INTERSTATE COMPACTS - 
THE NEXT FRONTIER FOR 
ADMINISTRATIVE PROCEDURE RULEMAKING

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I. Introduction

A new body of Administrative Procedure rules is emerging. Until recently, there have been only two types of APA rulemaking; (a) that conducted under the federal Administrative Procedure Act (APA), and (b) each state's APA. Within the past 4 years, drafters of new Interstate Compacts have turned to Administrative Procedure rulemaking, and while these compacts lack some structure and process typical of state notice & comment APA's, they have charted a direction for other interstate compacts when it comes to rulemaking methodology.

For instance, in 1998, a multi-state/federal team was formed to draft a revised interstate compact for Adult Corrections. Staff for the project came from the Council of State Governments, headquartered in Lexington, Ky.. The result was the Interstate Compact for Adult Offender Supervision (AOS). It was drafted because its predecessor, the Interstate Compact on Probationers and Parolees, was found lacking

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2 5 USC $551 through $583

3 See e.g., Section 63-46a-1 et seq, Utah Code; Also Model State Administrative Procedure Act, 1981 Act, Uniform Laws Annotated, vol. 15, p.1 (2000), West Publishing Co..

4 Section 77-28c-103, Utah Code. The proposed Compact on Adult Offender Supervision is available from The Council of State Governments [CSG], P.O. Box 11910, Lexington, Ky., 40578, and on their website at "www.csg.org".
some enforcement authority between states.

Interstate Compacts are multi-state agreements between one or more states. State governments agree to commit time and resources to support/manage joint functions, and/or resolve problems shared by those states. Once a state adopts a compact, it fully agrees to undertake it’s functions. Management is by appointed "commissioners," one from each state, with a single vote on that compact’s commission, or Board. Rules & regulations written by most interstate compacts comprise a body of law that until now, has been completely separated from administrative law methods.

A look at the existing compacts reveals three typical patterns:

(a) Early compacts empowered their commissioners to administer core functions, though regulatory methods or rulemaking methods were not prescribed. Examples include the Interstate Compact on Corrections, and the Interstate Compact on Civil Defense.⁵

(b) Later compacts often required compliance with each adopting state’s statutes, rules or regulations that could affect that state’s ability to implement the compact. No rules or rulemaking methods were provided. The Compact on Wildlife Violators is an example.⁶

(c) Most recent compacts [mid-1950's through 1980's] provided for rulemaking to regulate. As no rulemaking procedure was suggested, most courts continued to use contract-law principles in reviewing disputes. Examples include the Interstate Compact on Vehicle Equipment Safety and the Commission for Higher

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⁵ These compacts are available at The Council of State Governments [CSG], P.O. Box 11910, Lexington, Ky., 40578, and at their website at "www.csg.org".
Also, some compacts promulgated model rules for states to file under each state's APA. For example, some rules were enacted pursuant to the Multi State Tax Compact, as adopted by legislatures in each state. It appears that either (a) multi state tax commissioners felt obligated to allow states enact their own versions of their model rules just to get the word out, or (b) they may have felt that each state's APA would somehow bestow more force-of-law on such rules than the compact itself provided. Keep in mind that the latter assumption is yet untested in the courts.

6 Id.
7 Id. Also, some compacts promulgated model rules for states to file under each state's APA. For example, some rules were enacted pursuant to the Multi State Tax Compact, as adopted by legislatures in each state. It appears that either (a) multi state tax commissioners felt obligated to allow states enact their own versions of their model rules just to get the word out, or (b) they may have felt that each state's APA would somehow bestow more force-of-law on such rules than the compact itself provided. Keep in mind that the latter assumption is yet untested in the courts.
Where most interstate compacts have authorized rules based on explicit or implicit specified functions of each particular compact's core provisions, the Adult Offender Compact diverted from that mode. It specifically required that it's Commissioners make rules that "substantially conform to principles of the federal Administrative Procedure Act."^8

II. Interstate Compacts – An Overview

States devised some 196 Interstate Compacts since 1783, prior to the U.S. Constitution. These multi-state agreements are used by two or more states to cooperate with each other to manage mutual problems.^9 The drafters of the U.S. Constitution in 1789 authorized the use of this tool by including the following provision, which reads in part:

No state shall, without the consent of congress, ... enter into any agreement or compact with another state, ... .^10

This wording seems to imply that the only legal agreements are those which have obtained formal passage by congress. But the U.S. Supreme Court has since ruled that approval is only needed when a compact affects (I) the political balance within the federal system, or (ii) a power delegated to the national government.^11 Many compacts have been adopted without states obtaining specific congressional consent. Still, the U.S. Supreme Court decided that a state could not be its own final judge in any controversy with a sister State, and that federal courts alone had "final power to pass

^8 5 USC §551 through §583.
^10 U.S. Constitution, Art. 1, §10, Clause 3.
^11 Virginia v. Tennessee, 148 U.S. 503 (1893)
upon the meaning or validity of interstate compacts.”¹²

¹² See *West Virginia Dyer v. Sims*, 341 U.S. 22 (1951)  This landmark case arose when the W. Va court held invalid the statute approving the compact as an unconstitutional delegation of power to an agency outside the state. The U.S. Supreme court reversed, noting that the state also delegated its police power to other states and to the federal government, and for other reasons.
The oldest compact was adopted in 1783, before the U.S. Constitution, and by 1920, 35 more had followed. The earlier compacts dealt with boundaries, canals, navigation, fisheries, bridges, tunnels, etc. By 1987, more than 170 compacts were in place. The Council of State Governments [CSG], provides web-site server-access to the text of all compacts.

Adoption of a compact requires each state’s legislature to pass it just as any statute, followed by gubernatorial presentment. State withdrawal from a compact requires compliance with its withdrawal provisions. And, some compacts do not allow withdrawal. Courts have held that compacts are valid prospective delegations with future obligations.

As noted, most earlier interstate compact agreements lacked explicitly defined regulatory procedures. Typically, a compact has managed its tasks through its "one-vote/per member/state Commission. It is that body which devises operating policies, by-laws, and/or rules to implement its functions which are legally binding upon all member states.

A most unique aspect is that an interstate compact's rules stand independent and separate from state or federal laws. There has been no attempt to include "compact rules" within the purview of any administrative procedure adopted by Congress, or any of the state APA's which were patterned on Model State Acts of

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13 Id.
14 Id.
15 See a list of compacts, and their full texts, at "www.csg.org."
16 See The Book of the States, 1989-1990 ed., p. 465. These volumes are published biennially by the Council of State Governments. Some [i.e., 1970 to 1992] have included analyses of Interstate Compacts then currently being reviewed.
17 Supra note 12.
18 Supra note 12.
19 5 USC §551 through §583.
1946, 1961 and 1981.\textsuperscript{20}

In the late 1980's, the *Interstate Compact for the Supervision of Parolees and Probationers* was considered for revision by the commissioners of that compact, which had been adopted in 1937. By the 1970's and 80's, states found some roadblocks in trying to enforce some of the regulatory provisions upon their partner compacting states. That is, when one state attempted to enforce a compact provision upon another member state, and that state refused, the state having jurisdiction had no recourse. So, in 1986, the National Institute of Corrections funded a "Commission to Re-Structure" the compact. They examined the enforcement issues, and identified at least eight enforcement gaps in the existing Probationers/Parolees Compact:

1. Outdated client eligibility requirements, which preclude acceptance of certain client groups... (i.e., misdemeanants);
2. Inefficient, inflexible and cumbersome operational procedures resulting in delays in all interstate processes (i.e., transfer; arrest, violation, and program delivery);
3. A lack of authority in some states to arrest out-of-state violators;
4. An inefficient interstate parole and probation violation process;
5. A lack of uniformity in administration of preliminary revocation hearings;
6. Conflicting state policies in the areas of misdemeanor supervision, the administration of supervision fees and the supervision of certain difficult client groups (i.e., clients with AIDS);
7. A lack of knowledge within the criminal justice system of the compact and its authority over conflicting state statutes; and
8. Deteriorated compact administration in some states.

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[21] The Interstate Compact on Parolees and Probationers is available at The Council of State Governments [CSG], P.O. Box 11910, Lexington, Ky., 40578, and at its website: "www.csg.org". Compact drafters claim congressional authority from the National Crime Control Act of 1934, as found in 4-USC-112; which act addresses crime prevention and control laws and policies, and authorizes "such agencies, joint or otherwise, as they (the several states and territories ...) may deem desirable."
[23] Id.
[24] Id.
[25] Id.
[26] Id.
[27] Id.
[28] Id.
[29] Id.
Four years later, the suggestion was made that administrative rules, as used in the older compact, be expanded. Mr. Ben Jones, writing for the C.S.G. study, observed the following:

"... [If] the compact contained a rare provision authorizing the compact administrators acting jointly, to establish interstate administrative rules governing their operations, the commission could make detailed recommendations to the Parole and Probation Compact Administrators Association for rules to govern the agreement’s operation. After a study of the system’s problems, the commission ... [could] work on a series of standards, rules, forms and legislation for eventual endorsement by the association. Such a system of detailed rules and regulations, along with operating standards for the compact and recommended legislation, [could occur] through the Council of State Governments.\(^{30}\)

In 1999, the Compact on Adult Offender Supervision (AOS) was completed and was introduced into several of the state’s legislatures. It provided, in part:

Article VIII. Rulemaking Functions ...
(a) The Interstate Commission shall promulgate rules in order to effectively and efficiently achieve the purposes of the compact: ...
(b) Rulemaking shall occur pursuant to the criteria set forth in this article and the by-laws and rules adopted pursuant thereto. Such rulemaking shall substantially conform to the principles of the federal Administrative Procedure Act, 5 U.S.C.S. Section 551 et seq., and the Federal Advisory Committee Act, 5 U.S.C.S. App. 2, Section 1 se seq., ...\(^{31}\)

Because the Adult Compact requires rules to “substantially conform to the principles of the federal APA,” it identifies a new trend in compact-rulemaking.\(^{32}\) The use of administrative-procedure notice & comment rulemaking appears to rely on two underlying postulates: (a) First, it assumes that a compact’s rules will be more equal, in court, with other state rules, if notice & comment procedures are followed. (b) Second,

\(^{31}\) Interstate Compact for Adult Offender Supervision; Chapter 45, Laws of Utah, 2001.
\(^{32}\) The Insurance Receiver Compact, also drafted in the late 1990’s, was actually the first compact to incorporate the “federal APA” referent, but only one state has adopted it, thereby
it also presumes that if AOS Compact rules "substantially conform" to the federal APA's principles, those rules will have more force of law.

making it moot.
Addressing the AOS Compact's rules, one reviewer noted: "The unusual part of the AOS Compact's language is ... (an) attempt to limit that [compact's] authority and to require that it be exercised in a way that guarantees some minimum level of due process."^33 But, one might ask, why should a Compact's rulemaking authority be limited?

III. Administrative Procedure Acts Limit Government Decision-Making

For purposes of this paper, this author suggests that “administrative procedure acts (APA’s)” at least partly function to “limit” the discretion of the Executive. Early APA court decisions hinged on amounts of legislative or judicial power that could be constitutionally delegated to an agency. For example, in two cases, the US Supreme Court could find no real statutory limits on presidential authority, and struck them for overly broad delegation.^34-35 In whatever ways such “overly broad delegation” can be viewed, this author finds the provisions of the federal Administrative Procedure Act provide a framework intended to limit agencies.

^33 Private correspondence from Michael McCabe, Director of the Mid-Western Office of the Council of State Governments, which was e-mailed to this author on September 20, 2001.

^34 *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). In this case, the court overturned part of the national Industrial Recovery Act, which had delegated broad discretion to the executive; particularly the power to prohibit shipment of oil produced in contravention of state laws. The Court found no standard in §9(c), and also found that general statements of policy in Title I were inadequate, such as phrases like, "to eliminate unfair competitive practices," and "to conserve natural resources.".

^35 See *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935), which said: "In view of ... that broad declaration ... the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered."
Because of that, fashioning the federal APA enjoined much debate. As Rosenbloom observed, the most difficult problem with many legislative delegations, is the need to meet the *Hampton* standard that requires an "intelligible principle" to guide the exercise of delegated authority. He noted that Congress adopted the federal APA in spite of broad delegations that could not be made constitutional by regulating agency procedure, and argued that standard-less delegations had already been gained by Roosevelt and post-1937 appointees. He also argued that delegated legislative authority didn’t incorporate enough public openness, and prevented affected parties from providing input. Because of that, he suggested the federal APA was never intended to constitutionalize delegations or the exercise of discretion.

The first Model State APA was drafted in 1947, revised in 1961, and again in 1981. After serving as a Uniform State Law Commissioner, Arthur Bonfield reviewed the 1981 Model State Act [MSAPA] in his book "State Administrative Rule Making"(1986), and wrote:

> The initial impetus for ... [administrative procedure] legislation was, not surprisingly, the New Deal of the 1930's. As the federal bureaucracy expanded in an effort to deal with the many serious problems of the Depression, the public and the organized bar became alarmed at what they perceived to be, in many cases, an unfettered, hence dangerous, exercise of authority by administrative agencies. The A.B.A. issued a series of reports between 1934 and 1938 decrying excesses of the federal administrative process as it was then being

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37 Id.
operated. ... The Federal APA ... established uniform minimum procedure for federal agency decision making, ... It also attempted to ensure greater openness for agency action of all kinds by assuring the public increased access to governmental information that affected their legal rights.³⁹

³⁸ Id.
³⁹ See Bonfield, pp. 16-18 [Emphasis Added].
As the federal APA, and thereafter, the several state APA's began functioning, it became axiomatic that each APA erects a different fence. That is, rules aren't lawful unless they meet the defined parameters of the particular APA that enables them. Those parameters include things like what a rule is; -or isn't; which agencies can -or cannot make rules;\textsuperscript{40} and what "public-notice" qualities must be included, and their characteristics.\textsuperscript{41} To that concept, Bonfield noted:

The main objective of the 1981 MSAPA is to achieve adequate procedural protection for individuals in their dealings with state agencies ..., uniformity ... [of] procedures ... is desirable, if not essential. ... It also assures that each agency will be bound in all its principal functions by procedures that are in fact adequate to protect private rights against improper state agency action.\textsuperscript{42}

Because each APA governs its own rules, one could ask if a rule made under a compact would have less force-of-law if it only substantially conformed with "principles" of the federal APA, rather than if it were specifically assigned to function under the federal APA. Further, would a rule made by a Compact have more force-of-law if it was published in the Federal Register? This question was posed to Michael White, Legal Affairs & Policy Director at the Federal Register Office, who noted that the Federal APA only governs Federal entities.\textsuperscript{43} But, since Congress did authorize the AOS Compact under its "Crime Control Act" of 1937 \textsuperscript{44}, and hence the "Probationers & Parolees" Compact,\textsuperscript{45} he deemed that it likely qualifies. He wrote:

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\textsuperscript{40} See Bonfield, Supra note 40, p. 597, 1981 MSAPA 1-102(1).
\textsuperscript{41} See Bonfield, Supra note 40, p. 598, 1981 MSAPA 1-102(10).
\textsuperscript{42} See Bonfield, Supra note 40, p.21.
\textsuperscript{43} Personal correspondence from Michael White; Director, Legal Affairs and Policy, Office of Federal Register; dated May 8, 2001.
\textsuperscript{44} 4-USC-112
\textsuperscript{45} Compact on file with The Council of State Governments [CSG], Box 11910,
Publishing in the *Federal Register* bestows a legal status on documents that courts will recognize, even where publication isn't required under the Federal Register Act or APA. ... the OFR [Office of the Federal Register] [has] the statutory discretion to publish the documents of various non-executive branch entities, giving them legal status well beyond what they might achieve through public notices appearing in a newspaper. Once a document appears in the *Federal Register*, there is no distinction in law between one that was required to be published and one that was permitted to be published under our discretionary authority, both in terms of enforceability and judicial notice.\(^{46}\)

IV. Notice and Comment Rulemaking
A central purpose of administrative procedure rules, is assure due-process; a quality primarily obtained through using a notice and comment procedure. Governments provide ways for impacted citizens to learn of proposed rules, and learn about what impacts may occur. Notice should disclose agency positions on policy to allow citizens to determine preconceived notions. Bonfield advocates notice and comment for “all” state APA rules. He noted:

No more satisfactory way can be found of minimizing abuses, or the fear of abuses, than ... give the citizen every reasonable opportunity to present his case, and to insure that public officials act under circumstances calculated to produce a fair and prompt result.

Early cases prompted the passage of due-process provisions which expanded federal administrative functions. For example, the *Panama Refining Co. v. Ryan* case moved congress to require agencies to publish official texts of their rules in the Federal Register. In his book on state rulemaking, Bonfield argued that agency rulemaking actually increases public involvement, and that an agency's rulemaking process is based on the assumption that:

... no matter how lawful, technically sound, and reasonable a particular administrative policy may be, it should not be adopted as law by an agency if the public, the community at large, does not want it.

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47 See Koch, Supra, note 39, Vol 1, p. 205.
48 See Bonfield, Supra, note 40, page 169
50 *Panama*, 293 U.S. 388. See also *Schechter*, 295 U.S. 495.
51 See Bonfield, Supra, note 41, pp. 8-9.
Bonfield also urged that state rulemaking should employ a more structured process than is available under the federal APA. Bonfield referred to “Bezanson” who advocated ‘formalism’ as a way to impose "societal restraint on the actions of agencies."\textsuperscript{52} This characterization of “formalism” is seen as imposing more objective criteria upon administrative decisions.\textsuperscript{53}

This author suggests that some rulemaking provisions in the Adult Compact would be hampered if the federal APA is used. To illustrate, a comparison of certain federal APA provisions -vs- their counterpart Model State APA provisions, follows below.

**A. Example One: Incorporation By Reference (IBR)**

While not explicitly named in the AOS Compact, “incorporation-by-reference” is a frequent rulemaking tool, whereby rules can avoid re-quotting large amounts of text, and even include entire documents which become an enforceable part of the rule. While rule-writers and code publishers benefit, readers are disadvantaged by having to search for incorporated documents elsewhere. Hence, it is a prerogative that should not be abused. And, the Federal APA only permits "use" of the IBR function, and provides no structure at all for its application:

... [it is] reasonably available to the class of persons affected thereby is deemed published in the Federal Register **when incorporated by reference** therein with


\textsuperscript{53} Id.
the approval of the Director of the Federal Register. 54 [emphasis added]

Drafters of the 1981 MSAPA devised a more formal structure. They set specific limits on the kinds of documents that could be incorporated:

54 5 USC 552a, 2001
"(c) An agency may incorporate, by reference in its rules and without publishing the incorporated matter in full, all or any part of a code, standard, rule, or regulation that has been adopted by an agency of the United States or of this State, another state, or by a nationally recognized organization or association, if incorporation of its text in agency rules would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the agency rules must fully identify the incorporated matter by location, date, and otherwise, and must state that the rule does not include any later amendments or editions of the incorporated matter. An agency may incorporate by reference such matter in its rules only if the agency, organization, or association originally issuing that matter makes copies of it readily available to the public. The rules must state where copies of the incorporated matter are available at cost from the agency issuing the rule, and where copies are available from the agency of the United States, this State, another state, or the organization or association originally issuing that matter."55

Many states adopted these kinds of limitations, and require that some documents should not be incorporated by reference; such as internal memos, bulletins, newsletters, media articles, and various agency work-products, thinking agencies would rely on such materials to regulate.

In summary, the "Incorporation-By-Reference (IBR)" procedures used by state APA’s are more extensive and more formally structured than they are under the federal APA.

**B. Example Two: "Emergency" rulemaking:**

The 1946 federal APA lacks guidance on the use of “emergency rules.” Federal agencies rely mostly on the Freedom of Information Act [FOIA] to expedite a rule’s

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55 Bonfield, Supra, note 41, MSAPA 3-111, p. 611 [Emphasis Added].
effective date. Michael White of the Office of the Federal Register, outlined this issue as follows:

... The specifics of publication requirements are generally NOT found in the Federal APA, but are in the Federal Register Act and its implementing regulations. ... there is no well codified procedure. Instead, we rely on the general good cause exception (unnecessary, impracticable, or contrary to the public interest) of the Federal APA to issue rules that are to become effective in less than 30 days. These may or may not address emergency conditions. (This) could lead to confusion when dealing with state authorities responsible for interstate compact regulations. Depending on the Federal agency ... emergency-type rules are published as Final Rules, Interim Final Rules, Immediate Final Rules, and Direct Final Rules. The latter three names have developed through ... practice, not statute. ... This rulemaking practice was developed by the former Administrative Conference of the United States and the Reinventing Government initiative. ... [This federal] office tries to set some standards of uniformity ... Courts have yet to rule definitively as to whether direct final rules are within APA procedural boundaries. 56 [Emphasis Added]

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56 Personal correspondence from Michael White; Director, Legal Affairs, Office of Federal Register, December 18, 2001.
This lack directly impacts the Adult Offender Supervision Compact, which specifically requires that its rules adhere to principles of the federal APA. It does not mention whether the Federal Register Act could be used\textsuperscript{57} in tandem. And, it is appropriate to note that procedures for Final Rules, Interim Final Rules, and other rules listed by the Administrative Conference of the U.S. and the Reinventing Government initiatives are not contained within any federal act.

\textit{C. Example Three: "Final" or "Adopted With Changes" rules.}

Most readers are aware of frequent differences between the published text of a "proposed" rule, and the un-published text of the "final adopted rule." The federal APA permits many amended rules to become final without being re-published. Because of that, citizens often do not learn directly, or soon enough, what the final version provides. Correcting that, the 1981 State Model APA reinforces the rights of citizens to be informed of changes. It provides that:

(a) An agency may not adopt a rule that is substantially different from the proposed rule contained in the published notice of proposed rule adoption. \text (...) [Some criteria are:]

(b)(1) the extent to which all persons affected by the adopted rule should have understood that the published proposed rule would affect their interests; (2) the extent to which the subject matter of the adopted rule or the issues determined by that rule are different from ... the published proposed rule; and (3) the extent to which the effects of the adopted rule differ from the effects of the published proposed rule had it been adopted instead.\textsuperscript{58}

It is suggested that the federal APA's ability to provide citizen protection, falls short of the need, and that the 1981 State Model APA better serves state governments and the people.

\textit{D. Example Four: "Exempted-rules."}

\textsuperscript{57} The Compact on Adult Offender Supervision, available at CSG, Box 11910, Lexington, Ky., 40578, and at "www.csg.org".
While this example is less related to the "formal structure" argument, it illustrates a basic departure from the federal APA, that state APA's have taken. Note that the federal APA exempts these four types of rules from its notice and comment procedure, as follows:

(b) ... Except when notice or hearing is required by statute, this subsection does not apply (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds ... that notice and public procedure thereon are

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58 See Bonfield, Supra, note 41, Section 3-107, p. 608.
impracticable, unnecessary, or contrary to the public interest.\textsuperscript{59}

Conversely, the 1981 MSAPA requires all rules, including interpretative rules and rules of agency organization, procedure, or practice, to follow the notice and comment procedure.\textsuperscript{60} In deleting exemptions, Bonfield explained the reasoning of the commissioners on this point:

"The term 'rule' ... includes legislative and interpretative rules, as well as procedural and substantive rules. ... The effect ...is to open up to the public through the rule-making process the structural and procedural mechanisms through which agencies conduct their public business."\textsuperscript{61}

Since these kinds of distinctions by a court could directly impact interstate compact rules, two observations may be useful. First, interpretative rules DO exist at the state level, though they are rarely mentioned within state APA's.\textsuperscript{62} Many state agency rule writers, legislative, and executive-branch rule reviewers, are unaware of interpretative rules, how they are different, and how they affect judicial review. Even some state court jurists have missed or largely ignored them.\textsuperscript{63} And while court opinions may or may not reflect views of legal treatises, or related case-law, consistency goes begging since some think "interpretative rules" should contain "interpretations" of rule substance. As Koch noted:

... Several courts seem to rely on a literal reading of the term 'interpretative.'

Thus if the rule merely interprets a statute or another rule they find it to be interpretative. ... An interpretative rule is not such because it interprets anything but because it only expresses the view of the agency on matters of interest to the

\textsuperscript{59} 5 USC 553(4) (2001).
\textsuperscript{61} See Bonfield, Supra, note 23, pp. 90-91.
\textsuperscript{62} If the reader is in doubt, a computer search of state court decisions should confirm some use of "interpretative rules" by jurists in at least a few cases.
public in a way that is not intended to have "legislative" or binding effect on the courts.64

In their previous treatise, Professors Davis and Pierce observed:

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63 See Koch, Supra, note 40, Vol. 1, pp.146.
64 Id.
The literal language of [§5 USC] 553 never uses the term 'legislative rule.' ... Based on pre-APA practice and the legislative history of the APA, however, courts universally understand this language to draw a distinction between legislative rules and interpretative rules. ... (A)n agency has the power to issue binding legislative rules only if and to the extent Congress has authorized it to do so. ... Since interpretative rules have no power to bind members of the public, but only the potential power to persuade a court, and since their issuance provides helpful guidance to the public, courts routinely conclude that agencies have the power to issue interpretative rules when Congress says nothing about such power.  

... An administrator who has a discretionary power but no delegated power to make legislative rules may state how he will exercise his discretion, and the result may be interpretative rules to which a court may give effect of law if the court is persuaded by the rules. 

The practical effect of the federal APA's exemption of interpretative rules upon the AOS compact could be a denial of notice, unless a compact entity finds a reason to publish and inform the public of an interpretative rule, or unless a question lands in court. The Adult Offender Supervision Compact specifically requires its rules be "published", though "how", is yet open. 

Contrast those exemptions with the 1981 MSAPA, where NO such exemptions exist; though admittedly, most state APA's have exempted things like internal management policies, orders, and the regulating of persons in state custody.

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66 Id., Vol. I, p. 239. Some may find fault in citing this older version, but the author justifies it due to its value at the time of original publication.
67 See Bonfield, Supra, note 23, MSAPA Article III, #3-116.
And, note that even these distinctions are separate from what Peter Strauss has labeled "Publication Rules," or advisory documents like bulletins, newsletters, guidelines, etc., intended for citizen information about agency practice. Many state courts have generally held these kinds of rules to be unenforceable. While Strauss adds some useful perspective, most state APA's generally require rulemakings to adhere to their full range of notice & comment procedures.

These examples: (1) Emergency rulemaking, (2) Incorporation By Reference, (3) Final rule adoption, and (4) Interpretative Rules, illustrate some fundamental differences between the federal APA and the Model State APA, and support the arguments for a separate Compact APA.

V. Summary and Proposal

Administrators of the former Probationers and Parolees Compact encountered instances where compact rules lacked sufficient enforcement authority. New compact drafters are turning away from formerly used compact rules, and are adopting Administrative Procedure rulemaking. The proposed Interstate Compact for Adult Offender Supervision is the first complete effort, but that compact’s rules must follow the "principles" of the federal APA. Given that the federal APA lacks ability to provide the broadest range of notice/comment procedures, and given that there is some

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69 C.P. v. Utah Office of Crime Victims' Reparations (Utah 1998); cert. denied. This logic might even argue that a kind of second-class "interpretative" rule system might exist in states.
question as to whether future amendments to the federal APA would be applicable, a question exists as to its utility. Other compacts are being updated, including the Juvenile Offender Compact which has been re-written, and is now being adopted by the states.

VI- Post-Script:

For over 200 plus years, interstate compacts have operated as a separate body of regulatory law; creating policies, rules and regulations that were not published, codified, nor made available for public review. Those kinds of rules were not subject to notice and comment rulemaking; and the public, including state law-makers, are unable to easily access them.

A new Administrative Procedure Act that would be adopted as a separate Administrative Procedure Compact, or model act, should be created. Compact law should undergo the same reform that has been thrust on federal and state agencies during the past 60 years. A separate Compact APA would use a more formal structure as found in the 1981 MSAPA, apply to all past compacts, and grant access for all citizens. Such a Compact APA would be a controlling-act; delegate rulemaking

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70 Personal correspondence from Professor Arthur E. Bonfield, University of Iowa, October 10, 2001.
71 In September 2001, the Council of State Governments (CSG) convened a drafting-team of persons representing state and federal entities, to discuss and revise the INTERSTATE COMPACT ON JUVENILES. That project was funded by the U.S. Office of Juvenile Justice & Delinquency Prevention. The group met again in November 2001, and a third time in February 2002. The proposed Adult Offender Supervision Compact was used as a starting point, but was revised. At the group's final meeting, they voted to remove the "federal APA" as the basic rulemaking procedure, and replace it with the 1981 Model State Administrative Procedure Act or any other act that may be selected. The reader may obtain a copy of meeting minutes and related information from Mr. John Mountjoy, CSG, PO Box 11910, Lexington, Ky., 40578-1910.
authority, define filing calendars, and provide notice and comment procedures similar to Administrative Procedure Act’s that have been adopted by the 50-states.

VII. Counterpoint

Some state Lawmakers may not want a state to have stronger enforcement powers against their states. But, this issue cuts both ways. If a state doesn't want to enforce mutual solutions for common problems, that state should not join the compact in the first place. Or, if a state finds that a compact is not suitable to that state, it should seriously consider withdrawing from it.

Secondly, some may feel a controlling Compact APA is not needed for rules. When California adopted the AOS Compact, a University of Pacific law student reviewed and described functions that the new AOS Compact would accomplish for the states. He wrote:

... the Interstate Commission will help to ensure that parolees and probationers transferring from state to state are not overlooked or lost in the shuffle of paperwork. The uniform system regulating transfer would maintain constant oversight over those entered into the database; thereby, limiting the likelihood that an individual will go without supervision for any period of time during the process of transferring supervision from one state to another.72

The above statement assumes that any one state will be able to easily enforce compact rules against another state. But, if that is the case, why wasn't the old

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compact sufficient?

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Clearly, since more new Interstate Compacts are expected to be drafted, and many existing compacts need revision, this debate becomes quite timely.