

**QUESTIONNAIRE FOR FILING PROPOSED RULES AND REGULATIONS
WITH THE ARKANSAS LEGISLATIVE COUNCIL**

DEPARTMENT/AGENCY Arkansas Insurance Department
DIVISION Legal Division
DIVISION DIRECTOR Jim Brader
CONTACT PERSON Booth Rand
ADDRESS 1200 West Third Street
PHONE NO. 501-371-2820 **FAX NO.** 501-371-2618 **E-MAIL** booth.rand@arkansas.gov
NAME OF PRESENTER AT COMMITTEE MEETING Booth Rand, Managing Attorney
PRESENTER E-MAIL booth.rand@arkansas.gov

INSTRUCTIONS

- A. Please make copies of this form for future use.
- B. Please answer each question **completely** using layman terms. You may use additional sheets, if necessary.
- C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this Rule" below.
- D. Submit two (2) copies of this questionnaire and financial impact statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:

**Jessica Sutton, ESQ.
Administrative Rules Review Section
Arkansas Legislative Council
Bureau of Legislative Research
One Capitol Mall, 5th Floor
Little Rock, AR 72201**

1. What is the short title of this rule? Rule 121: Declaratory Orders

This proposed regulation implements Ark. Code Ann. §25-15-206 which states that each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory orders as to the applicability of any rule, statute, or order enforced by it

2. What is the subject of the proposed rule? _____

3. Is this rule required to comply with a federal statute, rule, or regulation? Yes No
If yes, please provide the federal rule, regulation, and/or statute citation. _____

4. Was this rule filed under the emergency provisions of the Administrative Procedure Act? Yes No
If yes, what is the effective date of the emergency rule? Immediately upon approval by Executive Committee of ALC

When does the emergency rule expire?

Within 120 days unless sooner replaced by permanent Rule.

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act?

Yes No

5. Is this a new rule? Yes No

If yes, please provide a brief summary explaining the regulation. See Attached Summary

Does this repeal an existing rule? Yes No

If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.

Is this an amendment to an existing rule?

Yes No

If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: The summary should explain what the amendment does, and the mark-up copy should be clearly labeled "mark-up."** See attached mark-up of proposed changes.

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation.

Ark. Code Ann. §25-15-206 states that each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory orders as to the applicability of any rule, statute, or order enforced by it. These declaratory orders shall have the same status as agency orders in cases of adjudication. Ark. Code Ann. §25-15-206 (b) (1) states that if an agency finds that imminent peril to the public health, safety, or welfare or compliance with federal laws or regulations requires adoption of a rule upon less than thirty (30) days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing, or upon any abbreviated notice and hearing that it may choose, to adopt an emergency rule. The rule may be effective for no longer than one hundred twenty (120) days unless earlier replaced by a permanent rule.

7. What is the purpose of this proposed rule? Why is it necessary?

See attached Summary.

8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b). <https://www.insurance.arkansas.gov/pages/industry-regulation/>

9. Will a public hearing be held on this proposed rule? Yes No
If yes, please complete the following:

Date: October 20, 2020

Time: 10:00 A.M.

Place: Arkansas Department of Commerce,
Second Floor Hearing Room, 1

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)
October 20, 2020 at 10:00 A.M.

11. What is the proposed effective date of this proposed rule? (Must provide a date.)
Immediately upon approval by the Executive Committee of ALC.

12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice. We will update this after we send out our NOPH (“Notice of Public Hearing”) and receive newspaper documentation from the Arkansas Democrat-Gazette.

13. Please provide proof of filing the rule with the Secretary of State and the Arkansas State Library as required pursuant to Ark. Code Ann. § 25-15-204(e).

14. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known.

The Department does not know at this time but will update BLR and ALC in the public comments summary following the close of the comment period and public hearing.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT Arkansas Insurance Department

DIVISION Legal Division

PERSON COMPLETING THIS STATEMENT Booth Rand

TELEPHONE 501-371-2820 **FAX** 501-371-2618 **EMAIL:** _____

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

SHORT TITLE OF THIS RULE RULE 121: DECLARATORY ORDERS

1. Does this proposed, amended, or repealed rule have a financial impact? Yes No
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule? Yes No
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes No

If an agency is proposing a more costly rule, please state the following:

- (a) How the additional benefits of the more costly rule justify its additional cost;

(b) The reason for adoption of the more costly rule;

(c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and;

(d) Whether the reason is within the scope of the agency's statutory authority; and if so, please explain.

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

(a) What is the cost to implement the federal rule or regulation?

NONE or NOT APPLICABLE.

Current Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

(b) What is the additional cost of the state rule?

Current Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

There should be no financial impact on small business.

Current Fiscal Year

\$ _____

Next Fiscal Year

\$ _____

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is

affected.

NONE

Current Fiscal Year

\$ _____

Next Fiscal Year

\$ _____

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

NOT APPLICABLE

Yes

No

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

**ECONOMIC IMPACT STATEMENT
OF PROPOSED RULES OR REGULATIONS
EO 05-04: Regulatory Flexibility**

Department: Arkansas Insurance Department
Contact Person: Booth Rand
Contact Phone: 501-371-2820

Division: Legal
Date: September 15, 2020
Contact Email: booth.rand@arkansas.gov

Title or Subject:

Proposed AID Rule 121: "DECLARATORY ORDERS"

Benefits of the Proposed Rule or Regulation

1. Explain the need for the proposed change(s). Did any complaints motivate you to pursue regulatory action? If so, please explain the nature of such complaints.

This proposed regulation implements Ark. Code Ann. §25-15-206 which states that each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory orders as to the applicability of any rule, statute, or order enforced by it. AID does not have a validly promulgated modern rule authorizing declaratory actions or orders.

2. What are the top three benefits of the proposed rule or regulation?

Allows AID to issue declaratory orders and to administer declaratory actions filed at the Insurance Department. Avoids challenges to AID lack of authority to issue declaratory orders. Complies with requirements of the Arkansas Administrative Procedures Act.

3. What, in your estimation, would be the consequence of taking no action, thereby maintaining the status quo?

The lack of a modernly promulgated rule authorizing declaratory proceedings jeopardizes any declaratory order or action instituted by AID.

4. Describe market-based alternatives or voluntary standards that were considered in place of the proposed regulation and state the reason(s) for not selecting those alternatives.

None.

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Impact of Proposed Rule or Regulation

5. Estimate the cost to state government of collecting information, completing paperwork, filing, recordkeeping, auditing and inspecting associated with this new rule or regulation.

None.

6. What types of small businesses will be required to comply with the proposed rule or regulation? Please estimate the number of small businesses affected.

None.

7. Does the proposed regulation create barriers to entry? If so, please describe those barriers and why those barriers are necessary.

None.

8. Explain the additional requirements with which small business owners will have to comply and estimate the costs associated with compliance.

None.

9. State whether the proposed regulation contains different requirements for different sized entities, and explain why this is, or is not, necessary.

None.

10. Describe your understanding of the ability of small business owners to implement changes required by the proposed regulation.

The propose Rule does not require “small business owners” to implement provisions in the proposed Rule.

11. How does this rule or regulation compare to similar rules and regulations in other states or the federal government?

This proposed rule follows the Arkansas Attorney General Model on Rules and Regulations for State Agencies.

12. Provide a summary of the input your agency has received from small business or small business advocates about the proposed rule or regulation.

We have received no comments from small businesses at this time.

EMERGENCY RULE 121 DECLARATORY ORDERS

- 1. BACKGROUND**
- 2. PUBLIC EMERGENCY**
- 3. AUTHORITY**
- 4. THE PETITION**
- 5. EFFECTIVE DATE**

SECTION 1. BACKGROUND & PURPOSE

A declaratory order is a means of resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency the agency has authority. A petition for declaratory order may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory order is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition or declaratory order must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

SECTION 2. STATEMENT OF EMERGENCY

The Arkansas Insurance Department ("Department") does not maintain a validly modern, promulgated rule authorizing declaratory orders. The Arkansas Insurance Commissioner ("Commissioner") finds that the Department has pending declaratory actions and may in the future receive additional declaratory petitions and therefore has an urgent need and public emergency to be given emergency authority to issue declaratory orders, pending a permanently promulgated rule.

SECTION 3. AUTHORITY

Ark. Code Ann. §25-15-206 states that each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory orders as to the applicability of any rule, statute, or order enforced by it. These declaratory orders shall have the same status as agency orders in cases of adjudication. Ark. Code Ann. §25-15-204 (b) (1) states that if an agency finds that imminent peril to the public health, safety, or welfare or compliance with federal laws or regulations requires adoption of a rule upon less than thirty (30) days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing, or upon any

abbreviated notice and hearing that it may choose, to adopt an emergency rule. The rule may be effective for no longer than one hundred twenty (120) days.

SECTION 4. THE PETITION

The process to obtain a declaratory order is begun by filing with the Insurance Commissioner a petition that provides the following information:

1. The name, address, telephone number and facsimile number of the petitioner;
2. The name, address, telephone number and facsimile number of the attorney of the petitioner;
3. The statutory provision(s), agency rule(s), or agency order(s) on which the declaratory order is sought;
4. A description of how the statutes, rules, or orders may substantially affect the petitioner and the petitioner's particular set of circumstances, and the question or issue on which the petitioner seeks a declaratory order;
5. The signature of the petitioner or petitioner's attorney;
6. The date; and
7. Request for a hearing, if desired.

The agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts. Within ninety (90) days of the filing of the petition, the agency will render a final order denying the petition or issuing a declaratory order.

SECTION 5. EFFECTIVE DATE

This Emergency Rule shall be effective upon the date signed by the Director of this Rule and shall be effective for one hundred and twenty (120) days unless sooner replaced by a permanent Rule.

ALAN McCLAIN
INSURANCE COMMISSIONER

DATE

SUMMARY

RULE 121

Declaratory Orders

AID issues this emergency rule in order to avoid challenges to our authority to issue declaratory orders. The Arkansas Administrative Procedures Act requires AID to have a validly enacted Rule authorizing declaratory Orders. Ark. Code Ann. §25-15-206 states that each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory orders as to the applicability of any rule, statute, or order enforced by it. Currently, for authority to issue declaratory orders, the only reference to AID authority to issue declaratory orders, is referred to in a document entitled, "AID Rules of Practice and Procedure," written prior to 1980. There exists no Rule history file for this document as we do have and maintain for our promulgated rules. We are therefore unsure if these Rules of practice and procedure were validly promulgated. We currently have a pending declaratory action and, out of an abundance of caution, we are in need of immediate rule authority and authority in the future to issue declaratory orders.

The proposed emergency Rule herein for declaratory orders is copied from the Arkansas Attorney General's "Model Rule of Procedure for Regulatory and Licensing Agencies." AID copied the Model Rule section in this manual pertaining to declaratory orders.

We intend to adopt the currently proposed emergency rule as a permanent rule within 120 days.



STATE OF ARKANSAS
BUREAU OF
LEGISLATIVE RESEARCH

Marty Garrity, Director
Kevin Anderson, Assistant Director
for Fiscal Services
Tim Carlock, Assistant Director
for Information Technology
Matthew Miller, Assistant Director
for Legal Services
Estella Smith, Assistant Director
for Research Services

MEMORANDUM

TO: Members, ALC – Executive Subcommittee

CC: Marty Garrity, Director, Bureau of Legislative Research;
Jessica Sutton, Administrator, Administrative Rules Review Section, Legal
Services Division

FROM: Lacey Johnson, Legislative Attorney, Administrative Rules Review Section,
Legal Services Division

DATE: September 14, 2020

SUBJECT: Legal Authorization for the Arkansas Insurance Department’s Emergency
Promulgation of Rules Regarding Declaratory Orders

Under Arkansas law, each administrative agency must “provide by rule for the filing and prompt disposition of petitions for declaratory orders as to the applicability of any rule, statute, or order enforced by it.” Ark. Code Ann. § 25-15-206. “These declaratory orders shall have the same status as agency orders in cases of adjudication.” *Id.* This proposed rule implements model language from the Arkansas Attorney General’s Office. *See* Ark. Att’y General’s Office, Model Rules of Procedure for Regulatory and Licensing Agencies, at 12-13, https://arkansasag.gov/site/assets/files/1024/model_rules_of_procedure_sept_2018.pdf.