the date of publication in the register unless a later time is stated in the rules. Procedural rules shall be included in the Michigan administrative code.

(4) An agency may adopt procedural rules, not inconsistent with this act or other applicable statutes, prescribing procedures for contested cases.

Sec. 34. The joint committee on administrative rules is created and consists of 7 members of the senate and 7 members of the house of representatives appointed in the same manner as standing committees are appointed for terms of 2 years. Members of the committee shall serve without compensation but shall be reimbursed for expenses incurred in the business of the committee. The expenses of the members of the senate shall be paid from appropriations to the senate and the expenses of the members of the house shall be paid from appropriations to the house of representatives. The committee may meet during a session of the legislature and during an interim between sessions. The committee may hold a hearing on a substantive rule transmitted to the committee. Action by the committee, including action taken under section 52, shall be by concurring majorities of the members from each house. The committee shall report its activities and recommendations to the legislature at each regular session.

Sec. 35. The joint committee on administrative rules may prescribe procedures and standards not inconsistent with this act or other applicable statutes, for the drafting, processing, publication, and distribution of interpretive, procedural, and substantive rules. The procedures and standards shall be included in a manual which the legislative service bureau shall publish and distribute in reasonable quantities to the state departments.

Sec. 36. A person may request an agency to adopt an interpretive, procedural, or substantive rule. Within 90 days after the filing of a request, the agency shall initiate the processing of a rule or issue a concise

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>sons for denial of the request. The denial of a request is not subject to judicial review.</p> <p>Sec. 40. (1) When an agency proposes to adopt a rule which will apply to a small business, and the small business economic impact statement discloses that the rule will have a disproportionate impact on small businesses because of the size of those businesses, the agency proposing to adopt the rule shall reduce the economic impact of the rule on small businesses by doing 1 or more of the following when it is lawful and feasible in meeting the objectives of the act authorizing the promulgation of the rule:</p> <ul style="list-style-type: none"><li>(a) Establish differing compliance or reporting requirements or timetables for small businesses under the rule.</li><li>(b) Consolidate or simplify the compliance and reporting requirements for small businesses under the rule.</li><li>(c) Establish performance rather than design standards, when appropriate.</li><li>(d) Exempt small businesses from any or all of the requirements of the rule.</li></ul> <p>(2) If appropriate in reducing the disproportionate economic impact on small business of a rule as provided in subsection (1), an agency may use the following classifications of small business:</p> <ul style="list-style-type: none"><li>(a) 0-9 full-time employees.</li><li>(b) 10-49 full-time employees.</li><li>(c) 50-249 full-time employees.</li></ul> <p>(3) For purposes of subsection (2), an agency may include a small business with a greater number of full-time employees in a classification that applies to a business with fewer full-time employees.</p> <p>(4) This section and section 45(3) shall not apply to a rule which is required by federal law and which an agency promulgates without imposing standards more stringent than those required by the federal law.</p> <p>Sec. 41. (1) Before the adoption of a rule, an agency shall give notice of a public hearing and offer a <u>person an opportunity to present data, views, and arguments</u>. The notice shall be given within the time prescribed by any applicable statute, or if none, not less than 30 days nor more than 90 days before the public hearing. The notice shall include all of the following:</p> <ul style="list-style-type: none"><li>(a) A reference to the statutory authority under which the action is proposed.</li><li>(b) The time and place of the public hearing and a</li></ul>	<p>written statement of its principal reasons for denial of the request. The denial of a request is not subject to judicial review.</p> <p><b>DELETED</b></p> <p>Sec. 41. (1) Before the adoption of an <u>interpretive, procedural, or substantive</u> rule, an agency shall give notice of a public hearing. The notice shall be given within the time prescribed by any applicable statute, or if none, not less than 30 days nor more than 90 days before the public hearing. The notice shall include all of the following:</p> <ul style="list-style-type: none"><li>(a) A reference to the statutory authority under which the action is proposed.</li><li>(b) The time and place of the public hearing and a</li></ul>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>statement of the manner in which data, views, and arguments may be submitted to the agency at other times by a person.</p>	<p>statement of the manner in which data, views, and arguments may be submitted to the agency at other times by a person.</p>
<p>(c) A statement of the terms or substance of the proposed rule, a description of the subjects and issues involved, and the proposed effective date of the rule.</p>	<p>(c) A statement of the terms or substance of the proposed rule, a description of the subjects and issues involved, and the proposed effective date of the rule.</p>
<p>(2) The agency shall transmit copies of the notice to the joint committee on administrative rules, the legislative service bureau, the office of the governor, and each person who requested the agency in writing for advance notice of proposed action which may affect the person. The notice shall be by mail, in writing, to the last address specified by the person. A request for notice shall be renewed each December.</p>	<p>(4) The agency shall transmit copies of the notice to the joint committee on administrative rules, the legislative service bureau, the office of the governor, <u>the department of attorney general</u>, and each person who requested the agency in writing for advance notice of proposed action which may affect the person. The notice shall be by mail, in writing, to the last address specified by the person. A request for notice shall be renewed each December.</p>
<p>(3) The public hearing shall comply with any applicable statute but is not subject to the provisions of this act governing contested cases.</p>	<p>Sec. 42. (1) The public hearing <u>required in section 41</u> shall comply with any applicable statute, but is not subject to the provisions of this act governing contested cases. <u>An agency which is subject to section 41 shall adopt procedural rules for the conduct of public hearings called for in section 41 within two years after the effective date of this act.</u></p>
<p>(4) The head of the promulgating agency or 1 or more persons designated by the head of the agency, who has knowledge of the subject matter of the proposed rule, shall be present at the public hearing and shall participate in the discussion of the proposed rule.</p>	<p>(2) <u>The public hearing shall be open to the public. A person shall have the opportunity to present data, views, and argument, both in writing and orally, but the agency may limit the time available to each person for oral presentation.</u> The head of the promulgating agency or 1 or more persons designated by the head of the agency, who has knowledge of the subject matter of the proposed <u>substantive</u> rule, shall be present at the public hearing and shall participate in the discussion of the proposed rule.</p>
<p>Sec. 41a. A member of the legislature may annually submit a written request to the legislative service bureau requesting that a copy of all proposed rules or changes in rules, or any designated proposed rules or changes in rules submitted to the legislative service bureau for its approval, be transmitted to the requesting member upon receipt of the same by the legislative service bureau.</p>	<p><b>DELETED</b></p>
<p>Sec. 42. (1) The agency shall publish the notice of public hearing as prescribed in any applicable statute, or if none, in a manner selected by the agency as best calculated to give notice to persons likely to be affected by the proposed rule. Methods that may be employed by the agency, depending upon the circum-</p>	<p>Sec 41. (2) The agency shall publish the notice of public hearing as prescribed in any applicable statute, or if none, in a manner selected by the agency as best calculated to give notice to persons likely to be affected by the proposed rule. Methods that may be employed by the agency, depending upon the circum-</p>

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

stances, include publication of the notice in 1 or more newspapers of general circulation or, if appropriate, in trade, industry, governmental, or professional publications. If the persons likely to be affected by the proposed rule are unorganized or diffuse in character and location, the agency shall publish the notice as a display advertisement in at least 3 newspapers of general circulation in different parts of the state, 1 of which shall be published in the Upper Peninsula.

(2) In addition to the requirements of subsection (1), the agency shall submit a copy of the notice to the legislative service bureau pursuant to section 41 for publication in the Michigan register. An agency's notice shall be published in the Michigan register not less than 30 days nor more than 90 days before the public hearing.

Sec. 43. (1) A rule hereafter promulgated is not valid unless processed in substantial compliance with sections 41 and 42. However, inadvertent failure to give the notice to any person as required by section 41 does not invalidate a rule processed thereunder.

(2) A proceeding to contest a rule on the ground of noncompliance with the procedural requirements of sections 41 and 42 shall be commenced within 2 years after the effective date of the rule.

### PROPOSED ACT

stances, include publication of the notice in 1 or more newspapers of general circulation or, if appropriate, in trade, industry, governmental, or professional publications. If the persons likely to be affected by the proposed rule are unorganized or diffuse in character and location, the agency shall publish the notice as a display advertisement in at least 3 newspapers of general circulation in different parts of the state, 1 of which shall be published in the Upper Peninsula.

Sec 41. (3) In addition to the requirements of subsection (1), the agency shall submit a copy of the notice to the legislative service bureau for publication in the Michigan register. An agency's notice shall be published in the Michigan register not less than 30 days nor more than 90 days before the public hearing.

Sec. 32. (2) A procedural rule adopted after the effective date of this section is not valid unless processed in substantial compliance with this section. However, inadvertent failure to give notice to any person as required does not invalidate a procedural rule which was otherwise processed in substantial compliance with this section.

Sec. 33. (2) An interpretive rule adopted after the effective date of this section is not valid unless processed in substantial compliance with this section. However, inadvertent failure to give notice to any person as required does not invalidate an interpretive rule which was otherwise processed in substantial compliance with this section.

Sec. 43. (1) A substantive rule hereafter promulgated is not valid unless processed in substantial compliance with sections 41 and 42. However, inadvertent failure to give the notice to any person as required by section 41 does not invalidate a rule processed thereunder.

Sec. 32. (3) A proceeding to contest a procedural rule on the grounds of noncompliance with this section shall be commenced within 2 years after the effective date of the procedural rule.

Sec. 33. (3) A proceeding to contest an interpretive rule on the grounds of noncompliance with this section shall be commenced within 2 years after the effective date of the interpretive rule.

Sec. 43. (2) A proceeding to contest a substantive rule on the ground of noncompliance with the procedural requirements of sections 41 and 42 shall be commenced within 2 years after the effective date of the rule.

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>Sec. 44. Sections 41 and 42 do not apply to an amendment or rescission of a rule which is obsolete or superseded, or which is required to make obviously needed corrections to make the rule conform to an amended or new statute or to accomplish any other solely formal purpose, if a statement to such effect is included in the legislative service bureau certificate of approval of the rule.</p>	<p>Sec. 44. Sections 41 and 42 do not apply to an amendment or rescission of a rule which is obsolete or superseded, or which is required to make obviously needed corrections to make the rule conform to an amended or new statute or to accomplish any other solely formal purpose, if a statement to such effect is included in the legislative service bureau certificate of approval of the rule.</p>
<p>Sec. 45. (1) The legislative service bureau promptly shall approve a proposed rule if the bureau considers the proposed rule to be proper as to all matters of form, classification, arrangement, and numbering. The department of the attorney general promptly shall approve a proposed rule if the department considers the proposed rule to be legal.</p>	<p>Sec. 45. (1) The legislative service bureau promptly shall approve a proposed <u>substantive</u> rule, if the bureau considers the proposed rule to be proper as to all matters of form, classification, arrangement, and numbering. The department of the attorney general promptly shall approve a proposed <u>substantive</u> rule, if the department considers the proposed rule to be legal.</p>
<p>(2) After the legislative service bureau and attorney general have approved a proposed rule, and after publication of the proposed rule in the Michigan register as provided in this act, but within 2 years after the date of the last public hearing on the proposed rule, unless the proposed rule is a <u>resubmission</u> under subsection (11), and before the agency has formally adopted the rule, the agency shall transmit by letter copies of the rule bearing certificates of approval and copies of the rule without certificates to the committee. <u>The agency shall include with the letter of transmittal a regulatory impact statement on a 1-page form provided by the committee. The statement shall provide estimates of the impact of the proposed rules upon all of the following:</u></p>	<p>(2) After the legislative service bureau and attorney general have approved a proposed <u>substantive</u> rule, and after publication of the proposed rule in the Michigan register as provided in this act, but within 2 years after the date of the last public hearing on the proposed rule, unless the proposed rule is <u>resubmitted</u> under subsection (8), and before the agency has formally adopted the rule, the agency shall transmit by letter copies of the rule bearing certificates of approval and copies of the rule without certificates to the committee.</p>
<p>(a) <u>The revenues, expenditures, and paper work requirements of the agency proposing the rule.</u></p>	<p>DELETED</p>
<p>(b) <u>The revenues and expenditures of any other state or local government agency affected by the proposed rule.</u></p>	<p>DELETED</p>
<p>(c) <u>The taxpayers, consumers, industry or trade groups, small business, or other applicable groups affected by the proposed rule.</u></p>	<p>DELETED</p>
<p>(3) Except as provided in section 40(4), if the regulatory impact statement discloses an impact on small businesses, the agency shall include with the letter of transmittal a small business economic impact statement in a form prescribed by the committee. A small business economic impact statement shall contain all of the following with respect to the proposed rules:</p>	<p>DELETED</p>
<p>(a) The nature of any reports and the estimated cost</p>	

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>of their preparation by small businesses which would be required to comply with the proposed rules.</p> <p>(b) An analysis of the costs of compliance for all small businesses affected by the proposed rules, including costs of equipment, supplies, labor, and increased administrative costs.</p> <p>(c) The nature and estimated cost of any legal, consulting, and accounting services which small businesses would incur in complying with the proposed rules.</p> <p>(d) A statement regarding whether the proposed rules will have a disproportionate impact on small businesses because of the size of those businesses.</p> <p>(e) The ability of small businesses to absorb the costs estimated under subdivisions (a) to (c) without suffering economic harm and without adversely affecting competition in the marketplace.</p> <p>(f) The cost, if any, to the agency of administering or enforcing a rule which exempts or sets lesser standards for compliance by small businesses.</p> <p>(g) The impact on the public interest of exempting or setting lesser standards of compliance for small businesses.</p> <p>(h) A statement regarding how the agency reduced the economic impact of the rule on small businesses as required under section 40, or a statement regarding why such reduction was not feasible.</p> <p>(i) A statement regarding whether and how the agency has involved small businesses in the development of the rule.</p> <p>(4) In order to obtain cost information for purposes of subsection (3), an agency may survey a representative sample of affected small businesses or trade associations or adopt any other means considered appropriate by the agency.</p> <p>(5) The agency shall transmit a copy of the small business economic impact statement to the director of the department of commerce at the same time as required in subsection (3) for transmittal to the committee. The director shall review the statement and within 30 days after receipt shall notify the committee of any additional information pertinent to the committee's review.</p> <p>(6) After its receipt of the agency's letter of transmittal, the committee shall have 2 months in which to consider the rule. If the committee by a majority vote determines that added time is needed to consider proposed rules, the committee may extend the time it has to consider a particular proposed rule by 1 month to a total of not longer than 3 months. This subsection and subsections (2) to (5) do not apply to an emergency rule.</p>	<p>(3) After its receipt of the agency's letter of transmittal, the committee shall have 2 months in which to consider the rule. If the committee by a majority vote determines that added time is needed to consider proposed rules, the committee may extend the time it has to consider a particular proposed rule by 1 month to a total of not longer than 3 months. This subsection and subsection (2) do not apply to an emergency rule promulgated under section 48.</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>(7) The committee shall furnish the senate fiscal agency and the house fiscal agency with a copy of each rule and regulatory impact statement filed with the committee, as well as a copy of the agenda identifying the proposed rules to be considered by the committee. If requested by the committee, the senate fiscal agency and the house fiscal agency shall analyze each proposed rule for possible fiscal implications which, if adopted, would result in additional appropriations in the current fiscal year, or commit the legislature to an appropriation in a future fiscal year, and report their findings in writing, to the senate and house appropriations committees and the committee before the date of consideration of the proposed rule by the committee.</p> <p>(8) If the committee approves the proposed rule within the time period provided by subsection (6), the committee shall attach a certificate of its approval to all copies of the rule bearing certificates except 1 and transmit those copies to the agency.</p> <p>(9) If, within the time period provided by subsection (6), the committee disapproves the proposed rule or the committee chairperson certifies an impasse after votes for approval and disapproval have failed to receive concurrent majorities, the committee shall immediately report that fact to the legislature and return the rule to the agency. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:</p> <p>(a) The legislature adopts a concurrent resolution approving the rule within 60 days after the committee report has been received by, and read into the respective journal of, each house.</p> <p>(b) The committee subsequently approves the rule.</p> <p>(10) If the time permitted by this section expires and the committee has not taken action under either subsection (8) or (9) then the committee shall return the proposed rules to the agency. The chairperson and alternate chairperson shall cause concurrent resolutions approving the rule to be introduced in both houses simultaneously. The concurrent resolutions shall be placed directly on the calendar of each house. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:</p> <p>(a) The legislature adopts a concurrent resolution approving the rule within 60 days after introduction by record roll call vote. The adoption of the concurrent resolution shall require a majority of the members elected to and serving in each house.</p>	<p><b>DELETED</b></p> <p>(4) If the committee approves the proposed rule within the time period provided by subsection (3), the committee shall attach a certificate of its approval to all copies of the rule bearing certificates except 1 and transmit those copies to the agency.</p> <p>(5) If, within the time period provided by subsection (3), the committee disapproves the proposed rule or the committee chairperson certifies an impasse after votes for approval and disapproval have failed to receive concurrent majorities, the committee shall immediately report that fact to the legislature and return the rule to the agency. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:</p> <p>(a) The legislature adopts a concurrent resolution approving the rule within 60 days after the committee report has been received by, and read into the respective journal of, each house.</p> <p>(b) The committee subsequently approves the rule.</p> <p>(6) If the time permitted by this section expires and the committee has not taken action under either subsection (4) or (5), then the committee shall return the proposed rules to the agency. The chairperson and alternate chairperson shall cause concurrent resolutions approving the rule to be introduced in both houses simultaneously. The concurrent resolutions shall be placed directly on the calendar of each house. The agency shall not adopt or promulgate the rule unless 1 of the following occurs:</p> <p>(a) The legislature adopts a concurrent resolution approving the rule within 60 days after introduction by record roll call vote. The adoption of the concurrent resolution shall require a majority of the members elected to and serving in each house.</p>

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

(b) The agency resubmits the proposed rule to the committee and the committee approves the rule within the time permitted by this section.

(11) An agency may withdraw a proposed rule by leave of the committee. An agency may resubmit a rule so withdrawn or returned under subsection (9) with minor modification or with changes suggested by the committee following a committee meeting on the proposed rule. A resubmitted rule is a new filing and subject to this section but is not subject to further notice and hearing as provided in sections 41 and 42.

(12) If the committee approves the proposed rule within the time period provided by subsection (6), or the legislature adopts a concurrent resolution approving the rule, the agency, if it wishes to proceed, shall formally adopt the rule, pursuant to any applicable statute, and make a written record of the adoption. Certificates of approval and adoption shall be attached to at least 6 copies of the rule.

Sec. 46. (1) To promulgate a rule an agency shall file in the office of the secretary of state 3 copies of the rule bearing the required certificates of approval and adoption and true copies of the rule without the certificates. An agency shall not file a rule, except an emergency rule under section 48, until at least 10 days after the date of the certificate of approval by the committee or after the legislature adopts a concurrent resolution approving the rule. An agency shall transmit a copy of the rule bearing the required certificates of approval and adoption to the office of the governor at least 10 days before it files the rule.

(2) The secretary of state shall indorse the date and hour of filing of rules on the 3 copies of the filing bearing the certificates and shall maintain a file containing 1 copy for public inspection.

(3) The secretary of state, as often as he deems it advisable, shall cause to be arranged and bound in a substantial manner the rules hereafter filed in his office with their attached certificates and published in a supplement to the Michigan administrative code. He shall certify under his hand and seal of the state on the frontispiece of each volume that it contains all of the rules filed and published for a specified period. The rules, when so bound and certified, shall be kept in the office of the secretary of state and no further record thereof is required to be kept. The bound rules are subject to public inspection.

### PROPOSED ACT

(b) The agency resubmits the proposed rule to the committee and the committee approves the rule within the time permitted by this section.

(7) An agency may withdraw a proposed rule by leave of the committee. An agency may resubmit a rule so withdrawn or returned under subsection (6) with minor modification or with changes suggested by the committee following a committee meeting on the proposed rule. A resubmitted rule is a new filing and subject to this section but is not subject to further notice and hearing as provided in sections 41 and 42.

(8) If the committee approves the proposed rule within the time period provided by subsection (3), or the legislature adopts a concurrent resolution approving the rule, the agency, if it wishes to proceed, shall formally adopt the rule, pursuant to any applicable statute, and make a written record of the adoption. Certificates of approval and adoption shall be attached to at least 6 copies of the rule.

Sec. 46. (1) To promulgate a substantive rule, an agency shall file in the office of the secretary of state 3 copies of the rule bearing the required certificates of approval and adoption and true copies of the rule without the certificates. An agency shall not file a rule, except an emergency rule under section 48, until at least 10 days after the date of the certificate of approval by the committee or after the legislature adopts a concurrent resolution approving the rule. An agency shall transmit a copy of the rule bearing the required certificates of approval and adoption to the office of the governor at least 10 days before it files the rule.

(2) The secretary of state shall indorse the date and hour of filing of rules on the 3 copies of the filing bearing the certificates and shall maintain a file containing 1 copy for public inspection.

(3) The secretary of state, as often as advisable, shall cause to be arranged and bound in a substantial manner the substantive rules hereafter filed in his or her office with their attached certificates and published in a supplement to the Michigan administrative code. He or she shall certify under his or her hand and seal of the state on the frontispiece of each volume that it contains all of the rules filed and published for a specified period. The rules, when so bound and certified, shall be kept in the office of the secretary of state and no further record thereof is required to be kept. The bound rules are subject to public inspection.

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

Sec. 47. (1) Except in case of a rule processed under section 48, a rule becomes effective on the date fixed in the rule, which shall not be earlier than 15 days after the date of its promulgation, or if a date is not so fixed then on the date of its publication in the Michigan administrative code or a supplement thereto.

(2) Except in case of a rule processed under section 48, an agency may withdraw a promulgated rule which has not become effective by a written request stating reasons, (a) to the secretary of state on or before the last day for filing rules for the interim period in which the rules were first filed, or (b) to the secretary of state and the legislative service bureau, within a reasonable time as determined by the bureau, after the last day for filing and before publication of the rule in the next supplement to the code. In any other case an agency may abrogate its rule only by rescission. When an agency has withdrawn a promulgated rule, it shall give notice, stating reasons, to the joint committee on administrative rules that the rule has been withdrawn.

Sec. 48. (1) If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by sections 41 and 42 and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by section 46 indorsed as an emergency rule, to 3 of which copies shall be attached the certificates prescribed by section 45 and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier. The rule may be extended once for not more than 6 months by the filing of a governor's certificate of the need for the extension with the office of the secretary of state before expiration of the emergency rule. An emergency rule shall not be numbered and shall not be compiled in the Michigan administrative code, but shall be noted in the annual supplement to the code. The emergency rule shall be published in the Michigan register pursuant to section 8.

### PROPOSED ACT

Sec. 47. (1) Except in case of a rule processed under section 48, a substantive rule becomes effective on the date fixed in the rule, which shall not be earlier than 15 days after the date of its promulgation, or if a date is not so fixed then on the date of its publication in the Michigan administrative code or a supplement thereto.

(2) Except in case of a rule processed under section 48, an agency may withdraw a promulgated rule which has not become effective by a written request stating reasons, (a) to the secretary of state on or before the last day for filing rules for the interim period in which the rules were first filed, or (b) to the secretary of state and the legislative service bureau, within a reasonable time as determined by the bureau, after the last day for filing and before publication of the rule in the next supplement to the code. In any other case an agency may abrogate its rule only by rescission. When an agency has withdrawn a promulgated rule, it shall give notice, stating reasons, to the joint committee on administrative rules that the rule has been withdrawn.

Sec. 48. (1) If an agency finds that preservation of the public health, safety, welfare, or financial resources entrusted to the agency requires promulgation of an emergency substantive rule without following the notice and participation procedures required by sections 41 and 42 and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by section 46 indorsed as an emergency rule, to 3 of which copies shall be attached the certificates prescribed by section 45 and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier. The rule may be extended once for not more than 6 months by the filing of a governor's certificate of the need for the extension with the office of the secretary of state before expiration of the emergency rule. If an extension is sought the agency shall inform the committee of the status of efforts to develop substantive rules regarding the subject matter of the emergency rules. An emergency rule shall not be numbered and shall not be compiled in the Michigan administrative code, but shall be noted in the annual supplement to the code. The emergency rule shall be published in the Michigan register pursuant to section 21.

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

(2) If the agency desires to promulgate an identical or similar rule with an effectiveness beyond the final effective date of an emergency rule, the agency shall comply with the procedures prescribed by this act for the processing of a rule which is not an emergency rule. The rule shall be published in the Michigan register and in the code.

(3) The legislature by a concurrent resolution may rescind an emergency rule promulgated pursuant to this section.

Sec. 49. (1) The secretary of state shall transmit or mail forthwith, after copies of rules are filed in his office, copies on which the day and hour of such filing have been indorsed, as follows:

(a) To the secretary of the joint committee on administrative rules and the legislative service bureau.

(b) To the secretary of the senate and the clerk of the house of representatives for distribution by them to each member of the senate and the house of representatives. When the legislature is not in session, or is in session but will not meet for more than 10 days after the secretary and clerk have received the rules, the secretary and clerk shall mail 1 copy to each member of the legislature at his home address.

(2) The secretary of the senate and clerk of the house of representatives shall present the rules to the senate and the house of representatives.

Sec. 50. When the legislature is in session the joint committee shall notify the appropriate standing committee of each house of the legislature when rules have been transmitted to the committee by the secretary of state. If the joint committee determines that a hearing on such rules is to be held it shall notify the chairmen of the standing committees and all members of the standing committees may be present and take part in the hearing. The chairman or a designated member of the standing committee should be present at the hearing but their absence does not affect the validity of the hearing.

Sec. 51. If the joint committee on administrative rules, an appropriate standing committee or a member of the legislature believes that a promulgated rule or any part thereof is unauthorized, is not within legislative intent or is inexpedient, the committee or

### PROPOSED ACT

(3) If the agency desires to promulgate an identical or similar rule with an effectiveness beyond the final effective date of an emergency rule, the agency shall comply with the procedures prescribed by this act for the processing of a rule which is not an emergency rule. The rule shall be published in the Michigan register and in the code.

(4) The legislature by a concurrent resolution may rescind an emergency rule promulgated pursuant to this section.

Sec. 49. (1) The secretary of state shall transmit or mail forthwith, after copies of substantive rules are filed in his or her office, copies on which the day and hour of such filing have been indorsed, as follows:

(a) To the secretary of the joint committee on administrative rules and the legislative service bureau.

(b) To the secretary of the senate and the clerk of the house of representatives for distribution by them to each member of the senate and the house of representatives. When the legislature is not in session, or is in session but will not meet for more than 10 days after the secretary and clerk have received the rules, the secretary and clerk shall mail a copy to each member of the legislature at his or her home address.

(2) The secretary of the senate and clerk of the house of representatives shall present the rules to the senate and the house of representatives.

Sec. 50. When the legislature is in session, the joint committee shall notify the appropriate standing committee of each house of the legislature when substantive rules have been transmitted to the committee by the secretary of state. If the joint committee determines that a hearing on such rules is to be held, it shall notify the chairpersons of the standing committees and all members of the standing committees may be present and take part in the hearing. The chairperson or a designated member of the standing committee should be present at the hearing, but the absence of the chairperson or designated member does not affect the validity of the hearing.

Sec. 51. If the joint committee on administrative rules, an appropriate standing committee, or a member of the legislature believes that a promulgated substantive rule or any part thereof is unauthorized, is not within legislative intent or is inexpedient, the

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>member may do either or both of the following:</p> <p>(a) Introduce a concurrent resolution at a regular or special session of the legislature expressing the determination of the legislature that the rule should be amended or rescinded. Adoption of the concurrent resolution constitutes legislative disapproval of the rule, but rejection of the resolution does not constitute legislative approval of the rule.</p> <p>(b) Introduce a bill at a regular session, or special session if included in a governor's message, which in effect amends or rescinds the rule.</p> <p>Sec. 52. If authorized by concurrent resolution of the legislature, the joint committee on administrative rules, acting between regular sessions, may suspend a rule or a part of a rule promulgated during the interim between regular sessions. The committee shall notify the agency promulgating the rule, the secretary of state, the department of management and budget, and the legislative service bureau of any rule or part of a rule the joint committee suspends, and the rule or part of a rule shall not be published in the Michigan register or in the Michigan administrative code while suspended. A rule suspended by the committee continues to be suspended until the end of the next regular session.</p> <p>Sec. 53. (1) Each agency shall prepare a plan for the review of the agency's rules that are brought to the attention of the Michigan business ombudsman. The plan shall be transmitted to the committee and to the director of the department of commerce. The agency shall conduct a review pursuant to the plan.</p> <p>(2) In conducting the review required by this section, the agency shall prepare a small business economic impact statement if the review discloses an impact on small businesses. The agency shall prepare a recommendation based on the review as to whether the rules should be continued without change or should be amended or rescinded. If the small business economic impact statement discloses that an existing rule has a disproportionate impact on small businesses because of the size of those businesses, the agency reviewing the rule shall, if it is lawful and feasible in meeting the objectives of the act authorizing the promulgation of the rule, amend or rescind the rule pursuant to this act to reduce or eliminate the disproportionate impact of the rule on small businesses.</p> <p>(3) The small business economic impact statement and recommendation shall be transmitted to the com-</p>	<p>committee or member may do either or both of the following:</p> <p>(a) Introduce a concurrent resolution at a regular or special session of the legislature expressing the determination of the legislature that the rule should be amended or rescinded. Adoption of the concurrent resolution constitutes legislative disapproval of the rule, but rejection of the resolution does not constitute legislative approval of the rule.</p> <p>(b) Introduce a bill at a regular session, or special session if included in a governor's message, which in effect amends or rescinds the rule.</p> <p>Sec. 52. If authorized by concurrent resolution of the legislature, the joint committee on administrative rules, acting between regular sessions, may suspend a <u>substantive</u> rule or a part of a rule promulgated during the interim between regular sessions. The committee shall notify the agency promulgating the rule, the secretary of state, the department of management and budget, and the legislative service bureau of any rule or part of a rule the joint committee suspends, and the rule or part of a rule shall not be published in the Michigan register or in the Michigan administrative code while suspended. A rule suspended by the committee continues to be suspended until the end of the next regular session.</p> <p><b>DELETED</b></p>

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

mittee and the director of the department of commerce. The director shall review the statement and shall notify the committee of any additional information pertinent to the committee's review.

(4) Four years after its effective date, this section shall not apply.

Sec. 55. (1) The legislative service bureau annually shall publish a supplement to the Michigan administrative code. The annual supplement shall contain all promulgated rules published in the Michigan register during the current year, except emergency rules, a cumulative numerical listing of amendments and additions to, and rescissions of rules since the last compilation of the code, and a cumulative alphabetical index.

(2) The Michigan administrative code and the annual supplements shall be made available for public subscription at a fee reasonably calculated to cover publication and distribution costs.

Sec. 56. (1) The legislative service bureau shall perform the editorial work for the Michigan register and the Michigan administrative code and its annual supplement. The classification, arrangement, numbering, and indexing of rules shall be uniform and shall conform as nearly as practicable to the classification, arrangement, numbering, and indexing of the compiled laws. The bureau may correct in the publications obvious errors in rules when requested by the promulgating agency to do so. The bureau may provide for publishing all or any part of the Michigan administrative code in bound volume, pamphlet, or loose-leaf form.

(2) An annual supplement to the Michigan administrative code shall be published at the earliest practicable date.

Sec. 57. (1) The legislative service bureau may omit from the Michigan register and the Michigan administrative code, and the code's annual supplement, any rule, the publication of which would be unreasonably expensive or lengthy if the rule in printed or reproduced form is made available on application to the promulgating agency, and if the code publication and the Michigan register contain a notice stating the general subject of the omitted rule and how a copy of the rule may be obtained.

### PROPOSED ACT

Sec. 22. (1) The legislative service bureau annually shall publish a supplement to the Michigan administrative code. The annual supplement shall contain all promulgated substantive rules and adopted procedural and interpretive rules published in the Michigan register during the current year, except emergency rules, a cumulative numerical listing of amendments, additions to, and rescissions of rules since the last compilation of the code, and a cumulative alphabetical index.

(2) The Michigan administrative code and the annual supplements shall be made available for public subscription at a fee reasonably calculated to cover publication and distribution costs.

Sec. 23. (1) The legislative service bureau shall perform the editorial work for the Michigan register and the Michigan administrative code and its annual supplement. The classification, arrangement, numbering, and indexing of rules shall be uniform and shall conform as nearly as practicable to the classification, arrangement, numbering, and indexing of the compiled laws. The bureau may correct in the publications obvious errors in rules when requested by the promulgating agency to do so. The bureau may provide for publishing all or any part of the Michigan administrative code in bound volume, pamphlet, or loose-leaf form.

(2) An annual supplement to the Michigan administrative code shall be published at the earliest practicable date.

Sec. 24. (1) The legislative service bureau may omit from the Michigan register, the Michigan administrative code, and the code's annual supplement, any rule, the publication of which would be unreasonably expensive or lengthy if the rule in printed or reproduced form is made available on application to the promulgating agency, and if the code publication and the Michigan register contain a notice stating the general subject of the omitted rule and how a copy of the rule may be obtained.

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>(2) The cost of publishing and distributing annual supplements to the Michigan administrative code and proposed rules, notices of public hearings on proposed rules, <u>small business economic impact statements, administrative rules and emergency rules filed with the secretary of state, notices of proposed and adopted agency guidelines, and the items listed in section 7(d) in the Michigan register shall be prorated by the legislative service bureau on the basis of the volume of these materials published for each agency in the Michigan register and annual supplement to the Michigan administrative code, and the cost of publishing and distribution shall be paid out of appropriations to the agencies.</u></p> <p><u>Sec. 58. (1) When requested by an agency, the legislative service bureau shall prepare reproduction proofs or negatives of the rules, or a portion of the rules, of the agency. The requesting agency shall reimburse the legislative service bureau for preparing the reproduction proofs or negatives, and the cost of the preparation shall be paid out of appropriations to the agency.</u></p> <p><u>(2) The Michigan administrative code may be arranged and printed to make convenient the publication in separate pamphlets of the parts of the code relating to different agencies. Agencies may order the separate pamphlets, and the cost of the pamphlets shall be paid out of appropriations to the agencies.</u></p> <p>Sec. 59. (1) The legislative service bureau shall print or order printed a sufficient number of copies of the Michigan register, the Michigan administrative code, and the annual supplement to the code to meet the requirements of this section. The department of management and budget shall deliver or mail copies as follows:</p> <p>(a) To the secretary of the senate, a sufficient number to supply each senator, standing committee, and the secretary.</p> <p>(b) To the clerk of the house of representatives, a sufficient number to supply each representative, standing committee, and the clerk.</p> <p>(c) To each member of the legislature, 1 copy at the member's home address.</p> <p>(d) To the legislative service bureau, 1 copy for each</p>	<p>(2) The cost of publishing and distributing annual supplements to the Michigan administrative code and proposed rules, notices of public hearings on proposed rules, rules, and emergency rules filed with the secretary of state in the Michigan register shall be prorated by the legislative service bureau on the basis of the volume of these materials published for each agency in the Michigan register and annual supplement to the Michigan administrative code, and the cost of publishing and distribution shall be paid out of appropriations to the agencies. . . .</p> <p><u>Sec. 24. (2) . . . The legislative service bureau may arrange to provide to agencies copies or plates of the rules, and to provide special compilations of rules, for which it shall be reimbursed for its costs by the agencies.</u></p> <p><u>Sec. 24. (2) . . . The legislative service bureau may arrange to provide to agencies copies or plates of the rules, and to provide special compilations of rules, for which it shall be reimbursed for its costs by the agencies.</u></p> <p>Sec. 25. (1) The legislative service bureau shall print or order printed a sufficient number of copies of the Michigan register, the Michigan administrative code, and the annual supplement to the code to meet the requirements of this section. The department of management and budget shall deliver or mail copies as follows:</p> <p>(a) To the secretary of the senate, a sufficient number to supply each senator, standing committee, and the secretary.</p> <p>(b) To the clerk of the house of representatives, a sufficient number to supply each representative, standing committee, and the clerk.</p> <p>(c) To each member of the legislature, 1 copy at the member's home address.</p> <p>(d) To the legislative service bureau, 1 copy for each</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>attorney on the bureau's staff.</p> <p>(e) To the department of the attorney general, 1 copy for each division.</p> <p>(f) To each other state department, 3 copies.</p> <p>(g) To each county law library, bar association library, and law school library in this state, 1 copy.</p> <p>(h) To other libraries throughout this state, 1 copy, upon request.</p> <p>(i) Additional copies to an officer or agency of this state and other governmental officers, agencies, and libraries approved by the legislative service bureau; and additional copies of the Michigan register for persons who subscribe to the publication as provided in subsection (3).</p> <p>(2) The copies of the Michigan register, the Michigan administrative code, and the annual code supplement are for official use only by the agencies and persons prescribed in subsection (1), and they shall deliver them to their successors, except that members of the legislature may retain copies of the Michigan register and the Michigan administrative code sent to their home address. The department of management and budget shall send to the home address of a new member of the legislature the current volume of the Michigan register and a complete copy of the Michigan administrative code. The department of management and budget shall deliver to the state library the Michigan register, the Michigan administrative code, and the annual supplement when requested by the state library sufficient for the library's use and for exchanges. The department of management and budget shall hold additional copies for sale at a price not less than the publication and distribution costs which shall be determined by the legislative service bureau.</p> <p>(3) A person may subscribe to the Michigan register. The legislative service bureau shall determine a subscription price which shall not be more than the publication and distribution costs.</p> <p>Sec. 61. (1) The filing of a rule under this act raises a rebuttable presumption that the rule was adopted, filed with the secretary of state, and made available for public inspection as required by this act.</p>	<p>attorney on the bureau's staff.</p> <p>(e) To the department of the attorney general, 1 copy for each division.</p> <p>(f) To each other state department, 3 copies.</p> <p>(g) To each county law library, bar association library, and law school library in this state, 1 copy.</p> <p>(h) To other libraries throughout this state, 1 copy, upon request.</p> <p>(i) Additional copies to an officer or agency of this state and other governmental officers, agencies, and libraries approved by the legislative service bureau; and additional copies of the Michigan register for persons who subscribe to the publication as provided in subsection (3).</p> <p>(2) The copies of the Michigan register, the Michigan administrative code, and the annual code supplement are for official use only by the agencies and persons prescribed in subsection (1), and they shall deliver them to their successors, except that members of the legislature may retain copies of the Michigan register and the Michigan administrative code sent to their home address. The department of management and budget shall send to the home address of a new member of the legislature the current volume of the Michigan register and a complete copy of the Michigan administrative code. The department of management and budget shall deliver to the state library the Michigan register, the Michigan administrative code, and the annual supplement when requested by the state library sufficient for the library's use and for exchanges. The department of management and budget shall hold additional copies for sale at a price not less than the publication and distribution costs which shall be determined by the legislative service bureau. <u>Copies shall be made available in both printed and electronic form.</u></p> <p>(3) A person may subscribe to the Michigan register. The legislative service bureau shall determine a subscription price which shall not be more than the publication and distribution costs.</p> <p>Sec. 5. (5) The filing of a rule under this act raises a rebuttable presumption that the rule was adopted, filed with the secretary of state, and made available for public inspection as required by this act.</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>(2) The publication of a rule in the Michigan register, the Michigan administrative code, or in an annual supplement to the code raises a rebuttable presumption that:</p> <p>(a) The rule was adopted, filed with the secretary of state, and made available for public inspection as required by this act.</p> <p>(b) The rule printed in the publication is a true and correct copy of the promulgated rule.</p> <p>(c) All requirements of this act relative to the rule have been complied with.</p>	<p>(6) The publication of a rule in the Michigan register, the Michigan administrative code, or in an annual supplement to the code raises a rebuttable presumption that:</p> <p>(a) The rule was adopted, filed with the secretary of state, and made available for public inspection as required by this act.</p> <p>(b) The rule printed in the publication is a true and correct copy of the promulgated rule.</p> <p>(c) All requirements of this act relative to the rule have been complied with.</p>
<p>(3) The courts shall take judicial notice of a rule which becomes effective under this act.</p>	<p>(7) The courts shall take judicial notice of a rule which becomes effective under this act.</p>
<p>Sec. 63. On request of an interested person, an agency may issue a declaratory <u>ruling</u> as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request <u>and</u> procedure for its submission, consideration and disposition. A declaratory <u>ruling</u> is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory <u>ruling</u>, but nothing in this subsection prevents an agency from prospectively changing a declaratory <u>ruling</u>. A declaratory <u>ruling</u> is subject to judicial review in the same manner as an agency final decision or order in a contested case.</p>	<p>Sec. 85. On request of an interested person, an agency may issue a declaratory <u>order</u> as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by <u>procedural</u> rule the form for such a request, <u>the procedure</u> for its submission, consideration, and disposition <u>and the time limits within which the agency will deny or issue a declaratory order. In the absence of a procedural rule establishing a time limit for action, a request for a declaratory order shall be deemed to be denied 90 days after it is received by the agency.</u> A declaratory <u>order</u> is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory <u>order</u>, but nothing in this section prevents an agency from prospectively changing a declaratory <u>order</u>. A declaratory <u>order</u> is subject to judicial review in the same manner as an agency final decision or order in a contested case. <u>A decision not to issue a declaratory order is not subject to judicial review.</u></p>
<p>Sec. 64. Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court <u>of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham county.</u> The agency shall be</p>	<p>Sec. 101. (1) Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court <u>for the county of the plaintiff's principal place of business in this state or for the county in which the plaintiff resides</u> or in the circuit court <u>of Ingham</u></p>

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

made a party to the action. An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously. This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted.

#### Chapter 4. Procedures in Contested Cases

Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(a) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

(3) A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which there is a

### PROPOSED ACT

county. The agency shall be made a party to the action. An action for declaratory judgment challenging the applicability of a rule may not be commenced under this subsection unless the plaintiff has first requested the agency for a declaratory order under section 85 and the agency has denied the request or failed to act on it expeditiously. This subsection shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted.

Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay. A hearing shall be open to the public unless, on the request of a party, the agency finds and includes as a sealed part of the record, that an open hearing would constitute an unwarranted invasion of personal privacy, or would result in the disclosure of trade secrets or proprietary information, which outweighs the public interest in open hearings.

(2) A contested case may be commenced by a person filing an administrative complaint or petition for hearing, or by the agency giving notice. The complaint, petition, or notice shall include:

(e) If the matter is commenced by a notice of hearing, a statement of the date, hour, place, and nature of the hearing.

(f) Unless otherwise specified by the agency, the hearing shall be held at its principal office.

(b) A statement of the legal authority and jurisdiction under which relief or action is sought.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or person is unable to state the matter in detail at the time the complaint, petition, or notice is provided, the initial complaint, petition, or notice may state the issues involved. Thereafter on application the agency or other person shall furnish a more definite and detailed statement on the issues.

Sec. 71. (4) A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>scheduled meeting of the house of which he or she is a member. However, a member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter on a day on which there is a scheduled meeting of the house of which he or she is a member, if such service of notice or process is executed by certified mail, <u>return receipt requested</u>.</p> <p>Sec. 72. (1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.</p> <p>(2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.</p> <p>(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.</p> <p>(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. <u>A party</u> may submit rebuttal evidence.</p> <p>Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the produc-</p>	<p>there is a scheduled meeting of the house of which he or she is a member. However, a member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter on a day on which there is a scheduled meeting of the house of which he or she is a member, if such service of notice or process is executed by certified mail <u>upon return receipt</u>.</p> <p>Sec. 71. (6) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party. <u>An agency may by procedural rule establish procedures for the entry of default orders when a party fails to appear or fails to file an answer, if the agency's procedural rules require the filing of an answer. Such procedures shall describe the type of case and the procedures under which default orders may issue, and shall set forth time limits and grounds on which orders entered upon default can be set aside. If a party who has filed an administrative complaint or a petition fails to appear, the case may be dismissed.</u></p> <p>Sec. 71. (5) A party who has been served with <u>an administrative complaint, petition, or notice of hearing</u> may file a written answer before the date set for hearing.</p> <p>Sec. 75. (2) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and arguments on issues of fact. . . .</p> <p>Sec. 75. (5) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for the use of the agency and offered in evidence.</p> <p>Sec. 75. (2) . . . <u>The parties</u> may submit rebuttal evidence.</p> <p>Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence, and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the produc-</p>

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

tion of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

Sec. 74. (1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take depositions. A deposition may be used in lieu of other evidence when taken in compliance with the general court rules. An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

(2) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

Sec. 75. In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting

### PROPOSED ACT

tion of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, being section 600.2552 of the Michigan Compiled Laws. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

Sec. 74. (1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts, and take depositions.

Sec. 75. (4) A deposition may be used in lieu of other evidence when taken in compliance with the Michigan court rules.

Sec. 74. (2) An agency authorized or required to adjudicate contested cases may adopt procedural rules to govern the administration of its contested case hearings, including procedural rules for discovery and depositions, to the extent and in the manner appropriate to its proceedings.

Sec. 75. (6) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of that testimony, shall make such statements or reports available to opposing parties for use on cross-examination.

Sec. 74. (4) On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, or by any other law, an agency shall make such records promptly available to a party.

Sec. 75. (3) In a contested case, the Michigan rules of evidence shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Irrelevant, immaterial, or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

Sec. 75a. (1) As used in this section:

(a) "Developmental disability" means an impairment of general intellectual functioning or adaptive behavior which meets the following criteria:

(i) It originated before the person became 18 years of age.

(ii) It has continued since its origination or can be expected to continue indefinitely.

(iii) It constitutes a substantial burden to the impaired person's ability to perform normally in society.

(iv) It is attributable to mental retardation, autism, or any other condition of a person found related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.

(b) "Witness" means an alleged victim under subsection (2) who is either of the following:

(i) A person under 15 years of age.

(ii) A person 15 years of age or older with a developmental disability.

(2) This section only applies to a contested case where a witness testifies as an alleged victim of sexual, physical, or psychological abuse. "Psychological abuse" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in substantial and protracted, visibly demonstrable manifestations of mental distress.

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support

### PROPOSED ACT

the parties will not be substantially prejudiced thereby, may provide in a contested case or by procedural rule for submission of all or part of the evidence in written form.

Sec. 76. (1) As used in this section:

(a) "Developmental disability" means an impairment of general intellectual functioning or adaptive behavior which meets the following criteria:

(i) It originated before the person became 18 years of age.

(ii) It has continued since its origination or can be expected to continue indefinitely.

(iii) It constitutes a substantial burden to the impaired person's ability to perform normally in society.

(iv) It is attributable to mental retardation, autism, or any other condition of a person found related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.

(b) "Witness" means an alleged victim under subsection (2) who is either of the following:

(i) A person under 15 years of age.

(ii) A person 15 years of age or older with a developmental disability.

(2) This section applies only to a contested case where a witness testifies as an alleged victim of sexual, physical, or psychological abuse.

(1)(c) "Psychological abuse" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in substantial and protracted, visibly demonstrable manifestations of mental distress.

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during the witness's testimony. A notice of intent to use a sup-

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

person shall name the support person, identify the relationship the support person has with the witness, and shall give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be served upon all parties to the proceeding. The agency shall rule on any objection to the use of a named support person prior to the date at which the witness desires to use the support person.

(5) In a hearing under this section, all persons not necessary to the proceeding shall be excluded during the witness's testimony.

(6) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

(7) This section applies to hearings beginning on or after January 1, 1988.

(8) This section shall take effect January 1, 1988.

Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

Sec. 77. An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

Sec. 78. (1) The parties in a contested case by a stipu-

### PROPOSED ACT

port person shall name the support person, identify the relationship the support person has with the witness, and shall give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be served upon all parties to the proceeding. The agency shall rule on any objections to the use of a named support person prior to the date at which the witness desires to use the support person.

(5) In a hearing under this section, all persons not necessary to the proceeding shall be excluded during the witness's testimony.

(6) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

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Sec. 75. (7) Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in the determination of the case, except as permitted under subsection (8). Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

Sec. 75. (8) An agency in a contested case may take official notice of judicially cognizable facts, and of general, technical, or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it.

Sec. 74. (3) The parties in a contested case by a st

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>lation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. <u>Parties are requested to thus agree upon facts when practicable.</u></p>	<p>lation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto.</p>
<p>(2) Except as otherwise provided by law, <u>disposition may be made of a contested case</u> by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.</p>	<p>Sec. 72. (4) <u>A presiding officer may do all of the following:</u> (f) Except as otherwise provided by law, <u>dispose of the case</u> by stipulation, agreed settlement, consent order, waiver, default, or other method agreed on by the parties.</p>
<p>Sec. 79. An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of <u>personal bias or disqualification</u> of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for <u>him</u> to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to <u>the</u> party will result therefrom.</p>	<p>Sec. 72. (1) An agency, 1 or more members of the agency, a person designated by statute, or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Sec. 72. (3) Hearings shall be conducted in an impartial manner. <u>A presiding officer is subject to disqualification for personal bias, prejudice, interest, or any other cause for which a judge may be disqualified.</u> On the filing in good faith by a party of a timely and sufficient affidavit of disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impractical for <u>the presiding officer</u> to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to a party will result therefrom.</p>
<p>Sec. 80. (1) A presiding officer may do all of the following:</p> <ul style="list-style-type: none"><li>(a) Administer oaths and affirmations.</li><li>(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence.</li><li>(c) Provide for the taking of testimony by deposition.</li><li>(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.</li><li>(e) Direct the parties to appear <u>and</u> confer to consider simplification of the issues by consent of the parties.</li></ul>	<p>Sec. 72. (4) A presiding officer may do all of the following:</p> <ul style="list-style-type: none"><li>(a) Administer oaths and affirmations.</li><li>(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses, and the production of books, papers, and other documentary evidence.</li><li>(c) Provide for the taking of testimony by deposition.</li><li>(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.</li><li>(e) Direct the parties to appear <u>at prehearing conferences and to confer and</u> to consider simplification of</li></ul>

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

(f) Act upon an application for an award of costs and fees under sections 121 to 127.

(2) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party in a contested case is a member of the legislature of this state, and the legislature is in session, the contested case shall be continued by the presiding officer to a nonmeeting day.

(3) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.

(4) In order to assure adequate representation for the people of this state, when the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet the contested case need not be continued, but the taking of the legislator's testimony, as a witness shall be postponed to the earliest practicable nonmeeting day.

(5) The presiding officer shall notify all parties to the contested case, and their attorneys, of any continuance granted pursuant to this section.

(6) As used in this section, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.

### PROPOSED ACT

the issues by consent of the parties.

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Sec. 72. (6) In order to assure adequate representation for the people of this state:

(a) When the presiding officer knows that a party in a contested case is a member of the legislature of this state, and the legislature is in session, the contested case shall be continued by the presiding officer to a nonmeeting day.

(b) When the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.

(c) When the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case need not be continued, but the taking of the legislator's testimony, as a witness, shall be postponed to the earliest practicable nonmeeting day. The presiding officer may also provide that the testimony be taken by deposition.

(7) As used in subsection (6), "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p><u>Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.</u></p> <p><u>(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.</u></p> <p><u>(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.</u></p>	<p><u>Sec. 81. (1) When the agency, person, or body authorized to make a final decision by statute or rule was present throughout or presided at the contested case, the agency, person, or body so authorized shall make a final decision. No initial or other preliminary form of decision is required.</u></p> <p><u>(2) In all contested cases in which the agency did not preside, the presiding officer shall make an initial decision, which shall become the final decision unless appealed to or reviewed by the agency.</u></p> <p><u>Sec. 82. (1) Except as otherwise provided by statute, an initial decision shall be subject to review by the agency on its own motion or upon appeal by any party. A motion to review or a notice of appeal shall be submitted within 30 days of the date of receipt of the initial decision of the agency, unless the agency adopts a procedural rule establishing a different time limitation.</u></p> <p><u>(2) A party appealing the initial decision shall submit the content of the appeal within 30 days after the submission of the notice of appeal. The appeal shall state all exceptions to the initial decision and such written arguments concerning the findings of fact, conclusions of law, and statements of policy as the appealing party shall choose to present. All other parties wishing to participate in the appeal shall have 30 days following their receipt of the appeal to submit their arguments in writing.</u></p> <p><u>(3) The agency may permit oral argument under such conditions or limitations as it determines.</u></p> <p><u>Sec. 81. (2) In all contested cases in which the agency did not preside, the presiding officer shall make an initial decision, which shall become the final decision unless appealed to or reviewed by the agency.</u></p> <p><u>(3) A decision in a contested case, whether initial or final, shall be made within a reasonable period, in writing or stated in the record and shall include findings of fact, conclusions of law, and statements of policy supporting the decision, if the decision represents an exercise of the agency's discretion. The decision shall consider the whole record, or such portions of the record as may be cited by the parties to the proceeding as relevant to the decision.</u></p> <p><u>Sec. 81. (2) In all contested cases in which the agency did not preside, the presiding officer shall make an initial decision, which shall become the final decision unless appealed to or reviewed by the agency.</u></p> <p><u>Sec. 82. (4) On review or appeal of an initial decision, the agency shall have all the powers it would have if it had presided at the hearing except that it shall not hear or accept new evidence. If the agency</u></p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.</p> <p>Sec. 82. Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to <u>make findings of fact and conclusions of law in a contested case</u> shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or the public service commission insofar as the case involves rate-making or financial practices or conditions.</p> <p>Sec. 85. A <u>final decision or order of an agency</u> in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the</p>	<p><u>believes that new evidence should be taken or that evidence was improperly excluded at the hearing, the agency shall remand the matter to the presiding officer who shall reopen the hearing for the limited purpose of taking the new testimony and hearing such additional argument of the effect of the new evidence as is appropriate. The presiding officer shall then give the new evidence such consideration as would have been accorded that evidence had it been presented in the original hearing and shall either affirm the original decision or prepare a new or revised initial decision. The agency shall then review the initial decision in light of the exceptions and arguments presented.</u></p> <p>Sec. 82. (5) <u>The agency shall make a final decision by affirming the initial decision in writing or on the record, or, if not affirming the initial decision, by stating its decision in writing or on the record.</u></p> <p style="text-align: center;"><b>DELETED</b></p> <p>Sec. 81. (6) Unless required for disposition of an ex parte matter authorized by law, <u>a presiding officer, member, or employee of an agency assigned to make a decision in a case or to assist the agency in making a decision in a case, and the deciding authority in the agency shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This subsection does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or ratemaking, in a contested case before the financial institutions bureau, the insurance bureau, or the public service commission insofar as the case involves ratemaking or financial practices or conditions.</u></p> <p>Sec. 75. (1) (b) <u>The burden of proof is the preponderance of evidence as applied in civil cases in circuit court. The preponderance may include any evidence admitted under subsection (3) and need not be based solely upon evidence admissible under the Michigan</u></p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. <u>If a party submits proposed findings of fact which would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material and substantial evidence. A copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.</u></p>	<p><u>rules of evidence.</u> Sec. 81. (3) A decision in a contested case, <u>whether initial or final, shall be made within a reasonable period, in writing or stated in the record and shall include findings of fact, conclusions of law, and statements of policy supporting the decision, if the decision represents an exercise of the agency's discretion. The decision shall consider the whole record, or such portions of the record as may be cited by the parties to the proceeding as relevant to the decision.</u> (4) Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact set forth in statutory language shall be accompanied by a concise and explicit statement of the underlying facts supporting them. <u>A presiding officer shall have the discretion to permit a party to submit proposed findings of fact and conclusions of law. If proposed findings of fact and conclusions of law are submitted, the decision shall include a ruling on each proposed finding of fact which would control the decision and on each proposed conclusion of law.</u> (5) A copy of <u>each initial or final</u> decision shall be delivered or mailed forthwith to each party and to <u>each</u> attorney of record. Sec. 82. (5) <u>The agency shall make a final decision by affirming the initial decision in writing or on the record, or, if not affirming the initial decision, by stating its decision in writing or on the record.</u></p>
<p>Sec. 86. (1) An agency shall prepare an official record of a hearing which shall include:</p> <ul style="list-style-type: none"><li>(a) Notices, pleadings, motions and intermediate rulings.</li><li>(b) Questions and offers of proof, objections and rulings thereon.</li><li>(c) Evidence presented</li><li>(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.</li><li>(e) <u>Proposed findings and exceptions.</u></li><li>(f) <u>Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.</u></li></ul> <p>(2) Oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who shall pay for the transcrip-</p>	<p>Sec. 83. (1) An agency shall prepare an official record of a hearing which shall include:</p> <ul style="list-style-type: none"><li>(a) Notices, pleadings, motions, and intermediate rulings.</li><li>(b) Questions and offers of proof, objections, and rulings thereon.</li><li>(c) Evidence presented.</li><li>(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.</li><li>(e) <u>Exceptions and arguments submitted on appeal of the initial decision.</u></li><li>(f) <u>The initial and final decision in the case.</u></li></ul> <p>(2) Oral proceedings at which evidence is presented shall be recorded and transcribed unless the agency determines by procedural rule that transcripts shall be</p>

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

tion of the portion requested except as otherwise provided by law.

Sec. 87. (1) An agency may order a rehearing in a contested case on its own motion or on request of a party.

(2) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of judicial review, the agency on its own motion or on request of a party shall order a rehearing.

(3) A request for a rehearing shall be filed within the time fixed by this act for instituting proceedings for judicial review. A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.

### Chapter 5. Licenses

Sec. 91. (1) When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply.

(2) When a licensee makes timely and sufficient ap-

### PROPOSED ACT

available only upon request of a party. The agency may charge to each party requesting a copy of a transcript, or a portion of the transcript, a reasonable fee. If the agency chooses not to have a transcription made, a party may request the transcription at the party's expense, but the agency shall pay for a proportional share of the transcription costs if it requests a copy. An agency required to furnish the transcript of a contested case hearing under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws, shall be permitted to charge a reasonable portion of the transcription costs to the requesting person.

Sec. 84. (1) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of final decision by the agency or judicial review, the agency on its own motion or on request of a party shall order a rehearing in whole or in relevant part.

Sec. 84. (1) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of final decision by the agency or judicial review, the agency on its own motion or on request of a party shall order a rehearing in whole or in relevant part.

(2) A request for a rehearing shall be filed within the time fixed by this act for instituting judicial review unless a different time is fixed for judicial review by statute, which time shall then control the time for a request. A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.

Sec. 91. (1) When licensing is required by statute or constitution to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply. The agency may, by procedural rule, provide that initial licensing or other activity related to licensing shall be subject to the provisions of this act governing a contested case or to such portions of the provisions governing a contested case as the agency shall in its discretion deem appropriate.

(2) When a licensee makes timely and sufficient ap-

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

plication for renewal of a license or a new license with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order or a later date fixed by order of the reviewing court. This subsection does not affect valid agency action then in effect summarily suspending such license under section 92.

Sec. 92. Before the commencement of proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license, an agency shall give notice, personally or by mail, to the licensee of facts or conduct which warrant the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license. If the agency finds that the public health, safety or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of a certified copy of the order on the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

### PROPOSED ACT

plication for renewal of a license or a new license with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order or a later date fixed by order of the reviewing court. This subsection does not affect valid agency action then in effect summarily suspending such license under section 93.

Sec. 92. (1) Before the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license:

- (a) The agency shall give written notice, personally or by mail, to the licensee of facts or conduct which warrant the intended action.
- (b) The licensee shall be given an informal opportunity to show or achieve compliance with all lawful requirements for retention of the license. This opportunity need not be on the record, may be conducted by any representative of the agency, including those who conducted the inspection or investigation which forms the basis of the agency's intended action, and may be conducted on the licensee's premises.

Sec. 93. If the agency has reasonable grounds to believe that the conduct of the licensee threatens the health, safety, or welfare of the public or of any person receiving services, housing, treatment, care, or support from a licensee, and determines that those grounds justify emergency action, it may summarily suspend a license. Such suspension shall take effect upon the date of the order or the date of service of the order upon the licensee, whichever is later, and shall remain in effect during the course of the proceedings. An order summarily suspending a license shall include a concise statement of the facts and law justifying the order. An agency decision to proceed summarily may be based upon such facts as it regards to be sufficient to implicate the public health, safety, or welfare, or the health, safety, or welfare of persons receiving services, housing, treatment, care, or support from the licensee. The facts relied upon need not meet the requirements of the rules of evidence provided for contested cases, nor must the decision be based upon a preponderance of evidence. The proceedings shall be promptly commenced and determined. Upon judicial review of a final licensing decision, the court shall not apply the provisions of section 106 (1)(d) to the decision of the agency to proceed under this section.

## COMPARATIVE ANALYSIS II.

### CURRENT LAW

#### Chapter 6. Judicial Review

Sec. 101. When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

Sec. 102. Judicial review of a final decision or order in a contested case shall be by any applicable special statutory review proceeding in any court specified by statute and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with sections 103 to 105.

Sec. 103. (1) Except as provided in subsection (2), a petition for review shall be filed in the circuit court for the county where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham county.

(2) As used in this subsection, "adoptee" means a child who is to be or who is adopted. In the case of an appeal from a final determination of the office of youth services within the department of social services regarding an adoption subsidy, a petition for review shall be filed:

(a) For an adoptee residing in this state, in the probate court for the county in which the petition for adoption was filed or in which the adoptee was found.

(b) For an adoptee not residing in this state, in the probate court for the county in which the petition for adoption was filed.

(3) A petition for review shall contain a concise statement of:

(a) The nature of the proceedings as to which review is sought.

### PROPOSED ACT

Sec. 101. (2) When a person has exhausted all administrative remedies available within an agency, and is aggrieved by final agency action as defined in section 2 (d), whether such action is affirmative or negative in form, the agency action is subject to direct review by the courts as provided by law and in the absence of such provision, as provided in this chapter. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural, or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

Sec. 102. Judicial review of final agency action shall be by any applicable special statutory review proceeding in any court specified and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with sections 103 to 105.

Sec. 103. (1) Except as provided in subsection (2), a petition for review shall be filed in the circuit court for the county of the petitioner's principal place of business in this state or for the county in which the petitioner resides or in the circuit court for Ingham county.

(2) As used in this section, "adoptee" means a child who is to be or is adopted. In the case of an appeal from a final determination of the office of youth services within the department of social services regarding an adoption subsidy, a petition for review shall be filed:

(a) For an adoptee residing in this state, in the probate court for the county in which the petition for adoption was filed or in which the adoptee was found.

(b) For an adoptee not residing in this state, in the probate court for the county in which the petition for adoption was filed.

(3) A petition for review shall contain a concise statement of:

(a) The nature of the action as to which review is sought.

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>(b) <u>The facts on which venue is based.</u></p> <p>(c) The grounds on which relief is sought.</p> <p>(d) The relief sought.</p> <p>(4) The petitioner shall attach to the petition, as an exhibit, a copy of the agency <u>decision or order</u> of which review is sought.</p> <p>Sec. 104. (1) A petition shall be filed in the court within 60 days after the date of mailing notice of the <u>final decision or order of the agency</u>, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. The filing of the petition does not stay enforcement of the agency action but the agency may grant, or the court may order, a stay upon appropriate terms.</p> <p>(2) Within 60 days after service of the petition, or within such further time as the court allows, the agency shall transmit to the court the original or certified copy of the entire record of the <u>proceedings</u>, unless parties to the proceedings for judicial review stipulate that the record be shortened. A party unreasonably refusing to <u>so</u> stipulate may be taxed by the court for the additional costs. The court may permit subsequent corrections to the record.</p> <p>(3) The review shall be conducted by the court without a jury and shall be confined to the record. In a case of alleged irregularity in procedure before the agency, not shown in the record, proof thereof may be taken by the court. The court, on request, shall hear oral arguments and receive written briefs.</p> <p>Sec. 105. If timely application is made to the court for leave to present additional evidence, and it is</p>	<p>(b) <u>The factual background of the matter.</u></p> <p>(c) The <u>factual and legal</u> grounds on which relief is sought.</p> <p>(d) The relief sought.</p> <p>(4) The petitioner shall attach to the petition, as an exhibit, a copy of the agency <u>action</u> of which review is sought. <u>If the agency action was not reduced to written form, the petitioner shall attach to the petition, as an exhibit, an affidavit in accordance with the general court rules describing the agency action of which review is sought.</u></p> <p>Sec. 104. (1) A petition shall be filed in the court within 60 days after the date of mailing notice of the final <u>agency action</u>, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. <u>If the agency action is the failure to act, the petition shall be filed in the court within 180 days after the date upon which the duty to act arose.</u> The filing of the petition does not stay enforcement of the agency action, but the agency may grant, or the court may order, a stay upon appropriate terms.</p> <p>(2) Within 60 days after service of the petition, or within such further time as the court allows, the agency shall transmit to the court the original or certified copy of the entire record of the <u>agency action</u>, unless parties to the proceedings for judicial review stipulate that the record be shortened. <u>If the action was not conducted as a hearing on the record, the agency shall transmit to the court an original or certified copy of its entire file relevant to the petition, unless the parties to the proceedings for judicial review stipulate that the record be shortened.</u> A party unreasonably refusing to stipulate <u>to shortening the record</u> may be taxed by the court for the additional costs. The court may permit subsequent corrections to the record.</p> <p>(3) The review shall be conducted by the court without a jury and shall be confined to the record. In a case of alleged irregularity in procedure before the agency <u>or in review of agency failure to act</u>, not shown in the record, proof thereof may be taken by the court. The court, on request, shall hear oral arguments and receive written briefs.</p> <p>Sec. 105. <u>In review of agency proceedings conducted under chapter 4</u>, if timely application is made to the</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>shown to the satisfaction of the court that an inadequate record was made at the hearing before the agency or that the additional evidence is material, and that there were good reasons for failing to record or present it in the proceeding before the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its findings, decision or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision or order, which shall become part of the record.</p> <p>Sec. 106. (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside <u>a decision or order of an agency</u> if substantial rights of the petitioner have been prejudiced because the <u>decision or order</u> is any of the following:</p> <p>(a) In violation of the constitution or a statute.</p> <p>(b) In excess of the statutory authority or jurisdiction of the agency.</p> <p>(c) Made upon unlawful procedure resulting in material prejudice to a party.</p> <p>(d) Not supported by competent, material and substantial evidence on the whole record.</p> <p>(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.</p> <p>(f) Affected by other substantial and material error of law.</p> <p>(2) The court, as appropriate, may affirm, reverse or modify the <u>decision or order</u> or remand the case for further proceedings.</p>	<p>court for leave to present additional evidence, and it is shown to the satisfaction of the court that an inadequate record was made at the hearing before the agency or that the additional evidence is material and that there were good reasons for failing to record or present it in the proceeding before the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its findings, decision, or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision, or order, which shall become part of the record.</p> <p>Sec. 106. (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside <u>agency action</u> if substantial rights of the petitioner have been prejudiced because the <u>agency action</u> is any of the following:</p> <p>(a) In violation of the constitution or a statute.</p> <p>(b) In excess of the statutory authority or jurisdiction of the agency, <u>or short of statutory right</u>.</p> <p>(c) Made upon unlawful procedure resulting in material prejudice to a party.</p> <p>(f) <u>In review of agency proceedings conducted under chapter 4</u>, not supported by competent, material, and substantial evidence on the whole record. <u>The court shall apply the rules of evidence in the same manner as applied in the agency under section 75 and shall not overturn an agency decision solely because the preponderance of the evidence is not wholly constituted of evidence admissible under the Michigan rules of evidence.</u></p> <p>(d) Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.</p> <p>(e) Affected by other substantial and material error of law.</p> <p>(2) The court, as appropriate, may affirm, reverse, or modify the <u>agency action</u> or remand the case for further proceedings. <u>The court shall authorize only such actions as are included within the powers granted to the agency in the underlying statute or statutes on which the agency's decision was based.</u></p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p data-bbox="194 243 660 275">Chapter 7. Miscellaneous Provisions</p> <p data-bbox="90 331 738 489">Sec. 111. Act No. <u>88</u> of the Public Acts of <u>1943</u>, as amended, being sections <u>24.71</u> to <u>24.80</u> of the <u>Compiled Laws of 1948</u>, and Act No. <u>197</u> of the <u>Public Acts of 1952</u>, as amended, being sections <u>24.101</u> to <u>24.110</u> of the <u>Compiled Laws of 1948</u>, are repealed.</p> <p data-bbox="90 548 738 667">Sec. 112. A reference in any other law to Act No. <u>88</u> of the Public Acts of <u>1943</u>, as amended, or Act No. <u>197</u> of the Public Acts of <u>1952</u>, as amended, is deemed to be a reference to this act.</p> <p data-bbox="90 726 738 846">Sec. 113. This act is effective July 1, <u>1970</u>, and except as to proceedings then pending applies to all agencies and agency proceedings not expressly exempted.</p> <p data-bbox="90 905 738 1245">Sec. 114. When an agency has completed any or all of the processing of a rule pursuant to Act No. <u>88</u> of the Public Acts of <u>1943</u>, as amended, before July 1, <u>1970</u>, similar processing required by this act need not be completed and the balance of the processing and the publication of the rule shall be completed pursuant to this act. <u>An effective date may be added to such a rule although it was not included in the notice of hearing on the rule pursuant to subsection (1) of section 41, when such notice was given before July 1, 1970.</u></p> <p data-bbox="90 1304 738 1892">Sec. 115. Chapters 4 and 6 shall not apply to proceedings conducted under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws. Chapters <u>4</u> and <u>8</u> shall not apply to a hearing conducted by the department of corrections pursuant to chapter IIIA of Act No. 232 of the Public Acts of 1953, being sections 791.251 to 791.255 of the Michigan Compiled Laws. <u>Chapter 8 shall not apply to a contested case or other proceeding regarding the granting or renewing of an operator's or chauffeur's license by the secretary of state; the Michigan employment relations commission; worker's disability compensation under Act No. 317 of the Public Acts of 1969; or unemployment compensation under Act No. 1 of the Public Acts of the Extra Session of 1936, being sections 421.1 to 421.73 of the Michigan Compiled Laws; or to department of social services public assistance</u></p>	<p data-bbox="812 338 1459 432">Sec. 6. Act No. <u>306</u> of the Public Acts of <u>1969</u>, being sections <u>24.201</u> to <u>24.328</u> of the <u>Michigan Compiled Laws</u>, is repealed.</p> <p data-bbox="812 548 1459 674">Sec. 7. A reference in any other law to Act No. <u>88</u> of the Public Acts of <u>1943</u>, Act No. <u>197</u> of the Public Acts of <u>1952</u>, or Act No. <u>306</u> of the <u>Public Acts of 1969</u> is deemed to be a reference to this act.</p> <p data-bbox="812 726 1459 831">Sec. 8. This act is effective July 1, <u>1990</u>, and except as to proceedings then pending applies to all agencies and agency proceedings not expressly exempted.</p> <p data-bbox="812 915 1459 1104">Sec. 9. When an agency has completed any or all of the processing of a rule pursuant to Act No. <u>306</u> of the Public Acts of <u>1969</u>, before July 1, <u>1990</u>, similar processing required by this act need not be completed and the balance of the processing and the publication of the rule shall be completed pursuant to this act.</p> <p data-bbox="812 1314 1459 1629">Sec. 10. (1) Chapters <u>4</u>, <u>5</u>, and 6 shall not apply to proceedings conducted under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws. (2) Chapter 4 shall not apply to a hearing conducted by the department of corrections pursuant to chapter IIIA of Act No. 232 of the Public Acts of 1953, being sections 791.251 to 791.255 of the Michigan Compiled Laws.</p>

**COMPARATIVE ANALYSIS II.**

<b>CURRENT LAW</b>
<p><u>hearings under section 9 of Act No. 280 of the Public Acts of 1939, being section 400.9 of the Michigan Compiled Laws.</u></p>
<p>Chapter 8.</p>
<p>Sec. 121. For the purposes of this chapter, the words and phrases described in section 122 have the meanings ascribed to them in that section.</p>
<p>Sec. 122. (1) "Contested case" means a contested case as defined in section 3(3) but does not include a case that is settled or a case in which a consent agreement is entered into or a proceeding for establishing a rate or approving, disapproving, or withdrawing approval of a form.</p>
<p>(2) "Costs and fees" means the normal costs incurred, after a party has received notice of an initial hearing under section 71(2), in being a party in a contested case under this act and include all of the following:</p>
<p>(a) The reasonable and necessary expenses of expert witnesses as determined by the presiding officer.</p>
<p>(b) The reasonable cost of any study, analysis, engineering report, test, or project which is determined by the presiding officer to have been necessary for the preparation of a party's case.</p>
<p>(c) Reasonable and necessary attorney or agent fees including those for purposes of appeal.</p>
<p>(3) "Party" means a party as defined in section 5(4), but does not include any of the following:</p>
<p>(a) An individual whose net worth was more than \$500,000.00 at the time the contested case was initiated.</p>
<p>(b) The sole owner of an unincorporated business or any partnership, corporation, association, or organization whose net worth exceeded \$3,000,000.00 at the time the contested case was initiated and which is not either exempt from taxation pursuant to section 501. (c)(3) of the internal revenue code or a cooperative association as defined in section 15(a) of the agricultural marketing act, 12 U.S.C. 1141j(a).</p>
<p>(c) The sole owner of an unincorporated business or any partnership, corporation, association, or organization that had more than 250 full-time equivalent employees, as determined by the total number of employees multiplied by their working hours divided by 40, at the time the contested case was initiated.</p>
<p>(d) As used in this subsection "net worth" means the amount remaining after the deduction of liabilities from assets as determined according to generally ac-</p>

<b>PROPOSED ACT</b>
<p><b>DELETED</b></p>
<p><b>DELETED</b></p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>cepted accounting principles.</p> <p>(4) "Presiding officer" means an agency, 1 or more members of the agency, a person designated by statute to conduct a contested case, or a hearing officer designated and authorized by the agency to conduct a contested case.</p> <p>(5) "Prevailing party" means as follows:</p> <p>(a) In an action involving several remedies, or issues or counts which state different causes of actions or defenses, the party prevailing as to each remedy, issue, or count.</p> <p>(b) In an action involving only 1 issue or count stating only 1 cause of action or defense, the party prevailing on the entire record.</p> <p>Sec. 123. (1) The presiding officer that conducts a contested case shall award to a prevailing party, other than an agency, the costs and fees incurred by the party in connection with that contested case, if the presiding officer finds that the position of the agency to the proceeding was frivolous. To find that an agency's position was frivolous, the presiding officer shall determine that at least 1 of the following conditions has been met:</p> <p>(a) The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.</p> <p>(b) The agency had no reasonable basis to believe that the facts underlying its legal position were in fact true.</p> <p>(c) The agency's legal position was devoid of arguable legal merit.</p> <p>(2) If the parties to a contested case do not agree on the awarding of costs and fees under this section, a hearing shall be held if requested by a party, regarding the awarding of costs and fees and the amount thereof. The party seeking an award of costs and fees shall present evidence establishing all of the following:</p> <p>(a) That the position of the agency was frivolous.</p> <p>(b) That the party is a prevailing party.</p> <p>(c) The amount of costs and fees sought including an itemized statement from any attorney, agent, or expert witness who represented the party showing the rate at which the costs and fees were computed.</p> <p>(d) That the party is eligible to receive an award under this section. Financial records of a party shall be exempt from public disclosure if requested by the party at the time the records are submitted pursuant to this section.</p> <p>(e) That a final order not subject to further appeal other than for the judicial review of costs and fees provided for in section 125 has been entered in the</p>	<p><b>DELETED</b></p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
<p>contested case regarding the subject matter of the contested case.</p> <p>(3) The presiding officer may reduce the amount of the costs and fees to be awarded, or deny an award, to the extent that the party seeking the award engaged in conduct which unduly and unreasonably protracted the contested case.</p> <p>(4) The final action taken by the presiding officer under this section in regard to costs and fees shall include written findings as to that action and the basis for the findings.</p> <p>(5) Subject to subsection (6), the amount of costs and fees awarded under this section shall include those reasonable and necessary costs actually incurred by the party and any costs allowed by law or by a rule promulgated under this act. Subject to subsection (6), the amount of fees awarded under this section shall be based upon the prevailing market rate for the kind and quality of the services furnished, subject to the following:</p> <p>(a) The expenses paid for an expert witness shall be reasonable and necessary as determined by the presiding officer.</p> <p>(b) An attorney or agent fee shall not be awarded at a rate of more than \$75.00 per hour unless the presiding officer determines that special circumstances existed justifying a higher rate or an applicable rule promulgated by the agency provides for the payment of a higher rate because of special circumstances.</p> <p>(6) The costs and fees awarded under this section shall only be awarded to the extent and amount that the agency caused the prevailing party to incur those costs and fees.</p> <p>(7) This section does not apply to any agency in its role of hearing or adjudicating a case. Unless an agency has discretion to proceed, this section does not apply to an agency acting ex rel on the information and at the instigation of a nonagency person who has a private interest in the matter nor to an agency required by law to commence a case upon the action or request of another nonagency person.</p> <p>(8) This section does not apply to an agency that has such a minor role as a party in the case in comparison to other nonprevailing parties so as to make its liability for costs and fees under this section unreasonable, unjust, or unfair.</p> <p>Sec. 124. An application for costs and fees and the awarding thereof under this chapter shall not delay the entry of a final order in a contested case.</p>	<p>DELETED</p>

**COMPARATIVE ANALYSIS II.**

<b>CURRENT LAW</b>	<b>PROPOSED ACT</b>
<p>Sec. 125. (1) A party that is dissatisfied with the final action taken by the presiding officer under section 123 in regard to costs and fees may seek judicial review of that action pursuant to chapter 6.</p> <p>(2) The court reviewing the final action of a presiding officer pursuant to subsection (1) may modify that action only if the court finds that the failure to make an award or the making of an award was an abuse of discretion, or that the calculation of the amount of the award was not based on substantial evidence.</p> <p>(3) An award of costs and fees made by a court under this section shall only be made pursuant to section 2421d of Act No. 236 of the Public Acts of 1961, being section 600.2421d of the Michigan Compiled Laws.</p>	<p><b>DELETED</b></p>
<p>Sec. 126. (1) The director of the department of management and budget shall report annually to the legislature regarding the amount of costs and fees paid by the state under this chapter during the preceding fiscal year. The report shall describe the number, nature, and amount of the awards; the claims involved; and any other relevant information which would aid the legislature in evaluating the scope and impact of the awards. Each agency shall provide the director of the department of management and budget with information as is necessary for the director to comply with the requirements of this section.</p> <p>(2) If costs and fees are awarded under this chapter to a prevailing party, the agency or agencies over which the party prevailed shall pay those costs and fees.</p>	<p><b>DELETED</b></p>
<p>Sec. 127. If a prevailing party recovers costs and fees under this chapter in a contested case, the prevailing party is not entitled to recover those same costs for that contested case under any other law.</p>	<p><b>DELETED</b></p>
<p>Sec. 128. Sections 121 to 127 shall apply to contested cases commenced after September 30, 1984, and shall not apply to contested cases commenced after September 30, 1987.</p>	<p><b>DELETED</b></p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
	<p>(Proposed Administrative Procedures Act provisions with no comparable equivalents in the current act)</p> <p>Sec. 2. (a) "Adjudication" means the agency process for the formulation of an order.</p> <p>(d) "Agency action" means the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or the failure to act.</p> <p>(e) "Agency proceeding" means rulemaking, adjudication, or licensing, including ratemaking and contested cases.</p> <p>(f) "Approval of a rule" means the actions described in chapter 3 regarding the action of the legislature required to approve substantive rules through the committee or through concurrent resolution.</p> <p>(j) "Housekeeping rule" means a rule which describes the internal organization, operation, management, and practices of an agency, including instructions or guidelines to employees regarding the scope and exercise of their functions.</p> <p>(k) "Interpretive rule" means a rule which expresses the formal opinion of an agency of the meaning of a statute or of another rule, which meaning the agency intends to follow in the execution or administration of its designated functions.</p> <p>(n) "Michigan administrative code" means the compilation of rules required to be kept pursuant to Act No. 193 of the Public Acts of 1970, being sections 8.41 to 8.48 of the Michigan Compiled Laws.</p> <p>(p) "Order" means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking, including licensing and ratemaking. This definition shall apply regardless of the denomination or characterization of the action by the agency.</p> <p>(s) "Procedural rule" means a rule which establishes the methods by which the agency will execute its designated functions in regard to the contact it has with persons and describes the procedures, practices, forms, applications, guidelines, instructions, and other requirements which persons must follow in the execution or administration of its designated functions.</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
	<p>(v) "Relief" means (i) a grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (ii) the recognition of a claim, right, immunity, privilege, exemption, or exception; or (iii) the taking of other action on the application or petition of, and beneficial to, a person.</p> <p>(x) "Rulemaking" means the agency process for formulating, amending, or rescinding a rule.</p> <p>(y) "Sanction" means (i) the prohibition, requirement, limitation, or other condition affecting the freedom of a person; (ii) the withholding of relief; (iii) the imposition of penalty or fine; (iv) the destruction, taking, seizure, or withholding of property; (v) the assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (vi) the requirement, revocation, or suspension of a license; or (vii) the taking of other compulsive or restrictive action.</p> <p>(z) "Substantive rule" means a rule which establishes a standard of conduct, which implements law enforced by or administered by the agency, and which affects private rights and obligations.</p> <p>Sec. 32. (5) Procedural rules shall be clearly labelled as such and shall include a statement that they are not intended to have substantive effect.</p> <p>Sec. 33. (4) Interpretive rules shall be clearly labelled as such and shall include a statement that they are not intended to have substantive effect and that they do not have the force and effect of law.</p> <p>Sec. 41. (5) Prior to the scheduled date of hearing, the committee may determine by concurring majorities of the members from each house that a proposed procedural or interpretive rule is substantive as defined in section 2(z). The committee shall provide to the agency a detailed explanation of its conclusion and the agency shall not adopt the rule without complying with sections 45 and 46. The agency may proceed to adopt the rule, if the committee takes no action or states its agreement with the agency's characterization of the rule.</p> <p>Sec 48. (2) An agency may adopt a procedural rule under the provisions of subsection (1), but any procedural rule so adopted shall be effective for no more</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
	<p>than 120 days.</p> <p>Sec. 71. (2) (a) The names of all parties.</p> <p>(3) Unless otherwise provided by statute or procedural rule, service of notice shall be by personal service or certified mail upon return receipt. Upon a claim of improper service of notice, the agency may show actual notice of the hearing, provided that the notice actually provided meets all the provisions of subsection (2). If the agency determines that actual notice does not result in material prejudice to a party, the agency may proceed with the hearing.</p> <p>(7) An agency may adopt procedural rules allowing for the service of notice, the filing of answers and other pleadings, and the submission of documents related to a contested case to be accomplished by facsimile transmission.</p> <p>(8) Unless otherwise provided by statute or procedural rule, a party is entitled to appear in person or by or with counsel or other duly qualified representative.</p> <p>Sec. 72. (2) A presiding officer in a contested case shall not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency. This subsection shall not apply to the individual who heads the agency or to a member or members of the body which heads the agency.</p> <p>(4) (g) Summarily dispose of a case in which there are no contested facts.</p> <p>(5) The following provisions shall apply to petitions for intervention:</p> <p>(a) A presiding officer shall grant a petition for intervention if:</p> <p>(i) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the notice of hearing, at least 7 days before the hearing;</p> <p>(ii) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and</p> <p>(iii) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention.</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
	<p>(b) A presiding officer may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice, is timely in view of the stage of the proceedings at the time of the petition for intervention, and will not impair the orderly and prompt conduct of the proceedings.</p> <p>(c) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include: (i) limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition; (ii) limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; (iii) requiring 2 or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings; and (iv) limiting participation to the filing of briefs.</p> <p>(d) A presiding officer, at least 48 hours before the hearing, shall issue an order granting or denying each pending petition for intervention submitted under subsection (5)(a), specifying any conditions and briefly stating the reasons for the order. A presiding officer shall state on the record prior to the commencement of proceeding an order granting or denying each pending petition for intervention submitted under subsection (5)(b), specifying any conditions and briefly stating the reasons for the order. A presiding officer may modify the order at any time, stating reasons for modification. A presiding officer may reverse an order granting intervention at any time, if the presiding officer determines that the facts presented during the course of the proceeding do not substantiate the claims set forth in the petition to intervene. A presiding officer shall promptly give notice of an order granting, denying, modifying, or reversing intervention to the petitioner for intervention and to all parties.</p> <p>(e) The provisions of this subsection shall apply to all petitions or other requests to intervene except as these provisions are contrary to the provisions of any statute pertaining to intervention in contested cases conducted under that statute.</p> <p>Sec. 75. (1) Except as otherwise provided by statute: (a) The proponent of a decision shall have the burden of going forward and the burden of proof. In matters</p>

**COMPARATIVE ANALYSIS II.**

<b>CURRENT LAW</b>

<b>PROPOSED ACT</b>
<p>subject to chapter 5, these burdens shall be on the applicant for an initial license, for a new license in regard to activity of a continuing nature, and for reinstatement of a license previously suspended or revoked, and in all other licensing matters, including the denial of the renewal of an existing license, these burdens shall be on the licensing agency.</p> <p>Sec. 82. (6) The agency may adopt substantive rules to change the procedures for review of initial decisions.</p> <p>Sec. 91. (3) When the agency engages in licensing involving competing applications in circumstances where the number of applications exceeds the number of licenses which can be granted, and the statute requires that the licensing be preceded by notice and an opportunity for hearing, the agency shall not grant any license until a review is completed of all competing applications. Where the circumstances so require or permit, a single contested case hearing shall be provided in which all competing applicants are entitled to participate.</p> <p>(4) An agency may provide by procedural rule that licenses based on applications for license subject to subsection (3) shall be awarded to qualified applicants: (a) in the order of receipt of applications within periods of application determined by the agency; or (b) by lot from all applications received within periods of application determined by the agency. This subsection shall not apply if the statute requires that the license be awarded to the best or better applicant</p> <p>(5) The agency may eliminate an application prior to proceedings conducted under subsection (3) or (4) when it finds that the application is incomplete or insufficient, or that the applicant fails to meet the minimum requirements for licensing under the statute or agency rules. Any applicant eliminated prior to the competitive proceedings established in subsection (3) or (4) shall be given an opportunity to exercise its statutory right to notice and hearing prior to the competitive proceedings. If the decision in the hearing under this subsection is that the application meets the minimum qualifications necessary for licensing under the statute, the application shall be included in the proceedings conducted under subsection (3) or (4).</p> <p>(6) An agency which participates in licensing of competing applicants shall promulgate procedural</p>

## COMPARATIVE ANALYSIS II.

CURRENT LAW	PROPOSED ACT
	<p>rules for the administration of the competitive proceedings, including the conduct of the competitive hearing.</p> <p>Sec. 92. (1)(c) The agency shall provide within a reasonable time a written summary of its determination following the informal opportunity to show compliance, which shall include a concise statement of the facts or conduct which warrant any conclusion that the licensee is not in compliance with the relevant statutes or rules. This statement shall not be used in lieu of a notice of contested case hearing should the agency decide to commence proceedings.</p> <p>(d) An agency which determines that the licensee is not in compliance shall begin its contested case proceedings within a reasonable time after the determination of non-compliance unless the agency and the licensee agree in writing to extend the time to show compliance to a date certain, after which the contested case proceedings shall begin within a reasonable time or the agency shall issue a statement of compliance.</p> <p>(2) Subsection (1) shall not apply to any licensing in which:</p> <p>(a) The provisions set forth in section 93 are invoked.</p> <p>(b) The conduct of the licensee threatens the health, safety, or welfare of the public or of any person receiving services, housing, treatment, care, or support from the licensee.</p> <p>(c) The conduct of the licensee constitutes a pattern of intentional and deliberate violation of the terms or conditions of the license.</p> <p>(d) The conduct of the licensee is of a nature that current or future compliance would be irrelevant to the determination of whether to suspend, revoke, annul, withdraw, recall, cancel, or amend the license.</p> <p>(3) The agency shall include in the notice of hearing in any ensuing contested case a concise statement of the facts and law justifying its decision to invoke any provision of this subsection. The determination of the agency to invoke the provisions of subsection (2) shall not be reviewable by any court, but this subsection shall not prohibit judicial review of the failure of an agency to provide the informal opportunity to show or achieve compliance for any other reason.</p>

**MICHIGAN STATE LAW IMPLICATIONS  
OF THE UNITED STATES - CANADA  
FREE TRADE AGREEMENT (FTA)**

**A Report to the:**

**MICHIGAN LAW REVISION COMMISSION**

**By the:**

**WAYNE STATE UNIVERSITY LAW SCHOOL  
UNITED STATES - CANADA STUDY TEAM:**

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**October 23, 1989**

## PREFACE

In April, 1989, the Michigan Law Revision Commission selected Wayne State University Law School to "undertake a review of the Michigan state law implications of the United States - Canada Free Trade Agreement (hereinafter FTA or Agreement)" and "to identify possible areas where Michigan laws could be modified to take advantage of the new market created by the FTA even though such changes are not required by the FTA". The Law School formed a United States-Canada Study team comprised of five law students, directed by Professor John E. Mogk.

Three of the students, Laura Brodeur, Clara DeQuick, and Louise Wright, examined specific chapters of the FTA and prepared a chapter by chapter analysis of its provisions, including an assessment of how to harmonize, or foster mutual recognition of, Michigan and Ontario laws and regulations. A fourth student, Jay Colvin, evaluated areas where the Michigan Legislature could modify laws to take advantage of new and expanded markets expected to result from the FTA, even though no change was strictly required. The fifth student, Samina Hurst, served as coordinator of the project and was responsible for identifying source materials, gathering additional information and contacting federal and state agencies, major border states, principals involved in drafting the FTA, and Canadian officials.

The team designed the study to meet four objectives: (1) to analyze each section of the FTA and determine whether Michigan laws and regulations are in compliance; (2) to identify areas where state laws may be modified to facilitate existing trade between Michigan and Canada (specifically Ontario); (3) to highlight areas where Michigan laws govern major trade expansion fields; and (4) to prepare a resource base for any further examination of the FTA by the Commission or others.

The team thoroughly reviewed the FTA, the U.S. Congressional Committee hearings and other material with respect to its adoption (Appendix A). Each team member assigned to study specific chapters of the FTA contacted the relevant Michigan agencies and incorporated into their assessments contributions received from agency representatives. Numerous outside resource people were also

contacted (Appendix B). No similar study was found to be ongoing in any other major border state.

Notices describing the study and requesting input from the Michigan practicing bar were published in the July issue of the Michigan Business Lawyer and the August issue of the Michigan International Law Journal. As of the date of this report, no comments were received.\*

The team identified specific pending legislation that relates to the FTA. Section III describes this legislation and Appendix C contains copies of it.

Moreover, an extensive computer search was conducted on Michigan Questor -- a database which incorporates all Michigan statutes. By entering the key words "alien, Canada, domestic, export, foreign, import, miles, non-resident, Ontario, resident, and safety standard" into the system, the computer isolated statutes covering every envisioned aspect of Michigan law that could govern dealings with Canada (Appendix D). For the most part, existing state laws and regulations are grandfathered or specifically exempted, thus remaining unaffected by the FTA. However, any non-exempt new laws enacted after January 1, 1989 must be no less compliant with the FTA provisions and must aim toward according Canada national treatment.

The team also devoted substantial time to reviewing studies forecasting the effects of the FTA on various businesses, services, and industries. This information was specifically applied to the statistics pertaining to Michigan business and industry. Section IV outlines the results of this research.

Section V summarizes legal recommendations that may enhance the benefits of the FTA to Michigan and its businesses. In addition, during the course of the study, resource persons suggested several non-legal actions that would be advisable. These are discussed in section VI.

The study team would like to thank the many officials and representatives who openly and freely contributed to its work. Special appreciation is extended to the staff of the Legislative Services Bureau. This project has been an interesting

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\*Appendix E contains a letter, dated October 20, 1989, received on October 25, 1989, from Donald E. Wilson, International Tax Partner, Touche Ross & Co., to Professor John E. Mogk, regarding harmonizing small business tax nexus rules.

challenge for us and we hope the Report which follows will be of substantial value to the Commission and to others who consult it.

October 23, 1989  
Detroit, Michigan

John E. Mogk  
Professor of Law  
Wayne State University

# TABLE OF CONTENTS

PREFACE

TABLE OF CONTENTS

DISCUSSION

## I. INTRODUCTION

(A) Overview.....	251
(B) Format of the FTA.....	252
(C) Definitions of Essential Provisions.....	252
(1) National Treatment.....	252
(2) Grandfathering.....	252
(3) Exemption.....	252
(4) Acceleration.....	253

## II. ANALYSIS OF THE FTA

### PART ONE: OBJECTIVES AND SCOPE

Chapter One: Objectives and Scope.....	254
Chapter Two: General Definitions.....	254

### PART TWO: TRADE IN GOODS

Chapter Three: Rules of Origin.....	255
Chapter Four: Border Measures.....	256

**PART TWO: TRADE IN GOODS (continued)**

Chapter Five:	National Treatment.....	260
Chapter Six:	Technical Standards.....	261
Chapter Seven:	Agriculture.....	264
Chapter Eight:	Wine and Distilled Spirits.....	275
Chapter Nine:	Energy.....	278
Chapter Ten:	Trade in Automotive Goods.....	278
Chapter Eleven:	Emergency Action.....	282
Chapter Twelve:	Exceptions for Trade in Goods.....	282

**PART THREE: GOVERNMENT PROCUREMENT**

Chapter Thirteen:	Government Procurement.....	284
-------------------	-----------------------------	-----

**PART FOUR: SERVICES, INVESTMENT AND TEMPORARY ENTRY**

Chapter Fourteen:	Services.....	285
Chapter Fifteen:	Temporary Entry for Business..... Persons	290
Chapter Sixteen:	Investment.....	291

**PART FIVE: FINANCIAL SERVICES**

Chapter Seventeen:	Financial Services.....	295
--------------------	-------------------------	-----

**PART SIX: INSTITUTIONAL PROVISIONS**

Chapter Eighteen:	Institutional Provisions.....	297
Chapter Nineteen:	Binational Dispute Settlement..... in Antidumping and Countervailing Duty Cases	297

**PART SEVEN: OTHER PROVISIONS**

Chapter Twenty: Other Provisions.....299

**PART EIGHT: FINAL PROVISIONS**

Chapter Twenty One: Final Provisions.....301

**III. CURRENT PENDING LEGISLATION**

(A) Michigan Professional Service Corporation Act.....302

(B) Michigan Export Development Act.....302

**IV. MARKET EXPANSION AREAS**

(A) Attractive Industry Sectors.....303

(B) State Involvement.....305

**V. LEGAL RECOMMENDATIONS**

(A) Modifications of Existing Laws and Regulations.....307

(B) Laws and Regulations to be Examined Further.....307

(C) Areas of Commerce to be Monitored as Growth Occurs.....309

**VI. NON-LEGAL SUGGESTIONS**

(A) Transportation.....311

(B) Information Data Base.....311

(C) Wineries.....311

(D) Government Procurement.....312

VII. CONCLUSION.....	313
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## APPENDICES

- (A) Bibliography
- (B) Contact List
- (C) Pending Legislation
- (D) Computer Isolated Sources
- (E) Incoming Correspondence

## INTRODUCTION

### (A) Overview

The United States - Canada Free Trade Agreement, Dec. 22, 1987, Department of State Bulletin (March 1988), went into effect as an Executive Agreement between the two countries on January 1, 1989. It phases out U.S. and Canadian import tariffs, saving consumers and businesses millions of dollars and expanding export opportunities in the fields of manufacturing, agriculture, financial services, and high technology.

The State of Michigan has much to gain from the FTA. Michigan conducts more trade with Canada than any other state and more than Canada's second and third largest trading partners, Japan and the United Kingdom, combined. In 1987, two-way trade between Michigan and Canada exceeded \$24.8 billion. This figure is most likely low. According to a study conducted by the U.S. Department of Commerce, "approximately one out of every seven dollars worth of U.S. exports to Canada cannot be assigned to a state. Most of these exports are automotive products, which are among Michigan's leading exports to Canada." The Office of Canada, International Trade Administration, United States Department of Commerce (2d ed. 1989).

This report focuses upon legal modifications that would assure Michigan's compliance with or enhance its business opportunities under the FTA. Although existing state laws and regulations are for the most part grandfathered or exempted, discussed below, a number of areas were found to justify action. Recommendations include the following: (1) modifications of existing laws and regulations; (2) laws and regulations to be examined further; and (3) areas of commerce to be monitored as growth occurs. In addition, the report provides suggestions for non-legal actions.

Although no FTA provisions deal directly with transportation services, both Canadian and Michigan officials expressed concern about the effectiveness of the transportation network between Canada and Detroit. They identified the need for operational changes to remove obstacles preventing the efficient flow of goods and services across the border.

## **(B) Format of the FTA**

The FTA consists of eight parts that are subdivided into twenty-one chapters. Each chapter is divided into sections identified as articles. These articles organize the subject matter of the chapter by category, e.g. Chapter Eight: Wine and Distilled Spirits, Article 801 - Coverage, Article 802 - Listing, etc. Some of the articles are supplemented by annexes. An annex sets forth detailed explanations of provisions contained in the article.

## **(C) Definitions of Essential Provisions**

The FTA includes several recurring provisions: (1) those requiring national treatment; (2) those that grandfather existing laws; (3) those that exempt laws from having to comply with the FTA; (4) and those that allow either country to petition for accelerated elimination of duties on specific products.

### **(1) National Treatment**

Unless specifically excepted, the FTA requires "national treatment", i.e., the U.S. and Canada will each accord equal treatment to the other country, treating the other's goods, services, investments, and people no less favorably than its own. See Chapter Five for further explanation.

### **(2) Grandfathering**

A grandfather clause is one that allows already existing laws to continue unaffected by the FTA. The FTA defines "existing" as being those laws enforceable at the time the Agreement went into effect -- January 1, 1989. For example, pursuant to Chapter 14, Article 1402, Paragraph five, an already existing licensing requirement that may discriminate against Canadians, does not have to comply with the newly enacted provisions of the FTA. Furthermore, under the FTA, selected existing non-compliant laws that have been grandfathered and are promptly renewed may continue their unaffected status (Article 1402, Paragraph five (b)). While there is no general grandfather clause in the FTA, the concept appears in a substantial number of chapters.

### **(3) Exemption**

In a few areas, the FTA exempts certain specific laws from having to comply with its provisions at any time. For example, Article 1402, Paragraph nine, states that government services contracts do not have to comply with the FTA.

#### **(4) Acceleration**

The FTA requires the elimination of duties on all products traded between the U. S. and Canada by 1998. The FTA assigns every product on which a duty had been levied prior to implementation to one of the following three (3) timetables:

- (A) duty automatically eliminated upon implementation of the FTA on January 1, 1989;**
- (B) duty reduced 20% of January 1989 levels annually for five (5) years, resulting in complete elimination by January 1, 1993; and**
- (C) duty reduced 10% of January 1989 levels annually for ten (10) years, resulting in complete elimination by January 1, 1998.**

These timetables, however, are modifiable under Article 401(5), a duty elimination accelerator clause. The clause provides for the accelerated elimination of the duty on any product by mutual agreement of the U.S. and Canadian governments. Interested private sector groups may petition for accelerated elimination of the duty on a particular product. Over 300 petitions have been received to date.

## II

### ANALYSIS OF THE FTA

Two formats are used in the FTA sectional analysis which follows: (1) chapters which are definitional, or fall exclusively under federal jurisdiction, are briefly summarized; (2) chapters applicable to Michigan laws and regulations are summarized in some greater detail, followed by comments addressing required or recommended action.

#### PART ONE

#### OBJECTIVES AND SCOPE

##### Chapter One: Objectives and Scope

The free trade area established by the FTA is consistent with the General Agreement on Tariffs and Trade (GATT). The objectives of the FTA are to:

- i. eliminate trade barriers in goods and services between the two countries;
- ii. liberalize conditions for investment;
- iii. establish effective procedures to administer the FTA and resolve disputes; and
- iv. lay the foundation for further bilateral and multilateral cooperation.

Each country retains its rights and obligations under their pre-existing agreements, with the FTA taking precedence over any inconsistencies, unless otherwise specified in the FTA. Furthermore, to the extent provided in the FTA, each country will accord national treatment to the other.

Comment: No action required or recommended.

##### Chapter Two: General Definitions

Comment: No action required or recommended.

## PART TWO

### TRADE IN GOODS

#### Chapter Three: Rules of Origin

##### Article 301: General Rules

This section provides that goods must meet the origin requirement in order to qualify for duty free treatment. The FTA's rules regarding origin are designed to prevent circumvention of the agreement's intent by the transshipment of goods from third countries. Goods (including accessories and spare parts) are only deemed to originate in the territory of a party if they are "wholly obtained or produced" in the territories of either or both parties. Goods are also deemed to originate in a party if they have been substantially transformed within the territory of either the U.S. or Canada, to such an extent that they become subject to a change in tariff classification under Annex 301.2.

A good is not deemed to have originated in the territory of a party if it has only undergone: a packaging or combining operation (unless Annex 301.2 allows); a process that does not materially alter the good; or any process in which the objective was to circumvent the origin requirements.

Comment: No action required or recommended.

##### Annex 301.2: Interpretation

This annex states that the basis for tariff classification is the "Harmonized System" (Harmonized Commodity Description and Coding System). It provides that if goods are processed or assembled in the territory of either or both parties to the extent that they qualify for a change in tariff classification, they will meet origin requirements as long as they have not subsequently undergone any assembly or processing outside the boundaries of either party.

The section does not allow goods that are classified as unassembled, and imported as such, to qualify for a change in tariff classification treating them as goods originating within that party's territory.

To be considered a product of the United States or Canada, when not wholly originating in either territory, the goods must have been substantially transformed in one of the territories or have at least 50% of their value added in either territory, measured in materials and direct cost of assembly. Substantially transformed

means a change such that the product falls under a different tariff classification. This paragraph does not apply to Chapters 61-63 (apparel and other made-up articles) of the Harmonized System.

#### **Article 302: Transshipment**

This article specifies that goods exported from one party originate in that territory only if they meet the requirements of section 301 and are shipped to the other party without having entered a third country's commerce. Goods may go through a third country for loading, reloading, or preservation.

Comment: No action required or recommended.

#### **Article 303: Consultation and Revision**

This section states that both parties shall consult to ensure that the provisions of Chapter 3 are administered in a consistent and effective manner. If a party determines that a provision needs revision that party is allowed to submit a proposed revision along with supporting rationale to the other party for consideration and possible action pursuant to Article 2104 (Amendments).

Comment: No action required or recommended.

#### **Article 304: Definitions**

This section defines the following: "direct cost of processing or direct cost of assembling", "materials", "value of materials originating in the territory of either party or both parties", "value of the goods when exported to the territory of the other party", and "goods wholly obtained in the territory of either party or both parties".

Comment: No action required or recommended -- definitional.

### **Chapter Four: Border Measures**

#### **Article 401: Tariff Elimination**

This provision mandates that neither party shall increase any existing or introduce any new duty on goods of the other party unless allowed under the FTA. Furthermore, each party shall eliminate customs duties in accordance with schedule 401.2. This section recognizes as part of the FTA any agreement between the parties which accelerates duty-free treatment.

#### **Annex 401.2: Schedule of Canada and United States of America**

Staging Category A: Tariffs on goods in this category were eliminated entirely on January 1, 1989.

Staging Category B: Beginning January 1, 1989, tariffs on goods in this category shall be removed in five equal annual stages. Hence, on January 1, 1993, duty on all goods in this category shall be completely eliminated.

Staging Category C: Beginning January 1, 1989, tariffs on goods in this category shall be removed in ten equal annual stages. Hence, on January 1, 1998, all duty on goods in this category shall be eliminated.

#### **Annex 401.6: Machinery and Equipment**

This annex lists the machinery, equipment, and replacement parts, considered unavailable from Canadian production, which Canada shall continue to exempt from duties and applicable exceptions.

#### **Annex 401.7: Treatment of Concessionary Duty Provisions**

This annex lists which goods Canada may exempt from paragraph 7 of Article 401, and which goods the United States may exempt from paragraph 8 of Article 401.

Comment: No action required or recommended -- federal jurisdiction.

#### **Article 402: Rounding of Interim Rates**

Comment: No action required or recommended.

#### **Article 403: Customs User Fees**

This section prohibits either party from introducing customs users fees on goods originating in either party's respective territory. The section allows the

United States to change existing fees only if they are not scheduled to be eliminated by Article 403(3)(a)-(e) of the FTA.

Comment: No action required or recommended -- federal jurisdiction.

#### **Article 404: Drawback**

This section states that goods, which are imported into one party and subsequently exported to the other party or incorporated into goods, shall be subject to the customs duties of that party prior to export. This eliminates duty drawback programs which provide for the return of duties on imports when they were incorporated into goods subsequently exported. Because of the FTA tariff elimination, continuation of these programs would have allowed duty free entry of third country imports through the other FTA party. This provision does not apply to those goods that are (i) under bond for transport and export to the other party; (ii) deemed to be exported to the other party by reason of delivery to a duty free shop; (iii) used as supplies on aircraft/ships; or (iv) for joint use which will result in the other party taking possession. Goods that originate in one party, are imported by the other party, and then re-exported to the original party are also exempt.

The FTA states that these provisions shall be applicable starting January 1, 1994. It further states that unless the parties agree, this article does not apply to imported third party citrus or fabric that is made into apparel and is subject to the "most favored nation" rate of tariff when exported to the other party.

Comment: No action required or recommended.

#### **Article 405: Waiver of Customs Duties**

This article provides that neither party shall introduce, expand, or extend any program which would waive applicable customs duties to a new recipient, when that waiver is conditioned upon completed performance requirements. This procedure addresses trade distortions that occur when a firm is required to buy local imports or to export their output in exchange for tariff exceptions. See Chapter Ten, Article 1002.

Comment: No action required or recommended.

#### **Article 406: Customs Administration**

This section states that each party's "Customs Administration shall cooperate" as stated in Annex 406.

Comment: No action required or recommended.

#### **Annex 406: Customs Administration**

This annex provides that, for imported goods, each party may require the importing party not only to meet the rules of origin as specified in Chapter Three, but also to make a written declaration to that effect and provide it to the Customs Administration of the other party. A party may mandate that failure to comply with the above mentioned steps has the same consequence as making a false statement or misrepresentation. Under this provision, either party can allow exemptions from compliance.

For exported goods, both parties must require that the exporter who meets the rules of origin provide a copy of written certification of that fact if requested to do so. The parties must proclaim it unlawful for exporters to certify falsely that their goods meet the rules of origin criteria.

According to the FTA, the parties shall maintain proper record-keeping and cooperate in enforcing each party's laws.

Comment: No action required or recommended.

#### **Article 407: Import and Export Restrictions**

According to this article, each party must adhere to the GATT with regard to prohibitions and restrictions on bilateral trade, unless the FTA alters their rights and obligations. This does not prohibit a party from limiting or prohibiting the importation of third party goods. Upon the request of either party, however, the parties shall consult to avoid undue interference with trade. Furthermore, the parties must eliminate quantitative restrictions specified in Annex 407.6.

Comment: No action required or recommended.

#### **Annex 407.6: Elimination of Quantitative Restrictions**

This article requires, as of January 1, 1989, that Canada eliminate its embargo on all secondhand aircraft. The United States shall eliminate its embargo on any lottery tickets, printed paper, or any advertisement for a United States lottery that is printed in Canada.

Comment: No action required or recommended.

#### **Article 408: Export Taxes**

This section states that neither party is allowed to introduce or maintain any charge, tax, or duty on any good exported to the other party unless the fees are also imposed on these goods when consumed domestically.

Comment: No action required or recommended.

#### **Article 409: Other Export Measures**

This article provides that either party is allowed to maintain or introduce an export restriction on the other party if it can be justified under GATT provisions XI:2(a) and XX(g), (i), and (j) if: a restriction does not reduce proportionately the total export shipments of a specified good available to the other party; a party does not charge an export price to the other party that is higher than their domestic price; and the restriction will not result in disruption of the other party's normal supply channels or levels.

Comment: No action required or recommended.

#### **Article 410: Definitions**

This section defines the following; "consumed", "Customs Administration", "customs duty", "existing duty", "performance requirement", "restriction", "total export shipments", and "waiver of customs duty".

Comment: No action required or recommended -- definitional.

### **Chapter Five: National Treatment**

#### **Article 501: Incorporation of GATT Rule**

This article states that each party shall follow the existing provisions of the GATT, Article III, and "accord national treatment, as defined in Article 502, to the goods of the other party".

Comment: No action required or recommended.

## **Article 502: Provincial and State Measures**

This provision makes clear that whatever treatment a government of one party (province or state) gives to its domestic goods, the same treatment must be accorded to similar goods originating in the territory of the other party. For example, if one party sells a good which is subject to a certain safety standard, then it must allow the other party's goods to be sold subject to that same standard, not a more stringent one.

The rule effectively bars discrimination against goods imported from the other party by prohibiting preferential treatment for domestic goods.

This chapter of the FTA permeates all sections of the FTA unless it has been exempted. Therefore, the "national treatment" rule could potentially have an affect on many future state laws. Any modification of existing state law, a new state law, or any state measure cannot discriminate, unless excepted.

Comment: No action required or recommended.

## **Chapter Six: Technical Standards**

### **Article 601: Scope**

This provision establishes that all technical standards relating to goods other than those covered in Chapter 7 are within the scope of the Agreement. Noncomplying state and provincial standards are specifically excepted.

Comment: No action required, but recommended action is as follows: To facilitate increased trade, Michigan should adopt a policy of refraining from promulgating new, nonconforming technical standards unless such standards are clearly dictated by health or safety concerns. To the extent U.S. and Canadian standards are in harmony, free trade is encouraged.

### **Article 602: Affirmation of GATT Agreement**

Reaffirms the parties' rights and obligations under GATT.

Comment: No action required or recommended.

### **Article 603: No Disguised Barriers to Trade**

This provision prohibits the maintenance or adoption by the federal governments of any measures that would impose technical standards or product approval procedures that effectively create barriers to trade. The definitional section (Article 609) identifies technical standards as "including technical specifications, technical regulations, standards and rules for certification systems that apply to goods and processes and production methods ... ." Product approval procedures are defined as "a federal government declaration that a set of published criteria has been fulfilled and therefore that goods are permitted to be used in a specific manner or for a specific purpose ... ." Exceptions are made for those standards or procedures where the objective is protection of health, safety, essential security, the environment, or consumer interests. Goods of the other party which meet that objective may not be excluded.

Comment: No action required or recommended.

### **Article 604: Compatibility**

This provision requires that the U.S. and Canada work toward making their respective technical standards regulations more compatible, to help reduce trade barriers and the cost of satisfying two sets of regulations. The Agreement also recognizes that many technical standards are established by private entities, and requires that each party work toward harmonization in the standards established by such entities.

Comment: No action required or recommended.

### **Article 605: Accreditation**

This article requires both the U.S. and Canada to accept each others accreditation of testing and inspection facilities and certification bodies. It also prohibits either country from requiring that testing, inspection, or certification be done in its own territory. A fee may be charged for accreditation, but must approximate the actual cost of the service rendered in granting accreditation. After the transition period, any fee charged must be applicable to both domestic and Canadian entities seeking accreditation.

Comment: No action required or recommended.

## **Article 606: Acceptance of Test Data**

This provision requires that, when requested, written notification of the reason for non-acceptance of test data from a source within the territory of the other party be provided, when such data was deemed insufficient by one party to result in product approval or certification. The FTA works toward the goal of eliminating duplicate testing, and this explanatory procedure will facilitate the acceptance of data generated by appropriate facilities of either party.

Comment: No action required or recommended.

## **Article 607: Information Exchange**

The texts of proposed federal standards-related measures and product-approval procedures of either party must be provided to the other party, who will then have 60 days to respond with comments and suggestions. Where expeditious enactment of a regulation is necessary to achieve a legitimate domestic objective, a party may proceed without permitting prior review. The text of the regulation shall be promptly provided to the other party nevertheless. This article also requires that the parties notify each other of proposed state or provincial standards-related measures that may have significant impact on trade, that text of such proposed regulations be provided, and that any measures likely to facilitate the other party's ability to provide comments or enter into discussion with a state or province be taken. The text of proposed Canadian regulations are available through the Standards Information Service of the Standards Council of Canada.

Comment: No action required, but recommended action is as follows:

Michigan may benefit by being placed on the mailing list of interested parties to receive notification of proposed Canadian standards-related measures, to which it could develop comments for forwarding to the National Institute of Standards and Technology (NIST) in Washington, D.C. Michigan may also wish to develop a system for providing notification to the Canadian Standards Information Service of proposed standards-related measures, to ensure adequate input to avoid inadvertently impeding trade with Canada.

## **Article 608: Further Implementation**

This article provides for further negotiations to increase compatibility of standards-related measures and procedures, and interchangeability of test data.

Comment: No action required or recommended.

#### **Article 609: Definitions**

Comment: No action required or recommended.

### **Chapter Seven: Agriculture**

#### **Article 701: Agricultural Subsidies**

Under this section both parties agree that their primary goal is to work together to eliminate all agricultural subsidies which distort agricultural trade.

Comment: No action required or recommended.

#### **Article 702: Special Provisions for Fresh Fruits and Vegetables**

This section allows a party, for a period of 20 years from the time the FTA takes effect, to apply a temporary duty on fresh vegetables and fruits (classified within the Harmonized System, Annex 301.2) originating in the other party and imported into its territory when the following requirements are met: i) the import price of a fresh fruit or vegetable is, for each of five consecutive working days, below 90 percent of the average monthly price, and ii) the acres planted by the importing party of that particular fruit or vegetable is no higher than the average acreage for the last five years (this excludes wine grape acreage existing on October 4, 1987).

Comment: No action required or recommended.

#### **Article 703: Market Access for Agriculture**

This section states that the parties shall work together in order to improve access to each other's markets by reducing or eliminating import barriers.

Comment: No action required or recommended.

## **Article 704: Market Access for Meat**

This article states that neither party is allowed to introduce or maintain any quantitative import restrictions on meat goods originating in the other party, unless the FTA otherwise provides. If one of the parties imposes quantitative restrictions on goods from all third countries or limits exports from these countries, and the other party does not follow, the first party may impose the same restrictions on the other party's meat products only to the extent and duration necessary to counter the action taken against imports of third countries. If this is to be done, the other party must be notified prior to taking such action.

Comment: No action required or recommended.

## **Article 705: Market Access for Grain and Grain Products:**

This provision states that at the time when the level of United States government support for grain becomes equal to or less than the support provided by the Canadian Government, Canada must eliminate any import permit requirements on grain originating in the United States. Either party may introduce or reintroduce restrictions on the import of grain from the other party if import levels significantly increase due to either party's support programs.

Canada is allowed to require an end-use certificate; stating the grain is to be consumed in Canada, or, if feed, stating the grain is to be denatured or accompanied by an Agriculture Canada certification. For this section, grain includes grain products that contain at least 25 percent by weight of grain.

Comment: No action required or recommended.

## **Annex 705.4: Levels of Government Support for Wheat, Oats and Barley**

This annex provides the formula and rules for computing levels of support.

## **Schedule 1: United States Government Support Programs**

This schedule, for the most part, falls under federal jurisdiction. However, it should be noted that part twelve, "State Budget Outlays", specifically addresses support provided by state governments. Michigan provides no support for wheat, oats, or barley.

Comment: No action required or recommended.

## **Schedule 2: Canadian Government Support Programs**

Comment: No action required or recommended.

### **Article 706: Market Access for Poultry and Eggs**

This section states that if Canada chooses to maintain or introduce quantitative import restrictions on chicken/chicken products; turkey/turkey products; or eggs/egg products, Canada must permit imports. The level of global imports for one year must be no less than 7.5 percent of Canada's domestic production in the previous year for chicken -- 3.5 percent for turkey, 1.647 percent for shell eggs, .714 percent for processed eggs, and .627 percent for powdered eggs.

Comment: No action required or recommended.

### **Annex 706: Market Access for Poultry**

This annex defines "chicken and turkey products" and excludes certain products containing chicken and turkey.

Comment: No action required or recommended.

### **Article 707: Market Access for Sugar-Containing Products**

This section states that the United States cannot maintain or introduce any quantitative import restriction on any good that originates in Canada and contains ten percent or less sugar by dry weight, if the purpose of the import restriction is to limit the sugar content of the good.

Comment: No action required or recommended.

### **Article 708: Technical Regulations and Standards for Agricultural, Food, Beverage, and Certain Related Goods**

This article states that both parties shall "seek an open border policy" as it relates to trade in agriculture, food, beverage, and other specified goods. As a

guide, the parties should use the Schedules in Annex 708.1 and the following principles;

i) to harmonize (i.e., make identical) technical regulatory requirements and inspection procedures, or to make these equivalent when harmonization is not possible.

ii) to apply import and/or quarantine restrictions on a regional, rather than national basis on an exporting party, when a disease or pest is distributed regionally.

iii) to establish equivalent accreditation for inspectors and inspection systems.

iv) to establish reciprocal training and when appropriate, to utilize each other's testing and inspection personnel.

Where the parties have harmonized or made equivalent their technical and regulatory requirements, and an exporting party has certified that goods meet the requirements, the importing party is allowed to examine the goods to verify that the standards are met.

To achieve the above goals, the FTA states the parties shall establish working groups with equal representation in the areas of: Animal Health; Plant Health, Seeds, and Fertilizers; Meat and Poultry Inspection; Dairy, Fruit, Vegetable, and Egg Inspection; Veterinary Drugs and Feeds; Food, Beverage and Color Additives and Unavoidable Contaminants; Pesticides; and Packaging and Labelling of Agricultural, Food, Beverage and Certain Related Goods for Human Consumption.

These groups are required to meet at least annually, unless the parties agree otherwise, or at the request of either party. The parties are also required to form a joint monitoring committee to oversee the working groups' progress and report this to the Secretary of Agriculture (U.S.) and Minister of Agriculture (Canada).

Comment: Action required or recommended (see Annex 708.1).

#### **Annex 708.1 (including Schedules 1 through 12)**

This annex defines, for the purposes of the Schedules in this section, the following: "feed", "fertilizer", "means of conveyance", "pest", "pesticide", "plant", "plant pest", and "veterinary drug".

Comment: No action required or recommended -- definitional.

## **Schedule 1: Feeds**

This section states that the parties shall work toward the harmonization or the equivalent of federal technical requirements for testing, labelling, content, exemptions, and regulations regarding additives and drugs in feeds. Furthermore, the parties shall work through both the National Association of State Departments of Agriculture (NASDA) and the American Association of Feed Control Officials (AAFCO) toward achieving the goal of harmonizing United States federal and state and Canadian federal requirements with respect to certain technical regulations (eg. labelling, content, packaging, testing).

Furthermore, the parties shall recognize each others feed mill inspection results and work toward equivalence with respect to manufacturing regulations for medicated feeds, harmonization to validate feed assay methods, and harmonization regarding tolerances of drug residues and contaminants in feeds.

Michigan's feed laws are not identical to all other states nor are they identical to Canadian federal law. It has been suggested, however, that with regard to Canada, Michigan's laws do not vary significantly. Furthermore, agricultural officials for both parties have commented that the current laws have posed no difficulties with regard to trade.

AAFCO is a non-profit organization that is composed of members representing each state and Canada. All of these members are agricultural "control officials" and have authority to recommend regulatory policy. The AAFCO has proposed the "Uniform Feed Bill" which provides guidelines for states to follow. This bill is merely a suggestion and is totally voluntary. AAFCO has not done any work solely dealing with the FTA, however model legislation has been proposed for several years. Most states have adopted many of these proposed regulations, which are consistent with federal feed laws. Michigan has adopted many provisions of the model legislation.

Comment: No action required or recommended.

## **Schedule 2: Fertilizers**

This section states that both parties shall work toward equivalent federal technical requirements for labelling, testing, content, exemptions, and regulations regarding pesticides in fertilizers. Furthermore, the parties shall work through the both the National Association of State Departments of Agriculture (NASDA) and the American Association of Plant Food Control Officials (AAPFCO) toward achieving the goal of harmonizing United States' federal and state, and Canadian

federal requirements with respect to certain technical regulations (e.g. labelling, content, packaging, testing).

Michigan's fertilizer laws are not identical to the other state laws, nor to Canada's federal law. Discussion with officials from both Michigan and Canada indicate that their respective laws are very similar, and neither country has experienced any difficulty in trading as a result of the minor differences in the law.

The AAPFCO, has initiated no action which specifically addresses the FTA. The Association has, for many years, proposed uniform "model legislation". The Association, composed of administrators of fertilizer law from all 50 states, Puerto Rico, and Canada, will propose that the "Model State Fertilizer Bill" be the basis of harmonization. The possibility of this succeeding is enhanced by the fact that even though all states have separate laws, most of these laws accept the uniform bill.

Michigan is a very active member of the AAPFCO and has adopted its model legislation.

Comment: No action required or recommended.

### **Schedule 3: Seeds**

This section states that the parties can not introduce origin-staining requirements for alfalfa or clover. Furthermore, both shall work through the National Association of State Departments of Agriculture (NASDA) and the American Association of Seed Control Officials (AASCO), toward allowing seed grown in Canada and exported to the United States to be governed by uniform U.S. regulatory requirements. Finally, this schedule states that the parties shall "maintain mutual recognition" of certification standards, and testing methods established by the Association of Official Seed Certifying Agencies (AOSCA) and the Association of Official Seed Analysts (AOSA).

Currently, seeds are governed by federal and state law in the United States and federal law in Canada. The United States federal regulations are comprised of many standards, which are viewed more as voluntary than mandatory. As a result, most states generally employ state law. Both parties are working through the NASDA and AASCO, towards harmonization. The NASDA is comprised of a representative in Washington D.C. and each one of the state's presidents. The AASCO is composed of members of all fifty states, and Canada. Currently, the state laws vary with regard to labelling requirements, and one of the main goals of the AASCO is to harmonize requirements, so that all states will recognize each other's labels (e.g. analysis sheets). The AASCO has proposed the Recommended

Uniform State Seed Law (RUSSEL), a bill which proposes the use of uniform seed labels.

Certification and testing procedures proposed by the AOSCA and AOSA, are being followed by all states and Canada.

Michigan has its own body of seed law. There are some differences with regard to Canadian (federal) law, more than within feed or fertilizer laws, but these differences are generally viewed as not being an impediment to trade. Michigan has formulated its state law in accordance with the model legislation.

Comment: No action required or recommended.

#### **Schedule 4: Animal Health**

This schedule states that the parties shall work toward equivalent export certifications by private veterinarians, equivalent testing and certification procedures for veterinary biologists, and harmonized animal disease test methods. Furthermore, the parties shall work toward eliminating state and provincial restrictions regarding the importation of animals, embryos and animal by-products.

Michigan's and Canada's laws are not equivalent in all areas related to this section. Michigan's laws are viewed as more stringent than the USDA. As a result, the USDA allows animals and by-products to cross border states to reach destinations in other states. Reportedly, some of these goods never reach their final destination, and in some instances, goods that do not meet Michigan's requirements end up in Michigan.

Canada's laws are viewed, in some instances, as being even more restrictive than Michigan's. The differences between Michigan and Canadian law, however, have not been viewed as an impediment to trade.

Comment: No action required, but recommended action is as follows:

Michigan trade associations, industries, and producers should alert the "Animal Health" working group as to any issues that arise which are an impediment to trade. In addition, the various associations should continue working through this group to eliminate state and provincial restrictions.

## **Schedule 5: Veterinary Drugs**

This section specifies that both parties shall work toward making equivalent various testing and regulatory procedures. Health and safety regulations, warning and caution statements, procedures for accepting tolerances, and investigational new drug requirement equivalences must be accepted within twenty-four months of the signing of the FTA.

Comment: No action required or recommended -- federal jurisdiction.

## **Schedule 6: Plant Health**

This schedule states that the parties shall work toward equivalent or harmonized quarantine procedures and regulations regarding the importing of plants. Furthermore, the parties shall work toward agreeing on qualifications for accredited plant health inspectors, and once this is done, accept either party's inspection certificates.

Michigan plant health is regulated largely by P.A. 189, The Insect, Plant and Pest Disease Act and Michigan seed law. Michigan laws are not that similar to Canada's regarding plant health. Problems lie in the area of inspection because Michigan officials, in cooperation with the USDA, inspect imports and exports, and then Canada requires the same inspection procedure when the plants arrive there. Furthermore, Canada's new listing, entitled "Export Certification Manual for Canada," is very restrictive with regard to some Michigan agricultural products.

Comment: No action required, but recommended action is as follows:

Michigan trade associations, industries and producers should notify the "Plant Health" working group (authorized under Article 708 of FTA) of the impediments to trade that the Canadian restrictions place on Michigan products.

## **Schedule 7: Pesticides**

This section states that both parties shall exchange analytical methodology and crop residue data. In addition, both shall work toward making equivalent: guidelines, technical regulations, test methods and standards; residue monitoring programs; risk-benefit assessment process; tolerance setting; and the setting of regulations regarding oncogenic pesticides.

In the United States, pesticides are regulated by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Most state laws that regulate pesticide

chemicals are very similar. Only the American Association of Pesticide Control Officials (AAPCO) has initiated harmonization efforts. This Association, composed of pesticide control officials from all fifty states and Canada, has proposed model pesticide legislation, which was last adopted by the Association in 1972. This bill, the Pesticide Use and Application Act, is not mandatory.

The proposed legislation is offered as a guide, and states are encouraged to adopt whatever portions are appropriate for them. Michigan's laws regarding pest control are different than Canada's and are more stringent than most national models. Michigan agriculture officials are investigating and reviewing several national models, however.

Comment: No action required, but recommended action is as follows:

Michigan agriculture officials should continue to review national proposals for uniform law. Furthermore, the officials should review Michigan laws and consider amending state law, where necessary, to be harmonious with a national proposal (given other states adopt it as well). This would aid in furthering the FTA's objective of harmonization between all states and Canada, by accomplishing the first link -- harmonization among all the states' standards.

### **Schedule 8: Food, Beverage and Colour Additives**

This section states that both parties shall work together to develop a uniform policy regarding the removal of compounds in food and beverages. In addition, they shall work toward the development of uniform methods of health hazard evaluation and risk assessment.

Food and beverage additives are regulated by the Food and Drug Administration of the United States, authorized by the federal Food, Drug, and Cosmetic Act. One of the eight working groups specified by the FTA (Article 708, 4(a) i) iii) is researching these issues. The co-chairman of this working group was to set an agenda and in doing so, solicit information from U.S. firms about any "sources of irritation that Canadian rules and regulations impose on them" with regard to the area of food and beverage additives.

Comment: No action required, but action recommended is as follows:

It is essential that the "Food, Beverage and Colour Additives" working group receive input from state trade associations, industries and producers as to any Canadian regulations that hinder trade. These entities should continue to alert the working group as additional issues arise.

## **Schedule 9: Packaging and Labelling of Agricultural, Food, Beverage and Certain Related Goods for Human Consumption**

This section states that the parties shall work toward accepting dual declarations of content and equivalent requirements for nutrition labelling, listing ingredients, labelling terminology, and grading. In addition, both should review container sizes.

The United States government regulates packaging and labelling through the Food and Drug Administration. Again, a working group has been established in this area, as the FTA suggests.

**Comment:** No action required, but recommended action is as follows:

Michigan trade associations, industries and producers should continue to alert this working group of any areas of Canadian law, related to packaging and labelling, which act as an impediment to trade.

## **Schedule 10: Meat, Poultry and Egg Inspection**

Under this section, both parties shall work toward making equivalent and, if already equivalent, accept the equivalence as it relates to each party's: review of inspection systems and facilities of third countries; own inspection of laboratory systems, and egg testing methods.

Where the equivalent standards have been accepted by the parties, and the exporting party demonstrates that their goods meet the agreed upon standards, the importing party may examine the goods to verify that compliance has occurred.

The United States government regulates these procedures through the Food and Drug Administration. Because of the workload, many states, including Michigan, contract with the government to perform FDA inspections. The state inspectors are trained by the FDA and governed by their rules.

**Comment:** No action required or recommended -- federal jurisdiction.

## **Schedule 11: Dairy, Fruit and Vegetable Inspection**

This section states that both parties shall make equivalent, and accept the equivalence of each other's inspection system for fresh vegetables and fruits. Furthermore, they shall work toward equivalent inspection procedures for dairy

products, and make equivalent and accept each other's federally approved laboratory results regarding dairy inspection.

Comment: No action required or recommended -- federal jurisdiction.

## **Schedule 12: Unavoidable Contaminants in Foods and Beverages**

**This schedule states that both parties shall work toward the harmonization of regulatory requirements and the process for setting tolerance and/or action levels for unavoidable contaminants. Furthermore, the parties shall work to develop equivalent test methods for determining contaminants in food and beverages, and uniform methods for evaluating health hazards and assessing risk.**

**Laws pertaining to these areas fall under the Food and Drug Administration. These regulations are being evaluated by the working group on "Food, Beverage and Color Additives".**

Comment: No action required, but action recommended is as follows:

**Michigan trade associations, industries and producers, however, should continue to notify the working group as to areas of Canadian law which negatively impact trade.**

## **Article 709: Consultations**

**This section mandates that the parties must consult on agricultural issues at least semi-annually.**

Comment: No action required or recommended.

## **Article 710: International Obligations**

**This section states that the parties retain their rights and obligations under the GATT, unless this section of the FTA specifically provides otherwise.**

Comment: No action required or recommended.

## **Article 711: Definitions**

This section defines the following terms: "agricultural goods"; "agricultural, food, beverage and certain related goods"; "animal"; "equivalent"; "export subsidy"; "harmonization"; "import fee"; "import price"; "meat goods"; "standard"; "sugar"; "technical regulation"; and "technical specification".

Comment: No action required or recommended -- definitional.

## **Chapter Eight: Wine and Distilled Spirits**

### **Article 801: Coverage**

This chapter relates to regulation of the sale and distribution of wine and distilled spirits. Beer and malt containing beverages are not within the scope of this chapter. Although national treatment is generally required, certain miscellaneous regulations, not specifically addressed by the FTA, are exempt under the residual provision of Article 801(2). Beer and malt containing beverages are specifically exempted from national treatment in Chapter 12, Article 1204 (Amendments), and this exemption is addressed in depth in Chapter 20.

Comment: No action required or recommended.

### **Article 802: Listing**

This provision requires that listing of wine and distilled spirits be based on normal commercial considerations. National treatment must be accorded products of the other country and listing must be non-discriminatory, transparent and not a disguised barrier to trade. Prompt written notification to the applicant of listing decisions, including, in the case of denial, a statement of the reason for refusal and establishment of a prompt, fair and objective administrative appeal procedure is required. Listing regulations must be published and be generally available. British Columbia may continue to automatically list the products of existing small (producing less than 30,000 gallons/year) estate wineries under a special exception to the general listing rule. The Michigan Liquor Control Commission's current listing practices are in full compliance with the FTA, therefore, no change in Michigan regulations are necessary. Non-legal recommendations for increasing Michigan's wine exports are included in Section V of this report.

Comment: No action required or recommended.

## **Article 803: Pricing**

This provision eliminates discriminatory pricing by public entities that distribute wine and distilled spirits. Discriminatory distilled spirit mark-ups, i.e., price increases unrelated to commercial considerations, became violative of the FTA on January 1, 1989. Such mark-ups on wines will be eliminated according to the following schedule:

- mark-up < 75% as of Jan. 1, 1989;
- mark-up < 50% as of Jan. 1, 1990;
- mark-up < 40% as of Jan. 1, 1991;
- mark-up < 30% as of Jan. 1, 1992;
- mark-up < 20% as of Jan. 1, 1993;
- mark-up < 10% as of Jan. 1, 1994;
- No mark-up after Jan. 1, 1995.

The FTA permits the price charged by the public entity for both wine and distilled spirits to include any additional actual costs of handling imported products. The percentage of mark-up permitted on wines in the above schedule is calculated from a base differential established by subtracting the permissible cost of handling amount from the mark-up in place as of October 4, 1987. For example, if a bottle of wine was being marked up \$20 by the liquor control commission on October 4, 1987, and the actual additional cost of handling was \$4, the base differential for calculating permissible mark-ups under the schedule would be \$16. Therefore, as of January 1, 1989, the permissible mark-up is 75% of \$16, or \$12. The \$4 handling cost may also be added.

The current pricing practices of the Michigan Liquor Control Commission are in full compliance with the FTA, because no discriminatory mark-ups are utilized.

Comment: No action required or recommended.

## **Article 804: Distribution**

The national treatment standard set forth in Chapter 5 is made applicable to distribution of wine and distilled spirits, thereby ensuring that the distribution systems of both countries will be equally available to all producers of wine and distilled spirits. There are a few specific exceptions: (i) either party may require that on-premise sales by wineries or distilleries be limited to its own products; (ii) provincial regulations in Ontario and British Columbia permitting discrimination

by private outlets which sell only wines produced within the province, and Quebec regulations requiring that wines sold in grocery stores be bottled within the province are grandfathered. (Quebec must provide alternative outlets for the sale of U.S. wines.)

Comment: No action required, but recommended action is as follows:

The practices of the Michigan Liquor Control Commission regarding distribution satisfy the requirements of the FTA. Michigan may, however, want to consider entering into negotiations with the province of Ontario to secure treatment of Michigan wines comparable to the favored treatment Ontario gives its own wines, i.e., permitting distribution of Michigan wines in private outlets currently selling only Canadian products.

#### **Article 805: Blending Requirement**

This provision reflects Canada's agreement to eliminate regulations that required the blending with Canadian spirits of U.S. distilled spirits imported in bulk form.

Comment: No action required or recommended.

#### **Article 806: Distinctive Products**

Canadian Whiskey and U.S. Bourbon Whiskey are officially recognized as distinct products by both parties for purposes of standards and labelling. Sale as Canadian Whiskey of any product not manufactured in Canada according to its standards is prohibited, as is the sale as Bourbon Whiskey of any product not manufactured in the U.S. according to its standards.

Comment: No action required or recommended.

#### **Article 807: International Obligation**

Incorporates the rights and obligations of the parties under the GATT.

Comment: No action required or recommended.

## **Article 808: Definitions**

Comment: No action required or recommended.

Note: Canadian tariffs, particularly high on alcoholic beverages, will be eliminated under provisions of Chapter 4 by 1998. This elimination will result in American alcoholic beverages being more price competitive in Canada than imports from third countries.

## **Chapter Nine: Energy**

The provisions of Chapter Nine relate to the import and export of energy goods between the U.S. and Canada. Energy goods are defined as those classified in the Harmonized System of the GATT, including petroleum, natural gas, coal, electricity, uranium and other nuclear fuels.

Comment: No action required or recommended -- federal jurisdiction.

## **Chapter Ten: Trade in Automotive Goods**

### **Article 1001: Existing Arrangement**

This provision reaffirms the duty of the U.S. and Canada to administer the Agreement Concerning Automotive Products between the Government of Canada and the Government of the United States of America (hereinafter the "Auto Pact"), which became effective in September 1966, to benefit automotive employment and production in both countries. Under Chapter Four, Article 405, the rights of both the U.S. and Canada under the GATT and the Auto Pact are retained. Under the provisions of the Auto Pact, 95 percent of U.S. - Canadian automotive trade (specified motor vehicles and original equipment parts) was already duty-free.

Comment: No action required or recommended.

### **Article 1002: Waiver of Customs Duties**

This provision precludes the extension of Auto Pact benefits, or comparable duty-free status, to any company not already enjoying that status. Qualifying companies are listed in Part I of Annex 1002.1. Contravention of the goal of this

provision is prevented by the footnote to Part I, which requires cessation of Auto Pact benefits to a company for two reasons: (i) ownership or control is acquired by a manufacturer of motor vehicles that is not already a beneficiary of Auto Pact; (ii) subsequent to a change in ownership or control, significant, fundamental alterations in the nature, scope, or size of the business occur.

Paragraph 1 of this article restricts Canada's practice of granting duty waivers that are export based to those companies listed in Part II of Annex 1002.2.

Paragraph 2 provides that after January 1, 1989 (effective date of the FTA), exports to the U.S. are excluded from calculation of such duty waivers and all duty waivers based on exports will be eliminated by January 1, 1998.

Paragraph 3 requires that duty waivers extended by the Canadian government on the basis of production agreements be eliminated by January 1, 1996 or earlier, as the agreements terminate.

Paragraph 4 provides that if one party can demonstrate that a duty waiver granted on automotive goods by the other party adversely affects the commercial interests or economy of the other party, the waiver must be eliminated or, alternatively, made available to all importers. This provision does not apply to waivers under Auto Pact or that comply with paragraphs 1-3 above. (See Article 405, paragraph 3).

The overall effect of this article is to help ensure that production, investment, and sourcing decisions are not influenced by artificial controls, but by actual market conditions.

Comment: No action required or recommended.

### **Article 1003: Import Restrictions**

This article requires Canada to phase out all import restrictions on used automobiles by January 1, 1993. The timetable established by the FTA for the elimination of import tariffs is the following:

- January 1, 1989 on autos eight or more years old;
- January 1, 1990 on autos six or more years old;
- January 1, 1991 on autos four or more years old;
- January 1, 1992 on autos two or more years old; and
- January 1, 1993 all restriction eliminated.

Comment: No action required or recommended.

#### **Article 1004: Select Panel**

This article provides for the establishment of a select panel of "informed persons" to assess the state of the North American auto industry and recommend public policy measures and other action aimed at improving the global competitiveness of the industry.

A group was impaneled and held its first meeting in August 1989. Membership consists of 15 American and 15 Canadian private sector leaders, representing many interests. Co-chairmen are Peter G. Petersen, Chairman of the Blackstone Group, an American, and D'arcy McKeough, of Redpath Industries, a Canadian.

**The American representatives are:**

Owen Bieber, Pres. International UAW  
David E. Cole, Ph.D., University of Michigan  
Joseph T. Gorman, Chairman, Pres. and CEO, TRW Inc.  
Gerald Greenwald, V. Chairman, Chrysler Corp.  
Elliot Lehman, Co-Chairman, Pel-Pro, Inc.  
Harold Poling, V. Chairman and CEO, Ford Motor Co.  
J. David Power III, Pres., J. D. Power & Assn.  
Heinz Prechter, Chairman and Pres., ASC Inc.  
William Raftery, Pres., Motor Equip. Mfrs. Assn.  
Jack Reilly, Pres. and CEO, Tenneco Automotive  
Thomas Russel, Chairman and CEO, Federal-Mogul Corp.  
Paul Schloemer, CEO, Parker-Hannifin Corp.  
Roger Smith, Chairman, General Motors Corp.  
Neil Springer, Chairman, Pres., and CEO, Navistar  
Intern'l. Transportation Corp.

**The Canadian representatives are:**

Roy Bennett, Bennecon Ltd.  
Ken Harrigan, Pres., Ford Canada  
Moe Closs, Pres., Chrysler Canada  
M. V. Kempston-Darkes, V. Pres., General Motors Canada  
S. Yanagisawa, Pres., Toyota Canada  
E. I. Lee, Pres., Hyundai Canada

Peter Dawes, Pres., Canadian Importers' Assn.  
Robert Beamish, Chairman, Woodbridge Group  
Paul Calvi, Pres., Waterville T.G.  
Jim McAlpine, V. Chairman, Magna International  
Andre Normand, Pres., Prevost Car, Inc.  
Robert White, Pres., Canadian Auto Workers  
Sally Hall, Ex-Pres., Canadian Consumers Assn.  
Ken Graydon, Exec. V.Pres., Fed'n of Auto Dealers Assn.

Comment: No action required or recommended.

### **Article 1005: Relationship to Other Chapters**

This article refers to the FTA rule of origin for automotive goods enunciated in Chapter 3 (Annex 301.2, Section XVII). The rule applies to automotive goods imported into the territory of either party by the other. The content rule imposed by the FTA is more stringent than that previously required. 50 percent of the direct production costs of any vehicle traded must be incurred in either Canada or the United States to qualify for duty free treatment. Previously, overhead and other indirect costs were included in the formula. The new test is approximately equivalent to a 70 percent standard under the old formula. This article gives manufacturers the option of electing to meet the rule of origin in Annex 301.2 on a vehicle by vehicle basis, or by averaging its calculation over the period of a year on the same class of vehicles, or sister vehicles assembled in the same plant. Article 1006 divides vehicles into seven classes, defined by interior volume: minicompact automobiles, subcompact automobiles, compact automobiles, midsize automobiles, large automobiles, trucks and buses. All vehicles and original equipment parts imported into the U.S. from Canada will be duty free if they meet the new 50 percent rule of origin, as was the case under the Auto Pact. Canadian importers can import duty free under the Auto Pact, if they enjoy that status (see Article 1002). All other automotive goods must meet the FTA rule of origin to be duty free.

Paragraph 4 of this article provides for modification by agreement of the parties of the definition "class of vehicles" and of the list of companies permitted to benefit from Auto Pact contained in Annex 1002.1.

Comment: No action required or recommended.

### **Article 1006: Definitions**

Comment: No action required or recommended.

## **Chapter Eleven: Emergency Action**

This chapter allows for "safeguard" procedures providing emergency relief to domestic industries injured by imports. In the event that increased imports cause serious injury to a domestic industry, the injured country is allowed to take temporary emergency actions restricting imports in order to remedy the injury.

The FTA partner taking such emergency action must provide compensation to expand trade in another product, or the exporting partner may take substantially equivalent retaliatory action. Any disputes which arise as a result of such emergency action being taken are subject to binding arbitration under the dispute settlement provisions of the FTA (Chapter Eighteen).

Comment: No action required -- federal jurisdiction.

## **Chapter Twelve: Exceptions for Trade in Goods**

### **Article 1201: GATT Exceptions**

There are certain goods that are excepted from the provisions of the FTA. Article 1201 incorporates Article XX of the GATT into the FTA. Article XX permits regulation of trade which would otherwise violate the terms of the Agreement for the following reasons:

- protection of public morals;
- protection of human, animal or plant life;
- involves gold or silver;
- ensures compliance with domestic laws and regulations not otherwise inconsistent with GATT;
- produced with prison labor;
- protection of national treasures with artistic, historic or archaeological significance;
- regulation is pursuant to an international commodity agreement.

The provisions of the GATT Article XX may not be applied so as to constitute an arbitrary or disguised barrier to trade.

Comment: No action required or recommended.

### **Article 1202: Protocol of Provisional Application**

This provision incorporates into the FTA the "grandfather" clause of the GATT which excepted certain domestic legislation of the two parties from compliance.

Comment: No action required or recommended.

### **Articles 1203: Miscellaneous Exceptions**

Current restraints on the export of logs and eastern Canadian provincial statutes controlling the exportation of unprocessed fish are exempt from compliance with the FTA.

Comment: No action required or recommended.

### **Article 1204: Beer and Malt Containing Beverages**

The national treatment standard does not apply to regulation of beer and malt containing beverages, and nonconforming regulations may be renewed or amended, so long as such amendment does not increase noncompliance. New regulations must comply with the FTA. The exclusion of beer and malt containing beverages is also considered in detail in Chapter 20.

Comment: No action required or recommended.

**PART THREE**  
**GOVERNMENT PROCUREMENT**

**Chapter 13: Government Procurement**

This chapter is limited to the procurement of goods specified in the GATT Agreement on Government Procurement and those services incidental to their delivery (services must amount to less than 50 percent of the total contract). It applies only to procurement by the national governments of the U.S. and Canada and is limited to procurement by specific government agencies. The FTA altered the GATT agreement by reducing the threshold value for opening the procurement to both U.S. and Canadian suppliers on a non-preferential basis from \$171,000 U.S. to \$25,000 U.S. Under the FTA, only those goods manufactured in North America, and containing at least 50 percent U.S. and/or Canadian content, by cost, will qualify for such non-preferential treatment.

Comment: No action required or recommended. Non-legal suggestions for Michigan businesses are detailed in Section VI.

**PART FOUR**  
**SERVICES, INVESTMENT AND**  
**TEMPORARY ENTRY**

**Chapter Fourteen: Services**

**Article 1401: Scope and Coverage**

This chapter applies to all measures affecting "covered services" that are listed in Annex 1408 . It does not apply to any other services. The major categories of covered services are: agricultural and forestry services, mining services, construction services, distributive trade services, insurance and real estate services, commercial services, and others. Legal services, for example, are not covered services.

Comment: No action required or recommended.

**Article 1402: Rights and Obligations**

This provision sets forth the countries' general obligations regarding measures related to covered services: it requires that each country accord national treatment with respect to those services unless different treatment is necessary for "prudential, fiduciary, health and safety, or consumer protection" and prior notification for the different treatment has been given.

However, existing laws and regulations are grandfathered; they do not have to comply with the above national treatment provision, nor do their prompt renewal or continuation. Amendment of existing measures cannot be less conforming with the requirements of national treatment. New measures cannot arbitrarily or unjustifiably discriminate against nationals of either country, nor may they constitute a disguised restriction on the trade of covered services.

The article explicitly exempts either country's "government procurement or subsidies" from compliance.

Comment: No action required, but recommended action is as follows:

Consider changing laws or regulations, e.g., MCLA § 500.408(1)(viii), under the Insurance Code, MCLA § 500.401, et seq., that require maintenance of different deposits or reserves by some alien insurers.

## **Article 1403: Licensing and Certification**

The existing measures that relate to licensing and certification are grandfathered, as provided above in article 1402. However, there is a specific requirement that each country encourage recognition of the other's licensing and certification requirements. Moreover, each country must ensure that new laws and regulations do not discriminatorily impair the licensing or certification of the other country's nationals.

Comment: No action required, but recommended action is as follows:

- (1) Consider negotiations with Ontario to amend licensing laws and regulations that contain specific residency-related requirements:
  - a. security systems services: alarm system contractor or private security guard, MCLA § 338.1056, must be a U.S. citizen
  - b. personnel supply services: employment agent/agency, MCLA § 339.1005, must supply 3 recommendation letters from reputable business persons who are residents of Michigan
  - c. real estate agency & management services: real estate broker, MCLA § 339.2505, must supply 2 recommendation letters from individuals who have resided in the state for at least 1 year, in the county where applicant has a place of business.
- (2) Explore the following possible problem areas:
  - a. the application process for obtaining a license is extremely time consuming because in both the U.S. and Canada, a case-by-case analysis is often required
  - b. the requirements for some professions are not reciprocal among the states, e.g., engineers, MCLA § 339.2004, real estate brokers, MCLA § 339.2505; so, after obtaining an initial license in the other country, it may be even more difficult to obtain reciprocity in other states/provinces due to different requirements.

## **Article 1404: Sectoral Annexes**

This article sets forth special provisions for specific covered services. Unless specifically provided otherwise, the above provisions of Article 1402 apply.

### **Annex A: Architecture**

The Royal Architectural Institute of Canada and the American Institute of Architects must develop "mutually acceptable" professional standards and criteria and make recommendations by December 31, 1989. Each organization must then "encourage" the respective states/provinces to incorporate those recommendations into their laws within 6 months, so that national treatment is assured.

The major differences between the U.S.'s and Canada's laws re: architecture are:

i. Michigan requires graduation from a program accredited by the National Architectural Accrediting Board; no Canadian program is reviewed or accepted by the Board.

ii. Currently, the Michigan law requires all architect applicants to receive a passing grade on an approximately 34 hour exam; Canada requires no exam after graduation to qualify for a license.

Comment: Action required:

Within 6 months of the issuance of mutually acceptable professional standards and criteria for the licensing and conduct of architects, the Michigan legislature must consider amending its statute, MCLA § 339.2001, et seq., to comply.

Comment: Action recommended:

To adopt a statutory amendment in compliance with the standards and professional criteria promulgated by the two national organizations.

### **Annex B: Tourism**

This annex applies to all laws governing trade in tourism services, including the provision of these services, the appointment, maintenance, and commission of agents to provide the services, the issuance of traveller's insurance, etc., but the grandfather clause of Article 1402 applies. Thus, the Agreement guarantees protection of the current level of trade in tourism services with Canadians.

New laws must comply with the principle of national treatment. In particular, new laws may not restrict the value of tourism services that nationals from either country purchase, except in conformity with Article VIII of the Articles of Agreement of the International Monetary Fund.

Each country, or the provinces/states within, may officially promote travel and tourist opportunities in the other country, but these promotional services cannot be for profit. The parties agreed to meet yearly to eliminate impediments to trade in tourism services and to promote an increase in tourist travel between the countries.

Comment: No action required, but recommended action is as follows:

Foster further promotional activities in Canada of state tourism and travel opportunities to support state businesses taking advantage of the commitment to eliminate impediments in the trade of tourism services. MCLA § 2.102, et seq. (Advertising State; Tourist Council); MCLA § .141.871, et seq. (Community Convention and Tourism Marketing Act).

### **Annex C: Computer Services and Telecommunications-Network-Based Enhanced Services**

The purpose of this annex is to "maintain and develop an open and competitive market" for the provision of these services in the two countries. The annex applies to all measures affecting purchase, lease, sale, construction, and use of basic telecommunications transport services.

However, the annex applies only to laws governing the provision of services by or on behalf of a person, not by or on behalf of a corporate entity. Existing monopolies are exempted from compliance.

Comment: No action required, but recommended action is as follows:

(1) In the process of reviewing telecommunications legislation for enactment of a new code in 1992, as required by MCLA § 484.126, be cognizant of the FTA commitment to maintain and develop open and competitive telecommunications trade with Canada.

(2) Because Canada's huge national monopoly, Bell Canada, is exempted from compliance with the provisions of Chapter Fourteen, Michigan should negotiate for nondiscriminatory access to this essential service area.

## **Article 1405: Future Implementation**

This article imposes an obligation on the countries to work toward measures to comply with the provisions of Articles 1402 & 1403 and to implement further sectoral annexes.

Comment: No action required, but recommended action is as follows:

Michigan should work toward mutually recognized professional criteria and standards, especially regarding engineers and surveyors, MCLA § 339.2001, et seq., real estate services, MCLA § 339.2501, et seq., and insurance agencies/agents, MCLA § 500.1200, et seq.

## **Article 1406: Denial of Benefits**

The FTA does not apply to services indirectly supplied by a third country. The intent of this provision is to prevent services work from going to third-country individuals or corporations under a "shell" operation. For example, if an automobile company hires the services of a Japanese engineering company which has no more than a post office box in Michigan, and the services are really being performed in Japan, the protections of the Agreement would not be extended should the auto company's Canadian affiliate want to hire the services of that company. However, if the Japanese engineering company were incorporated in Michigan and the services were performed in Michigan, the benefits of the Agreement would extend to that corporation's employees if they provided services in Canada.

Comment: No action required or recommended.

## **Article 1407: Taxation**

Any new taxation measure is exempt from having to comply with the provisions of this chapter as long as it (i) does not nullify or impair any benefit expected to accrue under the FTA provisions; and (ii) does not constitute arbitrary or unjust discrimination.

Comment: No action required or recommended.

## **Article 1408: Definitions**

What constitutes a "covered service" is specifically set forth in a list contained in Annex 1408.

Comment: No action required, but recommended action is as follows:

(1) Consider negotiations with Ontario to extend the benefits of this chapter to professions that are included in Chapter 15: Temporary Entry for Business Persons (allows certain professionals employed by a business in the other country to easily obtain temporary entry), such as law and nursing, even though they are not included as "covered services."

(2) Because transportation services are exempted from the FTA, consider negotiations to develop mutually recognized regulations, especially trucking regulations, to facilitate transportation of goods traded between the U.S. and Canada. See Section VI.

## **Chapter Fifteen: Temporary Entry for Business Persons**

This chapter is to facilitate business persons' temporary entry (as opposed to facilitating the providing of services) into each country by establishing "transparent criteria and procedures," while also maintaining border security and protecting "indigenous labor and permanent employment." Both countries must provide for the temporary entry of persons "otherwise qualified" under laws regarding the public health and safety and the national security.

A major expectation on both sides is that the FTA will do away with, or at least significantly reduce, the duties on work materials brought into either country by entering business persons -- e.g., duties on architects' drawings and designs, accountants' computations.

Annex 1502 lists business persons and professionals to whom the chapter applies. Significant omissions include computer consultants. The chapter does not apply to blue collar workers, unless they are employed by a company of the country into which the professional seeks to enter. For example, a Canadian electrician could obtain temporary entry into the U.S. to perform a service for a U.S. company that employed him, but not to perform a service at a profit for a homeowner who employed him.

Comment: No action required or recommended -- federal jurisdiction.

## **Chapter 16: Investment**

### **Article 1601: Scope and Coverage**

This chapter applies to any measure affecting investment, but exempts those measures that control: (i) the provision of financial services, except insurance services, which are covered by this chapter; (ii) government procurement; and (iii) the provision of transportation services.

Comment: No action required or recommended.

### **Article 1602: National Treatment**

Each country, and the states/provinces within, must accord national treatment to all investors regarding laws or regulations that apply to the sale, acquisition, establishment, or conduct and operation of businesses. The FTA specifically extends the national treatment requirement to ownership of shares. Although either country may require that directors or incorporators own a nominal quantity of shares, neither country can require that a minimum amount of equity be owned by its nationals in order for a business to be located in its territory.

However, the national treatment requirement does not apply to subsequently enacted Canadian laws or regulations that govern businesses which were in existence at the time the treaty went into effect. Thus, Canada could enact a law restricting U.S. ownership of Canadian Bell assets. Later amendments of those laws, however, cannot render the law more nonconforming with the principle of national treatment.

Moreover, each country may enact laws that do not conform to the national treatment requirement if: (i) it is necessary for "prudential, fiduciary, health and safety, or consumer protection reasons"; (ii) its effect is no different from laws imposed on nationals; and (iii) prior notification has been given.

Comment: No action required, but recommended action is as follows:

(1) Because Canadian banks are permitted to sell insurance in Canada, consider permitting Canadian bank affiliates owned by Michigan holding companies and operating in Michigan to sell insurance in the state.

(2) Consider passing the amendment to the Michigan Professional Corporation Act described in Section III.

### **Article 1603: Performance Requirements**

Neither country can condition permission to invest in a business, or impose a business regulation, with a requirement: (i) to export a certain amount of goods or services; (ii) to substitute goods or services of the investing country with imported goods or services; (iii) to purchase goods or services from the country where the business is located; or (iv) to achieve a certain level of domestic content. Neither country can impose such requirements on a third country if they would have a significant impact on trade between the U.S. and Canada.

Comment: No action required or recommended.

### **Article 1604: Monitoring**

Either country can require investors to disclose "routine information" regarding their investments for statistical purposes and in connection with the "nondiscriminatory and good faith application of its laws." The information shall remain confidential if public disclosure would prejudice the investor's competitive position.

Comment: No action required or recommended.

### **Article 1605: Expropriation**

Neither country may directly or indirectly expropriate an investment owned by an investor of the other country except on a nondiscriminatory basis for a public purpose in accordance with due process of the law. Adequate compensation must be given.

Comment: No action required or recommended.

### **Article 1606: Transfers**

Neither country shall prevent an investor from transferring any income gained from the investment unless the transfer would be "inconsistent with" measures regarding: bankruptcy and protection of creditors' rights, securities transactions, criminal offenses, reports of currency transfers, withholding taxes, or satisfaction of adjudicatory judgments.

Comment: No action required or recommended.

### **Article 1607: Existing Legislation**

This article grandfathers all existing measures, their prompt continuation, and their amendment as long as the change does not make them less conforming to the provisions of the FTA. The annex leaves in place Canadian laws prohibiting more than 50% ownership of a previously Canadian-controlled cultural business, i.e., a book publishing company, broadcasting station, or film distributor. In addition, a foreign-owned book publisher must sell to a Canadian owner. If the publishing company is sold indirectly to a U.S. owner, ownership must be divested to a Canadian at a "fair open market value."

### **Annex 1607.3:**

This annex requires amendment of the Investment Canada Act. By 1993, Canada will be able to perform investment review of the direct acquisition of control of a Canadian business by a U.S. investor only if the total gross assets of the Canadian business exceed Can\$150 million (at the time of the agreement, the limit was Can\$5 million). The standard for review is whether the investment is in Canada's best interest. For indirect acquisitions -- where a U.S. investor purchases a Canadian business and thereby gains control of its subsidiary by default -- the FTA phases out Canadian review altogether. The provisions of this annex explicitly do not apply to the oil and gas and uranium mining industries, but Canadian restrictions on foreign investment in these industries have been liberalized since the agreement was initialed in October 1987.

Comment: No action required or recommended.

### **Article 1608: Disputes**

Dispute resolution is to be conducted pursuant to arbitration and panel procedures under Chapter Eighteen. Review under the Investment Canada Act, and rights and obligations arising under the General Agreement on Tariffs and Trade, are exempt from FTA dispute resolution provisions.

Comment: No action required or recommended.

### **Article 1609: Taxation and Subsidies**

Unless a country can show that a taxation or subsidy measure interferes with expected benefits of the FTA, this Chapter does not apply to any such new measures as long as they are not "arbitrary or unjustifiably discriminatory."

Comment: No action required or recommended.

### **Article 1610: International Agreements**

Both countries shall endeavor to improve "multilateral" investment agreements.

Comment: No action required or recommended.

### **Article 1611: Definitions**

Defines such terms as acquisition, business enterprise, control, etc.

Comment: No action required or recommended.

## PART FIVE

### FINANCIAL SERVICES

#### Chapter Seventeen: Financial Services

Under this chapter, each country has specific obligations, but the FTA specifically exempts the state and provincial governments from having to comply.

The U.S. agreed to allow all Canadian, U.S., and foreign financial institutions to deal in, underwrite, and purchase debt obligations backed by any level of the Canadian government to the same extent it allows such transactions regarding U.S.-backed debt obligations. This will put Canadian government securities on the same footing as United States federal, state, and local government securities. National and state banks that are so authorized by their charters may purchase Canadian government securities. It also agreed to grandfather Canada's multistate branches under the International Banking Act.

Finally, the U.S. agreed to accord national treatment to amendments to the Glass Steagall Act that affected Canadian financial institutions operating in the U.S. However, existing provisions of the Glass Steagall Act are grandfathered, which prevents reciprocal access to the U.S. market by Canadians. Canadian banks operating in the U.S. are prevented from expanding because of state and local laws. This expansion restriction also affects a majority of Canadian securities firms because most of them have bank affiliates. Canadian securities firms will not be able to underwrite U.S. corporate securities.

Canada agreed to exempt U.S. nationals from its restrictions on percent of foreign ownership of federally controlled financial institutions -- Canada restricts total foreign ownership to 16% of a bank's assets. It also agreed to exempt U.S. citizens from restrictions on market share, asset growth, and capital expansion. Finally, Canada agreed not to use its review powers governing entry of U.S. controlled financial institutions "in a manner inconsistent with" the FTA.

Each country agreed to grandfather existing rights and privileges of the other country's financial institutions, as long as the other country "meets its commitment to further liberalize its financial markets."

Because Canada has far greater investment barriers than the U.S., these changes appear to primarily benefit the U.S. However, because no Canadian company can own more than 10% of Canada's six largest banks under current law,

the provisions of this chapter may not have significant practical effect for Michigan investors seeking to gain controlling interest.

Comment: No action required, but recommended action as follows:

Although this chapter is explicitly under federal jurisdiction, Michigan should consider whether there are impediments that may limit state financial institutions' ability to purchase Canadian-backed securities.

## PART SIX

### INSTITUTIONAL PROVISIONS

#### **Chapter Eighteen: Institutional Provisions**

This chapter sets forth institutional provisions that: (i) allow for the joint management of the FTA; and (ii) provide ways in which disputes between the United States and Canada, regarding the interpretation or application of any element of the agreement, may be avoided or settled.

A Canada-United States Trade Commission, composed of cabinet-level representatives from both governments and operating by consensus, will supervise the implementation of the Agreement and resolve any disputes regarding all matters except financial services, antidumping, and countervailing duties.

Initially, either government may attempt to avoid or resolve disputes through consultations. However, if these consultations do not solve the problem within 30 days after the request for consultation is made, either party may request a meeting of the Commission. In an effort to resolve the dispute promptly, the Commission may seek expert advice from technical advisors or use a mediator acceptable to both parties. If the Commission is unable to resolve the dispute in this manner, it may refer the matter to binding arbitration or establish a panel at the request of either party. Members of the panel are selected from a roster maintained by the Commission.

If a panel is utilized to resolve the dispute, the Commission will agree on the resolution after receiving the panel's final report. If the Commission cannot reach an agreement, and a party believes that its fundamental rights or benefits under the FTA are being or would be impaired if the measure at issue were implemented, that party may withdraw equivalent benefits from the other, until both governments reach agreement on resolution of the dispute.

Comment: No action required or recommended -- federal jurisdiction.

#### **Chapter Nineteen: Binational Dispute Settlement in Antidumping and Countervailing Duty Cases**

The provisions of this chapter set forth procedures that would allow both parties to take equal advantage of the benefits of the FTA by establishing conditions

of fair competition so that both sides have equal access to the free trade area established by the Agreement.

Under this chapter, each party may continue to apply its own national anti-dumping (AD) and countervailing duty (CVD) laws to imports from the other country. In AD and CVD cases, independent reviews conducted by binational panels will replace judicial reviews conducted by domestic courts. The binational panel set up to review such cases will function independently of the dispute settlement procedures of Chapter Eighteen.

Comment: No action required -- federal jurisdiction.

## PART SEVEN

### OTHER PROVISIONS

#### **Chapter Twenty: Other Provisions**

Miscellaneous provisions that did not fit under the categories covered in other chapters are covered here. Provisions concerning areas such as: national security, cultural industries, retransmission rights, plywood standards, softwood lumber, etc. are included in this chapter.

A summary of Chapter Twenty, however, would be incomplete if it failed to mention: (i) several provisions that are discussed in the FTA, but are exempted from coverage, e.g. certain "cultural industries", beer and malt containing beverages, etc.; and (ii) several areas of trade that are completely absent from the Agreement, e.g. transportation, exchange rates, etc..

A report published by the Bureau of National Affairs, Inc. devotes a chapter to those issues that may logically have been included in the FTA, but are conspicuously not covered. (U.S.-Canada Free Trade Agreement: The Complete Resource Guide, Volume I: An Industry Guide (BNA)). This chapter describes the negotiations that led to: (i) exemption of certain provisions from FTA coverage; and (ii) the complete omission of other provisions.

#### **(i) Exempted Provisions:**

- (a) **Cultural Industries:** Certain cultural industries such as: publication, sale, distribution, or exhibition of: books, magazines, and newspapers are exempted from the provisions of the FTA. Canada is extremely sensitive about maintaining its "cultural identity". Hence, this exemption had to be granted in order for the Canadians to even contemplate entering the Agreement.
- (b) **Beer and Malt Containing Beverages:** The U.S. has provided a lucrative market for Canadian beer exports. 1987 import/export figures show that the U.S. imported over 61 million gallons of Canadian beer, but only exported 4.6 million gallons of its domestic beer to Canada (*Id.* at 114). This inequity partially exists because of provincial restrictions against the sale of non-provincially produced beer. If these restrictions were removed, the Canadian brewing industry would be severely disadvantaged.

At present, provincial law dictates that a brewery may sell beer in a province only if it also brews and bottles the beer in that province. This requirement forced Canadian breweries to establish facilities in each of the ten provinces. Hence, if it had been eliminated under the FTA, local breweries would have had to restructure their operations in order to compete with U.S. breweries. Consequently, beer is exempted from FTA coverage, unlike other alcoholic beverages (See Chapter Eight: Wine & Distilled Spirits).

Although a GATT panel ruled, in March 1988, that Canada's pricing, listing, and distribution practices regarding beer, wine, and distilled spirits were discriminatory, Canada only agreed to comply with those panel recommendations pertaining to wine and distilled spirits. Then-Canadian Trade Minister, Pat Carney, stated that Canada would not comply with the recommendations regarding beer because that would "give a free ride" to U.S. brewers, who had not filed the complaint (Id. at 115).

(ii) Omitted Provisions

- (a) Transportation: Due to heavy lobbying by both Parties, transportation was totally excluded from the Agreement. The U.S. maritime industry opposed FTA coverage of this area because inclusion of this provision would have relaxed the restrictions on foreign commerce currently in force under the U.S. Jones Act (Id. at 109). Canadian airline and trucking industry representatives opposed the deregulation of these two areas of transportation for fear that they would be unable to compete with their larger U.S. competitors.
- (b) Exchange Rates: Administration officials explain that exchange rates cannot be effectively addressed on a bilateral basis because the nature of trade is becoming global. Therefore, according to these officials, it would be futile to negotiate exchange rate parity without the other five members of the Group of Seven industrialized countries -- Japan, France, W. Germany, Italy, and the United Kingdom (Id. at 113).

Comment: No action required -- federal jurisdiction; non-legal suggestions for transportation (See Section IV).

**PART EIGHT**  
**FINAL PROVISIONS**

**Chapter Twenty One: Final Provisions**

The provisions of this chapter ensure that the two parties will exchange statistical information, usually consisting of data issued by Statistics Canada and the United States Department of Commerce and other U.S. government agencies, to facilitate implementation of the FTA.

The provisions of this chapter further allow either party to modify or amend the FTA by agreement. Moreover, under this chapter, the FTA remains in effect unless either party terminates it by providing the other party with a six-month notice.

**Comment:** No action required -- federal jurisdiction.

### III

## CURRENT PENDING LEGISLATION

In conducting research for the study, the team identified pending legislation stimulated by the passage of the FTA or affecting Michigan business and trade within its purview.

#### (A) Michigan Professional Service Corporation Act

A proposed amendment to the Michigan Professional Service Corporation Act, MCLA § 450.221, et seq., eliminates the requirement that shareholders of professional corporations incorporated under the Act must, with limited exceptions, be licensed in Michigan. The amendment does not change the requirement that the service providers of such corporations must be licensed in Michigan.

The current law prevents Canadian investors from becoming shareholders in Michigan corporations, and in addition, it restricts expansion into Canada because Canadian service providers may not invest in the company. The proposed amendment is in the spirit of the FTA because it encourages free trade of investment services with Canada.

#### (B) Michigan Export Development Act

A proposed amendment to the Michigan Export Development Act, MCLA §§ 447.152 - .165, broadens the scope of the Board of the Michigan Export Development Authority. The amendment, if passed, may have implications for implementing the non-legal suggestions. The proposal, Senate Bill No. 369, has been significantly altered in committee and the team has been unable to obtain a copy.

The original version expanded the Board's authority enabling it: to charge for its services, to contract with specified financial institutions, to provide loans, to provide export insurance, to lead or participate in trade shows to promote Michigan goods and services, to sponsor a foreign sales corporation, and to establish an export trading company.

## IV

### MARKET EXPANSION AREAS

The U.S.-Canada trading relationship is already the largest and most profitable bilateral trading relationship in the world. In 1987 alone, the U.S. traded over \$166 billion dollars in goods and services with Canadian counterparts. Under the U.S.-Canada Free Trade Agreement (FTA), this commercial relationship will continue to grow as import and export tariffs and other anti-competitive trade barriers are reduced over a ten year period. The major non-tariff protectionist policies addressed in the FTA include import quotas, export limitations, licensing and regulatory constraints, price supports, and domestic content requirements. The FTA allows both Canada and the U.S. to maintain trade barriers against other countries while expanding free trade between the two countries.

The goal of the FTA is to provide for greater unrestricted market access such that the traditional market forces of supply and demand can operate without distortion. As targeted protectionist measures are modified or eliminated, it becomes important for manufacturers on both sides of the border to analyze the changed trading environment and its impact on available manufacturing, retailing, marketing, service, and investment opportunities.

The FTA will benefit both countries, albeit via different mechanisms. Businesses located within the U.S. will benefit by the elimination of Canadian tariffs which are, for the most part, much higher than comparable American tariffs. However, from a Canadian business perspective, Canada is gaining increased access to a market over ten times its own size. An increase in free trade measures gives Canada firmer footing to trade with the U.S. than other countries which are geographically distant and still subject to protectionist trade measures.

The elimination or reduction of trade barriers will undoubtedly lead to "a reallocation of resources that otherwise were artificially and inefficiently diverted by market distorting trade barriers". Sen. Glen, Senate Hrg. 100-855, p. 5, 5/9/88. This reallocation of resources will occur as firms realize new economies of scale as a result of an increased free market population and take advantage of lower end costs due to tariff reductions. Benefits will inure to those states whose regulatory environment favors the "post-reallocation" economic environment.

#### (A) Attractive Industry Sectors

According to the U.S. Department of Commerce, there are several export products which are expected to become more attractive to U.S. businesses as a result

of the FTA. Among the products most frequently mentioned in connection with Michigan businesses are:

- Auto Parts and Accessories
- CAD/CAM and Robotics Technology
- Computers, Software and Peripherals
- Disposable Medical Equipment
- Metal and Plastic Furniture
- Telecommunications Equipment
- Printing and Publishing
- Plastics and Resins

Automobile engines, parts, and accessories are Michigan's leading exports to Canada. In 1987, Michigan exported approximately \$5.4 billion worth of these products to Canada, representing over 70 percent of our Canadian exports. U.S. Dept. of Commerce Intn'l Trade Admin., March 1989. This market is anticipated to expand further as after-market and original equipment parts duties are eliminated in 1993 and 1998, respectively. In addition, the phaseout of the Canadian embargo on used American motor vehicles will provide increased business opportunities for Michigan businesses.

Computer aided design and computer aided manufacturing (CAD/CAM) and robotics technology, along with computers aimed at the manufacturing sector are also promising prospects under the FTA. Michigan exported over \$75 million in electronic computers alone to Canada in 1987. Because of Michigan's strong automotive manufacturing economy, a large number of CAD/CAM robotics firms are already located in the state making Michigan one of the nation's leading states in this sector. With reduced tariff structures and an increased ability to provide after-sale service via more transparent immigration procedures, these firms will find more export opportunities under the FTA.

As with CAD/CAM and robotics, Michigan has a well developed plastics and resins industry as a result of close proximity to Michigan's major auto producers. In addition, according to the U.S. Department of Commerce, plastics and resins are listed among the top ten export prospects to Canada during 1989. Inasmuch as Canada's own consumption of plastics and resins is expected to grow, Michigan firms will benefit due to their close geographic proximity to the Canadian markets and the ten year phaseout of tariffs on plastics and resins which had been as high as 25 percent. Michigan's competitiveness in the plastics and resins market combined with current Canadian public sentiment with regard to the cost of health care should also translate well for Michigan manufacturers currently manufacturing or desiring to manufacture plastic disposable medical equipment.

Another attractive industry segment for Michigan is the manufacture of furniture and fixtures. While raw materials for wood furniture are likely to be cheaper in Canada, Michigan is one of the nation's leading manufacturers of metal and plastic office furniture, exporting over \$37 million of furniture and fixtures to Canada in 1987. As a competitive industry, Michigan businesses will benefit due to their geographic proximity to Canadian markets and the elimination of tariffs of over 12% on these products.

Books and periodicals are also ranked high among top U.S. export opportunities to Canada during 1989. *Id.* Although Michigan has a significant publishing industry, it is not currently a major exporter of published materials to Canada. The phaseout of Canada's "print in Canada" requirement which provided advertising tax deductions to Canadian businesses only if the publication were printed in Canada should provide incentive for Canadian interests to do business with Michigan businesses for the first time.

#### **(B) State Involvement**

Perhaps more important than attracting industries is educating the current business and industrial base on the benefits of the FTA: freer trade, less red tape, reduced tariffs, and an ability to provide after-the-sale assistance. Smaller firms have traditionally been discouraged from penetrating the Canadian market due to the tariff, customs, immigration and regulations surrounding dealings with Canadian interests. As long ago as May 1988, it was realized that "among the small and medium sized firms, however, there is generally less awareness of the opportunities provided by the [FTA]". Archey, William T., U.S. Chamber of Commerce, Senate Hrg. 100-85, at 24, 5/9/88. Notwithstanding the initial surge of conferences, it is very clear that small and medium size firms that could gain from the FTA have still not been educated as to its benefits.

Since awareness of the FTA is not well developed in the U.S., it is desirable that the Michigan Department of Commerce, the Michigan Department of Agriculture and other state agencies in cooperation with the private sector institute programs to increase awareness of the FTA and its benefits among existing Michigan businesses. Possible efforts with regard to education could include increased financing under the Michigan Export Development Act to fund local Canadian export trade offices in Michigan cities with trade border crossings. More modest efforts could include state sponsored education seminars aimed at small to medium size firms that otherwise lack the resources to learn of potential benefits under the FTA.

Along these lines, the University of Michigan announced in September 1989 that the University's School of Business Administration had been awarded approximately one-half million dollars by the U.S. Department of Education to establish a Center for International Business Education. The goal of the Center is to promote campus-based education and research and to help the U.S. become more competitive in international trade.

A healthy state environment for growth in the aforementioned industry sectors would also contribute to business expansion of new firms or those relocating to Michigan. Michigan has already proven its willingness to attract capital investment by providing benefits to businesses locating in Michigan. Packages comprising job training, recruitment, and infrastructure development such as water, sewer, roads, and interchanges have proven to be attractive bargaining incentives. To facilitate more expansion, laws and regulations on a prospective basis should be drafted to make Michigan a particularly attractive site for capital investment and production targeted at trade with Canada. Such laws and regulations might encompass licensing, design, manufacturing, or labelling requirements and should be drafted so as to comport with similar Canadian regulations.

## LEGAL RECOMMENDATIONS

Michigan should consider the following action related to laws and regulations:

### (A) Modifications of Existing Laws and Regulations:

#### (1) Chapter Fourteen: Services

Article 1403: Consider negotiations with Ontario to amend licensing laws and regulations that contain specific residency-related requirements:

- (a) security systems services: alarm system contractor or private security guard, MCLA § 338.1056, must be a U.S. citizen.
- (b) personnel supply services: employment agent/agency, MCLA § 339.1005, must supply 3 recommendation letters from reputable business persons who are residents of Michigan.
- (c) real estate agency & management services: real estate broker, MCLA § 339.2505, must supply 2 recommendation letters from individuals who have resided in the state for at least 1 year, in the county where applicant has a place of business.

Article 1404: Annex A: Architects: Within 6 months of the issuance of mutually acceptable professional standards and criteria for the licensing and conduct of architects, the Michigan legislature must consider amending its statute, MCLA § 339.2001, et seq., to comply.

Article 1405: Michigan should work toward mutually recognized professional criteria and standards, especially regarding engineers and surveyors, MCLA § 339.2001, et seq., real estate services, MCLA § 339.2501, et seq., and insurance agencies/agents, MCLA § 500.1200, et seq.

### (B) Laws and Regulations to be Examined Further:

#### (1) Chapter Seven: Agriculture

Article 708: Annex 708.1: Schedule 7: Pesticides:

Michigan agriculture officials should continue to review national proposals for uniform law. Furthermore, the officials should review

Michigan laws and consider amending state law, where necessary, to be harmonious with a national proposal (given other states adopt it as well). This would aid in furthering the FTA's objective of harmonization between all states and Canada, by accomplishing the first link - harmonization among all the states' standards.

(2) Chapter Fourteen: Services

Article 1402: consider changing laws or regulations, e.g., MCLA § 500.408(1)(viii), under the Insurance Code, MCLA § 500.401, et seq., that require maintenance of different deposits or reserves by some alien insurers.

Article 1404: Annex B: Tourism: Foster promotional activities in Canada of state tourism and travel opportunities to support Michigan businesses taking advantage of the commitment to eliminate impediments in the trade of tourism services. MCLA § 2.102, et seq. (Advertising State; Tourist Council); MCLA § 141.871, et seq. (Community Convention and Tourism Marketing Act).

Article 1404: Annex C: Computer Services and Telecommunications-Network-Based Services:

In the process of reviewing telecommunications legislation for enactment of a new code in 1992, as required by MCLA § 484.126, be cognizant of the FTA commitment to maintain and develop open and competitive telecommunications trade market with Canada.

Article 1408: Consider negotiations with Ontario to extend the benefits of this chapter to professions that are included in Chapter 15 (allows certain professionals employed by a business in the other country to easily obtain temporary entry), such as law and nursing, even though they are not included as "covered services."

Also, because transportation services are exempted from the FTA, consider developing mutually recognized regulations, especially trucking regulations, to facilitate transportation of goods traded between the U.S. and Canada. See Section VI.

(3) Chapter Sixteen: Investment

Article 1602: Because Canadian banks are permitted to sell insurance in Canada, consider permitting Canadian bank affiliates owned by Michigan

companies and operating in Michigan to sell insurance in the state. Also, consider passing the amendment to the Michigan Professional Corporation Act described in Section III.

**(C) Areas of Commerce to be Monitored as Growth Occurs:**

**(1) Chapter Six: Technical Standards**

Article 601: To facilitate increased trade, Michigan should adopt a policy of refraining from promulgating new, nonconforming technical standards unless such standards are clearly dictated by health or safety concerns. To the extent U.S. and Canadian standards are in harmony, free trade is encouraged.

**(2) Chapter Seven: Agriculture**

Article 708: Annex 708.1: Schedules 6: Plant Health; 8: Food, Beverage, and Colour Additives; 9: Packaging, Labelling of Agricultural, Food, Beverage and Certain Related Goods for Human Consumption; 12: Unavoidable Contaminants in Foods and Beverages: The working groups should receive input from state associations, industries, and producers regarding any rules that hinder trade. Michigan officials and representatives from the private sector should continue to alert these working groups as additional issues arise.

**(3) Chapter Eight: Wines and Distilled Spirits**

Article 804: The practices of the Michigan Liquor Control Commission regarding distribution satisfy the requirements of the FTA. Michigan may, however, want to consider entering into negotiations with the province of Ontario to secure treatment of Michigan wines comparable to the favored treatment Ontario gives its own wines, i.e., permitting distribution of Michigan wines in private outlets currently selling only Canadian products.

**(4) Chapter Fourteen: Services**

Article 1403: Explore the following possible problem areas:

- (a) the application process for obtaining a license is extremely time consuming because in both the U.S. and Canada, a case-by-case analysis is often required;

- (b) the requirements for some professions are not reciprocal among the states, e.g., engineers, MCLA § 339.2004, real estate brokers, MCLA § 339.2505; so, after obtaining an initial license in the other country, it may be even more difficult to obtain reciprocity in other states/provinces due to different requirements.

Article 1404: Annex C: Computer Services and Telecommunications-Enhanced-Network-Based Services: Because Canada's huge national monopoly, Bell Canada, is exempted from compliance with the provisions of Chapter Fourteen, Michigan should negotiate for nondiscriminatory access to this essential service area.

(5) Chapter 17: Financial Services

Although this chapter is explicitly under federal jurisdiction, Michigan should consider whether there are impediments that may limit state financial institutions' ability to purchase Canadian-backed securities.

## VI

### NON-LEGAL SUGGESTIONS

In conducting research for the study, suggestions were received for significant non-legal actions or major structural changes which were offered to improve Michigan's capacity to fully benefit from the FTA. A description of them is provided below.

#### (A) Transportation

The adequacy of the existing transportation infrastructure, roadways, bridges, and tunnels, to carry the anticipated increase in trade between Michigan and Canada has been questioned. Related to this is the need for more customs officers and inspectors, border stations, etc. These functions are governed by the United States Customs office and not regulated by the State.

Michigan may consider expanding ports. In addition, authorities may emphasize their usage as expressly authorized under MCLA § 447.103 which states that "the division of international commerce ... shall advertise and promote port utilization". Objectives to be accomplished under the FTA, markets to be served, and additional costs to be incurred require thorough examination.

Commercial transportation, such as shipping by truck, rail, barge, etc., and public transportation, including air and rail linkages for passengers are not addressed in the FTA. Opportunities may be discovered in thoroughly reviewing Michigan's plans, laws and regulations.

#### (B) Information Data Base

There is a lack of readily available information on the FTA and Canadian law for Michigan government, businesses and professionals. Lawyers and accountants who are involved in trade activity should acquire a strong FTA legal background. An easily accessible reference library should be established containing both U.S. and Canadian resource material on the FTA.

#### (C) Wineries

Michigan wineries may be able to take advantage of the increased access to Canadian customers created by elimination of Canadian discriminatory listing practices. An export strategy could productively be developed.

**(D) Government Procurement**

Michigan small and medium size businesses, unable to produce goods in sufficient quantities to meet the GATT threshold amount, might be able to take advantage of the reduced value and corresponding reduction in volume of Canadian procurement contracts. Interested companies should contact Supply and Services Canada, Corporate Relations Branch, 11 Laurier Street, Hull, Quebec, Canada, K1A 0S5, to be placed on the list of qualified suppliers of goods.

## VII

### CONCLUSION

After conducting an extensive analysis of the FTA, the study team concludes, as a number of experts have felt all along, that the FTA is not a true "free trade" agreement. However, the Agreement represents a step towards "freer trade" between the United States and Canada. Much of the FTA is policy oriented with emphasis placed on the future. Its main objective is to eliminate tariff barriers over a period of years and to prospectively work toward drafting harmonious laws and regulations that affect U.S.-Canada trade.

Based on the sheer volume of laws and regulations existing in Michigan alone\*, this prospective approach represents, perhaps, the most intelligent and practical strategy. To require the 50 states to retroactively alter their regulatory structure would be massive, complex and politically difficult. By establishing an overall policy goal of free trade and by focusing on future laws and regulations, the FTA allows the states to engage in a careful analysis of their laws and regulations and to address statutory changes on a priority basis. Those states seeking a competitive edge will be the first to undertake such efforts.

With regard to Michigan, perhaps the simplest regulatory adjustments involve licensing and professional recognition requirements. According national treatment to Canadian professionals carries with it the benefit of increasing the available base of qualified professionals, and, in the case of professions such as architecture, investment dollars may follow in the footsteps of the work performed. To the extent that Michigan employers are encouraged to venture into the Canadian markets, Michigan's economy can benefit from increased exports, a potential for increased employment and the long term benefits of "after the sale" services.

In addition to licensing standards, harmonization of regulations regarding product content and regulation such as agricultural and manufacturing products represent an opportunity for Michigan. To the extent these regulations are harmonized with Canadian regulations, it

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\*Searches conducted on Michigan's Questor legislative database yielded well over 1,000 statutes that could potentially affect trade with Canada. While the study team endeavored to identify those statutes that act as potential trade barriers or are not in compliance with the FTA, a more exhaustive legislative analysis is required.

becomes easier for Michigan businesses to conduct trade with Canada. Products which formerly required blending, alteration or relabelling could then be sold in Canada without change. The current costs of compliance with incongruous regulations could be a significant trade barrier. The benefit of eliminating such a trade barrier lies in simplifying export requirements, making exporting attractive to smaller businesses which otherwise would not have been interested.

The foregoing represent only two of a multitude of opportunities for Michigan to enhance its foreign trade environment. Banking, insurance and public utility regulations also bear further scrutiny, but require efforts beyond the scope of this study.

A simplified trade environment will not increase trade unless there is an awareness of its existence. This necessarily requires that Michigan businesses be educated on the procedural aspects of exporting and importing under the FTA and be able to receive day-to-day assistance. Export trade offices represent a logical approach to this problem, as do post-graduate centers which focus on international business and law.

Michigan would benefit by increasing its ability to physically transport imported and exported goods. Expansion of the trade infrastructure, including roads, bridges, tunnels and border crossings would allow Michigan to capitalize on our most valuable asset with regard to U.S.-Canadian trade -- our geographic proximity to the Canadian markets.

The FTA represents only the starting point in a quest to increase free trade. Its success or failure will in large part be determined by the extent to which the sovereign states capitalize on the FTA's opportunities or fail to do so. The study team's analysis of the FTA and its implication on Michigan laws yielded less required legislative modifications than originally anticipated. This is in large part due to the extensive grandfathering provisions found in the FTA. Despite this result, it is important to note that the grandfathering provisions were a practical requirement of implementing the FTA. It is said that the free trade zone of the United States has grown by ten percent as a result of the FTA. This figure is based on statistical population comparisons between Canada and the United States. Considering, however, that not all of the 50 contiguous states conduct any material amounts of trade with Canada, this percentage is probably low. If recalculated to reflect the market increase by comparing Canada's entire population to the population of those states that regularly conduct significant amounts of trade with Canada, the percentage would be much higher and would represent the true business opportunity to those states. Michigan, with

its close proximity to Canadian markets and its highly developed industrial base, has as much to gain as any other state. This study and the other actions underway should represent first steps in a continuing journey to place Michigan in the forefront of Canadian trade.

**APPENDIX A**  
**BIBLIOGRAPHY**

(1) THE OFFICE OF CANADA, INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, BENEFITS OF THE U.S. - CANADA FREE TRADE AGREEMENT FOR MICHIGAN (MARCH 7, 1988).

(2) United States - Canada Free Trade Agreement: Hearings on S. 776 Before the Subcomm. on Financial Affairs of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 16 (1988) (statement by the President).

(3) United States and Canada Forge Common Market, 2 NATIONAL CENTER FOR MANUFACTURING SCIENCES, FOCUS, March/April 1988, at 1-2.

(4) The Free Trade Agreement: Big Opportunities for U.S. Business, 2 NATIONAL CENTER FOR MANUFACTURING SCIENCES, FOCUS, March/April 1988, at 3.

(5) Members Share Views on Landmark Agreement, 2 NATIONAL CENTER FOR MANUFACTURING SCIENCES, FOCUS, March/April 1988, at 4-5.

(6) The FTA: What It Means to Canada, 2 NATIONAL CENTER FOR MANUFACTURING SCIENCES, FOCUS, March/April 1988, at 6-7.

(7) Some Voiced Opposition to FTA, 2 NATIONAL CENTER FOR MANUFACTURING SCIENCES, FOCUS, March/April 1988, at 7.

(8) THE OFFICE OF CANADA INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, BENEFITS OF THE U.S. - CANADA FREE TRADE AGREEMENT FOR THE STATE OF MICHIGAN (2d ed. March 1989).

(9) U.S. - CANADA FREE TRADE AGREEMENT: THE COMPLETE RESOURCE GUIDE (BNA) (1988).

## APPENDIX B

### CONTACT LIST

#### FEDERAL AGENCIES/OFFICIALS

- (1) Office: US Department of Commerce, Washington, D.C.  
Contact: Laura Gaughan  
Title: International Economist  
Telephone Number: (202) 377-3810  
Date Contacted: August 1, 1989  
Result: Forwarded data concerning Michigan compiled by Office of Canada/Department of Commerce regarding the impact of the FTA.
  
- (2) Office: United States Trade Representative (USTR), Washington, D.C.  
Contact: Chip Roh  
Title: Acting Assistant US Trade Representative for North America  
Telephone Number: (202) 395-5663  
Date Contacted: June 14, 1989  
Result: Mr. Roh was one of the attorneys active in drafting the FTA. Discussed grandfathering of existing laws under the FTA and the necessity to draft future laws in compliance with the FTA. Canada has already examined existing state laws to insure their compliance with the FTA and have not raised any issues regarding non-compliance.
  
- (3) Office: US Immigration and Naturalization Service, Detroit, MI  
Contact: James Montgomery  
Title: District Director  
Telephone Number: (313) 226-3250  
Date Contacted: May 30, 1989  
Result: Discussed professional licensing standards. Not all professions listed by the FTA require a license. In such situations, a case by case analysis is conducted examining each individual's educational background and professional experience. Michigan may want to consider licensing such people in order to facilitate a more uniform/orderly approach.

- (4) Office: Food and Drug Administration, Detroit, MI  
Contact: Jack Dempster  
Telephone Number: (313) 226-6260  
Date Contacted: July 6, 1989  
Result: Stated that all food, drugs, cosmetics, etc. are inspected by the Federal government as authorized by the Food, Drug and Cosmetic Act. Suggested that I contact Raymond W. Gill.
- (5) Office: Food and Drug Administration, Washington, D.C.  
Contact: Raymond W. Gill, Food & Drug Administration Center for Food Safety and Applied Nutrition  
Title: Deputy Director of Compliance  
Telephone Number: (202) 485-0162  
Date Contacted: August 14, 1989  
Result: Provided information about areas of harmonization of laws/regulations (under FDA jurisdiction) with Canada, and training programs and material available to states and Canada within FDA. Very knowledgeable about the 8 working groups within the Agriculture section of FTA. Currently is the co-chairman of the working groups on 'Food, Colour and Beverage Additives' and 'Unavoidable Contaminants'.
- (6) Office: Division of Field Investigations - Food & Drug Administration, Washington, D.C.  
Contact: Jim Lyda  
Title: Director, Import Operations Branch  
Telephone Number: (301) 443-6553  
Date Contacted: August 21, 1989  
Result: Discussed problems which occur in imports/exports which are subject to FDA regulations, crossing the border.
- (7) Office: Division of Federal State Relations - Food & Drug Administration, Washington, D.C.  
Contact: Gary German  
Title: Director, State Training and Information Branch  
Telephone Number: (301) 443-6553  
Date Contacted: August 21, 1989  
Result: Provided information about state training programs and the sharing of training information with Canada.

- (8) Office: U.S. Dept. of Commerce International Trade Administration  
Contact: Don Schilke  
Title: Director  
Telephone Number: (313) 226-3650  
Date Contacted: July 5, 1989  
Result: With regard to specific FTA studies or efforts, Schilke was not aware of any efforts undertaken within the Commerce Department. He feels the general emphasis has been on broad sweeping explanations of the legislation which have now been "put to bed". He is now beginning to develop "you-do-it" workshops on the FTA. A likely target for such efforts would be a border crossing city like Port Huron. The emphasis would be on providing small business interests and first time exporters with revised schedule B tariff amounts so that they can conduct their own personalized analysis of how the FTA might offer new opportunities. He feels the FTA can only benefit a company if that company does an economic study of how the FTA impacts its products. Schilke feels there is no consensus on a 10 year picture of the effects of the FTA. He feels that products will be the easiest segment to measure since the tariff reductions are tangible. It is his estimate that there are already close to 400 applications pending whereby joint U.S.-Canadian interests have requested acceleration of tariff reductions. He feels this is indicative of the tariff reduction domination in the FTA. When asked whether there were any changes that could be made to Michigan laws in particular, Schilke referred to a U.S. Department of Commerce study which placed Michigan in the top 3 of the contiguous 48 states for overregulation.
- (9) Office: U.S. Department of Commerce Office of Canada, Washington D.C.  
Contact: General Secretary  
Telephone Number: (202) 377-2000  
Date Contacted: July 5, 1989  
Result: Agreed to supply:  
(1) Business America, 1/30/89, International trade magazine, dealing exclusively with the FTA. 32 pages.  
(2) Your Market is about to grow by 10 percent; Are you ready?, Article by W.H. Cavin, Director U.S. Dept. of Commerce OOC/ITA.  
(3) FET 89-13 Foreign Economic Trends and their implications for the U.S., semiannual trade and economic statistics prepared by the American Embassy Ottawa, Feb 1989.  
(4) Marketing in Canada, Overseas Business Reports, prepared by OOC in cooperation with American Embassy Ottawa, 1988.

(5) Summary of the U.S.-Canada Free Trade Agreement (already obtained from congressional hearings) 42p.

(6) Overview of Tariff Removal under the FTA, U.S. Department of Commerce, March 1988, 12p.

(10) Office: U.S. Department of Commerce, Bureau of the Census, Southfield, MI

Contact: Kurt R. Metzger

Title: Information Specialist

Telephone Number: (313) 354-4654

Date Contacted: July 19, 1989

Result: Other than broad sweeping statistical abstracts, the U.S. Bureau of the Census has no available data on pre-FTA Michigan economics or the likely impact of the FTA on Michigan's economy. Was not able to provide any insight into studies, research, etc...

(11) Office: United States Trade Representative (USTR), Washington, D.C.

Contact: Russell LaMantia

Title: Assistant U.S. Trade Representative for Canadian Affairs

Telephone Number: (202) 395-5663

Date Contacted: October 13, 1989

Result: Discussed the provision in Article 1406 stating that the FTA does not apply to services indirectly supplied by a third country. He stated that the question whether the Agreement would protect a foreign corporation with an affiliate incorporated in Michigan, like a Japanese management consulting firm, is unclear, but would probably violate the intent of the Agreement, regardless whether the firm was acting independently or hired by Ford and seeking to perform services for Ford in Canada.

(12) Office: U.S. Treasury Department, Washington, D.C.

Contact: Phil Bareda

Title: Deputy Assistant Secretary for Trade & Investment Policy

Telephone Number: (202) 566-2748

Date Contacted: October 17, 1989

Result: The intent of Article 1406 is to prevent "shell" operations that appear to be based in Michigan, but are actually based in a third country. For instance, if an automobile company hired a Japanese engineering company part-time and the engineering services were

actually performed in Japan and "run through a Michigan post office box address, the company could not benefit from the FTA protections when contracting out its services in Canada. However, if the company were incorporated in Michigan and the services were performed in the State -- i.e., if the "real economic content" was Michigan -- the benefits of the FTA would extend to the corporation's employees providing services in Canada.

(13) Office: Food and Drug Administration, Washington, D.C.

Contact: Dr. John Vanderveen

Title: Director, Division of Nutrition

Telephone Number: (202) 245-1064

Date Contacted: October 18, 1989

Result: Knowledgeable about eight working groups within the Agriculture section of the FTA. Co-chairman of working group on Packaging and Labelling of Agricultural, Food, Beverage and Certain Related Goods for Human Consumption. His advice to American firms is to become familiar with what is required to do business in Canada.

## STATE OF MICHIGAN AGENCIES/OFFICIALS

- (1) Office: Washington Office of Governor James Blanchard  
Contact: James Callow  
Title: Legislative Analyst  
Telephone Number: (202) 624-5840  
Date Contacted: May 30, 1989  
Result: Retroactive changes to Michigan laws are not required although changes to existing statutes may enhance our competitive position. Suggested areas of inquiry include trucking/transportation and Detroit Port expansion.
  
- (2) Office: Michigan Board of Law Examiners, Lansing, MI  
Contact: Dennis Donohue  
Title: Assistant Secretary  
Telephone Number: (517) 334-6992  
Date Contacted: May 31, 1989, June 7, 1989  
Result: Because Michigan requires residence in one of the 50 states or in the District of Columbia to qualify for licensure as an attorney and graduation from an ABA approved school, graduates of a Canadian law school cannot practice law in Michigan.
  
- (3) Office: Michigan Attorney General's Office, Lansing, MI  
Contact: Jann Baugh  
Title: Assistant in Charge of Agriculture and International Trade  
Telephone Number: (517) 373-6514  
Date Contacted: June 8, 1989  
Result: The Attorney General's office has drafted amendments to the Michigan Export Development Authority statute and submitted a revised statute to the Legislature for approval.
  
- (4) Office: Legislative Services Bureau, Lansing, MI  
Contacts: Gary Gulliver/Carol Cukier  
Titles: Director of Legal Research/Legal Counsel  
Telephone Number: (517) 373-2339; (517) 373-9973  
Result: The Legislative Services Bureau was able to provide invaluable assistance in the form of searches for statutes in the Michigan Questor database.

- (5) Office: Michigan Board of Nursing, Lansing, MI  
Contact: Marty Martin  
Title: Licensing Supervisor and Examiner  
Telephone Number: (517) 373-1600  
Date Contacted: June 8, 1989  
Result: There is no residency requirement for a Michigan nursing license. Foreign applicants and Michigan residents are treated equally and hence, the FTA poses no problems in this area.
- (6) Office: Michigan Board of Architects, Lansing, MI  
Contact: Jack C. Sharpe  
Title: Licensing Administrator  
Telephone Number: (517) 335-1669  
Date Contacted: June 8, 1989  
Result: Canadian degrees are not accepted by the Board for licensure because they are not accredited by the National Architectural Accrediting Board (NAAB). In addition, Canadians must apply to sit for a post-graduation competency exam after applying to have their academic credentials certified. Approval process can take three to four years and acts as a major deterrent to Canadian architects wishing to practice in Michigan. The National Council of Architectural Registration is working to draft mutually recognized licensing requirements and professional standards.
- (7) Office: Michigan Travel Bureau, Lansing, MI  
Contact: John Savich  
Title: Director  
Telephone Number: (517) 373-0670; (517) 335-1879  
Date Contacted: July 27, 1989  
Result: No specific comments or suggestions on the FTA.
- (8) Office: Michigan Department of Licensing and Regulation, Lansing, MI  
Contact: Hal Ziegler  
Title: Deputy Director, Office of Legislation and Administrative Law Services  
Telephone Number: (517) 373-1866  
Date Contacted: July 13, 1989  
Result: Each profession within the department is constitutionally mandated to have its own Board. The Boards must meet periodically

and make recommendations to the department. Mr. Ziegler emphasized some factors that should be considered when addressing legislative changes: (a) although the requirements for many professions are becoming nationalized, some are not e.g. real estate agents, residential builders; (b) medicine has a statutory provision specifically giving reciprocity to Canadian doctors and Canada administers the same exams; (c) there are outdated and, perhaps, unnecessary registration requirements, but they cannot be eliminated. Those that are regulated want to be because state certification enables them to use certain titles, charge more money for their services, and, in some cases, be covered under insurance policies.

- (9) Office: Michigan Export Development Authority, Lansing, MI  
Contact: Randy Harmson  
Title: Executive Director  
Telephone Number: (517) 373-1054  
Date Contacted: July 5, 1989

Result: Stated that the gist of the draft amendment to the MEDA statute is to transfer authority from the Departments of Agriculture and Commerce to the MEDA with the goal being to create one organization in charge of all international trade activities within the state (see Senate Bill #369, Fair Trade and Marketing Act #23, and Act #24. Furthermore, he sees Canada the big winner of the FTA because of increased opportunities due to the expansion in market size. He also stated that nothing has been decided regarding the FTA and agriculture. Sees future problems as follows: potential protectionist measures in both countries; labor law problems; re-negotiations by U.S. - Canada Trade Commission. Future concerns: infrastructure (is it adequate to handle trade?); border stations; inspectors (are there enough?); parity in currency.

- (10) Office: Michigan Department of Agriculture, Lansing, MI  
Contact: Ken Rauscher  
Title: Manager, Pesticide & Plant Pest Management Division  
Telephone Number: (517) 373-1087  
Date Contacted: June 14, 1989, July 5, 1989

Result: Stated that Michigan and Canada do not have the same kind of grading systems (re: seed, feed, and fertilizers). Canada's law is broader, but Michigan allows Canada's goods to be imported into Michigan provided they meet our criteria. Canada is more restrictive in letting seeds come into their country, because they require all seed

to be registered. Feed and fertilizer are about the same standard as the U.S. He also stated that the current system has caused no problems. There are presently no reciprocal training programs for inspectors or testing. There are groups, however, that meet yearly, and have representatives from all fifty states and Canada.

- (11) Office: Michigan Department of Agriculture, Lansing, MI  
Contact: Al Hafner  
Title: Food Division  
Telephone Number: (517) 373-1060  
Date Contacted: June 14, 1989  
Result: Stated that Michigan has not made its own effort to harmonize criteria regarding training and inspecting for food division. He stated that there is a training session held twice a year by the Central State Association of Food and Drug Officials, which people from both Michigan and Canada attend.
- (12) Office: Michigan Department of Agriculture, Animal Industry Division  
Contact: Dr. Muir  
Title: Assistant State Veterinarian  
Telephone Number: (517) 373-1077  
Date Contacted: August 15, 1989  
Result: Stated that Michigan's and Canada's laws regarding animals import/export are not equivalent. However, this is not a significant barrier to trade. Department secretary also provided information regarding feed and vaccine requirements.
- (13) Office: Michigan Department of Agriculture - Pesticide and Plant Pest Management Division  
Contact: Keith Creagh  
Title: Interim Director  
Telephone Number: (517) 373-1087  
Date Contacted: August 24, 1989  
Result: Provided information about the differences in Michigan and Canadian laws and regulations. He stated they are not that similar and that some of the Canadian laws should be examined because they act as a barrier to trade. Stated that Canada publishes export certification manual listing which agricultural products are prohibited. Also knowledgeable on what model legislation Michigan has adopted and is

currently looking at. At the current time, Michigan's laws are more stringent than most of the national models.

- (14) Office: Michigan Department of Transportation  
Contact: John Lanum  
Title: Unit Supervisor, Project Development Planning  
Telephone Number: (517) 335-2949  
Date Contacted: August 21, 1989  
Result: Talked about some problems with transportation and the trade industry. Stated that Michigan has requested a study of 3 crossings (Ontario, Blue Water Bridge, and Ambassador Bridge) to determine the impact of the FTA. This includes traffic between Michigan and Ontario. This report is to be completed in 1990.
- (15) Office: Michigan Department of Transportation  
Contact: Jim Roach  
Title: Manager of Freight Transportation Planning  
Telephone Number: (517) 373-3335  
Date Contacted: August 21, 1989  
Result: Discussed problems of transportation as related to freight, especially rail crossing between Canada and Michigan. He stated that a lot of goods destined for overseas shipment are shipped to ports via Michigan rail tunnels to Canada.
- (16) Office: Michigan Public Service Commission  
Contact: Mitchell Heiser  
Title: Director of Planning, Policy and Evaluation  
Telephone Number: (517) 334-6240  
Date Contacted: July 5, 1989  
Result: Unaware of any studies done regarding the impact of the FTA on Michigan energy supplies or business in general. Heiser sees very little change coming down the pike as a result of the FTA. He does not see the U.S. (or Michigan) becoming an exporter of energy and only sees the FTA as an assurance of "intertied" energy supplies. In his estimation Michigan will remain "well above average" in terms of energy costs among the states. With regard to the elimination of the avoided cost formula, Heiser feels that only utilities that are looking for 20 to 30 year supplies of energy for new markets were charged under that formula. As an occasional interconnect/intertie user during peak periods, Michigan was not subject to the formula. He feels that

Michigan will remain a net importer. When queried on whether Michigan could revise its DNR regulations to allow hydroelectric power plants, Heiser said that studies have shown that Michigan's rivers, dams and tributaries would not provide enough of a flow to make the investment worthwhile.

(17) Office: Michigan Department of Commerce, Lansing, MI

Contact: Greg Main

Title: Director, Manufacturing Development Group

Telephone Number: (517) 373-0601

Date Contacted: July 7, 1989

Result: Reduced some of the U.S. Department of Commerce projections as to expanding areas under the FTA down to a Michigan Microeconomic level. We reviewed a listing of anticipated "big areas" expected to benefit under the FTA and Greg provided his insight as to which sectors he feels Michigan is currently strong in, which sectors Michigan could become strong in and sectors in which Michigan has no hope of becoming a dominant force. His insight has been incorporated into the section regarding business opportunities under the FTA. Expected strong areas: (summary) Automobiles and parts, CAD/CAM and Robotics, Manufacturing computer applications, disposable plastic medical supplies, Furniture (metal), Biotechnology chemicals, Plastics and resins and auto related textiles and apparels.

(18) Office: Michigan Public Service Commission

Contact: Bill Celio

Title: Director of Communications Division

Telephone Number: (517) 334-6380

Date Contacted: October 19, 1989

Result: Discussed telecommunications laws and regulations. Aware of none that effectively discriminate against nonresidents' or aliens' use or ownership of state lines and exchanges.

## OTHER STATES CONTACTED

### ILLINOIS

- (1) Office: State of Illinois Governor's Office  
Contact: Marsha Erixon  
Title: Assistant to the Governor  
Telephone Number: (312) 917-6725  
Date Contacted: June 8, 1989  
Result: Illinois has not conducted a similar assessment. Ms. Erixon will check with people who are familiar with this area, and contact us if there is anything worth reporting.
  
- (2) Office: Illinois Bar Association  
Contact: Mary Lou Lowder-Kent  
Title: Director, Department of Legislative Affairs  
Telephone Number: (217) 525-1760  
Date Contacted: June 13, 1989  
Result: No study is being conducted by the Illinois Bar Association. No legislative revision has been undertaken.
  
- (3) Office: Legislative Research Unit, Illinois State Legislature  
Contact: Robert Bayless  
Title: Staff Scientist  
Telephone Number: (217) 782-6851  
Date Contacted: June 15, 1989  
Result: Illinois has not looked into any law revision, or the effect of the FTA on Illinois.

### NEW YORK

- (4) Office: New York State Department of Economic Development  
Contact: Jonathan Doh  
Title: Policy Analyst  
Telephone Number: (518) 473-9748  
Date Contacted: June 5, 1989  
Result: NY had an inter agency working group looking at business marketing, tourism, etc. Formal, but not comprehensive. Did a fairly cursory review of statutes and regulations which may not be in compliance, and found none. USTR informed them that NY had no

problems with state compliance. They remain in touch with the National Governors' Association, and have not heard of any other states having problems. VERY interested in our study, and would like a copy of the final report.

- (5) Office: New York Bar Association  
Contact: Michael Maney  
Title: Chairman, International Law and Practice Section  
Telephone Number: (212) 558-3800  
Date Contacted: June 15, 1989  
Result: NY Bar Canada Committee considered doing a study, but they have not done so yet. They are in touch with the Governor's office, and were told that it was not really necessary to conduct such a study. Mr. Maney is also very interested in what we are doing, and will ask the Canada Committee of the NY Bar to consider conducting a similar study for the state of NY.

## OHIO

- (6) Office: Canada - US Law Institute, Case Western, Cleveland, OH  
Contact: Henry King  
Title: U.S. Director of Canada-US Law Institute  
Telephone Number: (216) 368-2096  
Date Contacted: August 17, 1989  
Result: No study is being conducted by their Institute for the state of Ohio, and Professor King is not aware of any such study being done in the state.

## CANADIAN CONTACTS

- (1) Office: Canadian Consulate General, Detroit, MI  
Contact: George Costaris  
Title: Economic Officer  
Telephone Number: (313) 567-2340  
Date Contacted: June 20, 1989  
Result: FTA provisions are designed so as not to violate provincial or state laws, hence, there are probably few existing laws in either country that would be in violation. He knows of no Michigan laws that are not in compliance. Mr. Costaris stated that if there are such laws, the Canadians will usually bring them to the state's attention. However, the states themselves must be sensitive to specific provisions of the FTA (investment particularly) when enacting new laws, to insure that they are not discriminatory against Canadians. Area of greatest concern: enactment of new laws. States should be aware of various provisions of the FTA, in order to be familiar with those areas where Canada has to be accorded national treatment. Mr. Costaris also stated that the FTA is not a free trade agreement in all areas, and was designed as such to protect certain industries, e.g. cultural industry, transportation, etc.
  
- (2) Office: Ministry of the Attorney General, Toronto, Canada  
Contact: John Gregory  
Title: Deputy Director  
Telephone Number: (416) 326-2503  
Date Contacted: June 2, 1989  
Result: The Canadian federal government passed a fairly extensive bill implementing the FTA, and few requirements were put on U.S. states or Canadian provinces. Mr. Gregory's office also examined existing provincial statutes and discovered nothing requiring modification. There is really nothing Ontario has to do to comply with the FTA, other than amending its wine pricing (administrative matter). Most other things concerning states and provinces are prospective only. At this point the focus should be on knowing where each party's hands are tied in reference to future legislation.
  
- (3) Office: Ministry of Industry, Trade and Technology (MITT),  
Toronto, Canada  
Contact: Leslie Delagran

Title: Manager, Trade Policy Branch

Telephone Number: (416) 965-2656

Date Contacted: June 7, 1989

Result: The MITT only looked at the direct effect of the FTA on Ontario. Alcoholic beverage distribution seemed to be the only area that could pose a problem. No study was conducted to determine what sorts of regulations could be restraining trade. Areas Canadians have problems with: (a) Detroit/Buffalo customs. This however, is not due to state regulations, but rather as a result of federal law. (b) There has been a problem getting access to US products in the steel industry. This MITT and the state of Michigan have set up a Michigan/Ontario Group which is going to look at the following areas: economic opportunities (what type exist); how to create a more competitive investment environment; future negotiations; transportation between Michigan and Ontario (is a "disaster" - operational changes are needed). She will discuss our study with the Director of the MITT and have him describe our endeavor to the MI/Ontario Group.

(4) Office: University of Windsor Law School, Windsor, Canada

Contact: Maureen Irish

Title: Professor of Law

Telephone Number: (519) 253-4232

Date Contacted: June 13, 1989

Result: Professor Irish is not familiar with the specifics regarding state and federal laws that could be changed to comply with, or take advantage of the FTA. She did however explain the differing political attitudes (in Canada) towards the FTA, i.e. Ontario's opposition to it, and the federal government marketing it as the "greatest thing since sliced bread". Professor Irish was also very helpful in directing us to various studies that have been published about the FTA.

(5) Office: Office Agriculture Canada

Contact: Russell Knapp

Title: Program Officer, Food Products Inspection Branch

Telephone Number:

Date Contacted: July 20, 1989

Result: Stated that U.S. and Canada seed, feed, and fertilizer laws are not that different, nor are the methods for inspection, etc. Gave names of three persons from Ottawa who are attendees of the American Association of Seed, Feed, and Pest Control.

## PRIVATE SECTOR

- (1) Office: Strategic Policy, Inc., Washington, D.C.  
Contact: William Merkin  
Title: Senior Vice-President  
Telephone Number: (202) 659-0878  
Date Contacted: May 31, 1989  
Result: Mr. Merkin used to work at the USTR, and was involved with the drafting of the FTA. He stated that service/trade regulations for the most part are grand-fathered. Auto Pact is grandfathered -- only a few minor changes were made. One area that is NOT grandfathered: Alcoholic Beverage Distribution. There may be problems if this area is state regulated. Furthermore, we should be sensitive to so called "conservation measures" which may really be trade barriers in disguise.
  
- (2) Office: Elm International, Lansing, MI  
Contact: Marc Santucci  
Title: President  
Telephone Number: (517) 482-3543  
Date Contacted: June 12, 1989  
Result: Mr. Santucci previously worked at the USTR and the Michigan Department of Commerce and presently serves as the main resource person for the Governor's committee working on the FTA. He is also a member of the Michigan/Ontario Group. He suggested the following areas where Michigan laws may be modified to take full advantage of the FTA: laws pertaining to national treatment; banking; insurance; service industry where states have purview; interstate/intrastate trucking regulations; various provisions of "Buy Michigan" laws.
  
- (3) Office: Greater Detroit Chamber of Commerce, Detroit, MI  
Contact: Pamela Miller  
Title: Manager, Business Development  
Telephone Number: (313) 964-4000  
Date Contacted: August 1, 1989  
Result: Ms. Miller stated that no one can predict the impact the FTA will have, hence, there is a wait and see attitude: see what the next ten years will bring as a result of the FTA being enacted. Their office is initiating a marketing campaign promoting office development here: to encourage foreign countries to base their US/North America offices

in this area (due to our proximity to Canada). They are also developing a marketing campaign to promote the FTA.

- (4) **Office:** Michigan Society of Architects, Detroit, MI  
**Contact:** Rae Dumke  
**Title:** Executive Director  
**Telephone Number:** (313) 965-4100  
**Date Contacted:** July 19, 1989  
**Result:** Ms. Dumke personally knows of an American architect who is trying to get licensed in Ontario. Ontario requires a letter stating that the firm is licensed to practice, and Michigan grants no such license, but merely requires that two-thirds of the principals in the firm have an individual license. She referred the applicant to Mr. Sharpe of the Michigan Board of Architects. She does not know of any other legal impediments to the free trade in architectural services, but gave the names of contacts in several state firms that do business in Canada.
- (5) **Office:** Smith, Hinchman & Grills, Detroit, MI  
**Contact:** Joe Uicker  
**Title:** Architect  
**Telephone Number:** (313) 964-3000  
**Date Contacted:** July 20, 1989  
**Result:** States that the real problems are not related to initial registration, but when the licensed alien attempts to obtain reciprocity in a state/province of the other country. Canada and the U.S. have a different policy towards exams. The U.S. requires a passing grade on an exam after graduation and an internship; Canada requires no such exam, but merely graduation from an accredited university. The general rule for reciprocity within the U.S. is that the applicant receive the initial license at a time when the two states have the same licensing requirements. Since the U.S. and Canada do not have the same requirements, reciprocity cannot be granted Canadian architects under this rule.
- (6) **Office:** Smith, Hinchman & Grills, Detroit, MI  
**Contact:** Tito Marzotto  
**Title:** Engineer  
**Telephone Number:** (313) 964-3000  
**Date Contacted:** July 24, 1989

**Result:** Mr. Marzotto is a member of the Michigan Society of Professional Engineers, part of the National Society. There are currently three national organizations attempting to standardize professional standards and licensing requirements in the U.S. and between the U.S. and other countries. The goal is to develop uniform requirements for a "U.S. Designated Engineer" for purposes of providing engineering services internationally. The coalition has been meeting regularly with the Canadian Council of Professional Engineers and has set a two year time table to establish mutual recognition of national professional standards and licensing requirements.

Mr. Marzotto identified a number of problem areas that interfere with the trade of engineering services:

(a) different licensing requirements -- (1) education: all Michigan engineers must have graduated from an ABET accredited program; Ontario schools are not accredited by ABET; (2) exam: all Michigan engineers must pass a state exam; Ontario engineers have no exam requirement (their school programs are one year longer). Proposal: for Ontario to accept ABET accreditation and passing grade on the first part of the exam; for Michigan to accept graduation from a Canadian-approved program.

(b) Canada may have a residency requirement for corporate officers. A majority of the corporate officers must be Ontario residents for the business to be incorporated in Canada.

(c) Duties on intellectual documents brought into either country.

(d) Immigration requirements to get a work visa.

(7) **Office:** Southeast Michigan Chapter of the Michigan Banker's Association, Detroit, MI

**Contact:** Parker Moore

**Title:** Executive Director

**Telephone Number:** (313) 968-0914

**Date Contacted:** July 20, 1989

**Result:** He referred me to the Michigan Banker's Association in Lansing because it is involved with legislative issues and action. See below.

- (8) Office: Michigan Banker's Association, Lansing, MI  
Contact: Don Higgins  
Title: Senior Vice President & Staff Counsel  
Telephone Number: (517) 485-3600  
Date Contacted: August 2, 1989  
Result: His organization did a preliminary review and their initial impression was that not much can be done in Michigan to benefit from the FTA provisions. For example, NBD owns a subsidiary branch in Canada which, in comparison to the huge national Canadian banks, is small and not a real competitor. There is not much that can be done with Michigan law to improve the state's marketability and competitive position. However, Michigan banks that own Canadian affiliates operating in Michigan could benefit from amendment of Michigan laws to allow those affiliates to get into the insurance business in the state, as Canadian banks are allowed to do so in Canada.
- (9) Office: American Association of Feed Control Officials  
Contact: Barb Sims  
Title: Secretary, Member  
Telephone Number: (409) 845-1121  
Date Contacted: August 15, 1989  
Result: Provided information about AAFCO, annual meetings, training, dealings with Canada, and model legislation proposed by the association.
- (10) Office: American Association of Seed Control Officials, Oregon  
Contact: Dave Turner  
Title: Secretary, Member  
Telephone Number: (503) 378-3774  
Date Contacted: August 21, 1989  
Result: Provided information about AASCO, annual meetings, dealings with Canada, reciprocal training, and model legislation for seeds.
- (11) Office: American Association of Plant Food Control Officials, Kentucky  
Contact: David Terry  
Title: Secretary, Member  
Telephone Number: (606) 257-2668  
Date Contacted: August 14, 1989

Result: Provided information about AAPCO, annual meetings, training, dealings with Canada, and model legislation.

- (12) Office: American Association of Pesticide Control Officials (AAPCO), Virginia

Contact: Harry Rust

Title: Secretary, Member

Telephone Number: (804) 288-8181

Date Contacted: August 15, 1989

Result: Provided information about the structure of AAPCO, and model legislation it offers for a guide to the states' and Canada.

- (13) Office: University of Michigan

Contact: Prof. Robert Stern

Title: Professor of Economics

Telephone Number: (313) 764-3490

Date Contacted: July 5, 1989

Result: Professor Stern was vacationing on the East Coast. With approval from Prof. Stern, his secretary, Judy Brown (763-4214), was able to provide an Institute for Public Policy Studies study done by Stern and Prof. D. Brown of Tufts Univ entitled: Evaluating the impacts of U.S.-Canadian Free Trade: What do the multisector trade models suggest (IPPS paper number 249, 5/86). The paper is a complex economic study.

- (14) Office: Wayne State University School of Business

Contact: David Verway

Title: Professor, Editor, Michigan Statistical Abstracts Annual

Telephone Number:

Date Contacted: July 19, 1989

Result: Prof. Verway referred the team to the U.S. Department of Commerce (specifically the Foreign Economic Trends publication, supra).

PROPOSED AMENDMENTS TO  
PROFESSIONAL SERVICE CORPORATION ACT

Section 1. Sections 2, 4, 5, 9, 10, 13 and 15 of Act 192 of the Public Acts of 1962 are amended to read as follows:

Sec. 2(b) "Professional corporation" means a corporation which is organized under this act for the sole and specific purpose of rendering 1 or more professional services and which has as its shareholders only LICENSED PERSONS ~~individuals who themselves are duly licensed or otherwise legally authorized within this state to render the same professional services as the corporation,~~ or the personal representatives or estates of individuals as provided in section 10.

SEC. 2(c) "LICENSED PERSON" SHALL MEAN ANY INDIVIDUAL WHO IS DULY LICENSED OR ADMITTED TO PRACTICE HIS OR HER PROFESSION BY A COURT, DEPARTMENT, BOARD, COMMISSION OR OTHER AGENCY OF THIS STATE OR UNDER THE LAWS OF ANOTHER JURISDICTION TO RENDER A PROFESSIONAL SERVICE WHICH IS OR WILL BE RENDERED BY THE PROFESSIONAL CORPORATION OF WHICH HE OR SHE IS, OR INTENDS TO BECOME, AN OFFICER, DIRECTOR, SHAREHOLDER, EMPLOYEE OR AGENT, AND ANY CORPORATION ALL OF WHOSE SHAREHOLDERS ARE LICENSED PERSONS.

Sec. 4. ~~An individual~~ A LICENSED PERSON or group of ~~individuals licensed~~ LICENSED PERSONS ~~or otherwise legally authorized to render professional services within this state~~ may organize and become a shareholder or shareholders of a professional corporation for pecuniary profit under this act for the purpose of rendering 1 or more professional services.

Sec. 5. No corporation organized and incorporated under this act may render professional services WITHIN THIS STATE except through its officers,

employees and agents who are duly licensed or otherwise legally authorized to render such professional services within this state. This provision shall not be interpreted to include in the term employee, secretaries, bookkeepers, technicians and other assistants who are not usually and ordinarily considered by custom and practice to be rendering professional services to the public for which a license or other legal authorization is required.

Sec. 9. If an officer, shareholder, agent, or employee of a corporation organized under this act ~~who has been rendering professional service to the public~~ becomes legally disqualified to render THE professional services ~~within this state~~ RENDERED BY THE CORPORATION or accepts employment that, pursuant to existing law, places restrictions or limitations upon his OR HER continued rendering of professional services, he shall sever within a reasonable period all employment with and financial interests in the corporation. A corporation's failure to require compliance with this provision shall constitute a ground for the forfeiture of its articles of incorporation and its dissolution. When a corporation's failure to comply with this provision is brought to the attention of the ~~corporation and securities commission~~ DEPARTMENT OF COMMERCE, it shall certify that fact to the attorney general for appropriate action to dissolve the corporation.

Sec. 10. No shares of a corporation organized under this act shall be sold or transferred except to a individual who is eligible to be a shareholder of such corporation or to the personal representative or estate of a deceased or legally incompetent shareholder. The personal representative or estate of such shareholder may continue to own such shares for a reasonable period but shall not be authorized to participate in any decisions concerning the rendering of professional service. The articles of

incorporation or bylaws may provide specifically for additional restrictions on the transfer of shares and may provide for the redemption or purchase of such shares by the corporation or its shareholders at prices and in a manner specifically set forth. ~~The provisions dealing with the purchase or redemption by the corporation of its shares may not be invoked at a time or in a manner that would impair the capital of the corporation.~~

Sec. 13. Act No. 284 of the Public Acts of 1972, as amended, being sections 450.1101 to 450.2099 of the Michigan Compiled Laws, shall be applicable to a corporation organized pursuant to this act except to the extent that any of the provisions of this act are interpreted to be in conflict with the provisions of that act. In the event of conflict the provisions and sections of this act shall take precedence with respect to a corporation organized pursuant to the provisions of this act. A professional corporation organized under this act shall consolidate or merge only with another ~~domestic professional corporation organized under this act to render the same specific professional service or services and a merger or consolidation with any foreign corporation is prohibited~~ WHOSE SHAREHOLDERS ARE LICENSED PERSONS.

Sec. 15. The annual report of a professional corporation shall list the names and post office addresses of all shareholders and shall certify that ~~all shareholders are duly licensed or otherwise legally authorized in this state to render the same professional service as the corporation~~ THE CORPORATION MEETS THE REQUIREMENTS OF SECTION 2(b).

# SENATE BILL No. 369

April 25, 1989, Introduced by Senator ARTHURHULTZ and referred to the Committee on Economic Development.

A bill to amend sections 2, 3, 4, 5, 7, 8, 10, 14, and 15 of Act No. 157 of the Public Acts of 1986, entitled "Michigan export development act," being sections 447.152, 447.153, 447.154, 447.155, 447.157, 447.158, 447.160, 447.164, and 447.165 of the Michigan Compiled Laws; and to add section 8a.

## THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Section 1. Sections 2, 3, 4, 5, 7, 8, 10, 14, and 15 of Act  
2 No. 157 of the Public Acts of 1986, being sections 447.152,  
3 447.153, 447.154, 447.155, 447.157, 447.158, 447.160, 447.164,  
4 and 447.165 of the Michigan Compiled Laws, are amended and  
5 section 8a is added to read as follows:

6 Sec. 2. As used in this act:

7 (a) "Authority" means the Michigan export development  
8 authority created by section 3.

SENATE BILL No. 369

1 (b) "Board" means the board of directors of the authority  
2 established by section 4.

3 ~~(c) "Eligible export loan" means a loan to a participating~~  
4 ~~financial institution located within this state the proceeds of~~  
5 ~~which are restricted to the financing of eligible export~~  
6 ~~transactions.~~

7 (C) ~~(d)~~ "Eligible export transaction" means the sale of  
8 goods or services, or the development of goods or services for  
9 sale, outside of the United States by a person doing business in  
10 this state, which goods or services, in the judgment of the  
11 authority, have ~~at least 5%~~ A SUFFICIENT PORTION of their  
12 value created within this state and which sale or development, in  
13 the judgment of the authority, creates or maintains employment in  
14 this state.

15 (D) "EXPORT INSURANCE" MEANS INSURANCE PROVIDED BY THE  
16 AUTHORITY TO PROTECT AN EXPORTER AGAINST A FOREIGN BUYER'S FAIL-  
17 URE TO PAY FOR GOODS OR SERVICES FOR POLITICAL OR COMMERCIAL  
18 REASONS. THE AMOUNT OF THE LOSS COVERED FOR EACH TRANSACTION AND  
19 PARTICULAR RISKS SHALL BE DETERMINED BY THE AUTHORITY.

20 (E) "GRANT" MEANS AN AMOUNT OF MONEY PROVIDED BY THE AUTHOR-  
21 ITY TO A NONPROFIT ORGANIZATION.

22 (F) ~~(c) "Guaranteed funding"~~ "GUARANTEE" means a guarantee  
23 against loss, in whole or in part, of principal of and interest  
24 on an eligible export loan. The guarantee may include, without  
25 limitation, insurance against loss up to the guarantee amount. A  
26 single guarantee may encompass several individual eligible export  
27 loans or eligible export transactions.

1 (G) ~~(f)~~ "Guarantee amount" means the maximum amount  
2 payable under ~~guaranteed funding~~ A GUARANTEE which amount shall  
3 be specifically set forth in writing ~~, executed by the chair~~  
4 ~~person and secretary of the board,~~ at the time the guarantee is  
5 entered into by the authority.

6 (H) "LOAN" MEANS AN AMOUNT OF MONEY PROVIDED BY THE AUTHOR-  
7 ITY WHICH IS TO BE REPAID AT THE INTEREST RATE OR RATES, TERMS,  
8 AND OTHER CONDITIONS AS DETERMINED BY THE AUTHORITY. IF THE LOAN  
9 IS TO A PARTICIPATING FINANCIAL INSTITUTION, THE CONDITIONS OF  
10 THE LOAN SHALL BE ESTABLISHED BY THE INSTITUTION AND THE  
11 AUTHORITY.

12 (I) ~~(g)~~ "Participating financial institution" means a bank  
13 as defined by the banking code of 1969, Act No. 319 of the Public  
14 Acts of 1969, being sections 487.301 to 487.598 of the Michigan  
15 Compiled Laws, an agency or branch of a foreign banking corpora-  
16 tion licensed by the commissioner of the financial institutions  
17 bureau, or a national bank, federal savings and loan association,  
18 or federal credit union located within this state that has been  
19 approved by the board to participate in guaranteed funding for  
20 eligible export loans and transactions within the purposes of  
21 this act.

22 (J) "PERSON" MEANS AN INDIVIDUAL, SOLE PROPRIETORSHIP, PART-  
23 NERSHIP, JOINT VENTURE, PROFIT OR NONPROFIT CORPORATION, PUBLIC  
24 OR PRIVATE UNIVERSITY OR COLLEGE, PUBLIC UTILITY, OR AN ASSOCIA-  
25 TION OF PERSONS ORGANIZED FOR AGRICULTURAL, COMMERCIAL, OR INDUS-  
26 TRIAL PURPOSES.

1       Sec. 3. (1) The Michigan export development authority is  
2 created as a body politic and corporate within, but not as a part  
3 of, the department of agriculture. The authority shall exercise  
4 the authority's prescribed statutory powers, duties, and func-  
5 tions independently of the director of the department of agricul-  
6 ture and independently of the commission of agriculture.  
7 ~~However, the~~ THE budgeting, procurement, and related functions  
8 of the authority shall be performed under the direction and  
9 supervision of the director of the department of agriculture.

10       (2) The purpose of the authority is:

11       (a) To assist, promote, encourage, develop, and advance eco-  
12 nomic prosperity and employment throughout this state by foster-  
13 ing the expansion of exports of goods and services to foreign  
14 purchasers.

15       (b) To cooperate and act in conjunction with other organi-  
16 zations, public and private, the objects of which are the promo-  
17 tion and advancement of export trade activities in this state.

18       (c) To establish a source of ~~guaranteed funding~~ LOANS,  
19 GRANTS, GUARANTEES, and EXPORT insurance to support export devel-  
20 opment not otherwise available.

21       (d) To provide information and referrals to, and to act as a  
22 clearinghouse for, potential and existing exporters.

23       Sec. 4. (1) The governing and administrative powers of the  
24 authority are vested in a board of directors consisting of 12  
25 members. Three members shall be the director of the department  
26 of commerce, the director of the department of agriculture, and  
27 the state treasurer. The director of commerce, the director of

1 the department of agriculture, and the state treasurer shall  
2 serve as full voting members of the board and may ~~vote either by~~  
3 ~~proxy,~~ APPOINT A representative ~~or designee~~ TO SERVE AS A  
4 VOTING MEMBER IN THEIR ABSENCE. Nine members shall be appointed  
5 by the governor with the advice and consent of the senate.

6 (2) At least 6 of the members shall be from the private  
7 sector. An appointed member of the authority shall be a resident  
8 of this state. An appointment to fill a vacancy of an appointed  
9 member shall be made in the same manner as the original  
10 appointment. Of the 9 members appointed by the governor for a  
11 fixed term, 1 shall be appointed from 1 or more nominees of the  
12 speaker of the house of representatives and 1 shall be appointed  
13 from 1 or more nominees of the senate majority leader.

14 (3) At least 1 of the appointed members of the board shall  
15 be a person of recognized ability and experience in each of the  
16 following areas:

17 (a) Finance.

18 (b) International trade.

19 (c) Business management.

20 (d) Economics.

21 (e) Agriculture.

22 (4) Of the original 9 appointed members, 3 members shall be  
23 appointed for terms expiring on the third Monday in June, 1986; 3  
24 members shall be appointed for terms expiring on the third Monday  
25 in June, 1987; and 3 members shall be appointed for terms expir-  
26 ing on the third Monday in June, 1988. Their respective  
27 successors shall be appointed for terms of 3 years from the third

1 Monday in June of the year of appointment. A member shall serve  
2 until his or her successor is appointed and qualified.

3 (5) Before beginning his or her duties, a member of the  
4 board shall take and subscribe the constitutional oath of  
5 office. A record of each oath or affirmation shall be filed in  
6 the office of the secretary of state.

7 (6) A member of the board is not entitled to compensation  
8 for services as a member, but may be reimbursed for all actual  
9 and necessary expenses incurred in connection with the per-  
10 formance of duties as a member.

11 (7) The board annually shall elect 1 of its members as  
12 chairperson, 1 OF ITS MEMBERS AS VICE-CHAIRPERSON, and 1 member  
13 as secretary. The board may elect ~~such~~ other officers as it  
14 considers proper. Six members of the board constitute a quorum,  
15 and the affirmative vote of the majority of members present at a  
16 meeting of the board is necessary and sufficient for an action  
17 taken by the board. ~~However, the~~ THE affirmative votes of not  
18 less than 6 members are necessary for the approval of a resolu-  
19 tion authorizing the issuance of bonds ~~or guaranteed funding~~  
20 under this act.

21 Sec. 5. (1) A vacancy in the membership of the board shall  
22 not impair the right of a quorum to exercise all rights and per-  
23 form all the duties of the board. An action taken by the board  
24 may be authorized by resolution at a regular or special meeting  
25 and shall take effect upon the date ~~that the chairperson certi-~~  
26 ~~fies the action of the authority by signing~~ the resolution IS

1 APPROVED BY THE BOARD unless some other date is provided in the  
2 resolution.

3 (2) The board may delegate to 1 or more of its members or to  
4 an official, agent, or employee of the authority the powers and  
5 duties as the board considers proper.

6 (3) A member of the board or a person acting on behalf of  
7 the authority executing a contract, commitment, or agreement  
8 issued under this act shall not be personally liable or account-  
9 able on the contract, commitment, or agreement.

10 (4) A member of the board or a person acting on behalf of  
11 the authority shall not be liable personally for damage or injury  
12 resulting from the performance of his or her duties arising under  
13 this act. The authority shall indemnify and procure insurance  
14 indemnifying the members of the board AND STAFF OFFICERS  
15 APPOINTED BY A RESOLUTION OF THE BOARD from personal loss or  
16 accountability from liability asserted by a person on the bonds  
17 or notes of the fund or from any personal liability or account-  
18 ability by reason of the issuance of the bonds, notes, insurance,  
19 or guarantees; or by reason of any other action taken or the  
20 failure to act by the authority.

21 (5) THE BOARD MAY APPOINT UP TO 2 EMPLOYEES TO UNCLASSIFIED  
22 POSITIONS NOT INCLUDED IN THE STATE CIVIL SERVICE TO SERVE FOR  
23 TERMS AT THE PLEASURE OF THE BOARD.

24 Sec. 7. The authority shall possess all the powers of a  
25 body politic and corporate necessary and convenient to accomplish  
26 the purposes of this act including, but not limited to, all of  
27 the following powers:

1 (a) To borrow money and otherwise incur indebtedness for any  
2 of its purposes including the issuance of bonds, debentures,  
3 notes, or other evidence of indebtedness, whether secured or  
4 unsecured.

5 (b) To purchase, discount, sell, or negotiate, with or with-  
6 out guaranty notes, other evidences of indebtedness, and to sell  
7 and guarantee securities.

8 (c) To lend money to a financial institution in the form of  
9 an eligible export loan which is used to finance eligible export  
10 transactions OR AS OTHERWISE PROVIDED IN SECTION 8A.

11 (d) To procure OR PROVIDE EXPORT insurance OR GUARANTEES to  
12 guarantee, insure, coinsure, or reinsure against risk of loss,  
13 and ~~such~~ other insurance OR GUARANTEES as the authority may  
14 consider necessary.

15 (e) To provide financial counseling services to businesses  
16 of this state.

17 (f) To procure insurance to secure the payment of principal  
18 and interest on bonds, notes, or other obligations of the  
19 authority.

20 (g) To accept gifts, grants, or loans from, and enter into  
21 contracts or other transactions with, a federal or state agency,  
22 a municipality, a private organization, or any other source. TO  
23 CHARGE AND COLLECT FEES FOR ITS SERVICES. TO ENTER INTO CON-  
24 TRACTS OR OTHER AGREEMENTS WITH THE EXPORT-IMPORT BANK OF THE  
25 UNITED STATES, THE FOREIGN CREDIT INSURANCE ASSOCIATION, OR OTHER  
26 FEDERAL AGENCIES OR INSTRUMENTALITIES.

1 (h) To adopt, and from time to time to amend or rescind a  
2 bylaw or rule of the authority as may be necessary or convenient  
3 for the performance of its functions, powers, and duties under  
4 this act.

5 (i) To sue and be sued.

6 (j) To purchase; receive; take by grant, gift, devise,  
7 bequest, or otherwise; lease; or acquire, own, hold, improve,  
8 employ, use, or deal in and with real or personal property, or  
9 any interest in real or personal property, wherever situated.

10 (k) To sell, convey, lease, exchange, transfer, or otherwise  
11 dispose of property or an interest in property, wherever  
12 situated.

13 (l) To promulgate rules necessary to carry out the purposes  
14 of this act and to exercise the powers expressly granted in this  
15 act pursuant to the administrative procedures act of 1969, Act  
16 No. 306 of the Public Acts of 1969, being sections 24.201 to  
17 24.328 of the Michigan Compiled Laws.

18 (M) TO LEAD, PARTICIPATE IN, SUPPORT, OR OTHERWISE COOPERATE  
19 IN TRADE MISSIONS, TRADE SHOWS, AND RELATED EFFORTS TO ENCOURAGE  
20 THE EXPORT OF MICHIGAN GOODS AND SERVICES.

21 (N) TO SPONSOR OR FOSTER A FOREIGN SALES CORPORATION AS  
22 DEFINED IN SECTION 922 OF THE INTERNAL REVENUE CODE OF 1986, 26  
23 U.S.C. 922. TO ESTABLISH, PARTICIPATE, AND SECURE FEDERAL  
24 APPROVAL FOR AN EXPORT TRADING COMPANY UNDER THE EXPORT TRADING  
25 COMPANY ACT OF 1982, PUBLIC LAW 97-290, 96 STAT. 1233, OR EQUIVA-  
26 LENT ENTITIES UNDER SIMILAR FEDERAL LEGISLATION. THE AUTHORITY  
27 MAY IN CONNECTION WITH ANY ENTITIES CREATED UNDER THIS

1 SUBDIVISION ACQUIRE AND TRANSFER TITLE TO GOODS AND CORPORATE OR  
 2 PARTNERSHIP OWNERSHIP INTEREST, AND MAY ENTER INTO JOINT VENTURES  
 3 WITH OTHER EXPORT TRADING COMPANIES.

4 (O) ~~(m)~~ To exercise all other powers and functions neces-  
 5 sary or appropriate to carry out the duties and purposes set  
 6 forth in this act.

7 Sec. 8. (1) The authority may provide ~~guaranteed funding~~  
 8 ~~for an eligible export loan used to finance~~ A GUARANTEE OR  
 9 EXPORT INSURANCE FOR an eligible export transaction. ~~through a~~  
 10 ~~participating financial institution.~~ Any guarantee OR EXPORT  
 11 INSURANCE entered into by the authority under this act shall not  
 12 constitute a general obligation of this state. ~~Guaranteed~~  
 13 ~~funding~~ GUARANTEES OR EXPORT INSURANCE PROVIDED by the authority  
 14 under this act shall not be terminated, canceled, or otherwise  
 15 revoked except in accordance with the terms of the guarantee OR  
 16 EXPORT INSURANCE; shall be conclusive evidence that the guarantee  
 17 OR EXPORT INSURANCE complies fully with the provisions of this  
 18 act; and shall be valid and incontestable in the hands of a  
 19 holder in due course of a guaranteed eligible export loan.

20 (2) The authority may charge reasonable fees for providing  
 21 ~~guaranteed funding~~ GUARANTEE OR EXPORT INSURANCE pursuant to  
 22 this section to a participating financial institution.

23 (3) Before providing financing for an eligible export trans-  
 24 action, a participating financial institution shall ~~investigate~~  
 25 ~~a line of credit to the exporter in order to~~ determine the  
 26 exporter's viability, the economic benefits to be derived from  
 27 the eligible export transaction, the prospects for repayment, and

1 any other facts that it considers necessary in order to determine  
2 that the ~~guaranteed funding~~ GUARANTEE OR EXPORT INSURANCE is  
3 consistent with the purposes of this act.

4 (4) The authority shall provide ~~guaranteed funding~~ THE  
5 GUARANTEE OR EXPORT INSURANCE only if, and to the extent that,  
6 the authority determines in its sole discretion that at least  
7 1 of the following is true:

8 (a) ~~Guaranteed funding~~ THE GUARANTEE OR EXPORT INSURANCE  
9 is reasonably necessary in order to stimulate or facilitate the  
10 making of an eligible export transaction including, without limi-  
11 tation, the making of the eligible export transaction upon terms  
12 that will enable the transaction to be reasonably competitive  
13 with transactions in other states or in foreign countries.

14 (b) The ~~guaranteed funding~~ GUARANTEE OR EXPORT INSURANCE  
15 is reasonably necessary in order to stimulate or facilitate the  
16 resale of an eligible export loan to a holder in due course that  
17 otherwise would not purchase the eligible export loan.

18 ~~(c) The exporter applying for the guaranteed funding has~~  
19 ~~not or will not receive more than \$1,500,000.00 in guaranteed~~  
20 ~~funding in the 12 months preceding the date of execution of the~~  
21 ~~guaranteed funding agreement. This subdivision does not apply if~~  
22 ~~at least 2/3 of the members of the board vote to waive this~~  
23 ~~requirement.~~

24 ~~(5) The guaranteed funding for an eligible export loan pro-~~  
25 ~~vided by the authority to a participating financial institution~~  
26 ~~shall be loaned to the exporter at a fixed interest rate and term~~  
27 ~~as the authority, from time to time, may require.~~

1 (5) ~~(6)~~ The authority may condition the provision of  
 2 ~~guaranteed funding~~ GUARANTEE OR EXPORT INSURANCE under this  
 3 section upon such other terms and conditions as the authority  
 4 considers desirable to carry out the purposes of this act.

5 SEC. 8A. THE AUTHORITY MAY PROVIDE A LOAN OR GRANT FOR 1 OR  
 6 MORE OF THE FOLLOWING PURPOSES:

7 (A) THE FINANCING OF ELIGIBLE EXPORT TRANSACTIONS. THE PRO-  
 8 CEEDS OF LOANS TO PARTICIPATING FINANCIAL INSTITUTIONS SHALL BE  
 9 RESTRICTED TO THE FINANCING OF ELIGIBLE EXPORT TRANSACTIONS.

10 (B) TO INDUCE A PERSON TO ESTABLISH OR EXPAND BUSINESS OPER-  
 11 ATIONS WITHIN THIS STATE WHICH WILL PRODUCE EXPORTS.

12 (C) TO MODIFY A PRODUCT TO IMPROVE THE PRODUCT'S POSSIBIL-  
 13 ITIES FOR EXPORT.

14 (D) TO CONDUCT MARKET RESEARCH TO DETERMINE THE POTENTIAL  
 15 FOR EXPORTING GOODS AND SERVICES FROM THIS STATE.

16 Sec. 10. (1) Bonds issued under this act may be executed  
 17 and delivered at any time, may be issued as a single issue or  
 18 from time to time as several issues, may be in the form and  
 19 denominations, may ~~be of such tenor, shall~~ be in coupon or reg-  
 20 istered form, may be payable in installments and at such time or  
 21 times not exceeding ~~5~~ 30 years from their date, may be subject  
 22 to the terms of redemption, may be payable at such place or  
 23 places, may bear interest at the rate or rates ~~payable at the~~  
 24 ~~place or places and evidence in the manner,~~ AS MAY BE SET,  
 25 RESET, OR CALCULATED FROM TIME TO TIME, OR MAY BEAR NO INTEREST  
 26 and may contain provisions not inconsistent with this act, all of

1 which shall be provided in the resolution of the authority  
2 authorizing the bonds.

3 (2) Bonds issued under the authority of this act may be sold  
4 at public or private sale at the price and in the manner and from  
5 time to time as may be determined by the authority to be most  
6 advantageous. The authority may pay all expenses, premiums,  
7 insurance premiums, and commissions which the authority considers  
8 necessary or advantageous in connection with the authorization,  
9 sale, and issuance of the bonds from proceeds of the bonds.

10 (3) EXCEPT AS OTHERWISE PROVIDED BY THIS ACT, BONDS OR NOTES  
11 ISSUED BY THE AUTHORITY ARE NOT SUBJECT TO THE TERMS OF THE  
12 MUNICIPAL FINANCE ACT, ACT NO. 202 OF THE PUBLIC ACTS OF 1943,  
13 BEING SECTIONS 131.1 TO 139.3 OF THE MICHIGAN COMPILED LAWS. THE  
14 BONDS ISSUED BY THE AUTHORITY ARE NOT REQUIRED TO BE REGISTERED.  
15 A FILING OF A BOND OF THE AUTHORITY IS NOT REQUIRED UNDER THE  
16 UNIFORM SECURITIES ACT, ACT NO. 265 OF THE PUBLIC ACTS OF 1964,  
17 BEING SECTIONS 451.501 TO 451.818 OF THE MICHIGAN COMPILED LAWS.

18 (4) EXCEPT AS PROVIDED IN SUBSECTION (5), BONDS AND NOTES  
19 ISSUED BY THE AUTHORITY SHALL BE APPROVED BY THE DEPARTMENT OF  
20 TREASURY PRIOR TO THEIR ISSUANCE. THE DEPARTMENT OF TREASURY  
21 SHALL DETERMINE THAT THE AMOUNT OF THE PROPOSED ISSUE IS SUFFI-  
22 CIENT, BUT NOT EXCESSIVE, THAT THE REVENUE AND PROPERTIES PLEDGED  
23 FOR PAYMENT ARE SUFFICIENT, AND THAT THE BONDS OR NOTES AND THE  
24 PROCEEDINGS AUTHORIZING THE ISSUE COMPLY WITH THIS ACT AND OTHER  
25 APPLICABLE LAW.

1 (5) BONDS AND NOTES ISSUED BY THE AUTHORITY SHALL BE SUBJECT  
 2 TO SECTIONS 10 AND 11 OF ACT NO. 202 OF THE PUBLIC ACTS OF 1943,  
 3 BEING SECTIONS 133.10 AND 133.11 OF THE MICHIGAN COMPILED LAWS.

4 Sec. 14. The bonds, INTEREST ON THE BONDS, AND THE TRANSFER  
 5 OF THE BONDS authorized under this act ~~and the income from the~~  
 6 ~~bonds~~ shall be exempt from all ~~state taxes~~ TAXATION BY THIS  
 7 STATE OR ANY OF ITS POLITICAL SUBDIVISIONS, except for inheri-  
 8 tance, estate, or ~~transfer~~ GIFT taxes. ~~In addition, a secur-~~  
 9 ~~ity agreement or financing agreement made under this act is~~  
 10 ~~exempt from state stamp and transfer taxes.~~

11 Sec. 15. The PROPERTY OF THE authority ~~is~~ AND ITS INCOME  
 12 AND OPERATION ARE exempt from all ~~franchise, corporate, busi-~~  
 13 ~~ness, and income taxes levied by the state. However, this~~  
 14 TAXATION BY THIS STATE OR ITS POLITICAL SUBDIVISIONS. THIS sec-  
 15 tion shall not be construed to ~~exempt~~ PROVIDE AN EXEMPTION from  
 16 any ~~such~~ taxes FOR a person receiving ~~guaranteed funding with~~  
 17 ASSISTANCE FROM the authority under this act.

**APPENDIX D**  
**COMPUTER ISOLATED SOURCES**

**This document is on file with the Michigan Law Revision Commission and Professor John E. Mogk, Wayne State University Law School.**

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APPENDIX E

 Touche Ross

October 20, 1989

RECEIVED OCT 25 1989

Professor John E. Mogk  
Wayne State University Law School  
468 W. Ferry  
Detroit, MI 48202

Re: Michigan Law Revisions for U.S./Canada Free Trade Agreement

Dear Professor Mogk:

The International Law Section of the State Bar of Michigan has recently created an International Tax Committee. I cochair the committee with Mr. James Novis of Honigman, Miller, Schwartz & Cohn. One of the projects on the committee's agenda is to examine Michigan tax laws and to propose changes that would facilitate cross border trade and investment, particularly as it affects the U.S. and Canada. Although it may be too late to add some of our preliminary thoughts to your project for the Michigan Law Revision Commission, I did want to send along a few brief thoughts.

SBT Nexus

One issue is the different tax nexus rules at the state level and federal level. A Canadian company can be exempt from federal income tax due to the absence of a "permanent establishment" nexus under the U.S./Canada income tax treaty (see Article V of treaty enclosed) yet still be subject to Michigan SBT (since the treaty does not cover state and local taxes). Indeed, the auditors for the state of Michigan have been fairly aggressive in searching out such federally exempt Canadian companies in order to assess SBT (plus interest and penalties naturally). While large multinational companies, or their advisors, are aware of such divergent rules, many smaller Canadian companies are not aware of the possibility of state taxation given their exemption from federal income tax.

The committee believes that coordinating the SBT nexus threshold with that of the "permanent establishment" clause of the relevant income tax treaty (e.g., the U.S./Canada treaty) would present a very positive plus for Michigan in marketing the state to Canadian enterprises seeking to open "exploratory" offices. Such exploratory offices can be federally exempt under the U.S./Canada

Professor John E. Mogk  
October 20, 1989  
Page 2

 Touche Ross

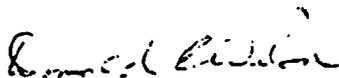
income tax treaty if their activities are confined to:

- purchasing of U.S. goods and merchandise (Article V, 6.d. of treaty)
- maintenance of goods in U.S. for purposes of processing (e.g., assembly) by a third party (Article V, 6.c.)
- advertising or scientific research (Article V, 6.e.)

The committee believes that the federal treaty policy of encouraging such activities by Canadian enterprises on a tax-free basis is equally applicable at the state level and would be a strong inducement for Canadian enterprises to consider locating such activities in Michigan. Experience shows that such "exploratory" offices often lead to more substantial, and taxable, business operations. In the interim, jobs are created and business for other Michigan companies is created (e.g., by sale of goods to such exploratory offices).

While the committee has not had the opportunity to consider all the ramifications to this proposal, we believe it has merit and can be fine tuned so as to prevent any significant revenue loss through appropriate limitations and dollar caps. Consideration might also be given to similar conforming amendments to the individual income tax laws so that they also would conform to the relevant provisions of the U.S./Canada income tax treaty. We look forward to refining these preliminary concepts and working with the appropriate parties to enhance the state of Michigan's position in attracting Canadian trade and investment under the U.S./Canada Free Trade Agreement

Very truly yours,



Donald E. Wilson  
International Tax Partner

DEW/bn

Encl.

cc: Steve Guittard - Chairman, International Law Section  
James Novis - Co-chairman, International Tax Committee

[1305] Article V

Permanent Establishment

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of a resident of a Contracting State is wholly or partly carried on.
2. The term "permanent establishment" shall include especially:
  - (a) A place of management;
  - (b) A branch;
  - (c) An office;
  - (d) A factory;
  - (e) A workshop; and
  - (f) A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
3. A building site or construction or installation project constitutes a permanent establishment if, but only if, it lasts more than 12 months.
4. The use of an installation or drilling rig or ship in a Contracting State to explore for or exploit natural resources constitutes a permanent establishment if, but only if, such use is for more than three months in any twelve-month period.
5. A person acting in a Contracting State on behalf of a resident of the other Contracting State—other than an agent of an independent status to whom paragraph 7 applies—shall be deemed to be a permanent establishment in the first-mentioned State if such person has, and habitually exercises in that State, an authority to conclude contracts in the name of the resident.
6. Notwithstanding the provisions of paragraphs 1, 2 and 5, the term "permanent establishment" shall be deemed not to include a fixed place of business used solely for, or a person referred to in paragraph 5 engaged solely in, one or more of the following activities:
  - (a) The use of facilities for the purpose of storage, display or delivery of goods or merchandise belonging to the resident;
  - (b) The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of storage, display or delivery;
  - (c) The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of processing by another person;
  - (d) The purchase of goods or merchandise, or the collection of information, for the resident; and
  - (e) Advertising, the supply of information, scientific research or similar activities which have a preparatory or auxiliary character, for the resident.
7. A resident of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because such resident carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.
8. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not constitute either company a permanent establishment of the other.
9. For the purposes of the Convention, the provisions of this Article shall be applied in determining whether any person has a permanent establishment in any State.

## Article VII

### Business Profits

1. The business profits of a resident of a Contracting State shall be taxable only in that State unless the resident carries on business in the other Contracting State through a permanent establishment situated therein. If the resident carries on, or has carried on, business as aforesaid, the business profits of the resident may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where a resident of a Contracting State carries on business in the other Contracting State through a permanent

establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the business profits which it might be expected to make if it were a distinct and separate person engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the resident and with any other person related to the resident (within the meaning of paragraph 2 of Article IX (Related Persons)).

3. In determining the business profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere. Nothing in this paragraph shall require a Contracting State to allow the deduction of any expenditure which, by reason of its nature, is not generally allowed as a deduction under the taxation laws of that State.

4. No business profits shall be attributed to a permanent establishment of a resident of a Contracting State by reason of the use thereof for either the mere purchase of goods or merchandise or the mere provision of executive, managerial or administrative facilities or services for such resident.

5. For the purposes of the preceding paragraphs, the business profits to be attributed to a permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

6. Where business profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

7. For the purposes of the Convention, the business profits attributable to a permanent establishment shall include only those profits derived from the assets or activities of the permanent establishment.

## BIOGRAPHIES OF COMMISSION MEMBERS

### **RICHARD D. McLELLAN**

Mr. McLellan is Chairman of the Michigan Law Revision Commission, a position he has filled since 1986, the year following his appointment as a public member of the Commission.

Mr. McLellan is a partner in the 275-lawyer firm of Dykema Gossett, which has offices in Michigan, Florida and Washington, D.C. He serves as the head of his firm's Government Policy and Practice Group.

He is a graduate of the Michigan State University Honors College and the University of Michigan Law School.

Prior to entering private practice, Mr. McLellan served as an Administrative Assistant to former Governor William G. Milliken. He is a former member of the National Advisory Food and Drug Committee in the United States Department of Health, Education and Welfare.

Mr. McLellan is also the Treasurer and a member of the Executive Committee of the Michigan State Chamber of Commerce and is the President of the Library of Michigan Foundation.

His legal practice includes primarily the representation of business interests in matters pertaining to state government. He is a member of his firm's International Practice Group which is responsible for coordinating services to non-United States companies who are clients of the firm.

McLellan is a member of the Board of Directors of Manufacturers Life Insurance Company of Michigan, a subsidiary of the Manufacturers Life Insurance Company of Canada.

### **ANTHONY DEREZINSKI**

Mr. Derezinski is Vice-Chairman of the Michigan Law Revision Commission, a position he has filled since May 1986 following his appointment as a public member of the Commission in January of that year.

Mr. Derezinski is Counsel to the law firm of Gardner, Carton and Douglas.

He is a graduate of Muskegon Catholic Central High School, Marquette University, University of Michigan Law School (Juris Doctor degree), and Harvard Law School (Master of Laws degree). He is married and has one child.

Mr. Derezinski is a Democrat and served as State Senator from 1975 to 1978. He is currently a member of the Board of Regents of Eastern Michigan University.

He served as a Lieutenant in the Judge Advocate General's Corps in the United States Navy from 1968 to 1971 and as a military judge in the Republic of Vietnam. He is a member of the Veterans of Foreign Wars, Derezsinski Post No. 7729, the American Academy of Hospital Attorneys, the International Association of Defense Counsel, and the National Health Lawyers' Association.

### **DAVID LEBENBOM**

Mr. Lebenbom is a public member of the Michigan Law Revision Commission and has served since his appointment in 1967, the second year of the Commission's existence.

Mr. Lebenbom is engaged in the private practice of law as David Lebenbom, P.C.

He is a graduate of Detroit Central High School, Wayne State University (where he graduated with distinction), and Columbia Law School. He is married and has four children.

Mr. Lebenbom is a Democrat and served as Chairman of the Wayne County Democratic Committee from 1961 to 1968.

He is a veteran of World War II with a Battle Star. He is a member of Congregation B'nai Moshe and Congregation Shaarey Zedek, the former President of the Jewish Community Council, and the current Vice President of the National Jewish Community Political Advisory Board.

Mr. Lebenbom is the Chair of the Columbia Law School Michigan Alumni Association.

### **RICHARD C. VAN DUSEN**

Mr. Van Dusen is a public member of the Michigan Law Revision Commission and has served since his appointment in September 1977.

Mr. Van Dusen is Senior Partner in the law firm of Dickinson, Wright, Moon, Van Dusen and Freeman.

He is a graduate of Deerfield Academy, the University of Minnesota, and Harvard Law School. He is married and has three children.

Mr. Van Dusen is a Republican and served as a State Representative in 1955 and 1956, a delegate to the 1961-62 Michigan Constitutional Convention, and Under Secretary of the United States Department of Housing and Urban Development from 1969 to 1972. He has served on the Wayne State University Board of Governors from 1979 to the present.

He served in the United States Naval Reserve from 1943 to 1946. He is a member of the Episcopalian Church.

## **RUDY J. NICHOLS**

Mr. Nichols is a legislative member of the Michigan Law Revision Commission and has served on the Commission since February 1987.

Mr. Nichols is a Republican State Senator representing the 8th Senatorial District. He was first elected to the Senate in January 1984, following his service as a State Representative representing the 20th House District from January 1983 to January 1984. Among his committee assignments, he is currently serving as Chair of the Senate Committee on Judiciary.

He is a graduate of Michigan State University and the Detroit College of Law. He is married and has two children.

Mr. Nichols is a member of the Waterford Republican Club, the Oakland County Republican Party, and the Waterford Optimist Club. He has been a leader in the Jaycees and was selected as one of the five Outstanding Young Men of Michigan in 1981.

## **VIRGIL C. SMITH, JR.**

Mr. Smith is a legislative member of the Michigan Law Revision Commission and has served on the Commission since May 1988.

Mr. Smith is a Democratic State Senator representing the 2nd Senatorial District. He was first elected to the Michigan House in November 1976 and served in that body until his election to the Senate in March 1988. He presently serves on the Senate Finance Committee and the Senate Local Government and Veterans Committee.

He is a graduate of Detroit Pershing High School, Michigan State University (Bachelor of Arts Degree in Political Science), and Wayne State University Law School. Mr. Smith is married and has two children.

Mr. Smith was a supervisory attorney for the Inkster office of Wayne County Legal Services and was Senior Assistant Corporation Counsel for the City of Detroit Law Department before his election to the Legislature.

## **W. PERRY BULLARD**

Mr. Bullard is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 1981.

Mr. Bullard is a Democratic State Representative representing the 53rd House District. He was first elected to the State House in November 1972. Among his committee assignments, he has served as Chair of the House Committee on Civil Rights and Chair of the House Committee on Labor. He is currently Chair of the House Committee on Judiciary.

He is a graduate of Harvard University and the University of Michigan Law School. He is married and has one child.

Mr. Bullard was in the United States Navy from 1964 to 1968, receiving 13-air medals. He is a member of the Michigan Commission on Criminal Justice, Educational Fund for Individual Rights Advisory Committee, and the American Civil Liberties Committee and is the Vice Chairman of the National Conference of State Legislatures State-Federal Assembly Energy Committee.

He was named the Police Officers Association of Michigan's Legislator of the Year in 1979 and 1988, the Outstanding Legislator of the Year in 1980 by the American Association of University Professors, and Legislator of the Year for the Michigan Network of Runaway & Youth Services for 1989.

Mr. Bullard is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.

### **DAVID M. HONIGMAN**

Mr. Honigman is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 1987.

Mr. Honigman is a Republican State Representative representing the 24th House District. He was first elected to the State House in November 1984. Among his committee assignments, he has served on the House Committee on Judiciary.

He is a graduate of Yale University (with honors) and the University of Michigan Law School. He is married.

Mr. Honigman serves on the Board of Trustees of the Michigan Cancer Foundation and the Alumni Board of Detroit County Day School. He is a member of the Michigan Regional Advisory Board of the Anti-Defamation League of B'nai Brith. He was named one of the Outstanding Young Men in America in 1985.

Mr. Honigman is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.

### **ELLIOTT JOHN SMITH**

Mr. Smith is an ex officio member of the Michigan Law Revision Commission due to his position as the Director of the Legislative Service Bureau, a position he has filled since January 1980.

Mr. Smith has worked with Michigan legislators since 1972 in various capacities, including his work as a Research Analyst for Senator Stanley Rozycki, Administrative Assistant to

Senator Anthony Derezinski, and Executive Assistant to Senate Majority Leader William Faust before being named to his current position.

He is a graduate of Michigan State University. He is married and has two children.

### **JEROLD ISRAEL**

Mr. Israel is the Executive Secretary to the Michigan Law Revision Commission, a position he has filled since October 1973.

Mr. Israel joined the University of Michigan law faculty in 1961 and has taught courses in constitutional law, civil procedure, criminal law, and criminal procedure. He is currently the Alene and Allan F. Smith Professor of Law at the University of Michigan Law School.

He is a graduate of Case-Western Reserve University and Yale University. Following his graduation from Yale, he served as a law clerk to Justice Potter Stewart of the United States Supreme Court. He is married and has three children.

Mr. Israel was co-reporter for the Michigan State Bar Association's Proposed Michigan Criminal Code and for the National Conference of Commissioners on Uniform State Laws' Uniform Rules of Criminal Procedure. He has served as a member of Michigan Supreme Court committees and gubernatorial commissions and as a consultant to other states revising their court rules and statutes.

He has co-authored several publications concerning criminal procedure, including the most widely used casebook and a frequently cited three-volume treatise.

### **GARY GULLIVER**

Mr. Gulliver acts as the liaison between the Michigan Law Revision Commission and the Legislative Service Bureau, a responsibility he has had since May 1984.

Mr. Gulliver is currently the Director of Legal Research with the Legislative Service Bureau. He is a graduate of Albion College (with honors) and Wayne State University Law School. He is married and has two children.

Mr. Gulliver is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.

*Michigan State Law Implications  
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Free Trade Agreement (FTA):*

*A Special Report to the*

*Michigan  
Law  
Revision  
Commission*

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**Michigan  
Law Revision Commission**

1989

**MICHIGAN  
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**This report is a reprint of a portion of the 24th Annual Report of the Michigan Law Revision and is prepared as a special service to the business, academic, governmental, and legal communities on a topic of important public concern.**

**Richard D. McLellan, Chairman  
Michigan Law Revision Commission**

**MICHIGAN STATE LAW IMPLICATIONS  
OF THE UNITED STATES - CANADA  
FREE TRADE AGREEMENT (FTA)**

**A Report to the:**

**MICHIGAN LAW REVISION COMMISSION**

**By the:**

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**October 23, 1989**

## PREFACE

In April, 1989, the Michigan Law Revision Commission selected Wayne State University Law School to "undertake a review of the Michigan state law implications of the United States - Canada Free Trade Agreement (hereinafter FTA or Agreement)" and "to identify possible areas where Michigan laws could be modified to take advantage of the new market created by the FTA even though such changes are not required by the FTA". The Law School formed a United States-Canada Study team comprised of five law students, directed by Professor John E. Mogk.

Three of the students, Laura Brodeur, Clara DeQuick, and Louise Wright, examined specific chapters of the FTA and prepared a chapter by chapter analysis of its provisions, including an assessment of how to harmonize, or foster mutual recognition of, Michigan and Ontario laws and regulations. A fourth student, Jay Colvin, evaluated areas where the Michigan Legislature could modify laws to take advantage of new and expanded markets expected to result from the FTA, even though no change was strictly required. The fifth student, Samina Hurst, served as coordinator of the project and was responsible for identifying source materials, gathering additional information and contacting federal and state agencies, major border states, principals involved in drafting the FTA, and Canadian officials.

The team designed the study to meet four objectives: (1) to analyze each section of the FTA and determine whether Michigan laws and regulations are in compliance; (2) to identify areas where state laws may be modified to facilitate existing trade between Michigan and Canada (specifically Ontario); (3) to highlight areas where Michigan laws govern major trade expansion fields; and (4) to prepare a resource base for any further examination of the FTA by the Commission or others.

The team thoroughly reviewed the FTA, the U.S. Congressional Committee hearings and other material with respect to its adoption (Appendix A). Each team member assigned to study specific chapters of the FTA contacted the relevant Michigan agencies and incorporated into their assessments contributions received from agency representatives. Numerous outside resource people were also

contacted (Appendix B). No similar study was found to be ongoing in any other major border state.

Notices describing the study and requesting input from the Michigan practicing bar were published in the July issue of the Michigan Business Lawyer and the August issue of the Michigan International Law Journal. As of the date of this report, no comments were received.\*

The team identified specific pending legislation that relates to the FTA. Section III describes this legislation and Appendix C contains copies of it.

Moreover, an extensive computer search was conducted on Michigan Questor -- a database which incorporates all Michigan statutes. By entering the key words "alien, Canada, domestic, export, foreign, import, miles, non-resident, Ontario, resident, and safety standard" into the system, the computer isolated statutes covering every envisioned aspect of Michigan law that could govern dealings with Canada (Appendix D). For the most part, existing state laws and regulations are grandfathered or specifically exempted, thus remaining unaffected by the FTA. However, any non-exempt new laws enacted after January 1, 1989 must be no less compliant with the FTA provisions and must aim toward according Canada national treatment.

The team also devoted substantial time to reviewing studies forecasting the effects of the FTA on various businesses, services, and industries. This information was specifically applied to the statistics pertaining to Michigan business and industry. Section IV outlines the results of this research.

Section V summarizes legal recommendations that may enhance the benefits of the FTA to Michigan and its businesses. In addition, during the course of the study, resource persons suggested several non-legal actions that would be advisable. These are discussed in section VI.

The study team would like to thank the many officials and representatives who openly and freely contributed to its work. Special appreciation is extended to the staff of the Legislative Services Bureau. This project has been an interesting

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\*Appendix E contains a letter, dated October 20, 1989, received on October 25, 1989, from Donald E. Wilson, International Tax Partner, Touche Ross & Co., to Professor John E. Mogk, regarding harmonizing small business tax nexus rules.

challenge for us and we hope the Report which follows will be of substantial value to the Commission and to others who consult it.

October 23, 1989  
Detroit, Michigan

John E. Mogk  
Professor of Law  
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# TABLE OF CONTENTS

PREFACE

TABLE OF CONTENTS

DISCUSSION

## I. INTRODUCTION

(A) Overview.....	1
(B) Format of the FTA.....	2
(C) Definitions of Essential Provisions.....	2
(1) National Treatment.....	2
(2) Grandfathering.....	2
(3) Exemption.....	2
(4) Acceleration.....	3

## II. ANALYSIS OF THE FTA

### PART ONE: OBJECTIVES AND SCOPE

Chapter One: Objectives and Scope.....	4
Chapter Two: General Definitions.....	4

### PART TWO: TRADE IN GOODS

Chapter Three: Rules of Origin.....	5
Chapter Four: Border Measures.....	6

**PART TWO: TRADE IN GOODS (continued)**

Chapter Five:	National Treatment.....	10
Chapter Six:	Technical Standards.....	11
Chapter Seven:	Agriculture.....	14
Chapter Eight:	Wine and Distilled Spirits.....	25
Chapter Nine:	Energy.....	28
Chapter Ten:	Trade in Automotive Goods.....	28
Chapter Eleven:	Emergency Action.....	32
Chapter Twelve:	Exceptions for Trade in Goods.....	32

**PART THREE: GOVERNMENT PROCUREMENT**

Chapter Thirteen:	Government Procurement.....	34
-------------------	-----------------------------	----

**PART FOUR: SERVICES, INVESTMENT AND TEMPORARY ENTRY**

Chapter Fourteen:	Services.....	35
Chapter Fifteen:	Temporary Entry for Business..... Persons	40
Chapter Sixteen:	Investment.....	41

**PART FIVE: FINANCIAL SERVICES**

Chapter Seventeen:	Financial Services.....	45
--------------------	-------------------------	----

**PART SIX: INSTITUTIONAL PROVISIONS**

Chapter Eighteen:	Institutional Provisions.....	47
Chapter Nineteen:	Binational Dispute Settlement..... in Antidumping and Countervailing Duty Cases	47

PART SEVEN: OTHER PROVISIONS

Chapter Twenty: Other Provisions.....49

PART EIGHT: FINAL PROVISIONS

Chapter Twenty One: Final Provisions.....51

III. CURRENT PENDING LEGISLATION

(A) Michigan Professional Service Corporation Act.....52

(B) Michigan Export Development Act.....52

IV. MARKET EXPANSION AREAS

(A) Attractive Industry Sectors.....53

(B) State Involvement.....55

V. LEGAL RECOMMENDATIONS

(A) Modifications of Existing Laws and Regulations.....57

(B) Laws and Regulations to be Examined Further.....57

(C) Areas of Commerce to be Monitored as Growth Occurs.....59

VI. NON-LEGAL SUGGESTIONS

(A) Transportation.....61

(B) Information Data Base.....61

(C) Wineries.....61

(D) Government Procurement.....62

VII. CONCLUSION.....63

APPENDICES

- (A) Bibliography
- (B) Contact List
- (C) Pending Legislation
- (D) Computer Isolated Sources
- (E) Incoming Correspondence

## INTRODUCTION

### **(A) Overview**

The United States - Canada Free Trade Agreement, Dec. 22, 1987, Department of State Bulletin (March 1988), went into effect as an Executive Agreement between the two countries on January 1, 1989. It phases out U.S. and Canadian import tariffs, saving consumers and businesses millions of dollars and expanding export opportunities in the fields of manufacturing, agriculture, financial services, and high technology.

The State of Michigan has much to gain from the FTA. Michigan conducts more trade with Canada than any other state and more than Canada's second and third largest trading partners, Japan and the United Kingdom, combined. In 1987, two-way trade between Michigan and Canada exceeded \$24.8 billion. This figure is most likely low. According to a study conducted by the U.S. Department of Commerce, "approximately one out of every seven dollars worth of U.S. exports to Canada cannot be assigned to a state. Most of these exports are automotive products, which are among Michigan's leading exports to Canada." The Office of Canada, International Trade Administration, United States Department of Commerce (2d ed. 1989).

This report focuses upon legal modifications that would assure Michigan's compliance with or enhance its business opportunities under the FTA. Although existing state laws and regulations are for the most part grandfathered or exempted, discussed below, a number of areas were found to justify action. Recommendations include the following: (1) modifications of existing laws and regulations; (2) laws and regulations to be examined further; and (3) areas of commerce to be monitored as growth occurs. In addition, the report provides suggestions for non-legal actions.

Although no FTA provisions deal directly with transportation services, both Canadian and Michigan officials expressed concern about the effectiveness of the transportation network between Canada and Detroit. They identified the need for operational changes to remove obstacles preventing the efficient flow of goods and services across the border.

## **(B) Format of the FTA**

The FTA consists of eight parts that are subdivided into twenty-one chapters. Each chapter is divided into sections identified as articles. These articles organize the subject matter of the chapter by category, e.g. Chapter Eight: Wine and Distilled Spirits, Article 801 - Coverage, Article 802 - Listing, etc. Some of the articles are supplemented by annexes. An annex sets forth detailed explanations of provisions contained in the article.

## **(C) Definitions of Essential Provisions**

The FTA includes several recurring provisions: (1) those requiring national treatment; (2) those that grandfather existing laws; (3) those that exempt laws from having to comply with the FTA; (4) and those that allow either country to petition for accelerated elimination of duties on specific products.

### **(1) National Treatment**

Unless specifically excepted, the FTA requires "national treatment", i.e., the U.S. and Canada will each accord equal treatment to the other country, treating the other's goods, services, investments, and people no less favorably than its own. See Chapter Five for further explanation.

### **(2) Grandfathering**

A grandfather clause is one that allows already existing laws to continue unaffected by the FTA. The FTA defines "existing" as being those laws enforceable at the time the Agreement went into effect -- January 1, 1989. For example, pursuant to Chapter 14, Article 1402, Paragraph five, an already existing licensing requirement that may discriminate against Canadians, does not have to comply with the newly enacted provisions of the FTA. Furthermore, under the FTA, selected existing non-compliant laws that have been grandfathered and are promptly renewed may continue their unaffected status (Article 1402, Paragraph five (b)). While there is no general grandfather clause in the FTA, the concept appears in a substantial number of chapters.

### **(3) Exemption**

In a few areas, the FTA exempts certain specific laws from having to comply with its provisions at any time. For example, Article 1402, Paragraph nine, states that government services contracts do not have to comply with the FTA.

(4) Acceleration

The FTA requires the elimination of duties on all products traded between the U. S. and Canada by 1998. The FTA assigns every product on which a duty had been levied prior to implementation to one of the following three (3) timetables:

- (A) duty automatically eliminated upon implementation of the FTA on January 1, 1989;
- (B) duty reduced 20% of January 1989 levels annually for five (5) years, resulting in complete elimination by January 1, 1993; and
- (C) duty reduced 10% of January 1989 levels annually for ten (10) years, resulting in complete elimination by January 1, 1998.

These timetables, however, are modifiable under Article 401(5), a duty elimination accelerator clause. The clause provides for the accelerated elimination of the duty on any product by mutual agreement of the U.S. and Canadian governments. Interested private sector groups may petition for accelerated elimination of the duty on a particular product. Over 300 petitions have been received to date.

## II

### ANALYSIS OF THE FTA

Two formats are used in the FTA sectional analysis which follows: (1) chapters which are definitional, or fall exclusively under federal jurisdiction, are briefly summarized; (2) chapters applicable to Michigan laws and regulations are summarized in some greater detail, followed by comments addressing required or recommended action.

#### PART ONE

#### OBJECTIVES AND SCOPE

##### Chapter One: Objectives and Scope

The free trade area established by the FTA is consistent with the General Agreement on Tariffs and Trade (GATT). The objectives of the FTA are to:

- i. eliminate trade barriers in goods and services between the two countries;
- ii. liberalize conditions for investment;
- iii. establish effective procedures to administer the FTA and resolve disputes; and
- iv. lay the foundation for further bilateral and multilateral cooperation.

Each country retains its rights and obligations under their pre-existing agreements, with the FTA taking precedence over any inconsistencies, unless otherwise specified in the FTA. Furthermore, to the extent provided in the FTA, each country will accord national treatment to the other.

Comment: No action required or recommended.

##### Chapter Two: General Definitions

Comment: No action required or recommended.

## **PART TWO**

### **TRADE IN GOODS**

#### **Chapter Three: Rules of Origin**

##### **Article 301: General Rules**

This section provides that goods must meet the origin requirement in order to qualify for duty free treatment. The FTA's rules regarding origin are designed to prevent circumvention of the agreement's intent by the transshipment of goods from third countries. Goods (including accessories and spare parts) are only deemed to originate in the territory of a party if they are "wholly obtained or produced" in the territories of either or both parties. Goods are also deemed to originate in a party if they have been substantially transformed within the territory of either the U.S. or Canada, to such an extent that they become subject to a change in tariff classification under Annex 301.2.

A good is not deemed to have originated in the territory of a party if it has only undergone: a packaging or combining operation (unless Annex 301.2 allows); a process that does not materially alter the good; or any process in which the objective was to circumvent the origin requirements.

Comment: No action required or recommended.

##### **Annex 301.2: Interpretation**

This annex states that the basis for tariff classification is the "Harmonized System" (Harmonized Commodity Description and Coding System). It provides that if goods are processed or assembled in the territory of either or both parties to the extent that they qualify for a change in tariff classification, they will meet origin requirements as long as they have not subsequently undergone any assembly or processing outside the boundaries of either party.

The section does not allow goods that are classified as unassembled, and imported as such, to qualify for a change in tariff classification treating them as goods originating within that party's territory.

To be considered a product of the United States or Canada, when not wholly originating in either territory, the goods must have been substantially transformed in one of the territories or have at least 50% of their value added in either territory, measured in materials and direct cost of assembly. Substantially transformed

means a change such that the product falls under a different tariff classification. This paragraph does not apply to Chapters 61-63 (apparel and other made-up articles) of the Harmonized System.

### **Article 302: Transshipment**

This article specifies that goods exported from one party originate in that territory only if they meet the requirements of section 301 and are shipped to the other party without having entered a third country's commerce. Goods may go through a third country for loading, reloading, or preservation.

Comment: No action required or recommended.

### **Article 303: Consultation and Revision**

This section states that both parties shall consult to ensure that the provisions of Chapter 3 are administered in a consistent and effective manner. If a party determines that a provision needs revision that party is allowed to submit a proposed revision along with supporting rationale to the other party for consideration and possible action pursuant to Article 2104 (Amendments).

Comment: No action required or recommended.

### **Article 304: Definitions**

This section defines the following: "direct cost of processing or direct cost of assembling", "materials", "value of materials originating in the territory of either party or both parties", "value of the goods when exported to the territory of the other party", and "goods wholly obtained in the territory of either party or both parties".

Comment: No action required or recommended -- definitional.

## **Chapter Four: Border Measures**

### **Article 401: Tariff Elimination**

This provision mandates that neither party shall increase any existing or introduce any new duty on goods of the other party unless allowed under the FTA. Furthermore, each party shall eliminate customs duties in accordance with schedule 401.2. This section recognizes as part of the FTA any agreement between the parties which accelerates duty-free treatment.

#### **Annex 401.2: Schedule of Canada and United States of America**

Staging Category A: Tariffs on goods in this category were eliminated entirely on January 1, 1989.

Staging Category B: Beginning January 1, 1989, tariffs on goods in this category shall be removed in five equal annual stages. Hence, on January 1, 1993, duty on all goods in this category shall be completely eliminated.

Staging Category C: Beginning January 1, 1989, tariffs on goods in this category shall be removed in ten equal annual stages. Hence, on January 1, 1998, all duty on goods in this category shall be eliminated.

#### **Annex 401.6: Machinery and Equipment**

This annex lists the machinery, equipment, and replacement parts, considered unavailable from Canadian production, which Canada shall continue to exempt from duties and applicable exceptions.

#### **Annex 401.7: Treatment of Concessionary Duty Provisions**

This annex lists which goods Canada may exempt from paragraph 7 of Article 401, and which goods the United States may exempt from paragraph 8 of Article 401.

Comment: No action required or recommended -- federal jurisdiction.

#### **Article 402: Rounding of Interim Rates**

Comment: No action required or recommended.

#### **Article 403: Customs User Fees**

This section prohibits either party from introducing customs users fees on goods originating in either party's respective territory. The section allows the

United States to change existing fees only if they are not scheduled to be eliminated by Article 403(3)(a)-(e) of the FTA.

Comment: No action required or recommended -- federal jurisdiction.

#### **Article 404: Drawback**

This section states that goods, which are imported into one party and subsequently exported to the other party or incorporated into goods, shall be subject to the customs duties of that party prior to export. This eliminates duty drawback programs which provide for the return of duties on imports when they were incorporated into goods subsequently exported. Because of the FTA tariff elimination, continuation of these programs would have allowed duty free entry of third country imports through the other FTA party. This provision does not apply to those goods that are (i) under bond for transport and export to the other party; (ii) deemed to be exported to the other party by reason of delivery to a duty free shop; (iii) used as supplies on aircraft/ships; or (iv) for joint use which will result in the other party taking possession. Goods that originate in one party, are imported by the other party, and then re-exported to the original party are also exempt.

The FTA states that these provisions shall be applicable starting January 1, 1994. It further states that unless the parties agree, this article does not apply to imported third party citrus or fabric that is made into apparel and is subject to the "most favored nation" rate of tariff when exported to the other party.

Comment: No action required or recommended.

#### **Article 405: Waiver of Customs Duties**

This article provides that neither party shall introduce, expand, or extend any program which would waive applicable customs duties to a new recipient, when that waiver is conditioned upon completed performance requirements. This procedure addresses trade distortions that occur when a firm is required to buy local imports or to export their output in exchange for tariff exceptions. See Chapter Ten, Article 1002.

Comment: No action required or recommended.

#### **Article 406: Customs Administration**

This section states that each party's "Customs Administration shall cooperate" as stated in Annex 406.

Comment: No action required or recommended.

#### **Annex 406: Customs Administration**

This annex provides that, for imported goods, each party may require the importing party not only to meet the rules of origin as specified in Chapter Three, but also to make a written declaration to that effect and provide it to the Customs Administration of the other party. A party may mandate that failure to comply with the above mentioned steps has the same consequence as making a false statement or misrepresentation. Under this provision, either party can allow exemptions from compliance.

For exported goods, both parties must require that the exporter who meets the rules of origin provide a copy of written certification of that fact if requested to do so. The parties must proclaim it unlawful for exporters to certify falsely that their goods meet the rules of origin criteria.

According to the FTA, the parties shall maintain proper record-keeping and cooperate in enforcing each party's laws.

Comment: No action required or recommended.

#### **Article 407: Import and Export Restrictions**

According to this article, each party must adhere to the GATT with regard to prohibitions and restrictions on bilateral trade, unless the FTA alters their rights and obligations. This does not prohibit a party from limiting or prohibiting the importation of third party goods. Upon the request of either party, however, the parties shall consult to avoid undue interference with trade. Furthermore, the parties must eliminate quantitative restrictions specified in Annex 407.6.

Comment: No action required or recommended.

#### **Annex 407.6: Elimination of Quantitative Restrictions**

This article requires, as of January 1, 1989, that Canada eliminate its embargo on all secondhand aircraft. The United States shall eliminate its embargo on any lottery tickets, printed paper, or any advertisement for a United States lottery that is printed in Canada.

Comment: No action required or recommended.

#### **Article 408: Export Taxes**

This section states that neither party is allowed to introduce or maintain any charge, tax, or duty on any good exported to the other party unless the fees are also imposed on these goods when consumed domestically.

Comment: No action required or recommended.

#### **Article 409: Other Export Measures**

This article provides that either party is allowed to maintain or introduce an export restriction on the other party if it can be justified under GATT provisions XI:2(a) and XX(g), (i), and (j) if: a restriction does not reduce proportionately the total export shipments of a specified good available to the other party; a party does not charge an export price to the other party that is higher than their domestic price; and the restriction will not result in disruption of the other party's normal supply channels or levels.

Comment: No action required or recommended.

#### **Article 410: Definitions**

This section defines the following; "consumed", "Customs Administration", "customs duty", "existing duty", "performance requirement", "restriction", "total export shipments", and "waiver of customs duty".

Comment: No action required or recommended -- definitional.

### **Chapter Five: National Treatment**

#### **Article 501: Incorporation of GATT Rule**

This article states that each party shall follow the existing provisions of the GATT, Article III, and "accord national treatment, as defined in Article 502, to the goods of the other party".

Comment: No action required or recommended.

## **Article 502: Provincial and State Measures**

This provision makes clear that whatever treatment a government of one party (province or state) gives to its domestic goods, the same treatment must be accorded to similar goods originating in the territory of the other party. For example, if one party sells a good which is subject to a certain safety standard, then it must allow the other party's goods to be sold subject to that same standard, not a more stringent one.

The rule effectively bars discrimination against goods imported from the other party by prohibiting preferential treatment for domestic goods.

This chapter of the FTA permeates all sections of the FTA unless it has been exempted. Therefore, the "national treatment" rule could potentially have an affect on many future state laws. Any modification of existing state law, a new state law, or any state measure cannot discriminate, unless excepted.

Comment: No action required or recommended.

## **Chapter Six: Technical Standards**

### **Article 601: Scope**

This provision establishes that all technical standards relating to goods other than those covered in Chapter 7 are within the scope of the Agreement. Noncomplying state and provincial standards are specifically excepted.

Comment: No action required, but recommended action is as follows: To facilitate increased trade, Michigan should adopt a policy of refraining from promulgating new, nonconforming technical standards unless such standards are clearly dictated by health or safety concerns. To the extent U.S. and Canadian standards are in harmony, free trade is encouraged.

### **Article 602: Affirmation of GATT Agreement**

Reaffirms the parties' rights and obligations under GATT.

Comment: No action required or recommended.

### **Article 603: No Disguised Barriers to Trade**

This provision prohibits the maintenance or adoption by the federal governments of any measures that would impose technical standards or product approval procedures that effectively create barriers to trade. The definitional section (Article 609) identifies technical standards as "including technical specifications, technical regulations, standards and rules for certification systems that apply to goods and processes and production methods ... ." Product approval procedures are defined as "a federal government declaration that a set of published criteria has been fulfilled and therefore that goods are permitted to be used in a specific manner or for a specific purpose ... ." Exceptions are made for those standards or procedures where the objective is protection of health, safety, essential security, the environment, or consumer interests. Goods of the other party which meet that objective may not be excluded.

Comment: No action required or recommended.

### **Article 604: Compatibility**

This provision requires that the U.S. and Canada work toward making their respective technical standards regulations more compatible, to help reduce trade barriers and the cost of satisfying two sets of regulations. The Agreement also recognizes that many technical standards are established by private entities, and requires that each party work toward harmonization in the standards established by such entities.

Comment: No action required or recommended.

### **Article 605: Accreditation**

This article requires both the U.S. and Canada to accept each others accreditation of testing and inspection facilities and certification bodies. It also prohibits either country from requiring that testing, inspection, or certification be done in its own territory. A fee may be charged for accreditation, but must approximate the actual cost of the service rendered in granting accreditation. After the transition period, any fee charged must be applicable to both domestic and Canadian entities seeking accreditation.

Comment: No action required or recommended.

## **Article 606: Acceptance of Test Data**

This provision requires that, when requested, written notification of the reason for non-acceptance of test data from a source within the territory of the other party be provided, when such data was deemed insufficient by one party to result in product approval or certification. The FTA works toward the goal of eliminating duplicate testing, and this explanatory procedure will facilitate the acceptance of data generated by appropriate facilities of either party.

Comment: No action required or recommended.

## **Article 607: Information Exchange**

The texts of proposed federal standards-related measures and product-approval procedures of either party must be provided to the other party, who will then have 60 days to respond with comments and suggestions. Where expeditious enactment of a regulation is necessary to achieve a legitimate domestic objective, a party may proceed without permitting prior review. The text of the regulation shall be promptly provided to the other party nevertheless. This article also requires that the parties notify each other of proposed state or provincial standards-related measures that may have significant impact on trade, that text of such proposed regulations be provided, and that any measures likely to facilitate the other party's ability to provide comments or enter into discussion with a state or province be taken. The text of proposed Canadian regulations are available through the Standards Information Service of the Standards Council of Canada.

Comment: No action required, but recommended action is as follows:

Michigan may benefit by being placed on the mailing list of interested parties to receive notification of proposed Canadian standards-related measures, to which it could develop comments for forwarding to the National Institute of Standards and Technology (NIST) in Washington, D.C. Michigan may also wish to develop a system for providing notification to the Canadian Standards Information Service of proposed standards-related measures, to ensure adequate input to avoid inadvertently impeding trade with Canada.

## **Article 608: Further Implementation**

This article provides for further negotiations to increase compatibility of standards-related measures and procedures, and interchangeability of test data.

Comment: No action required or recommended.

#### **Article 609: Definitions**

Comment: No action required or recommended.

### **Chapter Seven: Agriculture**

#### **Article 701: Agricultural Subsidies**

Under this section both parties agree that their primary goal is to work together to eliminate all agricultural subsidies which distort agricultural trade.

Comment: No action required or recommended.

#### **Article 702: Special Provisions for Fresh Fruits and Vegetables**

This section allows a party, for a period of 20 years from the time the FTA takes effect, to apply a temporary duty on fresh vegetables and fruits (classified within the Harmonized System, Annex 301.2) originating in the other party and imported into its territory when the following requirements are met: i) the import price of a fresh fruit or vegetable is, for each of five consecutive working days, below 90 percent of the average monthly price, and ii) the acres planted by the importing party of that particular fruit or vegetable is no higher than the average acreage for the last five years (this excludes wine grape acreage existing on October 4, 1987).

Comment: No action required or recommended.

#### **Article 703: Market Access for Agriculture**

This section states that the parties shall work together in order to improve access to each other's markets by reducing or eliminating import barriers.

Comment: No action required or recommended.

## **Article 704: Market Access for Meat**

This article states that neither party is allowed to introduce or maintain any quantitative import restrictions on meat goods originating in the other party, unless the FTA otherwise provides. If one of the parties imposes quantitative restrictions on goods from all third countries or limits exports from these countries, and the other party does not follow, the first party may impose the same restrictions on the other party's meat products only to the extent and duration necessary to counter the action taken against imports of third countries. If this is to be done, the other party must be notified prior to taking such action.

Comment: No action required or recommended.

## **Article 705: Market Access for Grain and Grain Products:**

This provision states that at the time when the level of United States government support for grain becomes equal to or less than the support provided by the Canadian Government, Canada must eliminate any import permit requirements on grain originating in the United States. Either party may introduce or reintroduce restrictions on the import of grain from the other party if import levels significantly increase due to either party's support programs.

Canada is allowed to require an end-use certificate; stating the grain is to be consumed in Canada, or, if feed, stating the grain is to be denatured or accompanied by an Agriculture Canada certification. For this section, grain includes grain products that contain at least 25 percent by weight of grain.

Comment: No action required or recommended.

## **Annex 705.4: Levels of Government Support for Wheat, Oats and Barley**

This annex provides the formula and rules for computing levels of support.

## **Schedule 1: United States Government Support Programs**

This schedule, for the most part, falls under federal jurisdiction. However, it should be noted that part twelve, "State Budget Outlays", specifically addresses support provided by state governments. Michigan provides no support for wheat, oats, or barley.

Comment: No action required or recommended.

## **Schedule 2: Canadian Government Support Programs**

Comment: No action required or recommended.

### **Article 706: Market Access for Poultry and Eggs**

This section states that if Canada chooses to maintain or introduce quantitative import restrictions on chicken/chicken products; turkey/turkey products; or eggs/egg products, Canada must permit imports. The level of global imports for one year must be no less than 7.5 percent of Canada's domestic production in the previous year for chicken -- 3.5 percent for turkey, 1.647 percent for shell eggs, .714 percent for processed eggs, and .627 percent for powdered eggs.

Comment: No action required or recommended.

### **Annex 706: Market Access for Poultry**

This annex defines "chicken and turkey products" and excludes certain products containing chicken and turkey.

Comment: No action required or recommended.

### **Article 707: Market Access for Sugar-Containing Products**

This section states that the United States cannot maintain or introduce any quantitative import restriction on any good that originates in Canada and contains ten percent or less sugar by dry weight, if the purpose of the import restriction is to limit the sugar content of the good.

Comment: No action required or recommended.

### **Article 708: Technical Regulations and Standards for Agricultural, Food, Beverage, and Certain Related Goods**

This article states that both parties shall "seek an open border policy" as it relates to trade in agriculture, food, beverage, and other specified goods. As a

guide, the parties should use the Schedules in Annex 708.1 and the following principles;

i) to harmonize (i.e., make identical) technical regulatory requirements and inspection procedures, or to make these equivalent when harmonization is not possible.

ii) to apply import and/or quarantine restrictions on a regional, rather than national basis on an exporting party, when a disease or pest is distributed regionally.

iii) to establish equivalent accreditation for inspectors and inspection systems.

iv) to establish reciprocal training and when appropriate, to utilize each other's testing and inspection personnel.

Where the parties have harmonized or made equivalent their technical and regulatory requirements, and an exporting party has certified that goods meet the requirements, the importing party is allowed to examine the goods to verify that the standards are met.

To achieve the above goals, the FTA states the parties shall establish working groups with equal representation in the areas of: Animal Health; Plant Health, Seeds, and Fertilizers; Meat and Poultry Inspection; Dairy, Fruit, Vegetable, and Egg Inspection; Veterinary Drugs and Feeds; Food, Beverage and Color Additives and Unavoidable Contaminants; Pesticides; and Packaging and Labelling of Agricultural, Food, Beverage and Certain Related Goods for Human Consumption.

These groups are required to meet at least annually, unless the parties agree otherwise, or at the request of either party. The parties are also required to form a joint monitoring committee to oversee the working groups' progress and report this to the Secretary of Agriculture (U.S.) and Minister of Agriculture (Canada).

Comment: Action required or recommended (see Annex 708.1).

### **Annex 708.1 (including Schedules 1 through 12)**

This annex defines, for the purposes of the Schedules in this section, the following: "feed", "fertilizer", "means of conveyance", "pest", "pesticide", "plant", "plant pest", and "veterinary drug".

Comment: No action required or recommended -- definitional.

## **Schedule 1: Feeds**

This section states that the parties shall work toward the harmonization or the equivalent of federal technical requirements for testing, labelling, content, exemptions, and regulations regarding additives and drugs in feeds. Furthermore, the parties shall work through both the National Association of State Departments of Agriculture (NASDA) and the American Association of Feed Control Officials (AAFCO) toward achieving the goal of harmonizing United States federal and state and Canadian federal requirements with respect to certain technical regulations (eg. labelling, content, packaging, testing).

Furthermore, the parties shall recognize each others feed mill inspection results and work toward equivalence with respect to manufacturing regulations for medicated feeds, harmonization to validate feed assay methods, and harmonization regarding tolerances of drug residues and contaminants in feeds.

Michigan's feed laws are not identical to all other states nor are they identical to Canadian federal law. It has been suggested, however, that with regard to Canada, Michigan's laws do not vary significantly. Furthermore, agricultural officials for both parties have commented that the current laws have posed no difficulties with regard to trade.

AAFCO is a non-profit organization that is composed of members representing each state and Canada. All of these members are agricultural "control officials" and have authority to recommend regulatory policy. The AAFCO has proposed the "Uniform Feed Bill" which provides guidelines for states to follow. This bill is merely a suggestion and is totally voluntary. AAFCO has not done any work solely dealing with the FTA, however model legislation has been proposed for several years. Most states have adopted many of these proposed regulations, which are consistent with federal feed laws. Michigan has adopted many provisions of the model legislation.

Comment: No action required or recommended.

## **Schedule 2: Fertilizers**

This section states that both parties shall work toward equivalent federal technical requirements for labelling, testing, content, exemptions, and regulations regarding pesticides in fertilizers. Furthermore, the parties shall work through the both the National Association of State Departments of Agriculture (NASDA) and the American Association of Plant Food Control Officials (AAPFCO) toward achieving the goal of harmonizing United States' federal and state, and Canadian

federal requirements with respect to certain technical regulations (e.g. labelling, content, packaging, testing).

Michigan's fertilizer laws are not identical to the other state laws, nor to Canada's federal law. Discussion with officials from both Michigan and Canada indicate that their respective laws are very similar, and neither country has experienced any difficulty in trading as a result of the minor differences in the law.

The AAPFCO, has initiated no action which specifically addresses the FTA. The Association has, for many years, proposed uniform "model legislation". The Association, composed of administrators of fertilizer law from all 50 states, Puerto Rico, and Canada, will propose that the "Model State Fertilizer Bill" be the basis of harmonization. The possibility of this succeeding is enhanced by the fact that even though all states have separate laws, most of these laws accept the uniform bill.

Michigan is a very active member of the AAPFCO and has adopted its model legislation.

Comment: No action required or recommended.

### **Schedule 3: Seeds**

This section states that the parties can not introduce origin-staining requirements for alfalfa or clover. Furthermore, both shall work through the National Association of State Departments of Agriculture (NASDA) and the American Association of Seed Control Officials (AASCO), toward allowing seed grown in Canada and exported to the United States to be governed by uniform U.S. regulatory requirements. Finally, this schedule states that the parties shall "maintain mutual recognition" of certification standards, and testing methods established by the Association of Official Seed Certifying Agencies (AOSCA) and the Association of Official Seed Analysts (AOSA).

Currently, seeds are governed by federal and state law in the United States and federal law in Canada. The United States federal regulations are comprised of many standards, which are viewed more as voluntary than mandatory. As a result, most states generally employ state law. Both parties are working through the NASDA and AASCO, towards harmonization. The NASDA is comprised of a representative in Washington D.C. and each one of the state's presidents. The AASCO is composed of members of all fifty states, and Canada. Currently, the state laws vary with regard to labelling requirements, and one of the main goals of the AASCO is to harmonize requirements, so that all states will recognize each other's labels (e.g. analysis sheets). The AASCO has proposed the Recommended

Uniform State Seed Law (RUSSEL), a bill which proposes the use of uniform seed labels.

Certification and testing procedures proposed by the AOSCA and AOSA, are being followed by all states and Canada.

Michigan has its own body of seed law. There are some differences with regard to Canadian (federal) law, more than within feed or fertilizer laws, but these differences are generally viewed as not being an impediment to trade. Michigan has formulated its state law in accordance with the model legislation.

Comment: No action required or recommended.

#### **Schedule 4: Animal Health**

This schedule states that the parties shall work toward equivalent export certifications by private veterinarians, equivalent testing and certification procedures for veterinary biologists, and harmonized animal disease test methods. Furthermore, the parties shall work toward eliminating state and provincial restrictions regarding the importation of animals, embryos and animal by-products.

Michigan's and Canada's laws are not equivalent in all areas related to this section. Michigan's laws are viewed as more stringent than the USDA. As a result, the USDA allows animals and by-products to cross border states to reach destinations in other states. Reportedly, some of these goods never reach their final destination, and in some instances, goods that do not meet Michigan's requirements end up in Michigan.

Canada's laws are viewed, in some instances, as being even more restrictive than Michigan's. The differences between Michigan and Canadian law, however, have not been viewed as an impediment to trade.

Comment: No action required, but recommended action is as follows:

Michigan trade associations, industries, and producers should alert the "Animal Health" working group as to any issues that arise which are an impediment to trade. In addition, the various associations should continue working through this group to eliminate state and provincial restrictions.

## **Schedule 5: Veterinary Drugs**

This section specifies that both parties shall work toward making equivalent various testing and regulatory procedures. Health and safety regulations, warning and caution statements, procedures for accepting tolerances, and investigational new drug requirement equivalences must be accepted within twenty-four months of the signing of the FTA.

Comment: No action required or recommended -- federal jurisdiction.

## **Schedule 6: Plant Health**

This schedule states that the parties shall work toward equivalent or harmonized quarantine procedures and regulations regarding the importing of plants. Furthermore, the parties shall work toward agreeing on qualifications for accredited plant health inspectors, and once this is done, accept either party's inspection certificates.

Michigan plant health is regulated largely by P.A. 189, The Insect, Plant and Pest Disease Act and Michigan seed law. Michigan laws are not that similar to Canada's regarding plant health. Problems lie in the area of inspection because Michigan officials, in cooperation with the USDA, inspect imports and exports, and then Canada requires the same inspection procedure when the plants arrive there. Furthermore, Canada's new listing, entitled "Export Certification Manual for Canada," is very restrictive with regard to some Michigan agricultural products.

Comment: No action required, but recommended action is as follows:

Michigan trade associations, industries and producers should notify the "Plant Health" working group (authorized under Article 708 of FTA) of the impediments to trade that the Canadian restrictions place on Michigan products.

## **Schedule 7: Pesticides**

This section states that both parties shall exchange analytical methodology and crop residue data. In addition, both shall work toward making equivalent: guidelines, technical regulations, test methods and standards; residue monitoring programs; risk-benefit assessment process; tolerance setting; and the setting of regulations regarding oncogenic pesticides.

In the United States, pesticides are regulated by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Most state laws that regulate pesticide

chemicals are very similar. Only the American Association of Pesticide Control Officials (AAPCO) has initiated harmonization efforts. This Association, composed of pesticide control officials from all fifty states and Canada, has proposed model pesticide legislation, which was last adopted by the Association in 1972. This bill, the Pesticide Use and Application Act, is not mandatory.

The proposed legislation is offered as a guide, and states are encouraged to adopt whatever portions are appropriate for them. Michigan's laws regarding pest control are different than Canada's and are more stringent than most national models. Michigan agriculture officials are investigating and reviewing several national models, however.

Comment: No action required, but recommended action is as follows:

Michigan agriculture officials should continue to review national proposals for uniform law. Furthermore, the officials should review Michigan laws and consider amending state law, where necessary, to be harmonious with a national proposal (given other states adopt it as well). This would aid in furthering the FTA's objective of harmonization between all states and Canada, by accomplishing the first link -- harmonization among all the states' standards.

### **Schedule 8: Food, Beverage and Colour Additives**

This section states that both parties shall work together to develop a uniform policy regarding the removal of compounds in food and beverages. In addition, they shall work toward the development of uniform methods of health hazard evaluation and risk assessment.

Food and beverage additives are regulated by the Food and Drug Administration of the United States, authorized by the federal Food, Drug, and Cosmetic Act. One of the eight working groups specified by the FTA (Article 708, 4(a)i-viii) is researching these issues. The co-chairman of this working group was to set an agenda and in doing so, solicit information from U.S. firms about any "sources of irritation that Canadian rules and regulations impose on them" with regard to the area of food and beverage additives.

Comment: No action required, but action recommended is as follows:

It is essential that the "Food, Beverage and Colour Additives" working group receive input from state trade associations, industries and producers as to any Canadian regulations that hinder trade. These entities should continue to alert the working group as additional issues arise.

## **Schedule 9: Packaging and Labelling of Agricultural, Food, Beverage and Certain Related Goods for Human Consumption**

This section states that the parties shall work toward accepting dual declarations of content and equivalent requirements for nutrition labelling, listing ingredients, labelling terminology, and grading. In addition, both should review container sizes.

The United States government regulates packaging and labelling through the Food and Drug Administration. Again, a working group has been established in this area, as the FTA suggests.

Comment: No action required, but recommended action is as follows:

Michigan trade associations, industries and producers should continue to alert this working group of any areas of Canadian law, related to packaging and labelling, which act as an impediment to trade.

## **Schedule 10: Meat, Poultry and Egg Inspection**

Under this section, both parties shall work toward making equivalent and, if already equivalent, accept the equivalence as it relates to each party's: review of inspection systems and facilities of third countries; own inspection of laboratory systems, and egg testing methods.

Where the equivalent standards have been accepted by the parties, and the exporting party demonstrates that their goods meet the agreed upon standards, the importing party may examine the goods to verify that compliance has occurred.

The United States government regulates these procedures through the Food and Drug Administration. Because of the workload, many states, including Michigan, contract with the government to perform FDA inspections. The state inspectors are trained by the FDA and governed by their rules.

Comment: No action required or recommended -- federal jurisdiction.

## **Schedule 11: Dairy, Fruit and Vegetable Inspection**

This section states that both parties shall make equivalent, and accept the equivalence of each other's inspection system for fresh vegetables and fruits. Furthermore, they shall work toward equivalent inspection procedures for dairy

products, and make equivalent and accept each other's federally approved laboratory results regarding dairy inspection.

Comment: No action required or recommended -- federal jurisdiction.

## **Schedule 12: Unavoidable Contaminants in Foods and Beverages**

This schedule states that both parties shall work toward the harmonization of regulatory requirements and the process for setting tolerance and/or action levels for unavoidable contaminants. Furthermore, the parties shall work to develop equivalent test methods for determining contaminants in food and beverages, and uniform methods for evaluating health hazards and assessing risk.

Laws pertaining to these areas fall under the Food and Drug Administration. These regulations are being evaluated by the working group on "Food, Beverage and Color Additives".

Comment: No action required, but action recommended is as follows:

Michigan trade associations, industries and producers, however, should continue to notify the working group as to areas of Canadian law which negatively impact trade.

## **Article 709: Consultations**

This section mandates that the parties must consult on agricultural issues at least semi-annually.

Comment: No action required or recommended.

## **Article 710: International Obligations**

This section states that the parties retain their rights and obligations under the GATT, unless this section of the FTA specifically provides otherwise.

Comment: No action required or recommended.

## **Article 711: Definitions**

This section defines the following terms: "agricultural goods"; "agricultural, food, beverage and certain related goods"; "animal"; "equivalent"; "export subsidy"; "harmonization"; "import fee"; "import price"; "meat goods"; "standard"; "sugar"; "technical regulation"; and "technical specification".

Comment: No action required or recommended -- definitional.

## **Chapter Eight: Wine and Distilled Spirits**

### **Article 801: Coverage**

This chapter relates to regulation of the sale and distribution of wine and distilled spirits. Beer and malt containing beverages are not within the scope of this chapter. Although national treatment is generally required, certain miscellaneous regulations, not specifically addressed by the FTA, are exempt under the residual provision of Article 801(2). Beer and malt containing beverages are specifically exempted from national treatment in Chapter 12, Article 1204 (Amendments), and this exemption is addressed in depth in Chapter 20.

Comment: No action required or recommended.

### **Article 802: Listing**

This provision requires that listing of wine and distilled spirits be based on normal commercial considerations. National treatment must be accorded products of the other country and listing must be non-discriminatory, transparent and not a disguised barrier to trade. Prompt written notification to the applicant of listing decisions, including, in the case of denial, a statement of the reason for refusal and establishment of a prompt, fair and objective administrative appeal procedure is required. Listing regulations must be published and be generally available. British Columbia may continue to automatically list the products of existing small (producing less than 30,000 gallons/year) estate wineries under a special exception to the general listing rule. The Michigan Liquor Control Commission's current listing practices are in full compliance with the FTA, therefore, no change in Michigan regulations are necessary. Non-legal recommendations for increasing Michigan's wine exports are included in Section V of this report.

Comment: No action required or recommended.

## **Article 803: Pricing**

This provision eliminates discriminatory pricing by public entities that distribute wine and distilled spirits. Discriminatory distilled spirit mark-ups, i.e., price increases unrelated to commercial considerations, became violative of the FTA on January 1, 1989. Such mark-ups on wines will be eliminated according to the following schedule:

- mark-up < 75% as of Jan. 1, 1989;
- mark-up < 50% as of Jan. 1, 1990;
- mark-up < 40% as of Jan. 1, 1991;
- mark-up < 30% as of Jan. 1, 1992;
- mark-up < 20% as of Jan. 1, 1993;
- mark-up < 10% as of Jan. 1, 1994;
- No mark-up after Jan. 1, 1995.

The FTA permits the price charged by the public entity for both wine and distilled spirits to include any additional actual costs of handling imported products. The percentage of mark-up permitted on wines in the above schedule is calculated from a base differential established by subtracting the permissible cost of handling amount from the mark-up in place as of October 4, 1987. For example, if a bottle of wine was being marked up \$20 by the liquor control commission on October 4, 1987, and the actual additional cost of handling was \$4, the base differential for calculating permissible mark-ups under the schedule would be \$16. Therefore, as of January 1, 1989, the permissible mark-up is 75% of \$16, or \$12. The \$4 handling cost may also be added.

The current pricing practices of the Michigan Liquor Control Commission are in full compliance with the FTA, because no discriminatory mark-ups are utilized.

Comment: No action required or recommended.

## **Article 804: Distribution**

The national treatment standard set forth in Chapter 5 is made applicable to distribution of wine and distilled spirits, thereby ensuring that the distribution systems of both countries will be equally available to all producers of wine and distilled spirits. There are a few specific exceptions: (i) either party may require that on-premise sales by wineries or distilleries be limited to its own products; (ii) provincial regulations in Ontario and British Columbia permitting discrimination

by private outlets which sell only wines produced within the province, and Quebec regulations requiring that wines sold in grocery stores be bottled within the province are grandfathered. (Quebec must provide alternative outlets for the sale of U.S. wines.)

Comment: No action required, but recommended action is as follows:

The practices of the Michigan Liquor Control Commission regarding distribution satisfy the requirements of the FTA. Michigan may, however, want to consider entering into negotiations with the province of Ontario to secure treatment of Michigan wines comparable to the favored treatment Ontario gives its own wines, i.e., permitting distribution of Michigan wines in private outlets currently selling only Canadian products.

#### **Article 805: Blending Requirement**

This provision reflects Canada's agreement to eliminate regulations that required the blending with Canadian spirits of U.S. distilled spirits imported in bulk form.

Comment: No action required or recommended.

#### **Article 806: Distinctive Products**

Canadian Whiskey and U.S. Bourbon Whiskey are officially recognized as distinct products by both parties for purposes of standards and labelling. Sale as Canadian Whiskey of any product not manufactured in Canada according to its standards is prohibited, as is the sale as Bourbon Whiskey of any product not manufactured in the U.S. according to its standards.

Comment: No action required or recommended.

#### **Article 807: International Obligation**

Incorporates the rights and obligations of the parties under the GATT.

Comment: No action required or recommended.

## **Article 808: Definitions**

Comment: No action required or recommended.

Note: Canadian tariffs, particularly high on alcoholic beverages, will be eliminated under provisions of Chapter 4 by 1998. This elimination will result in American alcoholic beverages being more price competitive in Canada than imports from third countries.

## **Chapter Nine: Energy**

The provisions of Chapter Nine relate to the import and export of energy goods between the U.S. and Canada. Energy goods are defined as those classified in the Harmonized System of the GATT, including petroleum, natural gas, coal, electricity, uranium and other nuclear fuels.

Comment: No action required or recommended -- federal jurisdiction.

## **Chapter Ten: Trade in Automotive Goods**

### **Article 1001: Existing Arrangement**

This provision reaffirms the duty of the U.S. and Canada to administer the Agreement Concerning Automotive Products between the Government of Canada and the Government of the United States of America (hereinafter the "Auto Pact"), which became effective in September 1966, to benefit automotive employment and production in both countries. Under Chapter Four, Article 405, the rights of both the U.S. and Canada under the GATT and the Auto Pact are retained. Under the provisions of the Auto Pact, 95 percent of U.S. - Canadian automotive trade (specified motor vehicles and original equipment parts) was already duty-free.

Comment: No action required or recommended.

### **Article 1002: Waiver of Customs Duties**

This provision precludes the extension of Auto Pact benefits, or comparable duty-free status, to any company not already enjoying that status. Qualifying companies are listed in Part I of Annex 1002.1. Contravention of the goal of this

provision is prevented by the footnote to Part I, which requires cessation of Auto Pact benefits to a company for two reasons: (i) ownership or control is acquired by a manufacturer of motor vehicles that is not already a beneficiary of Auto Pact; (ii) subsequent to a change in ownership or control, significant, fundamental alterations in the nature, scope, or size of the business occur.

Paragraph 1 of this article restricts Canada's practice of granting duty waivers that are export based to those companies listed in Part II of Annex 1002.2.

Paragraph 2 provides that after January 1, 1989 (effective date of the FTA), exports to the U.S. are excluded from calculation of such duty waivers and all duty waivers based on exports will be eliminated by January 1, 1998.

Paragraph 3 requires that duty waivers extended by the Canadian government on the basis of production agreements be eliminated by January 1, 1996 or earlier, as the agreements terminate.

Paragraph 4 provides that if one party can demonstrate that a duty waiver granted on automotive goods by the other party adversely affects the commercial interests or economy of the other party, the waiver must be eliminated or, alternatively, made available to all importers. This provision does not apply to waivers under Auto Pact or that comply with paragraphs 1-3 above. (See Article 405, paragraph 3).

The overall effect of this article is to help ensure that production, investment, and sourcing decisions are not influenced by artificial controls, but by actual market conditions.

Comment: No action required or recommended.

### **Article 1003: Import Restrictions**

This article requires Canada to phase out all import restrictions on used automobiles by January 1, 1993. The timetable established by the FTA for the elimination of import tariffs is the following:

- January 1, 1989 on autos eight or more years old;
- January 1, 1990 on autos six or more years old;
- January 1, 1991 on autos four or more years old;
- January 1, 1992 on autos two or more years old; and
- January 1, 1993 all restriction eliminated.

Comment: No action required or recommended.

#### **Article 1004: Select Panel**

This article provides for the establishment of a select panel of "informed persons" to assess the state of the North American auto industry and recommend public policy measures and other action aimed at improving the global competitiveness of the industry.

A group was impaneled and held its first meeting in August 1989. Membership consists of 15 American and 15 Canadian private sector leaders, representing many interests. Co-chairmen are Peter G. Petersen, Chairman of the Blackstone Group, an American, and D'arcy McKeough, of Redpath Industries, a Canadian.

The American representatives are:

Owen Bieber, Pres. International UAW  
David E. Cole, Ph.D., University of Michigan  
Joseph T. Gorman, Chairman, Pres. and CEO, TRW Inc.  
Gerald Greenwald, V. Chairman, Chrysler Corp.  
Elliot Lehman, Co-Chairman, Pel-Pro, Inc.  
Harold Poling, V. Chairman and CEO, Ford Motor Co.  
J. David Power III, Pres., J. D. Power & Assn.  
Heinz Prechter, Chairman and Pres., ASC Inc.  
William Raftery, Pres., Motor Equip. Mfrs. Assn.  
Jack Reilly, Pres. and CEO, Tenneco Automotive  
Thomas Russel, Chairman and CEO, Federal-Mogul Corp.  
Paul Schloemer, CEO, Parker-Hannifin Corp.  
Roger Smith, Chairman, General Motors Corp.  
Neil Springer, Chairman, Pres., and CEO, Navistar  
Intern'l. Transportation Corp.

The Canadian representatives are:

Roy Bennett, Bennecon Ltd.  
Ken Harrigan, Pres., Ford Canada  
Moe Closs, Pres., Chrysler Canada  
M. V. Kempston-Darkes, V. Pres., General Motors Canada  
S. Yanagisawa, Pres., Toyota Canada  
E. I. Lee, Pres., Hyundai Canada

Peter Dawes, Pres., Canadian Importers' Assn.  
Robert Beamish, Chairman, Woodbridge Group  
Paul Calvi, Pres., Waterville T.G.  
Jim McAlpine, V. Chairman, Magna International  
Andre Normand, Pres., Prevost Car, Inc.  
Robert White, Pres., Canadian Auto Workers  
Sally Hall, Ex-Pres., Canadian Consumers Assn.  
Ken Graydon, Exec. V.Pres., Fed'n of Auto Dealers Assn.

Comment: No action required or recommended.

### **Article 1005: Relationship to Other Chapters**

This article refers to the FTA rule of origin for automotive goods enunciated in Chapter 3 (Annex 301.2, Section XVII). The rule applies to automotive goods imported into the territory of either party by the other. The content rule imposed by the FTA is more stringent than that previously required. 50 percent of the direct production costs of any vehicle traded must be incurred in either Canada or the United States to qualify for duty free treatment. Previously, overhead and other indirect costs were included in the formula. The new test is approximately equivalent to a 70 percent standard under the old formula. This article gives manufacturers the option of electing to meet the rule of origin in Annex 301.2 on a vehicle by vehicle basis, or by averaging its calculation over the period of a year on the same class of vehicles, or sister vehicles assembled in the same plant. Article 1006 divides vehicles into seven classes, defined by interior volume: minicompact automobiles, subcompact automobiles, compact automobiles, midsize automobiles, large automobiles, trucks and buses. All vehicles and original equipment parts imported into the U.S. from Canada will be duty free if they meet the new 50 percent rule of origin, as was the case under the Auto Pact. Canadian importers can import duty free under the Auto Pact, if they enjoy that status (see Article 1002). All other automotive goods must meet the FTA rule of origin to be duty free.

Paragraph 4 of this article provides for modification by agreement of the parties of the definition "class of vehicles" and of the list of companies permitted to benefit from Auto Pact contained in Annex 1002.1.

Comment: No action required or recommended.

### **Article 1006: Definitions**

Comment: No action required or recommended.

## **Chapter Eleven: Emergency Action**

This chapter allows for "safeguard" procedures providing emergency relief to domestic industries injured by imports. In the event that increased imports cause serious injury to a domestic industry, the injured country is allowed to take temporary emergency actions restricting imports in order to remedy the injury.

The FTA partner taking such emergency action must provide compensation to expand trade in another product, or the exporting partner may take substantially equivalent retaliatory action. Any disputes which arise as a result of such emergency action being taken are subject to binding arbitration under the dispute settlement provisions of the FTA (Chapter Eighteen).

Comment: No action required -- federal jurisdiction.

## **Chapter Twelve: Exceptions for Trade in Goods**

### **Article 1201: GATT Exceptions**

There are certain goods that are excepted from the provisions of the FTA. Article 1201 incorporates Article XX of the GATT into the FTA. Article XX permits regulation of trade which would otherwise violate the terms of the Agreement for the following reasons:

- protection of public morals;
- protection of human, animal or plant life;
- involves gold or silver;
- ensures compliance with domestic laws and regulations not otherwise inconsistent with GATT;
- produced with prison labor;
- protection of national treasures with artistic, historic or archaeological significance;
- regulation is pursuant to an international commodity agreement.

The provisions of the GATT Article XX may not be applied so as to constitute an arbitrary or disguised barrier to trade.

Comment: No action required or recommended.

## **Article 1202: Protocol of Provisional Application**

This provision incorporates into the FTA the "grandfather" clause of the GATT which excepted certain domestic legislation of the two parties from compliance.

Comment: No action required or recommended.

## **Articles 1203: Miscellaneous Exceptions**

Current restraints on the export of logs and eastern Canadian provincial statutes controlling the exportation of unprocessed fish are exempt from compliance with the FTA.

Comment: No action required or recommended.

## **Article 1204: Beer and Malt Containing Beverages**

The national treatment standard does not apply to regulation of beer and malt containing beverages, and nonconforming regulations may be renewed or amended, so long as such amendment does not increase noncompliance. New regulations must comply with the FTA. The exclusion of beer and malt containing beverages is also considered in detail in Chapter 20.

Comment: No action required or recommended.

**PART THREE**  
**GOVERNMENT PROCUREMENT**

**Chapter 13: Government Procurement**

This chapter is limited to the procurement of goods specified in the GATT Agreement on Government Procurement and those services incidental to their delivery (services must amount to less than 50 percent of the total contract). It applies only to procurement by the national governments of the U.S. and Canada and is limited to procurement by specific government agencies. The FTA altered the GATT agreement by reducing the threshold value for opening the procurement to both U.S. and Canadian suppliers on a non-preferential basis from \$171,000 U.S. to \$25,000 U.S. Under the FTA, only those goods manufactured in North America, and containing at least 50 percent U.S. and/or Canadian content, by cost, will qualify for such non-preferential treatment.

Comment: No action required or recommended. Non-legal suggestions for Michigan businesses are detailed in Section VI.

## PART FOUR

### SERVICES, INVESTMENT AND TEMPORARY ENTRY

#### Chapter Fourteen: Services

##### Article 1401: Scope and Coverage

This chapter applies to all measures affecting "covered services" that are listed in Annex 1408. It does not apply to any other services. The major categories of covered services are: agricultural and forestry services, mining services, construction services, distributive trade services, insurance and real estate services, commercial services, and others. Legal services, for example, are not covered services.

Comment: No action required or recommended.

##### Article 1402: Rights and Obligations

This provision sets forth the countries' general obligations regarding measures related to covered services: it requires that each country accord national treatment with respect to those services unless different treatment is necessary for "prudential, fiduciary, health and safety, or consumer protection" and prior notification for the different treatment has been given.

However, existing laws and regulations are grandfathered; they do not have to comply with the above national treatment provision, nor do their prompt renewal or continuation. Amendment of existing measures cannot be less conforming with the requirements of national treatment. New measures cannot arbitrarily or unjustifiably discriminate against nationals of either country, nor may they constitute a disguised restriction on the trade of covered services.

The article explicitly exempts either country's "government procurement or subsidies" from compliance.

Comment: No action required, but recommended action is as follows:

Consider changing laws or regulations, e.g., MCLA § 500.408(1)(viii), under the Insurance Code, MCLA § 500.401, et seq., that require maintenance of different deposits or reserves by some alien insurers.

## Article 1403: Licensing and Certification

The existing measures that relate to licensing and certification are grandfathered, as provided above in article 1402. However, there is a specific requirement that each country encourage recognition of the other's licensing and certification requirements. Moreover, each country must ensure that new laws and regulations do not discriminatorily impair the licensing or certification of the other country's nationals.

Comment: No action required, but recommended action is as follows:

- (1) Consider negotiations with Ontario to amend licensing laws and regulations that contain specific residency-related requirements:
  - a. security systems services: alarm system contractor or private security guard, MCLA § 338.1056, must be a U.S. citizen
  - b. personnel supply services: employment agent/agency, MCLA § 339.1005, must supply 3 recommendation letters from reputable business persons who are residents of Michigan
  - c. real estate agency & management services: real estate broker, MCLA § 339.2505, must supply 2 recommendation letters from individuals who have resided in the state for at least 1 year, in the county where applicant has a place of business.
- (2) Explore the following possible problem areas:
  - a. the application process for obtaining a license is extremely time consuming because in both the U.S. and Canada, a case-by-case analysis is often required
  - b. the requirements for some professions are not reciprocal among the states, e.g., engineers, MCLA § 339.2004, real estate brokers, MCLA § 339.2505; so, after obtaining an initial license in the other country, it may be even more difficult to obtain reciprocity in other states/provinces due to different requirements.

## **Article 1404: Sectoral Annexes**

This article sets forth special provisions for specific covered services. Unless specifically provided otherwise, the above provisions of Article 1402 apply.

### **Annex A: Architecture**

The Royal Architectural Institute of Canada and the American Institute of Architects must develop "mutually acceptable" professional standards and criteria and make recommendations by December 31, 1989. Each organization must then "encourage" the respective states/provinces to incorporate those recommendations into their laws within 6 months, so that national treatment is assured.

The major differences between the U.S.'s and Canada's laws re: architecture are:

i. Michigan requires graduation from a program accredited by the National Architectural Accrediting Board; no Canadian program is reviewed or accepted by the Board.

ii. Currently, the Michigan law requires all architect applicants to receive a passing grade on an approximately 34 hour exam; Canada requires no exam after graduation to qualify for a license.

#### Comment: Action required:

Within 6 months of the issuance of mutually acceptable professional standards and criteria for the licensing and conduct of architects, the Michigan legislature must consider amending its statute, MCLA § 339.2001, et seq., to comply.

#### Comment: Action recommended:

To adopt a statutory amendment in compliance with the standards and professional criteria promulgated by the two national organizations.

### **Annex B: Tourism**

This annex applies to all laws governing trade in tourism services, including the provision of these services, the appointment, maintenance, and commission of agents to provide the services, the issuance of traveller's insurance, etc., but the grandfather clause of Article 1402 applies. Thus, the Agreement guarantees protection of the current level of trade in tourism services with Canadians.

New laws must comply with the principle of national treatment. In particular, new laws may not restrict the value of tourism services that nationals from either country purchase, except in conformity with Article VIII of the Articles of Agreement of the International Monetary Fund.

Each country, or the provinces/states within, may officially promote travel and tourist opportunities in the other country, but these promotional services cannot be for profit. The parties agreed to meet yearly to eliminate impediments to trade in tourism services and to promote an increase in tourist travel between the countries.

Comment: No action required, but recommended action is as follows:

Foster further promotional activities in Canada of state tourism and travel opportunities to support state businesses taking advantage of the commitment to eliminate impediments in the trade of tourism services. MCLA § 2.102, et seq. (Advertising State; Tourist Council); MCLA § 141.871, et seq. (Community Convention and Tourism Marketing Act).

### **Annex C: Computer Services and Telecommunications-Network-Based Enhanced Services**

The purpose of this annex is to "maintain and develop an open and competitive market" for the provision of these services in the two countries. The annex applies to all measures affecting purchase, lease, sale, construction, and use of basic telecommunications transport services.

However, the annex applies only to laws governing the provision of services by or on behalf of a person, not by or on behalf of a corporate entity. Existing monopolies are exempted from compliance.

Comment: No action required, but recommended action is as follows:

(1) In the process of reviewing telecommunications legislation for enactment of a new code in 1992, as required by MCLA § 484.126, be cognizant of the FTA commitment to maintain and develop open and competitive telecommunications trade with Canada.

(2) Because Canada's huge national monopoly, Bell Canada, is exempted from compliance with the provisions of Chapter Fourteen, Michigan should negotiate for nondiscriminatory access to this essential service area.

## **Article 1405: Future Implementation**

This article imposes an obligation on the countries to work toward measures to comply with the provisions of Articles 1402 & 1403 and to implement further sectoral annexes.

Comment: No action required, but recommended action is as follows:

Michigan should work toward mutually recognized professional criteria and standards, especially regarding engineers and surveyors, MCLA § 339.2001, et seq., real estate services, MCLA § 339.2501, et seq., and insurance agencies/agents, MCLA § 500.1200, et seq.

## **Article 1406: Denial of Benefits**

The FTA does not apply to services indirectly supplied by a third country. The intent of this provision is to prevent services work from going to third-country individuals or corporations under a "shell" operation. For example, if an automobile company hires the services of a Japanese engineering company which has no more than a post office box in Michigan, and the services are really being performed in Japan, the protections of the Agreement would not be extended should the auto company's Canadian affiliate want to hire the services of that company. However, if the Japanese engineering company were incorporated in Michigan and the services were performed in Michigan, the benefits of the Agreement would extend to that corporation's employees if they provided services in Canada.

Comment: No action required or recommended.

## **Article 1407: Taxation**

Any new taxation measure is exempt from having to comply with the provisions of this chapter as long as it (i) does not nullify or impair any benefit expected to accrue under the FTA provisions; and (ii) does not constitute arbitrary or unjust discrimination.

Comment: No action required or recommended.

## **Article 1408: Definitions**

What constitutes a "covered service" is specifically set forth in a list contained in Annex 1408.

Comment: No action required, but recommended action is as follows:

(1) Consider negotiations with Ontario to extend the benefits of this chapter to professions that are included in Chapter 15: Temporary Entry for Business Persons (allows certain professionals employed by a business in the other country to easily obtain temporary entry), such as law and nursing, even though they are not included as "covered services."

(2) Because transportation services are exempted from the FTA, consider negotiations to develop mutually recognized regulations, especially trucking regulations, to facilitate transportation of goods traded between the U.S. and Canada. See Section VI.

## **Chapter Fifteen: Temporary Entry for Business Persons**

This chapter is to facilitate business persons' temporary entry (as opposed to facilitating the providing of services) into each country by establishing "transparent criteria and procedures," while also maintaining border security and protecting "indigenous labor and permanent employment." Both countries must provide for the temporary entry of persons "otherwise qualified" under laws regarding the public health and safety and the national security.

A major expectation on both sides is that the FTA will do away with, or at least significantly reduce, the duties on work materials brought into either country by entering business persons -- e.g., duties on architects' drawings and designs, accountants' computations.

Annex 1502 lists business persons and professionals to whom the chapter applies. Significant omissions include computer consultants. The chapter does not apply to blue collar workers, unless they are employed by a company of the country into which the professional seeks to enter. For example, a Canadian electrician could obtain temporary entry into the U.S. to perform a service for a U.S. company that employed him, but not to perform a service at a profit for a homeowner who employed him.

Comment: No action required or recommended -- federal jurisdiction.

## **Chapter 16: Investment**

### **Article 1601: Scope and Coverage**

This chapter applies to any measure affecting investment, but exempts those measures that control: (i) the provision of financial services, except insurance services, which are covered by this chapter; (ii) government procurement; and (iii) the provision of transportation services.

Comment: No action required or recommended.

### **Article 1602: National Treatment**

Each country, and the states/provinces within, must accord national treatment to all investors regarding laws or regulations that apply to the sale, acquisition, establishment, or conduct and operation of businesses. The FTA specifically extends the national treatment requirement to ownership of shares. Although either country may require that directors or incorporators own a nominal quantity of shares, neither country can require that a minimum amount of equity be owned by its nationals in order for a business to be located in its territory.

However, the national treatment requirement does not apply to subsequently enacted Canadian laws or regulations that govern businesses which were in existence at the time the treaty went into effect. Thus, Canada could enact a law restricting U.S. ownership of Canadian Bell assets. Later amendments of those laws, however, cannot render the law more nonconforming with the principle of national treatment.

Moreover, each country may enact laws that do not conform to the national treatment requirement if: (i) it is necessary for "prudential, fiduciary, health and safety, or consumer protection reasons"; (ii) its effect is no different from laws imposed on nationals; and (iii) prior notification has been given.

Comment: No action required, but recommended action is as follows:

(1) Because Canadian banks are permitted to sell insurance in Canada, consider permitting Canadian bank affiliates owned by Michigan holding companies and operating in Michigan to sell insurance in the state.

(2) Consider passing the amendment to the Michigan Professional Corporation Act described in Section III.

### **Article 1603: Performance Requirements**

Neither country can condition permission to invest in a business, or impose a business regulation, with a requirement: (i) to export a certain amount of goods or services; (ii) to substitute goods or services of the investing country with imported goods or services; (iii) to purchase goods or services from the country where the business is located; or (iv) to achieve a certain level of domestic content. Neither country can impose such requirements on a third country if they would have a significant impact on trade between the U.S. and Canada.

Comment: No action required or recommended.

### **Article 1604: Monitoring**

Either country can require investors to disclose "routine information" regarding their investments for statistical purposes and in connection with the "nondiscriminatory and good faith application of its laws." The information shall remain confidential if public disclosure would prejudice the investor's competitive position.

Comment: No action required or recommended.

### **Article 1605: Expropriation**

Neither country may directly or indirectly expropriate an investment owned by an investor of the other country except on a nondiscriminatory basis for a public purpose in accordance with due process of the law. Adequate compensation must be given.

Comment: No action required or recommended.

### **Article 1606: Transfers**

Neither country shall prevent an investor from transferring any income gained from the investment unless the transfer would be "inconsistent with" measures regarding: bankruptcy and protection of creditors' rights, securities transactions, criminal offenses, reports of currency transfers, withholding taxes, or satisfaction of adjudicatory judgments.

Comment: No action required or recommended.

### **Article 1607: Existing Legislation**

This article grandfathers all existing measures, their prompt continuation, and their amendment as long as the change does not make them less conforming to the provisions of the FTA. The annex leaves in place Canadian laws prohibiting more than 50% ownership of a previously Canadian-controlled cultural business, i.e., a book publishing company, broadcasting station, or film distributor. In addition, a foreign-owned book publisher must sell to a Canadian owner. If the publishing company is sold indirectly to a U.S. owner, ownership must be divested to a Canadian at a "fair open market value."

### **Annex 1607.3:**

This annex requires amendment of the Investment Canada Act. By 1993, Canada will be able to perform investment review of the direct acquisition of control of a Canadian business by a U.S. investor only if the total gross assets of the Canadian business exceed Can\$150 million (at the time of the agreement, the limit was Can\$5 million). The standard for review is whether the investment is in Canada's best interest. For indirect acquisitions -- where a U.S. investor purchases a Canadian business and thereby gains control of its subsidiary by default -- the FTA phases out Canadian review altogether. The provisions of this annex explicitly do not apply to the oil and gas and uranium mining industries, but Canadian restrictions on foreign investment in these industries have been liberalized since the agreement was initiated in October 1987.

Comment: No action required or recommended.

### **Article 1608: Disputes**

Dispute resolution is to be conducted pursuant to arbitration and panel procedures under Chapter Eighteen. Review under the Investment Canada Act, and rights and obligations arising under the General Agreement on Tariffs and Trade, are exempt from FTA dispute resolution provisions.

Comment: No action required or recommended.

## **Article 1609: Taxation and Subsidies**

Unless a country can show that a taxation or subsidy measure interferes with expected benefits of the FTA, this Chapter does not apply to any such new measures as long as they are not "arbitrary or unjustifiably discriminatory."

Comment: No action required or recommended.

## **Article 1610: International Agreements**

Both countries shall endeavor to improve "multilateral" investment agreements.

Comment: No action required or recommended.

## **Article 1611: Definitions**

Defines such terms as acquisition, business enterprise, control, etc.

Comment: No action required or recommended.

## PART FIVE

### FINANCIAL SERVICES

#### Chapter Seventeen: Financial Services

Under this chapter, each country has specific obligations, but the FTA specifically exempts the state and provincial governments from having to comply.

The U.S. agreed to allow all Canadian, U.S., and foreign financial institutions to deal in, underwrite, and purchase debt obligations backed by any level of the Canadian government to the same extent it allows such transactions regarding U.S.-backed debt obligations. This will put Canadian government securities on the same footing as United States federal, state, and local government securities. National and state banks that are so authorized by their charters may purchase Canadian government securities. It also agreed to grandfather Canada's multistate branches under the International Banking Act.

Finally, the U.S. agreed to accord national treatment to amendments to the Glass Steagall Act that affected Canadian financial institutions operating in the U.S. However, existing provisions of the Glass Steagall Act are grandfathered, which prevents reciprocal access to the U.S. market by Canadians. Canadian banks operating in the U.S. are prevented from expanding because of state and local laws. This expansion restriction also affects a majority of Canadian securities firms because most of them have bank affiliates. Canadian securities firms will not be able to underwrite U.S. corporate securities.

Canada agreed to exempt U.S. nationals from its restrictions on percent of foreign ownership of federally controlled financial institutions -- Canada restricts total foreign ownership to 16% of a bank's assets. It also agreed to exempt U.S. citizens from restrictions on market share, asset growth, and capital expansion. Finally, Canada agreed not to use its review powers governing entry of U.S. controlled financial institutions "in a manner inconsistent with" the FTA.

Each country agreed to grandfather existing rights and privileges of the other country's financial institutions, as long as the other country "meets its commitment to further liberalize its financial markets."

Because Canada has far greater investment barriers than the U.S., these changes appear to primarily benefit the U.S. However, because no Canadian company can own more than 10% of Canada's six largest banks under current law,

the provisions of this chapter may not have significant practical effect for Michigan investors seeking to gain controlling interest.

Comment: No action required, but recommended action as follows:

Although this chapter is explicitly under federal jurisdiction, Michigan should consider whether there are impediments that may limit state financial institutions' ability to purchase Canadian-backed securities.

## PART SIX

### INSTITUTIONAL PROVISIONS

#### **Chapter Eighteen: Institutional Provisions**

This chapter sets forth institutional provisions that: (i) allow for the joint management of the FTA; and (ii) provide ways in which disputes between the United States and Canada, regarding the interpretation or application of any element of the agreement, may be avoided or settled.

A Canada-United States Trade Commission, composed of cabinet-level representatives from both governments and operating by consensus, will supervise the implementation of the Agreement and resolve any disputes regarding all matters except financial services, antidumping, and countervailing duties.

Initially, either government may attempt to avoid or resolve disputes through consultations. However, if these consultations do not solve the problem within 30 days after the request for consultation is made, either party may request a meeting of the Commission. In an effort to resolve the dispute promptly, the Commission may seek expert advice from technical advisors or use a mediator acceptable to both parties. If the Commission is unable to resolve the dispute in this manner, it may refer the matter to binding arbitration or establish a panel at the request of either party. Members of the panel are selected from a roster maintained by the Commission.

If a panel is utilized to resolve the dispute, the Commission will agree on the resolution after receiving the panel's final report. If the Commission cannot reach an agreement, and a party believes that its fundamental rights or benefits under the FTA are being or would be impaired if the measure at issue were implemented, that party may withdraw equivalent benefits from the other, until both governments reach agreement on resolution of the dispute.

Comment: No action required or recommended -- federal jurisdiction.

#### **Chapter Nineteen: Binational Dispute Settlement in Antidumping and Countervailing Duty Cases**

The provisions of this chapter set forth procedures that would allow both parties to take equal advantage of the benefits of the FTA by establishing conditions

of fair competition so that both sides have equal access to the free trade area established by the Agreement.

Under this chapter, each party may continue to apply its own national anti-dumping (AD) and countervailing duty (CVD) laws to imports from the other country. In AD and CVD cases, independent reviews conducted by binational panels will replace judicial reviews conducted by domestic courts. The binational panel set up to review such cases will function independently of the dispute settlement procedures of Chapter Eighteen.

Comment: No action required -- federal jurisdiction.

## PART SEVEN

### OTHER PROVISIONS

#### Chapter Twenty: Other Provisions

Miscellaneous provisions that did not fit under the categories covered in other chapters are covered here. Provisions concerning areas such as: national security, cultural industries, retransmission rights, plywood standards, softwood lumber, etc. are included in this chapter.

A summary of Chapter Twenty, however, would be incomplete if it failed to mention: (i) several provisions that are discussed in the FTA, but are exempted from coverage, e.g. certain "cultural industries", beer and malt containing beverages, etc.; and (ii) several areas of trade that are completely absent from the Agreement, e.g. transportation, exchange rates, etc..

A report published by the Bureau of National Affairs, Inc. devotes a chapter to those issues that may logically have been included in the FTA, but are conspicuously not covered. (U.S.-Canada Free Trade Agreement: The Complete Resource Guide, Volume I: An Industry Guide (BNA)). This chapter describes the negotiations that led to: (i) exemption of certain provisions from FTA coverage; and (ii) the complete omission of other provisions.

#### (i) Exempted Provisions:

- (a) Cultural Industries: Certain cultural industries such as: publication, sale, distribution, or exhibition of: books, magazines, and newspapers are exempted from the provisions of the FTA. Canada is extremely sensitive about maintaining its "cultural identity". Hence, this exemption had to be granted in order for the Canadians to even contemplate entering the Agreement.
- (b) Beer and Malt Containing Beverages: The U.S. has provided a lucrative market for Canadian beer exports. 1987 import/export figures show that the U.S. imported over 61 million gallons of Canadian beer, but only exported 4.6 million gallons of its domestic beer to Canada (Id. at 114). This inequity partially exists because of provincial restrictions against the sale of non-provincially produced beer. If these restrictions were removed, the Canadian brewing industry would be severely disadvantaged.

At present, provincial law dictates that a brewery may sell beer in a province only if it also brews and bottles the beer in that province. This requirement forced Canadian breweries to establish facilities in each of the ten provinces. Hence, if it had been eliminated under the FTA, local breweries would have had to restructure their operations in order to compete with U.S. breweries. Consequently, beer is exempted from FTA coverage, unlike other alcoholic beverages (See Chapter Eight: Wine & Distilled Spirits).

Although a GATT panel ruled, in March 1988, that Canada's pricing, listing, and distribution practices regarding beer, wine, and distilled spirits were discriminatory, Canada only agreed to comply with those panel recommendations pertaining to wine and distilled spirits. Then-Canadian Trade Minister, Pat Carney, stated that Canada would not comply with the recommendations regarding beer because that would "give a free ride" to U.S. brewers, who had not filed the complaint (Id. at 115).

(ii) Omitted Provisions

- (a) Transportation: Due to heavy lobbying by both Parties, transportation was totally excluded from the Agreement. The U.S. maritime industry opposed FTA coverage of this area because inclusion of this provision would have relaxed the restrictions on foreign commerce currently in force under the U.S. Jones Act (Id. at 109). Canadian airline and trucking industry representatives opposed the deregulation of these two areas of transportation for fear that they would be unable to compete with their larger U.S. competitors.
- (b) Exchange Rates: Administration officials explain that exchange rates cannot be effectively addressed on a bilateral basis because the nature of trade is becoming global. Therefore, according to these officials, it would be futile to negotiate exchange rate parity without the other five members of the Group of Seven industrialized countries -- Japan, France, W. Germany, Italy, and the United Kingdom (Id. at 113).

Comment: No action required -- federal jurisdiction; non-legal suggestions for transportation (See Section IV).

**PART EIGHT**  
**FINAL PROVISIONS**

**Chapter Twenty One: Final Provisions**

The provisions of this chapter ensure that the two parties will exchange statistical information, usually consisting of data issued by Statistics Canada and the United States Department of Commerce and other U.S. government agencies, to facilitate implementation of the FTA.

The provisions of this chapter further allow either party to modify or amend the FTA by agreement. Moreover, under this chapter, the FTA remains in effect unless either party terminates it by providing the other party with a six-month notice.

Comment: No action required -- federal jurisdiction.

### III

#### CURRENT PENDING LEGISLATION

In conducting research for the study, the team identified pending legislation stimulated by the passage of the FTA or affecting Michigan business and trade within its purview.

##### **(A) Michigan Professional Service Corporation Act**

A proposed amendment to the Michigan Professional Service Corporation Act, MCLA § 450.221, et seq., eliminates the requirement that shareholders of professional corporations incorporated under the Act must, with limited exceptions, be licensed in Michigan. The amendment does not change the requirement that the service providers of such corporations must be licensed in Michigan.

The current law prevents Canadian investors from becoming shareholders in Michigan corporations, and in addition, it restricts expansion into Canada because Canadian service providers may not invest in the company. The proposed amendment is in the spirit of the FTA because it encourages free trade of investment services with Canada.

##### **(B) Michigan Export Development Act**

A proposed amendment to the Michigan Export Development Act, MCLA §§ 447.152 - .165, broadens the scope of the Board of the Michigan Export Development Authority. The amendment, if passed, may have implications for implementing the non-legal suggestions. The proposal, Senate Bill No. 369, has been significantly altered in committee and the team has been unable to obtain a copy.

The original version expanded the Board's authority enabling it: to charge for its services, to contract with specified financial institutions, to provide loans, to provide export insurance, to lead or participate in trade shows to promote Michigan goods and services, to sponsor a foreign sales corporation, and to establish an export trading company.

## IV

### MARKET EXPANSION AREAS

The U.S.-Canada trading relationship is already the largest and most profitable bilateral trading relationship in the world. In 1987 alone, the U.S. traded over \$166 billion dollars in goods and services with Canadian counterparts. Under the U.S.-Canada Free Trade Agreement (FTA), this commercial relationship will continue to grow as import and export tariffs and other anti-competitive trade barriers are reduced over a ten year period. The major non-tariff protectionist policies addressed in the FTA include import quotas, export limitations, licensing and regulatory constraints, price supports, and domestic content requirements. The FTA allows both Canada and the U.S. to maintain trade barriers against other countries while expanding free trade between the two countries.

The goal of the FTA is to provide for greater unrestricted market access such that the traditional market forces of supply and demand can operate without distortion. As targeted protectionist measures are modified or eliminated, it becomes important for manufacturers on both sides of the border to analyze the changed trading environment and its impact on available manufacturing, retailing, marketing, service, and investment opportunities.

The FTA will benefit both countries, albeit via different mechanisms. Businesses located within the U.S. will benefit by the elimination of Canadian tariffs which are, for the most part, much higher than comparable American tariffs. However, from a Canadian business perspective, Canada is gaining increased access to a market over ten times its own size. An increase in free trade measures gives Canada firmer footing to trade with the U.S. than other countries which are geographically distant and still subject to protectionist trade measures.

The elimination or reduction of trade barriers will undoubtedly lead to "a reallocation of resources that otherwise were artificially and inefficiently diverted by market distorting trade barriers". Sen. Glen, Senate Hrg. 100-855, p. 5, 5/9/88. This reallocation of resources will occur as firms realize new economies of scale as a result of an increased free market population and take advantage of lower end costs due to tariff reductions. Benefits will inure to those states whose regulatory environment favors the "post-reallocation" economic environment.

#### (A) Attractive Industry Sectors

According to the U.S. Department of Commerce, there are several export products which are expected to become more attractive to U.S. businesses as a result

of the FTA. Among the products most frequently mentioned in connection with Michigan businesses are:

- Auto Parts and Accessories
- CAD/CAM and Robotics Technology
- Computers, Software and Peripherals
- Disposable Medical Equipment
- Metal and Plastic Furniture
- Telecommunications Equipment
- Printing and Publishing
- Plastics and Resins

Automobile engines, parts, and accessories are Michigan's leading exports to Canada. In 1987, Michigan exported approximately \$5.4 billion worth of these products to Canada, representing over 70 percent of our Canadian exports. U.S. Dept. of Commerce Intn'l Trade Admin., March 1989. This market is anticipated to expand further as after-market and original equipment parts duties are eliminated in 1993 and 1998, respectively. In addition, the phaseout of the Canadian embargo on used American motor vehicles will provide increased business opportunities for Michigan businesses.

Computer aided design and computer aided manufacturing (CAD/CAM) and robotics technology, along with computers aimed at the manufacturing sector are also promising prospects under the FTA. Michigan exported over \$75 million in electronic computers alone to Canada in 1987. Because of Michigan's strong automotive manufacturing economy, a large number of CAD/CAM robotics firms are already located in the state making Michigan one of the nation's leading states in this sector. With reduced tariff structures and an increased ability to provide after-sale service via more transparent immigration procedures, these firms will find more export opportunities under the FTA.

As with CAD/CAM and robotics, Michigan has a well developed plastics and resins industry as a result of close proximity to Michigan's major auto producers. In addition, according to the U.S. Department of Commerce, plastics and resins are listed among the top ten export prospects to Canada during 1989. Inasmuch as Canada's own consumption of plastics and resins is expected to grow, Michigan firms will benefit due to their close geographic proximity to the Canadian markets and the ten year phaseout of tariffs on plastics and resins which had been as high as 25 percent. Michigan's competitiveness in the plastics and resins market combined with current Canadian public sentiment with regard to the cost of health care should also translate well for Michigan manufacturers currently manufacturing or desiring to manufacture plastic disposable medical equipment.

Another attractive industry segment for Michigan is the manufacture of furniture and fixtures. While raw materials for wood furniture are likely to be cheaper in Canada, Michigan is one of the nation's leading manufacturers of metal and plastic office furniture, exporting over \$37 million of furniture and fixtures to Canada in 1987. As a competitive industry, Michigan businesses will benefit due to their geographic proximity to Canadian markets and the elimination of tariffs of over 12% on these products.

Books and periodicals are also ranked high among top U.S. export opportunities to Canada during 1989. *Id.* Although Michigan has a significant publishing industry, it is not currently a major exporter of published materials to Canada. The phaseout of Canada's "print in Canada" requirement which provided advertising tax deductions to Canadian businesses only if the publication were printed in Canada should provide incentive for Canadian interests to do business with Michigan businesses for the first time.

### **(B) State Involvement**

Perhaps more important than attracting industries is educating the current business and industrial base on the benefits of the FTA: freer trade, less red tape, reduced tariffs, and an ability to provide after-the-sale assistance. Smaller firms have traditionally been discouraged from penetrating the Canadian market due to the tariff, customs, immigration and regulations surrounding dealings with Canadian interests. As long ago as May 1988, it was realized that "among the small and medium sized firms, however, there is generally less awareness of the opportunities provided by the [FTA]". Archey, William T., U.S. Chamber of Commerce, Senate Hrg. 100-85, at 24, 5/9/88. Notwithstanding the initial surge of conferences, it is very clear that small and medium size firms that could gain from the FTA have still not been educated as to its benefits.

Since awareness of the FTA is not well developed in the U.S., it is desirable that the Michigan Department of Commerce, the Michigan Department of Agriculture and other state agencies in cooperation with the private sector institute programs to increase awareness of the FTA and its benefits among existing Michigan businesses. Possible efforts with regard to education could include increased financing under the Michigan Export Development Act to fund local Canadian export trade offices in Michigan cities with trade border crossings. More modest efforts could include state sponsored education seminars aimed at small to medium size firms that otherwise lack the resources to learn of potential benefits under the FTA.

Along these lines, the University of Michigan announced in September 1989 that the University's School of Business Administration had been awarded approximately one-half million dollars by the U.S. Department of Education to establish a Center for International Business Education. The goal of the Center is to promote campus-based education and research and to help the U.S. become more competitive in international trade.

A healthy state environment for growth in the aforementioned industry sectors would also contribute to business expansion of new firms or those relocating to Michigan. Michigan has already proven its willingness to attract capital investment by providing benefits to businesses locating in Michigan. Packages comprising job training, recruitment, and infrastructure development such as water, sewer, roads, and interchanges have proven to be attractive bargaining incentives. To facilitate more expansion, laws and regulations on a prospective basis should be drafted to make Michigan a particularly attractive site for capital investment and production targeted at trade with Canada. Such laws and regulations might encompass licensing, design, manufacturing, or labelling requirements and should be drafted so as to comport with similar Canadian regulations.

## LEGAL RECOMMENDATIONS

Michigan should consider the following action related to laws and regulations:

### (A) Modifications of Existing Laws and Regulations:

#### (1) Chapter Fourteen: Services

Article 1403: Consider negotiations with Ontario to amend licensing laws and regulations that contain specific residency-related requirements:

- (a) security systems services: alarm system contractor or private security guard, MCLA § 338.1056, must be a U.S. citizen.
- (b) personnel supply services: employment agent/agency, MCLA § 339.1005, must supply 3 recommendation letters from reputable business persons who are residents of Michigan.
- (c) real estate agency & management services: real estate broker, MCLA § 339.2505, must supply 2 recommendation letters from individuals who have resided in the state for at least 1 year, in the county where applicant has a place of business.

Article 1404: Annex A: Architects: Within 6 months of the issuance of mutually acceptable professional standards and criteria for the licensing and conduct of architects, the Michigan legislature must consider amending its statute, MCLA § 339.2001, et seq., to comply.

Article 1405: Michigan should work toward mutually recognized professional criteria and standards, especially regarding engineers and surveyors, MCLA § 339.2001, et seq., real estate services, MCLA § 339.2501, et seq., and insurance agencies/agents, MCLA § 500.1200, et seq.

### (B) Laws and Regulations to be Examined Further:

#### (1) Chapter Seven: Agriculture

Article 708: Annex 708.1: Schedule 7: Pesticides:

Michigan agriculture officials should continue to review national proposals for uniform law. Furthermore, the officials should review

Michigan laws and consider amending state law, where necessary, to be harmonious with a national proposal (given other states adopt it as well). This would aid in furthering the FTA's objective of harmonization between all states and Canada, by accomplishing the first link - harmonization among all the states' standards.

(2) Chapter Fourteen: Services

Article 1402: consider changing laws or regulations, e.g., MCLA § 500.408(1)(viii), under the Insurance Code, MCLA § 500.401, et seq., that require maintenance of different deposits or reserves by some alien insurers.

Article 1404: Annex B: Tourism: Foster promotional activities in Canada of state tourism and travel opportunities to support Michigan businesses taking advantage of the commitment to eliminate impediments in the trade of tourism services. MCLA § 2.102, et seq. (Advertising State; Tourist Council); MCLA § 141.871, et seq. (Community Convention and Tourism Marketing Act).

Article 1404: Annex C: Computer Services and Telecommunications-Network-Based Services:

In the process of reviewing telecommunications legislation for enactment of a new code in 1992, as required by MCLA § 484.126, be cognizant of the FTA commitment to maintain and develop open and competitive telecommunications trade market with Canada.

Article 1408: Consider negotiations with Ontario to extend the benefits of this chapter to professions that are included in Chapter 15 (allows certain professionals employed by a business in the other country to easily obtain temporary entry), such as law and nursing, even though they are not included as "covered services."

Also, because transportation services are exempted from the FTA, consider developing mutually recognized regulations, especially trucking regulations, to facilitate transportation of goods traded between the U.S. and Canada. See Section VI.

(3) Chapter Sixteen: Investment

Article 1602: Because Canadian banks are permitted to sell insurance in Canada, consider permitting Canadian bank affiliates owned by Michigan

companies and operating in Michigan to sell insurance in the state. Also, consider passing the amendment to the Michigan Professional Corporation Act described in Section III.

**(C) Areas of Commerce to be Monitored as Growth Occurs:**

**(1) Chapter Six: Technical Standards**

Article 601: To facilitate increased trade, Michigan should adopt a policy of refraining from promulgating new, nonconforming technical standards unless such standards are clearly dictated by health or safety concerns. To the extent U.S. and Canadian standards are in harmony, free trade is encouraged.

**(2) Chapter Seven: Agriculture**

Article 708; Annex 708.1; Schedules 6: Plant Health; 8: Food, Beverage, and Colour Additives; 9: Packaging, Labelling of Agricultural, Food, Beverage and Certain Related Goods for Human Consumption; 12: Unavoidable Contaminants in Foods and Beverages: The working groups should receive input from state associations, industries, and producers regarding any rules that hinder trade. Michigan officials and representatives from the private sector should continue to alert these working groups as additional issues arise.

**(3) Chapter Eight: Wines and Distilled Spirits**

Article 804: The practices of the Michigan Liquor Control Commission regarding distribution satisfy the requirements of the FTA. Michigan may, however, want to consider entering into negotiations with the province of Ontario to secure treatment of Michigan wines comparable to the favored treatment Ontario gives its own wines, i.e., permitting distribution of Michigan wines in private outlets currently selling only Canadian products.

**(4) Chapter Fourteen: Services**

Article 1403: Explore the following possible problem areas:

- (a) the application process for obtaining a license is extremely time consuming because in both the U.S. and Canada, a case-by-case analysis is often required;

- (b) the requirements for some professions are not reciprocal among the states, e.g., engineers, MCLA § 339.2004, real estate brokers, MCLA § 339.2505; so, after obtaining an initial license in the other country, it may be even more difficult to obtain reciprocity in other states/provinces due to different requirements.

Article 1404: Annex C: Computer Services and Telecommunications-Enhanced-Network-Based Services: Because Canada's huge national monopoly, Bell Canada, is exempted from compliance with the provisions of Chapter Fourteen, Michigan should negotiate for nondiscriminatory access to this essential service area.

(5) Chapter 17: Financial Services

Although this chapter is explicitly under federal jurisdiction, Michigan should consider whether there are impediments that may limit state financial institutions' ability to purchase Canadian-backed securities.

## VI

### NON-LEGAL SUGGESTIONS

In conducting research for the study, suggestions were received for significant non-legal actions or major structural changes which were offered to improve Michigan's capacity to fully benefit from the FTA. A description of them is provided below.

#### (A) Transportation

The adequacy of the existing transportation infrastructure, roadways, bridges, and tunnels, to carry the anticipated increase in trade between Michigan and Canada has been questioned. Related to this is the need for more customs officers and inspectors, border stations, etc. These functions are governed by the United States Customs office and not regulated by the State.

Michigan may consider expanding ports. In addition, authorities may emphasize their usage as expressly authorized under MCLA § 447.103 which states that "the division of international commerce ... shall advertise and promote port utilization". Objectives to be accomplished under the FTA, markets to be served, and additional costs to be incurred require thorough examination.

Commercial transportation, such as shipping by truck, rail, barge, etc., and public transportation, including air and rail linkages for passengers are not addressed in the FTA. Opportunities may be discovered in thoroughly reviewing Michigan's plans, laws and regulations.

#### (B) Information Data Base

There is a lack of readily available information on the FTA and Canadian law for Michigan government, businesses and professionals. Lawyers and accountants who are involved in trade activity should acquire a strong FTA legal background. An easily accessible reference library should be established containing both U.S. and Canadian resource material on the FTA.

#### (C) Wineries

Michigan wineries may be able to take advantage of the increased access to Canadian customers created by elimination of Canadian discriminatory listing practices. An export strategy could productively be developed.

**(D) Government Procurement**

Michigan small and medium size businesses, unable to produce goods in sufficient quantities to meet the GATT threshold amount, might be able to take advantage of the reduced value and corresponding reduction in volume of Canadian procurement contracts. Interested companies should contact Supply and Services Canada, Corporate Relations Branch, 11 Laurier Street, Hull, Quebec, Canada, K1A 0S5, to be placed on the list of qualified suppliers of goods.

## VII

### CONCLUSION

After conducting an extensive analysis of the FTA, the study team concludes, as a number of experts have felt all along, that the FTA is not a true "free trade" agreement. However, the Agreement represents a step towards "freer trade" between the United States and Canada. Much of the FTA is policy oriented with emphasis placed on the future. Its main objective is to eliminate tariff barriers over a period of years and to prospectively work toward drafting harmonious laws and regulations that affect U.S.-Canada trade.

Based on the sheer volume of laws and regulations existing in Michigan alone\*, this prospective approach represents, perhaps, the most intelligent and practical strategy. To require the 50 states to retroactively alter their regulatory structure would be massive, complex and politically difficult. By establishing an overall policy goal of free trade and by focusing on future laws and regulations, the FTA allows the states to engage in a careful analysis of their laws and regulations and to address statutory changes on a priority basis. Those states seeking a competitive edge will be the first to undertake such efforts.

With regard to Michigan, perhaps the simplest regulatory adjustments involve licensing and professional recognition requirements. According national treatment to Canadian professionals carries with it the benefit of increasing the available base of qualified professionals, and, in the case of professions such as architecture, investment dollars may follow in the footsteps of the work performed. To the extent that Michigan employers are encouraged to venture into the Canadian markets, Michigan's economy can benefit from increased exports, a potential for increased employment and the long term benefits of "after the sale" services.

In addition to licensing standards, harmonization of regulations regarding product content and regulation such as agricultural and manufacturing products represent an opportunity for Michigan. To the extent these regulations are harmonized with Canadian regulations, it

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\*Searches conducted on Michigan's Questor legislative database yielded well over 1,000 statutes that could potentially affect trade with Canada. While the study team endeavored to identify those statutes that act as potential trade barriers or are not in compliance with the FTA, a more exhaustive legislative analysis is required.

becomes easier for Michigan businesses to conduct trade with Canada. Products which formerly required blending, alteration or relabelling could then be sold in Canada without change. The current costs of compliance with incongruous regulations could be a significant trade barrier. The benefit of eliminating such a trade barrier lies in simplifying export requirements, making exporting attractive to smaller businesses which otherwise would not have been interested.

The foregoing represent only two of a multitude of opportunities for Michigan to enhance its foreign trade environment. Banking, insurance and public utility regulations also bear further scrutiny, but require efforts beyond the scope of this study.

A simplified trade environment will not increase trade unless there is an awareness of its existence. This necessarily requires that Michigan businesses be educated on the procedural aspects of exporting and importing under the FTA and be able to receive day-to-day assistance. Export trade offices represent a logical approach to this problem, as do post-graduate centers which focus on international business and law.

Michigan would benefit by increasing its ability to physically transport imported and exported goods. Expansion of the trade infrastructure, including roads, bridges, tunnels and border crossings would allow Michigan to capitalize on our most valuable asset with regard to U.S.-Canadian trade -- our geographic proximity to the Canadian markets.

The FTA represents only the starting point in a quest to increase free trade. Its success or failure will in large part be determined by the extent to which the sovereign states capitalize on the FTA's opportunities or fail to do so. The study team's analysis of the FTA and its implication on Michigan laws yielded less required legislative modifications than originally anticipated. This is in large part due to the extensive grandfathering provisions found in the FTA. Despite this result, it is important to note that the grandfathering provisions were a practical requirement of implementing the FTA. It is said that the free trade zone of the United States has grown by ten percent as a result of the FTA. This figure is based on statistical population comparisons between Canada and the United States. Considering, however, that not all of the 50 contiguous states conduct any material amounts of trade with Canada, this percentage is probably low. If recalculated to reflect the market increase by comparing Canada's entire population to the population of those states that regularly conduct significant amounts of trade with Canada, the percentage would be much higher and would represent the true business opportunity to those states. Michigan, with

its close proximity to Canadian markets and its highly developed industrial base, has as much to gain as any other state. This study and the other actions underway should represent first steps in a continuing journey to place Michigan in the forefront of Canadian trade.

**APPENDIX A**  
**BIBLIOGRAPHY**

(1) THE OFFICE OF CANADA, INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, BENEFITS OF THE U.S. - CANADA FREE TRADE AGREEMENT FOR MICHIGAN (MARCH 7, 1988).

(2) United States - Canada Free Trade Agreement: Hearings on S. 776 Before the Subcomm. on Financial Affairs of the Senate Comm. on Commerce, 94th Cong., 1st Sess. 16 (1988) (statement by the President).

(3) United States and Canada Forge Common Market, 2 NATIONAL CENTER FOR MANUFACTURING SCIENCES, FOCUS, March/April 1988, at 1-2.

(4) The Free Trade Agreement: Big Opportunities for U.S. Business, 2 NATIONAL CENTER FOR MANUFACTURING SCIENCES, FOCUS, March/April 1988, at 3.

(5) Members Share Views on Landmark Agreement, 2 NATIONAL CENTER FOR MANUFACTURING SCIENCES, FOCUS, March/April 1988, at 4-5.

(6) The FTA: What It Means to Canada, 2 NATIONAL CENTER FOR MANUFACTURING SCIENCES, FOCUS, March/April 1988, at 6-7.

(7) Some Voiced Opposition to FTA, 2 NATIONAL CENTER FOR MANUFACTURING SCIENCES, FOCUS, March/April 1988, at 7.

(8) THE OFFICE OF CANADA INTERNATIONAL TRADE ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, BENEFITS OF THE U.S. - CANADA FREE TRADE AGREEMENT FOR THE STATE OF MICHIGAN (2d ed. March 1989).

(9) U.S. - CANADA FREE TRADE AGREEMENT: THE COMPLETE RESOURCE GUIDE (BNA) (1988).

**APPENDIX B**  
**CONTACT LIST**

**FEDERAL AGENCIES/OFFICIALS**

- (1) Office: US Department of Commerce, Washington, D.C.  
Contact: Laura Gaughan  
Title: International Economist  
Telephone Number: (202) 377-3810  
Date Contacted: August 1, 1989  
Result: Forwarded data concerning Michigan compiled by Office of Canada/Department of Commerce regarding the impact of the FTA.
  
- (2) Office: United States Trade Representative (USTR), Washington, D.C.  
Contact: Chip Roh  
Title: Acting Assistant US Trade Representative for North America  
Telephone Number: (202) 395-5663  
Date Contacted: June 14, 1989  
Result: Mr. Roh was one of the attorneys active in drafting the FTA. Discussed grandfathering of existing laws under the FTA and the necessity to draft future laws in compliance with the FTA. Canada has already examined existing state laws to insure their compliance with the FTA and have not raised any issues regarding non-compliance.
  
- (3) Office: US Immigration and Naturalization Service, Detroit, MI  
Contact: James Montgomery  
Title: District Director  
Telephone Number: (313) 226-3250  
Date Contacted: May 30, 1989  
Result: Discussed professional licensing standards. Not all professions listed by the FTA require a license. In such situations, a case by case analysis is conducted examining each individual's educational background and professional experience. Michigan may want to consider licensing such people in order to facilitate a more uniform/orderly approach.

- (4) Office: Food and Drug Administration, Detroit, MI  
Contact: Jack Dempster  
Telephone Number: (313) 226-6260  
Date Contacted: July 6, 1989  
Result: Stated that all food, drugs, cosmetics, etc. are inspected by the Federal government as authorized by the Food, Drug and Cosmetic Act. Suggested that I contact Raymond W. Gill.
- (5) Office: Food and Drug Administration, Washington, D.C.  
Contact: Raymond W. Gill, Food & Drug Administration Center for Food Safety and Applied Nutrition  
Title: Deputy Director of Compliance  
Telephone Number: (202) 485-0162  
Date Contacted: August 14, 1989  
Result: Provided information about areas of harmonization of laws/regulations (under FDA jurisdiction) with Canada, and training programs and material available to states and Canada within FDA. Very knowledgeable about the 8 working groups within the Agriculture section of FTA. Currently is the co-chairman of the working groups on 'Food, Colour and Beverage Additives' and 'Unavoidable Contaminants'.
- (6) Office: Division of Field Investigations - Food & Drug Administration, Washington, D.C.  
Contact: Jim Lyda  
Title: Director, Import Operations Branch  
Telephone Number: (301) 443-6553  
Date Contacted: August 21, 1989  
Result: Discussed problems which occur in imports/exports which are subject to FDA regulations, crossing the border.
- (7) Office: Division of Federal State Relations - Food & Drug Administration, Washington, D.C.  
Contact: Gary German  
Title: Director, State Training and Information Branch  
Telephone Number: (301) 443-6553  
Date Contacted: August 21, 1989  
Result: Provided information about state training programs and the sharing of training information with Canada.

- (8) Office: U.S. Dept. of Commerce International Trade Administration  
Contact: Don Schilke  
Title: Director  
Telephone Number: (313) 226-3650  
Date Contacted: July 5, 1989  
Result: With regard to specific FTA studies or efforts, Schilke was not aware of any efforts undertaken within the Commerce Department. He feels the general emphasis has been on broad sweeping explanations of the legislation which have now been "put to bed". He is now beginning to develop "you-do-it" workshops on the FTA. A likely target for such efforts would be a border crossing city like Port Huron. The emphasis would be on providing small business interests and first time exporters with revised schedule B tariff amounts so that they can conduct their own personalized analysis of how the FTA might offer new opportunities. He feels the FTA can only benefit a company if that company does an economic study of how the FTA impacts its products. Schilke feels there is no consensus on a 10 year picture of the effects of the FTA. He feels that products will be the easiest segment to measure since the tariff reductions are tangible. It is his estimate that there are already close to 400 applications pending whereby joint U.S.-Canadian interests have requested acceleration of tariff reductions. He feels this is indicative of the tariff reduction domination in the FTA. When asked whether there were any changes that could be made to Michigan laws in particular, Schilke referred to a U.S. Department of Commerce study which placed Michigan in the top 3 of the contiguous 48 states for overregulation.
- (9) Office: U.S. Department of Commerce Office of Canada, Washington D.C.  
Contact: General Secretary  
Telephone Number: (202) 377-2000  
Date Contacted: July 5, 1989  
Result: Agreed to supply:  
(1) Business America, 1/30/89, International trade magazine, dealing exclusively with the FTA. 32 pages.  
(2) Your Market is about to grow by 10 percent; Are you ready?, Article by W.H. Cavin, Director U.S. Dept. of Commerce OOC/ITA.  
(3) FET 89-13 Foreign Economic Trends and their implications for the U.S., semiannual trade and economic statistics prepared by the American Embassy Ottawa, Feb 1989.  
(4) Marketing in Canada, Overseas Business Reports, prepared by OOC in cooperation with American Embassy Ottawa, 1988.

(5) Summary of the U.S.-Canada Free Trade Agreement (already obtained from congressional hearings) 42p.

(6) Overview of Tariff Removal under the FTA, U.S. Department of Commerce, March 1988, 12p.

- (10) Office: U.S. Department of Commerce, Bureau of the Census, Southfield, MI  
Contact: Kurt R. Metzger  
Title: Information Specialist  
Telephone Number: (313) 354-4654  
Date Contacted: July 19, 1989  
Result: Other than broad sweeping statistical abstracts, the U.S. Bureau of the Census has no available data on pre-FTA Michigan economics or the likely impact of the FTA on Michigan's economy. Was not able to provide any insight into studies, research, etc...
- (11) Office: United States Trade Representative (USTR), Washington, D.C.  
Contact: Russell LaMantia  
Title: Assistant U.S. Trade Representative for Canadian Affairs  
Telephone Number: (202) 395-5663  
Date Contacted: October 13, 1989  
Result: Discussed the provision in Article 1406 stating that the FTA does not apply to services indirectly supplied by a third country. He stated that the question whether the Agreement would protect a foreign corporation with an affiliate incorporated in Michigan, like a Japanese management consulting firm, is unclear, but would probably violate the intent of the Agreement, regardless whether the firm was acting independently or hired by Ford and seeking to perform services for Ford in Canada.
- (12) Office: U.S. Treasury Department, Washington, D.C.  
Contact: Phil Bareda  
Title: Deputy Assistant Secretary for Trade & Investment Policy  
Telephone Number: (202) 566-2748  
Date Contacted: October 17, 1989  
Result: The intent of Article 1406 is to prevent "shell" operations that appear to be based in Michigan, but are actually based in a third country. For instance, if an automobile company hired a Japanese engineering company part-time and the engineering services were

actually performed in Japan and "run through a Michigan post office box address, the company could not benefit from the FTA protections when contracting out its services in Canada. However, if the company were incorporated in Michigan and the services were performed in the State -- i.e., if the "real economic content" was Michigan -- the benefits of the FTA would extend to the corporation's employees providing services in Canada.

(13) Office: Food and Drug Administration, Washington, D.C.

Contact: Dr. John Vanderveen

Title: Director, Division of Nutrition

Telephone Number: (202) 245-1064

Date Contacted: October 18, 1989

Result: Knowledgeable about eight working groups within the Agriculture section of the FTA. Co-chairman of working group on Packaging and Labelling of Agricultural, Food, Beverage and Certain Related Goods for Human Consumption. His advice to American firms is to become familiar with what is required to do business in Canada.

## STATE OF MICHIGAN AGENCIES/OFFICIALS

- (1) Office: Washington Office of Governor James Blanchard  
Contact: James Callow  
Title: Legislative Analyst  
Telephone Number: (202) 624-5840  
Date Contacted: May 30, 1989  
Result: Retroactive changes to Michigan laws are not required although changes to existing statutes may enhance our competitive position. Suggested areas of inquiry include trucking/transportation and Detroit Port expansion.
  
- (2) Office: Michigan Board of Law Examiners, Lansing, MI  
Contact: Dennis Donohue  
Title: Assistant Secretary  
Telephone Number: (517) 334-6992  
Date Contacted: May 31, 1989, June 7, 1989  
Result: Because Michigan requires residence in one of the 50 states or in the District of Columbia to qualify for licensure as an attorney and graduation from an ABA approved school, graduates of a Canadian law school cannot practice law in Michigan.
  
- (3) Office: Michigan Attorney General's Office, Lansing, MI  
Contact: Jann Baugh  
Title: Assistant in Charge of Agriculture and International Trade  
Telephone Number: (517) 373-6514  
Date Contacted: June 8, 1989  
Result: The Attorney General's office has drafted amendments to the Michigan Export Development Authority statute and submitted a revised statute to the Legislature for approval.
  
- (4) Office: Legislative Services Bureau, Lansing, MI  
Contacts: Gary Gulliver/Carol Cukier  
Titles: Director of Legal Research/Legal Counsel  
Telephone Number: (517) 373-2339; (517) 373-9973  
Result: The Legislative Services Bureau was able to provide invaluable assistance in the form of searches for statutes in the Michigan Questor database.

- (5) Office: Michigan Board of Nursing, Lansing, MI  
Contact: Marty Martin  
Title: Licensing Supervisor and Examiner  
Telephone Number: (517) 373-1600  
Date Contacted: June 8, 1989  
Result: There is no residency requirement for a Michigan nursing license. Foreign applicants and Michigan residents are treated equally and hence, the FTA poses no problems in this area.
- (6) Office: Michigan Board of Architects, Lansing, MI  
Contact: Jack C. Sharpe  
Title: Licensing Administrator  
Telephone Number: (517) 335-1669  
Date Contacted: June 8, 1989  
Result: Canadian degrees are not accepted by the Board for licensure because they are not accredited by the National Architectural Accrediting Board (NAAB). In addition, Canadians must apply to sit for a post-graduation competency exam after applying to have their academic credentials certified. Approval process can take three to four years and acts as a major deterrent to Canadian architects wishing to practice in Michigan. The National Council of Architectural Registration is working to draft mutually recognized licensing requirements and professional standards.
- (7) Office: Michigan Travel Bureau, Lansing, MI  
Contact: John Savich  
Title: Director  
Telephone Number: (517) 373-0670; (517) 335-1879  
Date Contacted: July 27, 1989  
Result: No specific comments or suggestions on the FTA.
- (8) Office: Michigan Department of Licensing and Regulation, Lansing, MI  
Contact: Hal Ziegler  
Title: Deputy Director, Office of Legislation and Administrative Law Services  
Telephone Number: (517) 373-1866  
Date Contacted: July 13, 1989  
Result: Each profession within the department is constitutionally mandated to have its own Board. The Boards must meet periodically

and make recommendations to the department. Mr. Ziegler emphasized some factors that should be considered when addressing legislative changes: (a) although the requirements for many professions are becoming nationalized, some are not e.g. real estate agents, residential builders; (b) medicine has a statutory provision specifically giving reciprocity to Canadian doctors and Canada administers the same exams; (c) there are outdated and, perhaps, unnecessary registration requirements, but they cannot be eliminated. Those that are regulated want to be because state certification enables them to use certain titles, charge more money for their services, and, in some cases, be covered under insurance policies.

- (9) Office: Michigan Export Development Authority, Lansing, MI  
Contact: Randy Harmson  
Title: Executive Director  
Telephone Number: (517) 373-1054  
Date Contacted: July 5, 1989  
Result: Stated that the gist of the draft amendment to the MEDA statute is to transfer authority from the Departments of Agriculture and Commerce to the MEDA with the goal being to create one organization in charge of all international trade activities within the state (see Senate Bill #369, Fair Trade and Marketing Act #23, and Act #24. Furthermore, he sees Canada the big winner of the FTA because of increased opportunities due to the expansion in market size. He also stated that nothing has been decided regarding the FTA and agriculture. Sees future problems as follows: potential protectionist measures in both countries; labor law problems; re-negotiations by U.S. - Canada Trade Commission. Future concerns: infrastructure (is it adequate to handle trade?); border stations; inspectors (are there enough?); parity in currency.
- (10) Office: Michigan Department of Agriculture, Lansing, MI  
Contact: Ken Rauscher  
Title: Manager, Pesticide & Plant Pest Management Division  
Telephone Number: (517) 373-1087  
Date Contacted: June 14, 1989, July 5, 1989  
Result: Stated that Michigan and Canada do not have the same kind of grading systems (re: seed, feed, and fertilizers). Canada's law is broader, but Michigan allows Canada's goods to be imported into Michigan provided they meet our criteria. Canada is more restrictive in letting seeds come into their country, because they require all seed

to be registered. Feed and fertilizer are about the same standard as the U.S. He also stated that the current system has caused no problems. There are presently no reciprocal training programs for inspectors or testing. There are groups, however, that meet yearly, and have representatives from all fifty states and Canada.

- (11) Office: Michigan Department of Agriculture, Lansing, MI  
Contact: Al Hafner  
Title: Food Division  
Telephone Number: (517) 373-1060  
Date Contacted: June 14, 1989  
Result: Stated that Michigan has not made its own effort to harmonize criteria regarding training and inspecting for food division. He stated that there is a training session held twice a year by the Central State Association of Food and Drug Officials, which people from both Michigan and Canada attend.
- (12) Office: Michigan Department of Agriculture, Animal Industry Division  
Contact: Dr. Muir  
Title: Assistant State Veterinarian  
Telephone Number: (517) 373-1077  
Date Contacted: August 15, 1989  
Result: Stated that Michigan's and Canada's laws regarding animals import/export are not equivalent. However, this is not a significant barrier to trade. Department secretary also provided information regarding feed and vaccine requirements.
- (13) Office: Michigan Department of Agriculture - Pesticide and Plant Pest Management Division  
Contact: Keith Creagh  
Title: Interim Director  
Telephone Number: (517) 373-1087  
Date Contacted: August 24, 1989  
Result: Provided information about the differences in Michigan and Canadian laws and regulations. He stated they are not that similar and that some of the Canadian laws should be examined because they act as a barrier to trade. Stated that Canada publishes export certification manual listing which agricultural products are prohibited. Also knowledgeable on what model legislation Michigan has adopted and is

currently looking at. At the current time, Michigan's laws are more stringent than most of the national models.

- (14) Office: Michigan Department of Transportation  
Contact: John Lanum  
Title: Unit Supervisor, Project Development Planning  
Telephone Number: (517) 335-2949  
Date Contacted: August 21, 1989  
Result: Talked about some problems with transportation and the trade industry. Stated that Michigan has requested a study of 3 crossings (Ontario, Blue Water Bridge, and Ambassador Bridge) to determine the impact of the FTA. This includes traffic between Michigan and Ontario. This report is to be completed in 1990.
- (15) Office: Michigan Department of Transportation  
Contact: Jim Roach  
Title: Manager of Freight Transportation Planning  
Telephone Number: (517) 373-3335  
Date Contacted: August 21, 1989  
Result: Discussed problems of transportation as related to freight, especially rail crossing between Canada and Michigan. He stated that a lot of goods destined for overseas shipment are shipped to ports via Michigan rail tunnels to Canada.
- (16) Office: Michigan Public Service Commission  
Contact: Mitchell Heiser  
Title: Director of Planning, Policy and Evaluation  
Telephone Number: (517) 334-6240  
Date Contacted: July 5, 1989  
Result: Unaware of any studies done regarding the impact of the FTA on Michigan energy supplies or business in general. Heiser sees very little change coming down the pike as a result of the FTA. He does not see the U.S. (or Michigan) becoming an exporter of energy and only sees the FTA as an assurance of "intertied" energy supplies. In his estimation Michigan will remain "well above average" in terms of energy costs among the states. With regard to the elimination of the avoided cost formula, Heiser feels that only utilities that are looking for 20 to 30 year supplies of energy for new markets were charged under that formula. As an occasional interconnect/intertie user during peak periods, Michigan was not subject to the formula. He feels that

Michigan will remain a net importer. When queried on whether Michigan could revise its DNR regulations to allow hydroelectric power plants, Heiser said that studies have shown that Michigan's rivers, dams and tributaries would not provide enough of a flow to make the investment worthwhile.

(17) Office: Michigan Department of Commerce, Lansing, MI

Contact: Greg Main

Title: Director, Manufacturing Development Group

Telephone Number: (517) 373-0601

Date Contacted: July 7, 1989

Result: Reduced some of the U.S. Department of Commerce projections as to expanding areas under the FTA down to a Michigan Microeconomic level. We reviewed a listing of anticipated "big areas" expected to benefit under the FTA and Greg provided his insight as to which sectors he feels Michigan is currently strong in, which sectors Michigan could become strong in and sectors in which Michigan has no hope of becoming a dominant force. His insight has been incorporated into the section regarding business opportunities under the FTA. Expected strong areas: (summary) Automobiles and parts, CAD/CAM and Robotics, Manufacturing computer applications, disposable plastic medical supplies, Furniture (metal), Biotechnology chemicals, Plastics and resins and auto related textiles and apparels.

(18) Office: Michigan Public Service Commission

Contact: Bill Celio

Title: Director of Communications Division

Telephone Number: (517) 334-6380

Date Contacted: October 19, 1989

Result: Discussed telecommunications laws and regulations. Aware of none that effectively discriminate against nonresidents' or aliens' use or ownership of state lines and exchanges.

## OTHER STATES CONTACTED

### ILLINOIS

- (1) Office: State of Illinois Governor's Office  
Contact: Marsha Erixon  
Title: Assistant to the Governor  
Telephone Number: (312) 917-6725  
Date Contacted: June 8, 1989  
Result: Illinois has not conducted a similar assessment. Ms. Erixon will check with people who are familiar with this area, and contact us if there is anything worth reporting.
  
- (2) Office: Illinois Bar Association  
Contact: Mary Lou Lowder-Kent  
Title: Director, Department of Legislative Affairs  
Telephone Number: (217) 525-1760  
Date Contacted: June 13, 1989  
Result: No study is being conducted by the Illinois Bar Association. No legislative revision has been undertaken.
  
- (3) Office: Legislative Research Unit, Illinois State Legislature  
Contact: Robert Bayless  
Title: Staff Scientist  
Telephone Number: (217) 782-6851  
Date Contacted: June 15, 1989  
Result: Illinois has not looked into any law revision, or the effect of the FTA on Illinois.

### NEW YORK

- (4) Office: New York State Department of Economic Development  
Contact: Jonathan Doh  
Title: Policy Analyst  
Telephone Number: (518) 473-9748  
Date Contacted: June 5, 1989  
Result: NY had an inter agency working group looking at business marketing, tourism, etc. Formal, but not comprehensive. Did a fairly cursory review of statutes and regulations which may not be in compliance, and found none. USTR informed them that NY had no

problems with state compliance. They remain in touch with the National Governors' Association, and have not heard of any other states having problems. VERY interested in our study, and would like a copy of the final report.

- (5) Office: New York Bar Association  
Contact: Michael Maney  
Title: Chairman, International Law and Practice Section  
Telephone Number: (212) 558-3800  
Date Contacted: June 15, 1989  
Result: NY Bar Canada Committee considered doing a study, but they have not done so yet. They are in touch with the Governor's office, and were told that it was not really necessary to conduct such a study. Mr. Maney is also very interested in what we are doing, and will ask the Canada Committee of the NY Bar to consider conducting a similar study for the state of NY.

## OHIO

- (6) Office: Canada - US Law Institute, Case Western, Cleveland, OH  
Contact: Henry King  
Title: U.S. Director of Canada-US Law Institute  
Telephone Number: (216) 368-2096  
Date Contacted: August 17, 1989  
Result: No study is being conducted by their Institute for the state of Ohio, and Professor King is not aware of any such study being done in the state.

## CANADIAN CONTACTS

- (1) Office: Canadian Consulate General, Detroit, MI  
Contact: George Costaris  
Title: Economic Officer  
Telephone Number: (313) 567-2340  
Date Contacted: June 20, 1989  
Result: FTA provisions are designed so as not to violate provincial or state laws, hence, there are probably few existing laws in either country that would be in violation. He knows of no Michigan laws that are not in compliance. Mr. Costaris stated that if there are such laws, the Canadians will usually bring them to the state's attention. However, the states themselves must be sensitive to specific provisions of the FTA (investment particularly) when enacting new laws, to insure that they are not discriminatory against Canadians. Area of greatest concern: enactment of new laws. States should be aware of various provisions of the FTA, in order to be familiar with those areas where Canada has to be accorded national treatment. Mr. Costaris also stated that the FTA is not a free trade agreement in all areas, and was designed as such to protect certain industries, e.g. cultural industry, transportation, etc.
  
- (2) Office: Ministry of the Attorney General, Toronto, Canada  
Contact: John Gregory  
Title: Deputy Director  
Telephone Number: (416) 326-2503  
Date Contacted: June 2, 1989  
Result: The Canadian federal government passed a fairly extensive bill implementing the FTA, and few requirements were put on U.S. states or Canadian provinces. Mr. Gregory's office also examined existing provincial statutes and discovered nothing requiring modification. There is really nothing Ontario has to do to comply with the FTA, other than amending its wine pricing (administrative matter). Most other things concerning states and provinces are prospective only. At this point the focus should be on knowing where each party's hands are tied in reference to future legislation.
  
- (3) Office: Ministry of Industry, Trade and Technology (MITT), Toronto, Canada  
Contact: Leslie Delagran

Title: Manager, Trade Policy Branch

Telephone Number: (416) 965-2656

Date Contacted: June 7, 1989

Result: The MITT only looked at the direct effect of the FTA on Ontario. Alcoholic beverage distribution seemed to be the only area that could pose a problem. No study was conducted to determine what sorts of regulations could be restraining trade. Areas Canadians have problems with: (a) Detroit/Buffalo customs. This however, is not due to state regulations, but rather as a result of federal law. (b) There has been a problem getting access to US products in the steel industry. This MITT and the state of Michigan have set up a Michigan/Ontario Group which is going to look at the following areas: economic opportunities (what type exist); how to create a more competitive investment environment; future negotiations; transportation between Michigan and Ontario (is a "disaster" - operational changes are needed). She will discuss our study with the Director of the MITT and have him describe our endeavor to the MI/Ontario Group.

(4) Office: University of Windsor Law School, Windsor, Canada

Contact: Maureen Irish

Title: Professor of Law

Telephone Number: (519) 253-4232

Date Contacted: June 13, 1989

Result: Professor Irish is not familiar with the specifics regarding state and federal laws that could be changed to comply with, or take advantage of the FTA. She did however explain the differing political attitudes (in Canada) towards the FTA, i.e. Ontario's opposition to it, and the federal government marketing it as the "greatest thing since sliced bread". Professor Irish was also very helpful in directing us to various studies that have been published about the FTA.

(5) Office: Office Agriculture Canada

Contact: Russell Knapp

Title: Program Officer, Food Products Inspection Branch

Telephone Number:

Date Contacted: July 20, 1989

Result: Stated that U.S. and Canada seed, feed, and fertilizer laws are not that different, nor are the methods for inspection, etc. Gave names of three persons from Ottawa who are attendees of the American Association of Seed, Feed, and Pest Control.

## PRIVATE SECTOR

- (1) Office: Strategic Policy, Inc., Washington, D.C.  
Contact: William Merkin  
Title: Senior Vice-President  
Telephone Number: (202) 659-0878  
Date Contacted: May 31, 1989  
Result: Mr. Merkin used to work at the USTR, and was involved with the drafting of the FTA. He stated that service/trade regulations for the most part are grand-fathered. Auto Pact is grandfathered -- only a few minor changes were made. One area that is NOT grandfathered: Alcoholic Beverage Distribution. There may be problems if this area is state regulated. Furthermore, we should be sensitive to so called "conservation measures" which may really be trade barriers in disguise.
- (2) Office: Elm International, Lansing, MI  
Contact: Marc Santucci  
Title: President  
Telephone Number: (517) 482-3543  
Date Contacted: June 12, 1989  
Result: Mr. Santucci previously worked at the USTR and the Michigan Department of Commerce and presently serves as the main resource person for the Governor's committee working on the FTA. He is also a member of the Michigan/Ontario Group. He suggested the following areas where Michigan laws may be modified to take full advantage of the FTA: laws pertaining to national treatment; banking; insurance; service industry where states have purview; interstate/intrastate trucking regulations; various provisions of "Buy Michigan" laws.
- (3) Office: Greater Detroit Chamber of Commerce, Detroit, MI  
Contact: Pamela Miller  
Title: Manager, Business Development  
Telephone Number: (313) 964-4000  
Date Contacted: August 1, 1989  
Result: Ms. Miller stated that no one can predict the impact the FTA will have, hence, there is a wait and see attitude: see what the next ten years will bring as a result of the FTA being enacted. Their office is initiating a marketing campaign promoting office development here: to encourage foreign countries to base their US/North America offices

in this area (due to our proximity to Canada). They are also developing a marketing campaign to promote the FTA.

- (4) Office: Michigan Society of Architects, Detroit, MI  
Contact: Rae Dumke  
Title: Executive Director  
Telephone Number: (313) 965-4100  
Date Contacted: July 19, 1989  
Result: Ms. Dumke personally knows of an American architect who is trying to get licensed in Ontario. Ontario requires a letter stating that the firm is licensed to practice, and Michigan grants no such license, but merely requires that two-thirds of the principals in the firm have an individual license. She referred the applicant to Mr. Sharpe of the Michigan Board of Architects. She does not know of any other legal impediments to the free trade in architectural services, but gave the names of contacts in several state firms that do business in Canada.
- (5) Office: Smith, Hinchman & Grills, Detroit, MI  
Contact: Joe Uicker  
Title: Architect  
Telephone Number: (313) 964-3000  
Date Contacted: July 20, 1989  
Result: States that the real problems are not related to initial registration, but when the licensed alien attempts to obtain reciprocity in a state/province of the other country. Canada and the U.S. have a different policy towards exams. The U.S. requires a passing grade on an exam after graduation and an internship; Canada requires no such exam, but merely graduation from an accredited university. The general rule for reciprocity within the U.S. is that the applicant receive the initial license at a time when the two states have the same licensing requirements. Since the U.S. and Canada do not have the same requirements, reciprocity cannot be granted Canadian architects under this rule.
- (6) Office: Smith, Hinchman & Grills, Detroit, MI  
Contact: Tito Marzotto  
Title: Engineer  
Telephone Number: (313) 964-3000  
Date Contacted: July 24, 1989

Result: Mr. Marzotto is a member of the Michigan Society of Professional Engineers, part of the National Society. There are currently three national organizations attempting to standardize professional standards and licensing requirements in the U.S. and between the U.S. and other countries. The goal is to develop uniform requirements for a "U.S. Designated Engineer" for purposes of providing engineering services internationally. The coalition has been meeting regularly with the Canadian Council of Professional Engineers and has set a two year time table to establish mutual recognition of national professional standards and licensing requirements.

Mr. Marzotto identified a number of problem areas that interfere with the trade of engineering services:

- (a) different licensing requirements -- (1) education: all Michigan engineers must have graduated from an ABET accredited program; Ontario schools are not accredited by ABET; (2) exam: all Michigan engineers must pass a state exam; Ontario engineers have no exam requirement (their school programs are one year longer). Proposal: for Ontario to accept ABET accreditation and passing grade on the first part of the exam; for Michigan to accept graduation from a Canadian-approved program.
  - (b) Canada may have a residency requirement for corporate officers. A majority of the corporate officers must be Ontario residents for the business to be incorporated in Canada.
  - (c) Duties on intellectual documents brought into either country.
  - (d) Immigration requirements to get a work visa.
- (7) Office: Southeast Michigan Chapter of the Michigan Banker's Association, Detroit, MI  
Contact: Parker Moore  
Title: Executive Director  
Telephone Number: (313) 968-0914  
Date Contacted: July 20, 1989  
Result: He referred me to the Michigan Banker's Association in Lansing because it is involved with legislative issues and action. See below.

- (8) Office: Michigan Banker's Association, Lansing, MI  
Contact: Don Higgins  
Title: Senior Vice President & Staff Counsel  
Telephone Number: (517) 485-3600  
Date Contacted: August 2, 1989  
Result: His organization did a preliminary review and their initial impression was that not much can be done in Michigan to benefit from the FTA provisions. For example, NBD owns a subsidiary branch in Canada which, in comparison to the huge national Canadian banks, is small and not a real competitor. There is not much that can be done with Michigan law to improve the state's marketability and competitive position. However, Michigan banks that own Canadian affiliates operating in Michigan could benefit from amendment of Michigan laws to allow those affiliates to get into the insurance business in the state, as Canadian banks are allowed to do so in Canada.
- (9) Office: American Association of Feed Control Officials  
Contact: Barb Sims  
Title: Secretary, Member  
Telephone Number: (409) 845-1121  
Date Contacted: August 15, 1989  
Result: Provided information about AAFCO, annual meetings, training, dealings with Canada, and model legislation proposed by the association.
- (10) Office: American Association of Seed Control Officials, Oregon  
Contact: Dave Turner  
Title: Secretary, Member  
Telephone Number: (503) 378-3774  
Date Contacted: August 21, 1989  
Result: Provided information about AASCO, annual meetings, dealings with Canada, reciprocal training, and model legislation for seeds.
- (11) Office: American Association of Plant Food Control Officials, Kentucky  
Contact: David Terry  
Title: Secretary, Member  
Telephone Number: (606) 257-2668  
Date Contacted: August 14, 1989

Result: Provided information about AAPCO, annual meetings, training, dealings with Canada, and model legislation.

- (12) Office: American Association of Pesticide Control Officials (AAPCO), Virginia  
Contact: Harry Rust  
Title: Secretary, Member  
Telephone Number: (804) 288-8181  
Date Contacted: August 15, 1989  
Result: Provided information about the structure of AAPCO, and model legislation it offers for a guide to the states' and Canada.
- (13) Office: University of Michigan  
Contact: Prof. Robert Stern  
Title: Professor of Economics  
Telephone Number: (313) 764-3490  
Date Contacted: July 5, 1989  
Result: Professor Stern was vacationing on the East Coast. With approval from Prof. Stern, his secretary, Judy Brown (763-4214), was able to provide an Institute for Public Policy Studies study done by Stern and Prof. D. Brown of Tufts Univ entitled: Evaluating the impacts of U.S.-Canadian Free Trade: What do the multisector trade models suggest (IPPS paper number 249, 5/86). The paper is a complex economic study.
- (14) Office: Wayne State University School of Business  
Contact: David Verway  
Title: Professor, Editor, Michigan Statistical Abstracts Annual  
Telephone Number:  
Date Contacted: July 19, 1989  
Result: Prof. Verway referred the team to the U.S. Department of Commerce (specifically the Foreign Economic Trends publication, supra).

PROPOSED AMENDMENTS TO  
PROFESSIONAL SERVICE CORPORATION ACT

Section 1. Sections 2, 4, 5, 9, 10, 13 and 15 of Act 192 of the Public Acts of 1962 are amended to read as follows:

Sec. 2(b) "Professional corporation" means a corporation which is organized under this act for the sole and specific purpose of rendering 1 or more professional services and which has as its shareholders only LICENSED PERSONS ~~individuals who themselves are duly licensed or otherwise legally authorized within this state to render the same professional services as the corporation,~~ or the personal representatives or estates of individuals as provided in section 10.

SEC. 2(c) "LICENSED PERSON" SHALL MEAN ANY INDIVIDUAL WHO IS DULY LICENSED OR ADMITTED TO PRACTICE HIS OR HER PROFESSION BY A COURT, DEPARTMENT, BOARD, COMMISSION OR OTHER AGENCY OF THIS STATE OR UNDER THE LAWS OF ANOTHER JURISDICTION TO RENDER A PROFESSIONAL SERVICE WHICH IS OR WILL BE RENDERED BY THE PROFESSIONAL CORPORATION OF WHICH HE OR SHE IS, OR INTENDS TO BECOME, AN OFFICER, DIRECTOR, SHAREHOLDER, EMPLOYEE OR AGENT, AND ANY CORPORATION ALL OF WHOSE SHAREHOLDERS ARE LICENSED PERSONS.

Sec. 4. ~~An individual~~ A LICENSED PERSON or group of ~~individuals licensed~~ LICENSED PERSONS ~~or otherwise legally authorized to render professional services within this state~~ may organize and become a shareholder or shareholders of a professional corporation for pecuniary profit under this act for the purpose of rendering 1 or more professional services.

Sec. 5. No corporation organized and incorporated under this act may render professional services WITHIN THIS STATE except through its officers,

employees and agents who are duly licensed or otherwise legally authorized to render such professional services within this state. This provision shall not be interpreted to include in the term employee, secretaries, bookkeepers, technicians and other assistants who are not usually and ordinarily considered by custom and practice to be rendering professional services to the public for which a license or other legal authorization is required.

Sec. 9. If an officer, shareholder, agent, or employee of a corporation organized under this act ~~who has been rendering professional service to the public~~ becomes legally disqualified to render THE professional services ~~within this state~~ RENDERED BY THE CORPORATION or accepts employment that, pursuant to existing law, places restrictions or limitations upon his OR HER continued rendering of professional services, he shall sever within a reasonable period all employment with and financial interests in the corporation. A corporation's failure to require compliance with this provision shall constitute a ground for the forfeiture of its articles of incorporation and its dissolution. When a corporation's failure to comply with this provision is brought to the attention of the ~~corporation and securities commission~~ DEPARTMENT OF COMMERCE, it shall certify that fact to the attorney general for appropriate action to dissolve the corporation.

Sec. 10. No shares of a corporation organized under this act shall be sold or transferred except to a individual who is eligible to be a shareholder of such corporation or to the personal representative or estate of a deceased or legally incompetent shareholder. The personal representative or estate of such shareholder may continue to own such shares for a reasonable period but shall not be authorized to participate in any decisions concerning the rendering of professional service. The articles of

incorporation or bylaws may provide specifically for additional restrictions on the transfer of shares and may provide for the redemption or purchase of such shares by the corporation or its shareholders at prices and in a manner specifically set forth. ~~The provisions dealing with the purchase or redemption by the corporation of its shares may not be invoked at a time or in a manner that would impair the capital of the corporation.~~

Sec. 13. Act No. 284 of the Public Acts of 1972, as amended, being sections 450.1101 to 450.2099 of the Michigan Compiled Laws, shall be applicable to a corporation organized pursuant to this act except to the extent that any of the provisions of this act are interpreted to be in conflict with the provisions of that act. In the event of conflict the provisions and sections of this act shall take precedence with respect to a corporation organized pursuant to the provisions of this act. A professional corporation organized under this act shall consolidate or merge only with another ~~domestic professional corporation organized under this act to render the same specific professional service or services and a merger or consolidation with any foreign corporation is prohibited~~ WHOSE SHAREHOLDERS ARE LICENSED PERSONS.

Sec. 15. The annual report of a professional corporation shall list the names and post office addresses of all shareholders and shall certify that ~~all shareholders are duly licensed or otherwise legally authorized in this state to render the same professional service as the corporation~~ THE CORPORATION MEETS THE REQUIREMENTS OF SECTION 2(b).

C1260c

# SENATE BILL No. 369

April 25, 1989, Introduced by Senator ARTHURHULTZ and referred to the Committee on Economic Development.

A bill to amend sections 2, 3, 4, 5, 7, 8, 10, 14, and 15 of Act No. 157 of the Public Acts of 1986, entitled "Michigan export development act," being sections 447.152, 447.153, 447.154, 447.155, 447.157, 447.158, 447.160, 447.164, and 447.165 of the Michigan Compiled Laws; and to add section 8a.

## THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Section 1. Sections 2, 3, 4, 5, 7, 8, 10, 14, and 15 of Act  
2 No. 157 of the Public Acts of 1986, being sections 447.152,  
3 447.153, 447.154, 447.155, 447.157, 447.158, 447.160, 447.164,  
4 and 447.165 of the Michigan Compiled Laws, are amended and  
5 section 8a is added to read as follows:

6 Sec. 2. As used in this act:

7 (a) "Authority" means the Michigan export development  
8 authority created by section 3.

1 (b) "Board" means the board of directors of the authority  
2 established by section 4.

3 ~~(c) "Eligible export loan" means a loan to a participating~~  
4 ~~financial institution located within this state the proceeds of~~  
5 ~~which are restricted to the financing of eligible export~~  
6 ~~transactions.~~

7 (C) ~~(d)~~ "Eligible export transaction" means the sale of  
8 goods or services, or the development of goods or services for  
9 sale, outside of the United States by a person doing business in  
10 this state, which goods or services, in the judgment of the  
11 authority, have ~~at least 51%~~ A SUFFICIENT PORTION of their  
12 value created within this state and which sale or development, in  
13 the judgment of the authority, creates or maintains employment in  
14 this state.

15 (D) "EXPORT INSURANCE" MEANS INSURANCE PROVIDED BY THE  
16 AUTHORITY TO PROTECT AN EXPORTER AGAINST A FOREIGN BUYER'S FAIL-  
17 URE TO PAY FOR GOODS OR SERVICES FOR POLITICAL OR COMMERCIAL  
18 REASONS. THE AMOUNT OF THE LOSS COVERED FOR EACH TRANSACTION AND  
19 PARTICULAR RISKS SHALL BE DETERMINED BY THE AUTHORITY.

20 (E) "GRANT" MEANS AN AMOUNT OF MONEY PROVIDED BY THE AUTHOR-  
21 ITY TO A NONPROFIT ORGANIZATION.

22 (F) ~~(e) "Guaranteed funding"~~ "GUARANTEE" means a guarantee  
23 against loss, in whole or in part, of principal of and interest  
24 on an eligible export loan. The guarantee may include, without  
25 limitation, insurance against loss up to the guarantee amount. A  
26 single guarantee may encompass several individual eligible export  
27 loans or eligible export transactions.

1 (G) ~~(f)~~ "Guarantee amount" means the maximum amount  
2 payable under ~~guaranteed funding~~ A GUARANTEE which amount shall  
3 be specifically set forth in writing ~~, executed by the chair~~  
4 ~~person and secretary of the board,~~ at the time the guarantee is  
5 entered into by the authority.

6 (H) "LOAN" MEANS AN AMOUNT OF MONEY PROVIDED BY THE AUTHOR-  
7 ITY WHICH IS TO BE REPAID AT THE INTEREST RATE OR RATES, TERMS,  
8 AND OTHER CONDITIONS AS DETERMINED BY THE AUTHORITY. IF THE LOAN  
9 IS TO A PARTICIPATING FINANCIAL INSTITUTION, THE CONDITIONS OF  
10 THE LOAN SHALL BE ESTABLISHED BY THE INSTITUTION AND THE  
11 AUTHORITY.

12 (I) ~~(g)~~ "Participating financial institution" means a bank  
13 as defined by the banking code of 1969, Act No. 319 of the Public  
14 Acts of 1969, being sections 487.301 to 487.598 of the Michigan  
15 Compiled Laws, an agency or branch of a foreign banking corpora-  
16 tion licensed by the commissioner of the financial institutions  
17 bureau, or a national bank, federal savings and loan association,  
18 or federal credit union located within this state that has been  
19 approved by the board to participate in guaranteed funding for  
20 eligible export loans and transactions within the purposes of  
21 this act.

22 (J) "PERSON" MEANS AN INDIVIDUAL, SOLE PROPRIETORSHIP, PART-  
23 NERSHIP, JOINT VENTURE, PROFIT OR NONPROFIT CORPORATION, PUBLIC  
24 OR PRIVATE UNIVERSITY OR COLLEGE, PUBLIC UTILITY, OR AN ASSOCIA-  
25 TION OF PERSONS ORGANIZED FOR AGRICULTURAL, COMMERCIAL, OR INDUS-  
26 TRIAL PURPOSES.

1       Sec. 3. (1) The Michigan export development authority is  
2 created as a body politic and corporate within, but not as a part  
3 of, the department of agriculture. The authority shall exercise  
4 the authority's prescribed statutory powers, duties, and func-  
5 tions independently of the director of the department of agricul-  
6 ture and independently of the commission of agriculture.

7 ~~However, the~~ THE budgeting, procurement, and related functions  
8 of the authority shall be performed under the direction and  
9 supervision of the director of the department of agriculture.

10       (2) The purpose of the authority is:

11       (a) To assist, promote, encourage, develop, and advance eco-  
12 nomic prosperity and employment throughout this state by foster-  
13 ing the expansion of exports of goods and services to foreign  
14 purchasers.

15       (b) To cooperate and act in conjunction with other organi-  
16 zations, public and private, the objects of which are the promo-  
17 tion and advancement of export trade activities in this state.

18       (c) To establish a source of ~~guaranteed funding~~ LOANS,  
19 GRANTS, GUARANTEES, and EXPORT insurance to support export devel-  
20 opment not otherwise available.

21       (d) To provide information and referrals to, and to act as a  
22 clearinghouse for, potential and existing exporters.

23       Sec. 4. (1) The governing and administrative powers of the  
24 authority are vested in a board of directors consisting of 12  
25 members. Three members shall be the director of the department  
26 of commerce, the director of the department of agriculture, and  
27 the state treasurer. The director of commerce, the director of

1 the department of agriculture, and the state treasurer shall  
2 serve as full voting members of the board and may ~~vote either by~~  
3 ~~proxy,~~ APPOINT A representative ~~, or designee~~ TO SERVE AS A  
4 VOTING MEMBER IN THEIR ABSENCE. Nine members shall be appointed  
5 by the governor with the advice and consent of the senate.

6 (2) At least 6 of the members shall be from the private  
7 sector. An appointed member of the authority shall be a resident  
8 of this state. An appointment to fill a vacancy of an appointed  
9 member shall be made in the same manner as the original  
10 appointment. Of the 9 members appointed by the governor for a  
11 fixed term, 1 shall be appointed from 1 or more nominees of the  
12 speaker of the house of representatives and 1 shall be appointed  
13 from 1 or more nominees of the senate majority leader.

14 (3) At least 1 of the appointed members of the board shall  
15 be a person of recognized ability and experience in each of the  
16 following areas:

- 17 (a) Finance.
- 18 (b) International trade.
- 19 (c) Business management.
- 20 (d) Economics.
- 21 (e) Agriculture.

22 (4) Of the original 9 appointed members, 3 members shall be  
23 appointed for terms expiring on the third Monday in June, 1986; 3  
24 members shall be appointed for terms expiring on the third Monday  
25 in June, 1987; and 3 members shall be appointed for terms expir-  
26 ing on the third Monday in June, 1988. Their respective  
27 successors shall be appointed for terms of 3 years from the third

1 Monday in June of the year of appointment. A member shall serve  
2 until his or her successor is appointed and qualified.

3 (5) Before beginning his or her duties, a member of the  
4 board shall take and subscribe the constitutional oath of  
5 office. A record of each oath or affirmation shall be filed in  
6 the office of the secretary of state.

7 (6) A member of the board is not entitled to compensation  
8 for services as a member, but may be reimbursed for all actual  
9 and necessary expenses incurred in connection with the per-  
10 formance of duties as a member.

11 (7) The board annually shall elect 1 of its members as  
12 chairperson, 1 OF ITS MEMBERS AS VICE-CHAIRPERSON, and 1 member  
13 as secretary. The board may elect ~~such~~ other officers as it  
14 considers proper. Six members of the board constitute a quorum,  
15 and the affirmative vote of the majority of members present at a  
16 meeting of the board is necessary and sufficient for an action  
17 taken by the board. ~~However, the~~ THE affirmative votes of not  
18 less than 6 members are necessary for the approval of a resolu-  
19 tion authorizing the issuance of bonds ~~or guaranteed funding~~  
20 under this act.

21 Sec. 5. (1) A vacancy in the membership of the board shall  
22 not impair the right of a quorum to exercise all rights and per-  
23 form all the duties of the board. An action taken by the board  
24 may be authorized by resolution at a regular or special meeting  
25 and shall take effect upon the date ~~that the chairperson certi-~~  
26 ~~fies the action of the authority by signing~~ the resolution IS

1 APPROVED BY THE BOARD unless some other date is provided in the  
2 resolution.

3 (2) The board may delegate to 1 or more of its members or to  
4 an official, agent, or employee of the authority the powers and  
5 duties as the board considers proper.

6 (3) A member of the board or a person acting on behalf of  
7 the authority executing a contract, commitment, or agreement  
8 issued under this act shall not be personally liable or account-  
9 able on the contract, commitment; or agreement.

10 (4) A member of the board or a person acting on behalf of  
11 the authority shall not be liable personally for damage or injury  
12 resulting from the performance of his or her duties arising under  
13 this act. The authority shall indemnify and procure insurance  
14 indemnifying the members of the board AND STAFF OFFICERS  
15 APPOINTED BY A RESOLUTION OF THE BOARD from personal loss or  
16 accountability from liability asserted by a person on the bonds  
17 or notes of the fund or from any personal liability or account-  
18 ability by reason of the issuance of the bonds, notes, insurance,  
19 or guarantees; or by reason of any other action taken or the  
20 failure to act by the authority.

21 (5) THE BOARD MAY APPOINT UP TO 2 EMPLOYEES TO UNCLASSIFIED  
22 POSITIONS NOT INCLUDED IN THE STATE CIVIL SERVICE TO SERVE FOR  
23 TERMS AT THE PLEASURE OF THE BOARD.

24 Sec. 7. The authority shall possess all the powers of a  
25 body politic and corporate necessary and convenient to accomplish  
26 the purposes of this act including, but not limited to, all of  
27 the following powers:

1 (a) To borrow money and otherwise incur indebtedness for any  
2 of its purposes including the issuance of bonds, debentures,  
3 notes, or other evidence of indebtedness, whether secured or  
4 unsecured.

5 (b) To purchase, discount, sell, or negotiate, with or with-  
6 out guaranty notes, other evidences of indebtedness, and to sell  
7 and guarantee securities.

8 (c) To lend money to a financial institution in the form of  
9 an eligible export loan which is used to finance eligible export  
10 transactions OR AS OTHERWISE PROVIDED IN SECTION 8A.

11 (d) To procure OR PROVIDE EXPORT insurance OR GUARANTEES to  
12 guarantee, insure, coinsure, or reinsure against risk of loss,  
13 and ~~such~~ other insurance OR GUARANTEES as the authority may  
14 consider necessary.

15 (e) To provide financial counseling services to businesses  
16 of this state.

17 (f) To procure insurance to secure the payment of principal  
18 and interest on bonds, notes, or other obligations of the  
19 authority.

20 (g) To accept gifts, grants, or loans from, and enter into  
21 contracts or other transactions with, a federal or state agency,  
22 a municipality, a private organization, or any other source. TO  
23 CHARGE AND COLLECT FEES FOR ITS SERVICES. TO ENTER INTO CON-  
24 TRACTS OR OTHER AGREEMENTS WITH THE EXPORT-IMPORT BANK OF THE  
25 UNITED STATES, THE FOREIGN CREDIT INSURANCE ASSOCIATION, OR OTHER  
26 FEDERAL AGENCIES OR INSTRUMENTALITIES.

1 (h) To adopt, and from time to time to amend or rescind a  
2 bylaw or rule of the authority as may be necessary or convenient  
3 for the performance of its functions, powers, and duties under  
4 this act.

5 (i) To sue and be sued.

6 (j) To purchase; receive; take by grant, gift, devise,  
7 bequest, or otherwise; lease; or acquire, own, hold, improve,  
8 employ, use, or deal in and with real or personal property, or  
9 any interest in real or personal property, wherever situated.

10 (k) To sell, convey, lease, exchange, transfer, or otherwise  
11 dispose of property or an interest in property, wherever  
12 situated.

13 (l) To promulgate rules necessary to carry out the purposes  
14 of this act and to exercise the powers expressly granted in this  
15 act pursuant to the administrative procedures act of 1969, Act  
16 No. 306 of the Public Acts of 1969, being sections 24.201 to  
17 24.328 of the Michigan Compiled Laws.

18 (M) TO LEAD, PARTICIPATE IN, SUPPORT, OR OTHERWISE COOPERATE  
19 IN TRADE MISSIONS, TRADE SHOWS, AND RELATED EFFORTS TO ENCOURAGE  
20 THE EXPORT OF MICHIGAN GOODS AND SERVICES.

21 (N) TO SPONSOR OR FOSTER A FOREIGN SALES CORPORATION AS  
22 DEFINED IN SECTION 922 OF THE INTERNAL REVENUE CODE OF 1986, 26  
23 U.S.C. 922. TO ESTABLISH, PARTICIPATE, AND SECURE FEDERAL  
24 APPROVAL FOR AN EXPORT TRADING COMPANY UNDER THE EXPORT TRADING  
25 COMPANY ACT OF 1982, PUBLIC LAW 97-290, 96 STAT. 1233, OR EQUIVA-  
26 LENT ENTITIES UNDER SIMILAR FEDERAL LEGISLATION. THE AUTHORITY  
27 MAY IN CONNECTION WITH ANY ENTITIES CREATED UNDER THIS

1 SUBDIVISION ACQUIRE AND TRANSFER TITLE TO GOODS AND CORPORATE OR  
2 PARTNERSHIP OWNERSHIP INTEREST, AND MAY ENTER INTO JOINT VENTURES  
3 WITH OTHER EXPORT TRADING COMPANIES.

4 (0). ~~(m)~~ To exercise all other powers and functions neces-  
5 sary or appropriate to carry out the duties and purposes set  
6 forth in this act.

7 Sec. 8. (1) The authority may provide ~~guaranteed funding~~  
8 ~~for an eligible export loan used to finance~~ A GUARANTEE OR  
9 EXPORT INSURANCE FOR an eligible export transaction. ~~through a~~  
10 ~~participating financial institution.~~ Any guarantee OR EXPORT  
11 INSURANCE entered into by the authority under this act shall not  
12 constitute a general obligation of this state. ~~Guaranteed~~  
13 ~~funding~~ GUARANTEES OR EXPORT INSURANCE PROVIDED by the authority  
14 under this act shall not be terminated, canceled, or otherwise  
15 revoked except in accordance with the terms of the guarantee OR  
16 EXPORT INSURANCE; shall be conclusive evidence that the guarantee  
17 OR EXPORT INSURANCE complies fully with the provisions of this  
18 act; and shall be valid and incontestable in the hands of a  
19 holder in due course of a guaranteed eligible export loan.

20 (2) The authority may charge reasonable fees for providing  
21 ~~guaranteed funding~~ GUARANTEE OR EXPORT INSURANCE pursuant to  
22 this section to a participating financial institution.

23 (3) Before providing financing for an eligible export trans-  
24 action, a participating financial institution shall ~~investigate~~  
25 ~~a line of credit to the exporter in order to~~ determine the  
26 exporter's viability, the economic benefits to be derived from  
27 the eligible export transaction, the prospects for repayment, and

1 any other facts that it considers necessary in order to determine  
2 that the ~~guaranteed funding~~ GUARANTEE OR EXPORT INSURANCE is  
3 consistent with the purposes of this act.

4 (4) The authority shall provide ~~guaranteed funding~~ THE  
5 GUARANTEE OR EXPORT INSURANCE only if, and to the extent that,  
6 the authority determines in its sole discretion that at least  
7 1 of the following is true:

8 (a) ~~Guaranteed funding~~ THE GUARANTEE OR EXPORT INSURANCE  
9 is reasonably necessary in order to stimulate or facilitate the  
10 making of an eligible export transaction including, without limi-  
11 tation, the making of the eligible export transaction upon terms  
12 that will enable the transaction to be reasonably competitive  
13 with transactions in other states or in foreign countries.

14 (b) The ~~guaranteed funding~~ GUARANTEE OR EXPORT INSURANCE  
15 is reasonably necessary in order to stimulate or facilitate the  
16 resale of an eligible export loan to a holder in due course that  
17 otherwise would not purchase the eligible export loan.

18 ~~(c) The exporter applying for the guaranteed funding has~~  
19 ~~not or will not receive more than \$1,500,000.00 in guaranteed~~  
20 ~~funding in the 12 months preceding the date of execution of the~~  
21 ~~guaranteed funding agreement. This subdivision does not apply if~~  
22 ~~at least 2/3 of the members of the board vote to waive this~~  
23 ~~requirement.~~

24 ~~(5) The guaranteed funding for an eligible export loan pro-~~  
25 ~~vided by the authority to a participating financial institution~~  
26 ~~shall be loaned to the exporter at a fixed interest rate and term~~  
27 ~~as the authority, from time to time, may require.~~

1       (5) ~~(6)~~ The authority may condition the provision of  
2 ~~guaranteed funding~~ GUARANTEE OR EXPORT INSURANCE under this  
3 section upon such other terms and conditions as the authority  
4 considers desirable to carry out the purposes of this act.

5       SEC. 8A. THE AUTHORITY MAY PROVIDE A LOAN OR GRANT FOR 1 OR  
6 MORE OF THE FOLLOWING PURPOSES:

7       (A) THE FINANCING OF ELIGIBLE EXPORT TRANSACTIONS. THE PRO-  
8 CEEDS OF LOANS TO PARTICIPATING FINANCIAL INSTITUTIONS SHALL BE  
9 RESTRICTED TO THE FINANCING OF ELIGIBLE EXPORT TRANSACTIONS.

10       (B) TO INDUCE A PERSON TO ESTABLISH OR EXPAND BUSINESS OPER-  
11 ATIONS WITHIN THIS STATE WHICH WILL PRODUCE EXPORTS.

12       (C) TO MODIFY A PRODUCT TO IMPROVE THE PRODUCT'S POSSIBIL-  
13 ITIES FOR EXPORT.

14       (D) TO CONDUCT MARKET RESEARCH TO DETERMINE THE POTENTIAL  
15 FOR EXPORTING GOODS AND SERVICES FROM THIS STATE.

16       Sec. 10. (1) Bonds issued under this act may be executed  
17 and delivered at any time, may be issued as a single issue or  
18 from time to time as several issues, may be in the form and  
19 denominations, may ~~be of such tenor, shall~~ be in coupon or reg-  
20 istered form, may be payable in installments and at such time or  
21 times not exceeding ~~5~~ 30 years from their date, may be subject  
22 to the terms of redemption, may be payable at such place or  
23 places, may bear interest at the rate or rates ~~payable at the~~  
24 ~~place or places and evidence in the manner,~~ AS MAY BE SET,  
25 RESET, OR CALCULATED FROM TIME TO TIME, OR MAY BEAR NO INTEREST  
26 and may contain provisions not inconsistent with this act, all of

1 which shall be provided in the resolution of the authority  
2 authorizing the bonds.

3 (2) Bonds issued under the authority of this act may be sold  
4 at public or private sale at the price and in the manner and from  
5 time to time as may be determined by the authority to be most  
6 advantageous. The authority may pay all expenses, premiums,  
7 insurance premiums, and commissions which the authority considers  
8 necessary or advantageous in connection with the authorization,  
9 sale, and issuance of the bonds from proceeds of the bonds.

10 (3) EXCEPT AS OTHERWISE PROVIDED BY THIS ACT, BONDS OR NOTES  
11 ISSUED BY THE AUTHORITY ARE NOT SUBJECT TO THE TERMS OF THE  
12 MUNICIPAL FINANCE ACT, ACT NO. 202 OF THE PUBLIC ACTS OF 1943,  
13 BEING SECTIONS 131.1 TO 139.3 OF THE MICHIGAN COMPILED LAWS. THE  
14 BONDS ISSUED BY THE AUTHORITY ARE NOT REQUIRED TO BE REGISTERED.  
15 A FILING OF A BOND OF THE AUTHORITY IS NOT REQUIRED UNDER THE  
16 UNIFORM SECURITIES ACT, ACT NO. 265 OF THE PUBLIC ACTS OF 1964,  
17 BEING SECTIONS 451.501 TO 451.818 OF THE MICHIGAN COMPILED LAWS.

18 (4) EXCEPT AS PROVIDED IN SUBSECTION (5), BONDS AND NOTES  
19 ISSUED BY THE AUTHORITY SHALL BE APPROVED BY THE DEPARTMENT OF  
20 TREASURY PRIOR TO THEIR ISSUANCE. THE DEPARTMENT OF TREASURY  
21 SHALL DETERMINE THAT THE AMOUNT OF THE PROPOSED ISSUE IS SUFFI-  
22 CIENT, BUT NOT EXCESSIVE, THAT THE REVENUE AND PROPERTIES PLEDGED  
23 FOR PAYMENT ARE SUFFICIENT, AND THAT THE BONDS OR NOTES AND THE  
24 PROCEEDINGS AUTHORIZING THE ISSUE COMPLY WITH THIS ACT AND OTHER  
25 APPLICABLE LAW.

1 (5) BONDS AND NOTES ISSUED BY THE AUTHORITY SHALL BE SUBJECT  
2 TO SECTIONS 10 AND 11 OF ACT NO. 202 OF THE PUBLIC ACTS OF 1943,  
3 BEING SECTIONS 133.10 AND 133.11 OF THE MICHIGAN COMPILED LAWS.

4 Sec. 14. The bonds, INTEREST ON THE BONDS, AND THE TRANSFER  
5 OF THE BONDS authorized under this act ~~and the income from the~~  
6 ~~bonds~~ shall be exempt from all ~~state taxes~~ TAXATION BY THIS  
7 STATE OR ANY OF ITS POLITICAL SUBDIVISIONS, except for inheri-  
8 tance, estate, or ~~transfer~~ GIFT taxes. ~~In addition, a secur-~~  
9 ~~ity agreement or financing agreement made under this act is~~  
10 ~~exempt from state stamp and transfer taxes.~~

11 Sec. 15. The PROPERTY OF THE authority ~~is~~ AND ITS INCOME  
12 AND OPERATION ARE exempt from all ~~franchise, corporate, busi-~~  
13 ~~ness, and income taxes levied by the state. However, this~~  
14 TAXATION BY THIS STATE OR ITS POLITICAL SUBDIVISIONS. THIS sec-  
15 tion shall not be construed to ~~exempt~~ PROVIDE AN EXEMPTION from  
16 any ~~such~~ taxes FOR a person receiving ~~guaranteed funding with~~  
17 ASSISTANCE FROM the authority under this act.

**APPENDIX D**  
**COMPUTER ISOLATED SOURCES**

**This document is on file with the Michigan Law Revision Commission  
and Professor John E. Mogk, Wayne State University Law School.**

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APPENDIX E

 Touche Ross

October 20, 1989

RECEIVED OCT 25 1989

Professor John E. Mogk  
Wayne State University Law School  
468 W. Ferry  
Detroit, MI 48202

Re: Michigan Law Revisions for U.S./Canada Free Trade Agreement

Dear Professor Mogk:

The International Law Section of the State Bar of Michigan has recently created an International Tax Committee. I cochair the committee with Mr. James Novis of Honigman, Miller, Schwartz & Cohn. One of the projects on the committee's agenda is to examine Michigan tax laws and to propose changes that would facilitate cross border trade and investment, particularly as it affects the U.S. and Canada. Although it may be too late to add some of our preliminary thoughts to your project for the Michigan Law Revision Commission, I did want to send along a few brief thoughts.

SBT Nexus

One issue is the different tax nexus rules at the state level and federal level. A Canadian company can be exempt from federal income tax due to the absence of a "permanent establishment" nexus under the U.S./Canada income tax treaty (see Article V of treaty enclosed) yet still be subject to Michigan SBT (since the treaty does not cover state and local taxes). Indeed, the auditors for the state of Michigan have been fairly aggressive in searching out such federally exempt Canadian companies in order to assess SBT (plus interest and penalties naturally). While large multinational companies, or their advisors, are aware of such divergent rules, many smaller Canadian companies are not aware of the possibility of state taxation given their exemption from federal income tax.

The committee believes that coordinating the SBT nexus threshold with that of the "permanent establishment" clause of the relevant income tax treaty (e.g., the U.S./Canada treaty) would present a very positive plus for Michigan in marketing the state to Canadian enterprises seeking to open "exploratory" offices. Such exploratory offices can be federally exempt under the U.S./Canada

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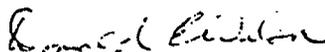
income tax treaty if their activities are confined to:

- purchasing of U.S. goods and merchandise (Article V, 6.d. of treaty)
- maintenance of goods in U.S. for purposes of processing (e.g., assembly) by a third party (Article V, 6.c.)
- advertising or scientific research (Article V, 6.e.)

The committee believes that the federal treaty policy of encouraging such activities by Canadian enterprises on a tax-free basis is equally applicable at the state level and would be a strong inducement for Canadian enterprises to consider locating such activities in Michigan. Experience shows that such "exploratory" offices often lead to more substantial, and taxable, business operations. In the interim, jobs are created and business for other Michigan companies is created (e.g., by sale of goods to such exploratory offices).

While the committee has not had the opportunity to consider all the ramifications to this proposal, we believe it has merit and can be fine tuned so as to prevent any significant revenue loss through appropriate limitations and dollar caps. Consideration might also be given to similar conforming amendments to the individual income tax laws so that they also would conform to the relevant provisions of the U.S./Canada income tax treaty. We look forward to refining these preliminary concepts and working with the appropriate parties to enhance the state of Michigan's position in attracting Canadian trade and investment under the U.S./Canada Free Trade Agreement

Very truly yours,



Donald E. Wilson  
International Tax Partner

DEW/bn  
Encl.

cc: Steve Guittard - Chairman, International Law Section  
James Novis - Co-chairman, International Tax Committee

[1305] Article V

Permanent Establishment

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of a resident of a Contracting State is wholly or partly carried on.

2. The term "permanent establishment" shall include especially:

- (a) A place of management;
- (b) A branch;
- (c) An office;
- (d) A factory;
- (e) A workshop; and

(f) A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. A building site or construction or installation project constitutes a permanent establishment if, but only if, it lasts more than 12 months.

4. The use of an installation or drilling rig or ship in a Contracting State to explore for or exploit natural resources constitutes a permanent establishment if, but only if, such use is for more than three months in any twelve-month period.

5. A person acting in a Contracting State on behalf of a resident of the other Contracting State—other than an agent of an independent status to whom paragraph 7 applies—shall be deemed to be a permanent establishment in the first-mentioned State if such person has, and habitually exercises in that State, an authority to conclude contracts in the name of the resident.

6. Notwithstanding the provisions of paragraphs 1, 2 and 5, the term "permanent establishment" shall be deemed not to include a fixed place of business used solely for, or a person referred to in paragraph 5 engaged solely in, one or more of the following activities:

- (a) The use of facilities for the purpose of storage, display or delivery of goods or merchandise belonging to the resident;
- (b) The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of storage, display or delivery;
- (c) The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of processing by another person;
- (d) The purchase of goods or merchandise, or the collection of information, for the resident; and
- (e) Advertising, the supply of information, scientific research or similar activities which have a preparatory or auxiliary character, for the resident.

7. A resident of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because such resident carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

8. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not constitute either company a permanent establishment of the other.

9. For the purposes of the Convention, the provisions of this Article shall be applied in determining whether any person has a permanent establishment in any State.

## Article VII

### Business Profits

1. The business profits of a resident of a Contracting State shall be taxable only in that State unless the resident carries on business in the other Contracting State through a permanent establishment situated therein. If the resident carries on, or has carried on, business as aforesaid, the business profits of the resident may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where a resident of a Contracting State carries on business in the other Contracting State through a permanent

establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the business profits which it might be expected to make if it were a distinct and separate person engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the resident and with any other person related to the resident (within the meaning of paragraph 2 of Article IX (Related Persons)).

3. In determining the business profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere. Nothing in this paragraph shall require a Contracting State to allow the deduction of any expenditure which, by reason of its nature, is not generally allowed as a deduction under the taxation laws of that State.

4. No business profits shall be attributed to a permanent establishment of a resident of a Contracting State by reason of the use thereof for either the mere purchase of goods or merchandise or the mere provision of executive, managerial or administrative facilities or services for such resident.

5. For the purposes of the preceding paragraphs, the business profits to be attributed to a permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

6. Where business profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

7. For the purposes of the Convention, the business profits attributable to a permanent establishment shall include only those profits derived from the assets or activities of the permanent establishment.