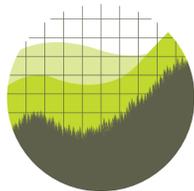




52 Experiments with Regulatory Review

The Political and Economic Inputs
into State Rulemakings



Institute for
Policy Integrity

new york university school of law

Jason A Schwartz
Report No. 6
November 2010

Copyright © 2010 by the Institute for Policy Integrity.
All rights reserved.

Printed in the United States of America.

Institute for Policy Integrity
New York University School of Law
139 MacDougal Street, Third Floor
New York, New York 10012

Contents

Executive Summary	ii
Introduction	1
PART ONE: Where We've Been and Where We're Trying To Go	
1. Weighing the Options	10
2. History and Models	31
3. Previous Studies on State Practices	44
4. Lessons from Federal Practice	54
5. Principles for Evaluation and Comparison	67
PART TWO: Where We Are Now	
6. Research Methodology	73
7. Grades and Comparative Charts	79
8. State-by-State Summaries	146
Alabama.....	146
Alaska.....	152
Arizona.....	159
Arkansas.....	165
California.....	170
Colorado.....	177
Connecticut.....	184
Delaware.....	190
District of Columbia.....	193
Florida.....	196
Georgia.....	204
Hawaii.....	207
Idaho.....	211
Illinois.....	216
Indiana.....	221

Iowa.....	227
Kansas.....	235
Kentucky.....	240
Louisiana.....	245
Maine.....	250
Maryland.....	256
Massachusetts.....	262
Michigan.....	265
Minnesota.....	271
Mississippi.....	277
Missouri.....	280
Montana.....	285
Nebraska.....	292
Nevada.....	294
New Hampshire.....	298
New Jersey.....	303
New Mexico.....	307
New York.....	309
North Carolina.....	317
North Dakota.....	324
Ohio.....	329
Oklahoma.....	338
Oregon.....	343
Pennsylvania.....	346
Puerto Rico.....	355
Rhode Island.....	357
South Carolina.....	360
South Dakota.....	365
Tennessee.....	370
Texas.....	373
Utah.....	377
Vermont.....	382
Virginia.....	387
Washington.....	392
West Virginia.....	400
Wisconsin.....	406

Wyoming.....412

PART THREE: Where to Go and How to Get There

9. Innovative Practices418

10. Recommendations421

Appendix426

Acknowledgments

Special thanks to Stephanie Tatham for her invaluable contributions to designing and coordinating the early research phases of this project. Special thanks also to Jennifer Gómez for her careful proofreading.

Thanks to Julia Brown, Meghan Dwyer, Elliott Farren, Ryan Reiffert, James Thompson, and John Wood for their hard work conducting surveys, collecting research materials, and drafting select state summaries.

Thanks to Bryant Cannon, Brandon Cunningham, Yoo-Soo Ho, Annie Jhun, Nathaniel Kane, Melissa Lang, Maggie Macdonald, Kristina Portner, Neil Rutledge, Jeff Seddon, David Seitzer, Megan Turek, and especially Jon Kalmuss-Katz for their assistance conducting surveys.

This project could not have been completed without the guidance and supervision of Richard L. Revesz and Michael A. Livermore, and the support of Edna Ishayik.

Executive Summary

The Problem

Nearly twenty percent of the American economy is directly regulated by the states. State agencies wield tremendous power over nearly every facet of economic life, from insurance to land use to health care—industries whose financial footprints easily climb into the billions of dollars each. Given the expanding scope of state regulatory programs and the present economic climate, there has never been a more important time to understand how state regulations are developed.

Yet bureaucrats issue the decrees that shape people's lives from deep within the labyrinthine halls of government, often sheltered from the scrutiny of the press and public. Inadequate decisionmaking procedures can lead to too much regulation—stifling economic growth—or too little, exposing the public to unnecessary risks. To ensure that agencies are making good decisions, systems of economic analysis and regulatory review are needed so that the costs and benefits of action are properly weighted.

In reality, approaches to regulatory decisionmaking in the states vary greatly in form, quality, and effectiveness. Some states have adopted relatively sophisticated strategies, while others have little or no way to ensure that their agencies are genuinely promoting the public good. In a time of continuing economic uncertainty, when the country faces a range of economic, environmental, and social risks, systems to promote rational decisionmaking by state agencies are profoundly important.

The Research

Focusing on the political and economic review of state-level regulatory decisionmaking, this report takes a snapshot of current practices and offers a comprehensive comparative analysis of how states are doing. Through research into the states' requirements "on the books" as well as their actual practice of economic analysis and regulatory review, this report examines how well states have set up their regulatory processes, and uncovers whether their systems of regulatory review and analysis are up to the task of ensuring high-quality protections at low costs.

To compile data for the report, dozens of researchers at New York University School of Law studied the laws and regulations governing agency decisionmaking in all 50 states, plus Washington D.C. and Puerto Rico. In addition, surveys were circulated to individuals in state government, as well as representatives from the business and public interest communities, with over 120 responses ultimately collected. The results were synthesized, and states were compared against each other to judge how well they conformed to the best practices for promoting sound and rational regulatory decisionmaking.

Key Findings

- States directly regulate 20% of the economy. Poorly designed regulations threaten economic growth and fail to efficiently protect the environment, public health, and safety.
- Powerful tools exist for states to promote rational and efficient regulatory decisions. Most states choose the wrong tools or wield them ineffectively.
- In many states, regulatory review only creates another access point for private interests who oppose new regulations; very few states use the review process to calibrate decisions and get the most out of regulatory proposals.
- Almost no states have mechanisms to check if necessary regulations are missing or to coordinate inter-agency conflicts.
- Almost no states have balanced or meaningful processes to check the ongoing efficiency of existing regulations.
- With exceedingly few (if any) trained economists, limited time, and strained budgets, most state agencies struggle to assess the basic costs of regulations—and completely forgo any rigorous analysis of benefits or alternative policy choices.
- Based on a fifteen-point scale, no state scores an A; the average grade nationwide is a D+; seven states score the lowest possible grade of a D-.
- By following a simple, step-by-step course of reforms (transparency, training, inter-state sharing, resource prioritization, new guidance documents, revised statutes, and ongoing reevaluation), all states can improve the rationality and effectiveness of their regulatory systems.

How the States Stack Up

Distilled from existing literature on how best to conduct regulatory review and channel agency decisionmaking, fifteen principles were used to evaluate state practices:

- #1: Regulatory review requirements should be realistic given resources.
- #2: Regulatory review should calibrate rules, not simply be a check against them.
- #3: Regulatory review should not unnecessarily delay or deter rulemaking.
- #4: Regulatory review should be exercised consistently, not only on an ad hoc basis.
- #5: Regulatory review should be guided by substantive standards, to ensure consistency and to increase accountability.
- #6: At least part of the review process should be devoted to helping agencies coordinate.
- #7: At least part of the review process should be devoted to combating agency inaction.
- #8: Regulatory review should promote transparency and public participation.
- #9: Periodic reviews of existing regulations should be guided by substantive standards.
- #10: Periodic reviews of existing regulations should be balanced, consistent, and meaningful.

- #11: Impact analyses should give balanced treatment to both costs and benefits.
- #12: Impact analyses should be meaningfully incorporated into the rulemaking process.
- #13: Impact analyses should focus on maximizing net benefits, not just on minimizing compliance costs.
- #14: Impact analyses should consider a range of policy alternatives.
- #15: Impact analyses should include a meaningful and balanced distributional analysis.

These principles were applied to grade the states' regulatory review structures on a fifteen-point scale—practices consistent with these principles earned states points, which were then translated into letter grades: twelve points or more earned an A, while states with practices that matched three or fewer guiding principles received a D.

Seven states scored in the B range: Iowa (B+); Vermont and Washington (B); and Michigan, New Hampshire, Pennsylvania, and Virginia (B-). Seven jurisdictions also scored a D-, having met none of the guiding principles: Alaska, Delaware, the District of Columbia, Georgia, Louisiana, New Mexico, and Texas.

The average grade was about a D+, and the most frequently awarded grade was a D. Across the nation, regulatory review structures are in clear need of an overhaul.

A	0 states
B+	1 state
B	2 states
B-	4 states
C+	6 states
C	10 states
C-	2 states
D+	5 states
D	15 states
D-	7 states

The Diagnosis

Some problems persistently and universally plague state regulatory practices: a lack of resources to conduct analysis and review rules; overly complex, duplicative, or obscure review requirements that deter agencies from pursuing regulations, reduce consistency, and block public transparency; and a historical bias that gives more attention to the potential costs of regulations than to their potential benefits.

Most states have some legislative review mechanism in place and require some economic impact analysis of proposed rules; many states also utilize gubernatorial review provisions, regulatory flexibility analysis requirements, or other structures. But most of these systems are not well designed to help calibrate regulations and maximize their net benefits. Over time, these lost benefits add up, and a poorly functioning review process cheats the public out of the efficient and effective regulatory climate that they deserve.

For example, in Kentucky, the beverage industry used the legislative review process to undermine new school nutrition regulations, renegeing on a promise to reduce the size of soda bottles in school vending machines—all to save well under a million dollars, and without considering the economic and social impacts to students' health. In West Virginia, the legislature let the coal industry redraft rules on water quality, abandoning the proposals carefully negotiated by agency experts. By critiquing each state's practices and conducting a comparative analysis, this report develops both individualized and general recommendations for all fifty-two jurisdictions.

The regulatory review toolbox houses many more instruments than just the rubber stamp and veto

pen. Options for regulatory review include a myriad of mechanisms with the potential to influence the content of rules dramatically, for example by emphasizing broad administrative priorities, resolving inter-agency conflicts, harmonizing regulatory policies and procedures, or assessing distributive impacts. The legislative and executive branches can also use analytical requirements to ensure that agencies will justify their policy choices on rational and accountable grounds, rather than exercise their regulatory discretion according to personal whim or backroom negotiations.

But states are not adequately using this toolkit, either ignoring it, reaching for the wrong tools, or wielding the tools inefficiently. The results: poorly structured regulations that harm the economy and deliver inadequate benefits for too high a price.

Recommendations

No state has earned a perfect score: all regulatory review structures nationwide could stand improvement to increase their rationality and effectiveness. Drawn from a set of best practices, this report recommends a simple, five-step course of reform all states can pursue:

Step-by-Step Recommendations
<p>#1: Low-Hanging Fruit</p> <ul style="list-style-type: none"> • Transparency: post more impact statements and agendas online • Training: host seminars for rule writers, rule reviewers, and the public • National Professional Association: create a body to facilitate interstate communication • Inter-State and Intra-State Sharing: share resources and best practices
<p>#2: Research and Resource Prioritization</p> <ul style="list-style-type: none"> • Conduct deeper survey of individual state practices • Prioritize agencies or reviewers that would benefit most from additional resources
<p>#3: Stroke of the Pen Changes</p> <ul style="list-style-type: none"> • Adopt off-the-shelf recommendations, like the Draft Order featured in the Appendix • Or design original guidance documents, promoting balance in analysis and reviews
<p>#4: Process-Intensive Changes</p> <ul style="list-style-type: none"> • Update the state's Administrative Procedure Act • Reform the state's Regulatory Flexibility Act to promote balanced analysis
<p>#5: Continual Reevaluation</p> <ul style="list-style-type: none"> • Monitor individual state practices • Support academic, empirical research into what works

The central theme of this report is that state regulatory review structures are powerful, poorly understood, and deserve much more attention than they have received to date. For eighty years, state governments have experimented with countless different regulatory review structures. Yet far too infrequently did they clearly define the problems they were trying to solve, assess whether their experimental tactics had succeeded, or stop to check if a better method had already been invented someplace else.

This report should encourage states to take stock and try to answer four fundamental questions: Where have we been? Where are we now? Where are we trying to go? And—ultimately—how do we get there? With answers to these questions in hand, states will be in a better position to use their tremendous regulatory powers to shape economic decisions in a way that most benefits the public, promotes economic growth, and provides efficient levels of protection.

Introduction

Be careful if you don't know where you're going,
because you might not get there.
—Yogi Berra¹

Since at least the 1930s, the tremendous expansion of regulatory powers and functions at the state level has caused “persistent apprehension” among government officials and scholars alike.² Ever the “laboratories of our democracy,”³ states have experimented boldly and continually with methods for checking and managing that growth: from executive approval of all new rules to the legislative veto, and from automatic sunset periods on existing regulations to mandatory economic analysis.

Unfortunately, states have not always articulated their goals for these experiments in governance with great clarity or consistency,⁴ and attempts in the academic literature to measure practices, effects, and successes are just as rare. Now, after eighty years of experimentation, where do the states stand on regulatory review? More importantly, where are they trying to go, and how will they know when they get there?

This report updates and expands on previous work, not only to capture what the laws of all fifty states (plus the District of Columbia and Puerto Rico) technically require in terms of regulatory review, but also to begin describing the actual execution of those requirements. By synthesizing the theoretical goals of regulatory review, taking a snapshot of current structures, and offering a comprehensive comparative analysis, this report should help states learn from each other's best practices, reassess the objectives of their own efforts, and then chart a new course to reach that destination.

What Is Regulatory Review?

Regulatory review can encompass any of the legislative and executive branches' checks on the rulemaking discretion afforded to administrative agencies. Starting in the twentieth century, legislatures have increasingly turned to agencies to translate their often-vague statutory pronouncements into actual laws. In areas ranging from environmental protection to business licensing, legislatures typically lack the expertise, time, and political insulation to design effective policies. Developing regulation requires decisionmakers to answer complex and potentially contentious questions: what is the dose-response of a toxin? which engineering solution best avoids contaminant usage? what are the risk preferences of citizens in this state? Legislatures rely on agencies to bring together data from a variety of disciplines, identify technical solutions, anticipate economic effects, and respond expeditiously to changing circumstances. Legislatures themselves usually cannot make such complex decisions in a timely manner.

Yet the large amount of power delegated to agencies raises concerns about rationality and democratic accountability. Bureaucrats issue the decrees that shape people's lives from deep within the labyrinthine halls of government, often sheltered from the scrutiny of the press and public: how can the people be sure that their needs and concerns are addressed? Given the incredible control, autonomy, and privacy that agencies enjoy, there is a persistent concern that delegating too much authority to agencies undermines the democratic system.

Regulatory review allows the legislative and executive branches to reassess the legality, political acceptance, efficiency, and fairness of the rules passed by agencies. For example, agencies might not be permitted to issue new rules or to continue enforcing existing rules without receiving the consent or comments of a reviewer. But the regulatory review toolbox houses many more instruments than just the rubber stamp and veto pen. Options for regulatory review include a myriad of mechanisms with the potential to influence the content of rules dramatically, for example by emphasizing broad administrative priorities, resolving inter-agency conflicts, harmonizing regulatory policies and procedures, or assessing distributive impacts. Regulatory review can also help agencies identify areas where beneficial regulation is lacking. Or, depending on the government's goals, the tools of regulatory review might instead be designed and wielded to slow down the rulemaking process or to create a new access point for interest groups.

Sometimes the legislative or executive branch uses analytical requirements to ensure that agencies will justify their policy choices on rational and accountable grounds, rather than exercise their regulatory discretion according to personal whim or backroom negotiations. Analytical mandates may require agencies to quantify or consider the potential impacts of their regulations on government revenue, the statewide economy, the environment, a particular class of citizens or businesses, or any other combination of costs and benefits. Such analyses may become part of the executive or legislature's review process, or the requirements may be designed to influence agency decisionmaking even without a subsequent political check.

Evaluation of regulatory review structures, therefore, enriches the fundamental understanding of how governments craft policies. That understanding equips the public with the ability to participate more actively in policy formation, and it reveals which characteristics—rationality, transparency, or accountability—the people and their governments value. The study of regulatory review also affords politicians the opportunity to reassess their power to check the legality, political acceptance, efficiency, and fairness of agency decisions. This type of evaluation is both particularly vital and particularly under-developed for the regulatory review structures of the U.S. state governments.

Regulatory review can encompass any of the legislative and executive branches' checks on the rulemaking discretion afforded to administrative agencies. The regulatory review toolbox houses many more instruments than just the rubber stamp and veto pen.

Why Study the States?

Despite the growth of the national government, the push toward federal preemption, and the appearance of supranational regulatory authorities during the twentieth century, states have maintained their far-reaching regulatory scope. If anything, since 1980 states have countered a federal trend toward deregulation with their own “reinforcement” policies, solidifying their local regulatory powers and expanding coverage.⁵ In fact, some academics and public policy experts have argued that states should take on an even greater role in the federalist system.⁶

In 1965, administrative law scholar Frank Cooper listed at least one subject matter controlled by the states for nearly every letter of the alphabet,⁷ and the list has only grown from there. States have significant regulatory powers over the insurance industry, land use, health care, and labor issues. Sometimes states are the only regulators; sometimes they share authority with the federal government; sometimes they implement federal standards, but retain the ability to push beyond minimum requirements.⁸ But even in areas where there is already a significant federal regulatory presence—like groundwater quality and wetlands protection, automotive emissions, and hazardous waste regulation—states often continue to play an important role.⁹ Other times, states take the lead and set an example for the federal government. The states beat the federal government to antitrust regulation, trucking regulation, and corporate governance (and were also the first to relax regulations on Savings and Loans and have experimented with other deregulatory schemes).¹⁰ More recently, states have taken independent actions, signed regional accords, and driven national policy forward on climate change.¹¹

The history of state regulation is filled with examples of both innovative successes and regrettable failures, but perhaps most often state regulation leads to the kind of subtle economic and social effects that cumulatively have profound impacts, yet often go overlooked.¹² The federal government believes that any regulation with a nationwide impact of \$100 million or more deserves careful analysis and review.¹³ States routinely regulate industries whose size and economic footprint dwarf that figure. For example, states are heavily involved in the regulation of managed healthcare, an industry with combined annual revenues over \$350 billion.¹⁴ In California alone, state-level appliance and building efficiency policies have saved consumers an estimated \$1.5 billion per year.¹⁵ Nearly twenty percent of the American economy is directly regulated by states.¹⁶ Given the expanding scope of state regulatory programs, there has never been a more important time to understand how such programs are developed.

The Need to Update and Expand the Literature

The frequency and persistence over time with which scholars have noted the lack of attention to state regulatory review nearly contradicts the sentiment of the statement. In 1965, Frank Cooper wrote: “In marked contrast to the incandescent glare of investigation and debate, which since 1941 has been focused on the functions of federal administrative agencies (a glare which has at times produced more heat than light), comparatively little attention has been paid to the multiform agencies operating within the states.”¹⁷ Twenty years later, Arthur Bonfield still wondered why, as state administrative functions had grown and were at least as varied and pervasive as the federal government, scholarship continued to focus almost entirely on the federal process alone.¹⁸ And after another twenty years, Paul Teske bemoaned that “very little is known about how states

actually regulate.”¹⁹

Similarly, Richard Whisnant and Diane Cherry have pointed out that “[d]iscussion of the states’ experience in economic analysis of rules is almost completely absent from the administrative law literature.”²⁰ Robert Hahn called the academic neglect of state-level regulatory analysis a “serious oversight.”²¹ In particular, many scholars note “[state] rule review procedures have received scant empirical attention.”²²

This report is indebted to the work of the scholars named above; their contributions, as well as the theoretical and empirical findings of many other important authors, are summarized in the chapters that follow. Nevertheless, all experts in this field of study agree that many crucial questions about state-level regulatory review remain unanswered. Especially given the rapid evolution of state regulatory review programs in the last decade, the current scholarship desperately needs an update and expansion. This report synthesizes the existing literature but then moves to present a more up-to-date and comprehensive picture of state-level practices.

The Structure of this Report

Yogi Berra warned us to “be careful if you don’t know where you’re going, because you might not get there.” To apply the master of baseball and witticism’s framework for navigation, Part One of this report summarizes where the states have already been and where they might want regulatory review to take them; Part Two investigates where they are now; and finally Part Three makes recommendations for how states can chart a course from their current location to their ultimate destination.

In Part One, Chapter One defines the options for regulatory review available to the states and synthesizes the advantages and disadvantages of those various mechanisms. Chapter Two looks at the historical phases of regulatory review in the states, especially as shaped by model recommendations that have been proposed in the past. Chapter Three reviews the existing literature on how regulatory review is actually practiced in the states, with special attention to some of the more recent empirical work. Chapter Four explores what lessons the states can or cannot learn from the history of federal regulatory review. Chapter Five distills the entire section into a basic set of principles for evaluating a state’s regulatory review structure.

Part Two then moves to state-by-state summaries, comparisons, and evaluations of current practices. The section first outlines the methodology used to collect materials for this study. In addition to key source materials—statutes and executive orders, minutes from meetings, sample impact analyses, and news items on controversial cases of regulatory review—this project

“In marked contrast to the incandescent glare of investigation and debate, which since 1941 has been focused on the functions of federal administrative agencies (a glare which has at times produced more heat than light), comparatively little attention has been paid to the multiform agencies operating within the states.”

—Frank Cooper

conducted over 120 surveys with reviewing entities, rulemaking agencies, and interested third parties in 52 jurisdictions (all the states plus Puerto Rico and the District of Columbia). Drawing from those materials, most state write-ups divide into three sections: a thorough summary of regulatory review practices required by law (the “process on paper”); an initial effort to understand how regulatory review is actually conducted (the “process in practice”); and a brief analysis or outlook for the future. This part addresses such questions as:

- What is the legal source of regulatory review obligations, and how does that affect the authority of reviewers or their ability to influence regulatory content?
- Who is technically responsible for fulfilling review requirements, who actually fulfills these requirements, and how do multiple reviewers interact?
- When is review supposed to occur, and when does review actually occur? What is the scope of regulatory review obligations, and which rules attract the attention of reviewers?
- For what purpose are regulations reviewed: legality, political accountability, efficiency, or fairness? Do reviewers investigate alternative options, costs and benefits, or distributional effects?
- What form does the review assume? Are there guidelines, rules, or standard documents to guide the evaluation efforts? Do reviewers exercise their influence through formal public hearings, or through informal private communications?
- If economic analysis is required, are there biases in the way it is conducted? Are both countervailing costs and ancillary benefits examined? Are approaches to economic analysis consistent among agencies, or might agencies assign different values to the same risks or benefits?
- Do agency analysts and regulatory reviewers have the time and resources necessary to comply with statutory requirements? How often does the regulatory review process conceived on paper match the regulatory review process exercised in practice?

Part Two also distills those 52 summaries into a series of comparative charts on the various regulatory review structures adopted by the states. The comparative charts facilitate contrasting individual states against each other, as well as with federal practices and the existing sets of model recommendations to the states. Finally, Part Two evaluates each state’s process against the guiding principles developed in Part One, assigning each state’s current efforts a grade. Grades range from “A (Solid Structure)” and “B (Room for Improvement)” down to “C (Problem Areas)” and “D (Rethink and Rebuild).”

Part Three highlights some innovative features from various states’ review structures and then presents some recommendations for how the states can further share ideas, reassess their goals for regulatory review, and begin to move to achieve those goals. Given the diversity of mechanisms that states have put in place, there will be a wide range of potential designs that can be evaluated, both for theoretical soundness, as well as actual results. From that diversity, this report identifies common elements of those practices that best forward the legitimate goals of regulatory review and

cost-benefit analysis: adding rationality, rigor, transparency, and accountability to administrative decisionmaking.

The best practice guidelines will both identify those states that are acting as innovators in the area of regulatory review, and help disseminate ideas and knowledge about how states can effectively structure regulatory review systems. These findings may also have some potential to inform the design or implementation of regulatory review practices by the federal government, foreign governments, or even international governing bodies.

For eighty years, state governments have experimented with countless different regulatory review structures. Yet far too infrequently did they clearly define the problems they were trying to solve, assess whether their experimental tactics had succeeded, or stop to check if a better method had already been invented someplace else. This report should encourage states to slow down, take stock, and try to answer four fundamental questions: Where have we been? Where are we now? Where are we trying to go? And—ultimately—how do we get there?

Notes

- ¹ YOGI BERRA & DAVID KAPLAN, *WHAT TIME IS IT? YOU MEAN NOW?* 39 (2002).
- ² See COUNCIL OF STATE GOV'TS, *ADMINISTRATIVE RULE-MAKING PROCEDURE IN THE STATES* 1 (1961) (noting that a systematic investigation into the problem began thirty years previously).
- ³ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments.”).
- ⁴ *But see, e.g.*, CAL. GOV'T CODE § 11340 (2010) (legislative findings and declarations).
- ⁵ See PAUL TESKE, *REGULATION IN THE STATES* 1 (2004).
- ⁶ For example, scholars have called for shifts in the federal-state balance to allow for “bottom-up,” state-level environmental regulation. See James L. Huffman, *Making Environmental Regulation More Adaptive Through Decentralization: The Case for Subsidiarity*, 52 U. KAN. L. REV. 1377 (2005); DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON* (2005); Jonathan H. Adler, *Letting Fifty Flowers Bloom: Using Federalism to Spur Environmental Innovation*, in *THE JURISDYNAMICS OF ENVIRONMENTAL PROTECTION: CHANGE AND THE PRAGMATIC VOICE IN ENVIRONMENTAL LAW* 263-64 (Jim Chen ed., 2004); Wallace E. Oates, *A Reconsideration of Environmental Federalism*, in *RECENT ADVANCES IN ENVIRONMENTAL ECONOMICS* 22 (John A. List & Aart de Zeeuw eds., 2002); Pietro S. Nivola & Jon A. Shields, *Managing Green Mandates: Local Rigors Of U.S. Environmental Regulation* (AEI-Brookings Joint Center for Regulatory Studies, 2001); Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 258-59 (2000); DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* 179-83 (1999); Richard Revesz, *Federalism and Environmental Regulation: A Normative Critique*, in *THE NEW FEDERALISM: CAN THE STATES BE TRUSTED?* 105 (John Ferejohn & Barry R. Weingast, eds. 1997); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 536-37 (1997); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the ‘Race to the Bottom’ Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).
- ⁷ See FRANK COOPER, *STATE ADMINISTRATIVE LAW: VOLUME ONE*, at 2 (1965).
- ⁸ See TESKE, *supra* note 5, at 8.
- ⁹ See Richard Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001).
- ¹⁰ See TESKE, *supra* note 5, at 7.
- ¹¹ See Pew Ctr. on Global Climate Change, *U.S. States & Regions*, <http://www.pewclimate.org/states-regions> (last visited July 15, 2010) (listing up-to-date state initiatives on climate change); see Inimai M. Chettiar & Jason A. Schwartz, *The Road Ahead: EPA’s Options and Obligations for Regulating Greenhouse Gases* (Policy Integrity Report No. 3, 2009) (explaining the role of states in using litigation to prod the federal Environmental Protection Agency into action, and particularly California’s role in shaping mobile source regulations).
- ¹² See TESKE, *supra* note 5, at 8.
- ¹³ See Exec. Order 12,866, 58 Fed. Reg. 51,735 (1993) (requiring additional economic analysis and review for “significant” regulatory actions, including those with more than a \$100 million annual impact on the economy).
- ¹⁴ Hoovers, *Industry Profile: Managed Healthcare*, <http://premium.hoovers.com/subscribe/ind/fr/profile/basic.xhtml?ID=102> (last visited Dec. 18, 2008).
- ¹⁵ CALIFORNIA AIR RESOURCES BOARD, *CLIMATE CHANGE DRAFT SCOPING PLAN ES-6* (2008), http://www.arb.ca.gov/cc/scopingplan/document/sp_executivesummary_draft.pdf.
- ¹⁶ TESKE, *supra* note 5, at 8.
- ¹⁷ COOPER, *supra* note 7, at 1 (further commenting that “[i]t is strange that this neglect should exist,” since more people and more lawyers have a stake in state proceedings).

- ¹⁸ ARTHUR E. BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* xxi (1986). See also JAMES R. BOWERS, *REGULATING THE REGULATORS: AN INTRODUCTION TO THE LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING* 3 (1990) (“This increased use of rules review has not been matched by an equivalent academic interest in it.”).
- ¹⁹ TESKE, *supra* note 5, at 7. See also Marjorie Sarbaugh-Thompson et al., *Legislators and Administrators: Complex Relationships Complicated by Term Limits*, 35 *LEGIS. STUD. Q.* 57, 57 (2010) (“Political scientists have written much about relationships between Congress and federal agencies, but said less about state legislatures’ relationships with state agencies.”); Dennis O. Grady & Kathleen M. Simon, *Political Restraints and Bureaucratic Discretion: The Case of State Government Rule Making*, 30 *POL. & POL’Y* 646, 648 (2002) (“Scholarly attention to the role of procedural law in restraining bureaucratic discretion has been overwhelming devoted to the federal Administrative Procedure Act. Only two comprehensive comparative examinations of [state Administrative Procedure Acts] have been published since Heady’s 1952 examination of six states.”).
- ²⁰ Richard Whisnant & Diane DeWitt Cherry, *Economic Analysis of Rules: Devolution, Evolution, and Realism*, 31 *WAKE FOREST L. REV.* 693, 697 (1996).
- ²¹ Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 29 *J. LEGAL STUD.* 873, 874 (2000).
- ²² Neal Woods, *Interest Group Influence on State Administrative Rule Making: The Impact of Rule Review*, 35 *AM. REV. PUB. ADMIN.* 402, 404 (2005); accord. Cheryl M. Miller & Deil S. Wright, *Who’s Minding Which Store? Institutional and Other Actors’ Influence on Administrative Rulemaking in State Agencies 1978-2004*, 33 *PUB. ADMIN. Q.* 397, 398 (2009) (“Gubernatorial and legislative oversight of administrative rule and decision-making has received far less empirical attention than the influence these actors have over other agency activities and functions.”).



Part One

Where We've Been and Where We're Trying To Go

Holding those who write rules accountable for the decisions they make and the manner in which they make them is critical to the maintenance of our democracy.
—Cornelius Kerwin¹

Chapter One

Weighing the Options

Eighty years of state experimentation with regulatory review has produced tremendous variety, but all states started off with access to roughly the same basic reagents: legislative review, executive review, periodic review, procedural constraints, and impact analyses. The reagents each have strengths and weaknesses, and states can adjust their configurations and combine them in different proportions. This chapter will first define the types of regulatory review ingredients to be analyzed in this report. Then this chapter overviews some of the special characteristics of state government that may alter the access to, power of, and need for certain regulatory review options. Finally, this chapter synthesizes the theoretical advantages and disadvantages of each variation.

The Scope of “Regulatory Review”

Regulatory review can encompass any of the legislative and executive branches’ checks on the rulemaking discretion afforded to administrative agencies. Generally, regulatory review allows the legislative and executive branches to reassess the legality, political acceptance, efficiency, and fairness of the rules passed by agencies. This report will focus on the systematic review of proposed or existing regulations by the executive and legislative branches, as well as on certain requirements for agencies to conduct special analyses during the design or justification of proposed or existing regulations.

Administrative Functions Subject to Review

The primary focus of this report is the review of *rules and regulations* (terms used interchangeably here), whether newly proposed or existing, and including deregulation. Regulatory review may also train its attentions on the lack of necessary or beneficial regulation, and it may investigate agency pronouncements that do not carry the force of law, such as guidance documents or voluntary programs.

Many related administrative functions that may also be subject to oversight, however, are not covered in this report. For example, executive or legislative reviews of an agency’s enforcement of regulations or implementation of programs are excluded. Similarly, audits of administrative efficiency, grant distribution, tax collection, financial administration, technological policies, or any other non-rulemaking agency function are beyond the scope of this study.

States sometimes impose periodic and automatic expiration dates on regulations as well as on agency programs or even entire agencies. The terminology in this area can quickly get confusing. Expiration and review of individual rules (which this report will call “sunset” reviews) will be included; review of programs or agencies (referred to here as “sundown” reviews) will not.

Elements of the Rulemaking Process

Again, the primary focus of this report is the *review* of rules and regulations and does not extend to the entire rulemaking process. Reviews by non-agency government actors (namely, the legislature, the executive, or an independent commission), regulatory impact analyses, and any other systematic review of regulations, including mandatory and periodic reviews of existing rules conducted by the agencies themselves, are the chief targets for analysis. On the other hand, reviews conducted principally for form or technical errors prior to official publication—while essential to the rulemaking process—will not be assessed; this report focuses on substantive reviews.

To some extent, any procedural constraint imposed on an agency’s discretion and rulemaking efforts can offer the legislature or executive the power to “stack the deck” and indirectly influence all regulatory content.² Nevertheless, despite their tremendous potential to serve a crucial review function by forcing agencies to consider the desirability and propriety of rules, the following elements will not generally be discussed: the judicial review of rules;³ the practices of declaratory orders, adjudications, and administrative hearings; or requirements for agencies to give notice to and receive comments from the public on rule proposals.⁴ However, public comment and public petitions for rulemakings can play an important role in triggering other regulatory review functions,⁵ and so will be discussed in that context when relevant.

To some extent, any procedural constraint imposed on an agency’s discretion and rulemaking efforts can offer the legislature or executive the power to “stack the deck” and indirectly influence all regulatory content.

Generally, this report concentrates on review requirements applicable to the majority of original and permanent regulations. Special exemptions or unique processes for certain agencies are not typically discussed, and unless relevant to the standard review process, this report will not usually devote separate attention to the processes for issuing emergency or temporary regulations, engaging in negotiated rulemakings, or adopting rules by reference or incorporation.

Legislative Oversight

The options for systematic legislative oversight of new and existing rules cover a wide spectrum, from mere notification requirements at one end to the legislative veto at the other. (The legislative veto is a statutory provision that preserves power for the legislature, a legislative chamber, or a legislative committee to quickly block regulations of a particular agency, subject matter, or type without resorting to the full process of enacting new legislation—and especially without needing a signature from the executive branch.)

In between those two extremes, legislatures might exercise review powers by returning comments to agencies on their rules, formally objecting to a rule, or temporarily suspending a rule's implementation. The legislature might also be able to influence rule content more informally, by holding hearings or communicating privately with agencies. Legislatures may delegate the review responsibilities to an office of legislative counsel or staff, to various committees with jurisdiction over different agencies, or to a specially created review committee.

Notably, all legislatures have the ability to adjust an agency's authority or directly nullify a rule by passing a new statute (with the governor's signature), and so this non-systematic power to "review" regulations by statutory adjustment should be assumed even if not always specifically discussed. This report will not generally discuss the indirect, non-systematic, or traditional methods of legislative oversight, such as narrowly drafting original statutes or using the powers of the purse, investigations, and appointments to control agency decisions.

Executive Oversight

As with the legislature, options for review on the executive side run the gamut, from perfunctory notification to mandatory approval. Most typically, the governor may have authority to modify, approve or disapprove, or choose not to file a regulation. "Filing" a regulation, typically by publishing it in the state's *Register* and Administrative Code, is necessary for a rule to take effect. Other executive officers may also have review authorities. In particular, the attorney general may review rules for legality, or particular agencies may review rules for impacts relevant to their areas of expertise (for example, a small business office may review and comment on small business impacts). Similarly, the agency promulgating the rule in question may itself be given enhanced review obligations beyond its own internal, discretionary policies. An agency head or legal counsel may be required to review and sign off on certain aspects of rule proposals, or the agency may periodically have to review all its existing regulations.

Generally, this report will not discuss the indirect, non-systematic, or traditional methods of executive oversight and persuasion, including budgetary requests and appointment powers.

Regulatory Impact Analyses

This report pays special attention to economic analyses, including fiscal notes, cost-effectiveness analysis, and cost-benefit analysis. The required rigor of such analyses can vary, from simple instructions for agencies to consider possible costs, to detailed guidelines for quantification of all direct and indirect costs and benefits. Distributional analyses also receive scrutiny, including analyses limited to exploring the effects of regulation on small businesses (often called "regulatory flexibility analysis").

Other types of specialized analyses that are generally reviewed only for completion or by the courts, and are not a substantive part of the review process, are excluded from this report. For example, environmental impact statements will not usually be discussed, unless substantive assessment of such statements is incorporated into a broader executive or legislative review process. The primary focus on economic analysis and regulatory flexibility analysis is appropriate given the centrality of the former in the federal review system (see Chapter Four) and the recently expanding role of the

latter at the state level (see Chapter Three).

Retrospective Reviews

Finally, this report will address retrospective reviews of existing regulations. Agencies may be periodically required to review their own regulations. Legislative and executive reviewers may also have authority to review certain existing regulations. In the most aggressive form of such review, rules may be automatically scheduled to “sunset”—that is, expire—after a certain number of years unless agencies justify their continued existence or receive permission from a reviewer. More typically, agencies might review existing regulations on their own initiative, as enforcement problems or changed circumstances come to light. Such discretionary, ad hoc reviews are not assessed here.

Are the States Special?

State governments may exhibit certain characteristics that alter their access to, the power of, or the need for various regulatory review options. By contrasting state governments with the federal government, a few key legal, political, and practical differences emerge.

Legal Differences

Plenary Legislative Authority: The basic constitutional text, separation of powers, and fundamental authority of the legislative branch may be different in many states compared to the federal government.⁶ Some state constitutions may explicitly define the legislature’s ability to review or suspend agency regulations. More generally, whereas Congress has only those powers enumerated in the U.S. constitution, most modern state legislatures exercise plenary power.⁷

A state’s executive branch may exist as “an amalgam of separate fiefdoms,” interfering with the governor’s power to lead and supervise the bureaucracy effectively.

Non-Unitary Executive Branch: With a few exceptions (such as Alaska, Hawaii, and New Jersey), most states do not have a unitary executive and instead hold elections for various executive officers besides the governor.⁸ Key officials like the attorney general, treasurer, and secretary of state are elected in at least three-fourths of states; in many states, agency heads for agriculture, education, insurance, and so forth are elected as well.⁹ On average, each state elects eight executive officials.¹⁰ Sometimes, those elected do not even belong to the governor’s same political party.¹¹ Still other state agencies are led by boards or commissions not directly appointed by the governor.¹² A state’s executive branch may consequently exist as “an amalgam of separate fiefdoms,”¹³ interfering

with the governor’s power to lead and supervise the bureaucracy effectively.¹⁴ The lack of effective executive supervision in some states may justify a relatively greater level of legislative review.¹⁵

Court Capacities: Not only are state courts aware of the legal, institutional, and practical differences that may justify “some degree of divergence in the jurisprudential approaches to legislative control

of the agency rulemaking process between federal and state courts,¹⁶ but state courts may also have less capacity to review economically complex analyses of regulatory impacts. In general, there is a concern that every un-provable assumption and rough estimate of a regulatory impact analysis could be challenged in court. But that vulnerability may be especially problematic for states, “where the available resources and expertise for conducting sophisticated cost-benefit analysis are much scarcer than at the federal level. Moreover, the need to evaluate the agency’s effort against specialized professional norms of policy analysis would strain at the outer limits of [state] judicial competence.”¹⁷

Political Differences

Elected Officials: States may elect their attorneys general or other agency heads, making them, as both reviewers and promulgators of regulation, potentially more accountable to and influenced by the electorate or the election cycle.¹⁸ Meanwhile, some state legislators may be term-limited or may have national ambitions, which can change their interest in and goals for regulatory review.¹⁹

Party Control: In some states, a single political party may continually dominate the legislative branch, executive branch, or both. Long-standing political feuds or engrained political ties may shape the dynamics between the legislative and executive branches, with agencies caught in between.²⁰

Public Access: Versus their federal counterparts, state agencies are responsible to much smaller constituencies, and as a result the agencies themselves tend to be smaller. As a function of that size and relationship with the public, state processes may be more visible and accessible than those at the federal level,²¹ though geographical and physical access matter somewhat less these days. Similarly, “because of geographical proximity and economic and cultural similarities, the organization and mobilization of interest groups . . . is much easier at the state level,” and state interest groups may experience relatively more political influence over the legislature, executive, or agencies.²²

Practical Differences

Legislative Professionalism: Though average legislative professionalism has increased in recent years, many state legislators do not enjoy levels of staffing, salary, or training comparable to federal legislators.²³ In thirty-eight states, legislators have no paid staffers (though most have access to some committee staff).²⁴ Modern state legislatures also undergo a high degree of turnover versus the U.S. Congress, in part because of term limits.²⁵ Lack of professionalism—especially lack of adequate staff to provide an independent source of analysis—may leave legislators open to the risk of capture: one 2000 study found five registered state lobbyists for every state legislator.²⁶ By contrast, over the last thirty years, the average governor’s length of time in office has doubled, and their average staff increased from around eleven to over fifty.²⁷

Short Legislative Calendars: Most state legislatures only meet for a few months each year.²⁸ Only seven state legislatures operate full-time; in six states the legislature convenes only every other year.²⁹ When in session, state legislatures have limited time to conduct either traditional oversight of agencies or more focused regulatory review functions. For example, “[i]n the states, by contrast

[to the federal level], agency-specific oversight hearings are rarely held.”³⁰ State legislatures may have little time to devote to agency oversight beyond a few high-profile issues.³¹

Limited Resources: As a function of size and chronic under-financing, state agencies often cannot obtain the quantity or quality of technical and legal expertise available at the federal level.³² States’ experiences with economic analysis are “problematic and unique for three main reasons: the lack of resources typically devoted to analysis of rules at the state level, the absence of staff expertise to conduct traditional benefit-cost analysis, and the minimal state judicial experience to review these analyses.”³³ Due to such resource constraints, state agencies may rely somewhat more on informal procedures.³⁴ State agencies have also tended to rely much more (and maybe exclusively) on the attorney general for legal advice, even though state attorneys general are much more under-staffed than the federal department of justice.³⁵

Only seven state legislatures operate full-time; in six states the legislature convenes only every other year. State legislatures may have little time to devote to agency oversight.

While such fundamental characteristics and constraints cannot be ignored, neither should these differences be overblown. For traits like legislative and agency professionalism, states are gaining ground and increasingly resemble the federal government. Other differences that seemed important in the past, like geographic proximity and physical access for the public and interest groups, matter less in the internet age. Moreover, some differences that scholars might predict would affect the practice of regulatory review may, empirically, make little difference. For example, it is perhaps telling that in one study, the size of state agencies did not change the average perceptions of agency administrators of the level of political influence over rulemaking.³⁶ In short, size matters, but perhaps not as much as originally thought.

Theoretical Advantages and Disadvantages

This section synthesizes the most common and representative theories from the literature on whether regulatory review is a good idea for the states and, if so, how it should be structured. For most key questions, the arguments for and against are simply presented without drawing a conclusion, though ultimate judgments are given where most experts agree. However, every state has its own unique legal and practical considerations when designing a regulatory review structure, so understanding the range of options and arguments may be more important than trying to draw universal conclusions.

One central theme that emerges from this synthesis is that regulatory review often attempts to pursue conflicting goals: adding analytical mandates may increase the rationality of rulemaking, but they may also cause delays and so decrease responsiveness; permitting strong legislative review could enhance democratic accountability, but it might interfere with bureaucratic discretion to pursue the most efficient policy designs. To structure their regulatory review processes, governments must balance the competing aims of rationality, accountability, and administrative workability: it is an exercise in value judgments, not a question with a single, clear answer.

“Rationality and responsiveness, while both traditional values in administration, reflect contradictory assumptions about the nature of administration.”

—Patty D. Renfrow and David J. Houston³⁷

Is Regulatory Review Necessary and Appropriate?

The most basic question to address is whether states should conduct regulatory review at all. Judicial review of rules, the non-systematic oversight authority of the legislature and the executive, and public participation in the rulemaking process could sufficiently achieve the goals of rationality and responsiveness. Governors and legislators, too, could take advantage of public participation procedures and submit their comments on proposed policies during the regular notice-and-comment period.³⁸

Moreover, regulatory review might do more harm than good, by undermining agency authority or injecting bias into the rulemaking process. Neither the governor nor the legislators (nor their staff) have the expertise or time to adequately consider all evidence for all rules. Plus they may be subject to undue political pressure, irrational popular passions, and the whims of the election cycle. Some scholars fear that regulatory review simply adds a new access point for special interest groups who already are highly influential over the content of rules. Indeed, some studies show that the perception of political influence increases with the robustness of regulatory review authority,³⁹ and that the stringency of regulations may decrease with the application of regulatory review procedures.⁴⁰ The more burdensome or unfair agencies perceive the review process to be, the more likely agencies will be tempted to evade the public rulemaking process and rely more heavily on the undesirable ad hoc process of rulemaking by adjudication or by un-reviewed guidance documents.⁴¹

But most experts agree that some version of regulatory review is both necessary and appropriate. To start, judicial review of regulation alone is inadequate. Judicial review is slow, expensive, sometimes difficult to invoke, and a rather blunt hammer to apply. Other regulatory review processes can be simpler, cheaper, faster, softer,⁴² and fairer (since the burdens of litigation fall on just a few unlucky individuals, while the whole government shares the burdens of regulatory review).⁴³ In addition to such practical arguments, judicial review is mainly limited to questions of legality and cannot check the desirability or political acceptance of a rule, nor can it help coordinate between agencies.⁴⁴ Similarly, the traditional, non-systematic oversight powers available to the legislative and executive branches may be quite limited and difficult to exercise,⁴⁵ and they lack consistency and transparency as to the scope of influence.⁴⁶

Regulatory review may also correct some problems inherent in the rulemaking system. Agencies may, at times, pursue policies inconsistent with prevailing social opinion and goals,⁴⁷ perhaps the result of capture by interest groups or the career ambitions of bureaucrats. Agencies may also neglect their institutional missions, diverting resources to other projects or simply to their own

leisure time.⁴⁸ Bureaucrats suffer from the same institutional and cognitive limitations that plague all decisionmakers, and so may not always identify the optimal policy choice.⁴⁹ Finally, agencies tend to focus only on active rulemakings under their jurisdiction; neither individual agencies nor the courts can coordinate the government's entire suite of regulatory policies.⁵⁰ Regulatory review is one way to begin addressing and correcting such problems.⁵¹

Even if regulatory review were not systematically implemented, legislatures would still retain some ability to check rule by enacting new statutes. As long as some "review" authority always exists, it may make sense to systematize the power so it is exercised efficiently and transparently.⁵²

Regulatory review certainly has its costs. Complying with analytical mandates takes time and money; the preferences of oversight authorities may inefficiently distort the amount of effort agencies devote to particular rules, policies, or analyses; regulatory review may delay the promulgation of new rules, causing uncertainty for regulated parties and deferring the realization of benefits; and some efficient policies may get rejected or may never be introduced for fear of rejection.⁵³ Nevertheless, in many cases, regulatory review vastly improves the quality of regulation.⁵⁴ Though difficult to prove, the benefits most likely outweigh the costs.⁵⁵

Moreover, regulatory review and analytical mandates need not be universally applied: they can be tailored in ways that maximize their benefits. For example, thresholds for significance, such as a minimum economic impact, could trigger when regulatory analysis is required. Rigorous reviews may be selective or discretionary. Universal requirements can quickly either monopolize time and resources or else lead to pointless, perfunctory analyses. But if properly structured, the costs of regulatory review can be minimized even as the benefits are enhanced.

Legislative versus Executive Review

Regulatory review may be worthwhile, but who should exercise the authority: the legislature branch, the executive branch, or both?

Some see legislative review as a "fundamental check and balance."⁵⁶ Legislative review brings the legislative branch into close contact with the administrative branch; it increases the administrative responsibility of the legislature; and it permits agencies to call upon the legislature to take responsibility for difficult policy problems. While of course the legislature always has the power to alter agency authority or nullify a rule by enacting a new statute, creating a systematic and institutionalized review process makes it much more likely that the legislature will exercise its oversight authorities.⁵⁷

On the other hand, the legislature faces serious limits on its time, resources, expertise, and interest level, and may not be able to monitor agencies effectively.⁵⁸ Given limited time, political ambitions, and the low-visibility of the regulatory process, legislators may be unlikely to prioritize review functions ahead of other more electorally advantageous activities, such as passing new legislation or providing constituent services.⁵⁹

“There is always so much the committee has to do with important legislation, we just can’t take the time to worry about what an agency is doing with something we drafted five or ten years ago. The agency’s going to be on its own for the most part. Because nobody wants to do the job of checking up on it.”

—Anonymous Legislative Committee Chair (1963)⁶⁰

Then again, the frequency of the formal exercise of review power may not be the best measure of effectiveness. Legislatures may use informal mechanisms or may rely on public complaints to trigger their review in rare, controversial, high value cases.⁶¹ In such arrangements, limited legislative interest and resources may be irrelevant. The mere possibility of legislative review, even if not exercised, may have “a powerful controlling effect” on agencies.⁶²

Regardless of how often it is exercised, overly powerful legislative review may confuse the locus of responsibility for administrative rules. Legislative review—and perhaps most especially the legislative veto—has the potential to undermine the rulemaking process, since some stakeholders may concentrate their efforts on lobbying the legislature and so ignore the initial rulemaking proceedings. The recommendations of legislative staff may end up being decisive, with the legislature operating through informal compromises with agencies that lack adequate public disclosure and transparency.⁶³ By diluting agency authority and shifting final decisionmaking power to the legislature, legislative review may confuse the public about who is truly responsible for the content of regulations. Public confusion about the locus of responsibility undermines accountability to the electorate.⁶⁴

For those reasons, some prefer executive review. Governors, as head of the executive branch, generally have more direct control over agency actions. Moreover, legislatures are composed of many individuals with varied preferences, making it hard for them to act concertedly. Some scholars have theorized that solitary executives, because they have no coordination problems associated with collective action, are more effective at influencing the bureaucracy than legislatures.⁶⁵ On the other hand, the lack of a unitary executive branch in most states and the “consequent fragmentation of executive authority” seriously complicate gubernatorial review.⁶⁶

Still, as a single official, the governor is perhaps the most logical choice to try to coordinate and rationalize all agency activity.⁶⁷ But in some states, the review power might not be exercised by the governor or another politically accountable official, but instead delegated to a bureaucratic agency, like a budgetary or policy office. In that case, there is some concern that the reviewer has its own institutional interests and lacks accountability to the electorate, especially because its lower visibility to the public makes it harder to monitor.⁶⁸

Another perspective is that the choice between the legislature and the governor is of little consequence. In either case, staff is likely to end up performing the actual review, not the elected official.⁶⁹ As a result, the structure of the review power may matter more than who nominally wields that authority.

How Should Legislative Review Be Structured?

If legislative review is a right of “institutional self-preservation,” through which the legislature checks that the power it delegated to an agency is exercised according to its original intent and the “will of the general public,”⁷⁰ then arguably the legislature should be able to review a regulation on any grounds: its legality; its consistency with statutory authority and legislative intent; its efficiency and fairness.

Others insist that legislative review should focus on a rule’s legality and statutory authority alone, since legislative intent is impossible to determine and cost-benefit justifications may be too complex for legislative review.⁷¹ Overly broad review criteria run the risk of encouraging arbitrary actions motivated by unchecked political considerations. On the other hand, reviewers might try to shoehorn policy objections into narrowly crafted review criteria or into informal channels of control, thereby producing the same review outcome only with less public transparency. But despite the chance that the legislature will misperceive or abuse the jurisdiction of its review, legislative oversight is worth the risk, and clear statutory criteria for review might help minimize the risk.

Once criteria are set, the next consideration is who within the legislature should conduct the review. Because of the size of state legislatures, the most effective method of review is through the committee process.⁷² Though standing committees do have subject matter expertise and experience with particular agencies, having separate committees in each chamber with overlapping review authority could lead to disagreements and confusion,⁷³ and standing committees may be too subjective on the question of legislative intent. Plus standing committees have heavy workloads and do not frequently meet during interims when the legislature is not in session.⁷⁴

Many experts recommend a single, joint committee, with members drawn from both legislative chambers and with the ability to meet regularly, even during the interim sessions. Such a committee should have the time and motivation to conduct its review seriously and effectively.⁷⁵ Even still, successful review will require continuous monitoring of agency activity, with considerable daily work. As such, the presence of sufficient, qualified staff will, in practice, determine the committee’s success.⁷⁶

What should the consequences of legislative review be, and especially what actions should a committee be entitled to take on its own?⁷⁷ The main criticism of making approval or ratification mandatory for all rules is that then “no more than legislative procrastination is required to abolish a rule.”⁷⁸ Given the heavy workload of legislatures, few support that expansive power.

The mirror equivalent of mandatory approval is the legislative veto. While the legislative veto certainly has its proponents,⁷⁹ detractors may now outnumber them. Besides the possible constitutional problems (which are pervasive but state-specific, see Chapter Two), most scholars

and courts⁸⁰ believe that, essentially, the legislative veto encourages “secretive, poorly informed, and politically unaccountable legislative action.”⁸¹ The legislative veto is also a one-way ratchet, eliminating rules without replacing them—nor does the legislature have the time or expertise to replace the rule; that is why they delegated authority to the agency in the first place.

Agencies typically view the legislative veto as the most unfair review mechanism, and so its mere existence could lead agencies to avoid the rulemaking process and use ad hoc adjudication or guidance documents instead.⁸² Finally, the legislative veto may actually reduce serious efforts of the legislature to review rules: the veto is seen as a panacea, but ultimately it will be difficult to exercise on more than rare occasions; thus, it gives a false sense of security, which leads to underuse of more effective ways to influence rules.⁸³

And, indeed, the veto is not the only option to give legislative review real bite. A rule suspension allows a review committee to temporarily delay implementation of an objectionable rule, often for up to a year. Typically intended to give the full legislature enough time to consider enacting a new statute to nullify the rule, the lengthy delay might be incentive enough to force agency compliance with the committee’s objections. Criticized by some as a de facto legislative veto,⁸⁴ the suspension is not guaranteed to avoid all constitutional objections. But it may be a practical and necessary tool for states with short legislative calendars, where the full legislature can not always be on call to respond to problematic regulations. If a suspension only applies during the interim session, according to strict statutory criteria, for a limited time, and using public procedures, the power is probably justifiable.⁸⁵

Another option to give a committee’s comments on a proposed rule more teeth is the burden-shifting technique. Under this structure, if the legislative review committee issues a formal objection to a rule, in any subsequent litigation over the rule’s legality, the burden of proof shifts from the petitioner to the agency. Burden-shifting is intended to make agencies more careful in the drafting process, to encourage the withdrawal of objectionable rules (sparing the public the cost of complying or litigation), and to assist credible private legal challenges.⁸⁶

How Should Executive Review Be Structured?

The practice and theory of executive review is somewhat less developed at the state level, so most lessons for the proper structure and scope will instead be drawn from federal experience (see Chapter Four). Many of the concerns raised about legislative review structure do apply with equal force to executive review: for example, the value of establishing clear review criteria and providing sufficient staff and resources. Public participation safeguards and transparency requirements may also be appropriate if the governor is given a strong veto power that can be exercised early in the rulemaking process.

The governor is not the only potential reviewer from the executive branch. From the start, reviews by attorneys general for a rule’s legality have been “a little more common” than gubernatorial reviews; but equally from the start, they have been criticized for causing delays and for the impossibility of limiting the review to non-policy questions of legality alone.⁸⁷ Theoretically, attorney general reviews for legality save the public the burden of complying with or litigating against an illegal rule, and they give agencies a valuable opportunity to make necessary corrections.

But in practice, reviews may tend toward one of two extremes. Either they will be perfunctory and “amount to little more than one [government attorney] obtaining the assent of another to the filing of the work-product of the first.” Or else the reviews will inevitably creep from issues of pure illegality to issues of impropriety and policy, which would mean that “the discretion vested in law in the agency was being exercised in fact by the Attorney General.”⁸⁸

Finally, as already discussed, the review power might not be exercised by the governor or another politically accountable official, but instead delegated to a bureaucratic agency, like a budgetary or policy office. In that case, there is some concern that the reviewer has its own institutional interests and lacks accountability to the electorate, especially because its lower visibility to the public makes it harder to monitor.⁸⁹ On the other hand, unlike the governor or attorney general, a dedicated rule review office within the executive can devote the time and resources to developing real expertise in the regulatory process and can offer agencies more consistent guidance on the development of rules. This may be especially true for the review of complex impact analyses.

Should States Conduct Impact Analyses?

Though not everyone agrees on the role of cost-benefit analysis in government decisionmaking,⁹⁰ impact analysis can help promote rationality, accountability, and transparency when placed at the heart of a regulatory review structure. By requiring governments to justify their regulatory choices in the language of science and economics, cost-benefit analysis helps ensure that decisions are not made on the basis of special interest politics. Instead, a regulatory review process places decisions on the public record, encouraging transparency and accountability. When decisions are made in the open, using the best information, and in response to public participation, democracy flourishes.

Resources and capacity, both to conduct meaningful analysis and to review them, are a real concern at the state level. If not carefully integrated into the decisionmaking process, analytical mandates risk producing perfunctory studies that simply justify what the agency has already decided to do: “more lonely numbers” that policymakers will ignore.⁹¹ But after balancing the advantages and disadvantages, many respected experts and organizations endorse at least some economic analysis for the states.⁹²

Small business impact analysis, or regulatory flexibility analysis, has become a hot topic in state administrative law (see Chapter Two). Special attention for small entities may be appropriate if groups with limited resources need extra help to make sure their interests are considered.⁹³ Some argue that small firms face disproportionate compliance costs, mostly because they cannot as

By requiring governments to justify their regulatory choices in the language of science and economics, cost-benefit analysis helps ensure that decisions are not made on the basis of special interest politics. When decisions are made in the open, using the best information, and in response to public participation, democracy flourishes.

easily take advantage of economies of scale.⁹⁴ But in general, devoting considerable analytical attention to just one group of affected entities may not be a justifiable use of limited resources.⁹⁵ In particular, small businesses may not need any special political protection: the mere fact that small business interests consistently win direct government subsidies, regulatory exemptions, and other special treatment suggests that small businesses are a potent interest group and do not need a leg up in politics.⁹⁶ A broader distributional analysis, that considers the distribution of regulatory benefits and burdens on all affected parties, might be a more appropriate use of limited analytical resources.

How Should Impact Analyses Be Structured?

The theory of cost-benefit analysis is more developed at the federal level, and so lessons will be drawn mostly from that context (see Chapter Four). But, as discussed above, states face special constraints on resources and capacity. Overly universal requirements for rigorous economic analysis might divert agency resources, lead to haphazard analysis, and motivate agencies to use back-door rulemakings to avoid the requirement. Ideally, a significance threshold should be set, and only rules with the potential to have a minimum economic impact should go through full cost-benefit analysis. Of course, the trouble is predicting the size of the impact before the full range of impacts has been analyzed. Depending on a state's resources and preferences, an alternate trigger may be desirable, such as requiring analysis upon the petition of an elected official, a political subdivision, or a sufficient number of affected citizens.⁹⁷

States may also have different motivations for requiring economic analysis: they may want to improve efficiency, enhance the quality of public debate, minimize regulatory burdens, or ensure legislative intent. Especially with limited resources, it may be impossible to pursue all these aims at once, and different motivating forces may dictate different methodological choices for the analysis.⁹⁸ For example, if the goal is to enhance public debate, analytical requirements might focus more on the disclosure of all studies used in the preparation of the rule or on illuminating distributional consequences, and choose to emphasize the quantification of costs and benefits somewhat less.⁹⁹

Most importantly, though, impact analyses should never be structured in biased ways. Regulatory flexibility analyses provide an important example. Like all analyses, regulatory flexibility should be structured to focus on net benefits, not just on exemptions.¹⁰⁰ Traditionally, regulatory flexibility analysis strives to minimize costs for small businesses by creating special regulatory exemptions for them, rather than to maximize net benefits through the strategic use of exemptions. As such, analysis often ignores the transaction costs of exemptions, such as increased enforcement costs to government and the increased information costs to regulated parties (to determine who is covered or not). Plus there are administrative and procedural costs to conducting the analysis and creating the exemption, and there are costs associated with firms' strategic behavior as they try to force themselves into the exemption.¹⁰¹ Any regulatory flexibility act that blindly creates exemptions

Any regulatory flexibility act that blindly creates exemptions without weighing whether those exemptions really enhance net benefits does not accomplish its goals.

without weighing whether those exemptions really enhance net benefits does not accomplish its goals.¹⁰²

Inaction and Review of Existing Regulations

Agency inaction is a pervasive problem. So long as agencies retain final discretion on whether to issue a regulation and in what form, there is little downside to allowing both the legislature and the governor to prompt an agency to initiate a public rulemaking proceeding.¹⁰³

Agencies also tend not to review their existing regulations collectively or systematically. There are many reasons why a rule may no longer be as efficient, fair, or legal as it was when first adopted: laws or administrative policy may change; technology may advance; the economic landscape may shift; unexpected implementation problems may crop up; and regulated parties may respond to regulation in unpredictable ways.¹⁰⁴ Though it may be challenging to change a politically, institutionally, and economically entrenched regulation,¹⁰⁵ it may nonetheless be quite necessary.

There are many reasons why a rule may no longer be as efficient, fair, or legal as it was when first adopted: laws or administrative policy may change; technology may advance; the economic landscape may shift; unexpected implementation problems may crop up; and regulated parties may respond to regulation in unpredictable ways.

Most agencies will conduct informal, ad hoc reviews of regulations as problems arise, and they certainly receive reports, recommendations, complaints, and petitions.¹⁰⁶ Agencies may worry that they lack the resources to develop a more formal process for evaluating existing rules. Retrospective reviews are taxing: identifying and collecting new data to demonstrate the results of a rule is time- and resource-intensive; diverse factors affect those results, and may be impossible to tease apart from the rule's impact; and some results do not materialize for long periods of time.¹⁰⁷ Agencies may prefer to adopt a wait-and-see approach to existing regulations, assuming that if a problem arises or if circumstances change, they will hear about it from the public.¹⁰⁸

Still, most agencies acknowledge the need for more formal reviews of existing regulations.¹⁰⁹ Without proper motivation, agencies will always and indefinitely delay optional reviews due to workloads and understaffing. Additionally, both mandatory and discretionary reviews may have different but compatible roles. One study of federal agencies found that discretionary reviews were more likely to involve the public and to result in actual rule changes, but mandatory reviews were more likely to be conducted by substantive standards and to be documented.¹¹⁰

One especially aggressive form of retrospective review—sunset periods—in practice is unlikely to accomplish more than just a superficial review of merits and a standard re-adoption of all rules.¹¹¹ Some studies suggest that both one-time and continuous sunset reviews can be productive in the states. By one account, such provisions have been responsible for the analysis of thousands of

state regulations and, on average, the repeal of twenty to thirty percent of existing regulations and the modification of another forty percent.¹¹² But most scholarship suggests the benefits of sunset laws are largely intangible and likely insignificant compared to the costs.¹¹³ Moreover, the burdens of such mandatory reviews can draw staff away from performing other vital oversight duties.¹¹⁴ Generally, sunset requirements produce perfunctory reviews and waste resources.¹¹⁵

States have available a truly dizzying array of options for conducting regulatory review. There is no single right answer for how the regulatory review process should be designed. Instead, building a regulatory review process is an exercise in value judgments, calling for governments to balance the competing goals of rationality, accountability, transparency, and workability. The next chapter looks at some early experiments with achieving that balance.

Notes

- ¹ CORNELIUS KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 212 (2003).
- ² As can the agency's organizational design and enabling statutes. See Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as an Instrument of Political Control*, 3 J. L. ECON. & ORG. 243 (1987).
- ³ For some empirical data on the role of state courts in the regulatory process, see PAUL TESKE, REGULATION IN THE STATES 218 (2004). The judicial review of regulatory impact analyses will also not be discussed.
- ⁴ A separate literature explores the importance of notice-and-comment requirements in rulemakings. See ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULE MAKING 436 (1986); see also William West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66 (2004) (discussing, based on a study of 42 federal rules, the potential for the notice-and-comment process to influence rule content both directly and indirectly, by triggering the responsiveness of political influences and government oversight).
- ⁵ Government rule reviewers may rely on notice-and-comment procedures to ease the burden of tracking every piece of regulation, by waiting for the public to comment on controversial rules and so selectively trigger the government review functions: the so-called "fire alarm" oversight strategy, in contrast to direct and comprehensive monitoring of agency rulemakings under the "police patrol" oversight strategy. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); see also Arthur Lupia & Mathew D. McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J. L. ECON. & ORG. 96 (1994); Neal Woods, *Promoting Participation? An Examination of Rulemaking Notification and Access Procedures*, 69 PUB. ADMIN. REV. 518, 523 (2009) ("All else constant, greater public notification is associated with significant increases in the amount of influence agency heads report other agencies, courts, and the governor as having. A one-unit change in the public notification index increases . . . the odds of the respondent viewing the governor as being one category more influential by 24 percent.").
- ⁶ See BONFIELD, *supra* note 4, at 38.
- ⁷ See G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 NYU. ANN. SURV. AM. L. 329, 329 (2004).
- ⁸ See COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 213 tbl 4.10 (vol. 42, 2010 ed.).
- ⁹ See *id.*; Fred Monardi, "Divided Government" in *State Executive Branches*, 31 POL. & POL'Y 232, 232 (2003).
- ¹⁰ Margaret R. Ferguson & Cynthia J. Bowling, *Executive Orders and Administrative Control*, PUB. ADMIN. REV. S20 (Dec. 2008).
- ¹¹ Monardi, *supra* note 9, at 232.
- ¹² Ann O'M. Bowman, Neal D. Woods, & Milton R. Stark II, *Governors Turn Pro*, 63 POL. RES. Q. 304, 307-08 (2010).
- ¹³ *Id.*
- ¹⁴ Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1226-27 (1999) (commenting on governors' potentially limited powers, "although political scientists observe great variations in the degree of reduced leadership and supervision").
- ¹⁵ See *id.* at 1231.
- ¹⁶ *Id.* at 1229.
- ¹⁷ See Agenda and Minutes of the June 2008 Teleconference Call of the Model State Administrative Procedure Act Drafting Committee, http://www.law.upenn.edu/bll/archives/ulc/msapa/2008juneconfcall_agenda.htm (statement of Ron Levin) (noting that state judges could still consider a regulatory impact analysis during their review of the merits of a challenge to regulation, even if state law does not provide for a direct challenge to the analysis itself).
- ¹⁸ See BONFIELD, *supra* note 4, at 38; see also Paul Teske, *The New Role and Politics of State Regulation*, REGULATION, Fall 2004, at 18-19 (noting the potential role of an "aggressive attorney general").

- ¹⁹ See Marjorie Sarbaugh-Thompson et al., *Legislators and Administrators: Complex Relationships Complicated by Term Limits*, 35 LEGIS. STUD. Q. 57, 57 (2010) (“Our findings indicate that monitoring state agencies was a low priority for this legislature, and it dropped even lower after term limits were implemented.”).
- ²⁰ See Neal D. Woods, *Political Influence on Agency Rule Making: Examining the Effects of Legislative and Gubernatorial Rule Review Powers*, 36 STATE & LOCAL GOV’T REV. 174, 182 (2004) (“Political context has a very strong substantive effect, with agency heads in states with simple divided government being nearly three times as likely to view the governor as highly influential as those in states with unified partisan control.”); Richard B. Doyle, *Partisanship and Oversight of Agency Rules in Idaho*, 11 LEGIS. STUD. Q. 109, 112 (1986) (“Divided party government or partisanship may encourage the adoption of rule review legislation.”).
- ²¹ See BONFIELD, *supra* note 4, at 30.
- ²² Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 556 (2001). See also Teske, *supra* note 18, at 18 (“Regulatory capture would seem to be even more applicable to the states than the federal government because a smaller number of powerful, and sometimes mobile, interests are presumed to hold sway in state capitals and because the competition for business location and economic development can fuel a ‘race to the bottom.’ Examples are not too hard to find.”).
- ²³ See James D. King, *Changes in Professionalism in U.S. State Legislatures*, 25 LEGIS. STUD. Q. 327, 327 (2000) (“a higher degree of professionalism [compared to thirty years ago] is a general, but not universal, trait of state legislatures”); THE BOOK OF THE STATES, *supra* note 8, at 88 (detailing general growth of legislative staff since 1930s, but a “slight decline” in the twenty-first century).
- ²⁴ See PAUL TESKE, REGULATION IN THE STATES 201, 203 (2004).
- ²⁵ See Rossi, *Overcoming Parochialism*, *supra* note 22, at 556-57.
- ²⁶ TESKE, *supra* note 24, at 209 (citing the Dunber and Rush study).
- ²⁷ *Id.*
- ²⁸ See THE BOOK OF THE STATES, *supra* note 8, at 97 tbl. 3.2.
- ²⁹ TESKE, *supra* note 24, at 201, 203.
- ³⁰ Rossi, *Antifederalist Separation of Powers Ideals*, *supra* note 14, at 1231.
- ³¹ See *id.*
- ³² BONFIELD, *supra* note 4, at 30.
- ³³ Richard Whisnant & Diane DeWitt Cherry, *Economic Analysis of Rules: Devolution, Evolution, and Realism*, 31 WAKE FOREST L. REV. 693, 696-97 (1996).
- ³⁴ FRANK COOPER, STATE ADMINISTRATIVE LAW: VOLUME ONE, at 4-5 (1965).
- ³⁵ BONFIELD, *supra* note 4, at 34.
- ³⁶ Woods, *Political Influence*, *supra* note 20, at 182.
- ³⁷ Patty D. Renfrow & David J. Houston, *A Comparative Analysis of Rulemaking Provisions in State Administrative Procedure Acts*, 6 POL’Y STUD. REV. 657, 663 (1987).
- ³⁸ See David S. Neslin, *Quis Custodiet Ipsos Custodes?: Gubernatorial and Legislative Review of Agency Rulemaking under the 1981 Model Act*, 57 WASH. L. REV. 669, 695 (1982).
- ³⁹ State administrators are more likely to rate the legislature and the governor as being influential in states where these institutions have greater rule review authority, although the evidence is somewhat mixed. See Brian J. Gerber, Cherie Maestas, Nelson C. Dometrius, *State Legislative Influence over Agency Rulemaking: The Utility of Ex Ante Review*, 5 STATE POL. & POL’Y Q. 24 (2005); Woods, *Political Influence*, *supra* note 20. But these impacts are “little understood” and have not yet been fully studied. Neal Woods, *Interest Group Influence on State Administrative Rule Making: The Impact of Rule Review*, 35 AM. REV. PUB. ADMIN. 402, 402-03 (2005).
- ⁴⁰ See Woods, *Interest Group Influence*, *supra* note 39, at 404 (citing Ethridge’s 1981 and 1984 work).

- ⁴¹ See BONFIELD, *supra* note 4, at 461-62 (noting, for example, that if interest groups can wield greater influence during an intrusive review procedure than during the original rulemaking, opponents of any regulation could wait for review stage to attack, undermining the usefulness of the agency's original rulemaking proceedings). Some studies have found that agency administrators view many review procedures as intrusive and resent their application. See RICHARD C. ELLING, *PUBLIC MANAGEMENT IN THE STATES* (1992).
- ⁴² See COUNCIL OF STATE GOV'TS, *ADMINISTRATIVE RULE-MAKING PROCEDURE IN THE STATES* 11-12 (1961).
- ⁴³ See BONFIELD, *supra* note 4, at 460.
- ⁴⁴ *Id.* at 456, 459.
- ⁴⁵ See Opinion of the Justices, 431 A.2d 783 (N.H. 1981) (“[L]egislative supervision of administrative agencies through constant statutory modification of their activities could be cumbersome and ultimately be doomed to fail. Likewise, the indirect supervision of administrative agencies through legislative budgetary pressure, as well as the intense scrutiny of executive appointments, is unsatisfactory.”); see also David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 *YALE J. ON REG.* 407, 436-38 (1997) (though Spence believes agencies should retain autonomy over policymaking); Christopher Reenock & Sarah Poggione, *Agency Design as an Ongoing Tool of Bureaucratic Influence*, 29 *LEGIS. STUD. Q.* 383, 394 (2004) (based on a survey of legislators in 24 states, “we find that legislators, on average, do not exhibit extraordinarily favorable attitudes toward ex ante design tactics. Far from appearing to embrace ex ante design as the optimal control tactic after the appointment stage, state legislators seem to be generally reluctant to engage in it,” though the attractiveness of ex ante tactics in part depended on legislators’ access to more direct ex post tactics, like regulatory review). But at least one prominent scholar has questioned whether traditional oversight authority is really so limited. L. Harold Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 *WM. & MARY L. REV.* 79, 97 (1982). See also Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as an Instrument of Political Control*, 3 *J. L. ECON. & ORG.* 243 (1987).
- ⁴⁶ Levinson, *supra* note 45, at 106.
- ⁴⁷ Some scholars believe that regulatory review reflects a democratic belief that “the will of the general public, expressed as the contemporary balance of power in day-to-day interest group politics, should normally prevail, in the end, over the expert judgment of the technocrats.” BONFIELD, *supra* note 4, at 457. Some also believe that the governor and legislature may have an inherent right to “institutional self-preservation”: since they originally delegated the rulemaking authority to the agencies, they are entitled to check to see if that power is being exercised consistent with their original intent. *Id.* at 458. “Without such a scheme for formal review of agency rules, neither the governor nor the legislature is likely to provide that input to agencies in a systematic or timely manner.” *Id.* at 460.
- ⁴⁸ See Ethan Bueno de Mesquita & Matthew C. Stephenson, *Regulatory Quality under Imperfect Oversight*, 101 *AM. POL. SCI. REV.* 605, 605 (2007).
- ⁴⁹ See Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 *J. LEGAL STUD.* 1059 (2000).
- ⁵⁰ See J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 *GEO. L. J.* 757 (2003).
- ⁵¹ For example, insulating an agency from elected official could actually increase the influence of organized interest groups. See Sarah J. Poggione & Christopher Reenock, *Political Insulation and Legislative Interventions: The Impact of Rule Review*, 9 *STATE POL. & POL’Y Q.* 456, 457 (2009).
- ⁵² See BONFIELD, *supra* note 4, at 480 (“[T]he inability to discover the real reason for such [review] action, as distinguished from the publicly stated reasons, present no greater problem here than in many other contexts tolerated by our legal system.”).
- ⁵³ See De Mesquita & Stephenson, *supra* note 48, at 606, 613 (on tendency for agencies to overemphasize observable efforts and underemphasize unobservable efforts, and on agencies initiating less regulation when decisions are subject to oversight.).
- ⁵⁴ De Mesquita & Stephenson, *supra* note 48, at 617 (“[W]hen agency preferences regarding the benefits of regulation track social preferences but agency effort is not socially costly (i.e., there is bureaucratic slack but not bureaucratic drift), introducing regulatory oversight by an overseer that is more biased against regulation than society can improve social welfare, but only if the overseer is not so skeptical of regulation that its demands dissuade the agency

from acting at all. In contrast, when society's policy preferences align with those of the overseer but agency effort is socially costly (i.e., there is drift but no slack), then regulatory oversight is weakly dominated by banning either regulation or oversight altogether.”).

- ⁵⁵ Robert W. Hahn & Paul C. Tetlock, *Has Economic Analysis Improved Regulatory Decisions?* (AEI-Brookings Joint Ctr. for Reg. Stud. Working Paper No. 07-08, 2007) (the direct costs of economic analysis and OIRA review appear to be small compared to the likely benefits. estimating the cost of federal regulatory review—preparation of economic analysis and OIRA review—at about \$72 million per year, and proposing that there are many regulatory proposals for which net benefits are increased by at least a billion dollars annually as a result of analysis and evaluation (e.g., removal of lead in gasoline)).
- ⁵⁶ Nat'l Conf. of State Legis., Legislative Oversight, <http://www.ncsl.org/default.aspx?tabid=13538> (last visited Feb. 13, 2010).
- ⁵⁷ See COOPER, *supra* note 34, at 222, 230.
- ⁵⁸ See, e.g., Alan Rosenthal, *Legislative Behavior and Legislative Oversight*, 6 LEGIS. STUD. Q. 115 (1981); Morris S. Ogul & Bert A. Rockman, *Overseeing Oversight: New Departures and Old Problems*, 15 LEGIS. STUD. Q. 5 (1990); Neslin, *supra* note 38, at 694.
- ⁵⁹ See Seymour Scher, *Conditions for Legislative Control*, 25 J. POL. 526, 532 (1963). Alan Rosenthal points out that very little credit accrues to legislators involved in oversight and that case work and introduction of legislation are likely to be far more electorally profitable. He quotes a state senator from Connecticut: “Constituents have valued the production of bills and we have responded to them by introducing more bills in order to get the limelight. . . . Let's face it, we've got to look for payoffs. We're all politicians and we're all concerned about how we will be perceived by the public and whether we are appreciated.” Rosenthal, *supra* note 58, at 118.
- ⁶⁰ Scher, *supra* note 59, at 532 (quoting the committee chair).
- ⁶¹ For a survey of the literature on the value of “fire alarms” versus “police control,” see Ogul & Rockman, *supra* note 58. Fire-alarm oversight has cost advantages compared to police-patrol oversight. Under a fire-alarm system, interested third parties bear the lion's share of the costs of learning about bureaucratic activities. McCubbins & Schwartz, *supra* note 5, at 166, 172 (“Although our model refers only to Congress, we hazard to hypothesize that as most organizations grow and mature, their top policy makers adopt methods of control that are comparatively decentralized and incentive based.”).
- ⁶² HERBERT SIMON, *ADMINISTRATIVE BEHAVIOR* 58 (3d. ed. 1976).
- ⁶³ See Neslin, *supra* note 38, at 694.
- ⁶⁴ See BONFIELD, *supra* note 4, at 508-09.
- ⁶⁵ See Woods, *Promoting Participation?*, *supra* note 5, at 524 (“Thus, if public notification procedures cause groups to raise concerns about an agency's rulemaking actions, governors may be better positioned institutionally to exert a concerted response.”).
- ⁶⁶ COUNCIL OF STATE GOVERNMENTS, *ADMINISTRATIVE RULE-MAKING PROCEDURE IN THE STATES*, *supra* note 42, at 4. As of 1961, only Indiana and Nebraska required the governor's approval of substantially all rules. Indeed, the Council of State Governments believed that ultimately the arguments in favor of executive review—better maintains administrative organization, a single reviewer keeps the process simple, fewer constitutional worries compared to legislative review—were unpersuasive when weighed against the problem of fragmentation. *Id.* at 12.
- ⁶⁷ See BONFIELD, *supra* note 4, at 463; *but cf.* Neslin, *supra* note 38 (criticizing MSAPA's provision for governor review).
- ⁶⁸ See BONFIELD, *supra* note 4, at 475.
- ⁶⁹ Neslin, *supra* note 38, at 695.
- ⁷⁰ BONFIELD, *supra* note 4, at 457-58.
- ⁷¹ Neslin, *supra* note 38, at 688.
- ⁷² BONFIELD, *supra* note 4, at 482 (citing NAT'L CONF. OF STATE LEGISLATURES, *RESTORING THE BALANCE* (1979)).
- ⁷³ Also, having multiple reviewers does not help with coordination and rationalization across agencies and policies—

tasks which the legislature likely does not want to leave entirely up to the governor.

- ⁷⁴ BONFIELD, *supra* note 4, at 483-84 (citing NAT'L CONF. OF STATE LEGISLATURES, RESTORING THE BALANCE (1979)). Also, having different review systems for the session versus the interim is not ideal because it lacks cohesion and agencies may try to time their rules and game the system. *Id.* at 485.
- ⁷⁵ NAT'L CONF. OF STATE LEGISLATURES, RESTORING THE BALANCE (1979). Most agree that the single committee review is preferable, because multiple layers of review may demonstrate "undue complexity" and may be unnecessarily repetitious because "formal review process is often circumvented in practice by informal negotiation." Neslin, *supra* note 38, at 687. *But see* JAMES R. BOWERS, REGULATING THE REGULATORS: AN INTRODUCTION TO THE LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING 108 (1990) (noting that, in Illinois, joint committee members lack substantive expertise and so lack interest, which leads to low attendance and participation).
- ⁷⁶ See BONFIELD, *supra* note 4, at 488.
- ⁷⁷ See Marcus E. Ethridge III, *Legislative-Administrative Interaction as "Intrusive Access": An Empirical Analysis*, 43 J. POL. 473, 475 (1981) (questioning whether committee decisions get the same prima facie assumption of democratic legitimacy as actions by the whole legislature).
- ⁷⁸ See COOPER, *supra* note 34, at 222.
- ⁷⁹ See *infra*, Chapter Two (describing those states that have recently selected the legislative veto). Some scholars also question whether the legislative veto really increases the legislature's workload. Levinson, *supra* note 44, at 91 ("Preliminary data on number of staff personnel and annual cost shows wide variations among states but does not indicate that the one-house or two-house veto system requires more staff or funds than other types of legislative oversight systems.").
- ⁸⁰ Levinson, *supra* note 45, at 86. Levinson notes that almost all courts have rule it unconstitutional; some legislators have vigorously advocated in favor of it; and scholarly commentary is mixed. The Administrative Conference of the United States and the American Bar Association vigorously objected to the legislative veto. *Id.* at 96. Levinson believes that the rejection by the electorate of proposed constitutional amendments on legislative veto in at least four states is highly indicative of the public's skepticism about the mechanism's usefulness. *Id.* at 90.
- ⁸¹ 29 State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980) (citing Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977)). Even if constitutional, legislative veto schemes "unduly aggrandize the legislature's authority at the expense of the executive branch's countervailing independence." BONFIELD, *supra* note 4, at 507.
- ⁸² BONFIELD, *supra* note 4, at 513. But others question whether the legislative veto is really any more a deterrent to rulemaking (and incentive for ad hoc adjudication) than the traditional power to review by statute. Levinson, *supra* note 45, at 92.
- ⁸³ BONFIELD, *supra* note 4, at 511.
- ⁸⁴ See Neslin, *supra* note 38, at 689.
- ⁸⁵ See Levinson, *supra* note 45, at 102.
- ⁸⁶ BONFIELD, *supra* note 4, at 534-35.
- ⁸⁷ COUNCIL OF STATE GOVERNMENTS, ADMINISTRATIVE RULE-MAKING PROCEDURE IN THE STATES, *supra* note 42, at 4.
- ⁸⁸ COOPER, *supra* note 34, at 220-21.
- ⁸⁹ BONFIELD, *supra* note 4, at 475.
- ⁹⁰ See FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).
- ⁹¹ William Niskanen, *More Lonely Numbers*, 26 REGULATION 22 (2003); *see also* Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 24 J. LEGAL STUD. 873, 874 (2000) ("If the statutory mandate is not clear, agencies may only superficially analyze the costs and benefits of regulations or may manipulate analyses to

achieve political ends.”).

- ⁹² See Whisnant & Cherry, *supra* note 33, at 695.
- ⁹³ See BONFIELD, *supra* note 4, at suppl, 109-112 (1993).
- ⁹⁴ See Richard J. Pierce, Jr., *Small Is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 Admin. L. Rev. 537, 549 (1998) (summarizing the arguments in favor of small firm support: small firms have healthy effect on political environment; small firms account for disproportionate share of socially beneficial innovation; small firms contribute more than large firms to economic growth and job creation).
- ⁹⁵ See BONFIELD, *supra* note 4, at suppl, 109-112 (1993).
- ⁹⁶ Pierce, *supra* note 94, at 550. Some scholars also question the assumption that “small is good and big is bad”—i.e., that small businesses deserve protection because they are better at creating jobs and driving the economy. *Id.* at 539-40; but see C. Steven Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 J. SMALL & EMERGING BUS. L. 1, 19 (2004) (critiquing some of Pierce’s economics).
- ⁹⁷ See BONFIELD, *supra* note 4, at suppl, 106 (1993).
- ⁹⁸ Whisnant & Cherry, *supra* note 33, at 702-05.
- ⁹⁹ *Id.* at 700; Nathaniel O. Keohane, *The Technocratic and Democratic Functions of the CAIR Regulatory Analysis*, in REFORMING REGULATORY IMPACT ANALYSIS 48 (Winston Harrington, Lisa Heinzerling, & Richard D. Morgenstern eds., 2009).
- ¹⁰⁰ See Bradford, *supra* note 96, at 19.
- ¹⁰¹ C. Steven Bradford, *The Cost of Regulatory Exemptions*, 72 UMKC L. REV. 857, 858-59, 864, 869 (2004).
- ¹⁰² Moreover, while the cumulative effect of regulation on small businesses is often the loudest complaint of politicians and small business owners, the cumulative effect is rarely studied, and “Considering the cumulative effect of regulation could justify less regulation of small business, but it also could justify more.” Bradford, *Does Size Matter?*, *supra* note 96, at 26.
- ¹⁰³ See BONFIELD, *supra* note 4, at suppl, 178 (1993) (responding to 71 Minn. L. Rev. 543 (1987)).
- ¹⁰⁴ See Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 ADMIN. L. REV. 139, 144-46 (1996); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATION: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 12 (2007).
- ¹⁰⁵ Eisner & Kaleta, *supra* note 104, at 153.
- ¹⁰⁶ *Id.* at 147.
- ¹⁰⁷ U.S. Gov’t Accountability Office, *supra* note 104, at 11.
- ¹⁰⁸ Eisner & Kaleta, *supra* note 104, at 148-9.
- ¹⁰⁹ *Id.* at 147-48 (“[Federal a]gencies agree that they cannot ignore the need to review their regulations and that, as a general proposition, whether mandatory or discretionary, periodic review of existing regulations is a sound idea.”).
- ¹¹⁰ U.S. Gov’t Accountability Office, *supra* note 104.
- ¹¹¹ See BONFIELD, *supra* note 4, at 435-36.
- ¹¹² Teske, *supra* note 18, at 20-21.
- ¹¹³ See Dan Stengle & James Parker Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rulemaking by Executive Agencies*, 21 FLA. ST. U. L. REV. 415, 420 (1993) (citing STAFF OF FLA. S. COMM. ON GOVTL. OPS., A REVIEW OF THE REGULATORY SUNSET ACT AND THE SUNDOWN ACT (1991)).
- ¹¹⁴ *Id.*
- ¹¹⁵ Eisner & Kaleta, *supra* note 104, at 160.

Chapter Two

History and Models

While this report's chief goal is to help states navigate the path from where they are to where they want to be on regulatory review, a quick trip through history may prove illuminating. In particular, history can reveal original motivations and can remind states of which roads were dead ends. This chapter highlights a few key phases of state practices, including the rise, fall, and potential rebirth of the legislative veto and sunset mechanisms; the influence of the Model State Administrative Procedure Act; and the recent influence of the Model Regulatory Flexibility Act.

Early Experiments in Administrative Process and Economic Analysis

The practice of legislative review can be traced back to England's system of laying regulations before Parliament. Notably, under the Parliamentary system, the legislative and executive branches are much more closely related than they are in most U.S. states.¹ Still, the success of regulatory review in England was largely responsible for the push to expand the practice in the United States.²

Kansas was the first state to adopt legislative review, in 1939,³ and Michigan followed suit a few years later.⁴ But it was not until the 1970s that oversight of administrative agencies emerged as an issue of dominant concern for most state legislatures.⁵ That period coincided with a mid-century wave of regulatory reform initiatives aimed at increasing the public sector's efficiency, economy, and responsiveness.⁶ It also tracked the rise of legislative professionalism, when legislatures sought to assert themselves as more co-equal with the executive branch. Beginning in the 1970s, state legislators generally began "staying [in office] longer, participating in longer and more frequent legislative sessions, and enjoying greater resources."⁷ Though legislative professionalism could have conflicting impacts on the nature of regulatory review,⁸ its general rise seems to correlate with the increased adoption of legislative oversight authority.⁹ Others feel the expansion of the legislative review function is more likely explained by pure self-interest of legislators and the tremendous growth of public interest lobbies that occurred during the same time period.¹⁰ Regardless of motivation, by 1993 every state but three had experimented with some variation on legislative review.¹¹

By 1993, every state but three had experimented with some variation on legislative review.

But by the late 1970s and 1980s, some states also began thinking of shifting the balance of oversight

authority away from the legislature and back to the executive, again in an attempt to improve administrative effectiveness, efficiency, and economy.¹² Indiana was perhaps the earliest state to give the governor some review powers, in 1943,¹³ and Wyoming created an executive veto in 1977. California established an “independent” review agency in 1980, and Arizona created an executive regulatory oversight office the next year. A few states, like Colorado and Pennsylvania followed quickly thereafter, and interest in executive oversight surged again after the 1994 Republican “Contract with America.”¹⁴

With these shifting dynamics in oversight authority, it is not surprising that struggles frequently broke out between governors and legislatures battling for control of the administrative process. Despite some limited communication and information-sharing between legislative review staff and executive review staff, the relationship in the 1980s tended to be quite adversarial along the front of regulatory review.¹⁵ The judiciary often found itself in the 1980s and 1990s arbitrating such protracted disputes about separation of powers and constitutional authority to review rulemakings. In addition to the numerous cases on the legislative veto and suspension powers (see next section, below), some litigation targeted the powers claimed by governors through executive orders. For example, New York’s Governor was the object of a class action suit arguing that the Governor’s Office of Regulatory Reform infringed on legislative powers (in that case, the court determined it did not).¹⁶

Interest in economic analysis also grew popular during the 1960s and 1970s, in a period of “growing dissatisfaction with the outcomes of the regulatory process.”¹⁷ The 1990s were a fertile period for the “implementation and refinement of [states’] rudimentary systems for economic analysis as a means of regulatory reform.”¹⁸ Early interest in administrative practice was more concerned with public transparency and political oversight, rather than the actual formulation of rules, and so economic analysis did not become a priority until the second half of the twentieth century.¹⁹ Analytical mandates might also have had to wait until governments had the revenue or agencies had access to the regulatory fees necessary to support such resource-intensive analytical efforts.²⁰

The Rise, Decline, and Resurrection of Legislative Vetoes and Sunsets

Over two dozen states have experimented with legislative vetoes and rule suspension powers at some point. But starting around 1979, many of those provisions were repealed or ruled unconstitutional.²¹ State courts in Alaska, Connecticut, Kansas, Michigan, Missouri, Montana, New Hampshire, New Jersey, Oregon, and West Virginia all declared that legislative vetoes interfere with the separation of powers.²² According to these courts, agencies exercise executive functions when they promulgate rules, and so the legislature can only check those functions by enacting new statutes according to standard constitutional procedure, which typically requires legislation to pass both houses and be presented to the governor for signature. Kentucky’s Supreme Court similarly held legislative suspension powers were unconstitutional.²³ Tennessee repealed its suspension procedure and Virginia repealed its legislative veto following opinions issued by their attorneys general that those mechanisms were unconstitutional.²⁴

It seemed that legislative vetoes were on their way out. Interestingly, court cases and attorneys

general opinions (particularly the federal case on Congress’s legislative veto power, see Chapter Four), appeared to have had some influence even beyond their respective jurisdictions, discouraging the spread of the legislative veto in other states:²⁵ for example, Florida shied away from the legislative veto, wanting to “take no constitutional chances.”²⁶ The recommendations of the National Conference of State Legislatures and the National Conference of Commissioners on Uniform State Laws also reflected the apparently shifting mood against the legislative veto.²⁷

But reports of the death of the legislative veto may have been premature. To start, not all courts have found legislative vetoes unconstitutional. Idaho’s Supreme Court held that its legislative veto passed constitutional muster,²⁸ and states like Wisconsin have found at least limited suspension powers are constitutional.²⁹ In other states, such as North Carolina, the courts have so far declined to rule on the constitutionality of their review structures.³⁰

Constitutional amendments are another route back to the legislative veto. The voters of Michigan and South Dakota amended their constitutions to explicitly allow for committee suspensions during legislative interim sessions,³¹ and Connecticut, Iowa, Nevada, and New Jersey all amended their constitutions to permit legislative vetoes.³²

But even quite recently, states are also using regular statutes to grant their legislature enhanced review powers: Illinois did so in 2004.³³ Other states have more creatively overcome potential constitutional problems. North Dakota granted its review committee veto power in 1995, but built in a backup system, through which its committee retains a weaker suspension power if a state court ever declares the veto is unconstitutional. West Virginia now no longer delegates any real rulemaking authority, reserving the right to approve all requests to promulgate a rule. And both Colorado and Tennessee have tied their review committees’ powers to a short sunset period: all rules automatically expire in a matter of months unless the legislature chooses to extend them.³⁴

Reports of the death of the legislative veto may have been premature. Not all courts have found legislative vetoes unconstitutional. Constitutional amendments are another route back to the legislative veto. And, even quite recently, states have creatively overcome potential constitutional problems using regular statutory means.

Indeed, sunset laws have followed a similar trajectory to the veto. Sunset and sundown laws—automatically terminating rules or entire agencies—were considered by all states and adopted by thirty-six by the end of 1981.³⁵ By some reports, such provisions were responsible for the analysis of thousands of state regulations and, on average, the repeal of twenty to thirty percent of existing regulations and the modification of another forty percent.³⁶ But for many states, “sunset provisions quickly proved to be an expensive, cumbersome, and disappointing method for enhancing legislative control.” North Carolina was first to repeal its sunset law, and many other states quickly followed suit.³⁷ Though not as pervasive as they once were, they remain an important element of several states’ review structures.³⁸

The Influence of Model Rules

The creation of model rules has had a tremendous influence on state regulatory review practices. Most states have adopted some version of either the 1961 or 1981 Model State Administrative Procedure Act (“MSAPA”), as recommended by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). A majority of states have also adopted some version of the Model Regulatory Flexibility Act, developed by the U.S. Small Business Administration’s Office of Advocacy.

Many scholars see the creation of such model rules by interstate or national bodies as advantageous, in that it insulates state lawmaking from interest group influences. However, others suggest that interest groups do use model or uniform laws to leverage state lawmakings,³⁹ and the initial adoption of state APAs does appear to have a partisan bias.⁴⁰ The successful push from the federal Small Business Administration on the adoption of regulatory flexibility mechanisms might also have had partisan goals.

Model State Administrative Procedure Act

In July 2010, the NCCUSL approved a major update to MSAPA, the first full revision since 1981.⁴¹ Historically, the MSAPA has been highly influential on the adoption of Administrative Procedure Acts in the states,⁴² and a new version could prove just as influential. But in turn, the existing regulatory review structures in various states also heavily inform the recommendations made in the revisions, with many provisions originally based on the statutes of Florida, Iowa, and other states.

When issuing a new version of MSAPA, the NCCUSL’s drafting committee reviews all existing laws and proposals for reform, and actively consults with state government officials, American Bar Association entities, practicing lawyers, and academics.⁴³

The Original 1946 MSAPA and the 1961 Revision: MSAPA was written as a “model act” rather than a “uniform act” because:

as the study of the subject advanced, it became apparent that there were wide and, indeed, irreconcilable diversities in statutory practices in effect in various states of the Union. It was deemed unwise to attempt to unify these diverse practices. In fact, there is good reason to favor diversity as a stimulus to experimentation in a new and highly fluid area of statute law where there is yet much to learn.⁴⁴

The model act deliberately did not try to work out all details, but to the extent it was concerned with the review of agency decisionmaking, it focused its attentions on encouraging public participation, ensuring responsible oversight by agency heads, and applying consistent standards for judicial review. Notably, the model act allowed for the public to petition agencies to adopt rules.⁴⁵

The 1961 revisions did not make any changes relevant to regulatory review.⁴⁶ Because legislative review was such a “recent innovation” that had “not been sufficiently tested to permit the establishment of a firm judgment as to its merits,” the MSAPA drafters in 1961 did not recommend

any provisions for such review.⁴⁷

The 1981 MSAPA Revision: In 1981, the model act was substantially revised, including the addition of new language both on regulatory analysis and regulatory review. In fact, Arthur Bonfield, one of the drafters of the revision, called it “an entirely new statute, and not just a revision.”⁴⁸ More details were provided, because “states badly need and want more specific guidance.”⁴⁹ (See Appendix for relevant text from the 1981 MSAPA.)

Bonfield explained that a requirement for regulatory impact analysis was added because the burden of full analysis was worth the costs for rules that were controversial or that might generate significant public impact.⁵⁰ Several states (but “less than a handful”⁵¹) had already begun adopting provisions on regulatory analysis, and MSAPA substantially modified and expanded a version of Florida’s requirements.⁵² To limit the burdens and expense, analysis would be required only if requested by certain political or public actors; drafters worried that a more universal requirement would divert agency resources, lead to haphazard analysis, and motivate agencies to use back-door rulemaking to avoid the requirement. A good faith exception for judicial review of regulatory analysis was added out of concern that expansive judicial review would lead to delay and obstructionism, because calculations can never be that precise and can always be questioned.⁵³

MSAPA also added a regular review of existing rules by the agency itself, to respond to changing circumstances and help combat overregulation. Trying to balance effective review against undue burdens, the provision called for agencies to review a rule at least once every seven years, after accumulating all data that is accessible at a reasonable cost. The hope was agencies would monitor and report on emerging information and public controversy related to rules, and, by making the review of a poorly-drafted rule at least slightly “onerous,” to incentivize good upfront rulemaking.⁵⁵

The 1981 MSAPA reflected a belief that, as a single official, the governor is the most logical choice to coordinate and rationalize all agency activity. Therefore, MSAPA allowed the governor to summarily terminate any rulemaking proceeding, and also to veto any severable portion of any rule at any time after it becomes final. The governor’s veto power had to be exercised through a public rulemaking procedure, and MSAPA did not give the governor the power to adopt rules.⁵⁶ Still, these were aggressive review powers, and some scholars worried there were far too few procedural checks, public participation safeguards, transparency requirements, or statutory criteria for this expansive gubernatorial oversight.⁵⁷ (Later, Bonfield admitted that the governor probably should

“The regulatory analysis requirement implements both the ideal of comprehensive rationality and the political model of rulemaking because it is calculated to ensure an adequate opportunity for the agency and the public to evaluate the desirability of a proposed rule and an adequate opportunity for those who oppose it to do so effectively.”

—Arthur E. Bonfield⁵⁴

not be able to terminate a rulemaking proceeding until after the public comment process had been complete, so as to collect all information before making a determination.⁵⁸)

But the drafters of MSAPA expected that early negotiations and compromises would be the norm, not formal disapproval from the governor. To that end, MSAPA adapted a structure from Iowa and recommended the creation of an administrative rules counsel to advise the governor, liaise with agencies, and be a “persuasive participant” in the rulemaking process: “To avoid later confrontations between agencies and the governor and to avoid political embarrassment of the chief executive, the administrative rules counsel is likely to be actively and continuously involved on a consultative basis.”⁵⁹

MSAPA’s recommendations on legislative review drew heavily from Iowa’s and Nebraska’s structures. MSAPA tried to “create a fully institutionalized, general scheme of legislative review of rules with bite” by recommending a single-purpose, joint committee with authority to review all rules and to affect their content by means other than just revising the underlying statute.⁶⁰ MSAPA recommended a joint committee structure, but did not preclude standing committees from reviewing particular rules on their own motion.

MSAPA gave the legislative committee discretion on which rules to review and how to review them, because any universal requirement would take too much time and would lead to pointless, perfunctory reviews; most reviews do not really need review. It was expected that the committee’s staff and public complaints would help the committee construct its agenda for review.⁶¹

In 1981, there was a clear “consensus of the NCCUSL that the legislature should not be authorized to nullify or suspend an agency rule by means other than the enactment of a statute.”⁶² Based on constitutional concerns and policy considerations, MSAPA preferred a system that combined the legislative committee’s power to object with the governor’s ability to nullify. Under MSAPA, the legislative committee could object because a rule is procedurally or substantially beyond authority, arbitrary and capricious, or unreasonable, but not just because it is “unwise.”⁶³ If the committee objected, the burden of proof would shift from the petitioner to the agency in any subsequent legal challenge to the rule.

The committee could also, importantly, recommend the adoption of rules, incentivized by political pressures and the requirement to initiate public proceedings. The outcome of the rulemaking proceeding was left up to the agency, but the requirement ensured a fully informed and public decisionmaking.⁶⁴ Scholars agreed that this power might be more significant than the committee’s formal objection powers, since the requirement for a public process would cause most agencies to comply or negotiate with the committee.⁶⁵

Current MSAPA Revisions: Beginning in 2004, the NCCUSL started to revise MSAPA for the first time in over two decades. At first, the new drafting committee did little to change the content of the 1981 provisions on regulatory analysis and rule review, except to label both as “optional” rather than “core” provisions.⁶⁶ But by April 2007, new language was beginning to take shape, and by July 2010, the NCCUSL had adopted significant amendments. (See Appendix for relevant text from both the April 2007 draft and the July 2010 adopted version, as well as section-by-section comparisons with the 1981 version.)

In the latest version, regulatory analysis is mandatory for all economically significant rules; a precise monetary threshold is not set, but states are advised to choose a sufficiently high level to preserve resources. Petitions from either government officials or the public no longer can trigger analysis for minor rules. Quantification is emphasized less, but agencies are instructed that benefits should “justify” costs. (At one point, the drafting committee even considered dropping the use of the terms “costs” and “benefits” entirely, because it did not want to imply a requirement for expensive cost-benefit analysis conducted by hired economists.⁶⁷) Analysis of alternatives is explicitly required and is now oriented more toward maximizing net benefits, rather than just minimizing burdens.

Several elements of the review structure were deleted from the text. Most importantly, the recommendations on the governor’s review authority were removed, giving implicit preference to a legislative-based structure. Ongoing review of existing rules by agencies was also deleted, and legislature’s power to review existing rules is left highly discretionary and seemingly without consequences. Importantly, the legislature no longer can affirmatively recommend to agencies the adoption of new rules, or require agencies to begin public proceedings pursuant to such recommendations.

In general, legislative review was kept discretionary, at the recommendation of one of the NCCUSL’s commissioners “who had participated in his legislature’s review process,” who claimed: “We were just swamped with all the rules. We had no idea how many rules were being issued. Many of them were so perfunctory that they really didn’t need to be reviewed, but under our statute initially they all had to be.”⁶⁸ In response, the drafting committee considered whether to limit mandatory review to rules for which regulatory impact analysis had been prepared, but ultimately felt legislature would demand the discretion to review all rules.⁶⁹

“We were just swamped with all the rules. We had no idea how many rules were being issued. Many of them were so perfunctory that they really didn’t need to be reviewed, but under our statute, initially, they all had to be.”

—A Frustrated Legislative Reviewer

The legislative review committee’s powers were also adjusted. The committee now explicitly has authority to review rules broadly for legislative intent, for reasonableness, and for analysis of costs, benefits, and alternatives. And instead of committee objections shifting the burdens at trial, the committee now can temporarily suspend objectionable rules, to allow the full legislature the chance to consider adopting a statute or resolution to nullify the rule. The drafting committee did have concerns about giving the legislative review committee the power to suspend rules, considering “the checks on that power are quite limited,” but ultimately felt the option was necessary for legislatures that did not meet year-round.⁷⁰

The drafting committee considered some other possible variations during their deliberations, but ultimately rejected the following proposals: letting the governor’s objections to rules result in burden-shifting in subsequent litigation; making legislative review of new and existing

rules mandatory instead of selective; requiring attorney general review of legality and procedure; requiring summary of all data that served as the basis for a rule.⁷¹

The NCCUSL approved substantial changes to its recommendations on both economic analysis and regulatory review. Whether states will continue the historical pattern of adopting those recommendations may be seen in the coming years. At any rate, the creation of a new MSAPA should signal to states that there have been significant developments in the theory of regulatory review over the last three decades, and now is the perfect time to reassess their own structures.

Model Regulatory Flexibility Act

In December 2002, the U.S. Small Business Administration's ("SBA") Office of Advocacy developed model regulatory flexibility legislation for the states. Concerned that small businesses and their disproportionate regulatory burdens were being systematically overlooked in the states, the SBA hoped the model legislation would "foster a climate for entrepreneurial success in the states."⁷²

The model legislation requires that, before proposing any regulation that may have an adverse impact on small businesses, agencies prepare an economic impact statement to describe probable effects, estimate recordkeeping costs, and describe any less intrusive alternatives to achieve the regulatory purpose. Then, before adopting any regulation, the agency must prepare a regulatory flexibility analysis to minimize adverse impacts on small businesses, "consistent with health, safety, environmental, and economic welfare." The analysis must, "without limitation," examine ways to tailor the regulation or exempt small businesses.⁷³ The model legislation also provides for judicial review of the analysis, "to give the law teeth."⁷⁴ Finally, the model legislation requires periodic review every five years of existing regulations with potential small business effects. The aim is again to minimize adverse impacts, by examining a regulation's continued need, the complaints or comments received from the public, and any changed circumstances since the regulation was adopted.

The SBA worked hard to advocate for the adoption of the legislation across the country. They sponsored educational sessions, testified at legislative hearings, and worked directly with state legislators. They also secured the support of the American Legislative Exchange Council, the National Federation of Independent Business, state chambers of commerce, the U.S. Chamber of Commerce, and other national organizations.⁷⁵

The campaign appeared to be highly successful. Since 2002, forty-four states have enacted the model bill, at least in part, through legislation or an executive order. Efforts to refine existing structures and encourage enactment in new states continue: every year dozens of states consider legislative refinements.⁷⁶ According to the SBA's statistics as of August 2010, eighteen states and Puerto Rico have active regulatory flexibility statutes; twenty-six states have partial or partially used regulatory flexibility statutes; and only six states (Alabama, Idaho, Montana, Nebraska, North Carolina, and Wyoming) and the District of Columbia have no regulatory flexibility laws.⁷⁷

But these official counts from the SBA do not tell the whole story. Some states identified by the SBA as having "partially used statutes," such as Kansas, really require nothing more than a

description of small business costs and do little to encourage agencies to explore small business exemptions.⁷⁸ Consistent practice of regulatory flexibility requirements is rare. In some states, operations essentially ceased when a new governor came to office,⁷⁹ or never were really active to begin with.⁸⁰ The SBA reports that it is still pursuing its state advocacy initiative, but it is now focused more on state implementation of existing laws.⁸¹ However, many key positions at the SBA have not yet been filled since the start of the Obama Presidency, and so state-level advocacy has slowed somewhat.⁸² It will be interesting to see whether the SBA's orientation shifts as Obama appointees and hires enter the ranks.

Notes

- ¹ See COUNCIL OF STATE GOV'TS, ADMINISTRATIVE RULE-MAKING PROCEDURE IN THE STATES 6 (1961).
- ² See FRANK COOPER, STATE ADMINISTRATIVE LAW: VOL. ONE, at 222 (1965); Bernard Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U. L. REV. 1031, 1039 (1955) (“[B]oth the English experienced [with legislative oversight of administrative rules] ... and that in the [six] American states which have adopted analogous techniques [so far] indicate that serious consideration should be given to their further use in this country.”).
- ³ David S. Neslin, *Quis Custodiet Ipsos Custodes?: Gubernatorial and Legislative Review of Agency Rulemaking under the 1981 Model Act*, 57 WASH. L. REV. 669, 673 (1982).
- ⁴ See Florence A. Heffron, *Legislative Review of Administrative Rules under the Idaho Administrative Procedure Act*, 30 Idaho L. Rev. 369, 371 (putting the Michigan start date at 1947); JAMES R. BOWERS, REGULATING THE REGULATORS: AN INTRODUCTION TO THE LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING 24 (1990) (putting the Michigan start date at 1943).
- ⁵ Heffron, *supra* note 4, at 369.
- ⁶ Julie Bundt & Gene M. Lutz, *Connecting State Government Reform with Public Priorities: The Iowa Test Case*, 31 STATE & LOCAL GOV'T REV. 78, 79 (1999).
- ⁷ Neal Woods & Michael Baranowski, *Legislative Professionalism and Influence on State Agencies: The Effects of Resources and Careerism*, 31 LEGIS. STUD. Q. 585, 585 (2006).
- ⁸ *Id.* at 586 (2006) (“Greater legislative resources serve to increase legislative influence on administrative agencies, but greater political careerism among state legislators serves to decrease it because of the changed mix of incentives for the use of scarce resources.... Our preliminary analysis suggests, however, that the negative effect of careerism may outweigh the positive effect of institutional resources.”).
- ⁹ See L. Harold Levinson, *The Decline of the Legislative Veto: Federal/State Comparisons and Interactions*, 17 J. FEDERALISM 115, 120-21 (1987) (noting that the majority of state legislature adopted review procedures in late 1960s and 1970s).
- ¹⁰ Marcus E. Ethridge, *A Political-Institutional Interpretation of Legislative Oversight Mechanisms & Behavior*, 17 POLITY 340, 345 (1984).
- ¹¹ Heffron, *supra* note 4, at 371. Tallies at particular moments in time are difficult to pin down. By one count, as of 1987, 29 states had just legislative review; 4 states had just executive review; and 3 states had both. 22 states had legislative vetoes (including those where governor’s signature was required); 7 states have executive vetoes. 27 states had some economic impact analysis requirements. 5 states had periodic review. Patty D. Renfrow & David J. Houston, *A Comparative Analysis of Rulemaking Provisions in State Administrative Procedure Acts*, 6 POL’Y STUD. REV. 657, 659-60 (1987) (reviewing 49 states, all but Kansas, which had recently amended its APA). But another count in 1981 said 38 states had legislative review. Neslin, *supra* note 3, at 673.
- ¹² See James K. Conant, *In the Shadow of Wilson and Brownlow: Executive Branch Reorganization in the States, 1965 to 1987*, 48 PUB. ADMIN. REV. 892, 898 (1988).
- ¹³ See *State ex rel. Sights v. Edwards*, 228 Ind. 13 (1950) (“Acts of 1943, ch. 213; § 60-1501, Burns’ 1943 Replacement, makes it the duty of every officer, or board, having power to make rules and regulations, to submit them to the attorney general and governor and requires their approval.”). Nebraska was also an early adopter of executive review.
- ¹⁴ PAUL TESKE, REGULATION IN THE STATES 210 (2004).
- ¹⁵ See ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULE MAKING 488-89 (1986).
- ¹⁶ *Rudder v. Pataki*, 93 N.Y.2d 273 (1993).
- ¹⁷ Renfrow & Houston, *supra* note 11, at 662.
- ¹⁸ Richard Whisnant and Diane DeWitt Cherry, *Economic Analysis of Rules: Devolution, Evolution, and Realism*, 31

WAKE FOREST L. REV. 693, 695 (1996).

- ¹⁹ See COUNCIL OF STATE GOV'TS, *supra* note 1, at 11. Also, retrospective review requirements tended to be adopted in the same states that pursued economic analysis and review requirements. Renfrow & Houston, *supra* note 11, at 660.
- ²⁰ Income and sales taxes are relatively recent developments in some states, while statutes and executive orders on economic analysis routinely pass without any extra appropriations or funding. See Whisnant & Cherry, *supra* note 18, at 719, 720 (“There is unfortunately, and ironically, little good data about the level of resources needed for optimal analysis.”).
- ²¹ See Levinson, *supra* note 9, at 120-21.
- ²² See *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980); *Maloney v. Pac.*, 439 A.2d 349 (Conn. 1981) (Connecticut Supreme Court disposed of the case on other grounds and vacated the trial court’s judgment on the constitutionality of the legislative veto); *State ex rel. Stephan v. House of Representatives*, 687 P.2d 622 (Kan. 1984); *Blank v. Dep’t of Corrections*, 611 N.W.2d 530 (Mich. 2000); *Miss. Coal. for the Env’t v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125 (Mo. 1997); *Mon. Taxpayers’ Ass’n v. Dep’t of Revenue*, No. 47126 (Mont., Lewis & Clark Cty., 18 March 1982); *Opinion of the Justices*, 431 A.2d 783 (N.H. 1981); *Gen. Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982) (a companion case upheld a specific legislative veto system); *Gilliam County v. Dep’t of Env’tl. Quality*, 849 P.2d 500 (Ore. 1993), *reversed on other grounds*, 511 U.S. 93 (1994); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W.Va. 1981).
- ²³ *Legislative Research Comm’n v. Brown*, 664 S.W.2d 907 (Ky. 1984). In non-binding observations rendered in 1981, the New Hampshire high court implied that a committee suspension system would be valid, while the West Virginia court took the opposite view. *Opinion of the Justices*, 431 A.2d 783, 789 (N.H. 1981); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 632 (W.Va. 1981).
- ²⁴ Levinson, *supra* note 9, at 122; see also *Opinion of the Attorney General*, OAG 01-086 (Tenn., May 23, 2001).
- ²⁵ Levinson, *supra* note 9, at 128-29.
- ²⁶ F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida’s New APA*, 24 FLA. ST. U. L. REV. 309, 331 (1997).
- ²⁷ See Levinson, *supra* note 9, at 131.
- ²⁸ *Mead v. Arnell*, 791 P.2d 410, 414 (Idaho 1990). Another significant case upholding a specific legislative veto system is *Enourato v. New Jersey Bldg. Auth.*, 448 A.2d 449 (N.J. 1982), a companion to the case that invalidated New Jersey’s more generic legislative veto system. See also *Commonwealth v. Kuphal*, 500 A.2d 1205 (Pa. Super. 1985). The Kuphal court held, by a vote of five to four, that a two-house nullification provision in an enabling statute was unconstitutional. One of the five judges in the majority decided, however, that this provision could be severed from the remainder of the statute. Consequently, this judge and the four dissenters formed a majority that upheld the remainder of the statute.
- ²⁹ *Martinez v. DILHR*, 478 N.W.2d 582, 587 (Wisc. 1992); see also *Opinion of the Justices*, 431 A.2d 783, 789 (N.H. 1981).
- ³⁰ *N.C. Bd. of Pharm. v. Rules Review Comm’n*, 620 S.E.2d 893 (2005), *rev’d, in part on other grounds, remanded, review improvidently allowed*, 637 S.E.2d 515 (N.C. 2006); see also *Caro v. Blagojevich*, 895 N.E.2d 1091 (Ill. App. Ct. 2008). Louisiana and Maryland courts have not yet addressed their review structures.
- ³¹ Mich. Const., Art. 4 § 37 (adopted in 1963); S.D. Const., Art. III § 30 (adopted in 1980).
- ³² Conn. Const. Art. 2 (amended in 1982); Iowa Const. Art. 3 § 40 (adopted in 1984); Nev. Const., Art. 3 § 1(2) (adopted in 1996); N.J. Const. Art. V § 4(6) (amended in 1992).
- ³³ Ill. P.A. 93-1035 (2004).
- ³⁴ See *infra*, Chapter Eight, containing summaries of each state.
- ³⁵ Heffron, *supra* note 4, at 370.
- ³⁶ Paul Teske, *The New Role and Politics of State Regulation*, REGULATION, Fall 2004, at 20-21.
- ³⁷ By 1988, five other states had followed suit. Six other states allowed their sunset laws to become inactive. See Richard

- Kearney, *Sunset: A Survey and Analysis of the State Experience*, 50 PUB. ADMIN. REV. 49 (1990).
- ³⁸ Even more states have retained what we will call “sundown,” authority, and most legislature have some sort of programmatic review that can investigate agencies or programs. See NAT’L CONF. OF STATE LEGIS., ENSURING THE PUBLIC TRUST: PROGRAM POLICY EVALUATION’S ROLE IN SERVING STATE LEGISLATURES (2008).
- ³⁹ Jim Rossi, *Politics, Institutions, and Administrative Procedure: What Exactly Do We Know from the Empirical Study of State Level APAs, and What More Can We Learn?*, 58 ADMIN. L. REV. 961, 962-63 (2006) (citing Larry E. Ribstein and Bruce H. Kobayahi, in *An Economic Analysis of Uniform State Laws*, 25 J. LEG. STUD. 131 (1996)).
- ⁴⁰ Rui J. P. de Figueiredo, Jr. & Richard G. Vanden Bergh, *The Political Economy of State-Level Administrative Procedure Acts*, 47 J. L. & ECON. 569 (2004).
- ⁴¹ Nat’l Conf. of Comm’rs on Uniform State Law, Revised Model State Administrative Procedure Act (2010), available at, http://www.law.upenn.edu/bll/archives/ulc/msapa/2010am_approved.htm.
- ⁴² Michael Asimow, *Introduction to the Administrative Law Review Symposium on State Administrative Law*, 53 ADMIN. L. REV. 395, 396 (2001) (“The very widespread adoption of the 1961 Model State APA is, perhaps, the most important state administrative law development of the twentieth century. However... [the 1981 version] has been adopted only in a very few states,” perhaps because it was overambitious, or because states were largely satisfied with their existing APAs.).
- ⁴³ BONFIELD, *supra* note 15, at 3.
- ⁴⁴ E. Blythe Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196, 199 (1948).
- ⁴⁵ *Id.* at 200-01, 203.
- ⁴⁶ See Nat’l Conf. of Comm’rs on Uniform State Law, Model State Administrative Procedure Act (1961), available at <http://www.japc.state.fl.us/publications/USAPA/MSAPA1961.pdf>.
- ⁴⁷ COOPER, *supra* note 2, at 221.
- ⁴⁸ Arthur E. Bonfield, *An Introduction to the 1981 Model State Administrative Procedure Act, Part I*, 34 ADMIN. L. REV. 1, 2 (1982).
- ⁴⁹ *Id.* at 3.
- ⁵⁰ BONFIELD, *supra* note 15, at 211.
- ⁵¹ Bonfield, *supra* note 48, at 8.
- ⁵² BONFIELD, *supra* note 15, at 212.
- ⁵³ *Id.* at 213-14, 222 (1986).
- ⁵⁴ Arthur E. Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 FLA. ST. U. L. REV. 617, (1991).
- ⁵⁵ BONFIELD, *supra* note 15, at 434, 437-38.
- ⁵⁶ *Id.* at 463-68.
- ⁵⁷ Neslin, *supra* note 3, at 683-85 (Neslin felt giving the governor veto power enables each successive governor to unilaterally terminate past policies; Neslin also worried there would not be any effective electoral, judicial, or legislative check on the governor’s powers, since the rule review action would not attract voter attention, judicial review would likely be deferential, and legislative action itself would be subject to governor’s veto).
- ⁵⁸ BONFIELD, *supra* note 15, at suppl.,184 (1993) (responding to 71 MINN. L. REV. 543 (1987)).
- ⁵⁹ *Id.* at 471-72. According to Iowa’s experience, staff resolved most problems by informally consulting with agencies on about 20% of rules, and the governor only reviewed about 5% of rules. Neslin, *supra* note 3, at 683 n.94 & 684 n.96.
- ⁶⁰ BONFIELD, *supra* note 15, at 489.
- ⁶¹ *Id.* at 489-90.

- ⁶² *Id.* at 495.
- ⁶³ *Id.* at 518.
- ⁶⁴ *Id.* at 548-49.
- ⁶⁵ *Id.* at suppl. 198 (1993) (responding to Auerbach).
- ⁶⁶ See Drafting Committee, November 2004 Draft of Revised Model State Administrative Procedure Act (2004), available at http://www.law.upenn.edu/bll/archives/ulc/msapa/Nov2004Draft.htm#TOC2_43.
- ⁶⁷ May 2009 Agenda and Minutes of the Drafting Committee, <http://www.law.upenn.edu/bll/archives/ulc/msapa/2009mayagenda.htm> (statement of Ron Levin).
- ⁶⁸ June 2008 Conference Call of the Drafting Committee, http://www.law.upenn.edu/bll/archives/ulc/msapa/2008juneconfcall_agenda.htm.
- ⁶⁹ *Id.* (statement of Ron Levin).
- ⁷⁰ *Id.* (statement of Ron Levin); see also November 2008 Agenda and Minutes of the Drafting Committee, http://www.law.upenn.edu/bll/archives/ulc/msapa/2008nov_agenda.htm.
- ⁷¹ *Id.*; see also Appendix, *infra* (comparing earlier drafts).
- ⁷² Office of Advocacy, U.S. Small Business Administration, Report on the Regulatory Flexibility Act FY 2009 (2010), available at <http://www.sba.gov/advo/laws/flex/09regflx.html>; accord. Office of Advocacy, U.S. Small Business Administration, Small Business Regulatory Flexibility Model Legislative Initiative (2005), available at http://www.sba.gov/advo/laws/law_modelrpt.pdf.
- ⁷³ Office of Advocacy, U.S. Small Business Administration, Model Legislation, http://www.sba.gov/advo/laws/model_bill.pdf.
- ⁷⁴ See sources *supra* note 72.
- ⁷⁵ See Office of Advocacy, Report on the Regulatory Flexibility Act FY 2009, *supra* note 72.
- ⁷⁶ *Id.* For example, in 2010, Florida's legislature passed a radical expansion of its regulatory flexibility analysis requirements, though the statute was vetoed by the governor. See Florida, *infra* Chapter Eight.
- ⁷⁷ Office of Advocacy, U.S. Small Business Administration, Fact Sheet, http://www.sba.gov/advo/laws/factsmodeleg_03.pdf.
- ⁷⁸ See Kansas Summary, *infra*.
- ⁷⁹ See, e.g., West Virginia Summary, *infra*.
- ⁸⁰ See, e.g., New Mexico Summary, *infra*.
- ⁸¹ Interview with Kate C. Reichert, SBA Regulatory and Legislative Counsel, and Shawne Carter McGibbon, SBA Regional Advocate, June 1, 2010.
- ⁸² *Id.*

Chapter Three

Previous Studies on State Practices

Just as states should learn from each other's experiments with regulatory review, this report does not try to reinvent the wheel. Numerous, valuable studies have already catalogued state structures as they exist "on paper" in statutes and executive orders, and have already investigated the exercise of regulatory review "in practice" using both qualitative and empirical analysis. This tremendous body of work offers important insights, but due to limitations, it must be updated and expanded.

Catalogues of Processes "On Paper"

Several entities try to keep ongoing, up-to-date tallies of basic review structures: the National Conference of State Legislatures keeps a running count of states with various legislative oversight powers;¹ the National Association of Secretaries of State's Administrative Codes and Register Section conducts a regular survey on prerequisites for filing rules;² and, most importantly, every year for the last several decades, the Council of State Governments has published the *Book of the States*, which contains tables detailing the latest information on legislative and attorney general oversight authority.³ The information from these catalogues has informed this report, but these catalogues do not offer much fine-grained distinctions, do not cover regulatory impact analyses, and do not reveal how regulatory review is actually conducted.

Other entities have conducted more selective or one-time surveys of regulatory review. For example, during its revision of MSAPA, the National Conference of Commissioners on Uniform State Laws surveyed a selection of states with regard to their regulatory review and impact analysis practices.⁴ Some states, in particular Virginia, have at times conducted their own thorough surveys of other states' practices.⁵

Academics as well have captured processes as they existed on paper at select moments in time.⁶ Robert Hahn utilized and augmented the National Association on Administrative Rule Review's 1996 survey (covering forty-nine states and Puerto Rico, but Rhode Island did not respond)⁷ to catalogue state practices on economic analysis and regulatory oversight.⁸ Hahn concluded that:

While states generally require agencies to analyze the economic impact of rules, most states shy away from more stringent requirements, such as benefit-cost analysis and risk assessment. . . . [S]tates also seem hesitant to establish comprehensive oversight processes. While most states have some form of oversight entity, these entities are not typically responsible for

review of the agency’s economic analysis.⁹

Dennis Grady and Kathleen Simon also conducted surveys in 1996 under the direction of the National Association on Administrative Rules Review. Using a combination of mail surveys, telephone surveys, and interviews with individuals involved in the promulgation or review of administrative rules, Grady and Simon eventually reached all fifty states and categorized the rule review powers accorded to each executive and legislative branch.¹⁰ From that information, they developed an eight-point summary index for each actor:

Table 1—Grady & Simon’s Executive Rule Review Power Index	
8.0	Formal procedure to review all existing and all proposed rules (5 states)
7.0	Formal procedure to review all proposed and some existing rules (3 states)
6.0	Formal procedure to review some existing and some proposed rules (4 states)
5.0	Formal procedure to review only proposed rules (6 states)
4.0	Formal procedure to review only some existing rules (1 states)
3.0	Formal procedure to review only some proposed rules (6 states)
2.0	Procedure to review rules but may not void any rules (1 states)
1.0	No formal power to review rules but informal political power over agencies (24 states)
0.0	No power to review rules or political power over agency (0 states)

Table 2—Grady & Simon’s Legislative Rule Review Power Index	
8.0	Power to veto without gubernatorial concurrence (2 states)
7.0	Power to veto subject to gubernatorial veto (2 states)
6.0	Power to permanently suspend or sunset a rule subject to later legislative action (4 states)
5.5	Power to temporarily suspend or sunset a rule subject to later legislative action, without gubernatorial concurrence (3 states)
5.0	Power to temporarily suspend or sunset a law subject to later legislative action (9 states)
4.5	Power to temporarily suspend rule, with gubernatorial concurrence, pending later legislative action (2 states)
3.5	Power to object, with objection forwarded to governor and placed in register or forwarded to legislature for action not subjected to gubernatorial concurrence (2 states)
3.0	Power to approve rule and advise full legislature of its opinion for action, not subject to gubernatorial concurrence (1 states)
2.5	Power to review rule and advise full legislature of its opinion for action, not subject to gubernatorial concurrence (1 states)
2.0	Power to review rule and advise full legislature/governor/agency of its opinion (11 states)
1.0	Power to review only a special type of rule (1 states)
0.5	Power to create committee to review rules provided for but never done (2 states)
0.0	No formal power to review agency rules (5 states)

These indexes take a rather detailed snapshot of the “paper” regulatory review practices in 1996.

Grady and Simon also catalogued the number of states where the public may petition the review entity to hold a hearing (twenty-two) or petition the agency or reviewer to prepare an economic analysis (eighteen).¹¹

Of course, many authors have written about single or selective states; their findings will be discussed in the state-by-state summaries in Part Two.

Paper and Practice Do Not Always Match

Previous works have also used surveys to confirm that processes on paper do not always match processes in practice. In 2001, Virginia’s Administrative Law Advisory Committee surveyed forty-nine states and found “paper” requirements for legislative review in forty of them. However:

On balance, it was apparent that very few states have extensive legislative involvement in the regulation process, even if such a role is authorized by statute... Most persons interviewed seemed to feel that the ultimate power of review rested in the power to grant and withdraw regulating powers through authorizing statutes. The comment most commonly heard was that if the legislature was extremely unhappy with what a particular agency was doing, the best way to control the agency action was to amend its authorizing statute.¹²

Similarly, Hahn concluded that “survey data are sometimes misleading because they credit states for initiating potentially ineffective reform efforts.” For example, Connecticut reported that its agencies used cost-benefit analysis to develop regulations, but Hahn discovered the agencies did not consider private sector impacts or generally identify the benefits of a rule (let alone quantify

“There is, unfortunately, and ironically, little good data about the level of resources needed for optimal [regulatory impact] analysis.”

—Richard Whisnant and Diane Cherry¹⁶

them): “in practice, Connecticut’s efforts fall far short of widely accepted standards for such analysis.”¹³ More generally, Hahn believed that:

a mandate to analyze proposed regulations does not ensure that agencies will comply. Vague statutory language and a lack of oversight often allow agencies to comply only partially with requirements or not comply at all. A study in Virginia, for example, found that agencies complied with review requirements less than 20 percent of the time before recent reforms. . . . [M]ost states need to develop more effective means through which to hold agencies accountable for their analyses.¹⁴

Finally, government officials are not even always aware of the review requirements in their own states. Interviewers who surveyed Michigan legislators in 1998 and 2004 were “alarmed to discover that nearly one-third of those serving on the Appropriations Committee, the institutional locus of monitoring, did not acknowledge their responsibility for oversight. Further, we were startled by the . . . knowledge vacuum regarding the institutional checks and balances embodied in legislative monitoring of the executive branch.”¹⁵

Empirical Studies of Processes “In Practice”

A few studies have attempted to tease out the policy impacts of regulatory review structures, using quantitative analysis. Others have conducted empirical studies of regulatory review by surveying bureaucrat’s opinions about the perceived influence of various political actors.

Impacts on Policy

In the 1980s, Marcus Ethridge studied the impacts of regulatory review on rule stringency. Comparing the sulfur dioxide emissions limitations set by various states, Ethridge found that states with legislative review committees had less strict and considerably less complex regulations; Ethridge further hypothesized that complexity was more affected than stringency because the influences working through the legislative review process focused on the less visible (but still important) aspects of the rule—namely, complexity rather than stringency.¹⁷ While Ethridge cautioned against generalizing about the directionality of effects (the review may either be weakening optimal regulations or correcting for biased, overly-strict regulations), his study did suggest that review of regulation is not neutral on policy impact.¹⁸

In 1984, Ethridge followed that study with a closer look at the hundreds of reviews conducted by legislative committees in Michigan, Tennessee, and Wisconsin over a period of several years. Ethridge found that, at least in Michigan and Tennessee, committee objections were especially likely for regulatory proposals that restrict private business activity, and the review committees treated occupational licensing boards with special favor.¹⁹

In Wisconsin, there was no discernible tendency for committee review to focus on either particular regulatory bureaus or on restrictive proposals, which led Ethridge to conclude that review was either neutrally applied or inconsistently applied. Perhaps significantly, Wisconsin’s centralized review committee had achieved higher political visibility than the committees in Michigan or Tennessee, thanks to the aggressive efforts of the Wisconsin committee co-chair. That suggests individual leadership can potentially exert significant influence on oversight behavior. The Wisconsin co-chair only reviewed controversial proposals and aggressively sought public support for the committee’s pro-regulatory activity.²⁰

Overall, Ethridge could not conclude that all restrictive regulatory proposals will inevitably attract a review committee’s objection. Instead, the findings suggest that committees are “sensitive to changing political balances.” For example, larger agencies may have fared better because they were able to mobilize a broader base of support for their proposals. Similarly, regulatory proposals that went through extensive public hearings fared better before the legislative review committees. Review at least has the potential to “create a new access point for interests already successful in obtaining influence,” and political influence was an “important determinant” of committee action.²¹

Paul Teske has also tried to empirically measure the relationships between regulatory outcomes and explanatory factors in the states. Teske found that legislatures are among the most important and influential institutional actors on state regulatory decisions, with regulatory policy differences associated with legislative professionalism and ideology in eight out of ten case studies. Given the low average professionalism of legislatures and the fact that some agencies are fairly insulated,

Teske was surprised to find legislative influence in the “average” state, but noted the influence of legislative ideology is maybe a positive result for democratic accountability.²² By comparison, Teske’s quantitative evidence did not demonstrate a clear impact of state governors on regulation, “though this is probably due to the lack of good measures of gubernatorial power and ideology.”²³

In 2007, Dorothy Daley and colleagues used data to test whether four different veto points over regulation (legislative veto; legislative committee discharge of proposed legislation; formal policy power of governor; and citizen initiatives, as in western states) resulted in lower regulatory compliance costs in forty-eight states.²⁴ They found that legislative review was the only oversight mechanism examined that significantly reduced compliance costs. Notably, the formal powers of governors appeared to have little influence.²⁵

But generally, attempts to study the impact of regulatory review structures are frustrated by a lack of data. For example, Hahn noted that “Some states claim their regulations are more effective and less costly as a result of improvements to the regulatory process, but the analytical support for such claims is generally weak. . . . Although some of these approaches seem comprehensive, the actual impact of state requirements is not clear because they are relatively untested and difficult to enforce and because most states do not consistently or accurately document the impact of the changes on the regulatory process.”²⁶

Governors’ Policy Offices

In 2004, the National Governors Association’s Center for Best Practices surveyed thirty-seven states about governors’ policy offices. Governors typically have between two and ten policy advisors. Seventy-one percent of the states surveyed operated a formal policy office (up from twenty-eight percent in 1997), but sixty-four percent of policy directors split their time serving other roles, such as legal counsel, chief of staff, intergovernmental affairs, or legislative affairs. Limited resources is a real concern: policy offices have little funding for analysts or advisors, and the legislature is hesitant to fund additional staff for the governor. Staff is stretched thin, and it is difficult to retain experienced personnel.²⁷

Policy advisors feel that regular communication with agency executives is critical to the success of the governor’s policy agenda. Fifty-six percent of states reported that the policy office was highly responsible for ensuring agencies conform with the governor’s agenda, by overseeing agency activities, reviewing budget requests, and reviewing regulations. Agencies are monitored through several channels, including document reviews, periodic meeting, and

When asked who exercises greater control over agencies, forty-five percent of state agency administrators report the governor; thirty percent say the legislature; and twenty-five percent answer that their influence is equal. When asked who should exercise more control, thirty-four percent name the governor, and only seventeen percent choose the legislature.

collaboration on policy. Over ninety percent of policy offices reported regular collaboration with agencies on policy development.²⁸

Perceptions of Political Influence (Woods)

In 2000, Neal Woods surveyed 991 agency directors in fifteen states about their perceptions of the influence that governors, legislators, and third parties have over rulemaking.

Review Powers: Woods found that increases in executive review power significantly increased the reported influence of the governor in rulemaking.²⁹ By contrast, greater legislative review powers did not significantly increase the reported power of state legislators.³⁰ In particular, a legislative veto did not have a significant effect on legislative influence; however, the existence of a legislative veto did lead to lower reported levels of influence by both the governor and other agencies.³¹

Greater gubernatorial and legislative rule review powers also significantly decreased the perceived impact of interest groups on rulemaking. This evidence supports the argument that regulatory review ameliorates, rather than exacerbates, special interest capture.³²

Economic Analysis: Requirements that agency rules undergo an economic analysis conducted by a separate executive branch agency are associated with increases in the reported influence of both other agencies and the governor.³³

Legislative Professionalism: Woods and colleagues have found that, overall, increases in legislative professionalism do not increase perceived influence over agencies, and may in fact significantly decrease legislative influence.³⁴ But legislative professionalism can be teased out into two factors with different impacts: increases in legislative resources increase legislative influence, while increases in legislative careerism decrease it (likely because agency oversight is seen as having low electoral value).³⁵ Interestingly, increases in legislative professionalism caused interest groups to be regarded as more influential.³⁶

Contacts and Perceptions of Influence (ASAP)

For the last several decades, Auburn's Center for Government Services has conducted the American State Administrators Project ("ASAP"), periodically surveying hundreds of agency administrators from across the fifty states.³⁷ The surveys cover perceptions of political influence over rulemaking and other functions, as well as the extent of contact with political and external actors.

Contact: Though many agencies report daily or weekly contact with the governor's office or staff,³⁸ two thirds of all agency heads are so peripheral to the governor's orbit that they have less-than-monthly contacts with the governor, and nearly one third have less-than-monthly contact with the governor's staff.³⁹

Daily and weekly contact with legislative staff seems to have fallen off, from a high of sixty-one percent of administrators reporting daily contact in 1974, to only thirty percent reporting daily contact in 2004.⁴⁰

Perceived Influence Levels: Two thirds of agency heads indicate that the governor did not exercise substantial influence on agency rulemaking—a much higher level of reported autonomy than for other agency functions, like budgeting or general policy work.⁴¹

When asked who exercises greater control over an agency, forty-five percent report the governor; thirty percent say the legislature; and twenty-five percent answer that their influence is equal. When asked who *should* exercise more control, thirty-four percent name the governor, and only seventeen percent choose the legislature.⁴² In general, the surveys reveal a consistent pattern of “influence deficits, rather than influence surpluses”—in other words, agency administrators generally want more influence, especially from governors.⁴³

Over the years, the levels of reported influence have shown “remarkable stability,” with the governor and legislature consistently perceived as more influential than courts, professional associations, or interest groups.⁴⁴

Factors Changing Perceived Influence: Contrary to Woods’s conclusions reported above, using ASAP data, Cherie Maestas, Brian Gerber, and Nelson Dometrius find that, in states with relatively stronger review authority (as categorized by the 1994 *Book of the States*), legislators are reported to have more influence over agency rulemaking decisions.⁴⁵ Though their model could not distinguish between legislatures with advisory review powers and those with no review powers,⁴⁶ empirically, “the dividing line seems to be the availability of veto power to legislators.”⁴⁷ They also found that a divided government (where the executive and legislative branches are controlled by different political parties) significantly increased legislative influence, as did politically unified legislative chambers.

Administrative officials confirmed by the legislature were no more likely to view the legislature as influential, but those having extensive contact with legislative staff did view the legislature as more influential.⁴⁸ By contrast, the governor’s perceived influence does seem to increase for appointed agency heads.⁴⁹ Increased contact with the governor’s staff also increased perceived influence,⁵⁰ and the level of agency contact with the governor’s staff is very sensitive to the governor’s approval ratings.⁵¹ Agency size (by either staff or budget), however, appears to have no impact on the level of influence by political or public actors.⁵²

The literature on state-level regulatory review is insightful, but it is also limited, and it is dwarfed by the body of work covering the federal level. Federal practice is therefore the next place states can look to learn more about the structure of regulatory review.

Notes

- ¹ Nat'l Conf. of State Legis., Legislative Oversight, <http://www.ncsl.org/default.aspx?tabid=13538> (last visited Feb. 13, 2010).
- ² E.g., ADMIN. CODES & REGISTERS SECTION, NAT'L ASSOC. OF SEC'YS OF STATE, STATE & FEDERAL SURVEY: 2007-2009 (2008).
- ³ E.g., COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 163-69, 256-57 (vol. 42, 2010 ed.).
- ⁴ See various meeting minutes and memoranda prepared by the Drafting Committee on the MSAPA, available at http://www.law.upenn.edu/bll/archives/ulc/msapa/2007april17_article7memo.htm, http://www.law.upenn.edu/bll/archives/ulc/msapa/2007april_issuesmemo.html, and http://www.law.upenn.edu/bll/archives/ulc/msapa/2008june1_section305.htm.
- ⁵ See Virginia Admin. Law Advisory Comm., Report of the Subcommittee to Study Petitions for Rulemaking 3 (2001) (reporting on a 50-state survey, which found 10 states did not have any codified provisions for public petition for agency rules); Stacey M. Tharp, Virginia Admin. Law Advisory Comm., Legislative Powers of Rules Review in the States and Congressional Powers of Rules Review (2001) (finding 40 of 49 states responding allowed for legislative review).
- ⁶ E.g., Neal Woods, *Promoting Participation? An Examination of Rulemaking Notification and Access Procedures*, 69 PUB. ADMIN. REV. 518, 520 (2009) (finding that in 0 states, public hearings must be held by reviewing entity before proposal; in 9 states, public hearings must be held by reviewing entity before adoption; in 30 states, public has the right to present written comments to reviewing entity; in 25 states, public has the right to present oral comments to reviewing entity; in 22 states, public may petition reviewing entity to hold a hearing; in 12 states, public may petition agency to prepare detailed economic analysis; in 6 states, public may petition reviewing entity to prepare detailed economic analysis; in 42 states, public may petition agency for rulemaking; and in 15 states, public may petition reviewing entity for rulemaking).
- ⁷ The National Association on Administrative Rule Review was previously an associate of the Council of State Governments.
- ⁸ Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 29 J. LEGAL STUD. 873, 875 (2000).
- ⁹ *Id.* at 876-77.
- ¹⁰ Dennis O. Grady & Kathleen M. Simon, *Political Restraints and Bureaucratic Discretion: The Case of State Government Rule Making*, 30 POL. & POL'Y 646, 649, 654 (2002).
- ¹¹ *Id.*
- ¹² Susan Eckerly et al., Virginia Administrative Law Advisory Committee, Report of the Subcomm. to Study State Legislative and Congressional Involvement in the Regulatory Rulemaking Process (2001).
- ¹³ Hahn, *supra* note 8, at 877-78.
- ¹⁴ *Id.* at 880-81. "An Illinois statute, for example, requires agencies to review all rules at least every 5 years. Agencies have not, however, completed a review in over a decade. The legislative committee responsible for enforcement cited a lack of staff and funds as the reason for its negligence." *Id.* at 882.
- ¹⁵ Marjorie Sarbaugh-Thompson et al., *Legislators and Administrators: Complex Relationships Complicated by Term Limits*, 35 LEGIS. STUD. Q. 57 (2010).
- ¹⁶ Richard Whisnant and Diane DeWitt Cherry, *Economic Analysis of Rules: Devolution, Evolution, and Realism*, 31 WAKE FOREST L. REV. 693, 720 (1996).
- ¹⁷ Marcus E. Ethridge, III, *Legislative-Administrative Interaction as "Intrusive Access": An Empirical Analysis*, 43 J. POL. 473, 487-89 (1981).
- ¹⁸ *Id.* at 490.

- ¹⁹ Marcus E. Ethridge, *Consequences of Legislative Review of Agency Regulations in Three U.S. States*, 9 *Legis. Stud. Q.* 161, 171 (1984).
- ²⁰ *Id.* at 172, 174.
- ²¹ *Id.*
- ²² PAUL TESKE, *REGULATION IN THE STATES 197-98* (2004).
- ²³ *Id.* at 209 (“I do find some evidence about the role of divided government, . . . which begins to bring in the governor’s role relative to the legislature, and there is substantial anecdotal evidence.”).
- ²⁴ Some of Daley et al.’s categorizations may be questionable: for example, they coded North Carolina as having no legislative review to be conservative, even though the determinations of the independent Rules Review Commission can be appealed to the legislature. Categorizations were based on information from the Council of State Government’s *Book of the States*, which really only captures the review process on paper process, not in practice.
- ²⁵ Dorothy M. Daley et al., *Checks, Balances, and the Cost of Regulation: Evidence from the American States*, 60 *POL. RES. Q.* 696 (2007).
- ²⁶ Hahn, *supra* note 8, at 882.
- ²⁷ NAT’L GOVERNORS ASSOC.’S CTR. FOR BEST PRACTICES, *ORGANIZING THE GOVERNOR’S POLICY OFFICE 1*, 10 (2005).
- ²⁸ *Id.* at 5-6.
- ²⁹ Neal Woods, *Political Influence on Agency Rule Making: Examining the Effects of Legislative and Gubernatorial Rule Review Powers*, 36 *STATE & LOCAL GOV’T REV.* 174, 180 (2004) (“A unit increase in the gubernatorial rule review power index increases the likelihood of the governor being regarded as highly influential by 12 percent.”).
- ³⁰ *Id.* at 180-82.
- ³¹ Woods, *Promoting Participation?*, *supra* note 6, at 518, 525.
- ³² Neal Woods, *Interest Group Influence on State Administrative Rule Making: The Impact of Rule Review*, 35 *AM. REV. OF PUB. ADMIN.* 402, 409 (2005).
- ³³ Woods, *Promoting Participation?*, *supra* note 6, at 525.
- ³⁴ Woods, *Political Influence*, *supra* note 29, at 180-82; see also Michael Baranowski, *Legislative Professionalism and Influence on State Agencies*, 29 *POL. & POL’Y* 147 (2001) (finding that more professional legislatures are not perceived to have more influence over agencies).
- ³⁵ Woods and Baranowski also found that sunset laws increase legislative influence, the legislative veto significantly decreased influence (contrary to hypothesis, but may be conditional on political circumstances), legislative turnover increased influence (contrary to hypothesis, since turnover should increase the informational advantage of bureaucrats over legislators, but this result may be capturing something else), and legislature contact with agencies increased influence. Neal Woods & Michael Baranowski, *Legislative Professionalism and Influence on State Agencies: The Effects of Resources and Careerism*, 31 *LEGIS. STUD. Q.* 585, 596-97 (2006). Woods and Baranowski also review the mixed literature on the effects of legislative professionalism.
- ³⁶ Woods, *Interest Group Influence*, *supra* note 32, at 409.
- ³⁷ For a criticism of ASAP’s methodology, see Michael Baranowski & Donald A. Gross, *Influence over State Agency Activities: A Test of Two Survey-Based Measures*, 6 *State Pol. & Pol’y Q.* 220 (2006) (critiquing ASAP for asking only about influence and not about relative influence); see also Cheryl M. Miller & Deil S. Wright, *Who’s Minding Which Store? Institutional and Other Actors’ Influence on Administrative Rulemaking in State Agencies, 1978-2004*, 33 *PUB. ADMIN. Q.* 397, 420 (2009) (discussing limitations of ASAP’s surveys, such as failure to measure citizen influence or to gauge the type or content of influence).
- ³⁸ See ASAP 2004 Survey Results, available at <http://www.auburn.edu/outreach/cgs/documents/The2004ASAPReport.pdf>
- ³⁹ Yoo-Sung Choi et al., *Administrative Autonomy Among American State Administrators: An Empirical Analysis of*

Fragmentation and Functionalism, 27 INT'L J. PUB. ADMIN. 373, 379 (2004).

- ⁴⁰ See ASAP 2004 Survey Results, *supra* note 38 (another 30% reported weekly contact in 2004).
- ⁴¹ Yoo-Sung Choi et al., *supra* note 39, at 380. In later surveys, “policy” versus “rules” is not clearly distinguished, but see Brendan F. Burke et al., *Continuity and Change in Executive Leadership: Insights from the Perspectives of State Administrators*, 68 PUB. ADMIN. REV. s29 (2008); see also BARANOWSKI & GROSS, *supra* note 37.
- ⁴² See ASAP 2004 Survey Results, *supra* note 38.
- ⁴³ For all except state legislators, state courts, and media, agency administrators wanted more influence, not less. Notably, agency administrations do not tend to see influence as a zero-sum game, expressing a desire for increased influence from several policy actors. Cheryl M. Miller & Deil S. Wright, *The Politics-Policy-Administration Continuum: Zero-Sum versus Positive-Sum Patterns in Balancing Bureaucratic Initiative with Administrative Accountability*, presentation at 2002 Annual Meeting of the American Political Science Association.
- ⁴⁴ Miller & Wright, *Who’s Minding Which Store?*, *supra* note 37, at 403.
- ⁴⁵ Cherie D. Maestas, Brian J. Gerber, & Nelson C. Dometrius, *Assessing the Effect of LARRI: Legislative Authority to Review Rules as a “Flexible” Ex Ante Control over Agency Decision-Making* (2003).
- ⁴⁶ See also Brian J. Gerber, Cherie Maestas, & Nelson C. Dometrius, *State Legislative Influence over Agency Rulemaking: The Utility of Ex Ante Review*, 5 STATE POL & POL’Y Q. 24, 35 (2005) (reporting that data does not show with statistical significance that legislatures with sanction powers are more influential than legislatures with only advisory review powers).
- ⁴⁷ Maestas, Gerber, & Dometrius, *supra* note 45.
- ⁴⁸ *Id.*
- ⁴⁹ Miller & Wright, *supra* note 37, at 408.
- ⁵⁰ Christine A. Kelleher & Susan Webb Yackee, *Who’s Whispering in Your Ear? The Influence of Third Parties Over State Agency Decisions*, 59 POL. RES. Q. 629 (2006).
- ⁵¹ Nelson C. Dometrius, *Gubernatorial Approval and Administrative Influence*, 2 STATE POL. & POL’Y Q. 251 (2002).
- ⁵² Miller & Wright, *supra* note 37, at 405.

Chapter Four

Lessons from Federal Practice

Federal practices do not necessarily offer states a perfect model for their own regulatory review structures. To the contrary, some scholars have recently argued that state legislatures have done a better job of “institutionaliz[ing] and professionaliz[ing] their review of administrative rules,” and the federal government “should take a cue” from them.¹ Indeed, thorough executive review of regulation in some states predates federal efforts, and states have experimented with more variations on legislative oversight of agency rules than Congress has.²

Perhaps more importantly, state governments face very real legal, political, and practical differences from the federal government, which may limit the usefulness of the federal system as a template (see Chapter One). Though not everyone agrees that the states’ experiences with regulation are significantly different than the federal government’s,³ most scholars believe there are at least some undeniable distinctions. Nevertheless, the federal system can be a useful “reference point” for evaluating the features and successes of state institutions.⁴ Put another way, federal lessons can be “relevant” but “not controlling,” since federal experiences cannot always lead to solutions for the unique challenges that face the states.⁵

Brief History of Federal Executive Review

The process of federal regulatory review has evolved over the course of several presidential administrations. History shows both the dangers and the promises of a centralized system based on executive oversight and mandatory cost-benefit analysis.⁶

Elected on a platform of deregulation, President Reagan quickly asserted an unprecedented level of control over the federal administrative apparatus upon taking office in 1981. Within a month of his inauguration, Reagan issued Executive Order 12,291, creating the essential architecture for the centralized review of agency action that still governs today.⁷

That Executive Order required agencies to prepare detailed cost-benefit analyses of any proposed regulation with a significant impact on the economy; if a regulation’s expected costs exceeded its expected benefits, it could not move forward. Reviewing those analyses and deciding regulations’ fates were tasks assigned to the officials at the Office of Information and Regulatory Affairs (OIRA), which soon earned the nickname “the regulatory black hole.”⁸

Under Reagan, “cost-benefit analysis” became code for “deregulation.” Influential backchannel communications from industry, combined with OIRA’s tendency to focus more on potential costs than on potential benefits, precipitated the demise of many proposed regulations. Agencies received OIRA’s demanding inputs and changes so late in the rulemaking process that it was nearly impossible to respond meaningfully. The size of OIRA’s staff—tiny relative to the number of regulations it was meant to review—created costly and lengthy delays. Moreover, the entire

History shows both the dangers and the promises of a centralized system based on executive oversight and mandatory cost-benefit analysis.

review process was shrouded in secrecy, hidden from public scrutiny. Vice President George H.W. Bush played a key role in developing Executive Order 12,291, and he largely continued Reagan’s legacy during his presidency.

When President Clinton took office in 1993, he carefully weighed the pros and cons of centralized review. Under Reagan, regulatory review had been criticized heavily for stripping power from agency experts, reducing the transparency of the regulatory process, creating unnecessary delay, and giving OIRA undue influence over the regulatory process. However, there were also benefits of regulatory review, including quality-control

over a growing and increasingly important regulatory state, a dispassionate second opinion concerning new regulation, and the introduction of a broader perspective into the sometimes-parochial rulemaking process. Recognizing that regulatory review and cost-benefit analysis were not inherently biased or anti-regulatory, Clinton chose to preserve Reagan’s Executive Order, but with some key modifications.

Reissued as Executive Order 12,866, Clinton’s directive maintained the basic existing structure, with OIRA reviewing cost-benefit analyses for significant regulatory actions.⁹ However, Clinton changed the tone and substance of the Order. The review process followed firmer deadlines and more robust transparency requirements. Analysts were instructed to give due consideration to qualitative measures of costs and benefits, as well as to weigh the potential distributive impacts of regulations. These were crucial improvements, and cost-benefit analysis under Clinton moved closer to becoming a neutral tool for rational decisionmaking. These reforms were important first steps, but the overall structure of regulatory review and many of the methodologies of cost-benefit analysis continued to include important flaws.

For the first six years of his presidency, George W. Bush maintained Clinton’s Executive Order entirely intact. However, the actual practice of regulatory review changed significantly. While some aspects of transparency and timeliness improved during the Bush Administration, many others suffered. In particular, by augmenting the use of “informal” review, OIRA skirted around transparency requirements and formal review requirements. Agencies also felt that OIRA overstepped its role and interfered in their areas of expertise. Although Clinton’s additions on qualitative measures and distributive impacts remained in effect, such instructions often went unheeded.

When President Bush did announce a revised Executive Order in January 2007, it tended to forge an even closer link between cost-benefit analysis and a larger deregulatory agenda. Executive

Order 13,422 instituted the following key changes: it required agencies to identify a market failure before moving forward with proposed regulations; and it placed political appointees in agencies as Regulatory Policy Review Officers, further cementing presidential political influence over agency scientist and experts.¹⁰

At the start of his term in 2009, President Obama quickly rescinded Bush's amendments and reverted back to Clinton's original Executive Order 12,866, emphasizing his belief that "if properly conducted, centralized review is both legitimate and appropriate as a means of promoting regulatory goals."¹¹ At the same time, he issued a call for recommendations on revising the regulatory review process, which would:

offer suggestions for the relationship between OIRA and the agencies; provide guidance on disclosure and transparency; encourage public participation in agency regulatory processes; offer suggestions on the role of cost-benefit analysis; address the role of distributional considerations, fairness, and concern for the interests of future generations; identify methods of ensuring that regulatory review does not produce undue delay; clarify the role of the behavioral sciences in formulating regulatory policy; and identify the best tools for achieving public goals through the regulatory process.

A re-imagined Executive Order has not yet materialized, but OIRA has already announced some new protocols. For example, OIRA has advised agencies "that significant regulations should be accompanied with clear, tabular presentations of both benefits and costs, including nonquantifiable variables; that analysis should take account, where relevant, of the effects of the regulation on future generations and the least well-off; and that continuing efforts should be made to meet some difficult challenges posed by regulatory impact analysis, including treatment of variables that are difficult to quantify and monetize."¹²

Current Structure of Federal Executive Review

Executive Order 12,866¹³ calls for agencies to assess all costs and benefits of regulatory alternatives, to choose regulatory options where the benefits justify the costs, and to tailor regulations to accomplish the policy objectives while minimizing the regulatory burdens. Agencies must submit "significant" rules to OIRA for review both before proposal and before adoption. OIRA both reviews the significant rules itself and also coordinates an inter-agency review. "Significant" rules are those likely to have an annual effect on the economy of over \$100 million, or another adverse effect on the economy, the environment, or health, as well as those rules creating a serious inter-agency conflict or raising a novel issue of law or policy. If a rule is "economically significant" or may have an adverse effect on the economy, environment, or health, the agency must not only assess costs and benefits, but must quantify both to the extent possible. Agencies must also prepare a regulatory agenda of their intended rulemaking activities.

In addition to its formal review, OIRA also meets with public stakeholders and discusses regulatory options informally with agencies. Some analyses find that OIRA reviews have a fairly consistent and significant impact on the substance of rules,¹⁴ while others question whether federal requirements for economic analysis and review have any real impact.¹⁵

Though Executive Order 12,866 calls for agencies to develop a program for periodic review of their significant existing regulations, agency compliance with mandates for retrospective reviews is inconsistent at best, and agencies are more likely to conduct reviews on their own discretion or upon public petition.¹⁶ Incoming presidents also now routinely have their newly installed agency heads review the most recently finalized regulations of the previous administration,¹⁷ and OIRA has from time to time used its annual reports to solicit comments from the public on existing regulations to target for review.¹⁸

Brief History of Federal Legislative Review

The legislative veto is a statutory provision that preserves power for the legislature, a legislative chamber, or a legislative committee to quickly block regulations of a particular agency, subject matter, or type without resorting to the full process of enacting new legislation—and especially without needing a signature from the executive branch. At the peak of usage, Congress had once deployed some 350 separate versions of this aggressive regulatory review mechanism.²¹

But in 1983, the Supreme Court declared the practice unconstitutional (at least at the federal level). In the case *I.N.S. v. Chadha*, the Court held that vetoing agency regulations was a lawmaking function, and Congress can only exercise such power if both chambers first approve a measure and then present it to the President for signature or veto.²² Nullifying a regulation through other means does not pass constitutional muster.²³

A few tailored, subject-matter-specific, implicit legislative vetoes, or informal committee veto arrangements (essentially enforced with the heavy stick of Congress’s budgetary and lawmaking powers), did survive after the *Chadha* ruling, but they are rare and might not pass a serious judicial challenge.²⁴ Much more frequently, Congress attaches substantive riders to annual appropriations bills that block agencies from spending money during that fiscal year on the creation or enforcement of certain rules. These appropriations riders can act as an indirect legislative veto on either new or existing regulations. Though technically riders can only temporarily suspend an agency’s ability to spend money on a particular rulemaking, the technique can have long-term regulatory impacts. For example, Congress once used the appropriations process to block the Department of Transportation for six years running from promulgating any new regulations to increase the fuel efficiency of cars.²⁵ Appropriations riders are a common and often effective check on the regulatory process, but they are highly criticized as being incredibly opaque, a “low-visibility means of derailing programs.”²⁶

“The once rather vibrant legal and policy debate over the pros and cons of presidential review has gradually evolved into a fairly broad agreement that it is not only legal, but that if properly administered, it is essential to effective executive branch management.”

—Jeffrey S. Lubbers¹⁹

In 1996, as a replacement for the legislative veto, Congress passed the Congressional Review Act (“CRA”) to create a formal mechanism for the speedy disapproval of newly proposed rules.

The CRA requires agencies to submit all new regulations to Congress and temporarily delays the effective date of major regulations to allow for congressional review.²⁷ Congress can then use expedited legislative procedures to pass a joint resolution disapproving the regulation. But since the resolution must be presented to the President to become law, and the President will normally support the regulations promulgated in his administration, only unique circumstances set up a successful application of the CRA. Between 1996 and 2008, of nearly 48,000 final rules submitted to Congress by agencies, just forty-seven CRA joint resolutions of disapproval were introduced regarding thirty-five rules; only one rule was overturned, right after a presidential election changed political control of the White House.²⁸ Though the mere possibility of congressional rejection could theoretically affect the shape of rules,²⁹ most agency officials report an “attitude of nonchalance” toward the CRA, given its limited potential for effective use.³⁰

“Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive.”

—D.C. Circuit Court of Appeals²⁰

As a result of these limitations on its direct regulatory review powers, Congress now mostly reviews rules non-systematically, using traditional oversight powers such as holding hearings on agency actions. Many agencies report active communications with legislators and congressional staff during the course of individual rulemakings.³¹ Once dismissed as “erratic, superficial, politically motivated, and largely ineffective,” ad hoc staff communications and congressional hearings can be effective review tactics—indeed, congressional staff rank such indirect oversight mechanisms as more effective than legislative vetoes or systematic analysis of rules.³² Still, some scholars fear that such non-systematic review can lead to undemocratic outcomes, or at least the appearance of such.³³

Congress can also try to influence rules *ex ante*, by tightly limiting the discretion delegated to agencies in original enabling statutes, or by exercising its role in the appointment process. Congress has tremendous power to “stack the rulemaking deck” by imposing procedural constraints or budgetary controls.³⁴ One of Congress’s most active *ex ante* techniques is to require agencies to prepare regulatory impact analyses, which can not only influence the content of rules, but are also subject to the regulatory review authority of the courts or the executive branch.

The National Environmental Policy Act of 1969 was the first federal statute to require an “impact statement,” but it was not the last. For example, the Unfunded Mandates Reform Act of 1995 requires agencies to analyze any large fiscal impacts of their rules on local governments and the private sector; agencies must also consider alternatives and justify its decision if the least burdensome option was not selected.³⁵

The Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, is of particular importance.³⁶ The Act requires agencies to conduct a regulatory flexibility analysis for all rules with a “significant economic impact on a substantial number” of small businesses.³⁷ The flexibility analysis must detail the rule’s goals, the types and number of entities that will be affected, the anticipated compliance requirements, and any alternative policy options that would achieve the agency’s objectives with fewer burdens placed on small business.

The Act also requires agencies to review existing regulations with small business impacts every ten years, to ensure that they are still necessary and to determine whether their impact can be minimized.

Congress sometimes drafts the executive and judicial branches into the review of these impact analysis requirements: the White House sets guidelines for the preparation of environmental impact statements; OIRA collects unfunded mandate reports; the federal Small Business Administration submits comments on regulatory flexibility analyses; and the adequacy of some statements can be challenged in court.³⁸

Such impact analyses and retrospective review requirements have had mixed success. A 2004 report indicates that the Unfunded Mandates Reform Act has not always had the intended coverage or effect.³⁹ And while some agencies hold back regulatory proposals they feel would not pass OIRA's scrutiny due to their flexibility analyses,⁴⁰ agencies retain a good deal of discretion in implementing the Regulatory Flexibility Act. For example, key terms like "significant economic impact" are left open to interpretation,⁴¹ and some critics feel that retrospective reviews, if they are carried out at all, have little practical impact.⁴²

A Flawed System with Great Potential

Though the federal regulatory review system is neither perfect in conception or execution,⁴³ bipartisan support for the practice's potential has evolved at the federal level. First conceived by President Reagan as a tool to eliminate overly-burdensome regulations, the process was modified by President Clinton into a broader and more neutral tool for rational decisionmaking. Both Republicans and Democrats recognize the many benefits of regulatory review, including quality-control over a growing and increasingly important regulatory state, a dispassionate second opinion concerning new regulation, and the introduction of a broader perspective into the sometimes parochial rulemaking process.

While cost-benefit analysis and regulatory review at the federal level have not had a blemish-free record of success, numerous examples testify to the tremendous potential benefits of the practice. Cost-benefit analysis can help insulate good rules from attacks by special interests. When President George W. Bush took office in 2001, there was strong pressure from industry for the new administration to overturn a Clinton-era regulation on diesel exhaust from heavy trucks. However, the White House used cost-benefit analysis to show that the regulation's costs (\$3 to \$5 billion per year) were far outweighed by the benefits (8,300 premature deaths, 5,500 cases of bronchitis, and 361,400 asthma attacks avoided

Both Republicans and Democrats recognize the many benefits of regulatory review, including quality-control over a growing and increasingly important regulatory state, a dispassionate second opinion concerning new regulation, and the introduction of a broader perspective into the sometimes parochial rulemaking process.

each year—the equivalent of over \$60 billion in benefits). In fact, using such analysis, the White House encouraged the Environmental Protection Agency to expand the regulations to cover off-road vehicles as well.⁴⁴

The regulatory review process can also help agencies identify the most cost-effective approach early in their rulemaking endeavors, thereby conserving government resources. For example, in 1994-1995, the Food and Drug Administration wanted to begin issuing new standards for seafood, but was uncertain about the optimal form of regulation. Through conversations with the White House, the agency was able to pick which of three alternate courses was likely to produce the best results, leading to a smooth rulemaking and an effective regulation.⁴⁵

Finally, regulatory review can also help agencies identify areas where beneficial regulation is lacking. In recent years, the White House has used the regulatory review process to encourage the Occupational Safety and Health Administration to promote use of automatic external defibrillators in the workplace, and has prompted the Food and Drug Administration to finish a rule requiring food labels on trans-fat content, a consumer protection measure that had been stalled for years.⁴⁶ Though chronically underused, the ability of the review process to identify gaps in regulatory coverage can balance out what is sometimes viewed as an inherently anti-regulatory structure.⁴⁷

As these examples demonstrate, regulatory review yields far more benefits than just encouraging proper economic and scientific analysis. Regulatory review promotes democracy. By requiring governments to justify their regulatory choices in the language of science and economics, cost-benefit analysis helps ensure that decisions are not made on the basis of special interest politics. Instead, a regulatory review process places decisions on the public record, encouraging transparency and accountability. When decisions are made in the open, using the best information, and in response to public participation, democracy flourishes.

Lessons States Can Learn from the Federal System

In 2008, the Institute for Policy Integrity brought together a number of experts on the federal regulatory process, representing different backgrounds and different political perspectives, to discuss lessons learned and recommendations for reform.⁴⁸ Many of these lessons could apply to the states as well.

First, the history of federal regulatory review teaches that execution matters at least as much as text. The same Executive Order 12,866 has been wielded very differently under three different presidential administrations. Not only does that teach scholars to look beyond the text when studying state practices, but it also suggests to the states that the fundamental architecture for regulatory review can have surprising staying power, and should be designed to produce consistent results over time and during different political administrations. Even within a single administration, different federal agencies have complied with the analytical requirements of Executive Order 12,866 and the Regulatory Flexibility Act with inconsistent frequency and rigor.⁴⁹ For more consistent compliance, state agencies must be given the necessary resources to conduct the analysis, the clear guidelines to frame the analysis, and the incentive that failure will carry real consequences.

A key but often neglected role for regulatory review is to facilitate coordination between agencies. Many risks are not easily cordoned off along bureaucratic lines. Perhaps the clearest example is energy policy, which touches on issues as far flung as environmental emissions standards and procurement processes for lighting in government buildings. Agencies can, and sometimes do, engage in turf battles, work at cross-purposes, enact redundant regulation, or shuffle off difficult problems. These failures of coordination waste resources and reduce the effectiveness of agencies. Under the Clinton Administration, a federal Regulatory Working Group met monthly to discuss issues, agendas, and regulatory gaps. Though originally productive, the practice died when the Bush Administration came to power. States may consider options for building a permanent coordinative role into some of their review processes.

“When agencies are told that they ‘may,’ at their discretion, take some action that requires substantial cost or effort on their part, at least some agencies will seek to avoid it.”

—Curtis W. Copeland⁵⁰

An element related to coordination is the review of inaction. Agency inaction is currently not subject to the same scrutiny at the federal level as agency action, leading to a fundamental anti-regulatory bias in how regulatory review operates. OIRA has at times used “prompt letters” to attempt to prod agencies to take action on under-regulated issues. However, the practice occurs inconsistently and infrequently, as an ad hoc mechanism that is not enshrined in the Executive Order. Unfortunately, given the potentially unlimited universe of possible agency inaction, requiring reviewers to study every regulatory gap and make recommendations would place unbearable burdens on an already resource-strapped agency—even at the federal level, let alone at the more

resource-limited state level. States may consider how to engage the public more in their regulatory review practices, since the public can play a valuable role in alerting reviewers to important issues that agencies have overlooked, especially through formal petitions and comments.

When it comes to informal reviews, federal practice teaches states that there is a delicate balance to be drawn between the competing goals of transparency and expediency. In recent years, OIRA has increasingly used an “informal” review process to inject its comments earlier into the rulemaking process. Though OIRA claims this practice is motivated by concerns about scarce resources and quick deadlines, many experts feel informal review is neither a response to nor a solution for the timeliness problem, but has instead been an opportunity for OIRA to influence rulemaking off-the-record, before most transparency requirements kick in. On the other hand, early review can serve a very useful purpose. During the Clinton Administration, agencies often approached OIRA in the pre-rule stage, asking for guidance on how to proceed. These informal consultations helped agencies choose the most efficient and effective rulemaking tactics.

And while the importance of transparency is clear, absolute transparency also presents some downsides. Candid conversations can be vital to the rulemaking process, but agency staff may feel the need to censor themselves and their ideas if every communication becomes part of the public record. Moreover, full transparency can tax limited resources: though the cost of disclosing a single communication may seem small, the cumulative effort required to draft or transcribe, edit, and post every individual communication and document would demand substantial resources.

While many states may aspire to fuller transparency, they should think carefully about how to increase transparency without sacrificing the beneficial elements of early and informal reviews.

Historically, deregulation is often subjected to less stringent review than new regulations. There is no justification for this bias, because inefficient deregulation can be as costly, in terms of social welfare, as inefficient regulation. There are many examples where deregulation has been subjected to a lower level of scrutiny by the federal review process. Perhaps the most egregious recent example was large-scale changes made to the New Source Review Program under the Clean Air Act that extended grandfathering provision that protect old dirty power plants. Most states include deregulatory actions in their definition of a “rule” that can be reviewed, but states should be vigilant to ensure that regulation and deregulation get the same treatment.

Similarly, federal practice shows a need to balance the treatment of costs and benefits in the drafting and review of economic analysis. Decades ago the federal government placed cost-benefit analysis at the heart of its regulatory review structure. Cost-benefit analysis, with its reliance on economic principles and scientific inputs, helps translate thorny policy decisions into tractable and discrete sets of issues. The technique provides a generally applicable framework for asking the appropriate empirical questions to identify wealth-maximizing regulations. While not the ultimate answer, cost-benefit analysis is an extremely useful tool both to structure agency decisionmaking and to ensure that decisions are made on the basis of data, rather than special interests or partisan politics.

Federal courts have ruled that ignoring significant ancillary benefits can be arbitrary and capricious, and states should take that legal precedent to heart: treat costs and benefits differently at the peril of producing inefficient and legally insufficient regulations.

However, some unfortunate (but correctable) biases have crept into the practice of cost-benefit analysis in federal government. The history of federal practice reveals a tendency to focus more on costs than benefits. But history also reveals that minimizing regulatory costs is insufficient to maximize net benefits. Similarly, there is no sound economic reason to believe that ancillary benefits are more rare than countervailing risks, yet ancillary benefits are often ignored. In the same vein, there is a tendency for agencies to overestimate compliance costs by ignoring the production process changes and technological innovations that may occur in response to new regulation. Federal courts have ruled that ignoring significant ancillary benefits can be arbitrary and capricious,⁵¹ and states should take that legal precedent to heart: treat costs and benefits differently at the peril of producing inefficient and legally insufficient regulations.

Finally, since 1993, the federal Executive Order has directed agencies to consider the distributional consequences of regulation—to assess whether and how a regulation affects certain subpopulations of society. However, that Order treats distributional consequences as a potential “cost” of regulation, which is not analytically sensible and does not integrate distributional analysis into the system of regulatory review. States should learn from federal practice that merely mentioning “distribution” in the legal text is insufficient to encourage serious analysis of distributive impacts.

Notes

- ¹ Jack M. Beermann, *Symposium: The Most Disparaged Branch—Toward a More Responsible Congress?: The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 758-59 (2009).
- ² L. Harold Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79, 84 (1982) (“Executive oversight is more highly developed in some states than in the federal government.”). By 1961, at least two states (Indiana and Nebraska) already required the governor’s approval of substantially all rules. Council of State Governments, *Administrative Rule-Making Procedure in the States* 4 (1961). See Chapter Three, *supra*.
- ³ See Richard J. Pierce, Jr. *How Much Should an Administrative Law Course Accomplish?: A Response to Schotland’s Five Easy Pieces*, 43 ADMIN. L. REV. 123 (1991) (arguing that state agency experience is not generalizable or interestingly different from the federal experience).
- ⁴ Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 554 (2001) (“The point of the characterization is that many state institutions of governance have features that might be characterized as imperfections when measured against widely-accepted notions of democratic governance reflected in federal institutions and their ideals—institutions and ideals that form the backdrop for our conventional understanding of democratic governance. So, taking the federal system as a reference point, state systems of governance may be gauged for imperfections.”).
- ⁵ ARTHUR E. BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* 31-32, 40 (1986).
- ⁶ Overview adapted from Richard L. Revesz & Michael A. Livermore, *Fixing Regulatory Review: Recommendations for the Next Administration* (Policy Integrity Report No. 2, 2008); see also RICHARD L. REVEZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008).
- ⁷ Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).
- ⁸ See *RETAKING RATIONALITY*, *supra* note 6; see also Curtis W. Copeland, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, IN *FEDERAL RULEMAKING AND REGULATION* 148 (Paul Lee, ed. 2010) (describing OIRA’s role as “significant—if not determinative”). Under the Paperwork Reduction Act of 1980, which established OIRA, that office also reviews the information collection burdens that regulations or other agency activity may impose on regulated parties. 44 U.S.C. §§ 3501-3520 (2010). Interestingly, OIRA review under the Paperwork Reduction Act may work at cross-purposes with OIRA review under Executive Order 12,866, because agencies are more likely to try to rely on existing information rather than collect new data from regulated parties, which complicates the production of an up-to-date an accurate analysis of regulatory effects. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-205, *FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS* 28 (2009).
- ⁹ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).
- ¹⁰ Exec. Order No. 13,422, 72 Fed. Reg. 2763 (2007).
- ¹¹ Presidential Memorandum on Regulatory Review, 74 Fed. Reg. 5977 (2009), available at http://www.reginfo.gov/public/jsp/EO/fedRegReview/POTUS_Memo_on_Regulatory_Review.pdf.
- ¹² OIRA, *2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATION* 35 (2010).
- ¹³ Besides Executive Order 12,866, a few additional executive orders also require special regulatory impact analyses or shape the regulatory review process: Executive Order 13,132 requires input from local governments in developing rules with federalism implications; Executive Order 12,898 requires a strategy to address disproportionately high health and environmental effects on minority and low-income populations; Executive Order 13,045 requires special analysis for environmental and safety effects on children; Executive Order 13,211 requires energy impact statements; and so forth. For more on other executive orders, see JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 266 (4th ed., 2006).

- ¹⁴ See Copeland, *The Role of OIRA*, *supra* note 8, at 160-68; GAO-09-205, *supra* note 8, at 6 (reporting that OIRA reviews resulted in changes to 10 of 12 rules in a case study).
- ¹⁵ See Robert W. Hahn & Paul C. Tetlock, *Has Economic Analysis Improved Regulatory Decisions?* (AEI-Brookings Joint Ctr. For Regulatory Studies Working Paper 07-08, April 2007). See also REFORMING REGULATORY IMPACT ANALYSIS (WINSTON HARRINGTON, LISA HEINZERLING, & RICHARD D. MORGENSTERN EDS., 2009).
- ¹⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, REEXAMINING REGULATION: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 13 (2007).
- ¹⁷ See Memorandum from the Institute for Policy Integrity, to the Obama-Biden Transition Project, Jan. 6, 2009 (on presidential action options to respond to "midnight" regulations) (on file with author).
- ¹⁸ See, e.g., OMB, 2004 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATION (2005).
- ¹⁹ LUBBERS, *supra* note 13, at 31.
- ²⁰ *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).
- ²¹ CORNELIUS KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 220-21 (2003).
- ²² *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).
- ²³ U.S. Const. Art. 1 § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States").
- ²⁴ See Jim Rossi, *Institutional Design and Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1184-85 (1999).
- ²⁵ Curtis W. Copeland, *Congressional Influence on Rulemaking and Regulation through Appropriations Restrictions*, in FEDERAL RULEMAKING AND REGULATION, *SUPRA* NOTE 8, AT 33, 36. RIDERS CAN ALSO EXEMPT CERTAIN RULES FROM THE OIRA REVIEW PROCESS.
- ²⁶ William W. Buzbee, *Regulatory Underkill*, <http://www.progressiveregulation.org/perspectives/underkill.cfm> (A "low-visibility means of derailing programs... [T]hey commonly appear without announcement or even an open legislative sponsor... Because these riders do not involve a frontal attack on a popular law, and their advocates may remain unknown, the public seldom knows of these proposal in time to mount an effective opposition."); accord. Copeland, *Congressional Influence*, *supra* note 25, at 45 (explaining that most appropriations riders have little or no legislative history).
- ²⁷ 5 U.S.C. §§ 801-808 (2010) (defining "major" rules and the length of suspension). Agencies do not always follow the instructions to submit all new rules to Congress, a failure which apparently has had little consequence. See Curtis Copeland, CRS R40997, Congressional Review Act: Rules Not Submitted to GAO and Congress (2009).
- ²⁸ Curtis W. Copeland, *Congressional Influence*, *supra* note 25, at 30-31; see also Michael A. Livermore, Inimai M. Chettiar, & Jason A. Schwartz, *The Price of Neglect: The Hidden Environmental and Public Health Costs of Bad Economics* (Policy Integrity Report No. 1, 2008) (discussing congressional disapproval of the ergonomics rule). Some commenters feel that because the CRA applies broadly not just to rules but policy statements, technical manuals, and so forth, "Congress has spread its [review] resources extremely thin." Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 103 (1997).
- ²⁹ Beermann, *supra* note 1, at 758-59 (but noting that "by and large the Act has not been very successful").
- ³⁰ Kerwin, *supra* note 21, at 141.
- ³¹ *Id.* at 140-41 ("Congress may take an interest in a rule under development, creating, at minimum, a liaison function and, at maximum a political dimension that could influence profoundly the content of the rule.").
- ³² *Id.* at 219-20 (citing studies and surveys of congressional staff by Joel Aberbach (1990) and Scott Furlong (1998)).
- ³³ Beermann, *supra* note 1, at 759 ("Congress's review of regulations has not been sufficiently systematic to counteract the increased presidential influence. This tends to reduce the legitimacy of regulation in two ways. First, it reduces democratic influence over the regulatory process when the only accountable official is the President. Second, in the extraordinary case in which Congress does get involved in the regulatory process, suspicions of interest group influ-

ence can be raised regarding what motivated members of Congress to take off the blinders and pay attention in this particular case.”).

³⁴ See Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as an Instrument of Political Control*, 3 J. L. ECON. & ORG. 243 (1987).

³⁵ 2 U.S.C. §§ 1532-1538 (2010).

³⁶ 5 U.S.C. §§ 601-612 (2010); see also Office of Advocacy, U.S. Small Business Administration, Report on the Regulatory Flexibility Act FY 2009 (2010), available at <http://www.sba.gov/advo/laws/flex/09regflx.html>.

³⁷ “Small entities” includes more than small businesses, but small business is the focus.

³⁸ See sources at *supra* notes 35-36.

³⁹ See Curtis Copeland, *The Federal Rulemaking Process: An Overview*, in FEDERAL RULEMAKING AND REGULATION, *supra* note 8, at 122 (citing a 2004 GAO study).

⁴⁰ For example, the Department of Transportation indicates that it does not even bother proposing some rules because it expects that the Office of Management and Budget will not approve them. *Regulatory Reform: Are Regulations Hindering Our Competitiveness? Before the Subcommittee on Regulatory Affairs, House Comm. on Government Reform*, 109th Cong. (2005) (statement of Christopher Mihm, Managing Director, Strategic Issues, Government Accountability Office), available at <http://reform.house.gov/uploadedfiles/7-27-2005%20GAO%20testimony%20Final.pdf>.

⁴¹ Sarah E. Shive, *If You've Always Done It That Way, It's Probably Wrong: How the Regulatory Flexibility Act Has Failed to Change Agency Behavior, and How Congress Can Fix It*, 1 ENTREPREN. BUS. L. J. 153, 158 (2006); COPELAND, AN OVERVIEW, *supra* note 39, at 114.

⁴² Michael R. See, *Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act's Periodic Review Requirement—And Current Proposal to Invigorate the Act*, 33 FORDHAM URB. L. J. 1199, 1200 (2006) (“Unfortunately, over the past twenty-five years, federal regulators have often ignored section 610 and have not conducted periodic reviews of their rules. Even those agencies which review some of their existing rules under section 610 rarely act in response to their reviews. Most of these agencies comply with the letter of the law for only a small percentage of their rules, and they rarely take action beyond publishing a brief notice in the Federal Register. Ironically, when regulators conduct periodic reviews under section 610, they are far more likely to increase the burden of regulation on small entities than to reduce it.”); see also U.S. GOV'T ACCOUNTING OFFICE, GAO/T-GGD-98-64, REGULATORY REFORM: AGENCIES' SECTION 610 REVIEW NOTICES OFTEN DID NOT MEET STATUTORY REQUIREMENTS 1 (1998).

⁴³ For a brief history of federal regulatory review and a discussion of the need for conceptual changes in the governing executive orders, see Revesz & Livermore, *Fixing Regulatory Review*, *supra* note 6. For a discussion of recent abuses of the regulatory review process by the federal government, see Livermore, Chettiar & Schwartz, *Price of Neglect*, *supra* note 28.

⁴⁴ John D. Graham, *The Evolving Regulatory Role of the U.S. Office of Management and Budget*, 1 REV. ENVTL. ECON. & POL'Y 171 (2007), available at <http://reep.oxfordjournals.org/cgi/content/full/1/2/171>.

⁴⁵ Roundtable discussion on regulatory review with the Institute for Policy Integrity, at New York University School of Law, New York, NY (Nov. 17, 2008).

⁴⁶ Graham, *supra* note 44.

⁴⁷ Copeland, *The Role of OIRA*, *supra* note 8, at 171; REVESZ & LIVERMORE, RETAKING RATIONALITY, *supra* note 6.

⁴⁸ See Revesz & Livermore, *Fixing Regulatory Review*, *supra* note 6 (listing experts who attended the roundtable: Rob Brenner, Nancy Ketcham-Colwill, Steven Croley, Adam Finkel, Sally Katzen, Rick Melberth, Richard D. Morgenstern, Vickie Patton, Kathleen Rest, Richard Stewart, and Katrina Wyman).

⁴⁹ See Robert W. Hahn & Paul C. Tetlock, *Has Economic Analysis Improved Regulatory Decisions?* (AEI-Brookings Joint Ctr. For Regulatory Studies Working Paper 07-08, April 2007). See also REFORMING REGULATORY IMPACT ANALYSIS (Winston Harrington, Lisa Heinzerling, & Richard D. Morgenstern EDS., 2009).

⁵⁰ *Regulatory Reform: Are Regulations Hindering Our Competitiveness? Before the Subcommittee on Regulatory Affairs, House Comm. on Government Reform*, 109th Cong. (2005) (statement of Curtis W. Copeland, Senior Fel-

low in Environmental Policy, Competitive Enterprise Institute), *available at* <http://reform.house.gov/Uploaded-Files/7-27-2005%20Copeland%20Testimony.pdf>

⁵¹ Ctr. for Biological Diversity v. NHTSA, 508 F.3d 508, 533 (9th Cir. 2007).

Chapter Five

Principles for Evaluation and Comparison

The overarching goal of regulatory review is to ensure that rules are legal, politically accountable, efficient, and fair, without sacrificing the workability of the rulemaking process.¹ These are potentially contradictory objectives and so require careful balance.² There is no single answer to the question of how regulatory review should be conducted. Different states have different resources and legal structures,³ and inter-jurisdictional policy competition can be good: states should continue to experiment. But some guiding principles can be distilled from the theories and historical practices outlined in the previous four chapters:

- **Regulatory review requirements should be realistic given resources.** Overly complex or unnecessarily repetitive structures are likely to produce more error, confusion, and litigation; to be more expensive; and ultimately to be less effective. Overly ambitious goals will produce inconsistent, arbitrary practices, or will lead to wholly superficial reviews, which wastes money. Agencies may be tempted to avoid burdensome procedures, and so turn to less transparent, less reviewable means of rulemaking (such as ad hoc adjudications or guidance documents). Requirements should be appropriately scaled to available staff and resources, because even if the resulting process is no longer ideal, it is better to at least be able to execute what is on paper. Otherwise, public transparency and rationality suffer. Of course, increasing available resources is always another response.
- **Regulatory review should calibrate rules, not simply be a check against them.** The most appropriate and natural role for regulatory review is to help find the “regulatory sweet spot.” Cost-benefit analysis can help achieve efficient levels of regulation, but that does not always mean reducing stringency. To maximize social welfare, sometimes review should prescribe more lenient rules; other times, stricter rules.
- **Regulatory review should not unnecessarily delay or deter rulemaking.** If the review process drags on too long or is otherwise too cumbersome, agencies will avoid rulemaking and turn to less transparent, less reviewable means, like guidance documents. If routine, non-controversial, and well-designed regulations have to wait for months on end before taking effect, the public loses out on the benefits those rules would have delivered had they been implemented sooner. Regulatory review periods should have clear deadlines, and analytical requirements should not force agencies to expend unreasonable amounts of time or resources.

- **Regulatory review should be exercised consistently, not only on an ad hoc basis.** Relying on public outcry over controversial rules to trigger additional legislative or executive scrutiny can be a useful and justifiable element of the review process. Indeed, some public participation in the review process is advisable. But exclusively relying on such a trigger can lead to both the perception and the reality of regulatory review as simply another access point for special interest politics. Building consistency into the practice, so that every regulation is subject to at least some basic level of review, will not only help guarantee the process's credibility, but will also help ensure the process remains tied to substantive review standards and not dominated purely by special interests.
- **Substantive standards of review are necessary to ensure consistency and to increase accountability.** Given the discretion afforded administrative agencies and central reviewers, as well as the technical nature of many regulatory decisions, regulatory review must be based on objective measurements to guarantee that decisions are transparent and free of special-interest politics. This principle applies both the review of new regulations and the periodic review of existing regulations.
- **At least part of the review process should be devoted to helping agencies coordinate.** The coordination role of regulatory review has long been neglected. While most review structures take a cursory look at whether proposed rules would conflict with other agencies' existing rules, something more is needed to tackle cross-jurisdictional problems and to resolve bureaucratic turf wars. Inter-agency review of new regulations, inter-agency meetings, and common standards to harmonize inter-agency processes can all be beneficial.
- **At least part of the review process should be devoted to combating agency inaction.** The absence of regulation where regulation is necessary can be just as costly to social welfare as overly burdensome regulation. Regulatory reviewers should be empowered to recommend that agencies explore under-regulated areas.
- **Regulatory review should promote transparency and public participation.** There is a delicate balance between the competing goals of transparency and expediency, but regulatory review should not take place in the dark. Review meetings should be open to the public; review decisions and analytical statements should be widely available and should include enough information to allow citizens and interested stakeholders to understand and meaningfully engage in the process. Some form of public participation beyond the standard notice-and-comment period should be actively encouraged.
- **Periodic reviews of existing regulations should be balanced, consistent, and meaningful.** Periodic reviews often focus only on deleting obsolete rules and striking down overly burdensome rules. Without devoting any significant additional resources, the same review process could easily also identify rules that are lacking or where increased stringency would better maximize net benefits. Such opportunities to review rules in a balanced fashion should not be wasted. Periodic reviews should be tailored to available resources so they are meaningful; perfunctory reviews pursuant to a sunset law

are unlikely to be beneficial. And, as mentioned above, periodic reviews should also be guided by substantive standards.

- **Impact analyses should give balanced treatment to both costs and benefits.** When resources are limited, just looking at costs is not the only available response. Indeed, analyzing just the benefits could be equally useful in assessing how effectively an agency is achieving its mission. Ideally, both costs and benefits, including indirect costs and benefits, should be quantified whenever possible; translating costs and benefits into the common metric of money (monetization) is the most straightforward way of promoting equal treatment. Un-quantifiable costs and benefits must be given detailed qualitative descriptions and incorporated into the analysis. That said, carefully setting the threshold for when impact analyses are required, or permitting assessment of costs and benefits in terms of thorough but “rough” proportionality may better accord with realistic constraints on states’ time, resources, data, and expertise. Though cost-benefit analysis is not always a perfect policymaking tool, it is better at promoting welfare and good decisionmaking than most alternatives. The debate should be over how to refine cost-benefit analysis so it is most productive and not biased against rational regulations.
- **Analytical requirements should be meaningfully incorporated into the rulemaking process.** If merely tacked on at the end of the process as a way to justify the choice an agency has already made, analysis is unlikely to achieve its goal of improving the quality of rules. While that kind of post hoc regulatory analysis can play a role in disclosing information and enhancing the public debate, that role still depends on including enough detail on the costs and benefits of various alternatives to let the public understand the rule’s justification. Preparing a sparse analytical statement after the rule’s form has already been finalized does not promote rational decisionmaking, assist the review process, or engage the public.
- **Impact analyses should focus on maximizing net benefits, not just on minimizing compliance costs.** Regulations should be designed to promote overall social welfare and not simply to keep the burdens to the regulated community to a bare minimum. Selecting the lowest-cost regulatory option is not nearly as important as selecting the option that equitably delivers the most benefits to the public.
- **Impact analyses should consider a range of policy alternatives.** Assessing the costs and benefits of a single policy choice in a vacuum cannot help calibrate a rule. Developing a range of reasonable alternatives—more and less stringent versions; performance standards versus design standards versus market-based approaches; no regulation or voluntary approaches—is essential to selecting the option that will best maximize net benefits.
- **Impact analyses should include a meaningful and balanced distributional analysis.** Analyses should not single out just a few select groups (such as small business) for special protection. Instead, analyses should assess how the costs and benefits of regulatory alternatives fall across the entire public, including all vulnerable groups. Though any regulation will inevitably have some winners and some losers, the overall goal of

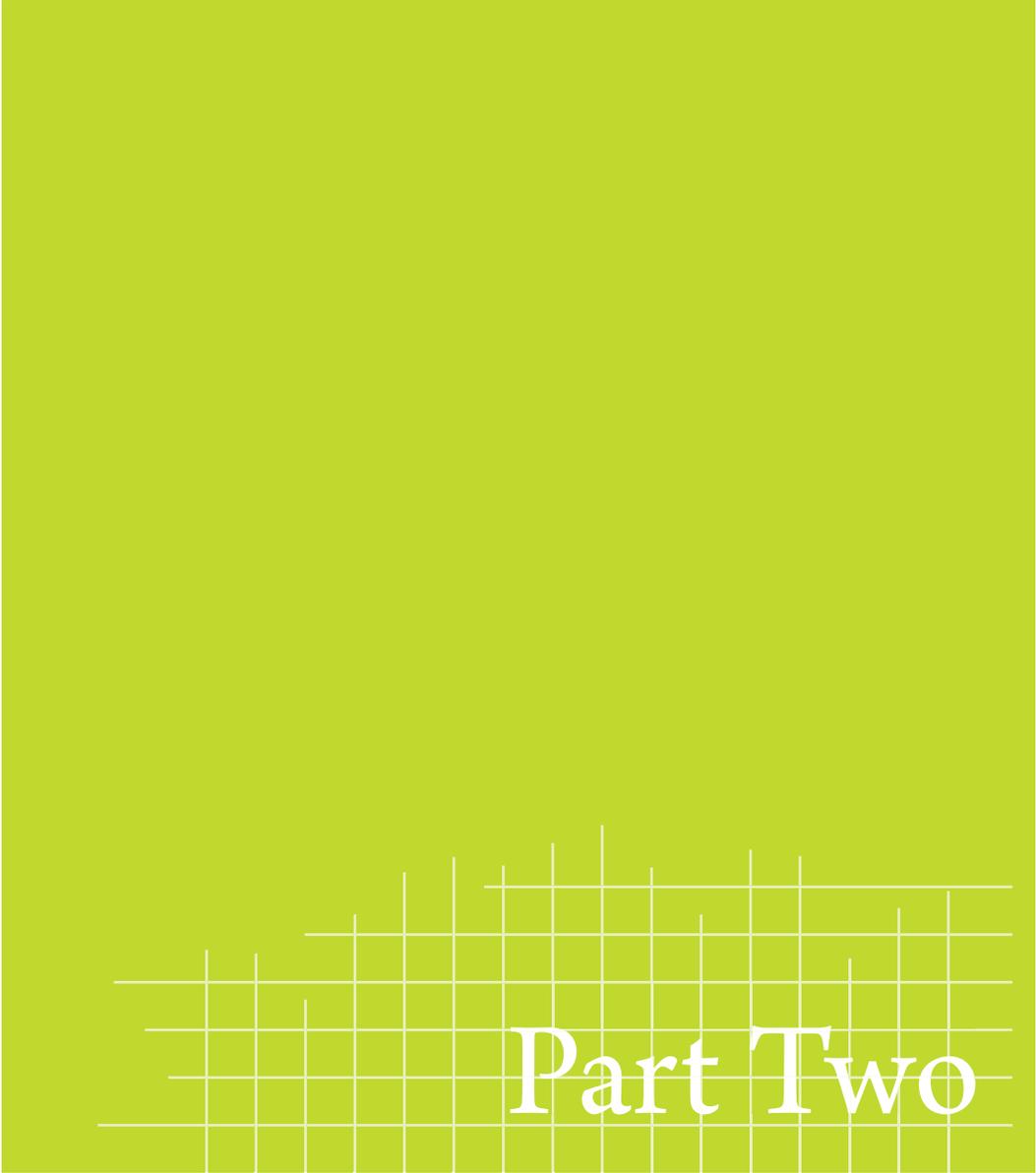
distributional analysis is to further maximize net benefits and, over the long run, advance equity.

These guiding principles focus on high-level objectives and do not detail the specifics of how to achieve a particular outcome. Flexibility is essential so states can tailor their regulatory review structures to their resources and needs, and practical pursuit of these principles may yet reveal some inherent tension. For example, it is theoretically possible to both promote transparency and protect against delay; practically, that balance entails a delicate tightrope walk and requires a state-specific solution.

But even though there is no one-size-fits-all approach to the specific structure and details of state-level regulatory review, all state-level review processes can be evaluated using this list of principles.

Notes

- ¹ *But see* Julie Bundt & Gene M. Lutz, *Connecting State Government Reform with Public Priorities: The Iowa Test Case*, 31 STATE & LOCAL GOV'T REV. 78 (1999). Bundt and Lutz conducted a survey in Iowa and found polled citizens emphasized trustworthy, financially responsible, ethical, and accountable as the most important characteristics of good government; efficient, fair, effective consistently rated somewhat lower; few rated “utilizes data” as a top characteristic. *Id.* at 84-86, 88. That said, lower-ranked traits like efficiency may be interlinked with more desired traits, like trustworthiness.
- ² *See* COUNCIL OF STATE GOV'TS, ADMINISTRATIVE RULE-MAKING PROCEDURE IN THE STATES 11 (1961) (“If trends further to encumber administrative agencies are carried too far, the very purposes and objectives for which the administrative process has been resorted to—speed, flexibility, and expertise—will be defeated.”).
- ³ This report will not generally question which review structures might be unconstitutional, except to say that inherently unconstitutional structures are a bad policy choice, since the legal uncertainty undermines the legitimacy of the system. *See generally* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1226-27 (1999); *id.* at 1231-32 (noting that “state legislatures hold on dearly to rules review mechanisms, such as the legislative veto. As a practical matter, a state legislature’s rules review mechanism, even if unconstitutional, is unlikely to be challenged successfully because any agency doing so is almost certain to be subject to retaliation”); *id.* at 1237 (noting that legislative review has not been fully litigated in many states).



Part Two

Where We Are Now

It would be an impossible task to present a complete, thorough, and accurate survey of all the statutory [administrative] law in the fifty states.

—Frank Cooper (1965)¹

Chapter Six

Research Methodology

The methodology outlined in this chapter explains how primary and secondary sources were collected and how actors involved in regulatory review were interviewed.

Fifty-Two Jurisdictions

In addition to studying the fifty states, for a truly comprehensive analysis of state-level review structures this project also surveyed the laws of the District of Columbia and the Commonwealth of Puerto Rico. Though Washington, D.C. was largely included because of the unique review power of the U.S. Congress over its local laws, its inclusion does raise the question of whether large municipalities generally have their own regulatory review structures. Indeed, some cities, such as New York City, have explored regulatory review practices.² However, given the complex relationships between municipal and state governments and the sheer number of local governments, this survey does not cover any municipal regulatory review structures.

Additionally, the quasi-sovereign Native American nations have not been surveyed. Besides Puerto Rico, this survey does not include other unincorporated U.S. territories. Guam, American Samoa, and the U.S. Virgin Islands have sometimes been included in past summaries of state-level review practices,³ and they might be surveyed in any future updates of this work.

Existing Literature

This project began with an exhaustive study of existing research on the issue of state-level regulatory review. A thorough search of academic publications—including law journals, public policy journals, books, and other published reports—was conducted.

A targeted number of law and public policy journals were selected for a complete article-by-article review of the last ten to twenty years, depending on availability and relevance: *Administrative Law Journal of the American University*, *Administrative Law Review*, *American Political Science Review*, *American Review of Public Administration*, *Legislative Studies Quarterly*, *Political Research Quarterly*, *Political Science Quarterly*, *Politics and Policy*, *Public Administration Review*, *Public Administration Quarterly*, *Regulation*, *State and Local Government Review*, *State Politics and Policy Quarterly*, and the *Yale Journal on Regulation*. At least one major law journal in each state was searched for terms relating to general and state-specific regulatory review. Other law journals, public policy journals,

and books were also searched for key terms, using a number of different search engines (including LexisNexis, Westlaw, Proquest, HeinOnline, WorldCat, and the Social Science Research Network).

In addition to the academic literature, the review focused on national or interstate groups that work on issues of state-level government and have independently produced relevant studies or reports, such as the National Association of Secretaries of State (and particularly its Administrative Codes and Register Section), the National Conference of Commissions on Uniform State Laws, the Council of State Governments, the National Association on Administrative Rules Review, the National Governors Association, the National Conference of State Legislators, and the U.S. Small Business Administration's Office of Advocacy. Searching for materials published by national or state bar associations did not yield any significant new finds.

Government studies, both at the national level by entities like the Government Accountability Office and the Congressional Research Service, and at the state level by task forces on the regulatory process, were searched. Review entities and task forces commissioned by individual states (in particular those of Virginia and California) have also published useful summaries of state-level practices, both generally and specific to their states.

Recent scholarship demonstrating substantive and institutional biases in the federal rulemaking and review process also added significant value to examining state-level programs.

Finally, while a general news search for articles about trends in state-level regulatory review failed to yield useful results, the efforts did lead to an important outgrowth of the literature review: namely, news articles on individual states. Searching for the names of state-level regulatory review bodies (such as Kentucky's Administrative Regulation Review Subcommittee) in LexisNexis and other news aggregators returned many valuable case studies of particular (and often controversial) instances of regulatory review actions, which informed the state-by-state summaries.

State Laws and Other Primary Sources

To describe the current landscape of regulatory review requirements as they exist on paper, this project next collected all relevant laws and official guidelines from the fifty-two jurisdictions. Most states have used statutes to structure their regulatory review process, enacting some version of a state administrative procedure act. But executive orders have been an equally powerful vehicle for creating and amending the regulatory review process.

State constitutions, statutory compilations, and administrative codes were fully searched, as were collections of executive orders. In some states, additional documents shed light on the legislative history of regulatory review statutes, as well as on relevant statutory proposals currently before the legislature or that were considered but ultimately not enacted. Guidance documents, reports, memoranda, and standard forms developed for the regulatory review process were also pulled from government websites. The vast majority of documents were identified and collected by independent research into the state regulatory process; in some cases, additional sources were suggested or supplied by the recipients of our surveys (see below).

For several states, the meeting agendas and minutes of the regulatory review bodies are publicly

available, and those records reveal one key perspective of the review process. More generally, websites for those review bodies often contain valuable summaries, forms, or other background information. Similarly, regulatory impact analyses and other rulemaking documents, as well as notices and announcements published in the State Register or analogous periodicals, can provide useful case studies of how the regulatory review process was carried out in particular instances.

Of course, extrapolation from public records and case studies must be done carefully, since many aspects of the regulatory review process take place “behind the scenes, relatively invisible.”⁴ Still, such sources offer an invaluable glimpse into how regulatory review sometimes works in practice.

In several states, important court cases have developed around the regulatory review process (particularly with respect to the legislative veto), and such cases were studied.

Survey of State Actors and Stakeholders

Carefully cataloging how regulatory review is supposed to be conducted according to a state’s laws is of limited analytical value if the hypothetical structure designed on paper bears little resemblance to actual practices. To begin to understand the reality of regulatory review in the states, this project surveyed government officials and public stakeholders involved in the regulatory review practices of all fifty-two jurisdictions.

This study did not attempt to conduct a statistical survey: this was not a data-gathering survey in support of a quantitative analysis. Rather, the purpose of the survey was to generate qualitative descriptions of the review process, to complement analysis of laws as they exist “on paper.” Questionnaires were designed both to help confirm that our “on paper” study was comprehensive and up-to-date, and also to generate vital information about how review is conducted—how often? by whom? under what guidance?—that would be difficult or impossible to obtain strictly through a “paper” search of laws and regulations. At times, the questionnaires asked for responses with subjective terms, like whether informal contact between rulemaking agencies and reviewing entities occurs “rarely,” “sometimes,” or “frequently.” Though imprecise, such subjective measures are commonly used in surveys of the state administrative process, and they are appropriate in cases where “it is the perceptions of administrators who create the ‘enacted environment’ within which administrators function.”⁵ In other words, whether an agency administrator believes that the legislature influences the rulemaking process “frequently” can be as revealing as whether the legislature actually influences the rulemaking process “frequently” by some quantitative measure.

For reasons of practicality, there was no attempt to generate a random sample or to survey a sufficiently large population to enable quantitative analysis. Instead, the survey first targeted government officials responsible for regulatory review functions in every jurisdiction. For each jurisdiction, a reviewing body or bodies were identified where possible; where not immediately apparent, initial contact was made with the state’s attorney general, secretary of state, governor’s office, legislature, or regulatory agencies, as appropriate, who then helped to identify the proper contacts. Surveys were distributed primarily by email, with follow-up contacts made by telephone, e-mail, and in some cases postal mail. A minority of respondents preferred to participate by telephone interview.

At least one survey was collected from every state. In states with multiple reviewing bodies, attempts were made to collect multiple surveys, with an emphasis on those reviewers with the most substantive or frequent reviews.⁶ A small number of reviewers refused to participate or were only able to return partial responses. Time and resources were again possible limitations, but political concerns may also have been a factor. For example, Virginia's Joint Commission on Administrative Rules felt too many questions had "political connotations" they could not address.⁷ (But note that other surveys were collected for Virginia.)

This survey process did not generally collect more than one response per reviewing entity. Often it appeared that a mid-level staff member would complete the survey and have it reviewed by the entity's leader, head of legal services, or some other senior official for final approval before submission. Other times, it was evident that the senior official in charge of review functions directly completed the questionnaire.

Regardless, drawing generalized conclusions about statewide practices from the opinions of just one survey per reviewing entity has risks. For example, officials may be prone to sugar coat their evaluations of their review processes, either to make themselves or their state look good, or to prevent any sanctions from current or future supervisors. Moreover, as an initial and informal survey of New York State revealed, expertise in cost-benefit analysis and comprehension of the regulatory review process may vary widely between agency heads and the staff-level employees who actually conduct the reviews. That said, when used carefully and appropriately, such surveys can offer tremendous detail and perspective on the actual practice of regulatory review.

A select number of states were identified for additional outreach efforts, due to the complexity, scale, or unique features of their processes: Arizona, California, Florida, Indiana, Michigan, New York, Pennsylvania, and Virginia. For these states, follow-up questionnaires were developed for the reviewing bodies in those states, and additional surveys (see Appendix) were designed for both the regulatory agencies and the non-governmental organizations most active in that state's regulatory review process. Contacting these additional government officials and public stakeholders offered new perspectives on the regulatory review process. Active regulatory agencies and non-governmental organizations were identified from a review of the state register announcements, from the Leadership Directories online listings of state government and associational contacts, and from internet searches, and additional names were provided by other survey recipients.

Collecting surveys from non-governmental organizations was the least successful step of this research effort. Identifying those groups actively involved in regulatory review as distinct from the broader rulemaking process proved difficult. To start, many advocacy groups do not engage in regulatory review.⁸ And while the questionnaires' preamble explained the distinction between regulatory review and the broader rulemaking process in each state, both advocacy groups and trade associations sometimes conflated the two.⁹ The overly complex structure of some review systems and the limited resources of some groups to participate in the review process are both partly to blame for non-government groups' general unfamiliarity with their state's review system. Regardless, some surveys collected did not contain much useful information on the regulatory review process.

Over 120 surveys were collected in total—at least one from every jurisdiction. For a list of the entities successfully surveyed in the various jurisdictions, please see the Appendix.

Limitations

States continually think of ways to improve their regulatory review structures, and they may at any point adopt new legislation, issue new executive orders, or tweak their guidelines. Unfortunately, any analysis must freeze the states' bodies of law in a single point in time and cannot hope to incorporate the very latest or future amendments to the legal structure. This report attempts to be as up-to-date as possible and incorporates extremely recent developments where possible. But generally, this report can only claim reasonable accuracy and comprehensiveness through January 2010.

As discussed above, this report also only begins to describe regulatory review structures as they work in practice. Over-generalizing from the limited information available—surveys, minutes from regulatory review committees, examples of regulatory impact analysis, and news reports—is dangerous, especially since much of the regulatory review process can be expected to occur behind the scenes, invisibly. This report can offer case studies, revealing glimpses, and preliminary conclusions, but it cannot definitively characterize the practice of regulatory review in any state.

Notes

- ¹ FRANK COOPER, *STATE ADMINISTRATIVE LAW: VOL. ONE*, at 5 (1965).
- ² New York City Council, Regulatory Review Panel, http://council.nyc.gov/html/action_center/rrp.shtml.
- ³ COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES* 147-153, TBLs. 3.35 & 3.26 (vol. 41, 2009 ed.). The Council of State Governments reports that American Samoa's legislative body can review existing rules in standing committees, but also notes that no law can be enacted except by statute. The standing committees of Guam's legislative body can review proposed rules within forty-five days of their submission, but can only disapprove of rules by enacting standard legislation. The U.S. Virgin Islands have no formal review by the legislative or executive branch. The Commonwealth of Northern Mariana Islands and other unincorporated territories were not included in the *Book of the States* or other surveys of state-level review practices.
- ⁴ ARTHUR E. BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* 493 n.27 (1986).
- ⁵ Neal Woods, *Promoting Participation? An Examination of Rulemaking Notification and Access Procedures*, 69 *PUB. ADMIN. REV.* 518 (2009) (citing Brudney and Hebert (1987)).
- ⁶ Except that in states where multiple standing legislative committees have review authority over various agencies, no attempt was made to contact them all individually.
- ⁷ Interview with Elizabeth Palen, Virginia's Joint Comm'n on Admin. Rules staff, Feb. 10, 2010.
- ⁸ See Michael A. Livermore, *Is It a Problem that More Industry Groups Are Meeting with Key Regulatory Officials Than Enviro's?*, *Grist*, Mar. 8, 2010, available at <http://www.grist.org/article/2010-03-08-is-it-a-problem-that-industry-groups-are-meeting-with-regulators>.
- ⁹ See, e.g., Survey from Florida Assoc. of Insurance Agents (2009, on file with author).

Chapter Seven

Grades and Comparative Charts

Based on the research and analysis presented in the individual state-by-state summaries (see Chapter Eight), this chapter evaluates each state’s performance, compares the various structures states have selected, and identifies some patterns and trends. The clear conclusion is that while states are continuing to experiment, current structures do not fully take advantage of regulatory review’s potential, and there is substantial room for improvement across the country.

Guiding Principles Grades

Each of the fifteen principles distilled in Chapter Five (the substantive standards principle applies to the review of both new and existing regulations) can be used to evaluate and grade the states’ regulatory review structures on a fifteen-point scale. States with review practices consistent with twelve to fifteen guiding principles receive an “A,” for demonstrating a solid structure. Achieving eight to eleven principles earns states a “B,” indicating there is room for improvement. A “C” designates states that comply with four to seven principles: these states show some promise, but there are clear problem areas. Finally, if the review structure matched three or fewer guiding principles, states are given a “D” and are encouraged to rethink and rebuild their approaches.

The grading system is, inevitably, subjective. To the degree possible, grades are based on the actual practice of regulatory review in each individual state, but collecting the entire universe of relevant data on practices would be impossible. To a certain extent, simply selecting a state for more targeted and deeper research increased the chances of uncovering at least some evidence of inconsistent or imperfect practices; states that made less information publicly available may have had an easier time hiding their mistakes. In particular, in cases of incomplete or inconclusive evidence of whether a structure on paper was used consistently in practice, states were typically given the benefit of the doubt. Pluses and minuses were sometimes awarded to or stripped off of the base letter grades if a state was close on several factors.

Earning a check mark on a particular guiding principle does not indicate perfection: though this report did not employ a grading curve, as mentioned above, states were sometimes given the benefit of the doubt. Every state—even those that score relatively high—can use improvement. For example, the federal government would do quite well if it were graded on this scale, even though the federal system is far from perfect. Nor does a state’s failure to match a particular guiding principle mean that its process is irredeemable. Each state demonstrated some positive and some less ideal features, but a check mark was only given if, for that category, the good

outweighed the bad.

Final grades broke down as follows:

Table 3	Guiding Principles Grade
A	0 states
B+	1 state
B	2 states
B-	4 states
C+	6 states
C	10 states
C-	2 states
D+	5 states
D	15 states
D-	7 states

Seven states scored in the B-range: Iowa (B+); Vermont and Washington (B); and Michigan, New Hampshire, Pennsylvania, and Virginia (B-). Seven jurisdictions also scored a D-, having met none of the guiding principles: Alaska, Delaware, the District of Columbia, Georgia, Louisiana, New Mexico, and Texas. The average grade was about a D+, and the most frequently awarded grade was a D. Across the nation, regulatory review structures are in clear need of an overhaul.

Specific problem areas begin to emerge when scores are viewed by guiding principle:

Table 4	Number of States Achieving Each Guiding Principle
Principle #1	Reasonable Requirements Given Resources: 11 states
Principle #2	Structure Calibrates Rules, Does Not Just Check Them: 11 states
Principle #3	Protection Against Delaying or Deterring Rules: 19 states
Principle #4	Review is Exercised Consistently, Not Ad Hoc: 30 states
Principle #5	Review Is Guided by Substantive Standards: 18 states
Principle #6	Review Promotes Inter-Agency Coordination: 5 states
Principle #7	Review Combats Agency Inaction: 13 states
Principle #8	Review Promotes Transparency and Participation: 20 states
Principle #9	Periodic Review is Guided by Substantive Standards: 18 states
Principle #10	Periodic Review is Balanced and Consistent: 4 states
Principle #11	Analysis Treats Costs and Benefits Equally: 11 states
Principle #12	Analysis Is Integrated into Decisionmaking: 14 states
Principle #13	Analysis Focuses on Maximizing Net Benefits: 7 states
Principle #14	Analysis Considers a Range of Alternatives: 14 states
Principle #15	Analysis Includes a Balanced Distributional Assessment: 7 states

Most states struggle to keep their review structures reasonable given resources. Some states have multiple, possibly duplicative layers of review that agencies feel are too cumbersome. In many more states, agencies do not have the time, data, staff, or motivation to consistently produce high-quality analytical statements. For example, California’s Department of Insurance

regulates an industry that takes in \$130 billion in insurance premiums, and yet the agency lacks the resources it needs to conduct the optimal level of analysis before regulating.¹ In times of budget cuts and economic hardship, it is all the more important for government to make sure its regulations maximize benefits and operate efficiently.

Sparse and inconsistent impact statements (especially on quantifying and describing benefits), combined with the failure in most states to emphasize the goal of maximizing net benefits, inevitably means that most state reviews operate more as gatekeepers than as calibrators: rules are rejected for being too burdensome or illegal or beyond statutory authority, but are far less often refined and improved to enhance social welfare.

Continuing that theme, reviews do not frequently target agency inaction. Very few states grant their reviewers clear authority to recommend new regulations to agencies. Nor do many review structures help coordinate inter-agency conflicts.

Periodic review remains a weak spot, with many states relying at most on perfunctory reviews every few years or pro forma re-adoptions whenever rules are scheduled to sunset.

Finally, balanced distributional analysis is exceedingly rare. While the vast majority of states have some special protections in place to analyze and reduce burdens to small businesses, few states assess whether those small business exemptions are cost-benefit justified or really scrutinize how rules might impact other vulnerable populations.

A few patterns are more promising. For example, in states with regulatory review structures, many of the reviewers do at least meet regularly to consistently apply substantive standards, with meetings and records open to public inspection and participation.² But all in all, there is certainly room for improvement nationwide.

Chart 1: Guiding Principles and Grades	OVERALL REVIEW STRUCTURE			EXECUTIVE/LEGISLATIVE/INDEPENDENT REVIEW					PERIODIC REVIEW		ANALYTICAL REQUIREMENTS					GUIDING PRINCIPLES GRADE 12-15 = A (Solid Structure) 8-11 = B (Room for Improvement) 4-7 = C (Some Promise, but Problem Areas) 0-3 = D (Rethink and Rebuild Structure)
	Reasonable Requirements Given Resources	Calibrates Rules, Does Not Just Check Them	Protects Against Delaying or Detering Rules	Exercised Consistently, Not Ad Hoc	Guided by Substantive Standards	Promotes Inter-Agency Coordination	Combats Agency Inaction	Promotes Transparency and Participation	Guided by Substantive Standards	Balanced, Consistent, and Meaningful	Balanced Treatment of Costs & Benefits	Integrated into Decisionmaking Process	Focused on Maximizing Net Benefits	Consideration of Range of Alternatives	Balanced Distributional Analysis	
Alabama	X	✓	✓	X	X	X	X	X	X	X	✓	X	✓	✓	✓	C (but unclear whether analytical requirements are consistently achieved in practice)
Alaska	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (review tools are powerful but not ideally designed)
Arizona	✓	X	✓	✓	✓	X	X	✓	X	X	X	X	X	✓	X	C (as epitomized by current moratorium, Arizona tends to view rules as burdens)
Arkansas	✓	X	X	X	X	X	✓	✓	X	X	X	X	X	✓	X	C- (should systematize legislative review, periodic review, and analysis)
California	X	X	X	✓	✓	X	X	X	X	X	X	X	X	X	X	D (agencies should be given the guidance and resources to conduct better analysis)
Colorado	X	X	X	✓	✓	X	X	✓	X	X	✓	X	X	✓	✓	C+ (balanced analytical requirements, but scope and timing of review should be rethought)
Connecticut	X	X	✓	✓	X	X	✓	X	X	X	X	X	X	X	X	D+ (review tools are powerful but not ideally designed)
Delaware	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (essentially no review structure exists)
District of Columbia	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (besides attorney general review for legality, no consistent review mechanism exists)
Florida	X	X	✓	✓	X	X	X	✓	✓	X	X	✓	X	✓	X	C (entire process should focus on maximizing net benefits, not just reducing regulatory costs)
Georgia	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (legislative review exists as a sledgehammer that is rarely picked up; no real analysis)
Hawaii	X	X	✓	✓	X	X	X	✓	✓	X	X	✓	X	X	X	C (resources could be spent on deeper, more balanced analysis, rather than multiple, duplicative reviews)
Idaho	X	X	X	✓	X	X	X	X	X	X	X	X	X	X	X	D (executive branch review should be on the books, transparent, and focused on maximizing benefits)
Illinois	X	X	✓	✓	✓	X	X	✓	✓	X	X	X	X	X	X	C (review committee and analysis both consciously focused on reducing burdens, not maximizing benefits)
Indiana	✓	X	✓	✓	X	X	✓	X	✓	X	X	✓	X	✓	X	C+ (analysis needs to consider benefits, and legislative review needs more resources to be meaningful)
Iowa	X	X	X	✓	X	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	B+ (analytical consistency needs improvement, and multiple reviews may focus too much on checking)
Kansas	✓	X	X	✓	X	X	X	✓	X	X	X	X	X	X	X	D+ (review is advisory only, but still could focus more on maximizing net benefits)
Kentucky	X	X	X	X	X	X	✓	X	X	X	X	X	X	X	X	D (still plenty of review power, but should be exercised transparently and with emphasis on net benefits)
Louisiana	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (legislative review exists as a sledgehammer that is rarely picked up; no meaningful analysis of benefits)
Maine	X	X	✓	✓	✓	X	✓	✓	✓	X	X	✓	X	X	X	C+ (analysis needs to consider benefits, and legislative review needs more resources to allow calibration)
Maryland	X	X	✓	✓	X	✓	X	✓	✓	✓	X	X	X	X	X	C (solid periodic review, but weak legislative review and analytical requirements)
Massachusetts	X	X	✓	✓	X	✓	X	X	X	X	X	✓	X	X	X	C- (limited analysis and limited transparency)
Michigan	X	✓	X	X	X	X	✓	X	✓	X	✓	✓	✓	✓	✓	B- (strong analytical requirements; executive review needs standards and transparency)
Minnesota	X	✓	X	✓	X	X	X	X	✓	X	X	✓	X	X	✓	C (governor's review lacks transparent standards; "net benefits" language from Exec. Order should be revived)
Mississippi	X	X	X	X	X	X	X	X	X	X	✓	✓	X	✓	X	D (analytical requirements show promise, but overall regulatory review is non-existent)
Missouri	X	X	✓	X	X	X	X	X	X	X	X	X	X	X	X	D (analysis and review not well-designed to calibrate rules and maximize net benefits)

Chart 1: Guiding Principles and Grades	OVERALL REVIEW STRUCTURE			EXECUTIVE/LEGISLATIVE/INDEPENDENT REVIEW					PERIODIC REVIEW		ANALYTICAL REQUIREMENTS					GUIDING PRINCIPLES GRADE 12-15 = A (Solid Structure) 8-11 = B (Room for Improvement) 4-7 = C (Some Promise, but Problem Areas) 0-3 = D (Rethink and Rebuild Structure)
	Reasonable Requirements Given Resources	Calibrates Rules, Does Not Just Check Them	Protects Against Delaying or Detering Rules	Exercised Consistently, Not Ad Hoc	Guided by Substantive Standards	Promotes Inter-Agency Coordination	Combats Agency Inaction	Promotes Transparency and Participation	Guided by Substantive Standards	Balanced, Consistent, and Meaningful	Balanced Treatment of Costs & Benefits	Integrated into Decisionmaking Process	Focused on Maximizing Net Benefits	Consideration of Range of Alternatives	Balanced Distributional Analysis	
Montana	X	X	✓	X	X	X	✓	✓	X	X	✓	X	✓	✓	✓	C+ (scope of analyses should be broader; legislative review needs consistency and standards)
Nebraska	X	X	X	✓	X	X	X	X	X	X	X	X	X	X	X	D (executive review should be more transparent and based on standards that promote maximizing benefits)
Nevada	X	X	X	✓	✓	X	X	✓	X	X	X	X	X	X	X	D+ (has been reforming its process in recent years, but still needs improvement)
New Hampshire	✓	✓	✓	✓	✓	X	✓	✓	X	X	✓	X	X	X	X	B- (periodic review and analytical requirements need to be better designed)
New Jersey	X	X	X	X	✓	X	✓	X	X	X	X	X	X	X	X	D (process on paper does not translate to effective practice)
New Mexico	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (no review structure exists)
New York	X	X	X	✓	✓	X	✓	X	X	X	X	X	X	X	X	D+ (plenty of review power, but must be exercised more transparently and with emphasis on net benefits)
North Carolina	✓	✓	X	✓	X	X	X	X	X	X	✓	✓	✓	✓	X	C+ (strong analysis with appropriate threshold; but review needs to work on transparency and delay)
North Dakota	✓	X	X	X	X	X	✓	X	X	X	X	X	X	X	X	D (analysis and review not well-designed to calibrate rules and maximize net benefits)
Ohio	X	X	✓	X	✓	X	X	X	✓	X	X	X	X	X	X	D+ (review is advisory only, but still could focus more on maximizing net benefits)
Oklahoma	X	X	✓	X	X	X	X	X	X	X	X	X	X	X	X	D (plenty of review power, but must be exercised more transparently and with emphasis on net benefits)
Oregon	X	X	✓	✓	✓	X	X	X	✓	X	X	✓	X	X	X	C (entire process should focus on maximizing net benefits, not just reducing regulatory costs)
Pennsylvania	X	✓	X	✓	✓	X	X	✓	✓	X	X	✓	X	✓	✓	B- (review could be streamlined; analytical consistency and balance need improvement)
Puerto Rico	✓	X	✓	✓	✓	X	X	✓	✓	✓	X	X	X	X	X	C+ (needs to expand beyond just small business analysis and review)
Rhode Island	X	X	✓	X	X	X	X	X	✓	X	X	X	X	X	X	D (needs to expand beyond just small business analysis and review)
South Carolina	X	X	X	X	X	X	X	X	✓	X	✓	X	X	X	X	D (legislative review is inconsistent, and analytical requirements are not rigorously enforced)
South Dakota	X	✓	X	✓	X	X	X	✓	X	X	X	X	X	X	X	D (plenty of review power, but not exercised consistently or with emphasis on net benefits)
Tennessee	X	X	X	X	✓	X	X	X	X	X	X	X	X	X	X	D (though future practice could improve, currently analysis is weak and review is inconsistent)
Texas	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (essentially no review structure exists, and analytical requirements are not ideally designed)
Utah	X	✓	X	✓	✓	X	✓	✓	X	X	X	X	X	X	X	C (sunset likely wastes resources; should reinvigorate what were balanced analytical requirements)
Vermont	✓	✓	✓	✓	✓	✓	X	✓	X	X	✓	X	X	✓	X	B (compliance with analytical requirements needs to be more consistent)
Virginia	✓	✓	X	✓	✓	X	X	✓	✓	X	X	✓	✓	X	X	B- (with more resources, analysis could be fuller and more balanced)
Washington	X	X	X	X	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	B (strong analytical practices, but review process needs to improve consistency)
West Virginia	X	X	X	✓	X	X	X	X	X	X	X	X	X	X	X	D (analysis and review not well-designed to calibrate rules and maximize net benefits)
Wisconsin	✓	✓	X	✓	✓	X	X	X	✓	X	X	X	X	X	X	C (current analytical requirements have little practical effect on rulemaking process)
Wyoming	X	X	X	✓	X	X	X	X	X	X	X	X	X	X	X	D (no analytical requirements, and too much review happens behind the scenes)

Comparative Structures

The next series of charts boils the states' regulatory review structures down to their most essential elements and enables comparison between states, federal practice, and model recommendations. These charts and the summaries presented below mostly reflect the legal requirements as they exist on paper, though are modified in cases where practice clearly contradicts or moves beyond the technical requirements.

Executive Review of New Rules: 16 states require their attorney general's office to approve all rules for legality, and 30 states grant the governor or some executive agency review powers. Besides the attorney general, executive reviewers are often given considerable discretion in exercising their powers, with few substantive standards or criteria for review established by law. Though a few states only allow executive reviewers to comment on rules, and Iowa gives its governor a burden-shifting objection power, most states that employ executive review have opted for either mandatory approval or a rescission/veto power.

Legislative Review of New Rules: Though all legislatures can "review" rules by enacting new bills to change statutory authority, 46 jurisdictions have granted their legislature at least some additional review powers (though a few are quite limited or essentially inactive). 28 use some form of a dedicated review committee to exercise the authority. States often define a specific set of criteria for legislative review of new rules, but equally often use terms like "necessity" and "authority" that are vague and somewhat open to interpretation. While a few states only have advisory disapproval powers, many have experimented with other more powerful review mechanisms. 8 states allow for some form of expedited disapproval mechanism, in which the standard legislative process of bicameral passage and executive presentment is somehow simplified, sped up, or prioritized. In 6, a formal objection from the legislature or review committee will shift burdens at any subsequent trial on the rule's validity. In 18 states, new rules either can be or automatically are temporarily suspended to allow for legislative review—sometimes for up to several months while the legislature is not in session. And 16 states employ some form of legislative veto or mandatory approval. Veto/approval powers are sometimes granted by constitution, sometimes claimed in statute as a legislative right, and sometimes creatively exercised through some back-door mechanism, like an annual sunset review. Only Nevada requires affirmative legislative approval of all individual rules.

Independent Review of New Rules: For 12 states, some other entity has review authority over regulations. These reviewers are typically designed to be independent bodies, not susceptible to political influence. However, most individuals are appointed to these bodies by political actors, and so have been accused of partisanship. What does distinguish this group of reviewers is that both the governor and the legislature may have a direct role in appointing members, and once appointed, members may not be removed without cause. Typically, these reviewers have limited jurisdictions, for example to review only rules with small business impacts. But in 4 states—California, Minnesota, Pennsylvania, and North Carolina—independent reviewers have more generalized authority over new rules. Plus, the U.S. Congress reserves the right to review any law of the District of Columbia.

Periodic Review: In 30 states, agencies are encouraged or required to reevaluate their existing regulations periodically, typically in the range of every two to ten years. In 28 states, some review entity can either comment on those periodic assessments performed by agencies, or else can directly review rules themselves, at their own discretion or when petitioned

by the public. Criteria for these periodic reviews, when they are defined, usually focus on identifying rules made obsolete by statutory changes, rules that are no longer appropriate given changing technology or economic conditions, rules that have outlived their necessity, rules that have attracted public criticism, and rules that are too burdensome. There are typically few consequences of these review requirements, with agencies needing to do little to justify a rule's continued existence. In 5 states (not counting states that use sunset periods as a de facto legislative veto), rules automatically sunset after a period of time, but agencies can generally re-adopt the same rule. In 9 states, a review entity has some authority to rescind existing rules.

Impact Analyses: 45 states require some form of economic impact analysis (besides specialized reviews like regulatory flexibility analysis). Frequently these requirements apply across the board to all new regulations, but in 12 states analytical requirements are either triggered or amplified by a public or governmental petition, and in 9 states a threshold limits the heaviest analytical burdens to a class of "major" rules—but thresholds range from \$500 to \$20 million. Fiscal impacts to government funds and revenues are the most common target of analysis, in 43 states. The economic costs and benefits to private or regulated parties are assessed in 38 states. Only 21 states require analysis of social costs and benefits. Though analysis of alternatives is a very common feature in regulatory flexibility statements, it appears less frequently in the more general economic impact statements, and when it does the emphasis is usually on identifying the least-cost method to achieve the regulatory purposes. Similarly, though the distribution of costs and benefits to different sized businesses is the hallmark feature of regulatory flexibility statements, broader and more balanced distributional assessments are much more rare.

Few states have clear, mandatory policies that rules should maximize net benefits. In 22 states, rule reviewers can comment on or approve impact analyses. While several states allow the public to challenge impact analyses in courts (often with agencies protected for good faith efforts to comply; court challenges are not reflected in the comparative chart or generally discussed in this report), few states allow the public to challenge analyses more directly.

38 states provide for some additional analysis to help agencies minimize regulatory burdens, particularly on small businesses. Only in 12 states is additional analysis limited to cases of a substantial impact to small entities or by specific request for analysis. For states with regulatory flexibility analysis, most require agencies to pursue small business exemptions where feasible, legal, and consistent with statutory objectives. Only in 12 states are agencies instructed to weigh small business exemptions against the negative public impact of such exemptions.

Chart 2: Executive Review	Source of Power	REVIEWERS		OPPORTUNITIES FOR REVIEW		CRITERIA				POWERS						
		Attorney General Approves All Rules for Legality	Other Executive Reviewers (rest of chart refers only to these reviewers' powers)	Coverage	Timing	Legality and/or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Return with Comments	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Veto with Concurrence of Other Branch	Objection Shifts Burdens at Trial	Temporarily Suspend	Mandatory Approval or Veto Power
MSAPA 1981	Statute		Governor, advised by Rules Counsel	May terminate any rulemaking	May act at any point				✓							✓ Governor may summarily terminate any pending rulemaking
MSAPA 2007 Draft	Statute	✓	Governor	May terminate any rulemaking	When rule is proposed				✓				States can let governor either (1) veto or (2) issue objection that shifts burden at trial		States can let governor either (1) veto or (2) issue objection that shifts burden at trial	
MSAPA 2010	Statute		Appropriate executive agency reviews impact analysis	Scope unclear												
Model RFA	Statute		Department of Economic and Community Development (or equivalent)	Advise agencies on compliance with small business impact analysis												
Federal Practice	Executive Order		Office of Information and Regulatory Affairs reviews and coordinates interagency review	All "significant" rules (except from independent agencies)	Multiple: before proposal and before adoption				✓	✓						✓ (de facto)
Alabama	n/a															
Alaska	Statute	✓	Governor	Optional for all rules	Before rules are finalized				✓ Governor reviews for consistency with execution of law and for legislature's concerns	✓						✓ Governor may return a rule before it is filed and takes effect
Arizona	Statute	Only those rules not subject to GRRC's authority	Governor's Regulatory Review Council	Reviews most rules	Before rules are finalized	✓	✓	✓		✓						✓
Arkansas	Statute and Executive Order		Economic Development Commission	Small business impact statements and rules	When rule is proposed			✓		✓						
California	Statute		Department of Finance	Reviews fiscal statements	Before rules are finalized					✓						

Chart 2: Executive Review	Source of Power	REVIEWERS		OPPORTUNITIES FOR REVIEW		CRITERIA				POWERS						
		Attorney General Approves All Rules for Legality	Other Executive Reviewers (rest of chart refers only to these reviewers' powers)	Coverage	Timing	Legality and/or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Return with Comments	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Veto with Concurrence of Other Branch	Objection Shifts Burdens at Trial	Temporarily Suspend	Mandatory Approval or Veto Power
Colorado	Statute	✓	Department of Regulatory Affairs	May review rules with certain economic impacts	When rule is proposed			✓		✓ Department may "urge" changes						
Connecticut	Statute (for AG review; the rest is unofficial)	✓	Governor's Office of Policy & Management	Unofficial, optional review	Before rules are finalized				✓							Unofficial review powers
Delaware	By Practice	✓														
District of Columbia	By Practice	✓														
Florida	Statute		Office of Tourism, Trade, and Economic Development; typically no involvement of Governor's office	May review rules with small business impacts	Before rules are finalized			✓		✓						
Georgia	n/a															
Hawaii	Executive Order and Statute	✓	Governor; the Department of Budget and Finance; and the Department of Business, Economic Development, and Tourism	Must review all rules	Multiple: before public hearing and before finalization				✓							✓
Idaho	By Practice		Department of Financial Management and Governor's Office	Must review all rules	Before rule is proposed				✓							✓
Illinois	n/a															
Indiana	Statute	✓	Governor and Office of Management and Budget; Economic Development Corporation also reviews small business impacts	Must review all rules	Before rules are finalized				✓							✓
Iowa	Statute	✓ AG may object to any rule	Governor	May object to any rule	Multiple: can review proposed and recently adopted rules	✓	✓	✓					✓			✓ Governor may rescind rules and in practice can stop any rulemaking
Kansas	Statute	✓ In practice, complex rules may be approved before AG issues opinion on legality														
Kentucky	n/a															

Chart 2: Executive Review	Source of Power	REVIEWERS		OPPORTUNITIES FOR REVIEW		CRITERIA				POWERS						
		Attorney General Approves All Rules for Legality	Other Executive Reviewers (rest of chart refers only to these reviewers' powers)	Coverage	Timing	Legality and/or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Return with Comments	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Veto with Concurrence of Other Branch	Objection Shifts Burdens at Trial	Temporarily Suspend	Mandatory Approval or Veto Power
Louisiana	Statute		Governor	May review any rule	After rule is finalized				✓				✓ Governor may approve or disapprove objection of legislative oversight committee			✓ Governor may rescind any rule within 30 days of adoption
Maine	Statute and Executive Order	✓	Agency commissioners		Preliminary approval from agency commissioner and AG encouraged				✓							
Maryland	Statute	✓														
Massachusetts	Executive Order		Department of Administration and Finance	Must review all rules	Before rule is proposed				✓							✓
Michigan	Statute and Executive Order		State Office of Administrative Hearings and Rules	Must review all rules	Multiple review points				✓							✓
Minnesota	Statute and By Practice	✓ By informal practice	Governor	By practice, must review all rules	Multiple review points				✓							✓ Governor's Office must approve various stages; Governor can veto adopted rules within 14 days
Mississippi	n/a															
Missouri	n/a															
Montana	By Practice		Governor	May review rules					✓							Unofficial review powers
Nebraska	Statute	✓	Governor	Must review all rules	Before rules are finalized				✓							✓
Nevada	n/a															
New Hampshire	n/a															
New Jersey	Statute		Smart Growth Ombudsman	Reviews rules for development effects	Before rule is proposed			Consistency with State Development Plan								Mandatory but limited approval powers
New Mexico	n/a															

Chart 2: Executive Review	Source of Power	REVIEWERS		OPPORTUNITIES FOR REVIEW		CRITERIA				POWERS						
		Attorney General Approves All Rules for Legality	Other Executive Reviewers (rest of chart refers only to these reviewers' powers)	Coverage	Timing	Legality and/or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Return with Comments	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Veto with Concurrence of Other Branch	Objection Shifts Burdens at Trial	Temporarily Suspend	Mandatory Approval or Veto Power
New York	Executive Order		Governor's Office of Regulatory Reform; the Labor & Economic Development Commissioners may also review	Must review all rules	Multiple: before proposal and before adoption	✓	✓	✓			✓ GORR can require analysis; Labor & Economic Development can recommend analysis	✓			✓ GORR can recommend a temporary suspension; Labor & Economic Development can suspend for 90 days	✓ GORR can recommend that Governor's senior advisors disapprove a rule; in practice, GORR must approval all rules
North Carolina	Statute		Governor and Office of State Budget Management	Governor reviews rules with local government effects; OSBM reviews fiscal notes	When rule is proposed			Review limited to fiscal impacts								Approve fiscal impacts statements only
North Dakota	Statute	✓														
Ohio	Executive Order and Statute		Agencies' chief legal officers; Department of Aging and Office of Small Business may also review select rules	Must review all rules	Before submission to legislative review committee			Principally for business impacts		✓ Department of Aging and Office of Small Business may comment						Agencies' chief legal officers encouraged to approve consideration of business impacts
Oklahoma	Statute		Governor	Must review all rules	Before rules are finalized				✓							✓ Governor must approve; lack of approval constitutes default disapproval; legislature can overturn with joint resolution (subject to Governor's veto)
Oregon	n/a															
Pennsylvania	Statute and Executive Order	✓	Governor's General Counsel, Secretary of Budget, and Policy Director	Must review all rules	Multiple: before proposal and before adoption				✓							✓
Puerto Rico	Statute		Ombudsman Office	May review rules with small business impacts	Before rules are finalized		✓	✓ Focus on small business development		✓						
Rhode Island	Statute		Economic Development Committee	May review rules with small business impacts	Before rules are finalized			Small business impacts		✓						

Chart 2: Executive Review	Source of Power	REVIEWERS		OPPORTUNITIES FOR REVIEW		CRITERIA				POWERS						
		Attorney General Approves All Rules for Legality	Other Executive Reviewers (rest of chart refers only to these reviewers' powers)	Coverage	Timing	Legality and/or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Return with Comments	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Veto with Concurrence of Other Branch	Objection Shifts Burdens at Trial	Temporarily Suspend	Mandatory Approval or Veto Power
South Carolina	n/a															
South Dakota	n/a															
Tennessee	Statute	✓														
Texas	n/a															
Utah	Statute and Executive Order		Division of Administrative Rules and Governor's Office of Planning and Budget	Must review all rules	When rule is proposed	✓	✓	✓		✓						No, but wields political pressure
Vermont	Statute and Executive Order		Interagency Committee on Administrative Rules	May review any rule	Before rule is proposed	✓ Especially public procedures	✓		✓ Governor's policies	✓	✓ Advise agency to conduct more public outreach					
Virginia	Statute and Executive Order	✓	Governor and Department of Planning and Budget	Must review all rules	Multiple: at notice, proposal, and finalization	✓ Clarity		✓ Necessary to protect health, safety, and welfare								✓
Washington	n/a															
West Virginia	n/a (Small Business Development Center review is inactive)															
Wisconsin	Statute		Department of Administration	Reviews rules with economic impact reports	Before rule is proposed	✓	✓	✓								✓
Wyoming	Statute	Advises agencies in drafting	Governor	Must approval all rules	Before rules are finalized	✓	✓					✓ Governor may use line-item veto authority to excise problematic portions of rules as identified by legislature				✓

Chart 3: Legislative Review	Source of Power	Reviewers	OPPORTUNITY FOR REVIEW		CRITERIA				POWERS						
			Coverage	Timing	Legality and/or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Advisory Disapproval Powers <u>Only</u> : Comment, Non-Binding Objection, Explicit but Normal Legislative Powers	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Expedited Legislative Disapproval (with Executive's Signature)	Objection Shifts Burdens at Trial	Temporarily Suspend	Mandatory Approval or Veto Power
MSAPA 1981	Statute	Review Committee	May review	Multiple: possible, proposed, or adopted rules	✓	✓				✓		✓			
MSAPA 2007 Draft	Statute	Review Committee	Must review	When rule is proposed	✓	✓	✓						✓	✓	
MSAPA 2010	Statute	Review Committee	May review	Before rule takes effect	✓	✓	✓		✓ Committee may object and recommend legislation					✓	
Model RFA	n/a														
Federal Practice	Statute	Full Legislature	May review "major" rules	Before rule takes effect				✓				✓			
Alabama	Statute	Review Committee	Must review (in practice, often only reviews upon public complaint)	Before rule takes effect				✓	Committee may comment, disapprove, and recommend amendments to the rule			No formal expedited process, but in practice, the legislature always ratifies the committee's disapprovals		✓	
Alaska	Statute	Legislative Counsel, Review Committee, and Standing Committees	May review	Counsel reviews before finalization; committee reviews after finalization	✓	✓			✓ Committee may comment and recommend legislation					✓	
Arizona	n/a (though revived in 2009, legislative review is historically inactive)														
Arkansas	Statute	Review Committee	May review	Rule can take effect before review is complete	✓	✓			✓ Committee may comment and recommend legislation		✓				
California	n/a (though legislature can review existing regulations)														
Colorado	Statute	Review Committee	Must review	Rule can take effect before review is complete	✓	✓									✓ "Sunset" review operates as de facto, though delayed, veto authority
Connecticut	Statute & Constitution	Review Committee	Must review	Before rule takes effect				✓							✓ Committee can veto; General Assembly can overturn

Chart 3: Legislative Review	Source of Power	Reviewers	OPPORTUNITY FOR REVIEW		CRITERIA				POWERS						
			Coverage	Timing	Legality and/or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Advisory Disapproval Powers <u>Only</u> : Comment, Non-Binding Objection, Explicit but Normal Legislative Powers	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Expedited Legislative Disapproval (with Executive's Signature)	Objection Shifts Burden at Trial	Temporarily Suspend	Mandatory Approval or Veto Power
Delaware	n/a (legislative committee has review authority, but never exercised)														
District of Columbia	Statute	City Council	Some statutes reserve right for Council to review some rules	Before rule takes effect				✓							Varies; review is only for a few, select rules
Florida	Statute	Review Committee	Must review	Rule can take effect before review is complete	✓	✓	✓		✓ Committee may recommend changes and temporary suspension, but agency can refuse; in practice, agencies rarely refuse to modify as suggested						
Georgia	Statute	Standing Committees	May review	Before rule takes effect				✓						✓	✓ Disapproval resolutions do not need governor's signature with 2/3 vote in each house
Hawaii	n/a														
Idaho	Statute	Legislative Counsel and Standing Committees	May review	Multiple: may review pending, temporary, or final rules		✓					In addition to veto, rules can be modified by concurrent resolution (but rarely are)				✓ Legislature can veto by concurrent resolution
Illinois	Statute	Review Committee	Must review	Before rule takes effect	✓	✓	✓							✓	✓ Committee can veto by 3/5 vote; General Assembly then has 180 days to overturn the veto
Indiana	Statute	Review Committee	May review	After rule is already adopted		✓	✓		✓ Committee may comment and recommend legislation		✓ Committee may comment on failure to adopt rule				
Iowa	Statute and Constitution	Review Committee	May review	Multiple review points	✓	✓	✓						✓	✓	✓ General Assembly has veto authority

Chart 3: Legislative Review	Source of Power	Reviewers	OPPORTUNITY FOR REVIEW		CRITERIA				POWERS							
			Coverage	Timing	Legality and/or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Advisory Disapproval Powers <u>Only</u> : Comment, Non-Binding Objection, Explicit but Normal Legislative Powers	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Expedited Legislative Disapproval (with Executive's Signature)	Objection Shifts Burdens at Trial	Temporarily Suspend	Mandatory Approval or Veto Power	
Kansas	Statute	Review Committee	May review	During public comment period				✓	Committee may comment or may recommend non-binding concurrent resolution or legislation							
Kentucky	Statute	Review Committee, Legislative Research Commission, & Standing Committees	Must review	Multiple review points				✓	Committee may find a rule deficient and request governor withdraw it		✓ Committee may pass a non-binding determination that a rule is needed to implement a statute	✓ Legislature can pass a single statute to disapprove all rules found deficient by the committee in the previous session				Legislature may be able to effectively veto rules by deferring review until rule expires
Louisiana	Statute	Standing Committees, Legislative Fiscal Office	May review	Multiple review points				✓				✓ Oversight committee of either house may disapprove; governor then has 10 days to reject the disapproval				✓ Legislature may suspend, amend, or repeal any rule by concurrent resolution; Fiscal Office must approve all impact statements
Maine	Statute	Standing Committees	May review any rule; must review "major substantive rules"	May review any rule after proposal; must review "major substantive rules" before they take effect	✓	✓	✓		✓ Legislature must pass a bill (with the governor's signature) to approve, amend, or disapprove of all major rules					✓ If legislature fails to act by end of session, major rules can go forward without approval		
Maryland	Statute	Review Committee	May review	Before rule takes effect; agencies encouraged to submit early		✓						✓Oversight committee may disapprove a rule; governor then can reject the disapproval				
Massachusetts	n/a															
Michigan	Statute and Constitution	Review Committee	May review	Before rule takes effect	✓	✓	✓		✓ Committee may comment and recommend legislation					✓		
Minnesota	Statute	Standing Committees; Coordinating Commission	May review (seldom practiced)	Rule can take effect before review is complete	✓	✓				✓			✓	✓		
Mississippi	n/a															
Missouri	Statute and Executive Order	Review Committee	May review	Before rule takes effect				✓				✓ If committee objects, rule is suspended for 30 legislative days while General Assembly considers concurrent resolution		✓		

Chart 3: Legislative Review	Source of Power	Reviewers	OPPORTUNITY FOR REVIEW		CRITERIA				POWERS						
			Coverage	Timing	Legality and/or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Advisory Disapproval Powers <u>Only</u> : Comment, Non-Binding Objection, Explicit but Normal Legislative Powers	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Expedited Legislative Disapproval (with Executive's Signature)	Objection Shifts Burden at Trial	Temporarily Suspend	Mandatory Approval or Veto Power
Montana	Statute	Interim Committees	May review	Before rule takes effect				✓			✓		✓	✓	
Nebraska	Statute	Standing Committees	May review	After rule is proposed				✓ (if any legislator feels "aggrieved")	✓ Committee may object						
Nevada	Statute and Constitution	Review Committee; by practice, Legislative Counsel also reviews authority and intent	Must review	Before rule takes effect		✓									✓ Since 2009, affirmative approval is mandatory; rules cannot take effect simply upon failure to veto
New Hampshire	Statute	Review Committee	May review	Before rule takes effect	✓	✓	✓		✓ Agencies must respond in writing to preliminary objections		✓		✓	✓ If committee objects and introduces joint resolution, rule is suspended while General Assembly considers	
New Jersey	Statute and Constitution	Standing Committees	May review	Rule can take effect before review is complete		✓									✓ Legislature can veto by concurrent resolution
New Mexico	n/a														
New York	Statute	Review Committee	Committees operate sporadically, often inactive	Rule can take effect before review is complete				✓	✓						
North Carolina	Statute	General Assembly	Rules approved by independent review committee but objected to by 10 people	Before rule takes effect; rules are suspended during review				✓	✓ Legislature can introduce bill to disapprove a rule					✓	
North Dakota	Statute	Review Committee	Must review	Before rule takes effect	✓	✓	✓						✓	Can only hold a rule for one additional meeting	✓ Committee can veto
Ohio	Statute	Review Committee	May review	Before rule takes effect	✓	✓	✓		✓ Committee may recommend a concurrent resolution						

Chart 3: Legislative Review	Source of Power	Reviewers	OPPORTUNITY FOR REVIEW		CRITERIA				POWERS						
			Coverage	Timing	Legality and/or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Advisory Disapproval Powers <u>Only</u> : Comment, Non-Binding Objection, Explicit but Normal Legislative Powers	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Expedited Legislative Disapproval (with Executive's Signature)	Objection Shifts Burdens at Trial	Temporarily Suspend	Mandatory Approval or Veto Power
Oklahoma	Statute	Review Committee in House; Standing Committees in Senate	Must review	Before rule takes effect				✓				✓ Legislature can use a joint resolution to disapprove a rule at any time			✓ Legislature can use a concurrent resolution to veto a rule during a 30- day review period
Oregon	Statute	Legislative Counsel and Standing Committees	May review; must review if any legislator requests	Rule can take effect before review is complete	✓	✓			✓ Committee may comment and object						
Pennsylvania	Statute	Standing Committees	May review any rule; must review if independent review committee disapproved	Before rule takes effect				✓	✓ Committees may comment and object at any time			✓		✓	
Puerto Rico	n/a														
Rhode Island	n/a														
South Carolina	Statute	Legislative Council and Standing Committees	May review	Before rule takes effect				✓	✓ Committee may request that agencies withdraw and revise regulations, and may introduce joint resolutions of disapproval					✓	
South Dakota	Statute and Constitution	Review Committee and Legislative Research Council	May review	Before rule takes effect	✓	✓	✓			✓				✓	Review committee can remand proposed regulation to earlier step in rulemaking process
Tennessee	Statute	Review Committees, which may meet jointly	May review	Rule can take effect before review is complete	✓	✓	✓		✓ Besides legislature's "sunset"/ veto power, committees can object and recommend modification of rulemaking authority					✓ Committees can suspend effective date	✓ "Sunset" review operates as de facto, though delayed, veto authority
Texas	Statute	Standing Committees	May review (but essentially inactive)	Before rule takes effect				✓	✓ Committees may send agency statement supporting or opposing						
Utah	Statute	Review Committee	May review	When rule is proposed		✓	✓		✓ Committee may comment and recommend legislative action						✓ "Sunset" review operates as de facto, though delayed, veto authority
Vermont	Statute	Review Committee	Must review	Before rule takes effect	✓	✓	✓						✓		

Chart 3: Legislative Review	Source of Power	Reviewers	OPPORTUNITY FOR REVIEW		CRITERIA				POWERS						
			Coverage	Timing	Legality and/or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Advisory Disapproval Powers <u>Only</u> : Comment, Non-Binding Objection, Explicit but Normal Legislative Powers	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Expedited Legislative Disapproval (with Executive's Signature)	Objection Shifts Burden at Trial	Temporarily Suspend	Mandatory Approval or Veto Power
Virginia	Statute	Review Committee and Standing Committees	May review (largely inactive)	Before rule takes effect		✓	✓		✓ Committee may comment and object		✓			✓ Committees can suspend with governor's concurrence	
Washington	Statute	Review Committee	May review; public can petition for review	May review proposed or existing rules	✓	✓			✓ Committee may file formal objection, recommend governor suspend rule, or recommend legislative action	✓					
West Virginia	Statute	Review Committee	Must review	Before rule takes effect	✓	✓	✓								✓ Full legislature has veto power, but mandatory approval no longer required
Wisconsin	Statute	Legislative Council, Standing Committees, and Review Committee	Council must review; committees may review	Council reviews initial submissions; if standing committee objects, rule is suspended and referred to review committee	✓	✓	✓					✓		✓	
Wyoming	Statute	Legislative Counsel and Management Council	May review	Rule can take effect before review is completed	✓	✓	In practice, reviews for reasonableness		✓ Management Council can recommend changes to the agency and governor, and can introduce legislation			✓ If Council recommends changes, Governor can use line-item veto power to excise problematic portions before approving rule			

Chart 4: Independent Review	Source of Power	Reviewers	OPPORTUNITIES FOR REVIEW		CRITERIA				POWERS						
			Coverage	Timing	Legality and/ or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Return with Comments or Object	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Suspend with Concurrence of Governmentt	Veto with Concurrence of Governmentt	Temporarily Suspend	Mandatory Approval or Veto Power
MSAPA 1981	n/a														
MSAPA 2007 Draft	n/a														
MSAPA 2010	n/a														
Model RFA	n/a														
Federal Practice	n/a														
Alabama	n/a														
Alaska	n/a														
Arizona	n/a														
Arkansas	n/a														
California	Statute	Office of Administrative Law	Reviews all rules	Before rule is finalized	✓	✓			✓						✓ Agency can appeal to governor
Colorado	n/a														
Connecticut	n/a														
Delaware	n/a														
District of Columbia	U.S. Constitution and Statute	U.S. Congress	Reviews all city legislation and reserves right to amend any "law"	Anytime										✓ U.S. Congress can reject city council statutes by joint resolution or pass legislation to amend any city law; both require presidential signature	
Florida	Statute	Small Business Regulatory Advisory Council	Rules with small business impacts	Before rule is finalized						✓ Agencies must adopt Council suggestions or explain refusal					
Georgia	n/a														
Hawaii	Statute and Executive Order	Small Business Regulatory Review Board	Rules with small business impacts	Multiple: before proposal and after public hearing						✓ Review criteria not clearly defined					
Idaho	n/a														
Illinois	n/a														
Indiana	n/a														

Chart 4: Independent Review	Source of Power	Reviewers	OPPORTUNITIES FOR REVIEW		CRITERIA				POWERS						
			Coverage	Timing	Legality and/ or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Return with Comments or Object	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Suspend with Concurrence of Governmentt	Veto with Concurrence of Governmentt	Temporarily Suspend	Mandatory Approval or Veto Power
Iowa	n/a														
Kansas	n/a														
Kentucky	n/a														
Louisiana	n/a														
Maine	n/a														
Maryland	Statute	Children's Environmental Health and Protection Advisory Council	Rules with children's health impacts	Before rule is proposed			Children's health impacts only		✓						
Massachusetts	n/a														
Michigan	n/a														
Minnesota	Statute	Office of Administrative Hearings	Must review all rules	Role depends on whether rule was published with or without public hearing	✓	✓				✓ Objection triggers additional legislative comment period					
Mississippi	n/a														
Missouri	Statute	Small Business Regulatory Fairness Board	Rules with small business impacts	Before rule is finalized			✓		✓						
Montana	n/a														
Nebraska	n/a														
Nevada	n/a														
New Hampshire	n/a														
New Jersey	n/a														
New Mexico	Statute	Small Business Regulatory Advisory Commission (established but inactive)													
New York	n/a														
North Carolina	Statute	Rules Review Commission	Must review all rules	Before rule is finalized	✓	✓	✓			✓ RRC can hold additional public hearings				✓	✓
North Dakota	n/a														

Chart 4: Independent Review	Source of Power	Reviewers	OPPORTUNITIES FOR REVIEW		CRITERIA				POWERS						
			Coverage	Timing	Legality and/ or Procedure	Authority and Legislative Intent	Reasonable, Efficient, Effective	Any Relevant Factor	Return with Comments or Object	Require Agency to Conduct Additional Hearings or Analysis	Recommend Adoption of New Rule	Suspend with Concurrence of Governmentt	Veto with Concurrence of Governmentt	Temporarily Suspend	Mandatory Approval or Veto Power
Ohio	n/a														
Oklahoma	Statute	Inter-Governmental Committee; Small Business Regulatory Review Committee	Inter-Government Committee reviews local impacts; Small Business Committee reviews small business impacts	After rule is proposed				✓	✓						
Oregon	n/a														
Pennsylvania	Statute	Independent Regulatory Review Commission	Must review all rules	Multiple: at proposal and at finalization	✓	✓		✓		✓ Objection triggers additional review by Commission and legislature			✓ Objection can trigger expedited disapproval process in legislature (requires presentment to governor)	✓	
Puerto Rico	n/a														
Rhode Island	n/a														
South Carolina	Statute	Small Business Regulatory Review Committee	Rules with small business impacts	After rule is proposed				✓	✓	✓ Committee may direct agency to prepare economic impact statement					
South Dakota	n/a														
Tennessee	n/a														
Texas	n/a														
Utah	n/a														
Vermont	n/a														
Virginia	n/a														
Washington	n/a														
West Virginia	n/a														
Wisconsin	Statute	Small Business Regulatory Review Board	Rules with small business impacts	At proposal				✓	✓						
Wyoming	n/a														

Chart 5: Periodic Review	Source of Requirement	SCOPE		CRITERIA					POWERS			
		Agency's Periodic Review	External Review of Existing Regulations	Changed Laws or Duplication/Conflict	Changed Circumstances	Ongoing Need	Public Complaints	Economic Impacts	Agency Must Re-Justify	Agency Must Re-Analyze	Reviewer May Rescind Rule	Sunset without Legislative/ Executive Re-Approval
MSAPA 1981	Statute	All rules, every 7 years	Agency reports are sent to reviewers; both legislature and governor have discretion to review			✓	✓Agency must respond to criticisms			✓ Agency must use available data to analyze rule's effectiveness	✓ Governor may rescind any portion of any rule	
MSAPA 2007 Draft	Statute		Legislative committee reviews existing rules on ongoing basis									
MSAPA 2010	Statute		Legislative committee may review									
Model RFA	Statute	If small business impact, every 5 years		✓	✓	✓	✓	✓				
Federal Practice	Statute and Executive Order	If small business impact, every 10 years; encouraged for all significant rules		✓	✓	✓	✓ (for rules with small business impacts)	✓				
Alabama	n/a											
Alaska	Executive Order	Agencies are instructed to develop plans for review						✓				
Arizona	Statute	All rules, every 5 years	Executive committee reviews agency reports			✓	✓	✓				✓ Executive review committee must approve agency reports or rules expire
Arkansas	Statute		Optional					✓ (for "unduly negative" small business impacts)				
California	Statute and Executive Order	Occasional executive orders require reviews when new governor takes office	Any legislative committee may petition Office of Administrative Law for review	✓ (for necessity, authority, clarity, consistency, reference, and duplication)						✓ Office of Administrative Law can order repeal; agency can appeal to Governor		
Colorado	Statute		Legislature reviews existing rules for conflicts	✓						✓ Legislative review committee can repeal existing rules that conflict with new statutes		N/A: Though all newly enacted rules sunset after one year, this operates not as a periodic review but as a delayed legislative veto
Connecticut	Statute	All rules, every 5 years	Legislative committee reviews agency reports	✓	✓	✓	✓			✓ Legislative committee may request that an agency repeal a rule; if the agency fails, the legislature can introduce legislation to require repeal		
Delaware	n/a											
District of Columbia	n/a											

Chart 5: Periodic Review	Source of Requirement	SCOPE		CRITERIA					POWERS			
		Agency's Periodic Review	External Review of Existing Regulations	Changed Laws or Duplication/Conflict	Changed Circumstances	Ongoing Need	Public Complaints	Economic Impacts	Agency Must Re-Justify	Agency Must Re-Analyze	Reviewer May Rescind Rule	Sunset without Legislative/ Executive Re-Approval
Florida	Statute	All rules, every 2 years	Legislative committee can review any rule; Small Business Regulatory Advisory Council can recommend reviews	✓	✓	✓	✓	✓	N/A: Agencies report changes to legislative review committee, but do not have to justify continuation of rule			
Georgia	Executive Order	Encouraged if small business impact						✓				
Hawaii	Statute	If small business impact, every 2 years	Small Business Regulatory Review Board can review	✓	✓	✓	✓Board reports complaints to agencies	✓ Board reports on whether public interest outweighs rule's effect on small business	✓	✓ Board can request full analysis		
Idaho	Statute		Legislative committee can review any existing rule									✓ All rules sunset every year unless extended by the legislature
Illinois	Statute		Legislative committee reviews rules every 5 years	✓	✓			✓				
Indiana	Statute	All rules, every 7 years		✓	✓	✓	✓	✓ (small business impacts)				✓ All rules sunset every 7 years; agencies can readopt identical rules
Iowa	Executive Order and Statute	Required if petitioned; encouraged for other rules	Optional			✓	✓	✓	✓	✓ Public can petition for analysis	✓ Legislature can review and rescind rules; Governor can rescind recently enacted rules	
Kansas	n/a											
Kentucky	Statute		Legislative committee may make non-binding determination that existing regulation should be amended or repealed									
Louisiana	n/a											
Maine	Statute	Agency must respond to petitions on existing rules submitted by 150 voters	100 voters can petition legislature to review existing rules; legislative committees can also review rules by their own motion		✓	✓		✓				
Maryland	Statute and Executive Order	Specific rules scheduled for review by Executive Order on an 8-year cycle	Legislative review committee may comment on agencies' evaluation reports	✓		✓			✓	✓ Agencies must gather new information		
Massachusetts	n/a (some ad hoc review may exist)											

Chart 5: Periodic Review	Source of Requirement	SCOPE		CRITERIA					POWERS			
		Agency's Periodic Review	External Review of Existing Regulations	Changed Laws or Duplication/Conflict	Changed Circumstances	Ongoing Need	Public Complaints	Economic Impacts	Agency Must Re-Justify	Agency Must Re-Analyze	Reviewer May Rescind Rule	Sunset without Legislative/ Executive Re-Approval
Michigan	Statute and Executive Order	Identify rules for review in annual agenda	Public can petition executive review office	✓		✓						
Minnesota	Statute and Executive Order	Encouraged	Local governments can petition for reviews and can appeal to the Office of Administrative Hearings	✓	✓	✓		✓			✓ If a review is appealed by local governments to the Office of Administrative Hearings, that office can rescind rules	
Mississippi	Statute	All rules, every 5 years (but not practiced)										
Missouri	Statute	Encouraged if small business impact; small businesses can petition	Small Business Regulatory Fairness Board can recommend reviews	✓	✓	✓	✓	✓	✓			
Montana	Statute	All rules, every 2 years	Optional									
Nebraska	n/a											
Nevada	Statute	All rules, every 10 years										
New Hampshire	Statute	All rules, every 8 years										✓ All rules sunset every 8 years; agencies can readopt identical rules
New Jersey	Statute	All rules, every 5 years										✓ All rules sunset every 5 years; agencies can readopt identical rules
New Mexico	Statute	Required, but not enforced										
New York	Statute and Executive Order	All rules, every 5 years	Executive review committee sets schedule for agency review	✓	✓	✓	✓	✓	✓	✓	✓ Review Committee can direct repeal	
North Carolina	n/a											
North Dakota	Statute	Encouraged for obsolete rules	Legislative committee reviews for obsolete rules and general "dissatisfaction"	✓								
Ohio	Statute	All rules, every 5 years	Legislative committee can recommend invalidation by two-thirds vote	✓	✓	✓	✓	✓	✓	✓		No, but voluntary sunset dates recommended by executive order
Oklahoma	n/a											

Chart 5: Periodic Review	Source of Requirement	SCOPE		CRITERIA					POWERS			
		Agency's Periodic Review	External Review of Existing Regulations	Changed Laws or Duplication/Conflict	Changed Circumstances	Ongoing Need	Public Complaints	Economic Impacts	Agency Must Re-Justify	Agency Must Re-Analyze	Reviewer May Rescind Rule	Sunset without Legislative/ Executive Re-Approval
Oregon	Statute and Executive Order	All rules, every 5 years; especially encouraged for business impacts		✓	✓	✓	✓	✓		✓ If five people request, agency must determine if rule is accomplishing objectives		
Pennsylvania	Statute		Independent review commission can review and recommend changes	✓	✓	✓	✓Commission acts as clearinghouse for complaints	✓				
Puerto Rico	Statute	If small business impact, every 5 years	Ombudsman Office can participate in review of rules with small business effects		✓	✓	✓	✓				
Rhode Island	Statute	If small business impact, every 5 years		✓	✓	✓	✓	✓				
South Carolina	Statute	All rules, every 5 years; especially for small business impacts		✓	✓	✓	✓	✓	✓			
South Dakota	Statute		Legislative committee can review existing rules [but rarely does]									
Tennessee	Statute											N/A: Though all newly enacted rules sunset after one year, this operates not as a periodic review but as a delayed legislative veto
Texas	Statute	All rules, every 4 years				✓			✓ Agencies must readopt, revise, or repeal			
Utah	Statute	All rules, every 5 years	All rules expire every year unless reauthorized						✓		✓ If agency misses deadline for five-year review, rules expire	✓ All rules sunset every year unless extended by omnibus legislation or executive action
Vermont	Statute		Optional								✓ Legislative committee can rescind any rule older than 6 years; agency can readopt	
Virginia	Statute and Executive Order	If small business impact, every 5 years; under current Executive Order, all rules, every 4 years	Each governor must, by executive order, create process for periodic review	✓	✓	✓	✓	✓				
Washington	Statute and Executive Order	Required for rules with economic impacts on more than 20% of industries; encouraged for other rules	Legislative committee can review any rule, and can be petitioned to review existing rules		✓	✓	✓	✓				

Chart 5: Periodic Review	Source of Requirement	SCOPE		CRITERIA					POWERS			
		Agency's Periodic Review	External Review of Existing Regulations	Changed Laws or Duplication/Conflict	Changed Circumstances	Ongoing Need	Public Complaints	Economic Impacts	Agency Must Re-Justify	Agency Must Re-Analyze	Reviewer May Rescind Rule	Sunset without Legislative/ Executive Re-Approval
West Virginia	n/a (small business review not practiced)											
Wisconsin	Statute		Legislative committee can review and investigate meritorious public complaints; Small Business Regulatory Review Board may review								✓ Legislative committee can temporarily suspend an existing rule under review; full legislature can make suspension permanent by enacting statute	
Wyoming	n/a (statutory power not formally exercised)											

Chart 6: Impact Analyses Requirements	Source of Requirements	COVERAGE OF ECONOMIC ANALYSIS (not including Reg. Flex.)		CONTENTS OF ECONOMIC ANALYSIS (not including Reg. Flex.)					CONSEQUENCES OF ANALYSIS (not including Reg. Flex.)		SMALL ENTITY/REGULATORY FLEXIBILITY ANALYSIS			Other Impact Analyses and Comparisons
		Label	Threshold/Trigger	Government Costs and Benefits	"Economic" Costs and Benefits	"Social" Costs and Benefits	Alternatives	Distributional Effects	Must Justify if Benefits Do Not Exceed Costs	Reviews and Objections (excluding court challenges)	Coverage	Balance	Reviews and Consequences (excluding court challenges)	
MSAPA 1981	Statute	Regulatory analysis	Governor, legislative committee, local government, agency, or 300 people may petition	✓	✓	✓	✓	✓						
MSAPA 2007 Draft	Statute	Regulatory analysis	All major rules; Governor, legislator, local government, or agency may petition for any rule	✓	✓	✓	Only for less costly methods	✓		✓ Legislative review committee can object on basis of costs				
MSAPA 2010	Statute	Regulatory analysis	All major rules	✓	✓	✓	✓	✓	✓	✓ Legislative review committee can object to analysis				
Model RFA	Statute	n/a									✓ (if adverse impact on small business)	Minimize small business impacts, consistent with health, safety, environmental, and economic welfare, and statutory objectives	Department of Economic and Community Development (or equivalent) assists agencies in compliance	
Federal Practice	Statute and Executive Order	Cost-benefit analysis	All economically or otherwise significant rules	✓	✓	✓	✓	Mentioned in law, but in practice rarely conducted	✓	✓ Office of Information and Regulatory Affairs reviews	✓(if significant economic impact on substantial number of small businesses)	Minimize small business impacts, consistent with statutory objectives	Small Business Administration gathers comments	Analyze impacts to federalism, environmental justice, children's health, and energy
Alabama	Statute	Fiscal note	All rules with "economic impact" (term is undefined)	✓	✓	✓ (emphasis on environmental and health effects)	✓ (implied)	✓	✓Explain why rule is most cost-effective, efficient, and feasible	✓Legislative reviews of effects on costs of goods and services				
Alaska	Statute and Executive Order	Fiscal note	Rules with effect on government appropriations; other cost consideration encouraged	Government costs	Consideration of private costs encouraged						✓ (all rules)	Encouraged to minimize compliance costs		
Arizona	Statute	Economic, small business, and consumer impact statement	All rules with "economic, small business, or consumer impact" (terms are undefined)	✓	✓		✓	Mentioned, but mostly applies only to small business impacts	✓	✓Public and government can challenge	✓ (if small business impact)	List costs and benefits to small business; must minimize impacts where legal and feasible		Justify if rule exceeds federal requirements
Arkansas	Statute and Executive Order	Financial impact statement	Scope left to agency discretion	✓	Content largely left to agency discretion						✓ (if small business impact)	List top three benefits; emphasis on selecting least costly, market- based, or voluntary alternatives	Non-binding review of analysis and rule's impacts by Economic Development Commission	Compare neighboring states

Chart 6: Impact Analyses Requirements	Source of Requirements	COVERAGE OF ECONOMIC ANALYSIS (not including Reg. Flex.)		CONTENTS OF ECONOMIC ANALYSIS (not including Reg. Flex.)					CONSEQUENCES OF ANALYSIS (not including Reg. Flex.)		SMALL ENTITY/REGULATORY FLEXIBILITY ANALYSIS			Other Impact Analyses and Comparisons	
		Label	Threshold/Trigger	Government Costs and Benefits	"Economic" Costs and Benefits	"Social" Costs and Benefits	Alternatives	Distributional Effects	Must Justify if Benefits Do Not Exceed Costs	Reviews and Objections (excluding court challenges)	Coverage	Balance	Reviews and Consequences (excluding court challenges)		
California	Statute and Executive Order	Economic and Fiscal Impact Statement	All rules	✓	✓		✓ (focus on business impacts)				✓Department of Finance reviews fiscal impacts	✓(if significant, adverse economic impact on business statewide)	Identify affected business types, tailor requirements to scale, consider small business alternatives	For reporting requirements, the need must justify the costs	Analyze housing cost and impacts to job and business creation; if an environmental rule is more stringent than federal standard, the benefits must justify the costs
Colorado	Statute	Regulatory analysis	By petition	✓	✓	✓	✓	✓	No, but guiding principle is to consider costs in relation to benefits		✓(executive reviewer can request analysis if negative impact on competition or small business)	List top three benefits; emphasis on selecting least costly, market- based, or voluntary alternatives	Non-binding review by executive branch; agencies sometimes withdraw rules before proposal because of potential negative small business impacts		
Connecticut	Statute	Fiscal note	All rules	✓								✓(if small business impact)	Minimize small business impacts, consistent with health, safety, and welfare	Department of Economic and Community Development and legislative committees may advise agency	
Delaware	Statute	n/a										✓(all rules)	Tailor to individuals and small businesses, but consider the public impact and administrative costs of exemptions		
District of Columbia	n/a														
Florida	Statute	Statement of Estimated Regulatory Costs	Triggered if public suggests a lower-cost alternative; encouraged for all rules	✓	Direct compliance costs only			✓		Legislative committee can review cost estimates; in practice, economic analysis is not a factor in regulatory review	✓(analysis is required if small business impact; encouraged for all rules)	Select lowest- cost alternative while "substantially accomplishing objectives"	Small Business Council reviews and can appeal to legislature, though agency can ignore the recommendations. Office of Tourism, Trade, and Economic Development also reviews.		
Georgia	Statute	n/a										✓(if any economic impact on any business)	Minimize impact where legal and consistent with objectives; no real analysis of costs or benefits	Agencies must coordinate with Office of Planning and Budget on small business plans	

Chart 6: Impact Analyses Requirements	Source of Requirements	COVERAGE OF ECONOMIC ANALYSIS (not including Reg. Flex.)		CONTENTS OF ECONOMIC ANALYSIS (not including Reg. Flex.)					CONSEQUENCES OF ANALYSIS (not including Reg. Flex.)		SMALL ENTITY/REGULATORY FLEXIBILITY ANALYSIS			Other Impact Analyses and Comparisons
		Label	Threshold/Trigger	Government Costs and Benefits	"Economic" Costs and Benefits	"Social" Costs and Benefits	Alternatives	Distributional Effects	Must Justify if Benefits Do Not Exceed Costs	Reviews and Objections (excluding court challenges)	Coverage	Balance	Reviews and Consequences (excluding court challenges)	
Hawaii	Statute and Executive Order	AD 09-01 Statement	All rules	✓	✓	✓	✓	Focus is mostly on small business impacts			✓(if small business impact)	Quantify economic costs and benefits and select least restrictive alternative	Public petition can allege failure to consider impacts and appeal to Small Business Regulatory Review Board, whose powers are generally advisory	Justify if more stringent than comparable federal or state standards
Idaho	Statute and Practice	Fiscal impact statement	All rules. Legislative review committee may request a fuller economic impact statement, but rarely used.	✓				By practice, agencies describe affected citizens, but not their particular benefits or burdens		✓Governor's Division of Financial Management reviews				
Illinois	Statute	Economic and Budgetary Effects Analysis	If legislative review committee requests	✓	✓					✓Legislative committee reviews	✓(If Department of Commerce feels it is warranted or if petitioned)	Reduce impacts, where legal and feasible, to small business, small non- profits, and small municipalities	Legislative review committee can object to rule for not minimizing small business burdens	
Indiana	Statute and Executive Order	Fiscal impact statement/cost- benefit analysis	All rules. Economic impact on regulated parties greater than \$500,000 triggers additional review.	✓	✓	In practice, indirect costs and benefits are not required, and social benefits are not quantified	✓	In practice, informal at best	✓	✓Office of Management and Budget reviews	✓(if small business impact)	Must justify any cost to small business not expressly required by law	Economic Development Corporation can review and make recommendations	
Iowa	Statute and Executive Order	Fiscal impact statement; Regulatory analysis	All rules receive fiscal impact statement. Petitions trigger fuller regulatory analysis.	✓ (fiscal impact statement)	✓ (fiscal impact statement)	✓ (regulatory analysis)	✓ (regulatory analysis)	✓ (regulatory analysis)	✓	✓Legislative committee reviews	✓(if petitioned and if substantial small business impact)	Full analysis of quantitative and qualitative impacts; pursue small business exemptions where legal, feasible, and consistent with statutory objectives	Legislative committee gives high review priority to rules that impact small businesses	
Kansas	Statute	Economic impact statement	All rules. Legislative review committee may request expanded statement.	Costs for all; benefits for expanded statement	Costs for all; benefits for expanded statement	Encouraged for costs; required for environmental benefits of environmental rules	Only for less intrusive alternatives	Focus on distribution of costs		✓Legislature reviews but has no direct authority to reject rules				Justify if rule exceeds federal requirements
Kentucky	Statute	Regulatory impact analysis; Fiscal note	All rules	✓	✓					✓Legislative Research Commission reviews	✓(all rules)	Must "tier" rule when possible to reduce disproportionate impacts, especially for small businesses and local governments	Comments from Commission on Small Business Advocacy or government entities receive special attention	Justify if rule exceeds federal requirements

Chart 6: Impact Analyses Requirements	Source of Requirements	COVERAGE OF ECONOMIC ANALYSIS (not including Reg. Flex.)		CONTENTS OF ECONOMIC ANALYSIS (not including Reg. Flex.)					CONSEQUENCES OF ANALYSIS (not including Reg. Flex.)		SMALL ENTITY/REGULATORY FLEXIBILITY ANALYSIS			Other Impact Analyses and Comparisons
		Label	Threshold/Trigger	Government Costs and Benefits	"Economic" Costs and Benefits	"Social" Costs and Benefits	Alternatives	Distributional Effects	Must Justify if Benefits Do Not Exceed Costs	Reviews and Objections (excluding court challenges)	Coverage	Balance	Reviews and Consequences (excluding court challenges)	
Louisiana	Statute	Fiscal impact statement; Economic impact statement	All rules	✓	✓					✓Legislative Fiscal Office approves all statements	✓(if small business impact)	Consider "without limitation" exemptions that would still achieve objectives	Notify Department of Economic Development of intent	Family impact statement
Maine	Statute	Fiscal impact statement; economic impact statement	All rules require fiscal impact statement. Impact of \$1 million triggers fuller economic impact statement.	✓ (fiscal impact statement)	✓ (economic impact statement)	✓ (economic impact statement; in practice, benefits are not discussed in detail)		✓			✓(if adverse small business impact)	Describe any less intrusive alternatives that achieve regulatory purpose		
Maryland	Statute	Economic impact statement	All rules	✓	✓	Not required by statute, but sometimes discussed in practice					✓(if meaningful economic impact on small business)	Fuller economic analysis, including costs to goods and services; workforce; housing costs; investment; competition; and consumer choice	Department of Legislative Services can help develop analysis and comment on analysis	
Massachusetts	Executive Order and Statute	Economic analysis	In practice, for rules with substantial costs	✓	✓					✓Department of Administration and Finance must approve	✓(if significant small business impact)	Consider appropriateness of performance standards, and otherwise minimize costs	Small Business Advocate can comment	
Michigan	Statute and Executive Order	Regulatory Impact Statement	All rules	✓	✓	✓	✓ (specifically including market-based)	✓	✓	✓State Office of Administrative Hearings and Rules must approve	✓(if any disproportionate impacts on small business)	Reduce disproportionate impacts on small business; analyze the negative impacts to the public of any small business exemptions		Compare parallel federal rules and accreditation association standards
Minnesota	Statute	Statement of Need and Reasonableness	All rules	✓	✓	Costs of not adopting	✓	✓		✓Governor's office reviews				Compare to existing federal standards
Mississippi	Statute	Economic impact statement	All new rules and all "significant" amendments, meaning \$100,000 in compliance costs	✓	✓	✓	✓				Impacts to small business included in general economic impact statement			
Missouri	Statute	Fiscal note	If impact is greater than \$500	✓	Compliance costs only			Limited classification of businesses by type			✓(if small business impact)	Determine practicability of less- restrictive alternatives that achieve the same results	Small Business Regulatory Fairness Board reviews new rules and whether existing rules create barrier to business that outweighs public benefits	

Chart 6: Impact Analyses Requirements	Source of Requirements	COVERAGE OF ECONOMIC ANALYSIS (not including Reg. Flex.)		CONTENTS OF ECONOMIC ANALYSIS (not including Reg. Flex.)					CONSEQUENCES OF ANALYSIS (not including Reg. Flex.)		SMALL ENTITY/REGULATORY FLEXIBILITY ANALYSIS			Other Impact Analyses and Comparisons
		Label	Threshold/Trigger	Government Costs and Benefits	"Economic" Costs and Benefits	"Social" Costs and Benefits	Alternatives	Distributional Effects	Must Justify if Benefits Do Not Exceed Costs	Reviews and Objections (excluding court challenges)	Coverage	Balance	Reviews and Consequences (excluding court challenges)	
Montana	Statute	Economic impact statement	By request of legislature	✓	✓	✓	✓	✓	✓Determine whether rule efficiently allocates public and private resources		Impacts to small business included in general economic impact statement			
Nebraska	Statute	Fiscal impact statement	All rules	✓	Costs only									
Nevada	Statute	Notice of intent	All rules		✓						✓(if small business impact)	Estimate adverse and beneficial economic impacts; consider "without limitation" methods to reduce impact	Small businesses can petition for failure to prepare or for underestimation	
New Hampshire	Statute	Fiscal impact statement	All rules	✓	✓	Statute calls for narrative; in practice, indirect benefits rarely quantified				✓Legislative committee reviews	Impacts to small and independent business included in general impact statement			
New Jersey	Statute and Executive Order	Socio-economic impact statement	All rules	✓	✓	✓					✓(if small business impact)	Minimize small business impacts, consistent with statutory objectives		Analyze impacts to housing, smart growth, jobs, agriculture, and small cities; justify if rule exceeds federal requirements
New Mexico	n/a													
New York	Statute and Executive Order	Regulatory impact statement	All rules. Governor's Office of Regulatory Reform can require cost-benefit analysis or other impact analyses.	✓	Compliance costs only. GORR can require fuller cost-benefit analysis	Statement of needs and benefits. GORR can require fuller cost-benefit analysis	✓		✓GORR reviews whether benefits outweigh costs	✓GORR reviews	✓(if impact to small business, local government, or rural areas)	Estimate costs and technological feasibility of compliance; minimize burdens consistent with public health, safety, and welfare		Analyze employment impacts
North Carolina	Statute and Practice	Fiscal note	If government impact or "substantial" economic impact (\$3 million)	✓	✓	✓ (benefits discussed by practice)	✓ (by practice)	✓		✓Office of State Budget and Management approves accuracy of analysis, but does not judge rule content	By practice, fiscal note discusses small businesses			
North Dakota	Statute	Regulatory analysis	\$50,000 impact to regulated community, or by request of governor or any legislator	✓	✓		✓	✓			✓(if impact to small business, small organizations, or small political subdivisions)	Minimize impacts, consistent with health, safety, and welfare; detail costs and benefits to private persons and consumers		Prepare a takings statement (which must find that benefits exceed possible legal costs)

Chart 6: Impact Analyses Requirements	Source of Requirements	COVERAGE OF ECONOMIC ANALYSIS (not including Reg. Flex.)		CONTENTS OF ECONOMIC ANALYSIS (not including Reg. Flex.)					CONSEQUENCES OF ANALYSIS (not including Reg. Flex.)		SMALL ENTITY/REGULATORY FLEXIBILITY ANALYSIS			Other Impact Analyses and Comparisons
		Label	Threshold/Trigger	Government Costs and Benefits	"Economic" Costs and Benefits	"Social" Costs and Benefits	Alternatives	Distributional Effects	Must Justify if Benefits Do Not Exceed Costs	Reviews and Objections (excluding court challenges)	Coverage	Balance	Reviews and Consequences (excluding court challenges)	
Ohio	Statute and Executive Order	Fiscal analysis	All rules	✓	Compliance costs only	Legislative review committee can ask for any other information				✓Legislative committee reviews	Local government impacts get additional analysis. Agencies are to consider cumulative effects on businesses and competitiveness.	If appropriate, agencies must create small business exemptions	Office of Small Business and legislative committee on small business can review	
Oklahoma	Statute	Rule impact statement	All rules (unless Governor waives)	✓	✓	✓(health, safety, and environmental effects)	✓ (emphasis on less costly and non-regulatory alternatives)	✓			✓(consider effects on various types of businesses and government entities)	Minimize impacts, except where prohibited	Agencies must call for comments on compliance costs	Consider possible effects on consumers
Oregon	Statute	Fiscal impact statement	All rules	✓	Costs only					✓If 10 people object to a fiscal statement, the agency must convene a public advisory committee (if it did not already)	✓(if significant, adverse effect on small business)	Minimize impacts, consistent with health and safety		Select agencies must analyze housing costs
Pennsylvania	Statute and Executive Order	Regulatory analysis	All rules	✓	✓	✓	✓	✓	✓	✓Governor's office and independent review committee both review	Needs of small business, farmers, minorities, other groups considered in regulatory analysis	Independent review committee considers impact on public interest of creating small business exemptions		Justify if rule exceeds federal requirements; compare to other states and assess effect on competitiveness
Puerto Rico	Statute	n/a									✓(if substantial economic impact on small business)	Consider impacts and alternatives	Office of Ombudsman reviews	
Rhode Island	Statute	n/a									✓(if substantial economic impact on small business, identified by Governor or Economic Development Committee)	Minimize burdens "without limitations," consistent with health, safety, environmental and economic welfare	Economic Development Committee can review	
South Carolina	Statute	Statement of Need and Reasonableness; Assessment Report	All rules include statement of need. Budget and Control Board prepares assessment report if requested by two legislators and if substantial economic impact.	✓ (plus optional study of revenue sources)	✓	✓ (emphasis on environmental and health effects)	✓	Optional description of who bears costs and who will benefit	✓Explain why rule is most cost-effective, efficient, and feasible		✓(if requested by Small Business Regulatory Review Committee)	Minimize impacts	Small Business Regulatory Review Committee reviews	Optional employment and competition analysis

Chart 6: Impact Analyses Requirements	Source of Requirements	COVERAGE OF ECONOMIC ANALYSIS (not including Reg. Flex.)		CONTENTS OF ECONOMIC ANALYSIS (not including Reg. Flex.)					CONSEQUENCES OF ANALYSIS (not including Reg. Flex.)		SMALL ENTITY/REGULATORY FLEXIBILITY ANALYSIS			Other Impact Analyses and Comparisons
		Label	Threshold/Trigger	Government Costs and Benefits	"Economic" Costs and Benefits	"Social" Costs and Benefits	Alternatives	Distributional Effects	Must Justify if Benefits Do Not Exceed Costs	Reviews and Objections (excluding court challenges)	Coverage	Balance	Reviews and Consequences (excluding court challenges)	
South Dakota	Statute	Fiscal note	All rules	✓							✓ (if small business impact)	Analyze impacts, using readily available information and existing resources		
Tennessee	Statute	Fiscal impact statement	All rules	✓							✓ (if small business impact)	Minimize impacts consistent with health, safety, and well-being; analyze effect of creating small business exemptions		
Texas	Statute	Fiscal note	All rules	✓	✓	✓					✓ (if adverse, economic impact on small business)	Minimize impacts consistent with health, safety, environmental, and economic welfare		Analyze local employment impacts and major environmental rules
Utah	Statute and Executive Order	Rule analyses	All rules	✓	✓	✓ (non-fiscal impacts to citizens, businesses, and governments)					✓ (if measurable, negative small business impact, or if public testifies that rule will cost one day's gross receipts)	Consider means to reduce impact		
Vermont	Statute	Economic impact statement	All rules		✓	Greenhouse gases only; by practice, other social costs and benefits sometimes discussed	✓	✓	No, but must conclude that rule is most appropriate method	✓ Legislative review committee can object	✓ (if rule regulates small business)	Reduce impacts without significantly reducing effectiveness of rule or increasing risk to health, safety, welfare, or environment		Greenhouse gas impact statement, local schools impact statement
Virginia	Statute and Executive Order	Notice and economic impact analysis	All rules	✓	✓	✓	✓	By practice, some analysis for socioeconomic status impacts		✓Department of Planning and Budget prepares economic analysis; agencies review analysis; Governor and others approve rule	✓ (if adverse, economic impact on small business)	Minimize impacts consistent with health, safety, environmental, and economic welfare		Analyze impact on private property and families
Washington	Statute	Cost-benefit analysis	Significant rules from select agencies, or by request of legislative review committee	✓	✓	✓	✓		✓		✓ (if more than minor small business costs)	Compare small business compliance costs with largest ten percent of businesses; reduce disproportionate impacts where feasible and legal		Must coordinate to extent possible with analogous federal, state, and local laws

Chart 6: Impact Analyses Requirements	Source of Requirements	COVERAGE OF ECONOMIC ANALYSIS (not including Reg. Flex.)		CONTENTS OF ECONOMIC ANALYSIS (not including Reg. Flex.)					CONSEQUENCES OF ANALYSIS (not including Reg. Flex.)		SMALL ENTITY/REGULATORY FLEXIBILITY ANALYSIS			Other Impact Analyses and Comparisons
		Label	Threshold/Trigger	Government Costs and Benefits	"Economic" Costs and Benefits	"Social" Costs and Benefits	Alternatives	Distributional Effects	Must Justify if Benefits Do Not Exceed Costs	Reviews and Objections (excluding court challenges)	Coverage	Balance	Reviews and Consequences (excluding court challenges)	
West Virginia	Statute	Fiscal note	All rules	✓	By practice, nothing beyond fiscal effects to government normally considered						✓ (if adverse, economic impact on small business)	Process may be inactive	Small Business Development Center is inactive	
Wisconsin	Statute	Fiscal estimate; Economic impact report	All rules include fiscal estimate. Petition for economic impact report of certain agencies if rule has \$20 million in compliance costs over 5 years or other adverse impacts on economy, health, environment	✓ (fiscal estimate)	✓ (economic impact report)	✓ (particularly health and environment)	Initial scoping statement must analyze alternatives	Initial scoping statement must list all entities potentially affected		✓ Department of Administration must approve (economic analysis never ordered)	✓ (if small business impact)	Analysis includes as much information as can be feasibly obtained with existing resources, including the costs and benefits of proposed exemptions	Small Business Regulatory Review Board uses cost- benefit analysis to determine fiscal effects	Scoping statement; comparison with federal rules and neighboring states; housing impact report and electricity impact report
Wyoming	n/a													

Patterns and Trends

Consistency and Continuity: A predictable but nonetheless important conclusion is that practice and paper do not always match up. In nearly every state, at least some element of the legally required structure is not followed in practice; in a few states, substantial features of the review process occur regularly but are not codified in any law.

Part of the story is resource constraints. Very few state agencies have economists to assist with the preparation of impact analyses. Some states, like Connecticut, are recovering from a recent and unexpectedly large retirement of experienced rule writers. Many more states face continuity

“I believe less than 10 rules were actually reviewed by the [New Mexico Small Business Regulatory Advisory Commission] in the short time that it met regularly. During that time period, over 800 rule actions took place.”

— John Martinez,
Director of New Mexico’s
Administrative Law Division

problems with their rule reviewers: legislators (and their staff) are voted in and out of office; review committees’ priorities and activity levels shift with rotating committee chairs; new gubernatorial administrations sweep into office with little knowledge of the previous occupant’s formal and informal practices. Continuity, turnover, and the inability to build on experience are real obstacles to consistent and effective regulatory review.

That problem with consistency also challenges the accepted narrative on the spread and value of regulatory flexibility acts. The U.S. Small Business Administration reports that the vast majority of states have adopted at least part of its model regulatory flexibility act, and indeed most have. But while small business initiatives remain popular and good politics in most states, some states have let their small business reviews lapse, either in law or in practice. For example, after a change of administrations in West Virginia, the previous governor’s attention to small business impacts was all but forgotten. In several other states, small business review

commissions are relatively inactive or essentially defunct, and in most the effect of small business review on actual rule content remains unclear.

Power Dynamics: Especially compared to the federal system, the main locus of regulatory review in the states is much more likely to be the legislature. As state legislatures transformed themselves from part-time, semi-professional bodies into more powerful entities, legislatures used regulatory review as a tactic for asserting themselves as a co-equal branch of government. Regulatory review sometimes becomes the battlefield for an adversarial relationship between the legislature and the governor. One recent and high profile conflict broke out in 2007 in Illinois, when Governor Rod Blagojevich’s refusal to comply with a legislative veto of health care regulation led to litigation and added to the articles of impeachment filed against him.

As Chapter Two previewed, reports of the death of the legislative veto may have been premature. Though a fair number of state courts have found that power to be unconstitutional, not all have. Idaho’s Supreme Court held that its legislative veto passed constitutional muster, and states like Wisconsin have found at least limited suspension powers were constitutional. In other states, such as North Carolina, the courts have so far declined to rule on their review structures.

Constitutional amendments are another route back to the legislative veto. The voters of Michigan and South Dakota amended their constitutions to explicitly allow for committee suspensions during legislative interim sessions, and Connecticut, Iowa, Nevada, and New Jersey all amended their constitutions to permit legislative vetoes.

But even quite recently, states are using regular statutes to grant their legislature enhanced review powers: Illinois did so in 2004, and Nevada in 2009. Other states have more creatively overcome potential constitutional problems. North Dakota granted its review committee a veto power in 1995, but also built in a backup system, through which its committee automatically reverts to having only suspension powers if a state court ever rules the veto is unconstitutional. West Virginia's legislature now no longer delegates any real rulemaking authority, reserving the right to approve all requests to promulgate a rule (though lack of action constitutes default approval). And both Colorado and Tennessee have tied their review committee's powers to a short sunset period: all rules automatically expire unless the legislature chooses to extend them.

Whether state legislatures are actually using their enhanced review powers is another matter. Legal review powers do not necessarily dictate level of activity: some legislatures with only advisory powers are quite active, whereas some legislatures with veto power are relatively inactive. Sometimes limitation on formal authority simply prompts expanded use of informal powers of persuasion, an outcome that might undermine transparency. For example, Ohio's legislative review committee cannot formally recommend rule changes and can only recommend that the full legislature invalidate a rule (which only blocks the rule from going forward for two years). As a result, Ohio's legislature may pursue informal communications in an attempt to persuade agencies to change the content of rules. These off-the-record negotiations may substitute for more transparent talks open to the public.

Balance: Nearly all states at least purport to treat repeals of existing rules the same as proposals for new rules, and the vast majority clearly include "repeals" in the definition of "rule" under the state Administrative Procedure Act. But a few do not. For example, New Hampshire set up an expedited process for the legislative review of repeals, and Virginia has recently expanded its fast-track rulemaking process to cover deregulation. Arizona exempted deregulatory proposals from its recent rulemaking moratorium, and some deregulatory rules are exempt from impact analysis requirements. Similarly, Minnesota's governor explicitly does not review repeals. In practice, repeals still may not receive the same level of scrutiny as proposals in many other states as well.

A similar lack of balance persists among regulatory impact analyses. While analyses often focus on fiscal impacts to government and economic impacts to regulated parties, benefits frequently remain an afterthought. In addition to and compounding the resource problem highlighted above is the lack of a reasonable threshold to trigger analytical requirements. When agencies are told to conduct thorough economic analysis of all rules but given no additional resources, the inevitable result is incomplete and inconsistent analysis. Tiering the required level of analysis, so that all rules get basic assessments but only the most significant rules get full analysis, would be a good start. But that partial solution must be paired with increased resources. Exceedingly few agencies report ever using economists or building economic models to predict costs and benefits. Much more frequently, agencies use the limited data they have to take a best guess, and rely on public stakeholders to object to and refine that estimate. Given these resource constraints, it is no surprise that benefits do not receive equal analytical attention.

Missing and Underground: Due to cumbersome rulemaking procedures or sheer habit, agencies in several states prefer to use guidance documents—sometimes called “underground regulations”—in lieu of regular rules. Several states, such as Arizona, Florida, California, and Washington, have adopted a variety of procedures to combat this persistent problem. Reviewers may have authority to declare that guidance documents should be turned into rules, or agencies may face deadlines for issuing rules to implement a recently enacted statute. No dominant strategy has emerged as clearly victorious in the fight against underground regulations.

The deadlines for rulemaking may generally help prevent agency inaction. But more typically, the public is left with the responsibility of identifying necessary but missing regulations. Nearly all states have used their Administrative Procedure Act to establish a centralized process through which the public can petition any agency for any rulemaking. Only a small numbers of states have no mechanism for public petition.³ But equally few states allow for the public to appeal denied petitions to a review entity.⁴

Successes: This chapter has painted a rather grim picture of regulatory review in the states. In fact, some states feature innovative review designs, consistent practices, and success stories. Those highlights are detailed in the state-by-state summaries found in Chapter Eight. Most states are eager to build on those successes, to create a more efficient rulemaking process that delivers more effective rules to their citizens. States may have a long way to go on reforming their regulatory review structures, but after the next few chapters, the path ahead should at least be clearer.

Notes

- ¹ Interview with George Tekel & Adam Cole, General Counsel, Cal. Dept. of Insurance, July 12, 2010.
- ² On public participation, *see generally* Neal Woods, *Promoting Participation? An Examination of Rulemaking Notification and Access Procedures*, 69 PUB. ADMIN. REV. 518, 520 (2009) (in 0 states, public hearings must be held by reviewing entity before proposal; in 9 states, public hearings must be held by reviewing entity before adoption; in 30 states, public has the right to present written comments to reviewing entity; in 25 states, public has the right to present oral comments to reviewing entity; in 22 states, public may petition reviewing entity to hold a hearing; in 12 states, public may petition agency to prepare detailed economic analysis; in 6 states, public may petition reviewing entity to prepare detailed economic analysis; in 42 states, public may petition agency for rulemaking; in 15 states, public may petition reviewing entity for rulemaking).
- ³ *See* Virginia Admin. Law Advisory Comm., Report of the Subcommittee to Study Petitions for Rulemaking 3 (2001) (reporting on a 50-state survey, which found 10 states did not have any codified provisions for public petition for agency rules); *see also* Woods, *supra* note 2, at 520 (in 42 states, public may petition agency for rulemaking). States that lack a public petition mechanism include Kansas, Mississippi, New York, North Dakota, and New Mexico (which does not even have a generally applicable Administrative Procedure Act).
- ⁴ For example, California, Iowa, and Maine. Several more states permit appeals that concern rules impacting small businesses.

Chapter Eight

State-by-State Summaries

Alabama

Alabama’s regulatory review structure aims to “strike a fair balance” between “increase[d] public accountability of administrative agencies” and “the need for efficient, economical, and effective government administration.”¹ Though the requirements on paper contain some ambitious and admirable elements—especially with regard to economic analysis—those requirements may not always be realized in practice.

Alabama’s Process on Paper

Legislative Review: The legislature’s Joint Committee on Administrative Regulation Review (“JCARR”) reviews all proposed rules. JCARR is a joint standing legislative committee made up of the Legislative Council.² JCARR is instructed to study and hold public hearings on all proposed rules. JCARR can then take four action: (1) approve the rule or accept by acquiescence; (2) allow the agency to withdraw the rule for purposes of amendment; (3) disapprove the rule; or (4) disapprove the rule with a proposed amendment.³ Rules cannot take effect until they have gone through the legislative review process, but thirty-five days of committee silence on a rule is a de facto approval of the rule.⁴

The criteria for JCARR’s review are outlined by statute. Considerations include whether absence of the rule would jeopardize the public health, safety, or welfare; whether a reasonable relationship exists between the state’s police power and the ends sought by the rule; whether less restrictive means would be adequate; what direct and indirect effect the rule has on the cost of goods and services; a comparison of the harm resulting from expected increases in cost of goods or services, with the harm resulting from an absence of the rule; and whether the rule’s primary purpose as well as primary effect is to protect the public. JCARR is also granted discretion to consider any other criteria deemed appropriate.⁵

If JCARR disapproves a rule, it must notify the agency. Any disapproved rule is suspended until the adjournment of the next regular session of the legislature (unless the legislature ends the suspension earlier by resolution). On the first day of the legislature’s regular session, JCARR introduces a joint resolution to sustain its disapproval of the rule: the full legislature must ratify the disapproval to permanently nullify the rule;⁶ such joint resolutions are subject to the governor’s signature or veto. If the legislature fails to approve the joint resolution, a disapproved rule is reinstated on the adjournment of the legislative session.⁷

Fiscal Note: Agencies must prepare a fiscal note for all rules with an “economic impact.”⁸ The fiscal note must detail, inter alia:

- the need or expected benefit of the rule;
- a determination of the costs and benefits associated with the regulation and an explanation of why the regulation is considered to be the most cost effective, efficient, and feasible means to achieve the intended purpose;
- the effects on the cost of living and doing business, competition, and employment;
- the short- and long-term economic impact upon all persons substantially affected, including an analysis of which persons bear the costs and which will benefit directly or indirectly;
- the uncertainties associated with the estimation of particular benefits and burdens and the difficulties involved in the comparison of qualitatively and quantitatively dissimilar benefits and burdens; and
- the effect of the regulation on the environment and public health, and the detrimental effect on the environment and public health if the regulation is not implemented.⁹

Fiscal notes must accompany the Notice of Intended Actions submitted to JCARR for review, but are not expressly listed among the materials that agencies must disclose to the public.¹⁰

Alabama’s Process in Practice

Though JCARR only has the power to temporarily suspend a rule, all evidence suggests that the legislature has never failed to sustain JCARR’s disapproval of a rule.¹¹ The practical effect is to give JCARR significant control over the substance of regulations. However, JCARR usually reserves its review powers for controversial rules that attract public attention: JCARR hearings are typically prompted by concerns raised by affected members of the public, rather than by the direct objections of JCARR members or staff.¹² JCARR is staffed by the Legislative Reference Service, and “review of administrative rules is a very small part of [LRS’s] operations.”¹³

“Review of administrative rules is a very small part of [the Legislative Reference Service’s] operations.”

—Jerry Bassett, Director of Alabama’s Legislative Reference Service

There is no statutory procedure for periodic review of regulations by JCARR or agencies. The legislature can of course review any existing regulation post-enactment, but such reviews are done on a case-by-case basis by the legislature, not systematically by JCARR.¹⁴

The public plays a clear role in JCARR’s review process, with some JCARR hearings filled to capacity.¹⁵ But for anyone not in attendance, it may be difficult to discern JCARR’s rationale for any particular action, since JCARR does not generally issue a formal statement explaining its votes.¹⁶ Complicating matters and further reducing transparency, JCARR is authorized to disapprove a rule on the basis of any criteria it deems appropriate.

Fiscal notes and other materials submitted by agencies to JCARR are also not consistently available to the public. While agencies and the Legislative Reference Service supposedly make fiscal notes accessible to the public,¹⁷ few such documents are available online, nor are they published in the *Alabama Administrative Monthly*.¹⁸

On the transmittal sheets agencies submit to JCARR, agencies are asked specific questions about each of JCARR's statutory review criteria: for example, "Would the absence of the proposed rule significantly harm or endanger the public health, welfare, or safety?"¹⁹ But agencies only supply simple "yes" or "no" responses to these complex questions.²⁰ While the questions are highly relevant, the answers can leave something to be desired.

The small handful of recent and readily available fiscal notes suggests that even some of the more thorough economic analyses fall short of the promise of Alabama's Administrative Procedure Act. Though costs, benefits, and even distributional effects are discussed in qualitative terms, quantification and analytical support is limited, and there is no real analysis of alternative options that might better maximize net benefits.²¹ Much more disconcerting is the lack of consistency on when agencies label rules as having an "economic impact": some rules with annual effects as low as \$3,000 are analyzed,²² while others with arguably equal or greater impacts do not include a fiscal note.²³

Analysis and Grade

Giving Alabama the benefit of the doubt on the implementation of its economic analysis requirements, Alabama's Guiding Principles Grade is a C.

As written and in practice, Alabama's requirements are not reasonable given resources. The analytical burden of the fiscal note technically applies to any rule with any "economic impact," which nearly every rule could have in theory. In practice, the lack of a realistic threshold has led to inconsistent application. Neither statute nor court case has defined "economic impact," leaving agencies to interpret the term ad hoc. Additionally, giving JCARR just thirty-five days per rule to review every proposed rule may not be sufficient time, as evidenced by the fact that JCARR tends to only review rules specifically brought to its attention by the public. Admittedly in tension with the reasonableness of the requirements, the thirty-five day cap on JCARR's review period at least establishes some protection against delay.

Though perhaps not always realized in practice, Alabama's structure at least has the potential to calibrate rather than always just check regulations. JCARR's review criteria ask about harm from not having the rule, and the fiscal note must explain why the regulation is most cost-effective, efficient, and feasible option.

But JCARR's powers are not exercised consistently. Instead, JCARR hearings are mostly triggered by public protest over specific rules. Alabama's statutes do give JCARR an impressive and specific list of criteria for review, but any specificity is swamped by the final catch-all authority to review for any appropriate reason, and is further undermined by JCARR's failure to disclose its reasons for action. Alabama's process would benefit in general from greater transparency. Though JCARR meetings are public and sometimes crowded, economic analysis and transmittal sheets are hard to obtain, and JCARR does not disclose its reasons for disapproving a rule.

Alabama's process focuses almost exclusively on the preparation and legislative review of new regulations. JCARR's mandate does not include promoting inter-agency coordination or

combating inaction, and Alabama has no formal periodic review procedures.

Finally, Alabama's economic analysis requirements are ambitious on paper, though they may not always translate to practice. The fiscal note requirements mention indirect benefits and qualitative factors, and they especially emphasize environmental and public health effects. While not explicitly mandating analysis of alternatives, the requirements do call for an explanation of why the regulation chosen is most cost-effective, efficient, and feasible. The specific inclusion of language on uncertainty and distribution is especially impressive. Given the strong paper structure, Alabama receives favorable marks here, but economic analysis is not well-integrated into the decisionmaking process; fiscal notes read more like post-hoc justifications. The paper structure holds promise, but it needs to be implemented better in practice. Narrowing the scope by defining "economic impact" could help agencies focus resources on those regulations that would benefit the most from analysis.

Notes

- ¹ See ALA. CODE § 44-22-2(B).
- ² The Legislative Council is composed of the President and President Pro Tempore of the Senate, six members of the Senate elected by the Senate, the Speaker and Speaker Pro Tempore of the House of Representatives, six members of the House of Representatives elected by the House of Representatives, the chairs of the Senate's standing committees on finance and taxation and on the judiciary, and the chairs of the standing committees on ways and means and on the judiciary of the House. JCARR is also charged to continuously review agencies' authorities for rulemaking, and to advise them of any statutory changes to their authority. *Id.* § 41-22-22(b)(1)-(4).
- ³ In the event the agency accepts the rule as amended, the agency may resubmit the rule as amended to the committee.
- ⁴ ALA. CODE §§ 41-22-6(c), -22-23(B).
- ⁵ *Id.* §§ 41-22-23(g)(1)-(7).
- ⁶ *Id.* § 41-22-22 (A).
- ⁷ *Id.* §§ 41-22-23(b), -22-24.
- ⁸ *Id.* § 41-22-23(f).
- ⁹ *Id.* §§ 41-22-23(f)(1)-(10); LEGIS. REF. SERV., INSTRUCTION MANUAL AND DRAFTING STYLE MANUAL FOR PREPARING RULES AND NOTICES, AT A-6 TO A-7 (2004) (economic impact statement form).
- ¹⁰ See ALA CODE § 41-22-5.
- ¹¹ Survey from Jerry Bassett, Dir. Legis. Reference Serv. (2009, on file with author). See, e.g., <http://www.alabamaadministrativecode.state.al.us/UpdatedMonthly/AAM-MAY-10/SUSTAINING.pdf> (sustaining disapprovals from late 2009).
- ¹² Survey from Basset, *supra* note 11.
- ¹³ *Id.*
- ¹⁴ *Id.* But see ALA. CODE § 41-22-23(e) (giving the JCARR the power to approve or disapprove of rules adopted before the committee's creation in 1982).
- ¹⁵ E.g., Marie Leech, *Teacher Ethics Code Is Rejected, Plan Too Vague, AEA Argues*, BIRMINGHAM NEWS, AUG. 13, 2009 (reporting on standing room only conditions at JCARR hearing).
- ¹⁶ Survey from Basset, *supra* note 11.
- ¹⁷ *Id.*
- ¹⁸ See Leg. Ref. Serv., *Alabama Administrative Monthly*, <http://www.alabamaadministrativecode.state.al.us/monthly.html>.
- ¹⁹ LEGIS. REF. SERV., INSTRUCTION MANUAL, *supra* note 9.
- ²⁰ See Transmittal Sheet for Notice of Intended Action on Laser Guidelines, from Alabama State Board of Medical Examiners, to Alabama Legislature, Mar. 9, 2007; Transmittal Sheet for Notice of Intended Action on Inpatient Hospice Services, from State Health Planning and Development Agency to Alabama Legislature, Nov. 4, 2009.
- ²¹ See, e.g., Transmittal Sheet for Notice of Intended Action on Income Scales and Fee Schedule, from Department of Human Resources, Jan. 21, 2009 (concluding that "The cost to the 5% of affected families outweighs the potential long-term cost if services end for all families receiving assistance through the Child Care Subsidy Program," but not backing that up with quantitative analysis, and not exploring other policy options); Transmittal Sheet for Notice of Intended Action on License Fee, from Alabama Surface Mining Commission, June 30, 2010 (concluding that "The increased costs in license application fees will be more than offset by the benefits gained," but not analyzing whether

other fee rates could better maximize net benefits).

²² Transmittal Sheet for Notice of Intended Action on Blaster Fees, from Alabama Surface Mining Commission, June 30, 2010 (reporting “this rule would generate annual revenue of approximately \$3,000”).

²³ For example, on a rule prepared by the Alabama State Board of Medical Examiners concerning the use of lasers in medical procedures, the board reports the rule has no economic impact. The rule declares that procedures conducted using laser devices constitute the practice of medicine, requires sixteen hours of training for all such practitioners, and specifies which procedures can be performed with or without supervision by a physician. ALA. RULE NO. 540-X-11 and Appendix A (Laser Guidelines). It is not difficult to imagine how declaring that certain laser procedures are legally the practice of medicine, requiring training for all such practitioners, and imposing supervisory requirements on hospital staff when such procedures are carried out, could have economic impacts on the cost of those procedures, on the cost of medical malpractice insurance premiums, and on hospital budgets.

Alaska

Legislative oversight of agency regulations in Alaska has been called “selective but fairly comprehensive,”¹ and in recent years the legislature has been expanding its powers.

History of Alaska’s Process

Alaska’s legislature first established an Administrative Regulation Review Committee (“ARRC”) in 1975 to help exercise the power it claimed to veto agency rules.² But just five years later, the state Supreme Court held that the legislature’s use of concurrent resolutions—which do not require the governor’s signature—to overturn agency regulations was unconstitutional.³ After that, the ARRC continued to review regulations once they had already been finalized,⁴ but the legislature’s only permanent recourse was the cumbersome option of passing a bill to annul the regulation, which either required the governor’s signature or a legislative vote to override the governor’s objection.

The legislature did little to augment its review powers until 2004,⁵ when it gave the Legislative Affairs Agency the formal ability to review proposed regulations earlier in the rulemaking process.⁶ By adding an earlier layer of review, the legislature hoped to address the problem that “the cost for a poorly written regulation is millions of dollars,” yet aggrieved parties cannot get relief until they exhaust the administrative process.⁷ The other main goals of reform were to give extra weight to the ARRC’s opinions (as well as to the public input that filters through that committee),⁸ and to increase harmony between the executive and legislative branches.⁹

A pilot project to review small business impacts was allowed to expire in 2005.¹⁰

Alaska’s Process on Paper

Executive Branch Review: The Department of Law (which is run by the state’s attorney general) advises agencies on legal issues raised by proposed regulations, as well as on the need for such regulations and the policies involved in the proposal.¹¹ A regulation cannot become final without approval from the Department on issues of legality, statutory authority, and clarity.¹² The Department of Law is also given responsibility for alerting agencies when regulations necessary to implement statutes have not yet been proposed and to make recommendations on the deficiencies or obsolescence of existing regulations.¹³

The lieutenant governor is in charge of filing regulations, and all proposed regulations go the governor for review before they are finalized. As part of the governor’s review, she may return a proposal to an agency to encourage a response to issues raised by the ARRC.¹⁴

Cost Considerations: If a rule would require increased appropriations by the state government, such effects must be estimated over approximately three fiscal years.¹⁵ When considering public submissions on rules, agencies must “pay special attention to the cost to private persons of the proposed regulatory action.”¹⁶ Since 1995, Administrative Order 157 has shined extra light on potential costs, requiring agencies to actively solicit public comments on costs and to design regulations when possible to minimize any known or potential compliance costs.¹⁷ The Department of Law also encourages agencies to consider the “fiscal ramifications of the regulation—for the adopting agency, for other agencies, and for the public,” but this language is mostly precatory.¹⁸

Legislative Review: During the public notice-and-comment period on a rule, the Legislative Affairs Agency may review any proposed regulation for legality and consistency with statutory authority; during its review, the legislative counsel may consult with the rulemaking agency or the

Department of Law, and may make non-binding suggestions for modification of the rule.¹⁹

Once finalized and filed by the executive branch, rules are still submitted to the ARRC for formal review.²⁰ The ARRC collects comments from other legislative committees,²¹ from the public, and from its legal counsel.²² If the legislature is not in session,²³ the ARRC may, by two-thirds vote, suspend the effectiveness of any adopted regulation until thirty days in to the next session.²⁴ Otherwise, the ARRC's only formal powers are to examine regulations, determine legislative intent, provide comments, and introduce a bill to nullify a rule.²⁵

Ex Post Review: In 1995, Administrative Order 157 required agencies to submit to the Department of Law a plan for reviewing existing regulations, with a focus on identifying provisions to possibly amend or repeal because they might be confusing; because they impose excessive public costs compared to benefits or the state's interests; or because they are more burdensome than necessary to carry out an agency's statutory responsibilities.²⁶

Alaska's Process in Practice

Department of Law: In practice, the Department of Law does not review fiscal notes, and instead advises agencies to review their assumptions and estimates carefully, since the Department "is not in a position to audit an adopting agency when reviewing final adopted regulations."²⁷ In the end, it is rare for the Department of Law to totally disapprove of a regulation; most concerns are worked out through consultations with the agency.²⁸

Legislative Review: A single attorney from the Legislative Affairs Agency is tasked with reviewing the thousands of pages of regulations drafted every year. If that attorney thinks a regulation passes the review criteria (legality, statutory authority, legislative intent), "the committee generally doesn't hear about them."²⁹ If she does find a problem, she drafts a confidential memorandum to submit to the ARRC, the Department of Law, and the agency, which typically responds favorably to her advice and agrees to cooperate on her objections.³⁰ As a practical matter, however, the legislature lacks the manpower and resources to check whether the agencies always make the changes discussed with the Legislative Affairs Agency.³¹

According to assistant Attorney General Deborah Behr, the new and earlier layer of legislative oversight added in 2004 has been relatively successful.³² Behr notes that when the legislature comments, the agencies take it seriously, and the governor's ability to return regulations to the proposing agency for further consideration of the ARRC's comments is "a very powerful tool."³³ Similarly, ARRC staff have noted that "agency heads are sensitive to being called in to the Capitol; the real power [of ARRC] is the bully pulpit," and not its ability to introduce bills of disapproval.³⁴

Frequent and extensive public comments are a regular part of ARRC meetings.³⁵ Observers have noted that "[t]he committee's activities suggest that it is particularly concerned with securing the input of members of the public." One scholar concluded that ARRC "members see themselves as ombudsmen, protecting the public from regulations gone awry."³⁶ According to committee staff, ARRC tries to be "sensitive" to the public.³⁷

Consideration of costs and benefits is not specifically enumerated in the statute governing the ARRC's review,³⁸ and the ARRC tries to exercise its authority narrowly.³⁹ ARRC staffer John Davies explained that the committee makes a legal judgment call, not a policy decision: "It's not the job of the committee to remake or rehash the regulations."⁴⁰ However, as a matter of course the ARRC will sometimes consider such factors as a reflection on the regulation's necessity and

compliance with legislative intent.⁴¹ For example, at a 2005 ARRC meeting, Chairman Anderson stated:

Another element we look to in this committee is the necessity for these regulations. We have yet to see any verifying evidence or statistics that say we have a public health problem with food establishments. We would like that to be presented [by the agency]. We also will look at the increased burdens that these regulations will lay upon the industries.⁴²

The ARRC usually tries to avoid introducing bills to annul regulations, preferring to work more collaboratively or informally with agencies to modify rules;⁴³ but the ARRC is not averse to threatening bills of disapproval in order to motivate agencies to make changes.⁴⁴ Because of the inconvenience of using the formal disapproval procedure—it is a “limited, heavy-handed power” that requires a full legislative vote and the governor’s signature—it is reserved for only the “most egregious” cases.⁴⁵

“Agency heads are sensitive to being called in to the Capitol; the real power of [legislative review] is the bully pulpit.”

—John Davies, Legislative Staff

Ultimately, John Davies believes the ARRC still operates somewhat under the radar, calling the committee “a set of tools in the legislature’s toolbox that few people know about.”⁴⁶ Even though the ARRC’s main tool (formal bill of disapproval) is cumbersome to use, the committee has access to other tools (informal comments and threats) that are just as sharp and can be very effective. If recent trends continue, early intervention of the legislature in the rulemaking process may become increasingly

the norm in Alaska. Davies (giving his personal opinion and not representing the view of the ARRC) believes the process would benefit from tasking a specific committee member to “early intervention,” to spark discussion between the ARRC and the agency “while there’s still time to make the easy and effective changes. . . . [I]t’s easier to close the barn door before the horse gets out.”⁴⁷

Analysis and Grade

Alaska’s procedures miss the mark on all guiding principles and so receive a D-.

Alaska’s requirements are not reasonable given resources. Both the Department of Laws and the Legislative Affairs Agency struggle to carry out their responsibilities with the resources available. On the other end, the required economic analysis is quite limited and applies only to a very narrow set of rules; agencies likely could do much more.

Nothing on paper encourages the review process to calibrate rather than just check rules. In fact, the ARRC sees itself as “ombudsmen, protecting the public from regulations gone awry.” Similarly, the periodic review provisions of Administrative Order 157 are out-of-date and focus only on reducing the costs and burdens of regulations, not maximizing benefits or responding to changed circumstances. Beyond a perfunctory call in Administrative Order 157 for state agencies to work together, Alaska’s process does not effectively promote inter-agency coordination, and it does not combat agency inaction.

Alaska now has two layers of legislative review and three executive actors involved in the review process. These multiple levels of review could start to delay or discourage rulemakings, especially

if the legislature increases its early interventions, as signaled. Nothing on paper currently combats against these possible delays.

Alaska has taken some steps to improve public access to rulemaking documents, and the ARRC is reportedly sensitive to public input. But available documentation remains thin, no ARRC meeting minutes have been posted online since 2005, and the paper requirements do little to incorporate the public input beyond the standard notice-and-comment procedures.

Though the role of the Legislative Affairs Agency and the Department of Laws seems consistent, the ARRC's criteria for review are vague, and despite attempts to avoid policy determinations, the committee clearly sometimes blurs the lines. The governor's review has no substantive standards.

Perhaps most challenging, Alaska struggles with problems of staff continuity, and the ARRC's activity level fluctuates with its chair's interest and time. ARRC membership changes with elections, and there are no permanent, professional committee aides, making it difficult to build institutional experience. Individual legislators do not always understand how to use the committee's informal powers to make positive changes. The committee ends up being as active or as inactive as its chair decides to be, who must balance the time and political commitments of a half dozen other committee assignments.⁴⁸ Alaska has some powerful regulatory review tools available, but the state may need to redeploy resources and build consistency before those tools can be wielded effectively.

Notes

- ¹ *Oversight and Insight: Legislative Review of Agencies and Lessons from the States*, 121 HARV. L. REV. 613, 628 (2007).
- ² ALASKA STAT. § 24.20.400 (enacted 1975) (“recognizing the need for prompt legislative review of regulations”). Alaska first created a process for legislative review in 1959. *Id.* § 44.62.320 (enacted 1959).
- ³ *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980) (also holding there was no implied power to veto by informal legislative action).
- ⁴ ALASKA STAT. § 44.62.320(b) (requiring the lieutenant governor to submit regulations and fiscal notes to the ARRC for review at the same time he files them as final).
- ⁵ Nor did the legislature officially repeal its old, unconstitutional powers to annul rules until 2004. *See Id.* § 44.62.320(a) (repealed in 2004).
- ⁶ *Id.* § 24.20.105 (enacted 2004).
- ⁷ HB 424—*Regulation Review: Hearing Before H. Judiciary Comm.*, 2004 Leg., 23d Sess. (Alaska 2004) (statement of David Stancliff, representing Sen. Gene Therriault), available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=23&beg_line=01376&end_line=01592&time=1320&date=20040227&comm=JUD&house=H.
- ⁸ Minutes of ARRC Meeting, Feb. 2, 2005 (statement of ARRC Chair Anderson); *see also* 121 HARV. L. REV. AT 627 (noting that the legislature hoped getting early review from legislative counsel, who drafted the original statutes, would benefit the rulemaking process).
- ⁹ Minutes of ARRC Meeting, Feb. 2, 2005 (statement of legislative staffer David Stancliff).
- ¹⁰ ALASKA STAT. § 44.62.218 (repealed in 2005); *see also* Survey from Deborah Behr, Regulations Attorney, Alaska Dep’t of Law (2009, on file with author).
- ¹¹ ALASKA STAT. § 44.62.060(B); *see also* DEP’T OF LAW, DRAFTING MANUAL FOR ADMINISTRATIVE REGULATIONS 13 (18th ed. 2009) (advising agencies to seek the Department’s advice early in the rulemaking process).
- ¹² ALASKA STAT. §§ 44.62.060(b) & (c).
- ¹³ *Id.* § 44.62.125(b).
- ¹⁴ *Id.* § 44.62.040 (2009). The governor may also return regulations if they are inconsistent with the faithful execution of laws, and the governor may not delegate this review to anyone besides the lieutenant governor. *Id.*
- ¹⁵ *Id.* § 44.62.195. *See* DRAFTING MANUAL, *supra* note 11, at 109 (“Although it is not absolutely clear what the legislature intended to require through AS 44.62.195, that law should be interpreted in a common-sense way so that the true financial impact of a regulation project is considered and publicized.”); *id.* (recommending a relatively broad interpretation, but focusing only on state government revenues and expenditures).
- ¹⁶ ALASKA STAT. § 44.62.210(A).
- ¹⁷ Administrative Order 157, §§ 2-3 (1995).
- ¹⁸ DRAFTING MANUAL, *supra* note 11, at 5; *accord. id.* 9-10 (advising agencies to consider, from the start of a rulemaking project, how best to achieve intent while keeping costs to the public low).
- ¹⁹ ALASKA STAT. §§ 24.20.105(a), (d), (e), (h); *see also* Drafting Manual, *supra* note 11, at 16-17 (noting that the Legislative Affairs Agency reviews, though during the public comment period, are not the same as public comments and are not publicly disclosed).
- ²⁰ ALASKA STAT. § 44.62.320(b). *See id.* § 24.20.410 for details on ARRC membership.
- ²¹ *Id.* § 24.05.182(d) (standing legislative committees can review regulations for compliance with legislative intent and

submit their findings to the ARRC).

- ²² Interview with John Davies, staff to ARRC chair Wes Keller, Feb. 9, 2010.
- ²³ The legislature generally meets for ninety days at the beginning of each year.
- ²⁴ ALASKA STAT. § 24.20.445(A).
- ²⁵ *Id.* § 24.20.460.
- ²⁶ Administrative Order 157, § 10 (1995). The ARRC also technically has review authority over “regulations” in general, which could include existing regulations. However, legislative staffer John Davies believes the ARRC would only review a “particularly egregious” existing rule, because “it’s easier to close the barn door before the horse gets out.” Interview with Davies, *supra* note 22.
- ²⁷ DRAFTING MANUAL, *supra* note 11, at 111; *id.* at 167 (advising agencies to involve their fiscal staff in the preparation of fiscal notes).
- ²⁸ See Minutes of ARRC Meeting, Feb. 2, 2005 (statement of Deborah Behr, assistant attorney general).
- ²⁹ Interview with Davies, *supra* note 22.
- ³⁰ *Id.* (explaining that legislative counsel told him agencies usually say things like “oh, good point,” or “we didn’t realize that might be a problem”).
- ³¹ *Id.*
- ³² See Minutes of ARRC Meeting, Feb. 2, 2005 (statement of Deborah Behr, assistant attorney general).
- ³³ *Id.*
- ³⁴ Interview with Davies.
- ³⁵ See various minutes of ARRC meetings, available at <http://arr.legis.state.ak.us/reports.htm>. See also 121 HARV. L. REV. at 625 (citing one example where dozens of people testified before the ARRC on a single issue over the course of two separate two-hour meetings).
- ³⁶ 121 HARV. L. REV. AT 628.
- ³⁷ Interview with Davies, *supra* note 22 (citing a recent example where the ARRC listened to small dairy business interests who were unhappy with a regulation they thought took a one-size-fits-all approach).
- ³⁸ ALASKA STAT. § 24.20.445(a); see also Interview with Davies, *supra* note 22 (noting that the legislature sees fiscal notes, but cost considerations are not normally part of the Legislative Affairs Agency’s review or of the ARRC’s review).
- ³⁹ See *Administrative Regulation Review Holds First Meeting of 2010 Legislative Session*, U.S. STATE NEWS, Feb. 10, 2010 (quoting ARRC Chair Wes Keller, “We did not find sufficient grounds to recommend to the legislature that a law be passed to veto any of the regulations reviewed. The meeting was a good example of the committee exercising its due diligence regarding regulatory oversight.”).
- ⁴⁰ Interview with Davies, *supra* note 22.
- ⁴¹ *Id.* (admitting that if the ARRC felt the expense of a proposed rule was so objectionable that it was out of line with legislative intent, the ARRC could bring that up).
- ⁴² Minutes of ARRC Meeting, Apr. 20, 2005.
- ⁴³ See Minutes of ARRC Meeting, Apr. 20, 2005 (statement of vice-chair Therriault: “The legislature, if it believes the regulations are out of line, has the ability to pass legislature to modify the underlying statute. However, the hope is that the aforementioned isn’t necessary. This committee allows the legislature to be brought into the discussion, although the committee can’t necessarily dictate how the regulations package moves forward.”).
- ⁴⁴ 121 HARV. L. REV. at 626 (noting that the ARRC does propose disapproval resolutions on occasion, but also uses threats to get agencies to change regulations it feels are “unacceptable”); Interview with Davies, *supra* note 22 (explaining that committee members might use strong words at hearings to motivate agencies to make the regulatory

changes they want).

⁴⁵ Interview with Davies, *supra* note 22.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

Arizona

Arizona’s regulatory review process, already layered and complex, has been complicated by a rulemaking moratorium since the start of 2009.

Arizona’s Moratorium

On January 22, 2009, in her first official act as governor, Governor Jan Brewer issued a moratorium on all rulemaking activities.¹ The effort was part of a larger, systematic “push from the business community and Republican legislative leaders to lighten Arizona’s regulatory requirements, which they see as overreaching and onerous.”² The governor’s office would determine if any specific rules could go forward—due to a critical impact on public peace, health, or safety, or a relation to the state’s budget deficit³—but otherwise, all rulemaking was suspended.

An April 29, 2009 order extended the moratorium and added a requirement for agencies to identify rules that are not necessary, not effective, not enforced, or otherwise obsolete.⁴ On June 29, Brewer extended the moratorium again, this time adding an exemption for any deregulatory proposals.⁵ Finally, the legislature started to take up the cause, passing moratoriums through at least fiscal year 2011 on all rulemakings that would impose monetary or regulatory costs or would not reduce regulatory burdens.⁶ The governor signed the legislation to “assist in creating a more positive business climate.”⁷

“The moratorium has stunted [our] ability . . . to conduct rulemakings.”

—Casey Cullings, Department of Agriculture

The moratorium has had a clear and powerful effect on rulemaking in Arizona.⁸ Though some agencies have utilized the public health and safety exception to pass a few rules,⁹ other agencies feel “[t]he moratorium has stunted [our] ability . . . to conduct rulemakings.”¹⁰ The future of rulemaking in Arizona also remains up in the air. Governor Brewer recently established a Commission on Privatization and Efficiency “to create government efficiencies and reduce regulatory burdens on the citizens of Arizona”; some agency officials anticipate the Commission’s findings will shape future regulatory review procedures in Arizona.¹¹

Arizona’s Process on Paper

Before the rulemaking moratorium, agencies followed a highly detailed rulemaking procedure.

Impact Analysis: Most new rules must have an economic, small business, and consumer impact statement, unless the promulgating agency determines there will be no such impact. A few exemptions exist, most notably for rules that decrease monitoring or recordkeeping burdens.¹²

Impact statement must include, inter alia: identification of the harm that the rule addresses; identification of who will bear costs and burdens; listing of probable costs and benefits to the government, businesses, small businesses, private persons, and consumers; and monetization of the costs and benefits of alternatives, in order to identify the least intrusive, least costly regulatory option.¹³ For rules with a small business impact, agencies must, where legal and feasible, reduce those burdens by creating exemptions or otherwise tailoring the rule.¹⁴

In 2010, the legislature added a provision allowing the governor’s office of strategic planning and budgeting to prepare the economic, small business, and consumer impact statement.¹⁵

Executive Review: Agencies must submit most rules and impact statements to the Governor’s

Regulatory Review Council.¹⁶ For a few rule categories (such as emergency rules), agencies submit to the attorney general instead; but otherwise, rules cannot be finalized without the Council's approval.¹⁷

The Governor's Regulatory Review Council ("GRRC")¹⁸ consists of six members appointed by the governor, including at least one public interest representative, one business community representative, one attorney, one member recommended by the Senate, and one member recommended by the House; the director of the Department of Administration also sits on the GRRC.¹⁹ Despite the legislature's role in recommending appointees, the governor's influence clearly dominates, and the GRRC operates as an executive branch reviewer.

The GRRC has 120 days to review a rule after it is submitted, though it may start a review early if petitioned by a member of the public adversely impacted by the rule.²⁰ The GRRC must approve a rule for it to take effect, and cannot approve unless it determines, inter alia: the impact statement contains the prescribed analysis and is generally accurate; the rule's probable benefits outweigh probable costs, and the agency selected the least burdensome and costly alternative; the rule is consistent with statutory authority and legislative intent; the agency has adequately addressed comments; and the rule is no more stringent than federal law, unless authorized.²¹

Legislative Review: The legislature's Administrative Rules Oversight Committee was recently revived in 2009, but is set to expire in 2017.²² While it lasts, it is a joint, bipartisan committee, on which either the governor or an executive designee also sits.²³ Legislative council staffs the committee,²⁴ which may review new and existing rules and practices. The committee can hold hearings, comment on a rule's consistency with statute and legislative intent, and testify before the GRRC.²⁵ The committee may also comment on any duplicative or onerous rules, and it must recommend legislation each year to alleviate such effects.²⁶

Periodic Review: Every five years, agencies must review all their rules, issue a written report on the rules' continued need, and get the GRRC's approval of its report. Agencies are to consider the rules' effectiveness; written criticisms received; the rules' consistency with current agency wisdom; currently estimated economic, small business, and consumer impact statement; and whether the rules are the least burdensome and costly option.²⁷ If an agency fails to get approval from the GRRC on its report, the rules expire.²⁸

Public Participation Rights: Arizona provides for extensive and explicit rights for the public to participate in regulatory review. Public notice of proposed rules must contain at least a preliminary summary of the economic, small business, and consumer impact statement, and must solicit input on the accuracy of the summary.²⁹ Arizona's Administrative Procedure Act contains a "regulatory bill of rights," which includes the right for the public to comment to the GRRC, and the right to file a complaint with the Administrative Rules Oversight Committee that a rule does not conform with legislative intent or is onerous.³⁰ Any affected person may petition an agency, objecting that a rule's actual impacts have significantly exceeded its estimated impacts, that the rule's impact was not estimated, or that the agency did not select the least burdensome alternative.³¹ Such petitions can be appealed to the GRRC.³²

Arizona's Process in Practice

Agencies currently prepare the impact statements themselves.³³ It is rare for agencies to have economists on staff or to consult with outside economists on the impact statements.³⁴ More often, agencies contact industry and stakeholders to estimate compliance costs for the impact statement;

sometimes, existing studies are reviewed.³⁵ The legally required focus of impact statements is on impacts to the state, citizens, and companies, and though an agency “may elect to consider the impact on others as it feels appropriate based on the nature of the rulemaking,” in practice public benefits are given little analytical attention.³⁶ Similarly, the emphasis of the distributional analysis is principally on small businesses impacts.³⁷

The GRRC hosts regular seminars for agencies on rule writing, periodic reviews, and the preparation of impact statements.³⁸ The GRRC will also, by request, conduct early “courtesy reviews” of draft rulemaking materials,³⁹ especially of the occasional complex impact statement.⁴⁰ The GRRC does have one economist on staff, along with a few rule analysts and attorneys.⁴¹ GRCC comments come on almost every rule, but GRRC staff (and not members) take the lead on issuing comments. Agencies usually make the recommended changes,⁴² and report that communications with the GRCC are generally collaborative.⁴³

In practice and through history, the Administrative Rules Oversight Committee’s involvement in regulatory review has been “minimal”⁴⁴ to non-existent.⁴⁵

Public appeals to the GRRC of petitions (for example, for review of the impact statements) are rare.⁴⁶

Analysis and Grade

As epitomized by the current moratorium, Arizona tends to view rules as burdens to be minimized, not as tools for maximizing social welfare. The state’s Guiding Principle Grade is a C.

Ignoring the largely inactive legislative review committee, the GRRC handles its responsibilities consistently and, reportedly, without significantly delaying the rulemaking process.⁴⁷ And while economic analysis requirements should be recalibrated to focus on different elements, agencies are capable of meeting current requirements, which do not seem unreasonable.

However, neither the GRRC’s review nor economic analysis requirements are well designed to help strengthen rule content. Though the GRRC’s membership balances public interest and business interests, its statutory criteria for review focus on the least costly alternative, not where benefits can be maximized. The public process similarly tends to carry the review process in a single direction: the public can petition or appeal if a rule proves more burdensome than estimated in the impact statement, but not if economic analysis suggests the rule should be strengthened. But the existence of a robust public participation process is notable: it clearly could be more balanced, and it is not frequently exercised, but it is available.

Again ignoring the largely inactive legislative review committee, the GRRC does seem to consistently exercise its duties. Similarly, though the legislature’s review standards are vague (“onerous”), the GRRC has clear, substantive standards. But neither reviewer is empowered to help coordinate agency conflicts or combat agency inaction. Periodic review is governed by vague standards (“consistent with current wisdom”) and tends to emphasize only eliminating costly rules.

The economic analysis requirements do mention monetizing the costs and benefits of alternatives, but the distributional analysis seems, both on paper and in practice, to focus only on small business impacts, and public benefits are not given the same analytical attention as private costs and government impacts.

Though Arizona should quickly move to end its moratorium on rulemaking—since well-designed regulations can actually address market failures and improve the state’s economic conditions—it should take this brief time out to redesign its regulatory review process and focus more on maximizing net benefits.

Notes

- ¹ Press Release, *Governor Brewer Freezes New Regulatory Burdens*, Jan. 22, 2009.
- ² Mary Jo Pitzl, *Freeze on New Laws, Rules Sought to Help Businesses*, THE ARIZONA REPUBLIC, Feb. 6, 2009.
- ³ Order on Regulatory Review Plan, from Gov. Brewer to State Agency Directors, Jan. 22, 2009.
- ⁴ Order on Continuation of Regulatory Review Plan (Moratorium), from Gov. Brewer to State Agency Directors, Apr. 29, 2009.
- ⁵ Order on Continuation of Regulatory Review Plan (Moratorium), from Gov. Brewer to State Agency Directors, June 29, 2009.
- ⁶ Engrossed H.B. 2260, 49th Legis. (Ariz. 2010).
- ⁷ Press Release, *Governor Jan Brewer Issues Executive Order to Continue Moratorium on Regulatory Rule Making*, July 1, 2010.
- ⁸ See Kathy Zatari, GRRRC, ANNUAL REPORT 2009, at 2 (2009).
- ⁹ E.g., Survey from Thomas Salow, Dept. of Health Serv., Office of Admin. Counsel and Rules (2010, on file with author).
- ¹⁰ Survey from Casey Cullings, Dept. of Agriculture (explaining the department has not promulgated any rules under the moratorium, and “Arizona law does not allow the Department to get around rulemaking through guidance documents, which are only advisory”).
- ¹¹ See Salow, *supra* note 9.
- ¹² ARIZ. ADMIN. CODE § 41-1055(D).
- ¹³ *Id.* § 41-1055. Generally, analysis is limited to costs and benefits within the state, *id.* § 41-1055(F); *but see id.* § 41-1055(G) (agencies can consider analysis comparing effects on business competition out of state).
- ¹⁴ *Id.* § 41-1035.
- ¹⁵ *Id.* § 41-1052(A) (if the legislature appropriates money for that purpose).
- ¹⁶ *Id.* § 41-1024(E).
- ¹⁷ *Id.* §§ 41-1024(G)-(H), 41-1044 (the attorney general reviews for procedure and authority). Some agencies, like the Department of Health Services, have not engaged in emergency rulemakings in last ten years. Survey from Salow, *supra* note 9.
- ¹⁸ The GRRRC was first established by Executive Order 81-3 on May 8, 1981.
- ¹⁹ ARIZ. ADMIN. CODE § 41-1051.
- ²⁰ *Id.* § 41-1052(A)-(C).
- ²¹ *Id.* § 41-1052(D). Statute creates a good faith exemption for judicial review of impact statements. *Id.* § 41-1052(I).
- ²² *Id.* § 41-3017.13.
- ²³ *Id.* § 41-1046(B).
- ²⁴ *Id.* § 41-1046(D).
- ²⁵ *Id.* § 41-1047.
- ²⁶ *Id.* § 41-1048.
- ²⁷ *Id.* § 41-1056.

- ²⁸ *Id.* § 41-1056(E). The public can petition the GRRC for repeal of obsolete rules. *Id.* § 41-1056(I).
- ²⁹ *Id.* § 41-1001(15).
- ³⁰ *Id.* §§ 41-1001.01(6), (10) & 41-1052(H).
- ³¹ *Id.* § 41-1056.01(A).
- ³² *Id.* § 41-1056.01(D).
- ³³ Survey from Kathy Zadari, GRRC (2009, on file with author).
- ³⁴ See Survey from Cullings, *supra* note 10; Survey from Salow, *supra* note 9 (“The Office of Administrative Counsel and Rules does not have an economist on staff, but has consulted with the staff economist of the Governor’s Regulatory Review Council. The Governor’s Regulatory Review Council’s staff economist always reviewed an economic impact statement, but was not involved in its preparation. For the preparation of one rulemaking within the last five years, the Office of Administrative Counsel and Rules consulted with an economist employed by or contracted with ADHS.”).
- ³⁵ See Survey from Cullings, *supra* note 10; Survey from Salow, *supra* note 9.
- ³⁶ See Survey from Cullings, *supra* note 10.
- ³⁷ See *id.*; Survey from Salow, *supra* note 9.
- ³⁸ GRRC, Council Seminars, <http://grrc.az.gov/mainpages/grrcsem.asp>.
- ³⁹ GRRC ANNUAL REPORT 2009, *SUPRA* NOTE 8, AT 5.
- ⁴⁰ See Survey from Cullings, *supra* note 10.
- ⁴¹ GRRC, Council Staff, <http://grrc.az.gov/mainpages/grrcstaf.asp>; Survey with Kathy Zadari, *supra* note 33.
- ⁴² See Survey from Cullings, *supra* note 10.
- ⁴³ See Survey from Salow, *supra* note 9.
- ⁴⁴ *Id.*
- ⁴⁵ See Virginia Admin. Law Advisory Comm., Legislative Powers of Rules Review in the States and Congressional Powers of Rules Review (2001).
- ⁴⁶ See recent GRRC annual reports.
- ⁴⁷ The GRRC has to either submit its findings or terminate review within 120 days of the rulemaking record closing; the GRRC reports that its review process does not delay rulemakings. GRRC, Frequently Asked Questions, <http://grrc.az.gov/mainpages/faqs.asp>.

Arkansas

Though Arkansas’s legislative review committee technically has only advisory powers, “state officials generally regard it as unwise to do things legislators appear to dislike.”¹

Arkansas’s Process on Paper

Economic Impact Statement: Arkansas requires a financial impact statement and, in certain cases, a small business impact statement for new proposed rules.² The scope and content of financial impact statements are left to the discretion of each promulgating agency, but at a minimum, they must include the estimated compliance costs and administrative costs.³ If an agency believes developing a financial impact statement would be so speculative as to be cost prohibitive, the agency can instead submit a statement and explanation to that effect.⁴

Executive Order 05-04 first required small business impact statements, and then several elements of the Order were codified into the Administrative Procedure Act.⁵ The combined requirements are:

- a description of the need for and the complaints that motivated the proposal;
- the top three benefits of the proposed rule;
- the consequence of maintaining the status quo;
- whether market-based alternatives or voluntary standards were considered in place of the proposed regulation, and the reasons for not selecting those alternatives;
- whether the proposed regulation create barriers to entry;
- whether a means exists to make the rule less costly for small businesses without compromising the objective of the rule;
- the types of small businesses that will be directly affected by the proposed rule, bear the cost of the proposed rule, or directly benefit from the proposed rule;
- a reasonable determination of the compliance costs for small businesses;
- a reasonable determination of the implementation costs or financial benefits to the agency;
- a comparison of the proposed rule with federal and state counterparts.

Small business impact statements, along with the proposed rule, are submitted to the Director of the Arkansas Economic Development Commission,⁶ who reviews whether the impact analysis was performed adequately and whether the agency properly balanced the rule’s goal with the interests of affected businesses.⁷ While the Director may also collect comments from impacted businesses,⁸ she only has ten days to review, and her recommendations on a rule are non-binding.⁹

Legislative Review: Proposed rules and regulations, as well as regular financial impact statements, are submitted to the Administrative Rule and Regulation Subcommittee (“ARRS”) for review;¹⁰ these reviews are then passed on to the Legislative Council (“LC”). The LC is charged to act as an agency watchdog, to ensure that agency actions conform to legislative intent.¹¹ Not only are agencies required to submit rules to the ARRS, but the LC has authority to selectively review possible, proposed, and adopted rules.¹² Furthermore, the LC is authorized to receive and investigate complaints filed by the public regarding possible, proposed, or adopted rules.¹³ The

LC can submit non-binding comments to agencies regarding rules, along with a request that the agency respond in writing,¹⁴ and can recommend the introduction of legislation.¹⁵ The LC may also submit to agencies nonbinding recommendations to adopt a rule.¹⁶

Periodic Reviews: At the end of each legislative session, each agency reviews recently passed statutes to determine whether to adopt new rules or amend existing ones, and issues a public, written report.¹⁷ The Economic Development Commission may also review existing rules for “unduly negative impact on small business.”¹⁸ The legislature only reviews existing rules in select instances, and Arkansas long ago repealed its sunset laws.¹⁹

Arkansas’s Process in Practice

In practice, the LC operates through its Administrative Rules and Regulations Subcommittee (“ARRS”).²⁰ The subcommittee has a staff of five: an administrator (who is an attorney), two staff attorneys, a legislative analyst, and an administrative assistant.²¹ Rules are reviewed primarily for legality and consistency with legislative intent, and the ARRS does not routinely police procedural requirements.²² The bulk of rule reviews are completed with little comment by the ARRS.²³ Occasionally, the committee may punt on issues of statutory authority, signing off on rules even while questioning their legality.²⁴ The ARRS is also tuned in to public comments: when submitting rules to the ARRS, agencies must identify whether they expect the rules to be controversial, and who is expected to comment.²⁵

Agencies are not required to accept ARRS comments and as a matter of law may proceed however they see fit. An agency is also not required to wait for the ARRS to complete its review before finalizing a rule. Nevertheless, agencies do sometimes change rules in response to ARRS hearings.²⁶ Agencies also might defer a rule to allow time to address public comments expressed at ARRS hearings,²⁷ or agree to conduct additional economic analysis.²⁸ Generally speaking, state officials “regard it as unwise to do things legislators appear to dislike. . . . It’s rare for state agencies to implement proposed rules without the subcommittee’s blessing.”²⁹

The financial impact statement questionnaire focuses on compliance costs and government costs,³⁰ with some quantification and monetization of government and small business costs.³¹ The small business impact statement does ask agencies to describe the rule’s top three benefits, but often agencies simply state what the rule does: “a. Clarifies the definition of an operator; b. Clarifies the recommended standards for sewer works; c. Clarifies the requirements of CAFO permitting which greatly lessens the impact to poultry growers in Arkansas.”³²

Case Study: Childcare Standards

In early 2010, the Department of Human Services proposed new quality ratings for childcare and early childhood education centers—the so-called “Better Beginnings” rule. Among other things, providers that maintained a high quality rating would be eligible for federal grant money.³³ At an ARRS hearing on the proposed rule, the Arkansas Child Care Providers Association testified to its concerns about the possible costs involved in meeting the new standards. The associated requested that the agency analyze impacts to childcare providers; the agency agreed, and the ARRS deferred consideration of the rule to the following month’s meeting.³⁴ The next month, a hearing was held on the cost analysis,³⁵ but some ARRS members were still concerned that the new standards would impose unfair burdens. The agency agreed to clarify that the new regulation only created a voluntary system of quality rankings.³⁶ Finally, after the third ARRS hearing, the committee approved the regulation. By that point, the ARRS co-chair, Sen. Percy Malone, was

quite eager to move on to new business—“As my grandma said, if you want to chew that cud over again, we’ll do it.”³⁷

Analysis and Grade

Arkansas’s regulatory review process needs to improve consistency across the board, and so its Guiding Principles Grade is a D+.

Legislative review is optional, but exercised relatively consistently. The scope of fiscal impact statements is discretionary, and so while the content of economic analysis needs dramatic improvements, the burden is inherently reasonable.

That said, the review process is not well designed to calibrate rules. Though the review process is optional and comes at the very end of rulemaking, agencies prefer to wait for ARRS approval before finalizing regulations. Since there are no deadlines, there is no protection against delay, and the ARRS ignores the statutory criteria for its review, judging more by policy on a selective basis. On the other hand, the ARRS takes public comments seriously and can recommend that agencies pursue new regulations.

There is no real requirement for periodic review. The regulatory flexibility analysis does seem to require broader analysis of market-based and voluntary alternatives beyond their small business impacts, but otherwise the discretionary scope of impact analysis means benefits and distributional consequences get little attention.

Notes

- ¹ Michael R. Wickline, *Lawmakers Reject School Vending Rules*, ARKANSAS DEMOCRAT-GAZETTE, Sept. 2, 2005.
- ² ARK. CODE ANN. § 25-15-302(a)(1) (“Before submitting a proposed rule for adoption, amendment, or repeal, an agency first shall determine whether the proposed rule affects small businesses.”).
- ³ *Id.* §25-15-204(d)(3)(A). If the purpose of a state agency rule is to implement a federal rule or regulation, the financial impact statement must be limited to any incremental additional cost of the state rule, as opposed to the total implementation costs of the state rule combined with the federal rule or regulation. *Id.* § 25-15-204(d)(3)(C).
- ⁴ *Id.* § 25-15-204(d)(3)(B). An exception is made for those rules promulgated by the State Board of Education or the State Board of Workforce Education and Career Opportunities. *See id.* § 6-11-132.
- ⁵ *Id.* § 25-15-301 et seq. The Order’s definitions are codified at § 25-15-301; its applicability requirements at § 25-15-302; and its substantive requirements for economic impact statements and interactions with the Director at § 25-15-303.
- ⁶ *Id.* § 25-15-303(c); the Commission’s review is assisted by the Regulatory Review Committee, *id.* § 25-15-304.
- ⁷ *Id.* § 25-15-303(d)(1).
- ⁸ *Id.* § 25-15-303(d)(2)(A).
- ⁹ *Id.* § 25-15-303 (e)(2)(A).
- ¹⁰ *Id.* § 10-3-309(e)(2).
- ¹¹ *Id.* § 10-3-309(c)(2).
- ¹² *Id.* § 10-3-309(d)(1)(A). Agencies must also notify the LC when they intend to repeal a rule. *Id.* § 10-3-309(b)(1)(B).
- ¹³ *Id.* § 10-3-309(d)(1)(B).
- ¹⁴ *Id.* § 10-3-309(d)(2)(B).
- ¹⁵ *Id.* § 10-3-309(d)(3)(A)(i)-(ii).
- ¹⁶ *Id.* § 10-3-309 (d)(5).
- ¹⁷ *Id.* § 25-15-216.
- ¹⁸ *Id.* § 25-15-303(d)(3).
- ¹⁹ Survey from Matthew Miller, Administrator of the Administrative Rules Review Section, Bureau of Legis. Res. (2009, on file with author).
- ²⁰ *See* ARK. CODE ANN. § 10-3-309.
- ²¹ Survey from Miller, *supra* note 19.
- ²² *Id.*
- ²³ *See* various ARRS reports, *available at* <http://staging.arkleg.state.ar.us/committeeattachments/000/>.
- ²⁴ *E.g.*, Michael R. Wickline, *Panel Approves New Regulation of Drilling Fluid; Lawyer Questions Legal Basis for Rule Imposing Permit Fee*, ARKANSAS DEMOCRAT-GAZETTE, May 23, 2009; *see also* Minutes of ARRS Hearing, May 2009 (reporting that new legislation would be necessary to ensure legality of proposed rule).
- ²⁵ *See* Questionnaire for Filing Proposed Rules and Regulations with the Arkansas Legislative Council and Joint Interim Committee.
- ²⁶ *E.g.*, Minutes of ARRS Hearing, Mar. 16, 2010, *available at* <http://staging.arkleg.state.ar.us/committeeattachments/000/I8112/Exhibit%20F.1%20-%20Rules%20Subcommittee%20Report.pdf> (noting a

change to a Department of Education rule after the ARRS questioned its compliance with law).

- ²⁷ *E.g., id.* (“The State Medical Board’s Regulation . . . was deferred until the next committee meeting to allow additional time for the physicians and nurses to meet jointly concerning their differences on this rule.”); Michael R. Wickline, *Doing About-Face, State Panel Backs School-Food Rules; Vending, Activity Edicts on Menu*, ARKANSAS DEMOCRAT-GAZETTE, Sept. 7, 2005 (reporting that the ARRS reversed its decision on a rule after the Department of Education agreed to hold more public hearings).
- ²⁸ *E.g., Minutes of ARRS Hearing, Mar. 16, 2010, supra note 26* (“The committee considered the Department of Human Services, Child Care/Early Childhood Education’s “Better Beginnings” rule. Alisa Carter with the Arkansas Child Care Providers Association testified that her association is not opposed to the rule, but rather, some providers are concerned about what the changes will cost. She requested that the department do an analysis on the impact to child care providers. While this issue was not raised during the public comment period, Tonya Russell, department director, agreed to meet with the association. There was also discussion about adding language to assure that if federal funding decreases, the providers would not be strapped with an unfunded mandate. The rule will be deferred until the April meeting.”).
- ²⁹ Michael R. Wickline, *Lawmakers Reject School Vending Rules*, ARKANSAS DEMOCRAT-GAZETTE, Sept. 2, 2005.
- ³⁰ *See Questionnaire, supra note 25.*
- ³¹ *See Ark. Dept. of Env’tl. Quality, Economic Impact Statement for Regulation No. 32 (Env. Prof. Certification), Jan. 3, 2008.*
- ³² Ark. Dept. of Env’tl. Quality, Economic Impact Statement for Arkansas Pollution Control and Ecology Commission Regulation Number 6, Jan. 5, 2006; *see also* Ark. Dept. Env’tl. Quality, Economic Impact Statement for Regulation No. 23 (hazardous waste management), July 1, 2009 (“Maintains equivalence between State and new Federal hazardous waste management regulations; Provides a lower-cost alternative means for the reclamation and recycling of cathode ray tubes; and Clarifies outdated language and corrects errors found in the current text of Regulation No. 23.”).
- ³³ Seth Blomeley, *Panel OKs Rating Child-Care Centers*, ARKANSAS DEMOCRAT-GAZETTE, May 12, 2010.
- ³⁴ Minutes from ARRS Hearing, Mar. 16, 2010, *supra* note 26.
- ³⁵ Minutes of Apr. 28, 2010 Hearing, *available at* <http://www.state.ar.us/childcare/bb/Better%20Beginnings%20Public%20Hearing%204-28-10.pdf>.
- ³⁶ Blomeley, *supra* note 33.
- ³⁷ *Id.* (quoting Malone).

California

California’s Office of Administrative Law—praised as one of the nation’s first, most active, and independent review entities—runs a review process that frustrates many agencies.

California’s Process on Paper

Impact Statements: Notice of a proposed rule must describe all known costs, including an estimate of any cost or savings to a state or local agency or school district.¹ Agencies must also compare their proposals to federal law, and proposed environmental rules cannot differ from federal standards unless authorized by law or if the additional costs are justified by health, safety, welfare, and environmental benefits. The notice also must include a statement on any significant effects on housing costs.²

More generally, California’s impact statements focus on reducing potential burdens on business. If a rule may have significant, statewide adverse economic impacts on business, agencies must identify in their notice the types of businesses affected and describe the rule’s requirements for them.³ Agencies must describe all reasonable alternatives and the reasons for rejecting them, with a focus on options that would lessen negative impacts on small businesses.⁴ Agencies are encouraged, consistent with regulatory objectives, to tailor requirements to the scale of affected businesses.⁵ Agencies must assess whether the proposed rule will affect jobs, business creation, or business expansion,⁶ and may only propose new reporting requirements for businesses if necessary for health, safety, and welfare.⁷

The Department of Finance assists agencies in preparing fiscal impact estimates and reviews the statements.⁸

Office of Administrative Law: Though the Office of Administrative Law (“OAL”) was established as part of the executive branch,⁹ with its director appointed by the Governor,¹⁰ the director is subject to Senate confirmation,¹¹ and is removable only for cause.¹² Consequently, the OAL will be grouped with other independent reviewers.¹³

The OAL is charged with both improving the quality of new regulations and reducing the overall number of regulations, and should be guided by “fairness,” “uniformity,” and “the expedition of business.”¹⁴ Before they can take effect, all adopted regulations are submitted to the OAL, along with a final statement of reasons, which includes a determination on unfunded mandates and a finding that no alternative would be more effective or as effective but less burdensome.¹⁵

The OAL then reviews the rule and the rulemaking record for procedural compliance (including the completion of required impact statements) and six criteria: necessity, authority, clarity, consistency, reference, and nonduplication.¹⁶ The OAL is instructed to not substitute its judgment for that of the agency on substantive content.¹⁷

From that point, the OAL has thirty days to either approve or disapprove rules; if the OAL does not act, the regulation is approved by default. If the OAL disapproves, the rule is returned to the agency.¹⁸ The agency can appeal the OAL’s decisions to the governor.¹⁹

Existing Regulations: At the request of any legislative committee, the OAL initiates a priority review of any existing regulation that the committee believes does not meet the standards of necessity, authority, clarity, consistency, reference, and nonduplication. If after a ninety-day review, the OAL finds the rule does not meet those standards, it can order the agency to show cause for why

the regulation should not be repealed. The agency has up to ninety days to respond, after which the OAL can make a final determination and order the repeal of the rule.²⁰ The Governor may overrule the decision to repeal.²¹

California governors also sometimes issue Executive Orders on the review of regulations. This is most common at the start of a new administration,²² but in 1997 Executive Order W-144-97 spelled out a more comprehensive approach to rulemaking. In addition to seeking an immediate 5% reduction in the compliance costs of existing regulations, the Order recommended the reevaluation of rules and their fiscal impacts every five years. The Order also tried to standardize economic impact statements for new rules, promoting the assessment of costs and benefits of any divergence from comparable state, federal, or local standards.²³

California's Process in Practice

Fiscal and Economic Analysis: California's State Administrative Manual, last revised in early 2009, outlines the basic procedures for preparing an Economic and Fiscal Impact Statement. The revised manual does not mention the assessment of social benefits.²⁴ The 1999 version of the manual did encourage agencies to evaluate all anticipated costs and benefits, quantifying where possible, and to avoid vague qualitative terms like "few" or "minor." The old manual conceded that agencies are not normally required to quantify benefits, but advised that monetizing benefits to the extent possible would help agencies demonstrate the proposed regulation's necessity. Still, even the

"If you want us to do more analysis, give us the money."

—George Tekel,
Department of Insurance

old manual concluded that "agencies need only include *direct costs and benefits on regulated parties.*"²⁵ The current standard template for impact statements features a short section on benefits and includes lines where agencies can quantify both the costs and benefits of alternative options.²⁶

California agencies do not typically employ economists in the preparation of their impact statements.²⁷ Cost estimates are often prepared by first making a preliminary, "not particularly scientific" estimate, and then relying on the regulated industry to critique and refine the estimate during the public comment period.²⁸ Non-economic costs and benefits may be mentioned, but they are not necessarily weighed in a cost-benefit comparison, and indirect effects are only considered on a "theoretical" basis.²⁹ Qualitative, speculative arguments on benefits may be included, but they are not required by law.³⁰

The statute assures agencies several times that analytical requirements are not intended to place additional burdens on the rulemaking process,³¹ and as such no additional funding is provided.³² Nevertheless, agencies report that existing analytical requirements are already burdensome enough and, citing budget cuts and lack of resources, undertaking the ideal level of analysis is usually out of the question.³³

Ultimately, agencies feel the impact statements are a burdensome but pro forma requirement not subject to much real scrutiny.³⁴ Though the Department of Finance does on occasion reject fiscal impact statements as incomplete,³⁵ the OAL only checks for the inclusion of a statement, not its accuracy.³⁶ Recently, some legislators have grown frustrated with the lack of third party review of economic assessments,³⁷ and have tried to expand the OAL's review to include a check on whether regulations are cost-effective and technologically feasible.³⁸

Cal EPA's Economic Analysis: By statute, California's Environmental Protection Agency established its own, separate, agency-wide economic analysis program.³⁹ The Air Resources Board's eight-person economic analysis unit reviews all departmental analyses (though otherwise the agency has very few economists).⁴⁰ Despite this additional layer of review, the agency's analyses remain sparse. While the agency is supposed to assess alternatives, often not much thought is given to any alternative besides a "no action" scenario. Analysis of benefits is also "very weak," and though the agency tries to quantify where possible, benefits are rarely monetized and often reported as unquantifiable.⁴¹ The agency is more rigorous on the cost side, developing economic models, reaching out to stakeholders, and sometimes even commissioning assistance from outside academics.⁴² Still, even the most thorough analyses may be criticized on their assumptions and methodology, as demonstrated recently by the controversy over the Air Resources Board's economics and jobs analysis of its climate change plan.⁴³

Office of Administrative Law: The OAL has always been one of the "best financed and most active reviewing bod[ies] in the states."⁴⁴ Currently, the OAL has a staff of twenty-one and an annual budget of \$2.8 million.⁴⁵ Yet even with those resources, the OAL cannot always complete all the review tasks it would like, and each year can only prioritize a few requests to review whether agencies are using guidance documents to avoid the rulemaking process.⁴⁶

Agency communications with the OAL frequently focus on clarifications and technical questions,⁴⁷ though agencies will sometimes seek an early, non-binding assessment.⁴⁸ This is especially true for high priority or complex, scientific rules,⁴⁹ or in an effort to speed up the approval process.⁵⁰ Most agencies agree that, at least currently, the OAL does not overtly get involved in reviewing policy and has no vested interest in the content of the regulation.⁵¹ But agencies have not always had collaborative relationships with the OAL, and in the past some agencies might have been inclined to speculate that OAL decisions were politically driven.⁵² Even some recent OAL disapprovals have attracted controversy, such as the OAL's review of new lethal injection rules and certain greenhouse gas rules.⁵³ For its part, the OAL insists that it sticks to its statutory review criteria and does not consider politics or public comments.⁵⁴

Since 2000, the OAL has disapproved over 150 rules.⁵⁵ Though officially the OAL cannot modify a rule, informally the OAL can signal to agencies that a rule will be disapproved unless modified.⁵⁶ Some agencies report that relatively few of their regulations are disapproved, since usually they will withdraw, modify, and resubmit a rule.⁵⁷ But this back-and-forth process can draw out the rulemaking schedule. While the OAL reports that it never fails to meet its deadlines for review,⁵⁸ agencies feel the entire rulemaking process can often drag on for up to a year.⁵⁹ For example, a tire pressure rule from the Air Resources Board went through three iterations before winning the

"Interest groups and external partners are much more knowledgeable about the substance of regulations than OAL. I would suggest that so long as a public process is required, centralized review by OAL could be eliminated without much loss of value."

—Lenora Frazier, Housing and Community Development Regulations Coordinator

OAL's approval.⁶⁰

Though agencies agree OAL review can be useful,⁶¹ some feel overly scrutinized. Agencies believe the extra layer of bureaucracy may be unnecessary, since the rule likely already survived several rounds of internal vetting and maybe even ran through the governor's office first.⁶² Ultimately, the entire process is so cumbersome that staff are tempted to avoid rulemakings whenever possible

Periodic Review: Besides the occasional review of existing regulation when a new governor takes office, periodic review happens sporadically at best.⁶⁴ The Department of Insurance reports it has over one thousand regulations: systematic review would be nearly impossible.⁶⁵

Analysis and Grade

Agencies report that they lack the resources to comply with analytical requirements and that the entire process is too cumbersome, forcing staff to resort to guidance documents in an attempt to avoid rulemaking. At the same time, the OAL does not substantively check or calibrate policy, nor do current analytical requirements present enough information on benefits to allow a reviewer to help calibrate a rule.

OAL reviews are consistent and guided by clear standards, even though some speculate that, from time to time, a bit of political influence sneaks in. However, the public has little chance to participate in this review process. The OAL is not assigned the task of coordinating interagency conflicts, and besides its eternal battle against so-called "underground" guidance documents, the OAL does not meaningfully push against agency inaction.

The OAL can, in conjunction with the legislature, review existing regulations, but agencies report periodic review only occurs when a new governor takes over, and even then the review is not likely to be very productive.

Impact analyses are often pro forma and very infrequently discuss benefits or alternatives in a meaningful way.

Overall, California's Guiding Principles Grade is a D. The grade is not only surprising given the state's long history with regulatory review, but it is especially disconcerting considering the power and responsibilities of California's agencies. California's Department of Insurance regulates an industry that takes in \$130 billion in insurance premiums, and yet the agency lacks the resources it needs to conduct the optimal level of analysis before regulating.⁶⁶ California's legislature should rethink its regulatory review structure, and then devote the resources necessary to make the process work. In times of budget cuts, it is all the more important for government to make sure its regulations maximize benefits and operate efficiently.

Notes

- ¹ CAL. GOV'T CODE § 11346.5(a). "Cost impact" means the amount of reasonable range of direct costs, or a description of the type and extent of direct costs, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action. *Id.* § 11342.535.
- ² *Id.* § 11346.2(b)(5).
- ³ *Id.* § 11346.5(a).
- ⁴ *Id.* § 11346.2(b)(3).
- ⁵ *Id.* tit. 2, div. 3, pt. 1, ch. 3.5, art. 1.
- ⁶ *Id.* § 11346.3(b).
- ⁷ *Id.* § 11346.3(c).
- ⁸ *Id.* § 11357.
- ⁹ OAL is also supposed to work closely with the legislature. CAL. GOV. CODE § 11340.1(A).
- ¹⁰ *Id.* § 11340.2; Survey from Linda C. Brown, Deputy Director, OAL (2009, on file with author).
- ¹¹ CAL. GOV. CODE § 11340.2.
- ¹² *See id.* § 3002.
- ¹³ *See* Virginia Admin. Law Advisory Comm., Legislative Powers of Rules Review in the States and Congressional Powers of Rules Review (2001).
- ¹⁴ *Id.* §§ 11340.1(a), 11340.4.
- ¹⁵ *Id.* § 11346.9(a).
- ¹⁶ *Id.* § 11349.1; terms are defined at *id.* § 11349.
- ¹⁷ *Id.* § 11340.1(a).
- ¹⁸ *Id.* § 11349.3.
- ¹⁹ The governor can overrule the OAL by transmitting a statement to the legislature. *Id.* § 11349.5.
- ²⁰ The OAL makes its final determination within sixty days; otherwise, the rule is approved by default. The OAL can prepare a statement for the agency, legislature, and governor.
- ²¹ *Id.* § 11349.7. A separate process for review and repeal is created for obsolete regulations for which statutory authority has been changed or eliminated. *Id.* §§ 11349.8-11349.9.
- ²² *See, e.g.*, Exec. Order S-2-03 (2003), available at <http://gov.ca.gov/executive-order/3381>.
- ²³ Exec. Order W-144-97 (1997), available at <http://www.arb.ca.gov/research/econprog/w-144-97.htm>.
- ²⁴ DEPT. OF GEN. SERV., STATE ADMINISTRATIVE MANUAL § 6601 (2009), available at <http://sam.dgs.ca.gov/TOC/6000/6601.htm>.
- ²⁵ DEPT. OF GEN. SERV., STATE ADMINISTRATIVE MANUAL § 6680 (1999).
- ²⁶ *See* Economic and Fiscal Impact Statement Form 399, available at <http://www.arb.ca.gov/research/econprog/399/form399/std399%28in-place-instructions%29.pdf>.
- ²⁷ *See* Survey from Dennis L. Beddard, Chief Counsel, & Lenora Frazier, Senior Legal Analyst, Department of Housing and Community Development (2010, on file with author); Survey from Ronald Beals, Chief Counsel, Department of Transportation (2010, on file with author); Interview with George Tekel & Adam Cole, General Counsel, Depart-

- ment of Insurance, July 12, 2010 (reporting that the agency has a few economists but they do not work on impact statements).
- ²⁸ Interview with Tekel & Cole, *supra* note 27.
- ²⁹ Survey from Beals, *supra* note 27.
- ³⁰ Interview with Tekel & Cole, *supra* note 27.
- ³¹ *E.g.*, CAL. GOV'T CODE § 11346.3(a) ("It is not the intent of this section to impose additional criteria on agencies, above that what exists in current law, in assessing adverse economic impact on California business enterprises, but only to assure that the assessment is made early in the process of initiation and development of a proposed [rule]."); *id.* § 11346.2(b)(3) (specifying that the agency is not required to artificially construct alternatives, describe unreasonable alternatives, or justify why it has not described alternatives).
- ³² *Id.* tit. 2, div. 3, pt. 1, ch. 3.5, art. 1.
- ³³ *See* Interview with Tekel & Cole, *supra* note 27.
- ³⁴ For example, the Department of Insurance will sometimes consider small business impacts and alternatives, but it relies on the public to suggest alternatives; as a practical matter, the agency just makes a pro forma statement that alternatives were considered and calls for public comments. Interview with Tekel & Cole, *supra* note 27.
- ³⁵ *See* California Air Resources Board, Memorandum on Regulatory Cost and Economic Impact Assessment: A New Approval Process and Guidance Document (2009).
- ³⁶ Follow-Up Survey from Linda Brown, OAL (2009, on file with author).
- ³⁷ Press Release from Senator Bob Huff, *Huff's Bill to Review State Regulations Receives Unanimous Support*, Apr. 27, 2010.
- ³⁸ Press Release from Senate Republican Caucus, *Senate Democrats Kill Dutton Measures to Protect Jobs*, Apr. 5, 2010.
- ³⁹ California Air Resources Board, Economic Analysis Requirements for the Adoption of Administrative Regulations (1996), available at <http://www.arb.ca.gov/research/econprog/econmem.pdf>.
- ⁴⁰ Interview with Anonymous Source within California EPA, July 9, 2010.
- ⁴¹ *Id.*
- ⁴² *Id.*
- ⁴³ *Id.*; Debra Kahn, *Reviewers Blast State's Economic Analysis of Climate Plan*, CLIMATE WIRE, DEC. 2, 2008.
- ⁴⁴ David S. Neslin, *Quis Custodiet Ipsos Custodes?: Gubernatorial and Legislative Review of Agency Rulemaking under the 1981 Model Act*, 57 WASH. L. REV. 669, 671 n.18 (1982). In 1981, the OAL had a staff of 26 and an operating budget of over \$1 million; it disapproved of 27% of all proposed rules in 1980-81. *Id.*
- ⁴⁵ Survey from Brown, *supra* note 10.
- ⁴⁶ Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 ADMIN. L. REV. 631, 636 (2002).
- ⁴⁷ *See* Survey from Beddard & Frazier, *supra* note 27; Survey from Beals, *supra* note 27; Survey from Miyoko Sawamura, staff services manager, Dept. of Public Health (2010, on file with author).
- ⁴⁸ *See* Interview with Tekel & Cole, *supra* note 27.
- ⁴⁹ *See* Interview with Anonymous Source within California EPA, *supra* note 40.
- ⁵⁰ *See* Survey from Beals, *supra* note 27.
- ⁵¹ *See* Survey from Sawamura, *supra* note 47; Interview with Anonymous Source within California EPA, *supra* note 40; Interview with Tekel & Cole, *supra* note 27.
- ⁵² Interview with Tekel & Cole, *supra* note 27.
- ⁵³ Interview with Anonymous Source within California EPA, *supra* note 40. In 2006, a federal judge halted executions in California, ordering a new lethal injection process that would protect against cruel and unusual punishment.

In June 2010, the OAL rejected an initial rule proposal, saying the statute did not allow media witnesses. *Death Penalty Changes Rejected*, MONTEREY COUNTY HERALD, June 10, 2010; OAL Disapproval Decision, http://www.oal.ca.gov/res/docs/pdf/disapproval_decisions/2010/2010-0429-04S.pdf (also objecting on other grounds). The OAL eventually approved the lethal injection rule. Neil Nisperos, *Revised Execution Procedures Challenged*, Whittier Daily News, Aug. 6, 2010.

- ⁵⁴ The public comment period is already closed by the time of OAL reviews. Follow-Up Survey from Brown, *supra* note 36.
- ⁵⁵ OAL, Disapproval Decisions, http://www.oal.ca.gov/OAL_Disapproval_Decision_Office_of_Administrativ.htm.
- ⁵⁶ See Survey from Beals, *supra* note 27.
- ⁵⁷ Interview with Tekel & Cole, *supra* note 27.
- ⁵⁸ Follow-Up Survey from Brown, *supra* note 36.
- ⁵⁹ See Interview with Tekel & Cole, *supra* note 27; see also Survey from Beals, *supra* note 27 (expressing unofficial position).
- ⁶⁰ Miles Moore, *Many Still Wary of Calif. Tire Pressure Check Mandates*, RUBBER & PLASTICS NEWS, AUG. 9, 2010.
- ⁶¹ See Survey from Sawamura, *supra* note 47; Interview with Anonymous Source within California EPA, *supra* note 40; Interview with Tekel & Cole, *supra* note 27.
- ⁶² See Interview with Anonymous Source within California EPA, *supra* note 40; Interview with Tekel & Cole, *supra* note 27.
- ⁶³ See Survey from Beddard & Frazier, *supra* note 27; Survey from Beals, *supra* note 27.
- ⁶⁴ See Survey from Beddard & Frazier, *supra* note 27; Survey from Beals, *supra* note 27; Interview with Anonymous Source within California EPA, *supra* note 40.
- ⁶⁵ Interview with Tekel & Cole, *supra* note 27.
- ⁶⁶ *Id.*

Colorado

Though Colorado’s legislature reviews regulations through a sunset provision, it operates less as a periodic review of existing regulations and more as a slightly delayed legislative veto over recently enacted regulations. The state’s regulatory analyses—technically triggered only by request and, therefore, somewhat inconsistent—are sometimes thorough and impressive.

Colorado’s Process on Paper

General Principle: The Colorado legislature found that agencies paid insufficient attention to the cost of regulation in relation to the benefits, and to unintended economic consequences such as effects on employment and competition.¹ As a general libertarian policy, therefore, agencies are directed not to restrict the freedom of any person to conduct their affairs, use their property, or enter into contracts unless the agency finds, “after a full consideration of the effects of the agency action,” that it would “benefit the public interest and encourage the benefits of a free enterprise system for the citizens of this state.”²

Cost-Benefit and Regulatory Analysis: Agencies must submit a copy of their notices of proposed rulemakings to the Department of Regulatory Agencies (“DORA”).³ If the Executive Director of DORA finds that the rule may have a negative economic impact on competitiveness or small businesses in Colorado, DORA may require the agency to prepare a cost-benefit analysis.⁴ All documents, including the data and research used to prepare the cost-benefit analysis, are made public.⁵ The cost-benefit analysis must include:⁶

- The anticipated economic benefits of the rule, including economic growth, the creation of new jobs, and increased economic competitiveness;⁷
- The anticipated costs, including direct administrative costs and direct or indirect compliance costs;
- Any adverse effects on the economy, consumers, private markets, small businesses, job creation, and economic competitiveness; and
- At least two alternatives to the proposed rule, identified by either the agency or the public, including the costs and benefits of those alternatives.

Moreover, if any person requests at least fifteen days before the rulemaking hearing, the agency must also prepare a “regulatory analysis”:⁸

- A description of the classes of persons who will be affected by the proposed rule, including classes that will bear the costs and classes that will benefit;
- To the extent practicable, a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons;
- The probable costs to the government of the implementation and enforcement, and any anticipated effect on state revenues;
- A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction;
- A determination of whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule; and

- A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered, and the reasons why they were rejected.

Notably, both types of analysis are scheduled after the rule has already been proposed, and by statute, none of these regulatory analysis requirements “shall limit an agency’s discretionary authority to adopt or amend rules.”⁹

Executive Review: The Executive Director of DORA studies the cost-benefit analysis, if required, and may urge the agency to revise a proposal to ameliorate any negative economic impact. DORA may also inform the public about the negative impact of the proposed rule.¹⁰

The agency itself must also review rules: no rule can be adopted unless the rulemaking record demonstrates need, proper statutory authority exists, and the rule does not conflict with or duplicate other regulation.¹¹

Finally, the Attorney General must review all rules for their constitutionality and legality.¹²

Legislative Review: After a rule has already been filed as final, but within twenty days of the Attorney General’s review, agencies must submit rules to the General Assembly’s Office of Legislative Legal Services (“OLLS”). The legislature’s Joint Committee on Legal Services (“JCLS”) establishes criteria for graduated stringency of rule review by OLLS: every rule is reviewed for its form and procedure; upon the request of any legislator, OLLS conducts a fuller legal review.¹³ OLLS reviews for whether rules are compatible with the agency’s delegated powers and consistent with other laws.¹⁴ OLLS presents its findings to the JCLS at a public meeting.

The JCLS then votes on whether to recommend that the General Assembly allow a rule to expire. By statute, all rules adopted or amended during any one-year period (which begins November 1 and ends the following October 31) automatically expire on the May 15th that follows unless the General Assembly adopts a bill that postpones their expiration.¹⁵ Each session, the JCLS sponsors a bill to postpone the expiration of whichever newly enacted rules the legislature wants to preserve. OLLS also reviews existing rules each session to determine if they conflict with any recently amended statutes and therefore should be allowed to expire.¹⁶

Sunrise and Sundown: Two other regulatory review procedures deserve a brief mention. DORA conducts a “sunrise review” of new regulation of occupations and professions, using cost-benefit analysis to determine whether new regulation is necessary to protect the public.¹⁷

DORA and JCLS also are both involved in sundown reviews of various regulatory functions, programs, or entire agencies. The sundown review pays attention to both costs and benefits, and focuses on minimizing regulatory burdens.¹⁸

Colorado’s Process in Practice

DORA’s Review of Cost-Benefit Analyses: The Office of Policy, Research, and Regulatory Reform (“OPRRR”) exercise DORA’s review functions—more precisely, one OPRRR employee spends a fraction of his time (around 30%) conducting all the rule review functions.¹⁹ OPRRR focuses mostly on rules with impacts on small business, job creation, or economic competitiveness; other rules are not reviewed in-depth.²⁰ During fiscal years 2003 through 2005, 353 rulemaking hearings were held, and OPRRR made fourteen requests for cost-benefit analysis.²¹

Early in the history of Colorado cost-benefit analysis, agencies did not always comply with OPRRR requests. But now, thanks in part to a simplification of the cost-benefit form that reduced

the number of questions from twenty-seven to fourteen, agency compliance is not a problem.²² Agencies are responsible for preparing cost-benefit analyses based on the OPRRR form, which asks about: the rule's authority and need; the number of complaints (if any) that spurred the regulatory action; the rule's top three benefits and how the regulation will achieve those results; the consequences of taking no action; any market-based or voluntary alternatives considered; the number of small businesses consulted on the regulation; and the regulation's impacts on government costs, small business compliance costs, small business financial effects, barriers to entry, cessation of businesses, and consumer choice.²³ Agencies can estimate costs in any manner they choose.²⁴ Cost-benefit analyses are available to the public on OPRRR's website.²⁵

OPRRR has no statutory authority to make agencies alter proposed rules, and can only "urge" an agency to revise its rule. But OPRRR can informally negotiate with agencies to help them reduce small business impacts and other negative economic effects.²⁶ In the fiscal years 2003 through 2005, of the fourteen cost-benefit analyses completed, two resulted in changes to the rule; four additional rules were withdrawn early in the rulemaking process because of potential negative economic impacts.²⁷

Regulatory Analyses: Requests for regulatory analysis are not uncommon, and they come from both industry²⁸ and the public.²⁹ Some agencies seem to have internal requirements for regulatory analysis and do not necessarily wait for a public request.³⁰ Still, given that analyses are technically triggered only by request, coverage may be somewhat inconsistent. Quality is also somewhat inconsistent: some responses are vague and conclusory. For example, when asked to describe other alternatives considered, one agency replied "The advantages to Colorado outweigh the alternative of taking no action."³¹

Still, at least some regulatory analyses are balanced and detailed. In 2009, the Department of Transportation ("DOT") analyzed a rule to raise the minimum vehicle clearance over roadways of utility lines. DOT sought cost and benefit information from the regulated community and stakeholders and also consulted with DORA. DOT then analyzed administrative costs, alternative regulatory options, and the distribution of costs to individual Rural Electric Association customers. DOT even monetized benefits: "While it is impossible to quantify the value of a human life, the insurance industry experts estimate the value to exceed \$1.2 million. . . . If one life is saved every thirteen years, the net overall benefit will result in an average savings of \$2.26 for each dollar spent in 2009 dollars. This equates to a benefit-cost ratio of 2.26 : 1."³² Although the agency used an out-of-date, under-estimate for the value of a statistical life (and should look at the federal EPA's more recent estimate of approximately \$7 million), this is a level of sophisticated, quantitative analysis not often seen at the state level.

Legislative Review: OLLS reviews all rules, and though some are given only a perfunctory check for form, most are given more thorough, full legal review.³³ OLLS gives its new rule reviewers a "three-hour training session."³⁴ OLLS will sometimes consider legislative intent, but mostly focuses on "the actual language in the statute."³⁵

Technically, JCLS does not veto or return rules to agencies; if the legislature finds a problem with a rule, the rule is allowed to expire pursuant to the automatic sunset provisions. The "vast majority" of rules are not found to be problematic, and once the legislature extends their expiration dates, "these rules are kept alive indefinitely."³⁶ While there is no deadline for legislative review, in practice all recently enacted rules are reviewed before the end of the calendar year, so as to include any "problem rules" in the next annual rule review bill.³⁷

In short, the so-called “sunset” review of existing regulations is actually a veto power disguised in a legal fiction. The structure was deliberately set up to avoid possible constitutional problems.³⁸ In reality, the legislature has a slightly delayed veto authority over all recently enacted new regulations.

Indeed, OLLS claims the legislature has no general review authority over existing regulations, except that it will use the annual rule review bill to repeal any existing rules in conflict with newly changed statutory provisions.³⁹ Otherwise, once a rule’s automatic expiration has been extended, it remains in effect indefinitely. Thus, it seems the legislature does not view its sundown authority as a tool for periodic regulatory review.⁴⁰

Attorney General Reviews: The Attorney General’s opinions on legality are usually just one page long and almost always support the proposed rules. Once or twice a year, the Attorney General may issue an unfavorable opinion on a rule, but that does not necessarily block the rule from moving forward.⁴

Case Study: Oil and Gas

In 2008 and 2009, the Colorado Oil and Gas Commission (“COGCC”) drafted a series of new regulatory restrictions on drilling, such as bans on new developments during certain times of year, bans within a certain distance of the public water supply, and mandatory best management practices. The Colorado Oil and Gas Association (“COGA”), a trade group, accused the Commission of failing to consider the economic impacts; the Commission’s Director Neslin argued that the agency had considered the possible impacts, though he acknowledged work did not begin on the cost-benefit and regulatory analysis until after finishing and posting the draft regulations.⁴²

The Commission’s cost-benefit and regulatory analysis is a 182-page document detailing the motivations for the regulations and estimated costs. Interestingly, the Commission “requested cost information from the oil and gas industry, local governments, and other stakeholders, but none of those parties provided responsive information.”⁴³ Of over 200 stakeholders sent questionnaires on economic impacts, only two responded (both from the Oil and Gas Accountability Project). COGA refused to provide any data, claiming it lacked the time and resources, and asserting it would provide such details at a public hearing and so “it would be inappropriate and prejudicial to provide this information, in advance, to the COGCC and, thereby, to other parties.”⁴⁴ Instead, the Commission developed the analysis itself, devoting over 300 staff hours, coordinating with other state agencies, and retaining two consulting teams to help study the costs and benefits.⁴⁵

The result was a detailed analysis on a range of alternatives, though it was not especially quantitative, particularly on the benefits side. The consultant’s report noted the persistent difficulties with quantification and monetization: “In all cases, it was difficult to develop quantitative estimates of benefits because of resource constraints and lack of quantitative information on both baseline conditions under the present rules and the expected changes due to the draft rules.”⁴⁶ Industry was not satisfied with the analysis, dismissing it as a post-hoc justification of the already selected policy choices.⁴⁷

At the long public hearings to review the rule, the legislature managed to exclude most controversial policy debates and focused on questions of legality and statutory authority. JCLS chair Sen. Jennifer Veiga said “Our purview here and our review here is very narrowly focused on whether these rules exceeded statutory authority. We are not focused on whether these rules are good public policy or bad public policy.”⁴⁸ According to press reports, “That set the stage for a hearing packed with

legislative citations and dense legal arguments, as opposed to the passionate, emotional speeches that usually mark debate on the rules.”⁴⁹ Ultimately, the rules were approved by the legislature.

Analysis and Grade

Because Colorado just barely falls short of meeting several key Guiding Principles, its grade is bumped up to a C+.

Colorado’s process is not well matched to its resources. By relying on a petition mechanism, Colorado’s analytical requirements are at best inconsistently applied, and at worst may be simultaneously too broad and too narrow, imposing analytical burdens on some minor rules while not covering all major rules. Colorado agencies have the analytical capacity to be doing more analysis, more consistently.

Colorado’s provisions on legislative review are among the densest, most convoluted statutory provisions on regulatory review. On the one hand, the structure is a creative way to escape potential constitutional issues; on the other hand, the structure can leave regulations in a state of limbo for up to year.

That said, legislative review is consistent and operates by substantive standards. So does DORA’s review, even though it is more discretionary. Unfortunately, neither reviewer has much ability to help calibrate rules. DORA’s review lacks teeth and mostly focuses on minimizing small business impacts; the legislature does not review until after rules are already enacted, giving it little opportunity to do anything but reject rules.

Colorado does not feature much on inter-agency coordination, agency inaction, or periodic review. Cost-benefit and regulatory analyses are made available to the public and the public can participate in the review process—there is room for improvement, but Colorado is off to a good start on transparency and participation.

Finally, Colorado agencies do try to quantify costs and benefits in their impact analyses, and both alternatives and distributional effects are given some consideration. But the requirements need to better emphasize maximizing net benefits. Most importantly, the analysis may be triggered too late and too sporadically to be meaningfully integrated into the decisionmaking process. The current statutory requirement on cost-benefit analysis is slated to expire on July 1, 2013, unless renewed by the legislature.⁵⁰ Colorado should take this opportunity before 2013 to rethink the scope and balance of its analytical and regulatory review requirements.

Notes

- ¹ COLO. REV. STAT. § 24-4-101.5.
- ² *Id.*
- ³ *Id.* § 24-4-103(2.5)(a).
- ⁴ *Id.* Failure to provide an economic analysis in time for the hearing precludes the adoption of the rule or amendment.
Id.
- ⁵ *Id.* § 24-4-103(4.5)(a).
- ⁶ *Id.* § 24-4-103(2.5)(a).
- ⁷ “Economic competitiveness” is defined as the ability of the state of Colorado to attract new business and the ability of the businesses currently operating in Colorado to create new jobs and raise productivity. *Id.* § 24-4-102(5.5).
- ⁸ *Id.* §§ 24-4-103(4.5)(a)-(b).
- ⁹ *Id.* § 24-4-103(4.5)(e).
- ¹⁰ *Id.* § 24-4-103(2.5)(b).
- ¹¹ *Id.* § 24-4-103(4)(b).
- ¹² *Id.* § 24-4-103(8)(b).
- ¹³ *Id.* § 24-4-103(8)(d).
- ¹⁴ *Id.*
- ¹⁵ *Id.* § 24-4-103(8)(c).
- ¹⁶ *Id.* § 24-4-103(8)(d).
- ¹⁷ *Id.* § 24-34-104.1.
- ¹⁸ *Id.* § 24-34-104(9).
- ¹⁹ Survey from Bruce Harrelson, Director of OPRRR (2009, on file with author); *see also* OPRRR, 2005 Sunset Review: Provisions Governing the Preparation of a Cost-Benefit Analysis by State Agencies (2005).
- ²⁰ *See* Survey from Harrelson, *supra* note 19.
- ²¹ OPRRR, 2005 Sunset Review, *supra* note 19, at 9.
- ²² *Id.*
- ²³ OPRRR Cost-Benefit Analysis Request Form.
- ²⁴ Survey from Harrelson, *supra* note 19.
- ²⁵ Office of Policy, Research, and Regulatory Reform, <http://www.dora.state.co.us/opr/index.htm>.
- ²⁶ OPRRR, 2005 Sunset Review, *supra* note 19.
- ²⁷ *Id.* at 15.
- ²⁸ *See, e.g.*, <http://mining.state.co.us/Rulemaking/RegulatoryanalysisrequestCMA.pdf>.
- ²⁹ *See, e.g.*, http://www.dora.state.co.us/real-estate/rulemaking/MB/Rule_211_Regulatory_Analysis.pdf.
- ³⁰ *See, e.g.*, <http://www.cdph.state.co.us/op/bh/minutes/2005minutes/bhmarch05finalminutes.pdf> (Board of Health initiated its own regulatory analysis).

- ³¹ Colorado Board of Health, Regulatory Analysis on Radiation Control Regulations, *available at* <http://www.cdphe.state.co.us/op/bh/hearingnotices%55C6CCR10071RadiationControlPart2RegulatoryAnalysisWEB.pdf>
- ³² Colo. Dept. of Transp., Benefit-Cost and Regulatory Analysis for Utility Accommodation Code Rulemaking Minimum Vehicle Clearance Over Roadways (2009), *available at* <http://www.coloradorea.org/documents/CDOT-HearingCostBenefitAnalysis.doc>.
- ³³ Survey from Chuck Brackney, Senior Staff Attorney for OLLS (2009, on file with author). *See also* COLO. REV. STAT. § 24-4-103(8)(D).
- ³⁴ Survey from Brackney, *supra* note 33.
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ *Id.*
- ³⁹ *Id.*
- ⁴⁰ Though it often functions as a performance review of entire divisions or boards, the sundown reviews have the potential to operate as a selective, periodic review of certain regulatory programs.
- ⁴¹ Charles P. Brackney, *Administrative Rule Review: Procedures and Oversight by the Colorado General Assembly*, 33 Colo. Lawyer 83, 84 (2004).
- ⁴² Randy Woock, *Energy Regulations Draw Opposition, Alternatives*, TRINIDAD TIMES INDEPENDENT, MAY 20, 2008.
- ⁴³ COGCC, Cost-Benefit and Regulatory Analysis 1 (2009), *available at* http://cogcc.state.co.us/RuleMaking/CBA/COGCC_CBA_Main_doc.pdf.
- ⁴⁴ *Id.* at 2-3.
- ⁴⁵ “Therefore, the staff had to develop the analysis itself, in consultation with the Department of Public Health and the Environment, the Division of Wildlife, and consultants Stratus Consulting, Inc. and Economic Advisors, Inc.” *Id.* at 1-2.
- ⁴⁶ Appendix to COGCC’s Cost-Benefit and Regulatory Analysis, *available at* http://cogcc.state.co.us/RuleMaking/CBA/COGCC_CBA_Appd_4.pdf.
- ⁴⁷ John Ingold, *New Salvo Against Drilling Rules*, DENVER POST, May 5, 2009 (in particular, the Colorado Oil and Gas Association asserted “We believe that the cost-benefit and the regulatory analysis were done to justify the [already decided] outcome.”).
- ⁴⁸ John Ingold, *Oil and Gas Rules Barrel into Fight*, DENVER POST, MARCH 7, 2009.
- ⁴⁹ *Id.*
- ⁵⁰ COLO. REV. STAT. § 24-4-103(2.5)(F).

Connecticut

By constitutional amendment, Connecticut has preserved its powerful legislative veto.

Connecticut's Process on Paper

Fiscal Notes and Small Businesses: Agencies must prepare fiscal notes for all proposed regulations. The note estimates the cost or revenue impact on government and small businesses.¹ Agencies must give the public an opportunity to inspect the fiscal note.²

Agencies must also, for all proposed regulations, consider methods to accomplish the rule's objectives while minimizing adverse impacts on small businesses. Agencies are to pursue small business protections "consistent with public health, safety, and welfare," but somewhat contradictorily are instructed to consider small business exemptions "without limitation."³

For regulations that may have an adverse impact on small businesses, agencies must notify the Department of Economic and Community Development and the relevant joint standing committee of the legislature of the intention to adopt the rule; the department and the relevant committee may then advise the agency on complying with these small business protections.⁴

Timelines and Approvals: When new legislation takes effect, an agency has five months (unless otherwise specified) to publish notice of its intent to adopt any regulations required to implement the new statute; otherwise, the agency must explain its failure to the governor, the relevant joint standing committee of the legislature, and legislature's Regulation Review Committee ("RRC"). The agency then has 180 days to submit final regulations to the RRC, or else explain that failure.⁵

If an agency violates these or other time limits, the RRC may call the agency head to testify and explain the delay; the RRC may also report the non-compliance to the governor for further review and action.⁶

No regulation (except emergency rules) may be adopted without approval by the attorney general.⁷ The attorney general's review is limited to issues of legal sufficiency: that is, the absence of a legal conflict and the compliance with administrative procedure. The attorney general has only thirty days to review the rule, after which time the rule is approved by default.⁸

No regulation may be adopted without approval by the legislative RRC.⁹

Legislative Review: Established in 1972, the RRC is a bipartisan committee composed of eight House members and six Senate members.¹⁰ After receiving approval from the attorney general, agencies submit regulations to the RRC, along with fiscal notes and a statement of purpose.¹¹ The legislature's Office of Fiscal Analysis gets a seven-day review period to analyze the fiscal note and report to the RRC.¹² The RRC must review all proposed regulations within sixty-five days, but has discretion whether to hold public hearings; after sixty-five days, rules are approved by default.¹³

The RRC may approve, disapprove, or reject a rule without prejudice.¹⁴ If it rejects without prejudice, the committee notifies the agency of its reasons. If the regulation was required by law, the agency then has about two months to revise and resubmit the rule; the RRC has thirty-five days to review a revised regulation, and unlike for a newly proposed regulation, the resubmission is not published in the *Connecticut Law Journal*.¹⁵

If the RRC disapproves a rule, the agency cannot take any substantively similar action, unless the General Assembly reverses the disapproval.¹⁶ Each year, the RRC submits to the General

Assembly a list of disapproved regulations, and the Assembly may then, by resolution, either sustain or reverse the disapproval.¹⁷ Though state courts did once call the legislative veto authority into question,¹⁸ the state constitution was amended in 1982 to solidify the legislature's veto over agency regulations.¹⁹

Periodic Review: Every five years, the RRC, in consultation with agencies, must establish deadlines for the periodic review of existing regulations. In scheduling the review, the RRC is to consider the complexity of the agency's regulations as well as the agency's resources.²⁰ Agencies then submit to the RRC their review, which includes: recommendations to substantially reduce the number and length of regulations; and determinations on whether each regulation is obsolete, inconsistent, the subject of written complaints, or otherwise no longer effective.²¹ The RRC (together with the relevant legislative committees), then schedules a public hearing,²² and can request that the agency initiate proceedings to amend or repeal regulations.²³ If an agency does not conduct a satisfactory review, the RRC itself may conduct the review; if an agency fails to initiate the requested proceedings to repeal regulations, the RRC can ask a relevant legislative committee to introduce legislation to compel the action.²⁴

Connecticut's Process in Practice

Executive Review: Connecticut's governor has long played an "unofficial" role in the regulatory review process.²⁵ The governor's office reviews rules for policy implications, and in particular agencies coordinate with the Office of Policy and Management ("OPM") on policy development and the preparation of fiscal notes.²⁶ Agencies will submit proposed regulations and fiscal notes to the OPM before formal submission of the final regulatory package to the attorney general.²⁷ According to its website, the OPM is charged with providing a "global overview of proposed policy initiatives, identifying the full range of financial and policy implications of proposed actions," and in particular facilitates inter-agency coordination.²⁸ An agency might also sometimes solicit an informal review from an assistant attorney general earlier in the process.²⁹

Legislative Review: RRC membership and attendance issues can sometimes affect review. The RRC is a bipartisan body that rotates leadership back and forth each term, even though Democrats currently dominate both the Senate and the House by large margins.³⁰ This arguably gives Republicans a greater voice during the review process than they perhaps had in drafting the original statutes that agencies are implementing. And while the RRC holds regular meetings throughout the year,³¹ not every meeting is well attended. For example, the RRC might vote 7-2 against approving a regulation but still have to approve it, since it takes eight votes to reject a rule.³²

In addition to RRC members, the Office of Fiscal Analysis, legislative counsel,³³ and Legislative Commissioner's Office all analyze and make recommendations on proposed rules.³⁴ But the RRC is "the last stop on the train."³⁵ The RRC or other legislators will sometimes engage in informal, collaborative communications with agency staff before an official RRC review.³⁶

The Office of Fiscal Analysis and the RRC will both look at the accuracy of a fiscal note;³⁷ the Office of Fiscal Analysis states its responsibility as "preparing short analyses of the costs and long-range projections of executive programs and proposed agency regulations."³⁸ But the RRC does not generally review the private costs or benefits of regulations, regulatory alternatives, or distributional effects beyond costs to small businesses and municipalities.³⁹ Even that review is limited, since the small business impact analytical requirements just became effective in October 2009. The General Assembly unanimously passed the small business requirements last year and

Governor Rell signed the law, saying “From now on, any new rules must pass an economic impact analysis. This is good news for small businesses and good news for jobs in Connecticut.”⁴⁰ As of winter 2010, the RRC had not yet seen small business analysis in practice.⁴¹

The RRC is much more likely to reject a rule without prejudice than to disapprove it.⁴² Since 2000, only two regulations have been disapproved by the RRC.⁴³ Many rejections are for technical problems: the state has reportedly lost many of its more experienced and careful rule drafters in recent years.⁴⁴ Agencies may also withdraw regulations from consideration,⁴⁵ and sometimes do so rather than face rejection.⁴⁶ Sometimes the RRC will return a rule “for no apparent reason,” which usually indicates some concern was raised last-minute by an interest group or lobbyist.⁴⁷ For example, in recently rejecting without prejudice a Department of Labor rule on unemployment compensation, the RRC’s meeting minutes simply state: “After discussion with both the agency and advocates it appears that there are issues to be addressed and the members look forward to both groups working to resolve the issues and the agency returning the regulations as quickly as possible.”⁴⁸

There is no formal public process during regulatory review, but the RRC does receive letters and emails, and sometimes stakeholders show up the morning of an RRC meeting to “grab a legislator and raise a concern.”⁴⁹ Interest groups can exercise influence over the RRC’s reviews. In 2005, for example, Animal Advocacy Connecticut persuaded the RRC to reject a rule on coyote traps. Senator Doc Gunther, who voted to approve the rule, said “In over 30 years on that committee, [I have] never seen such a blatant instance of lobbying.”⁵⁰

On rare occasions, controversial RRC actions can attract media and public attention. A 2008 vote offers an interesting example, though perhaps does not reflect the typical case. By a close 7-6 vote, and at the urging of the governor and the proposing agency (the Department of Environmental Protection), the RRC approved a last-minute change to a rule governing the proceeds from auctioning carbon dioxide emissions credits. The climate change auction revenue was originally slated to fund green energy development, but the agency asked the RRC to change the rule before approving it, and grant the flexibility to instead direct some money to consumer rebates. Even though the attorney general had issued an opinion stating that such a change would be contrary to statute and so illegal, and even though the RRC is arguably charged with promoting legislative intent, the RRC still voted to make the change.⁵¹

Periodic Review: In practice, the RRC does not seem to exercise its authority on the review of existing regulations, except that it reminds agencies of regulations that need to be repealed because the law changed.⁵²

Analysis and Grade

Despite Connecticut’s powerful legislative review, the state only earns a D+ when matched against this report’s guiding principles.

With the Office of Policy and Management available to help agencies prepare fiscal notes, Connecticut has the resources to require more consistent and balanced regulatory analysis. Current requirements focus only on costs, and the analytical process is not integrated into agency decisionmaking or regulatory review. As a result, the RRC typically lacks the necessary information on costs and

Connecticut’s
regulatory review
process is “almost
convoluted.”

—Pam Booth, Regulation
Review Committee
Administrator⁵³

benefits to effectively calibrate rules. Though it remains to be seen whether the new small business review will be effective or simply slow down the regulatory process,⁵⁴ most of the rulemaking process is governed by clear timelines.

The RRC does meet regularly and consistently reviews rules, but its oversight authority lacks clear substantive standards. RRC reviews also suffer from limited transparency: minutes are sparse, there is no formal vehicle for public participation, resubmitted rule proposals are not published in the *Law Journal*, and fiscal notes are not generally released.

The Office of Policy and Management claims to play a role in promoting inter-agency coordination, but the state's laws and formal review processes are silent on the matter. Deadlines are set for the implementation of recently enacted statutes, and so there is some effort to combat agency inaction.

The deadlines for periodic review can be flexible and tailored to agency resources, but there is no evidence that the state takes the periodic review process seriously.

According to Pam Booth, the legislature is always looking at ways to further streamline its regulatory system.⁵⁵ The next time the legislature revises its review process, it should try to improve effectiveness and fairness as well as efficiency, by focusing on transparency, analytical balance, and agency resources.

Notes

- ¹ CONN. GEN. STAT. § 4-168(A)(5).
- ² *Id.* § 4-168(a)(6).
- ³ *Id.* § 4-168a(b).
- ⁴ *Id.* § 4-168a(c).
- ⁵ *Id.* §§ 4-168(b), 4-170b.
- ⁶ *Id.* § 4-170(f).
- ⁷ *Id.* §§ 4-168(e)(1), 4-169.
- ⁸ *Id.* § 4-169.
- ⁹ *Id.* § 4-168(e)(2). The legislature can also review emergency regulations. *Id.* § 4-168(f)(2).
- ¹⁰ *Id.* § 4-170(a).
- ¹¹ *Id.* § 4-170(b).
- ¹² *Id.*
- ¹³ *Id.* § 4-170(c).
- ¹⁴ *Id.*
- ¹⁵ *Id.* § 4-170(e).
- ¹⁶ *Id.* § 4-170(d).
- ¹⁷ *Id.* § 4-171.
- ¹⁸ A state trial court ruled that Conn. Gen. Stat. § 4-170 was unconstitutional, but the State Supreme Court later set that ruling aside, finding that particular statutory provision did not apply to the regulatory matter at hand. *Maloney v. Pac*, 183 Conn. 313 (1981).
- ¹⁹ On November 24, 1982, by popular vote of 392,606 to 167,570, Connecticut adopted Constitutional Amendment XVIII on the disapproval of administrative regulations: “The legislative department may delegate regulatory authority to the executive department; except that any administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed.” Conn. State Library, Constitutional Amendments, <http://www.cslib.org/constitutionalamends/ArticleXVIII.htm>.
- ²⁰ CONN. GEN. STAT. § 4-189I(A).
- ²¹ *Id.* § 4-189i(b).
- ²² *Id.* § 4-189i(c).
- ²³ *Id.* § 4-189i(d).
- ²⁴ *Id.* § 4-189i(e).
- ²⁵ See Virginia Admin. Law Advisory Comm., Legislative Powers of Rules Review in the States and Congressional Powers of Rules Review (2001).
- ²⁶ Interview with Pam Booth, RRC Administrator, Feb. 8, 2010.
- ²⁷ See Conn. Dep’t of Env’tl. Prot., The Regulatory Process (2006).
- ²⁸ OPM, Background, http://www.ct.gov/opm/cwp/view.asp?a=3006&Q=382848&opmNav_GID=1386.
- ²⁹ See Conn. Dep’t of Env’tl. Prot., *supra* note 27.

- ³⁰ Ken Dixon, *New Leadership Team Named for House*, CONNECTICUT POST ONLINE, DEC. 11, 2008.
- ³¹ See RRC, Committee Meeting Agendas, http://www.cga.ct.gov/asp/menu/CommDocList.asp?comm_code=RR&doc_type=ca.
- ³² See Editorial, *Closely Monitor New Sound Rules*, CONNECTICUT POST, Sept. 5, 2003.
- ³³ Interview with Booth, *supra* note 26.
- ³⁴ See <http://www.cga.ct.gov/rr/regsbyyear.asp> for LCO reports.
- ³⁵ Interview with Booth, *supra* note 26.
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ OFA, Responsibilities, <http://www.cga.ct.gov/ofa/Documents/AboutOFA/Responsibilities.htm>.
- ³⁹ Interview with Booth, *supra* note 26.
- ⁴⁰ *Governor Rell: New Law Aimed at Helping Small Businesses*, States News Service, Sept. 30, 2009.
- ⁴¹ Interview with Booth, *supra* note 26.
- ⁴² *Id.*
- ⁴³ In 2002, a State Marshall Commission regulation on professional standards and training was disapproved, and in 2006, an Administrative Pardons Process rule was disapproved. See <http://www.cga.ct.gov/rr/regsbyyear.asp> for listing of RRC activities by year.
- ⁴⁴ Interview with Booth, *supra* note 26. Note that the RRC can also approve rules with technical corrections.
- ⁴⁵ RRC, 2009 Rules (2010), available at <http://www.cga.ct.gov/rr/>.
- ⁴⁶ E.g., Robert A. Hamilton, *State Withdraws Plan to Cut Swan Population*, NEW YORK TIMES, Apr. 29, 1990 (quoting Friends of Animals president Priscilla Feral: “DEP knew it was going to fail in the Regulations Review Committee, so this is their way of backing down gracefully”).
- ⁴⁷ Interview with Booth, *supra* note 26.
- ⁴⁸ Minutes of RRC Meeting, Aug. 24, 2010, <http://www.cga.ct.gov/2010/RRdata/cm/2010CM-00824-R001100RR-CM.htm>
- ⁴⁹ Interview with Booth, *supra* note 26.
- ⁵⁰ Ken Dixon, *Lopez, Radcliffe*, CONNECTICUT POST, JAN. 30, 2005.
- ⁵¹ See David Funkhouser, *Panel Adopts Rell Rebate Plan, New Rules Govern Power Plant Emissions*, HARTFORD COURANT, July 23, 2008, at B7; Editorial, *A Short-Sighted Vote*, HARTFORD COURANT, July 30, 2008, at A6.
- ⁵² Interview with Booth, *supra* note 26.
- ⁵³ Interview with Pam Booth, Feb. 5, 2010.
- ⁵⁴ Interview with Booth, *supra* note 26.
- ⁵⁵ *Id.*

Delaware

Years ago, looking for a way to increase accountability among agencies perhaps prone to over-regulation, the Delaware General Assembly turned to the standard public notice-and-comment process as a check on agency discretion.¹ On paper, Delaware does appear to have at least a few additional review structures in place, but generally, according to the Registrar of Regulations for the Legislative Council, “Delaware does not do regulatory review.”²

Delaware’s Process on Paper

Registrar and Public Comment: The Division of Research of the Legislative Council functions as a repository of all regulations and facilitates the public notice-and-comment process through the Register of Regulations.³ Once rules are proposed, they are sent to the Registrar for publication. Pursuant to the Registrar’s duties in preparation and maintenance of the Register of Regulations, the officer has authority to change and correct form, style, organization, redundancies, grammar, and clerical issues.⁴ The notice published in the Register must include a description of the substance of the proposal as well as the means for public comment.⁵ Rules must also be transmitted to legislative committees with relevant oversight responsibilities, and agencies must seek comments on possible impacts to individuals and small businesses.⁶

Regulatory Flexibility: The Regulatory Flexibility Act dictates that regulatory compliance costs should be appropriate to the size the entity being regulated.⁷ As such, agencies are authorized to tailor informational and regulatory demands differently for individuals and small businesses,⁸ in order to relieve the public from onerous and inequitable compliance costs, and to generally ameliorate public dissatisfaction with the regulatory process. To determine whether an entity should be exempted (or if a less stringent regulation should be passed), agencies are directed to consider the estimated compliance costs; the ability to absorb these costs without being adversely effected economically or competitively disadvantaged; the additional costs to the agency for enforcing a different rule for this special class of entities; and the impact on the public interest of exempting such entities from compliance or for administering a distinct rule for such entities.⁹

“Delaware does not do regulatory review.”

—Jeff Hague, Registrar of Regulations

Sunset Committee: The General Assembly passed a “sunset act,”¹⁰ which formed a joint committee to review agency performance and terminate certain agencies or policies unless they were meeting a state need and acting responsively to the public.¹¹ The Sunset Committee is a bipartisan group of five members from the House of Representatives and five members of the Senate;¹² while the meetings are public, only members of the committee are allowed to speak.¹³ Besides reviewing agency programmatic performance, the Sunset Committee is also authorized to conduct “rules review,” which is a discretionary review of the rules and regulations promulgated by the agency.¹⁴ The Sunset Committee compiles a list of regulatory changes that it deems necessary and appropriate and distributes the list to the relevant agencies; if an agency cannot make the changes, the Sunset Committee drafts legislation to implement its recommendations.¹⁵

Delaware’s Process in Practice

While Delaware has elements of a regulatory review apparatus on paper, the state does not in fact perform regulatory review according to those requirements. According to the Registrar of

Regulations for the Legislative Council, no small business impact statement has ever been prepared or published because that portion of the Delaware code has never been complied with, and so few people “are even aware of it.” Similarly, no regulatory impact statements have ever been prepared or published, and while the Sunset Committee may have power to review whether regulations are consistent with an agency’s statutory authority, to the best of the Legislative Council’s knowledge that provision “has never been utilized.”¹⁶

By contrast, in practice the attorney general does play some role in regulatory review, and “hundreds of deputy attorneys general perform formal review functions for each state agency and must sign off on all rules.”¹⁷

Analysis and Grade

Strikingly, Delaware has created a regulatory review structure that has never been used and that most regulators know little about. For example, Delaware might have scored points for having a regulatory flexibility act that balances the potential benefits of small business exemptions against their administrative costs and public impacts—except that Delaware agencies do not comply with the regulatory flexibility analysis requirements. As things stand, however, Delaware earns a D- as its Guiding Principles Grade.

Delaware has little experience with the potential benefits of a rigorous regulatory review system. More than most other states, therefore, Delaware might have much to gain by learning from the lessons and goals of other states in this area. In the meantime, rulemaking accountability in Delaware remains mostly a matter of bureaucratic discretion and public vigilance.

Notes

- ¹ DEL. CODE ANN. tit. 29 § 1131.
- ² Interview with Jeff Hague, Registrar of Regulations, Legislative Council, Feb. 26, 2009.
- ³ DEL. CODE ANN. tit. 29 § 1113.
- ⁴ *Id.* § 1134. The Registrar must complete his review and publish all rules within a month of their submission. *Id.* § 1134(4).
- ⁵ *Id.* § 10115.
- ⁶ DEL. CODE ANN. tit. 64 § 10405.
- ⁷ DEL. CODE ANN. tit. 29 §§ 10401, 10402(B).
- ⁸ *Id.* § 10403(2).
- ⁹ *Id.* §§ 10404(b)(1)-(6).
- ¹⁰ *Id.* § 10201.
- ¹¹ *Id.* § 10202.
- ¹² Members of the Joint Finance Committee and the Legislative Council are prohibited from participating.
- ¹³ *Id.* § 10203.
- ¹⁴ *Id.* § 10212.
- ¹⁵ *Id.* § 10212(d).
- ¹⁶ Interview with Hague, *supra* note 2. See also Dennis O. Grady & Kathleen M. Simon, *Political Restraints and Bureaucratic Discretion: The Case of State Government Rule Making*, 30 POL. & POL'Y 646, 659 (2002); Minutes of June 2008 MSAPA Drafting Committee, http://www.law.upenn.edu/bll/archives/ulc/msapa/2008june1_section305.htm (“Agencies in Delaware have never complied with the chapter [on transmission of rules to legislative committees].”).
- ¹⁷ Grady & Simon, *supra* note 16, at 657.

District of Columbia

Washington D.C. has a relatively thin body of administrative law governing regulatory oversight. The District of Columbia is, after all, a city.

But it is a unique city. The United States Congress has the power to “exercise exclusive Legislation” over the District of Columbia pursuant to Article I, Section 8 of the United States Constitution. At various times, the District has been treated as a quasi-federal agency (with a presidentially-appointed mayor) or a delegated governing unit of Congress.¹ From 1995 through 2001, the federal government imposed a five-member “Authority” to supervise the District, with power to approve all City Council legislation and budgets, and to make “recommendations” to the mayor—which, if the mayor and city agencies did not implement within ninety days, could be imposed directly by the Authority.²

After the Authority’s powers expired in 2001, the District’s governmental structure returned to the arrangement set up in 1973, when Congress passed the Home Rule Act. The Act granted certain powers of self-government, authorized local elections, and delegated most standard legislative powers to the City Council, including authority to create agencies under the Office of the Mayor.³

But under the Act, Congress retained certain review powers. Any legislation enacted by the City Council must be sent to Congress for a thirty-day review period, during which Congress can pass a joint resolution (subject to the President’s signature) disapproving the bill.⁴ More generally, Congress reserved its constitutional right to enact any legislation for the District, “including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.”⁵ Those terms would seem to extend beyond legislation and encompass regulations as well. While in the past, Congress has at times inserted itself into the city’s legislative and budgetary processes, reviewing bills and adding appropriations riders, Congress has lately adopted a more hands-off stance, staying out of even controversial legislative debates.⁶

In 1968, the District of Columbia adopted its own Administrative Procedure Act. Pursuant to the current version of the Act, agencies are required: “To give notice of the proposed adoption, amendment, or repeal, of a rule, by publishing such notice in the District of Columbia Register, no fewer than 30 days prior to the effective date of the proposed rule. Notice shall include a citation to the legal authority for the rule.”⁷ That is the extent of rulemaking guidance contained in the Administrative Procedure Act. Notably absent is any requirement to make a statement of purpose, provide an economic impact statement, describe alternatives, or state the circumstances making such action necessary. District agencies report that they are small and resource-constrained.⁸

Though not required by statute, in practice all executive agencies submit proposed administrative rulemakings to the Legal Counsel Division of the District’s Office of Attorney General.⁹ The Legal Counsel Division reviews the rules for legal sufficiency before the Office of the Secretary’s Office of Documents and Administrative Issuances publishes them in the District of Columbia *Register*.¹⁰

Certain agencies are required by statute to submit select proposed rules to the City Council for review; such reviews, however, are the exception rather than the norm.¹¹ These rare review processes seem to allow approval or disapproval on any grounds.¹²

Though the District of Columbia does face unique legal arrangements and resource constraints, the city has no consistent review mechanism beyond a de facto requirement to have the Attorney

General approve the legality of new rules. The District should consider whether new or additional review structures might be beneficial; at the very least, the attorney general’s review should be formalized and given substantive standards. The District gets a D- for its Guiding Principles Grade, but the mark should perhaps be interpreted more like an “incomplete.”

Notes

- ¹ See Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305 (2008); Aaron E. Price, Sr., *Representative Democracy: An Unfulfilled Ideal for Citizens of the District of Columbia*, 7 D.C. L. REV. 77, 83-84 (2003); District of Columbia City Council, History, <http://www.dccouncil.washington.dc.us/history>.
- ² See Stephen R. Cook, *Tough Love in the District: Management Reform under the District of Columbia Financial Responsibility and Management Assistance Act*, 47 AM. U. L. REV. 993 (1998).
- ³ D.C. CODE §§ 1-201.02, 1-204.04, 1-241.
- ⁴ District of Columbia City Council, How a Bill Becomes Law, <http://www.dccouncil.washington.dc.us/howabillbecomeslaw>.
- ⁵ Home Rule Act § 601 (1973).
- ⁶ For example, Congress did not debate D.C.'s gay marriage law. See *Congress Slowly Loosens its Grip on D.C.*, AP, Mar. 4, 2010, available at <http://www.cbsnews.com/stories/2010/03/04/politics/main6267225.shtml>.
- ⁷ D.C. CODE § 2-505(a).
- ⁸ Interview with Shana Kemp, Director, Dept. of Consumer and Regulatory Affairs, July 9, 2009.
- ⁹ Survey from Helder Gil, Legislative Affairs Specialist, Dept. of Consumer and Regulatory Affairs (2009, on file with author); see also D.C. Office of the Attorney General, Divisions and Offices, <http://occ.dc.gov/occ/cwp/view,a,3,q,530974,occNav,31692,>asp.
- ¹⁰ OFFICE OF DOCUMENTS AND ADMINISTRATIVE ISSUANCES, SECRETARY OF DC, RULEMAKING HANDBOOK, available at http://os.dc.gov/os/lib/os/info/odai/agency_liaison_materials/rulemaking_how_to.pdf (“Prior to receiving the rulemaking in the Office of Documents, the Legal Counsel Division of the Office of the Attorney General will forward an ‘advanced’ copy of the rulemaking as it was approved by OAG for legal sufficiency in accordance with OAG policy. This allows the Staff Attorney to recognize any changes proposed by the agency after OAG has certified the rulemaking as legally sufficient.”).
- ¹¹ Survey from Gil, *supra* note 9.
- ¹² *E.g.*, D.C. CODE § 7-1671.13 (on the legal use of marijuana: “The Mayor shall submit the proposed rules to the Council for a 30-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution, within this 30-day review period, the proposed rules shall be deemed approved.”); *id.* § 6-1410 (“The Mayor shall submit the proposed [Building Rehabilitation Code] rules to the Council for its review within 360 days of June 25, 2002. The Council shall have 90 days, exclusive of Saturdays, Sundays, holidays, and days of Council recess, in which to review and affirmatively approve the BRC. If the Council does not approve the BRC, it shall be deemed disapproved.”).

Florida

Florida's legislative review committee typically gets its way, despite the absence of official veto power. The committee has had less success, unfortunately, promoting consistent compliance with economic analysis requirements.

History and Recent Proposals

In the 1990s, as part of a populist political upsurge, regulatory reform moved to the front of Florida's legislative agenda.¹ An initial legislative crackdown on agencies' use of guidance documents in lieu of regulations triggered an up-tick in the number of new rules passed, which in turn sparked a counter-revolution seeking to decrease regulatory burdens.² In 1995, Governor Lawton Chiles issued Executive Order 95-74, which motivated agencies to repeal some ten thousand rules; however, most of those repeals were of outdated or un-enforced rules, and the deregulatory push had little substantive effect.³

Governor Chiles also issued Executive Order 95-256 the same year, creating the Administrative Procedure Act Review Commission.⁴ Implementing the Commission's recommendations and other ideas, the legislature amended the state's Administrative Procedure Act in 1996, adding new requirements like the mandate for agencies to select the "least-cost" alternative.⁵ A legislative review committee, already active in 1996, found some of its review powers strengthened by the amendments (for example, its abilities to respond to public complaints and to recommend a temporary suspension of rules).⁶ Though Florida did consider adding some broader legislative veto authorities,⁷ ultimately the legislative review augmentations in 1996 were mild and "[ook] no constitutional chances."⁸

From 1975 to the mid-1990s, Florida required agencies to prepare an economic impact statement evaluating the costs and benefits of many proposed rules, and to choose rules that showed the "lowest net cost to society."⁹ In 1995, Governor Chiles vetoed more rigorous analytical requirements, believing they were too onerous.¹⁰ Instead, the following year's amendments to the Administrative Procedure Act reduced and shifted the analytical burdens, moving Florida's rulemaking agencies from a cost-benefit analysis to a cost-effectiveness assessment, which excluded consideration of the general benefits of the regulation.¹¹

In April 2010, Florida's legislature unanimously passed a bill to expand the coverage of the cost assessment requirement and to radically enhance its own review authority. H.B. 1565 would have required cost assessments for any rule likely to adversely impact small business or to increase any regulatory costs by \$200,000 within one year. The assessment would have to include an economic analysis of any direct or indirect economic effects and regulatory costs that could exceed \$1 million within 5 years. Rules identified as having such million-dollar impacts would then be submitted to the legislature for ratification before they could take effect.¹²

In May 2010, Governor Charlie Crist vetoed the bill as an encroachment on the separation of powers, saying "If H.B. 1565 did become law, nearly every rule may have to await an act of the Legislature to become effective. This could increase costs to businesses, create more red tape, and potentially harm Florida's economy."¹³

Florida's Process on Paper

Cost Assessments: All agencies must choose the regulatory alternative that minimizes costs while "substantially accomplish[ing] the statutory objectives."¹⁴ Notices of proposed rules must include

an explanation of the rule's purpose and effect, and a summary of the statement of estimated costs (if prepared). The notice must also give the public twenty-one days to provide information on estimated costs or to propose a lower-cost alternative.¹⁵ Agencies must either adopt or explain the rejection of any lower cost alternatives suggested in good faith by the public.¹⁶

Agencies are encouraged to prepare a statement of estimated regulatory costs for all rules, and are required to do so if the rule will impact small business.¹⁷ The requirement is also triggered if anyone submits a good faith proposal for a lower cost regulatory alternative.¹⁸ Statements must include: a good faith estimate of the number of regulated individuals, along with a general description of the types of affected individuals; a good faith estimate of the costs to government and effects on revenue; a good faith estimate of direct compliance costs; and an analysis of the impact on small businesses and small local governments.¹⁹

Within one year of a rule's effective date, it can be challenged in court for not being the least burdensome alternative, and the statement of estimated costs can also be challenged.²⁰ One commentator noted this is a "rigorous" review structure: once a rule is challenged, the burden of showing the rule is cost-effective is on the agency, not on the challenging party.²¹

The Department of State can refuse to file any rule as final and effective if the agency did not follow rulemaking procedures, including if an agency did not include a required statement of estimated costs.²²

Legislative Review: At least twenty-one days before the proposed adoption date for a new rule, agencies must send the rule, the statement of estimated costs, and a statement of justification to the legislature's Joint Administrative Procedures Committee ("JAPC").²³ JAPC is composed of three senators and three representatives, with at least one minority party member from each house.²⁴ JAPC is given broad oversight authority related to the rulemaking process, including the general authority to review agency activity under the Administrative Procedure Act.²⁵ JAPC must examine every proposed rule and may examine any existing rule for its: legislative authority and intent; form and public notice; necessity to accomplish objectives; reasonableness "as it affects the convenience of the general public or persons particularly affected"; complexity and comprehensibility; compliance with preparation of a statement of estimated costs; and selection as the least costly alternative that substantially accomplishes objectives.²⁶

If JAPC objects to a rule, the committee sends a detailed notice to the agency and the legislative leadership.²⁷ Within thirty days of receiving the objection, the agency must either modify or withdraw the rule (or amend or repeal it, if the rule is already in effect), prepare a corrected statement of estimated costs, or else notify JAPC that it refuses to comply with the committee's recommendations.²⁸ If the agency fails to respond to the objection and the rule is not yet in effect, the rule is deemed withdrawn by default.²⁹

If a rule is already in effect and the agency fails to comply with the committee's objection within sixty days, JAPC may recommend the introduction of legislation to address the objection. In such a case, JAPC may also request that the agency temporarily suspend the rule; the agency then has thirty days to either suspend the rule or notify the committee of its refusal.³⁰ In short, JAPC's powers are advisory, and ultimately the committee mostly must rely on the agency or the full legislature to act on its suggestions.

JAPC does have a few other recourses. Along with any substantially affected member of the public, JAPC can petition an agency to repeal a rule for exceeding statutory authority.³¹ And, after giving

the agency and the governor a reasonable period of time to respond to an objection (not to exceed sixty days), JAPC can petition for judicial review of a rule.³²

Small Business Review: Before adopting new rules, agencies must consider the impacts on small business and small local governments, and where practicable must tier rules to reduce disproportionate impacts.³³ If a rule may have a small business impact, agencies must send written notice to the Small Business Regulatory Advisory Council (“Council”) and the Office of Tourism, Trade, and Economic Development at least twenty-eight days before the rulemaking action. If the Council suggests alternatives that are both feasible and consistent with policy objectives, the agency must either adopt those suggestions or explain to JAPC why it chose not to. The Council can appeal such a rejection to the legislature’s Office of Program Policy Analysis and Government Accountability; but the agency can still reject the proposed alternative even after such appeals, so long as it explains its actions to JAPC.³⁴

The Council consists of nine current or former small business owners from different geographic regions: three appointed by the governor, three appointed by the Senate, and three appointed by the House. Though the appointing official can remove appointees without cause at any time,³⁵ and so the Council may not appear classically independent, the Council does not fit neatly into either the legislative or executive branch. The Council is administratively housed within the Small Business Development Center Network,³⁶ which is funded by the federal Small Business Administration and is hosted by the University of West Florida.³⁷ For purposes of this report’s comparative charts, the Council will be designated as an independent reviewer.

The Council is empowered to make recommendations on proposed rules that may adversely affect small business and to consider public requests to review rules.³⁸ The Council also participates in periodic reviews of existing regulations, recommending to agencies ways to mitigate unnecessary burdens on small business, giving due consideration to the rule’s objectives, its continued need, any complaints or comments received, the length of time since the rule was last evaluated, and any relevant technological, economic, or other factors that may have changed.³⁹

Sunrise, Periodic Reviews, and Petitions: Every two years, agencies must perform a formal review of existing rules in order to: clarify and simplify rules; delete obsolete or unnecessary rules; improve efficiency, reduce paperwork, or decrease costs; coordinate on overlapping rules; and reduce impacts on small businesses while meeting stated objectives.⁴⁰ Agencies must file a report with the legislature and JAPC, specifying any changes made as a result of the review, or recommending statutory changes to promote efficiency, reduce paperwork, and decrease costs, specifically addressing small business impacts.⁴¹

In addition to a general public right to petition for rulemakings,⁴² if a petition identifies a guidance document that should be a rule (also known as an “unadopted rule”), the agency must, within thirty days, either initiate a rulemaking or hold a public hearing. If the agency still does not initiate a rulemaking, JAPC or a standing legislative committee may hold a hearing and recommend legislation.⁴³

Florida’s Process in Practice

Executive and Independent Review: Agencies may seek input from the governor’s office or other agencies if appropriate, but typically there is no direct involvement of the executive branch.⁴⁴

The Small Business Regulatory Advisory Council is young⁴⁵ but already quite active, requesting

the completion of cost estimates and commenting on rules.⁴⁶

Cost Assessments: Even though the cost statement requirements have been on the books for years, JAPC reports that “[t]his is a new requirement that the agencies are only beginning, with our assistance, to realize has been added to the law.”⁴⁷ Perhaps half of agency rulemaking packages include a cost assessment, prepared because of possible effects on small business. Still, the inclusion or omission of an economic statement reportedly has “no effect” on JAPC’s evaluation.⁴⁸

Some agencies at times may consult with outside economists on the preparation of cost estimates;⁴⁹ but for the most part, agencies do not use economists and instead rely on internal expertise and stakeholder input.⁵⁰ In the “vast majority of cases,” impact statements include absolutely no calculation of benefits: “Rather, the benefits are assumed, and further assumed to outweigh the costs. Focus is placed on the least expensive way to accomplish the statutory goals.”⁵¹

“In my limited contacts with other states, I have come to believe that Florida[’s regulatory review structure] stands head and shoulders above any other state because of the number and quality of our full-time legislative attorneys engaged in review.”

—Scott Boyd, Executive Director of the Joint Administrative Procedures Committee

Legislative Review: JAPC has fourteen full-time employees and a budget of \$1.2 million,⁵² and firmly believes that, given the number and quality of its rule reviewers, Florida’s structure “stands head and shoulders above any other state.”⁵³

JAPC regularly identifies at least some problems with the majority of new regulations. From 2000 through 2009, JAPC found “substantive error” in about 30-40% of rules: 43% lacked statutory authority; 25% were vague; 18% were guilty of “unbridled discretion.” Even more rules had some “technical error”—50-70% of the total.⁵⁴

Almost all such problems identified by JAPC attorneys are resolved at the staff level through informal communication with agencies. Very few objections, perhaps fewer than ten per year, are brought to the JAPC members for vote at a public meeting.⁵⁵ Mostly, agencies are willing to work with JAPC outside the review process, and JAPC feels such discussions are collaborative.⁵⁶ Agencies believe such informal contacts are necessary to “keep the process running smoothly” and useful “because JAPC is willing to help and has expertise,” but they describe the

communications more as seeking approval or “collegial” than purely collaborative. Despite a good working relationship, agencies do not always agree with JAPC recommendations; still, they usually find a way to compromise, or in the end the agency will most likely concede.⁵⁷

When JAPC does object to a rule, the agency almost never refuses to modify its proposal.⁵⁸ To date, JAPC has never found it necessary to use its authority to seek judicial review of the validity of any rule.⁵⁹

JAPC primarily reviews for statutory authority, and tries not to concern itself with policy issues like the stringency of regulation.⁶⁰ Nevertheless, policy occasionally creeps in to the decision. In 2009, Governor Crist wanted Florida to adopt California’s emission standards for passenger vehicles, but JAPC declared the proposed rule unconstitutional because it delegated power over

Florida's laws to a California agency. The decision was bipartisan and unanimous,⁶¹ but on the other hand several members of the committee were previously quoted as doubting that man-made emissions could lead to global warming, and the auto lobby pushed hard against the rule.⁶²

JAPC generally selects the oldest existing rules for its periodic review.⁶³ "Unadopted" rules continue to plague Florida's administrative process: in 2007, JAPC identified 130 instances of "unadopted" rules among 28 agencies.⁶⁴

Analysis and Grade

Florida's entire regulatory review process needs to focus more on maximizing social benefits, not just on minimizing compliance costs: Florida earns a C.

Several agencies apparently remain unaware of the scope of the cost assessment requirements, suggesting that either the system's design or enforcement does not align well with resources. More generally, some agencies feel the review process has grown "unduly complicated, costly, and burdensome."⁶⁵

JAPC reviews rules on a consistent basis and under specific timelines. Though Florida continues to struggle with the problem of "unadopted rules," and the regulatory review structure may be partly to blame, the state is working to solve that problem and has already implemented some tactics, like a petition mechanism. But beyond the problem of "unadopted rules," Florida's regulatory review does not combat agency inaction, nor does it sufficiently promote inter-agency coordination.

JAPC does have statutory criteria for its reviews, but the vagueness of some terms (for example, the reasonableness of a rule "as it affects the convenience of the general public") may allow politics to influence some decisions. The standards for agencies' periodic reviews are somewhat better defined (though terms like "unnecessary" are also vague). But on the whole, Florida's periodic review requirements are biased toward only eliminating overly costly rules and not strengthening beneficial rules.

The routes for public participation also give more weight to comments that identify lower-cost alternatives than to those that advocate for higher net benefits. Further, there is no real involvement of the public in JAPC reviews. But Florida's process does at least solicit public comment on cost estimates and alternatives, and it involves the public in the review of guidance documents.

The ability of the public to challenge a rule if the lowest-cost alternative is not selected should help encourage both consistent analysis of alternatives and the integration of analysis in the decisionmaking process. But the analytical mandate does not require any attention to benefits or any real comprehensive distributional analysis beyond listing the types of entities impacted. If Florida's legislature revisits the recently vetoed proposal to expand economic analysis for regulations, it should ensure that the analytical mandates are balanced and that agencies are given sufficient resources to comply.

Notes

- ¹ Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Rulemaking Revolution or Counter-Revolution?* 49 ADMIN. L. REV. 345, 346 (1997); see also Stephen T. Maher, *Administrative Procedure Act Amendments: The 1991 and 1992 Amendments to the Florida Administrative Procedure Act*, 20 FLA. ST. U. L. REV. 367 (1992).
- ² Rossi, *supra* note 1, at 348-49.
- ³ See Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 29 J. LEGAL STUD. 873, 900 (2000).
- ⁴ Rossi, *supra* note 1, at 351-52.
- ⁵ *Id.* at 353.
- ⁶ F. Scott Boyd, *Legislative Checks on Rulemaking under Florida's New APA*, 24 FLA. ST. U. L. REV. 309, 319, 321, 325 (1997).
- ⁷ See Dan R. Stengle & James Parker Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rule-making by Executive Agencies*, 21 FLA. ST. U. L. REV. 415 (1993).
- ⁸ Boyd, *supra* note 6, at 331.
- ⁹ Rossi, *supra* note 1, at 362.
- ¹⁰ *Id.*
- ¹¹ *Id.* at 363.
- ¹² H.B. 1565 (Fla. 2010).
- ¹³ Gov. Charlie Christ, H.B. 1565 Veto Letter, available at <http://www.docstoc.com/docs/40842491/Crists-HB-1565-veto-letter>.
- ¹⁴ FLA. STAT. § 120.54(1)(D).
- ¹⁵ *Id.* § 120.54(3)(a).
- ¹⁶ *Id.* § 120.541(1)(b).
- ¹⁷ *Id.* § 120.54(3)(b)(1).
- ¹⁸ *Id.* § 120.541(1)(b).
- ¹⁹ *Id.* § 120.541(2).
- ²⁰ The challenger must be materially affected by the rejection of a lower-cost alternative. *Id.* § 120.541(1)(c).
- ²¹ Rossi, *supra* note 1, at 365.
- ²² FLA. STAT. § 120.54(3)(E)(4).
- ²³ *Id.* § 120.54(3)(a)(4). Agencies must also notify JAPC of any changes from the original proposal before finalizing a rule. *Id.* § 120.54(3)(d).
- ²⁴ *Id.* § 11.60(1).
- ²⁵ *Id.* § 11.60(2). JAPC also advises agencies of changes to their statutory authority.
- ²⁶ *Id.* § 120.545(1); see also *id.* § 11.60(2) (granting JAPC the right to review rules and advise agencies of findings, in consultation with the relevant standing committees).

- ²⁷ *Id.* § 120.545(2).
- ²⁸ *Id.* § 120.545(3).
- ²⁹ *Id.* § 120.545(4).
- ³⁰ *Id.* § 120.545(8); *see also id.* § 11.6092 (noting that JAPC must report to the legislature on the number of objections it makes).
- ³¹ *Id.* § 120.536(2).
- ³² *Id.* § 11.60(2).
- ³³ *Id.* § 120.54(3)(b)(2)(a).
- ³⁴ *Id.* § 120.54(3)(b)(2)(b).
- ³⁵ *Id.* § 288.7001(3)(a).
- ³⁶ *Id.* § 288.7001(3)(b).
- ³⁷ *See* Florida Small Business Development Center Network, History, <http://www.floridasbdc.org/Aboutus/history.asp>.
- ³⁸ FLA. STAT. § 288.7001(3)(c).
- ³⁹ *Id.* § 288.7001(4).
- ⁴⁰ *Id.* § 120.74(1).
- ⁴¹ *Id.* § 120.74(2).
- ⁴² *Id.* § 120.54(7).
- ⁴³ *Id.* § 120.54(7).
- ⁴⁴ Survey from Mari Presley, Asst. Gen. Counsel, Dept. of Ed. (2010, on file with author); Survey from Richard J. Shoop, Clerk, Agency for Health Care Admin. (2010, on file with author).
- ⁴⁵ In July 2008, the newly established Small Business Regulatory Advisory Council began reviewing regulations with small business impacts. Survey from Scott Boyd, JAPC Executive Director (2009, on file with author).
- ⁴⁶ *See* activity at <http://floridasbrac.org/>.
- ⁴⁷ Follow-Up Survey from Scott Boyd, JAPC Executive Director (2009, on file with author).
- ⁴⁸ *Id.* For example, JAPC could not answer whether agencies consistently approached economic estimates. Survey from Boyd, *supra* note 45.
- ⁴⁹ *See, e.g.*, Survey from Harold Vielhauer, Florida Fish and Wildlife Conservation Comm'n General Counsel (2010, on file with author).
- ⁵⁰ *See id.* (“generally, we use a process that uses considerable stakeholder input”); Survey from Mari Presley, Asst. Gen. Counsel, Fla. Dept. of Ed. (2010, on file with author); Survey from Richard J. Shoop, Agency for Health Care Administration Clerk (2010, on file with author) (noting use of “a few accountants,” but no economists).
- ⁵¹ Follow-Up Survey from Boyd, *supra* note 47.
- ⁵² Survey from Boyd, *supra* note 45. JAPC has no economists on staff and rarely, if ever, consults with outside economists. Follow-Up Survey from Boyd, *supra* note 47.
- ⁵³ Follow-Up Survey from Boyd, *supra* note 47.
- ⁵⁴ JAPC, 2009 ANNUAL REPORT 6-9 (2010), available at <http://www.japc.state.fl.us/publications/2009AnnualReport.pdf>.
- ⁵⁵ *See* Follow-Up Survey from Boyd, *supra* note 47; JAPC, 2009 Annual Report, *supra* note 54, at 2 (“Often, the agency agrees that there is no authority for the rule and withdraws or amends the rule to meet the staff concerns.”). JAPC has only occasional contact with non-governmental organization. Follow-Up Survey from Boyd, *supra* note 47.

- ⁵⁶ Follow-Up Survey from Boyd, *supra* note 47.
- ⁵⁷ Interview with Steve Hall, Counsel, Dept. of Ag. & Consumer Serv., July 1, 2010; Survey from Presley, *supra* note 50; Survey from Shoop, *supra* note 50.
- ⁵⁸ Follow-Up Survey from Boyd, *supra* note 47.
- ⁵⁹ JAPC, 2009 Annual Report, *supra* note 54, at 3.
- ⁶⁰ Follow-Up Survey from Boyd, *supra* note 47.
- ⁶¹ JAPC, Report on DEP Rule 62-285.400 (2009), <http://www.japc.state.fl.us/publications/ReportOnDEPRule62-285-400.pdf>.
- ⁶² See Brandon Larrabee, *Panel Slams Emissions Proposal; Crist Will Continue to Work to Get the Measure Passed in Legislature*, FLORIDA TIMES-UNION, Feb. 17, 2009, at B-4. The issue then moved to the full legislature, Brian Skoloff, *Lawmakers to Consider Pollution Reduction Measures*, AP STATE & LOCAL WIRE, Feb. 18, 2009, since statute required the ratification of the legislature to adopt the rules, see DEPT. OF ENVTL. PROTECTION, EMISSION RULE, http://www.dep.state.fl.us/air/rules/ghg/california/emission_rule.pdf.
- ⁶³ Survey from Boyd, *supra* note 45.
- ⁶⁴ JAPC, SUPPLEMENT TO REPORT ON UNADOPTED RULES (2007), <http://www.japc.state.fl.us/publications/UnadoptedRulesSupplement.pdf>.
- ⁶⁵ See Survey from Presley, *supra* note 50.

Georgia

Despite Georgia’s powerful legislative veto authority, regulatory review in the state is essentially non-existent.

Georgia’s Process on Paper

Minimizing Costs: For any rule with an economic impact on businesses (note that the provision applies to any economic impact, not just small business impacts), agencies must explore options to minimize small businesses impacts wherever legal, feasible, and consistent with meeting statutory objectives.¹ For every rule, agencies must choose a regulatory alternative that does not impose excessive costs on any person.²

These goals were reinforced and expanded by a 2006 Executive Order, which requires all agencies to address the small business impacts, anti-competitive impacts, and undue burdens of both proposed and existing rules. Agencies must develop small business plans to streamline regulations, in coordination with the Office of Planning and Budget, and must appoint small business liaisons who will consider the interest of small businesses in new rule development and review current rules for small business impacts.³

Legislative Review: Notice of proposed regulations⁴ must be transmitted to the legislative counsel at least thirty days before adopting a new rule. The rule is then referred to appropriate standing committee in each house for review. Committees can call for the agency to hold a public hearing.⁵

If either house’s committee files an objection and the agency still adopts the rule, that house may, within the first thirty days of next session, consider a resolution to override the rule. If the resolution passes, the other house of the General Assembly must then consider it within five days. If adopted by both houses, the resolution is sent to the governor for his signature; if the resolution passes by a two-thirds vote of both houses, the rule is automatically void, even without the governor’s signature.⁶ If both reviewing committees hold a public hearing and object to a rule by a two-thirds vote, the rule is suspended until it can be considered by full General Assembly.⁷

Georgia’s Supreme Court has upheld this basic legislative veto structure in a separate context applying specifically to Department of Community Health regulations, though has not ruled on the more generally applicable structure.⁸ Some special review procedures exist for certain environmental regulations required by federal law.⁹

Georgia’s Process in Practice

There does not seem to be much activity under the Executive Order or small business impact reviews.¹⁰ In practice, there is no ex post review of existing regulations.¹¹

Legislative review is optional, standardless, and left to the determinations of each individual legislative committee. According to legislative counsel, “Rules review in Georgia is minimal and in general the committees take a hard look only when they have an interest in some particular issue.”¹² In 2000, when the legislature debated changing the application of its veto powers to rules from the Environmental Protection Division, some environmentalists worried the additional layer of review would create a “chilling effect” on regulation; but state senator Eddie Madden “noted that the Legislature has long held such veto power over rules handed down by other state departments, but has never exercised it.”¹³

Analysis and Grade

Georgia’s regulatory review is like a sledgehammer collecting cobwebs: the legislative veto is a powerful tool, but if it is wielded at all, it is done so infrequently and inconsistently. The required regulatory impact analysis incorporates no qualitative, let alone quantitative, review of costs, benefits, and alternatives, focusing instead only on minimizing small business impacts. It is possible the mere existence of a review structure has some “chilling effect” on regulations, but that is not a consistent, standards-based, or transparent way to exercise review power. Georgia flunks all of this report’s guiding principles, and so earns a D-.

Notes

- ¹ GA. CODE ANN. § 50-13-4(A)(3).
- ² *Id.* § 50-13-4(a)(4).
- ³ Exec. Order, issued by Gov. Sonny Perdue, Mar. 6, 2006.
- ⁴ Notice includes a synopsis of the rule, providing a statement of purpose and explaining the rule’s main features. GA. CODE ANN. § 50-13-4(A)(1).
- ⁵ *Id.* § 50-13-4(e).
- ⁶ *Id.* § 50-13-4(f)(1).
- ⁷ *Id.* § 50-13-4(f)(2).
- ⁸ *See* Albany Surgical, P.C. v. Georgia Dept. of Community Health, 602 S.E.2d 648, 650-51 (Ga. 2004) (ruling on the legislative veto procedure for Department of Community Health regulations adopted under GA. CODE ANN. § 31-6-21.1); *see also* David E. Shipley, *The Status of Administrative Agencies under the Georgia Constitution*, 40 GA. L. REV. 1109, 1130-31 (2006).
- ⁹ *See* GA. CODE ANN. § 50-13-4(G).
- ¹⁰ *See* Governor’s Small Business Regulatory Reform Initiative, <http://regs4ga.georgia.gov/02/gsbri/home/0,2484,51024814,00.html>.
- ¹¹ Survey from Sewell Brumbly, Legislative Counsel (2009, on file with author).
- ¹² Interview with Sewell Brumbly, Legislative Counsel, Mar. 9, 2009; *see also* Survey from Brumbly, *supra* note 11 (replying to most questions that review is “optional by reviewing committee”).
- ¹³ Peter Mantius, *Lawmakers Could Override Some Environmental Rules*, THE ATLANTA JOURNAL AND CONSTITUTION, Feb. 15, 2000.

Hawaii

Hawaii deploys multiple entities to review regulations at multiple points in the rulemaking process.

Hawaii's Process on Paper

Small Business Analysis and Independent Review Board: In addition to the small business advisory committees that every agency may create,¹ Hawaii established a Small Business Regulatory Review Board. The Board is housed within the Department of Business, Economic Development, and Tourism “for administrative purposes.”² Board members, though appointed by the governor with consent of the Senate, can only be removed for cause.³ Members are to represent a variety of businesses and counties; they must be current or former business owners or officers; and they cannot be employees of any government.⁴ Given this arrangement, the Board can be considered an “independent” executive agency.

Before proposing a rule, agencies must determine whether the proposal will affect small businesses. If so, the agency must determine the practicability of implementing “creative, innovative, or flexible,” less restrictive alternatives.⁵ Moreover, the agency must submit a small business impact statement to the Board, before submitting a rule to the governor for approval.⁶ The statement must include a reasonable determination of: the businesses that will bear costs or directly benefit; the quantified, direct and indirect compliance costs; the probable monetary costs and benefits to the government; any alternatives considered; how the agency consulted small businesses; and the justification for any provisions more stringent than comparable federal, state, or county standards, including the costs and benefits of such comparable standards.⁷

After holding a public hearing, agencies submit another statement to the Board, describing public comments and responses.⁸ The Board reviews new rules and also considers input from small businesses.⁹

Petitions and Periodic Reviews: Any affected small business may petition an agency and object to all or part of any adopted rule because: the rule’s actual effect on small business was not reflected in or significantly exceeded the original estimate; the rule creates an undue barrier to business in a manner that significantly outweighs the public benefit; the rule duplicates or conflicts with other laws; or technology, economic conditions, and other factors have changed.¹⁰ If a petition is denied, the petitioner may appeal to the Board, which can make recommendations to the agency.

Every other year, each agency also submits to the Board a list of existing rules with small business impacts, along with a report describing the rules’ public purpose and justifications for continued implementation. The Board then provides a list of rules that have generated complaints, including rules that duplicate, conflict, or exceed statutory authority. Agencies must consider those public complaints, along with any technological, economic, or other factors that diminish or eliminate the need for the rule. The Board reports to the legislature on whether public interest significantly outweighs the rule’s effect on small business; the legislature can then take any appropriate action.¹¹

Executive Review: No rule can be adopted without the governor’s approval.¹² Administrative Directive 09-01 details the procedure for requesting the governor’s approval.¹³ Agencies must first themselves ensure the rule’s legality. Then agencies explain: the reasons for the regulatory action; possible effects on the agency; the financial impact on the state; the long- and short-term impacts on the public, economic growth, and economy; any other alternatives explored; and whether the rule impacts small business (and, if so, whether the agency complied with the regulatory flexibility

requirements).

Before proceeding to a public hearing on a proposed rule, agencies must first obtain the attorney general's approval of the rule's "form." The attorney general is instructed to complete this review "expeditious[ly]." The rule is next submitted to the governor for approval; at this time, the Department of Budget and Finance, and the Department of Business, Economic Development, and Tourism also conduct a "prompt" review.¹⁴

After a public hearing and before final adoption of a new rule, agencies must again obtain the governor's approval. In requesting final approval, agencies must also get the attorney general's approval of the "form" of any changes made since the original, describe any such changes, and recount the small business impact statement.¹⁵

Hawaii's Process in Practice

The Legislative Reference Bureau may assist agencies with formatting, but this process does not affect the status of rules.¹⁶

Reportedly, and despite the requirements of Administrative Directive 09-01, the Department of Budget and Finance's role in regulatory review is quite limited.¹⁷

The Small Business Regulatory Review Board has only advisory powers, but it is active and can request agencies conduct further review of proposed rules.¹⁸ Since 2000, the Board has reviewed over 400 new regulations, supporting 359 rules, but opposing 10, commenting on 18, and giving partial support to 40.¹⁹ The Board can influence the content of rules, sometimes by prompting the governor to act: for example, on one rule in 2009, the Board expressed concerns about a proposed fee and recommended the rule proceed to a public hearing phase; "[s]ubsequently, the Governor's Office did not approve the rules with the proposed fees in it."²⁰

The Board's review of existing regulations has also been active. In coordination with eleven state agencies, the Board has created a list of 237 existing regulations for review of small business impacts. Of that list, the Board has recommended that agencies conduct a "full analysis" of 49 rules. So far, "[o]nly the Public Utilities Commission [has] refused to conduct a review after receiving our request."²¹

Analysis and Grade

Hawaii authorizes multiple reviews by multiple reviewers, creating a possibly duplicative and wasteful structure. Resources might be better directed at conducting deeper, more balanced analysis and review of a select number of rules. Hawaii earns a C.

Not all of Hawaii's authorized reviewers even exercise their powers: for example, the Department of Budget and Finance reports having a very minor role in the review of regulation. The consistency of the governor's review process is difficult to discern, given a lack of transparency. But the Small Business Regulatory Review Board—arguably the dominant review entity in Hawaii—does review rules consistently and transparently, with minutes posted online. The Board also encourages sending rules to public hearings, and a petition process allows the public to engage in the review of small business impact statements.

Unfortunately, the small business review is conducted without clear statutory criteria and operates more as a biased, anti-regulatory check. For example, the public can appeal to the Board in objection to rules with high small business impacts, but cannot use the review process to petition

for more stringent regulations that might increase net social benefits. The periodic review process, though governed by clearer standards, reflects a similar anti-regulatory bias.

Hawaii's regulatory review process does little to combat agency inaction or to coordinate inter-agency conflicts. Recently, though, some deadlines were added for the attorney general and other executive branch reviews.

For analytical mandate, the small business considerations again dominate Hawaii's structure. The small business impact statement is prepared early in the rulemaking process, giving it the chance to influence agency decisionmaking. But generally, Hawaii's analytical mandates do not do enough to promote equal attention to public benefits or sufficient consideration of alternatives, and instead perpetuate an unfortunately narrow focus on small business impacts alone.

Notes

- ¹ HAW. REV. STAT. § 201M-4.
- ² *Id.* § 201M-5.
- ³ *Id.* § 26-34.
- ⁴ *Id.* § 201M-5.
- ⁵ *Id.* §§ 201M-2(a)-(b).
- ⁶ *Id.* § 201M-2(b).
- ⁷ *Id.* §§ 201M-2(b)-(c). The requirement does not apply to federally-mandated rules. *Id.* § 201M-2(d).
- ⁸ *Id.* § 201M-3.
- ⁹ *Id.* § 201M-5.
- ¹⁰ 201M-6.
- ¹¹ *Id.* § 201M-7.
- ¹² *Id.* § 91-3(c).
- ¹³ Admin. Dir. 09-01, Oct. 29, 2009.
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 163 (VOL. 42, 2010 ED).
- ¹⁷ Survey from Neal Miyahira, Program Planning and Management Division Administrator, Dept. of Budget & Finance (2010, on file with author).
- ¹⁸ Survey from Dori Palcovich, Business Advocate and Liaison, Small Business Regulatory Review Board (2009, on file with author); see also the Board's agendas and minutes at http://hawaii.gov/dbedt/business/start_grow/small-business-info/sbrrb/agenda_minutes_reports.
- ¹⁹ SMALL BUSINESS REGULATORY REVIEW BOARD, 2009 ANNUAL REPORT 24 (2010) (detailing reviews during fiscal years 2000 through 2009).
- ²⁰ *Id.* at 10-11.
- ²¹ SMALL BUSINESS REGULATORY REVIEW BOARD, 201M-7 REPORT (2008).

Idaho

Idaho's courts have uniquely upheld the legislative veto power because agency rules, though "given the force and effect of law," in fact "do not rise to the level of statutory law."¹

Idaho's Process on Paper

Fiscal Impact Statement: Agency notices of proposed and adopted rules must include a "description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars. . . . during the fiscal year when the pending rule will become effective."²

During review, a legislative committee may request a statement of economic impact by filing a written request with the agency, and all rules that propose a fee change now must also include such a statement. Statements must contain an evaluation of "the costs and benefits of the rule, including any health, safety, or welfare costs and benefits," and a reasonable estimate of costs to the agency, citizens, and the private sector.³

Legislative Review: Idaho's legislative review was first established in 1969 and extended in 1993 to cover both proposed and adopted regulations.⁴ The legislature has no centralized review committee, and instead review is conducted by the standing committee with jurisdiction over the relevant subject matter. After an agency submits a rulemaking packet to the Office of Administrative Rules, the packet is forwarded to the Legislative Services Office, which then analyzes the rule,⁵ and submits it to a joint subcommittee of the germane standing committees from each house.⁶ The joint subcommittee may hold a meeting on the proposed rule within forty-two days of receiving analysis from the Director of Legislative Services. If the majority of each house's subcommittee members object to the rule, the subcommittee can issue a notice of objection to the agency and the legislature.⁷

After the subcommittee reports its findings, the full legislature may by concurrent resolution approve it, reject it as violating legislative intent, or even modify the rule.⁸ A pending rule cannot become final until either legislative review is complete or else, by default, at the end of the legislative session.⁹ All rules imposing fees must be approved or modified by concurrent resolution to take effect.¹⁰ Temporary rules can take effect without legislative approval, but their effectiveness is, as the name implies, temporary.¹¹

Rules can be rejected or modified by a concurrent resolution, which does not require the governor's signature. Idaho's Supreme Court has found a unique rationale to uphold the constitutionality of the legislature's veto authority, different from other courts that have considered the issue. The court reasoned that the legislative branch is unable to delegate any of its legislative power to another body. Because of this, agency rules are not laws: "[a]dministrative rules and regulations may be given the force and effect of law, but they do not rise to the level of statutory law."¹² Thus the legislature retains the authority to accept, reject, or modify regulations, without requiring presentment to the executive: as one commentator explained, "if rules are not laws, then a legislative veto is not the equivalent of repealing a law, and if it is not, then it need not be presented to the governor."¹³

"If rules are not laws,
then a legislative veto
is not the equivalent of
repealing a law, and if
it is not, then it need
not be presented to the
governor."

—Florence A. Heffron

Sunsets: The state Administrative Procedure Act also contains an automatic sunset provision, and all rules expire annually on July 1, unless extended in whole or in part by statute for an additional year.¹⁴

Executive Approval of Temporary Rules: Temporary rules must be specifically approved by the governor as necessary to protect public health, safety, or welfare; for compliance with legal deadlines; or to confer a benefit.¹⁵

Idaho's Process in Practice

Executive Review: By practice, executive branch review precedes legislative review. The Office of Administrative Rules reviews all proposed rules to make such that the agency's legal counsel and director have approved the draft and that the agency has included an approved Proposed/Temporary Administrative Rules Form ("PARF").¹⁶ Though not a statutory requirement, the Office of Administrative Rules "will not publish a proposed or temporary rule without a copy of the PARF that has been signed by the DFM administrator."¹⁷

When an agency first initiates a rulemaking, it must send a PARF to the governor's Division of Financial Management. The PARF asks the agency to detail the rule's "fiscal impact statement, both positive and negative, by fund source for all programs affected." The same form asks the agency to list the interest groups and citizens affected.¹⁸ The Division of Financial Management and the governor's other policy advisors review the PARF and either approve or deny the rulemaking request. The substantive bases for approval or denial are not articulated, but the Division of Financial Management refers to it as "a conceptual review,"¹⁹ and reportedly the review focuses on financial impacts, affected parties, and policy conflicts.²⁰ For example, the Division of Financial Management might stop an agency rule from proceeding if costs were found to be unacceptable.²¹

Impact Statements and PARFs: The Division of Financial Management or the Legislative Services Office may work with agencies on preparation of their impact analyses.²² Fiscal impact statements are short and do not reveal the methodology for quantifying impacts. One example consisted of a single line: "The cost savings for this rulemaking for SFY 2010 is estimated at \$210,000 in state general funds."²³

The fiscal impact portion of the PARF does not usually contain any additional economic detail. One PARF from a 2005 Public Utilities Commission rule, incorporating by reference federal changes to hazardous materials regulation for railroads, listed under "fiscal impacts" only the \$210 in publication costs required to incorporate the rule by reference.²⁴ PARFs contain the required information, but seldom much more: for example, on a Department of Health rule on Idaho's Child Care Program, affected interest groups were listed thoroughly but generically: "Child Care providers, parents, institutions of higher education, financial aid, vocational technical institutions, low-income advocacy groups, women's advocacy groups, and early learning professionals."²⁵

Legislative Review: Since the interim committees that review rules do not meet during Idaho's legislative session, there is a de facto moratorium on proposing regular new rules from mid-November until the end of the legislative session, during which time the Legislative Services Office will not accept proposed rulemaking filings.²⁶ When the legislature is not in session, the Legislative Services Office does still analyze rules.²⁷ "In most cases, [LSO's] review is done prior to publication [of a rule], but not always, and there is no statutory deadline for completing the review."²⁸

The legislature does review and reject rules. In 2009, for example, eight rules were rejected by resolution, and another three resolutions were debated in committee.²⁹ Though the legislature has the power to modify as well as reject rules, in practice and to avoid controversy, the legislature rarely amends pending rules and instead only rejects or accepts them.³⁰ By law, all concurrent resolutions state that rejections are made based on legislative intent, even though in practice rules are sometimes rejected for other reasons; “legislative intent” is just “an all-encompassing phrase that keeps them within their statutory authority to review and reject rules.”³¹

“In essence the review of all final rules would be a complete review of the Code. Even Idaho’s legislature is smart enough not to attempt that on an annual basis.”

—Dennis R. Stevenson

Historically, legislative review in Idaho was developed and exercised largely because of divided party government: between 1970 and 1982, fully one-fourth of all rule review resolutions were aimed at water quality rules, an issue that strongly split the political parties in Idaho.³² Today, most agencies use negotiated rulemakings and carefully solicit stakeholder input because “anyone can testify during the legislative committee review, [and] industry often is able to effectively get a rule rejected if it is obvious that the promulgating agency is ignoring or downplaying the costs to industry.”³³

Sunset Review: The legislature only occasionally reviews final and existing rules. As Administrative Rules Coordinator Dennis R. Stevenson put it: “In essence the review of all final rules would be a complete review of the

Code. Even Idaho’s legislature is smart enough not to attempt that on an annual basis.”³⁴

Still, a statute must be passed every year to continue rules beyond the automatic sunset. This resolution is known as “the Drop Dead Bill.”³⁵

Analysis and Grade

Several elements of Idaho’s regulatory review structure seem, at best, perfunctory. For example, rules are more or less automatically extended under sunset review, fiscal impact statements are sparse, and the fuller economic impact statements are rarely requested. The process does not make the most of resources.

Reviews by both the Division of Financial Management and the Legislative Services Office seem consistent, and though discretionary, legislative committee reviews are also regular. But the legislature only rejects rules, and rarely uses its power to modify or calibrate rules. Few deadlines govern the review process, and both the legislative veto and the annual sunset are burdensome, potentially contributing to a proliferation of temporary rules to avoid review requirements. The legislature has no trouble shoehorning any policy objection into its “legislative intent” criterion, and no standards govern the unofficial executive branch review. Lack of clear standards also makes it difficult for the public to track regulatory review decisions, especially for the executive branch.

On nearly all of this report’s guiding principles, Idaho falls short, and so overall earns a D. In particular, Idaho should place its executive branch review on the books, make the process more transparent, and focus more on maximizing net benefits.

Notes

- ¹ *Mead v. Arnell*, 791 P.2d 410, 414 (1990). *But see Holly Care Ctr. v. State Dep’t of Employment*, 714 P.2d 45 (Id. 1986) (insisting that judicial review, not legislative approval, remains the final determinant of statutory intent).
- ² IDAHO CODE ANN. § 67-5221(1)(c). However, “the absence or accuracy of a fiscal impact statement provided pursuant to this subsection shall not affect the validity or the enforceability of the rule.” *Id.* § 67-5224.
- ³ *Id.* §§ 67-5223(2)-(3). “The adequacy of the contents of the statement of economic impact . . . is not subject to judicial review and the accuracy of a fiscal impact statement . . . shall not affect the validity or the enforceability of the rule.” *Id.*
- ⁴ *Id.* § 67-5291 (“standing committees of the legislature *may* review temporary, pending and final rules which have been published in the bulletin or in the administrative code”) (emphasis added). On the history of Idaho’s legislative review, see Florence A. Heffron, *Legislative Review of Administrative Rules under the Idaho Administrative Procedure Act*, 30 IDAHO L. REV. 369, 371-72 (1994); see also Richard B. Doyle, *Partisanship and Oversight of Agency Rules in Idaho*, 11 LEGIS. STUD. Q. 109, 112 (1986) (“Between 1966 and 1982, the APA was amended 15 times, with 7 of these amendments, or nearly half, focusing on legislative rule review. A relatively coarse form of legislative rule review was passed in 1970 [session laws 1969].”).
- ⁵ IDAHO CODE ANN. § 67-704(3) (“shall review and analyze administrative rules”).
- ⁶ *Id.* § 67-5223(1); see *id.* § 67-454 on joint subcommittees.
- ⁷ *Id.* § 67-454.
- ⁸ *Id.* § 67-5224.
- ⁹ *Id.* § 67-5244(5).
- ¹⁰ *Id.* § 67-5224(5)(c).
- ¹¹ *Id.* § 67-5226.
- ¹² *Mead v. Arnell*, 791 P.2d 410, 414 (1990). *But see Holly Care Ctr. v. State Dep’t of Employment*, 714 P.2d 45 (Id. 1986) (insisting that judicial review, not legislative approval, remains the final determinant of statutory intent).
- ¹³ Heffron, *supra* note 4, at 376.
- ¹⁴ IDAHO CODE ANN. §§ 67-5292(1)-(3).
- ¹⁵ *Id.* § 67-5226.
- ¹⁶ Office of Admin. Rules, Checklist, <http://adm.idaho.gov/adminrules/bulletin/wordnotices/checklist.doc>.
- ¹⁷ Minutes from MSAPA Drafting Comm. Meeting, June 2008, http://www.law.upenn.edu/bll/archives/ulc/msapa/2008june1_section305.htm.
- ¹⁸ Idaho Division of Financial Management, Proposed/Temporary Administrative Rules Form.
- ¹⁹ Division of Financial Management, Proposed/Temporary Administrative Rules Form, http://dfm.idaho.gov/st_agency_guide/FormsIndex.html (also noting that the Division coordinates review with the governor’s office); see also OFFICE OF THE ADMINISTRATIVE RULES COORDINATOR, THE IDAHO RULE WRITER’S MANUAL 6 (2009) (explaining that PARF approval by the DFM is mandatory for an agency to proceed with a rulemaking).
- ²⁰ Survey from Dennis R. Stevenson, Administrative Rules Coordinator (2009, on file with author).
- ²¹ *Id.*
- ²² *Id.*
- ²³ Dep’t of Health and Welfare, Docket 16-0318-0901, www.icdd.idaho.gov/pdf/Legislative%20Advocacy/Dock-

et%2016-0318-0901.pdf (2009) (Medicaid Cost-Sharing Rule).

- ²⁴ Idaho Public Utilities Commission, Railroad Safety/Sanitation Rules, Docket No. 31-7103-0501 (2005), available at <http://www.puc.idaho.gov/internet/cases/rail/RUL/RULRO502/20050819NOTICE.pdf>.
- ²⁵ Dep't of Health and Welfare, PARF for IDAPA 16.06.12, Rules Governing the Idaho Child Care Program (2008), available at <http://www.idahovoices.org/policy/documents/ProposedAdministrativeRule16.06.12.701.pdf>.
- ²⁶ RULE WRITER'S MANUAL, *supra* note 19, at 7.
- ²⁷ See <http://www.legislature.idaho.gov/sessioninfo/2010/interim/adminrules/rules.htm> for rules reviewed during 2010 interim session.
- ²⁸ MSAPA survey with OAR, http://www.law.upenn.edu/bll/archives/ulc/msapa/2008june1_section305.htm
- ²⁹ See <http://legislature.idaho.gov/legislation/2009/minidata.htm> for listing of all resolutions on rule reviews; for examples, see <http://legislature.idaho.gov/legislation/2009/HCR009.htm> and <http://legislature.idaho.gov/legislation/2009/HCR010.htm>.
- ³⁰ Survey from Stevenson, *supra* note 20.
- ³¹ *Id.*; see also *Mead v. Arnell*, 791 P.2d 410, 421 (Id. 1990) (requiring that a concurrent resolution vetoing a regulation must explicitly state that the regulation violates legislative intent, or else the bill does not satisfy the state APA requirements and is null).
- ³² Richard B. Doyle, *Partisanship and Oversight of Agency Rules in Idaho*, 11 LEGIS. STUD. Q. 109, 112-13 (1986)
- ³³ Survey from Stevenson, *supra* note 20.
- ³⁴ *Id.*
- ³⁵ See Statement of Purpose for House Bill 674 (Idaho 2010), available at <http://www.legislature.idaho.gov/legislation/2010/H0674.htm> (passed nearly unanimously: House 58 to 1 (11 absent) and Senate 34 to 0 (one absent)); see also House Bill 266 (Idaho 2009), available at <http://legislature.idaho.gov/legislation/2009/H0266.htm>.

Illinois

As Governor Blagojevich discovered, crossing the Illinois legislature’s rule review committee can be hazardous to your political future.

History of Illinois’s Process

When the legislature’s Joint Committee on Administrative Rules (“JCAR”) was enacted in 1981, Governor James Thompson vetoed it as unconstitutional; his veto was overridden. Though subsequent governors “grumbled on occasion,” nobody seriously challenged JCAR’s constitutionality until Governor Rod Blagojevich (see case study below).¹

JCAR’s mission evolved from a “general legislative perception of a runaway and unaccountable state bureaucracy,” and the review committee always had the twin goals of reclaiming legislative authority and providing the public relief from burdensome rules.² Some JCAR members openly admit their reviews are a “smokescreen” for policy objections, and lobbying quickly became part of the review process.³

But through the 1980s and into the 1990s, JCAR could only temporarily suspend rules;⁴ this lack of firm power made regulatory review a low priority, which caused poor attendance at JCAR meetings, which in turn compounded the committee’s impotence, since it often lacked a quorum to vote on its suspension powers.⁵ As a result, committee staff long dominated the review process, with up to 95% of rule reviews initiated and resolved at the staff level.⁶ Perceived lack of interest among legislators and an adversarial tinge to the relationship between JCAR staff and agencies led to low compliance from agencies on JCAR’s objections.⁷

However, the dynamics shifted in 2004, when JCAR’s power was substantially expanded, transforming what was a temporary suspension power into a de facto veto power. Governor Blagojevich signed the change into law.⁸

A point on Illinois’s history with economic analysis may also be relevant. Agencies had to prepare fiscal notes on legislation that might affect them. In the mid 1990s, Illinois House Republicans forged possibly as many as two hundred such fiscal notes, underestimating costs with the intent of helping legislation pass.⁹ Though perhaps atypical, the Illinois example of “Notegate” is “illustrative of the tension that is created when the need to produce an accurate and unbiased estimate of mandate costs intersects with partisan politics.”¹⁰

Illinois’s Process on Paper

Impact Statements: If JCAR makes a request, agencies must prepare an economic and budgetary effects analysis, which concentrates on impacts to regulated parties and the government.¹¹

Generally, agencies are instructed to reduce impacts, where legal and feasible, on small businesses, small non-profits, and small municipalities. If the Department of Commerce and Economic Opportunity’s Business Assistance Office feels it is warranted, or if requested by twenty-five people, the governor, or JCAR, a small business impact analysis is prepared. The analysis summarizes requirements to small businesses; estimates the number of businesses affected, as well as the economic impact on small business; and describes any alternatives that would, consistent with regulatory objectives, reduce burdens on small business.¹²

Joint Committee on Administrative Rules (“JCAR”): All rulemaking authority is conditioned on compliance with JCAR procedures, even if a court should find that JCAR procedures are invalid.¹³

Agencies must send rules they wish to adopt to JCAR for a review period of up to ninety days.¹⁴ If the review period expires without JCAR deciding to object, or if the agency has responded to an objection, the agency can file and finalize its adopted rule.¹⁵ If JCAR objects, the agency must respond by amending or withdrawing the rule, or by explaining its disagreement; if the agency does not respond, the rule is withdrawn.¹⁶

JCAR's criteria for review include authority, legality, procedures, adequate consideration of alternatives, economic and budgetary issues, and whether the rule is designed to minimize small business impacts.¹⁷ JCAR can object on the basis of any of those factors. Additionally, if a rule does not meet those criteria, JCAR can then investigate whether the proposed rule constitutes a serious threat to the public interest, safety, or welfare.¹⁸ If it does, JCAR can take a three-fifths vote to prohibit the filing of the rule.¹⁹ Within 180 days, the General Assembly can pass a joint resolution reinstating the rule, but otherwise the agency is prohibited from filing it.²⁰

Periodic Review: JCAR evaluates rules at least every five years, considering legal changes, duplication, and economic and budgetary effects.²¹ JCAR can examine and object to any rule for statutory authority, and agencies must respond.²²

Illinois's Process in Practice

Impact Statements: Though JCAR may consider qualitative costs and benefits during its review, the impact statement forms only cover monetary impacts to regulated parties or the government. JCAR has trouble getting agencies to respond with more detail than just "N/A."²³

JCAR Reviews: With its new review powers, JCAR meetings are active and well-attended.²⁴ JCAR is staffed by twenty-five analysts and assistants.²⁵

The public may, and frequently does, contact JCAR. JCAR feels public participation is vital to its review process: "Frequently, it is only through this comment that the Committee fully recognizes the effect of a rule on the individual, business or local government that has to adhere to it on a daily basis."²⁶

In 2009, JCAR reviewed 317 regular rulemakings, prohibited the filing of six, objected to ten, and made recommendations on nine. JCAR's review is more substantive than procedural: in 2009, half of its objections and two-thirds of its prohibitions were based on statutory authority; one objection was based on economic impacts.²⁷

A Department of Natural Resources rule provides a good example. The agency proposed designating certain exclusion zones around run-of-river dams. In July 2009, JCAR prohibited filing the rule, finding it imposed unauthorized restrictions on private landowners' property rights and curtailed the recreational use of public waterways. The agency initially agreed to work with JCAR to revise the rule and considered such modifications as limiting the exclusion zones to just one hundred feet upstream. But ultimately, no agreement could be reached, the legislature did not overturn JCAR's objections, and the prohibition became permanent in January 2010.²⁸

Case Study: Blagojevich versus JCAR

In 2007, with the federal matching funds for an Illinois health care program in jeopardy, the Department of Healthcare and Family Services declared the need for an emergency rule. The rule would use the state's Medicaid laws to preserve the insurance program for families who technically exceeded Medicaid's eligibility criteria but could not afford private health insurance. JCAR

objected to and suspended the emergency rule, finding no emergency warranted adoption of the rule, and that the rule was not in the public's interest.²⁹

Despite JCAR's objections and prohibition—and despite having just a few years earlier signed the bill to expand JCAR's powers—Governor Rod Blagojevich instructed the agency to ignore JCAR and start implementing the emergency rule. Blagojevich explained that, “Because we couldn't get some legislators to support this, I'm acting unilaterally to expand health care.”³⁰ When the permanent rule came before JCAR, JCAR again objected, but the agency continued enrolling families.³¹

The conflict inevitably went to court, where defendants alleged that JCAR's new suspension power was unconstitutional. To avoid reaching the constitutional issues in the case, the court fashioned a statutory basis for its preliminary injunction against the rule.³² In July 2009, a settlement agreement and new legislation ended the dispute.³³

In December 2008, Blagojevich's violation of the state Administrative Procedure Act in ignoring the JCAR objection was cited as an abuse of power in the articles of impeachment brought against him.³⁴ In February 2009, the new Governor Pat Quinn, perhaps having learned a lesson, asserted “I think JCAR plays a very beneficial role.”³⁵

Analysis and Grade

Both JCAR and analytical requirements consciously focus more on reducing burdens than on maximizing benefits. Illinois earns a C.

Illinois's analytical mandates are minimal and biased: agencies are not required to study either the regulatory benefits of a proposal or any alternatives besides those that would minimize small business impacts. Still, agencies have trouble complying with even these minimal analytical requirements, suggesting either a lack of sufficient resources either for analysis or the review of analysis. The lack of any information on regulatory benefits makes it difficult for JCAR to use its review powers to calibrate rules. JCAR's relationship with agencies may also remain somewhat adversarial, complicating efforts to negotiate compromises and modify rather than simply reject regulations.

JCAR reviews do operate by deadlines, are relatively consistent and transparent, and are governed by substantive criteria. But they do not target agency inaction or inter-agency conflicts, and reviews are not always the most transparent.

JCAR's periodic reviews also are governed by clear standards, but there is little evidence of meaningful periodic reviews. In 2000, Robert Hahn reported: “An Illinois statute, for example, requires agencies to review all rules at least every 5 years. Agencies have not, however, completed a review in over a decade. The legislative committee responsible for enforcement cited a lack of staff and funds as the reason for its negligence.”³⁶

Notes

- ¹ *Is JCAR Unconstitutional?*, FEDERATION OF REGULATORY COUNSEL JOURNAL, vol. 19 (2008).
- ² JAMES R. BOWERS, REGULATING THE REGULATORS: AN INTRODUCTION TO THE LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING 29 (1990).
- ³ *Id.* at 52-53.
- ⁴ *See* Cent. Ill. Pub. Serv. Co. v. Ill. Commerce Comm'n, 644 N.E.2d 817, 825 (Ill. 1994) (“The opinions of JCAR are not binding on administrative agencies.”).
- ⁵ BOWERS, *supra* note 2, at 71-73.
- ⁶ *Id.* at 42.
- ⁷ *Id.* at 67-73.
- ⁸ P.A. 93-1035 (Ill. 2004).
- ⁹ Janet M. Kelly, *Institutional Solutions to Political Problems: The Federal and State Mandate Cost Estimation Process*, 29 STATE & LOCAL GOV'T REV. 90, 90 (1997).
- ¹⁰ *Id.* (“Fiscal noting is often a highly charged political activity, even in states where cost estimates are prepared by professional analysts.”).
- ¹¹ 5 ILL. COMP. STAT. (“ILCS”) 100/5-40(c); *see also* 5 ILCS 100/5-100(e)(1); 1 Ill. Admin. Code (“ILAC”) § 220.300.
- ¹² *Id.* 100/5-30.
- ¹³ *Id.* 100/5-6.
- ¹⁴ *Id.* 100/5-40(c).
- ¹⁵ *Id.* 100/5-40(d).
- ¹⁶ *Id.* 110/5-110.
- ¹⁷ 1 ILAC § 220.900; *see also* 5 ILCS 100/5-110.
- ¹⁸ The definition of a serious threat includes if the rule creates unreasonable economic costs, adverse effects on health or well-being, or a violation of rights, or contains policies rejected by the General Assembly. 1 ILAC § 220.900.
- ¹⁹ 5 ILCS 100/5-115.
- ²⁰ *Id.* 100/5-115(c).
- ²¹ *Id.* 100/5-130.
- ²² *Id.* 100/5-120. JCAR can vote to suspend an emergency or preemptory rule. 5 ILCS 100/5-125.
- ²³ Survey from Claire B. Eberle, Deputy Dir. of JCAR (2009, on file with author).
- ²⁴ *See* examples of JCAR Minutes at <http://www.ilga.gov/commission/jcar/Minutes/Minutes.asp>.
- ²⁵ JCAR, <http://www.ilga.gov/commission/jcar>.
- ²⁶ JCAR, Illinois Rulemaking Process, <http://www.ilga.gov/commission/jcar/ILRulemakingProcess.pdf>.
- ²⁷ JCAR, 2009 ANNUAL REPORT (2010), *available at* <http://www.ilga.gov/commission/jcar/09AnnualReport.pdf>.
- ²⁸ *Id.*
- ²⁹ *See* Caro v. Blagojevich, 895 N.E.2d 1091 (Ill. App. Ct. 2008).

³⁰ *Governor Outlines Health Insurance Plan*, CHICAGO TRIBUNE, Aug. 30, 2007.

³¹ *See Blagojevich*, 895 N.E.2d 1091.

³² *Id.*

³³ JCAR, 2009 ANNUAL REPORT, *supra* note 27, at 46.

³⁴ *Id.*

³⁵ *Quinn Gets Extra Month to Prepare Budget*, SPRINGFIELD NEWS-LEADER, Feb. 12, 2009.

³⁶ Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 29 J. LEGAL STUD. 873, 882 (2000).

Indiana

Though Indiana has partly mimicked the federal regulatory review structures, creating an Office of Management and Budget to review cost-benefit analyses, the state lacks the resources and institutional design to produce consistent, detailed impact analyses.

Indiana's Process on Paper

General Rulemaking Principles: To the extent possible, all rules must be designed to minimize expenses to regulated entities, taxpayers, and consumers, as well as to more generally achieve the regulatory goal in the least restrictive manner.¹ In the public notice of a proposed rule, agencies must justify any requirement or cost imposed on a regulated entity that is not expressly required by law.²

Attorney General and Governor: The attorney general must offer agencies legal advice in drafting regulations,³ and also reviews legality of rules during a forty-five-day period before their adoption. Failure to disapprove constitutes an approval.⁴

After the attorney general's review period ends, the rule is submitted to the governor for approval. The governor has up to thirty days to approve or disapprove a rule. Again, lack of action is a default approval.⁵

Impact Statements and OMB Approval: Based on the governor's review powers, Executive Order 2-89 states that the governor will not approve any rule unless the Budget Agency has first approved it.⁶ Rules must be submitted to the Budget Agency before finalization, along with a calculation of estimated fiscal impacts on the government.

A 2005 executive order, later codified in statute, created the Office of Management and Budget ("OMB") and expanded its rule review responsibilities.⁷ Agencies must submit rules to OMB, and within forty-five days OMB must prepare a fiscal impact statement on the rule's effects to the state and regulated parties.⁸ Rules with an annual economic impact on all regulated persons greater than \$500,000 receive additional review and analysis.⁹

Small Business Impacts: If a rule will impose requirements or costs on small business, agencies must prepare a statement of annual economic impact on small business. The statement estimates the number of entities subject to the rule, their annual compliance costs, and the total annual economic impact, and must justify any cost not expressly required by law and the reasons for rejecting any less intrusive alternatives.¹⁰

The Indiana Economic Development Corporation reviews these small business impact statements and can make recommendations, which agencies must fully consider before finally adopting a rule.¹¹ The Corporation was technically set up as a public-private partnership, but it is run by a Board chaired by the governor and led by the Secretary of Commerce, and replaced the Department of Commerce in the executive branch.¹²

Small business can also challenge impact statements themselves,¹³ and their interests are further represented by a Small Business Ombudsman, who serves at the pleasure of the Board of the Indiana Economic Development Corporation. The Ombudsman must review proposed rules that impose requirements on small business, and may review any proposed rules that impose requirements on other businesses. The Ombudsman may suggest alternatives to reduce regulatory burden, and agencies must respond to these suggestions.¹⁴

Legislative Review: A joint Administrative Rules Oversight Committee¹⁵ can review public complaints, any adopted rule, or the failure of an agency to adopt a rule.¹⁶ The Committee is particularly encouraged to review adopted rules with a fiscal impact of over \$500,000. The Committee can review a rule’s economic impact, compliance with legislative intent, creation of an unfunded mandate, or adherence to the general rulemaking principles (see above).¹⁷ But the Committee’s powers are advisory only: it may only make recommendations to the agency or introduce legislation.¹⁸

“[The statute] limits our [official] analysis of the fiscal impacts to the first twelve months after the rule’s effective date.

On at least one occasion, this really limited the agency’s ability to show that the proposed Energy Conservation Code could, in the long run, result in cost savings.”

—George C. Thompson,
Department of Homeland
Security General Counsel

Agencies must also notify the Committee if they do not initiate a required rulemaking within sixty days of the underlying statute’s effective date.¹⁹

Sunset: Unless extended by the governor in case of emergency,²⁰ all rules expire on January 1 of the seventh year after they took effect or were last amended.²¹ Agencies can re-adopt rules,²² but are instructed to reconsider small business impacts, continued need, complaints and comments received, complexity, conflicts, and technological or economic changes.²³

Indiana’s Process in Practice

Impact Statements: Though statute requires OMB to conduct the fiscal impact statements, OMB often has the agency prepare the statement and then adopts the agency’s analysis as its own.²⁴ OMB has issued two Financial Management Circulars to expand the requirements of cost-benefit analysis.²⁵ Cost-benefit analysis must include: a statement of need, including the number of individuals and businesses affected and an evaluation of the rule’s rationale or goal; a comprehensive enumeration of benefits and costs, whether monetized or not, both tangible and intangible, direct or indirect, and including impacts on consumer protection, worker

safety, and business competitiveness; a determination of whether benefits justify the costs; and an examination of alternatives.²⁶

Despite such seemingly precise instructions, detailed analysis is not always achieved in practice. For example, OMB’s general counsel and policy director reports that indirect costs and benefits are, in fact “not required to be included in the review, [though] they are also not specifically excluded.”²⁷ More generally, “[t]he cost-benefit analysis is primarily interested with the impact on Indiana businesses,” and not on broader social costs and benefits.²⁸ Resource constraints also translate into sparse analytical detail. Agencies do not typically have economists on staff, nor do they have the funding to support outside economic consultants.²⁹ According to the Department of Homeland Security, “The level of our analysis is pretty basic, since no one here has the economic background to go beyond the basics.”³⁰

Statutory constraints may also be a factor. For example, under statute formal consideration of costs is limited to the first twelve months after the rule’s effective date.³¹ “On at least one occasion,

this really limited the agency’s ability to show that the proposed Energy Conservation Code could, in the long run, result in cost savings.”³²

Agencies typically do not quantify the health benefits of regulations.³³ Distributional impacts are considered, at most, “informally.”³⁴ Alternatives are sometimes discussed.³⁵

Executive Review: Though the attorney general and OMB both have important review powers, the governor has the “ultimate authority” to approve or veto rules.³⁶ According to the agencies, “Proposed rules do not get very far unless both OMB and the governor’s office are in favor of changing the status quo.”³⁷ OMB comments in particular often focus on eliminating burdens to regulated community,³⁸ or changing the proposal if costs exceed benefits.³⁹

Small Business Review: The Economic Development Corporation’s involvement in rule reviews is fairly new, and by the time a rule gets to the Corporation for review, it has already been vetted by several others and the public, and so is “usually in pretty good shape.”⁴⁰

Legislative Review: A 1999 report by the Administrative Rules Oversight Commission found that an expansion of the oversight responsibility of the Administrative Rules Oversight Committee beyond review of complaints about existing rules would require allocation of substantially more resources, and “it is unclear whether the number of disputes . . . is sufficient to warrant the enactment of a law that would delay the effective dates and suspend the operation of administrative rules in order to permit the General Assembly to have a reasonable opportunity to review each rule.”⁴¹

On occasion the legislative Administrative Rules Oversight Committee will hold hearings on rules,⁴² but generally agencies report little legislative oversight of their regulations.⁴³

Sunset Period: Indiana’s sunset provision has been controversial: some new gubernatorial administrations have used it to let policies they disagree with expire, even though others firmly believe the provision was intended only to remove obsolete rules, not to change policies without public input.⁴⁴ But overall Indiana’s sunset law is not very active, and it has been said that once passed, rules are “almost impossible to get rid of.”⁴⁵

Analysis and Grade

Though Indiana’s sunset provision is potentially superfluous and wasteful, much of its structure is designed to conserve resources. Both cost-benefit analysis and legislative review are heightened for rules with impacts over \$500,000, and the scope of legislative review was deliberately not expanded from existing to proposed rules for fear of straining resources and causing delays. Though Indiana’s regulatory review process could be more balanced and more efficient, the state

“[I]t is unclear whether the number of disputes . . . is sufficient to warrant the enactment of a law that would delay the effective dates and suspend the operation of administrative rules in order to permit the General Assembly to have a reasonable opportunity to review each rule.”

—Administrative Rules Oversight Commission (1999)

is already sensitive to resource considerations.

One area where the state does lack resources, however, is analytical capacity within agencies. Though the OMB is supposed to prepare the impact statements, much of the burden falls on agencies, and the result is inattention to benefits and to any distributional issues beyond small business impacts. Though OMB does encourage agencies to analyze alternatives and to change rules where costs exceed benefits, analysis does not typically result in the kind of information necessary to really calibrate rules or maximize net benefits. Instead, reduction of compliance costs, especially for small businesses, remains the paramount goal—indeed, that is one of Indiana’s central goals for the rulemaking process.

There are deadlines for the rule review process, and not even the sunset provision seems to be much of an obstacle to rulemaking. Partly that is because sunset review, though guided by some statutory criteria, is largely pro forma.

Leaving aside the often inactive legislative review committee, executive review is consistent, but there are no clear standards for review (there are on the legislative side), and the governor’s review in particular lacks transparency. Even though it is mostly inactive, the legislative review process is notable for authorizing the review of an agency’s failure to adopt necessary regulations.

Overall, Indiana earns a C+.

Notes

- ¹ IND. CODE § 4-22-2-19.5.
- ² *Id.* § 4-22-2-24(d).
- ³ *Id.* § 4-22-2-22.
- ⁴ *Id.* §§ 4-22-2-31, -32. Also, if a rule may constitute a taking, the attorney general advises the governor and the agency. *Id.*
- ⁵ *Id.* § 4-22-2-34.
- ⁶ Exec. Order 2-89 (1989).
- ⁷ Exec. Order 05-02 (2005).
- ⁸ IND. CODE § 4-22-2-28(D); *see also id.* § 4-3-22-13(A).
- ⁹ *Id.* § 4-22-2-28(c); *see also id.* § 4-3-22-13(b).
- ¹⁰ *Id.* § 4-22-2.1-5.
- ¹¹ *Id.* § 4-22-2.1-6.
- ¹² *Id.* § 5-28-17-5.
- ¹³ *Id.* § 4-22-2.1-8.
- ¹⁴ *Id.* § 4-22-2-28(b).
- ¹⁵ The committee is composed of four members from the House and four from the Senate. *Id.* § 2-5-18-5.
- ¹⁶ *Id.* § 2-5-18-8.
- ¹⁷ *Id.* § 4-22-2-46.
- ¹⁸ *Id.* § 2-5-18-8.
- ¹⁹ *Id.* § 4-22-2-19.
- ²⁰ *Id.* § 4-22-2.5-5.
- ²¹ *Id.* § 4-22-2.5-2.
- ²² *Id.* § 4-22-2.5-3.
- ²³ *Id.* § 4-22-2.5-3.1
- ²⁴ *E.g.*, Dept. of Env'tl. Mgmt., Fiscal Impact Statement on Outdoor Wood Boilers (2010), available at http://www.in.gov/idem/files/apcb_2010_jul_05-332_fiscal_impact.pdf (adopted by OMB as its cost-benefit analysis on June 24, 2010); *see also* http://www.in.gov/iurc/files/1673_001.pdf.
- ²⁵ Financial Mgmt. Circular 2006-1 and 2006-2 (2006) (also asserting OMB's authority to review small business impact statements).
- ²⁶ Financial Mgmt. Circular 2006-2.
- ²⁷ Survey from Chris Atkins, OMB General Counsel and Policy Director (2009, on file with author).
- ²⁸ *Id.*

- ²⁹ *E.g.*, Survey from Preston Black, Director of Office of Legal Affairs, Dept. of Health (2010, on file with author); Survey from George C. Thompson, General Counsel, Dept. of Homeland Security (2010, on file with author) (also noting that getting free support from State University graduate students might be possible, but likely not a viable option given the time constraints in the rulemaking process).
- ³⁰ Survey from Thompson, *supra* note 29.
- ³¹ IND. CODE § 4-22-2-28
- ³² Survey from Thompson, *supra* note 29.
- ³³ Survey from Black, *supra* note 29 (explaining that the Department of Health considers value of statistical life, but there is no actual calculation of health benefits); Survey from Thompson, *supra* note 29 (explaining that the Department of Homeland Security, which is involved in rulemakings for building codes, boilers, fireworks sales, amusement rides, elevators, disaster relief, and so forth, “do[es] not attempt to quantify the value of a life saved or an injury averted”); Dept. of Env’tl. Mgmt., *supra* note 24 (very briefly describing health risks from problem, but not discussing or quantifying any health benefits from regulation).
- ³⁴ Survey from Black, *supra* note 29.
- ³⁵ *E.g.*, Dept. of Env’tl. Mgmt., *supra* note 24.
- ³⁶ Survey from Atkins, *supra* note 27.
- ³⁷ Survey from Thompson, *supra* note 29.
- ³⁸ *Id.*
- ³⁹ Survey from Black, *supra* note 29.
- ⁴⁰ Interview with Ryan Asberry, Indiana Economic Development Corporation, July 9, 2010.
- ⁴¹ Admin. Rules Oversight Comm’n, Report (1999), <http://www.in.gov/legislative/interim/committee/1999/.../reports/AROC2B1.pdf>.
- ⁴² *E.g.*, Tom Coyne, *BP Says It Won’t Increase Pollution Discharge into Lake Michigan*, AP, Aug. 23, 2007.
- ⁴³ *See* Survey from Black, *supra* note 29; Survey from Thompson, *supra* note 29.
- ⁴⁴ *See* Charles Wilson, *Lobbyists Push for Extension of Competitive Distribution*, AP STATE & LOCAL WIRE, July 6, 2001.
- ⁴⁵ Editorial, *A Little Tough at Sunset*, THE NEWS-SENTINEL, OCT. 6, 2006 (“an embarrassingly modest sunset law”).

Iowa

Iowa utilizes nearly every regulatory review structure possible: constitutional, statutory, and executive order authority; legislative and executive reviews; vetoes, burden shifting, and suspensions; fiscal impact analysis, regulatory impact analysis, and regulatory flexibility analysis. Despite multiple structures and multiple goals,¹ Iowa has strived to “strike a fair balance between these purposes and the need for efficient, economical and effective government administration.”²

Iowa’s Process on Paper

Burden-Shifting Objection: The governor, the attorney general, and the legislature’s Administrative Rules Review Committee (“ARRC”) all have authority to object to any portion of a proposed or adopted rule as “unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to the agency.” This objection removes the presumption of validity courts normally accord administrative rules, if the rule is challenged in court. Once a written objection has been filed, the burden shifts to the agency at any subsequent judicial proceeding to prove the rule is not unreasonable, arbitrary, capricious, or beyond the agency’s authority.³ If the agency fails to meet its burden of proof, the courts will declare the rule invalid.⁴

Rules Filed Without Notice: Agencies can choose not to publish notice of their proposed rules if the agency determines, for good cause, that such notice is unnecessary, impractical, or contrary to the public interest. The governor, the attorney general, and the ARRC (the latter by a two-thirds vote) can object to any such rule filed without notice; the objection voids the rule after 180 days.⁵

Gubernatorial Rescission: The governor can also rescind, by executive order, any rule within seventy days of its effective date.⁶ The Administrative Rules Coordinator (“ARC”), responsible for rule filings and for “direct control and oversight of the rulemaking process,”⁷ also provides the governor with a general opportunity to review and object to any rule.⁸

Executive Orders: On September 14, 1999, Governor Tom Vilsack issued a series of executive orders aimed at the administrative process. Executive Order 8 mandated comprehensive review of all agency rules, to identify and eliminate those rules that are outdated, redundant, over-broad, ineffective, unnecessary, or otherwise undesirable. After providing for public input, agencies were to judge rules based on the criteria of need, clarity, intent, costs, and fairness. The cost criterion included the question “do all the qualitative and quantitative benefits exceed the costs?”; the fairness criterion included the question “should it be strengthened to provide additional protection to those effected?” The principles and objectives of the Order were also meant to apply prospectively to any new rules or amendments. The ARC and the ARRC were instructed to help review agency assessments of their existing rules.⁹

Executive Order 9 largely mirrored federal Executive Order 12,866. The Order instructed agencies to issue only rules authorized by law or that serve an important public need. Agencies were required to assess all qualitative and quantifiable costs and benefits, to assess alternatives, and to choose approaches that maximize net benefits and are most equitable. Agencies were also required to prepare an annual Regulatory Plan and to provide the public with an online rulemaking docket. The ARC was given some powers to coordinate in cases of potential inter-agency conflict.¹⁰

Finally, Executive Order 10 established a Quality Rule-Making Committee to train agency personnel in drafting and assessing costs and benefits.¹¹

Administrative Rules Review Committee (“ARRC”): In 1963, a decade before enacting the basic

rulemaking process, the legislature created a special subcommittee to oversee agency regulations.¹² ARRC is a bipartisan committee, composed of five senators and five representatives.¹³ The ARRC can selectively consider either proposed or effective rules,¹⁴ but is especially directed to review existing rules for both “adverse and beneficial effects” and to give high priority to rules that affect small businesses.¹⁵

In addition to the review powers outlined above, the ARRC can impose a temporary seventy-day delay to allow additional time to study the adopted rule.¹⁶ The ARRC may also use a “general referral,” a process that refers any proposed or effective rule to the Speaker of the House and President of the Senate for further study.¹⁷ The ARRC may accompany this referral with a recommendation that the rule be “overcome by statute.”¹⁸ Although this latter action does not, alone, affect the validity of the rule, it can lead to legislative action. Finally, upon a two-thirds vote of its members, the ARRC may impose a “session delay,” delaying the effective date of the rule until the adjournment of the next session of the General Assembly.¹⁹ The rule is then referred to the Speaker of the House and the President of the Senate, who in turn forward the rule the appropriate standing committee. These committees are required to “take formal committee action by sponsoring a joint resolution to disapprove the rule, by proposing legislation relating to the rule, or by refusing to propose a joint resolution or legislation concerning the rule.” If they do not disprove of the rule, it becomes effective.²⁰

General Assembly’s Legislative Veto: Iowa’s state constitution gives the General Assembly authority to rescind any rule through a legislative veto.²¹ This action requires a majority vote in both chambers, but it does not require the signature of the governor. The ARRC’s role in legislative review does not restrict the General Assembly’s ability to review rules on its own motion.²²

Petition for Periodic Review: In addition to the general right to petition agencies for rulemakings,²³ any interested person may submit a written request to the Administrative Rules Coordinator (“ARC”) for an agency to conduct a formal review of a specific rule to determine whether the repeal, amendment, or adoption of a new rule is justified. The ARC determines whether request is reasonable and does not place an unreasonable burden on the agency; if the request not overly burdensome, the agency must review the rule within a reasonable time and produce a report on: the rule’s effectiveness, including a summary of any available data; written criticisms received; and any alternative solutions and the reasons they were rejected. A copy of the report sent to the ARRC and the ARC and is made available to public.²⁴

Fiscal Impact Statements: Agencies must prepare a fiscal impact statement whenever a rule “necessitates additional combined annual expenditures exceeding one hundred thousand dollars by all affected political subdivisions or agencies and entities which contract with the affected political subdivisions to provide services.”²⁵

Agencies must also prepare fiscal impact statements for any rules filed without notice that necessitate annual expenditures of at least \$100,000 (or combined expenditures of at least \$500,000 within five years) by all affected parties, including the agency. Such statements outlining expenditures must be delivered to the Legislative Services Agency, which analyzes and summarizes them for the ARRC.²⁶

Regulatory Analyses: An agency must file a regulatory analysis of a proposed rule if the ARC or ARRC requests one within thirty-two days of published notice. In addition, if the rule is likely to have a substantial impact on small business, the agency must file a regulatory analysis with special

findings related to this effect, if requested by the ARC, the ARRC, or at least twenty-five persons who each represent a small business.²⁷

The general regulatory analysis must include, among other things:²⁸

- a description of the groups of people likely to be affected, including those who will bear the costs and those who will receive the benefits;
- the likely quantitative and qualitative impact of the rule, economic or otherwise, upon affected classes of persons;
- the effect of the rule on state revenues, and the costs to the agency of implementing it;
- the costs and benefits of inaction;
- a determination of whether there are less expensive or intrusive methods of achieving the same goal; and
- the alternative methods considered.

A regulatory analysis for a rule affecting small businesses must include a discussion of whether it would be legal and feasible to establish exemptions while still meeting statutory objectives.²⁹

All regulatory analyses must quantify data to the extent practical, and account for both short- and long-term consequences.³⁰ If a regulatory analysis is requested, the time for public comment on the rule proposal is extended.³¹ If an agency makes a good faith effort to comply, a rule cannot be invalidated for an insufficient or inaccurate analysis.³²

Iowa's Process in Practice

Executive Review: The gubernatorial rescission is “never used; a private call from the Governor’s office is sufficient to persuade an agency not to implement a rule.”³³ Historically, staff has resolved most problems by informally consulting with agencies, and the governor has only reviewed about 5% of rules.³⁴ Similarly, the attorney general’s objection powers are rarely used; the attorney general prefers to maintain a “client-attorney” relationship with government agencies, advising the agencies throughout the rulemaking process.³⁵

Legislative Review: The ARRC has two part-time attorneys and a part-time fiscal analyst.³⁶ Though “informal review can occur at any time,” the burden-shifting objection “is the workhorse of the rules review process.”³⁷ While the objection has no official consequences unless and until a rule is challenged in court, in practice it is a powerful tool that can prompt regulatory changes.³⁸ In 2006, Governor Vilsack called the ARRC’s objection to water quality regulations his “biggest disappointment” from his eight years in office, criticizing the act as “a matter of political expediency,” in which legislators bowed to pressure from lobbyists during an election cycle.³⁹

The ARRC meets regularly to review proposed rules, with stakeholders often in attendance;⁴⁰ in practice, the ARRC does not usually review existing regulations.⁴¹ The governor’s Administrative Rules Coordinator sits on the ARRC as a non-voting, ex-officio member.⁴²

Analytical Statements: The Legislative Services Agency developed a worksheet to assist agencies with fiscal impact statements, and “as a practical matter, the form must be completed for every rulemaking, even if it merely indicates that the dollar thresholds have not been met.”⁴³ Each agency prepares its own statements and, as such, the “contents and technical sophistication vary widely.”⁴⁴ The worksheet asks agencies to estimate fiscal impacts on the government and affected persons,

as well as assumption that went into those calculations.⁴⁵ Costs are usually estimated by asking a sample of the regulated public; where agencies cannot estimate a precise dollar figure, ranges or general discussions are acceptable.⁴⁶ Although the Legislative Services Agency acknowledges that “affected persons,” taken to the extreme, could include everyone, it states that the fiscal impact statement “should focus on persons or groups explicitly affected by the rule.”⁴⁷ “In the case of rules affecting public goods,” such as environmental protection, “a brief sentence on the impact to the public should be included.”⁴⁸

Ultimately, the fiscal impact statement is just a general overview, principally of costs, and “is not intended to rival the detail and research required for the regulatory analysis.”⁴⁹ The Legislative Services Agency analyzes the statements for the ARRC,⁵⁰ and the ARRC may use the fiscal statement as a “tripwire” to determine whether to request a more detailed regulatory analysis.

The ARRC as well as the public do request regulatory analyses on occasion. They are detailed, but tend to quantify costs with more precision than benefits.⁵¹

Case Study #1: Landfills

Under Executive Order 8 review, the Department of Natural Resources concluded that its existing regulations on municipal solid waste landfills were out-of-date. In promulgating new rules, the agency completed a regulatory analysis on its own initiative, in anticipation of a request. The analysis first identified the number of landfills, the percent of Iowans who use groundwater as drinking water, and the facilities that use groundwater for industrial purposes. Then it quantitatively estimated the typical cost to bring landfills into compliance with the new rules. Though the analysis did not quantify benefits or thoroughly discuss qualitative benefits, it did discuss some alternative policy options.⁵²

The ARRC placed a seventy-day delay on the rules to give itself more time to review.⁵³ When the regulations came under legislative review, the ARRC felt the proposal had exceeded federal requirements and voted 6-3 to object to the rule and shift the burdens at litigation. Under the threat of litigation, the agency continued working to amend the regulations to respond to ARRC’s objections. In 2009, the agency issued revised regulations, but the ARRC again voted (this time 5-4) that the burden should be on the Department of Natural Resources to prove in court that its rules were legal and did not exceed federal requirements.⁵⁴

Case Study #2: Smoking Ban

In 2008 and in consultation with the attorney general, Iowa’s Department of Public Health drafted a rule banning indoor smoking. In June, the agency informally went before the ARRC to get the legislature’s initial reaction.⁵⁵ In July, the Iowa Restaurant Association submitted a request for a regulatory analysis. Though the agency did not expect any substantial impacts to small businesses, it decided to complete the analysis in order “to further public discussion.”⁵⁶ The analysis qualitatively discussed health benefits and quantified some effects, like recapturing lost productivity and reducing medical expenditures for employees. On cost, the agency found the only cost to be signage; based on peer-reviewed studies from other jurisdictions with similar laws already in place, the agency concluded there would be no adverse impact on business revenues or the economy. The agency also considered some alternative policy options.⁵⁷

Industry was not satisfied with the analysis. Iowans for Equal Rights asserted that its members—restaurants, bars, and small businesses—had already been negatively impacted in just the first

month of the rule's application. Industry groups decided to take their case to the ARRC.⁵⁸ For months, bar owners and other industry groups “jammed” meetings of the ARRC on the indoor smoking ban. Finding no statutory grounds to object to the rule, the chair of the committee, Senator Michael Connolly, advised critics of the ban to present their arguments instead to the legislature or the courts: “In America we follow the law. Until we have a resolution in the courts or upstairs in the Legislature, this is the law.”⁵⁹

Analysis and Grade

Iowa's multiple reviews are possibly redundant and wasteful. Regulatory analyses are triggered only by inconsistent requests; application could be better tailored to cover all significant regulations. Consequently, Iowa's structure is not reasonable given resources. Similarly, nothing strongly protects against possible delays or deterrents to rulemaking caused by the multiple layers of review.

Despite promising language featured in Executive Orders, regulatory review—especially on the legislative side—is mostly about objecting to rules, not recalibrating them or maximizing net benefits. And though the practice of rule review is relatively consistent, no clear standards govern the legislative veto, the gubernatorial rescission power, or the informal executive review.

Giving Iowa the benefit of the doubt, the Executive Order does contain some language to promote inter-agency coordination. On the other hand, Iowa's review structure does not do much to combat agency inaction.

Transparency on the executive side of the review process could be stronger, but legislative review is open to the public, regulatory analyses are available online, and the regulatory agenda may be significant in keeping the interested public in the loop.

For periodic review of existing regulations, some word choices in the Executive Orders are unfortunately anti-regulatory in their tone, but the Orders do require agencies to look into strengthening regulations. There are substantive criteria, and in practice, periodic review seems to have a meaningful and balanced impact.

Combining all the paper requirements from the Executive Orders and statutes, regulatory analysis in Iowa does focus on maximizing the benefits and equity of available policy alternatives. Analysis is inconsistently requested and inconsistently practiced, but there is strong potential for balanced, meaningful analysis.

Despite multiple, possibly duplicative layers of review and the inconsistent practice of regulatory analysis, Iowa can still boast one of the best-designed review structures in the country, and earns a B+.

Notes

- ¹ IOWA CODE § 17A.1(3) (“The purposes of this chapter are: To provide legislative oversight of powers and duties delegated to administrative agencies; to increase public accountability of administrative agencies; to simplify government by assuring a uniform minimum procedure to which all agencies will be held in the conduct of their most important functions; to increase public access to governmental information; to increase public participation in the formulation of administrative rules; to increase the fairness of agencies in their conduct of contested case proceedings; and to simplify the process of judicial review of agency action as well as increase its ease and availability.”).
- ² *Id.* § 17A.1(4).
- ³ *Id.* § 17A.4(6)(a).
- ⁴ *Id.* § 17A.4(6)(b).
- ⁵ *Id.* § 17A.4(3).
- ⁶ *Id.* § 17A.4(8).
- ⁷ Admin. Rules Coordinator, The Oversight Process, http://www.adminrules.iowa.gov/how_rules_work/oversight.html (last visited April 12, 2010); *see also* Survey from Joe Royce, Counsel for ARRC (2010, on file with author) (noting that the ARC advises the governor).
- ⁸ IOWA CODE § 7.17(1).
- ⁹ Exec. Order 8, Sept. 14, 1999, *available at* http://publications.iowa.gov/archive/00002570/01/EO_08.pdf.
- ¹⁰ Exec. Order 9, Sept. 14, 1999, *available at* http://publications.iowa.gov/archive/00002571/01/EO_09.pdf.
- ¹¹ Exec. Order 10, Sept. 14, 1999, *available at* http://publications.iowa.gov/archive/00002561/01/EO_10.pdf. The same day, Gov. Vilsack also established a uniform waiver rule by Executive Order 11.
- ¹² Survey from Royce, *supra* note 7.
- ¹³ IOWA CODE § 17A.8(1).
- ¹⁴ *Id.* § 17A.8(6).
- ¹⁵ *Id.* § 17A.33.
- ¹⁶ *Id.* § 17A.4(7).
- ¹⁷ *Id.* § 17A.8(7).
- ¹⁸ *Id.* § 17A.8(8).
- ¹⁹ *Id.* § 17A.8(9).
- ²⁰ *Id.* Note that emergency rules promulgated pursuant to § 17A.5(2) are generally excepted from these powers of delay.
- ²¹ IOWA CONST. art. III, § 40.
- ²² IOWA CODE § 17A.8(8).
- ²³ *Id.* § 17A.7(1).
- ²⁴ *Id.* § 17A.7(2).
- ²⁵ *Id.* § 25B.6.
- ²⁶ *Id.* § 17A.4(4). “If the agency has made a good faith effort to comply with the requirements of this subsection, the rule shall not be invalidated on the ground that the contents of the statement are insufficient or inaccurate.” *Id.*

- ²⁷ *Id.* § 17A.4A(1)
- ²⁸ *Id.* § 17A.4A(2)(a).
- ²⁹ *Id.* §§ 17A.4A(2)(b)-(c).
- ³⁰ *Id.* § 17A.4A(3).
- ³¹ *Id.* § 17A.4A(4). Agencies must make electronic copies available to maximum extent feasible. *Id.* § 17A.4A(6).
- ³² *Id.* § 17A.4A(7).
- ³³ Survey from Royce, *supra* note 7.
- ³⁴ David S. Neslin, Quis Custodiet Ipsos Custodes?: Gubernatorial and Legislative Review of Agency Rulemaking under the 1981 Model Act, 57 WASH. L. REV. 669, 683 n.94 & 684 n.96 (1982).
- ³⁵ *The Oversight Process*, *supra* note 7.
- ³⁶ Survey from Royce, *supra* note 7.
- ³⁷ *Id.*
- ³⁸ See Andy Piper, *Agency Suing Iowa DNR*, TELEGRAPH HERALD, Apr. 6, 2009 (on DNR working to amend its water quality rules in response to an objection and lawsuits).
- ³⁹ Mary Rae Bragg, *Vilsack Rips Legislative Panel on Water Quality*, TELEGRAPH HERALD, Aug. 10, 2006.
- ⁴⁰ See ARRC minutes available at http://www.legis.state.ia.us/scripts/docmgr/docmgr_ARR.dll/showtype?type=an.
- ⁴¹ Survey from Royce, *supra* note 7.
- ⁴² See Virginia Admin. Law Advisory Comm., *Legislative Powers of Rules Review in the States and Congressional Powers of Rules Review* (2001).
- ⁴³ Survey from Royce, *supra* note 7.
- ⁴⁴ *Id.*
- ⁴⁵ Legis. Serv. Agency, Administrative Rule Fiscal Impact Statement Worksheet.
- ⁴⁶ Survey from Royce, *supra* note 7.
- ⁴⁷ Legis. Serv. Agency, Fiscal Impact Statement Worksheet Instructions, at 2 (2003).
- ⁴⁸ *Id.*
- ⁴⁹ Survey from Royce, *supra* note 7.
- ⁵⁰ Legis. Serv. Agency, Fiscal Notes, http://staffweb.legis.state.ia.us/lfb/docs/Admin_Rules/arfiscal_notes.htm.
- ⁵¹ For example, in a 2004 ARRC review of the Department of Public Safety rule on training standards for fire fighters, ARRC requested a complete regulatory analysis. The analysis included the following statement on benefits: “The projected cost of inaction is increased likelihood of fire fighter injuries or deaths. No specific data are available to evaluate projected costs or benefits of either adoption of the proposed rules or inaction.” Dept. of Public Safety, *Regulatory Analysis* (2005), available at http://www.dps.state.ia.us/admrule/2005_filings/regulatory_analysis_min_ff_training_standards.pdf.
- ⁵² Dept. of Natural Resources, *Municipal Solid Waste Landfill Rules*, <http://www.iowadnr.gov/waste/policy/files/reganalysis.pdf>.
- ⁵³ Elizabeth Ahlin, *New Regulations Mean Two Landfills Will Close*, OMAHA WORLD-HERALD, Sept. 21, 2007 (“Oct. 1 was the original deadline for Iowa landfills to either comply with the regulations or close. That deadline has been pushed back 70 days pending approval of the final rules by the Legislature’s Administrative Rules Review Committee.”).
- ⁵⁴ Andy Piper, *Agency Suing Iowa DNR*, TELEGRAPH HERALD, Apr. 6, 2009.
- ⁵⁵ Rod Boshart, *Bar Owners Ask for Smoking-Ban Leeway*, THE GAZETTE (CEDAR RAPIDS), June 12, 2008.

⁵⁶ Dept. of Public Health, Regulatory Analysis for Smokefree Air Administrative Rule (2008), http://www.iowasmokefreeair.gov/common/pdf/reg_analysis.pdf.

⁵⁷ *Id.*

⁵⁸ Iowans for Equal Rights Press Release, Oct. 9, 2008.

⁵⁹ Mike Glover, *Backers, Critics Squabble over Iowa Smoking Ban*, AP STATE & LOCAL WIRE, Oct. 15, 2008.

Kansas

The Kansas legislature lost its veto power over regulations in 1984; now, its comments on regulations are given no more force or weight than any other public comments.

History of Kansas's Process

Kansas has had some form of regulatory oversight in place since 1939.¹ In the 1970s, the state formalized the process, creating a specialized review committee and authorizing rule rejection by concurrent resolution.² The original criteria for review and legislative veto, adopted in 1980, were “statutory authorization; basic reasonableness; proper form; technical errors; conflicts and overlaps; relationships; economic impact; and streamlining.”³

In 1984, the Kansas Supreme Court held that the existing regime, which allowed the legislature to amend, modify, or revoke agency rules by passing concurrent resolutions, violated the doctrine of separation of powers and the presentment clause in the State Constitution.⁴ Afterwards, though Kansas retained a legislative oversight process, the legislature’s most direct review powers were substantially weakened.

Kansas's Process on Paper

Executive Review: Before an agency can publish a rule proposal, the secretary of administration first checks the rule for “organization, style, orthography and grammar.”⁵ Next, the attorney general must clear the rule’s legality.⁶ The legality review focuses on authority and consistency, as well as whether the regulation constitutes a “takings.”⁷

Notice: After receiving the required executive approvals, the agency must give at least sixty days notice of its intended action by publishing in the Kansas Register.⁸ The notice must contain, among other things, a summary of the economic impacts, an environmental benefits statement if required, and the time and place of the public hearing.⁹ During the sixty-day comment period, a legislative joint committee also comments on the proposed rule.¹⁰

Joint Committee on the Administrative Rules and Regulations (“JCARR”): JCARR consists of five senators and seven representatives,¹¹ and is authorized to review rules both before and after they are adopted.¹² JCARR must review proposed rules during the sixty-day public comment period.¹³

Agencies are under no legal obligation to revise their proposals to conform with JCARR’s comments and recommendations. If the agency does not adopt the committee’s recommendations, JCARR may draft a resolution requesting the agency do so. At any time, the legislature may adopt a concurrent resolution expressing concern with any rule.¹⁴ But even if the resolution is adopted by the majority vote of both houses of the legislature, the agency still does not need to respond. JCARR may also recommend the legislature adopt statutory changes to “redefine the scope of an agency’s authority,” or it may recommend the legislature modify the substantive law.¹⁵

Impact Statements: Before the agency can submit a rule or regulation to the Secretary of Administration, thus initiating the rulemaking process, the agency is required to develop an economic impact statement.¹⁶ This statement must include:

- A description of the rule’s cost, the people who will bear those costs, and the groups who will be affected by the rule.
- A description of less expensive or less “intrusive” methods, and an explanation of why

such methods were rejected.

The agency is permitted to consult with other state agencies when it is preparing this economic statement.¹⁷

JCARR is empowered to request that the Director of Budget review and supplement the economic impact statement.¹⁸ The Director then prepares a statement that includes, to the extent possible, both a dollar estimate of the anticipated changes in revenues and expenditures of the state, and an estimate of both “the immediate and the long-range economic impact of the regulation on persons subject [to the regulation], small employers, and the general public.”¹⁹

Neither the original nor the supplemental economic impact statement explicitly covers benefits. But for any rule deemed an “environmental rule or regulation,”²⁰ an additional environmental benefit statement must be prepared. That statement explains the need for the regulation and the environmental benefits to be gained.²¹ Additionally, the economic impact statement for any environmental regulation must include more details on compliance costs, implementation costs, the cost of inaction, the distribution of those costs, and the methodology for those estimates.²²

Kansas’s Process in Practice

Deregulation, Deadlines, and Ex Post: Both the attorney general and the JCARR report that deregulatory actions are not subject to review.²³ Similarly, both the attorney general and the JCARR report that there is no routine review of existing regulations.²⁴

Besides the sixty-day window for JCARR comments during the public notice period, generally there are no deadlines for the various phases of review: “each reviewing entity takes as much time as it takes with the personnel available.”²⁵

Attorney General: Two attorneys in the Division of Legal Opinions and Government Counsel conduct the legality review. Since some proposed rulemaking activities could raise complicated legal questions, the attorney general may be unable to issue an opinion on the legality of the regulation before the agency issues notice of a public hearing. The attorney general is therefore permitted to approve a regulation and then later issue an opinion regarding its legality.²⁶ The Department of Administration suggests that the agency consult the attorney general’s office early during the drafting period for regulations that present complex legal or authority questions.²⁷

Impact Statements: In practice, all economic impact statements must detail costs to the government, small employers, private citizens, and consumers.²⁸ The Department of Administration encourages agencies to “think broadly when trying to identify potential economic impacts,” and to consider “less obvious, indirect economic impacts or hidden costs.”²⁹ Though “[s]ome state agencies do a much better economic analysis than others,”³⁰ impact statements are “often of great interest . . . to the Joint Committee. Moreover, the process of evaluating the economic impact of a proposed regulation may reveal significant policy issues that agencies need to consider.”³¹

JCARR Review: Immediately after the judicial decision stripping the legislature of its veto power, “[t]he loss of direct authority over agency regulations did not seem to diminish the impact the Legislature had over the regulatory process.”³² But according to the Department of Administration, JCARR comments are technically to be given the same weight as any other comments submitted during the public notice period—when it reviews proposed regulations, JCARR “is participating in the public comment period, rather than carrying out its legislative oversight responsibilities.”³³

Still, JCARR staff report that, from 2006 through 2009, “most agencies were fully addressing Committee comments.”³⁴ Most JCARR comments concern authority, economic impact on regulated community, and clarity,³⁵ and JCARR sometimes requests revisions to the economic impact statements.³⁶

In the 2008-2009 legislative term, JCARR met eight times to review rules from thirty-six different agencies.³⁷ Members of industry and the public sometimes attend and testify at these meetings, and JCARR sometimes encourages agencies to schedule additional sessions to hear such stakeholders’ concerns.³⁸ JCARR has not introduced any concurrent resolutions since the 1993-1994 session.³⁹ Though the committee does sometimes introduce clarifying legislation,⁴⁰ it does not generally try to reject a rule through statutory changes, since it mostly achieves its goals through the comment process and persuasion.⁴¹

Analysis and Grade

JCARR manages to have a meaningful effect through pure persuasion and without any direct oversight powers, which could help minimize burdens on agencies. Analytical resources could be better deployed, but the current requirements are not unreasonable. On the other hand, Delays may be problematic, especially on executive side, where reviews “take as long as they take.”

Though the potential for calibration of rules exists since JCARR’s review is more about commenting and persuading than about objecting, JCARR reports most of its comments focus on statutory authority and concerns for the economic impact to regulated parties—not maximizing net benefits. JCARR meetings and reviews seem consistent, but it is unclear whether any substantive standards currently guide its reviews (JCARR did have clear criteria in 1980 when it exercised its legislative veto). JCARR does take public testimony at its meetings and releases all its minutes and comments.

JCARR sometimes tries to help agencies coordinate and resolve conflicts,⁴² but the lack of a formal process is limiting. There is no process to combat agency inaction or for the systematic review of existing regulations.

In its analytical mandates, Kansas has no real requirement to analyze benefits beyond environmental benefits, alternatives beyond the least intrusive alternatives, or distributional effects.

Even though Kansas’s review is advisory only, it still could benefit from focusing more on maximizing net benefits. Kansas receives a D+ for its Guiding Principles Grade.

Notes

- ¹ Kan. Legis. Res. Dept., Kansas Legislator Briefing Book 1 (2010).
- ² Kan. Legis. Res. Dept., Report on Oversight Activities of the Joint Committee on Administrative Rules and Regulations 1-4 (2009).
- ³ *Id.* at 5.
- ⁴ State ex rel. Stephan v. Kansas House of Representatives, 687 P.2d 622, 638 (Kan. 1984).
- ⁵ KAN. STAT. ANN. § 77-420(A).
- ⁶ *Id.* § 77-420(b).
- ⁷ DEPT. OF ADMIN., POLICY AND PROCEDURE MANUAL FOR THE FILING OF KANSAS ADMINISTRATIVE REGULATIONS 14-15 (2010).
- ⁸ KAN. STAT. ANN. § 77-421
- ⁹ KSA 77-421(a)(1)
- ¹⁰ *Id.* § 77-436(c). Kansas administrative law also contemplates temporary regulations, which become effective upon approval of the State Rules and Regulations Board, which consists of the Attorney General, Secretary of State, Secretary of Administration, and designees from JCARR. *Id.* § 77-423.
- ¹¹ *Id.* § 77-436(a).
- ¹² *Id.* § 77-436(d)
- ¹³ *Id.* § 77-436(c)
- ¹⁴ *Id.* § 77-426(c).
- ¹⁵ POLICY AND PROCEDURE MANUAL, *supra* note 7, at 24.
- ¹⁶ KAN. STAT. ANN. § 77-416
- ¹⁷ Agencies also must consult with the League of Kansas municipalities, the Kansas Association of Counties, and the Kansas Association of School Boards, if they determine that the regulation will increase or decrease city, county, or school district revenues, or will impose additional responsibilities on these groups that will increase their fiscal liabilities or expenditures.
- ¹⁸ The State Rules and Regulations Board can make the same request for temporary rules.
- ¹⁹ *Id.* § 77-416(c).
- ²⁰ Any rule that “is adopted with the primary purpose of protecting the environment, and is adopted by the Secretary of Agriculture or the Secretary of Health and Environment” or “is adopted by the Secretary of Wildlife and Parks, and is related to threatened or endangered wildlife.”
- ²¹ *Id.* § 77-416(d).
- ²² *Id.* § 77-416(e).
- ²³ Survey from Camille Nohe, Assistant Attorney General (2009, on file with author); Survey from Raney Gilliland, Kan. Legis. Res. Dept. Asst. Dir. for Research (2010, on file with author).
- ²⁴ Survey from Nohe, *supra* note 23; Survey from Gilliland, *supra* note 23.
- ²⁵ Survey from Nohe, *supra* note 23.
- ²⁶ POLICY AND PROCEDURE MANUAL, *supra* note 7, at 70. In such a case, the Attorney General opinion concluding that a regulation is invalid will not void the regulation; the regulation can only be voided by agency action, legisla-

tion, or a court order to that effect.

²⁷ *Id.* at 71.

²⁸ *Id.* at 8.

²⁹ *Id.* at 9.

³⁰ Survey from Gilliland, *supra* note 23.

³¹ POLICY AND PROCEDURE MANUAL, *supra* note 7, at 9.

³² Report on Oversight Activities, *supra* note 2, at 13.

³³ POLICY AND PROCEDURE MANUAL, *supra* note 7, at 5; *see also* Stephen ex. Rel. Stephan v. House of Representatives, 236 Kan. 45, 64 (1984).

³⁴ Report on Oversight Activities, *supra* note 2, at 92; *see also* Virginia Admin. Law Advisory Comm., Legislative Powers of Rules Review in the States and Congressional Powers of Rules Review (2001) (“the agency always heeds the Committee’s comments”).

³⁵ Report on Oversight Activities, *supra* note 2, at 92.

³⁶ *Id.* at 82.

³⁷ *Id.* at 91.

³⁸ *E.g.*, Minutes of JCARR Meeting, May 5, 2010, at p.6, *available at* http://www.kslegislature.org/committeeminutes/09-10/interim_joint/joint/Administrative%20Rules%20&%20Regulations/jtAdminRules-Regs2010050405.pdf (testimony from winery); Minutes of JCARR Meeting, May 18, 2009, *available at* http://www.kslegislature.org/committeeminutes/09-10/interim_joint/joint/Administrative%20Rules%20&%20Regulations/jtAdminRulesRegs20090518.pdf (indicating attendance of advocacy groups).

³⁹ The two resolutions introduced that session were not adopted. Report on Oversight Activities, *supra* note 2, at 23.

⁴⁰ *Id.* at 95.

⁴¹ *See* Virginia Admin. Law Advisory Comm., Legislative Powers of Rules Review in the States and Congressional Powers of Rules Review (2001).

⁴² *See, e.g.*, Minutes of JCARR Meeting, May 18, 2009, at p.7 (“There was some concern by Committee members concerning the two different agencies having authority over food safety in the different facilities and whether they will be consistent. The Committee requested that a letter be addressed to the Department of Agriculture concerning their understanding of SB 203 and the transfer of food service inspection duties to the other agencies in similar situations.”).

Kentucky

Regulatory review in Kentucky has often been the source of friction between the legislative and executive branches, and at times the power has been wielded largely “to protect the Commonwealth’s interest of maintaining a positive business climate.”¹

History of Kentucky’s Process

A movement started in the 1960s to make Kentucky’s legislature a more co-equal branch of government, independent from the Governor.² Legislative oversight of administrative rules began in earnest in 1972 and reached its peak of power with the enactment of legislative veto authority in 1982.³ Just two years later, in 1984, the state Supreme Court ruled that making legislative review mandatory instead of merely precatory was unconstitutional.⁴ Since then, the legislature has failed to win support from the electorate for a constitutional amendment to give lawmakers more review power.⁵

While many legislators felt the court rulings substantially diminished the effectiveness of their review powers,⁶ historically even the legislature’s advisory authority has exerted “considerable influence on promulgating agencies.”⁷

Kentucky’s Process on Paper

Preparation and Impact Analyses: The Legislative Research Commission (“LRC”)—a sixteen-member panel of the legislature’s leadership, administered by a full-time staff—offers agencies guidelines and advice on the preparation of regulations.⁸ Statutory requirements also shape the preparation of regulations. For example, when designing new regulations or reviewing existing regulations, agencies are instructed to “tier” their rules “when possible.” “Tiering” means tailoring a rule’s requirements to reduce any disproportionate impacts on particular regulated entities, especially small business or government bodies.¹⁰

Agencies must submit a regulatory impact analysis to the LRC for every regulation. The report must cover, inter alia: an explanation of the regulation’s necessity; the types and numbers of individuals, businesses, organizations, and local governments affected, as well as analysis of the compliance costs and possible benefits to those entities; an estimate of administrative costs; and a statement on “tiering.”¹¹ Agencies also must justify any rules that propose stricter standards than required by federal mandate, and they prepare fiscal notes on the costs (or cost-savings) to local and state governments.¹² The LRC reviews all regulatory impact analyses and prepares a written report on its findings.¹³

Agencies must then either accept the LRC’s suggestions or else explain in writing their reasons for rejecting the recommendations.¹⁴ Agencies must also consider all public comments, with perhaps special attention given to reports filed by the Commission on Small Business Advocacy or by government entities.¹⁵

Legislative Review: After the public comment period, the LRC refers the rule first to its Administrative Regulation Review Subcommittee (“ARRS”). The ARRS consists of three senators and three representatives, including at least two members of the minority party.¹⁶

The ARRS reviews all regulations at monthly public meetings, where agency representatives are called forward to answer questions.¹⁷ During such meetings, if both the agency and the reviewing committee agree, the regulation can be amended.¹⁸ The ARRS may make a non-binding

determination that a rule is deficient because it: is wrongfully promulgated; conflicts with existing law; has no statutory authority; imposes stricter standards than required by federal mandate, without reasonable justification; fails to “tier” its requirements; imposes unreasonable burdens on government or small business; or appears deficient in any other manner.¹⁹

After the ARRS’s review, the LRC also refers the rule to the relevant standing legislative committees. Those committees may choose to hold public meetings and can make the same kind of finding of deficiency as the ARRS is authorized to make.²⁰

If a regulation is not found deficient, it becomes effective. If a regulation is found deficient, the legislature sends the governor a request to withdraw or amend the regulation, but the governor is free to submit a determination that the rule should become effective notwithstanding the finding of deficiency.²¹ At times, the legislature has passed laws declaring that any regulations found deficient during the previous legislative session are null and void; such laws must be presented to the governor for signature.²²

A regulation cannot become “effective” until the legislative review process is complete.²³ Legislative committees can vote to defer their consideration of a regulation; a regulation that does not complete the legislative review process within a year of its initial publication will expire.²⁴

The ARRS is also responsible for continually monitoring the lack of necessary regulations and legislation, as identified during the review of agency rules.²⁵ The ARRS may also make a non-binding determination that an existing regulation should be amended or repealed.²⁶

Kentucky’s Process in Practice

While the level of detail and quantification may vary substantially from one agency to another,²⁷ generally Kentucky’s regulatory impact analyses tend to be short, include little quantification, focus on the most direct costs, and rarely explore the full range of benefits.²⁸

ARRS hearings can sometimes feature several hours of heated debate, where proponents and opponents of a rule pack the room.²⁹ The legislature actually overturns relatively few regulations, and it tends to be most active in reviewing the more high-profile, controversial regulations.³⁰ But, as the following case study demonstrates, the ARRS has many more subtle methods for impacting the substance of a regulation.

Case Study: School Nutrition and Vending Machines

In 2005, Kentucky’s Department of Education proposed new nutritional standards for schools, including a seventeen-ounce limit on soft drink size. Representatives from the beverage industry complained to the ARRS that changing all school vending machines would prove too costly,³¹ and suggested that a twenty-ounce limit would be more appropriate.³² Specifically, the beverage industry testified that it would cost \$789,000 to adjust the Kentucky schools’ vending machines; no similarly precise quantification of the nutritional and health benefits for the school children was presented.³³ The ARRS voted in November 2005 to defer consideration of the rule, to give the Board of Education a chance to reconsider.³⁴

At their December 2005 meeting, the Board Members were upset by the turn of events. One Member noted that the beverage associations had been included in the decisionmaking process and had been part of the original consensus on a seventeen-ounce limit; now they had “renewed” on their agreement and were using the ARRS to make a last-minute change to the regulation. The

Member felt this was not the first time the ARRS had become a vehicle for industry access.³⁵

Though some Board Members wanted to defy the ARRS, ultimately most feared that failure to comply would result in an ARRS vote of deficiency, which could jeopardize enactment of the entire regulatory package. The advocacy groups involved, the supportive legislators, and Department of Education officials all worried that sticking with the seventeen-ounce limit would be like throwing the baby out with the bathwater.³⁶ The Board voted to agree to the twenty-ounce limit.³⁷

Would the ARRS have gone through with a finding of deficiency for the entire regulatory package, which included popular new nutritional standards for school children? Would the full legislature have acted to block adoption of the regulation? While those questions remain unanswered, the ARRS clearly has the power to win rule amendments by combining its ability to defer and delay review with its threat to find a rule deficient.

An old but not necessarily outdated account of the ARRS's operations explains that the committee members rely heavily on their staff to review the rules, though staff might be more focused on legal issues and less alert to the potential political implications of rules that the ARRS members will sometimes respond to.³⁸ The ARRS also will "often" work out a problem with an agency through informal communications, before a review hearing.³⁹

One quantitative study of ARRS decisions, while perhaps not reflecting the ARRS's current practices, provides an intriguing historical snapshot and suggests the general ability of interest groups to use ARRS review as an access point. In 1983, when ARRS briefly had its legislative veto powers, the committee reviewed 165 rules but only discussed 50 proposals in any real detail. These tended to be the more controversial rules; according to ARRS staff and agency officials interviewed at the time, "controversial" meant rules that shifted new burdens onto powerful interest groups. ARRS rejected 6 of those 50 proposals, mostly for imposing costly new restrictions on businesses. But ARRS reviews also resulted in a substantial number of amendments to numerous proposed regulations. The study found that, in 1983, businesses were successful in winning 90% of the rule changes they sought through ARRS review; farmers, local governments, and public employees won 100% of their changes; but public interest groups won only 21% of the time.⁴⁰

Analysis and Grade

The focus of Kentucky's regulatory impact analyses centers on private impacts, in particular compliance costs and administrative costs; agencies need not quantify social benefits or even explicitly define them. The analyses also do not help agencies or reviewers assess the strengths and weaknesses of various policy alternatives.

The legislative review authority is very broad, allowing a committee to generally find a rule deficient "in any other manner." Thanks to those vague parameters and the power to defer review, the legislature is often able to win changes to proposed regulations even without the legislative veto powers it once had. However, reliance on more informal review powers may have somewhat decreased the transparency of the review process.

Kentucky might consider the benefits of adopting a more formal or structured review process for existing regulations, and especially how the ARRS might use its duty to monitor the lack of necessary regulations in order to fill regulatory gaps and adjust regulatory stringencies in cost-benefit justified manners. Currently, Kentucky scores a D.

Notes

- 1 Malcolm E. Jewell & Penny M. Miller, *The Kentucky Legislature 176* (1988) (citing claims from several ARRS members).
- 2 Legis. Res. Comm'n, *History of LRC Video*, http://www.lrc.ky.gov/org_adm/lrc/HistoryLRC.wmv (last visited Aug. 1, 2009).
- 3 See KY. REV. STAT. ANN. § 13.087 (repealed in 1984).
- 4 Legis. Res. Comm'n v. Brown, 664 S.W.2d 907, 918-19 (K.Y. 1984) (also finding that legislative determinations of a rule's statutory compliance encroached on the judiciary's function).
- 5 Mark R. Challengren, *Briefs Carry on Spat over Administrative Regulations*, AP STATE & LOCAL WIRE, Nov. 23, 2001. The legislature has also tried to have its findings of a rule's deficiency shift the burdens of proof at trial, but the courts have said that is an unconstitutional intrusion of judicial powers. Mark R. Challengren, *Judge Sides with Executive in Regulations Spat*, AP STATE & LOCAL WIRE, Jan. 11, 2002.
- 6 See Jewell & Miller, *supra* note 1, at 168.
- 7 Edward H. Ziegler, Jr., *A Primer on Administrative Rules and Rule-Making in Kentucky*, 67 K.Y. L. J. 103, 125 (1979).
- 8 KY. REV. STAT. ANN. § 13A.070; see also Legis. Res. Comm'n, http://www.lrc.ky.gov/org_adm/lrc/aboutlrc.htm.
- 9 KY. REV. STAT. ANN. § 13A.210.
- 10 *Id.* §§ 13A.210, 13A.10(17).
- 11 *Id.* § 13A.240(1). "Economic impact" means a financial impact on business, government, consumers, or taxpayers. *Id.* § 13A.10(6).
- 12 *Id.* §§ 13A.245, 13A.250.
- 13 *Id.* § 13A.240(2). The LRC may require agencies to submit background data and explain their methodologies.
- 14 *Id.* § 13A.280(2); *id.* § 13A.10(15) (defining "statement of consideration").
- 15 *Id.* § 13A.280(1).
- 16 *Id.* § 13A.020. All actions are by majority vote.
- 17 *Id.* §§ 13A.290(1)-(4).
- 18 *Id.* § 13A.320.
- 19 *Id.* § 13A.030(2)(a). The ARRS forwards its findings to the LRC and the promulgating agency, and publishes them in the state *Register*. *Id.* § 13A.290(5).
- 20 *Id.* §§ 13A.290(6)-(10).
- 21 *Id.* §§ 13A.315(3), 13A.330.
- 22 See, e.g., *id.* §§ 13A.337, 13A.338; see also Survey from David Nicholas, ARRS Administrator (2009, on file with author).
- 23 KY. REV. STAT. ANN. § 13A.10(7).
- 24 *Id.* §§ 13A.300, 13A.315.
- 25 *Id.* § 13A.030(1); see also *id.* § 13A.030(2)(b) (ARRS may make a non-binding determination that an administrative regulation is needed to implement an existing statute).
- 26 *Id.* § 13A.030(2)(c).

- 27 Survey from Nicholas, *supra* note 22.
- 28 See generally Regulatory Impact Analyses available in the *Kentucky Register*.
- 29 E.g., Joe Black, *Legislative Panel Clears Proposed Exotic Animal Ban*, AP STATE & LOCAL WIRE, JUNE 15, 2005.
- 30 See Mark R. Challgren, *Judge Sides with Executive in Regulations Spat*, AP STATE & LOCAL WIRE, JAN. 11, 2002.
- 31 Mark R. Challgren, *School Board “Begrudgingly” Agrees to Larger Soft Drinks*, AP STATE & LOCAL WIRE, DEC. 9, 2005.
- 32 Minutes from ARRS Meeting, Nov. 8, 2005, <http://www.lrc.ky.gov/kar/contents/2005/12register.htm> (on 702 KAR 6:090).
- 33 See *id.* and Minutes from Kentucky Board of Education Meeting, Dec. 2005, http://www.education.ky.gov/users/spalmer/KBE_Summary_Minutes_of_December_2005_mtg.pdf.
- 34 Nov. 2005 ARRS Minutes, *supra* note 32 (the vote was 6-2). At the ARRS hearing, the Deputy Commission of Education and the State PTA Health Commissioner appeared in support of the rule; three beverage industry representatives appeared to recommend amending the rule.
- 35 Board Minutes, *supra* note 33 (statement of Jeff Mando).
- 36 *Id.*
- 37 *Id.* (7-3 vote). 702 K.A.R. 06:090 (middle school and high school have 20-ounce limit; other schools have 17-ounce limit), <http://www.lrc.ky.gov/kar/702/006/090.htm>.
- 38 See Jewell & Miller, *supra* note 1, at 165-66 (citing interviews with ARRS staffers and ARRS members).
- 39 *Id.* at 165.
- 40 *Id.*

Louisiana

One count put Louisiana at no fewer than six different legislative veto mechanisms;¹ yet none of them are used very frequently.

Louisiana's Process on Paper

Exceptions: Emergency rules are subject to different administrative procedures, and the use of emergency rulemaking in Louisiana is very common.² Special review procedures are also established for environmental rules.³

Impact Analyses: The Administrative Procedure Act of Louisiana contemplates two types of financial impact analysis: a fiscal impact statement and an economic impact statement. The Legislative Fiscal Office must approve both documents before a proposed rule can move forward. The fiscal impact statement covers the “receipt, expenditure, or allocation of state funds or funds of any political subdivision of the state.”⁴ The economic impact statement includes “an estimate of the cost or economic benefit to all persons directly affected by the proposed action; an estimate of the impact of the proposed action on competition and the open market for employment, if applicable; and a detailed statement of the data, assumptions, and methods used in making each of the above estimates.”⁵ Notice of a proposed regulation must include the approved impact statements.⁶

Louisiana does not allow any agency to adopt, amend, or repeal any rule if the impact statement suggests that the rule change would increase the expenditure of state funds, unless the legislature has appropriated the funds that are necessary for this expenditure, or in the case of an emergency.⁷

In 2008, Louisiana adopted the state's Small Business Regulatory Flexibility Act,⁸ requiring agencies to estimate the number of small businesses subject to a rule and the probable impacts.⁹ The agency must also consider “without limitation” whether any less stringent requirements or exemptions would still accomplish statutory objectives.¹⁰ Finally, the agency must notify the state's Department of Economic Development of its intent to adopt the proposed rule if any adverse impact on small business is likely.¹¹

Before adopting rules, agencies must consider and state in writing impacts on family formation, stability, and autonomy, including effects on family earnings and budgets.¹²

Legislative Review: On the same day that notice is submitted to the Louisiana Register for publication, agencies must also submit a report to the appropriate standing committees of the legislature, and to the presiding officers of the respective houses.¹³ The chairman of each standing committee may then appoint an oversight subcommittee, which may conduct hearings on the proposed rule.¹⁴ House and Senate subcommittees may meet jointly or separately to conduct hearings, but any meeting must be held within thirty days of receiving the agency's report.¹⁵

If a hearing is held, the subcommittee considers whether the rule is in conformity with law, but also, more vaguely, “the advisability or relative merit” of the rule change and whether it is “acceptable or unacceptable.”¹⁶ The respective subcommittees make their determination independently.¹⁷ If either the House or Senate oversight subcommittee finds the rule unacceptable, it reports its findings to the governor and the agency. The governor then has ten days to disapprove the subcommittee's rejection. If the governor does not take such action, the agency is barred from adopting a substantially similar rule for at least four months.¹⁸ If the governor overrides the committee's action, however, the rule may be adopted.

That veto power raises traditional bicameralism criticisms but not presentment concerns, as the governor retains the right to override the decision.¹⁹ Louisiana courts have not directly addressed the constitutionality of the legislative veto.²⁰ The state constitution does authorize the legislature to temporarily suspend laws by concurrent resolution,²¹ but arguably the term “law” does not include regulations.²²

In addition to the legislative veto authority of oversight committees, the legislature at large may, by concurrent resolution, “suspend, amend, or repeal any rule or regulation or body of rules or regulations, or any fee increase, decrease, or repeal of any fee, adopted by a state agency, board, or commission.”²³ Such concurrent resolutions do not need the governor’s signature.

Executive Review: The governor may, by executive order, suspend or veto any rule or regulation adopted by a state agency within thirty days of its adoption.²⁴

Louisiana’s Process in Practice

Impact Statements: Since the Legislative Fiscal Office must approve all economic impact statements before a rule proposal can move forward, this legislative agency has a quasi-veto power over regulations.²⁵

The Legislative Fiscal Office has prepared forms to guide agencies through the preparation of their impact statements. The forms and the statements are mostly limited to reviewing impacts on agency revenues and the economic well-being of the community;²⁶ assessing qualitative benefits or indirect effects is not a priority. The forms call for a narrative description and estimates of implementation costs, revenue effects, economic costs and benefits to directly affected persons, and effects on competition and employment.²⁷

The *Louisiana Register* publishes a summary of the statements along with notices of proposed rules. As expected from the focus of the forms, statements do not explore the indirect costs and benefits of proposals. For example, in proposing a new procedure to approve species for use in aquaculture—the first step in regulations that could carry large economic and environmental effects—the Department of Wildlife and Fisheries wrote: “No impact on receipts and/or income resulting from the adoption of the proposed rule is anticipated at this time. However, the production of new aquatic organisms in private facilities could contribute to Louisiana’s economy and positively impact receipts and income of aquaculture operations overtime, as species are added to the list of approved domesticated aquatic organisms for use in aquaculture.”²⁸

Regulatory Review: Records of legislative review meetings and actions are not compiled in a single location. Reports from oversight subcommittees disapproving a rule are occasionally published in the *Louisiana Register*, up to a few per year.²⁹

Though the legislature can review, amend, and suspend a regulation upon concurrent resolution at any time, generally there is no ex post review of regulations.³⁰

Analysis and Grade

Relying on multiple legislative committees to conduct multiple reviews likely contributes to the sporadic application of Louisiana’s regulatory review process. There is no deadline for the Legislative Fiscal Office’s review, possibly dragging out the process. Standards for reviews are vague, there is no procedure to promote interagency coordination or combat inaction, and periodic review is non-existent. There is no rules for public participation in legislative review

meetings, and it is difficult for the public to track the sporadic legislative review activities. Finally, analytical mandates are unbalanced, giving no attention to regulatory benefits, and are too broad, applying to all rules instead of focusing on the rules that would gain most from rigorous analysis.

Legislative review in Louisiana is like a sledgehammer that is never picked up, and there is no meaningful analysis of benefits. Louisiana scores a D-.

Notes

- ¹ David Marcello, *Administrative Practice Under the 1974 Constitution: A “Silver Anniversary” Review*, 62 LA. L. REV. 185, 218 (2001).
- ² See Brandee Ketchum & Andrew Olsan, *Louisiana Administrative Procedure: A Practitioner’s Procedure*, 68 LA. L. REV. 1313, 1352 (2008).
- ³ LA. REV. STAT. ANN. § 49:953(F); see also Marcello, *supra* note 1, at 202.
- ⁴ LA. REV. STAT. ANN. § 49:953(A)(3)(a).
- ⁵ *Id.* § 49:953(A)(3)(b).
- ⁶ *Id.* § 49:953(A).
- ⁷ *Id.* § 49:953(E).
- ⁸ *Id.* § 49:965.3.
- ⁹ *Id.* § 49:965.5.
- ¹⁰ *Id.* § 49:965.6.
- ¹¹ *Id.* The Department of Economic Development forwards that notification of intent to anyone who requested such notices about rules with small business impacts. *Id.* § 49:965.8.
- ¹² *Id.* § 49:972.
- ¹³ Section 968 of the Administrative Procedure Act identifies the standing committees relevant to each agency.
- ¹⁴ The oversight subcommittee may be composed of the entire standing committee, but must, at the very least, be composed of a majority of the subcommittee.
- ¹⁵ *Id.* § 49:968. The chairman of the subcommittee may also initiate a mail ballot, with the consent of the subcommittee members, rather than a meeting. The failure of the subcommittee to hold a hearing or make a determination, however, “shall not affect the validity of a rule otherwise adopted in compliance with this chapter.” *Id.* § 49:968(E).
- ¹⁶ *Id.* § 49:968(D)(3).
- ¹⁷ Action by a subcommittee requires the favorable vote of a majority of the members who are present and voting.
- ¹⁸ *Id.* § 49:968(G).
- ¹⁹ Marcello, *supra* note 1, at 208.
- ²⁰ See *id.* at 204.
- ²¹ LA. CONST. ART. III § 20.
- ²² Marcello, *supra* note 1, at 213.
- ²³ LA. REV. STAT. ANN. § 49:969.
- ²⁴ *Id.* § 49:970.
- ²⁵ See Marcello, *supra* note 1, at 218.
- ²⁶ Survey from H. Gordon Monk, Legislative Fiscal Officer (2009, on file with author).
- ²⁷ Legis. Fiscal Office, Fiscal and Economic Impact Statement for Administrative Rules Form (2007).
- ²⁸ *Louisiana Register*, Feb. 2009.
- ²⁹ E.g., *Louisiana Register*, Aug. 15, 2002; *Louisiana Register*, Sept. 20, 2009, at p. 1968.

³⁰ Survey from Monk, *supra* note 26.

Maine

Agencies can only provisionally adopt “major, substantive rules”; such rules typically require a bill, passed by the legislature and signed by the governor, to take full effect.

Maine’s Process on Paper

Impact Statements: Agencies are instructed to “consider all relevant information available to it, including, but not limited to, economic, environmental, fiscal and social impact analyses and statements and arguments filed, before adopting any rule.”¹ In particular, as agencies prepare new rules, they should consider goals, objective, possible alternatives, and estimated impacts.²

When an agency publishes notice of a proposed rule, it must also submit to the legislature a “fact sheet,” outlining the principal reasons for the rule, estimating the “fiscal impact,” and summarizing any relevant information considered.³ For “existing rules having an estimated fiscal impact greater than \$1 million,” the fact sheet must also describe: the “economic impact,” including effects that cannot be quantified; the individuals, major interest groups, and businesses that will be affected; and the benefits, including those that cannot be quantified.⁴

Before adopting any rule that may have adverse impacts on small business, agencies must prepare an economic impact statement that identifies probable impacts on small businesses and describes any reasonable, less intrusive alternative methods of achieving the regulatory purposes.⁵

Every rule must contain a fiscal impact note that estimates costs to municipalities.⁶

Executive Review: All adopted rules must be submitted to the attorney general for approval of form and legality.⁷ No one in the attorney general’s office who helped formulate or draft the rule may perform the review, and the attorney general cannot approve a rule that is reasonably expected to result in a taking of private property.⁸ A rule can only take effect if the attorney general approves it within 150 days of the close of the public comment period.⁹

By Executive Order, before proposing rules, agencies must obtain preliminary approval from their presiding Commissioners, who review the rules and any analysis of costs to the state and regulated community. Agencies are also encouraged to seek a “pre-review” from the attorney general, to obtain preliminary and informal approval of form and legality.¹⁰

Legislative Review: Agencies cannot adopt a rule without submitting it for legislative review.¹¹ For rules that have not been classified or for rules categorized as “routine technical rules,” the agency simply must provide its “fact sheet” and proposed rule to Legislative Council, who then refers the matter to the appropriate legislative committees for optional review.¹²

But starting in 1996, when delegating rulemaking authority to agencies, the legislature has classified certain rules as “major substantive rules.” These are rules that require significant agency discretion or that, because of their subject matter or anticipated impact, are reasonably expected to have serious burdens on the public or local government.¹³ Agencies can only provisionally adopt major substantive rules, pending legislative review.¹⁴

When a major rule is provisionally adopted, the agency must submit to the Legislative Council the rule’s full text, a concise summary, and a statement of economic impact on state and its residents.¹⁵ Materials are then referred to a joint standing committee. That committee must meet to review the rule, and the committee can also choose to hold public hearings.¹⁶ The committee must review whether the rule: has statutory authority; complies with legislative intent; conflicts with any laws;

is necessary to fully accomplish statutory objectives; is “reasonable, especially as it affects the convenience of the general public or of persons particularly affected”; is complex; complies with procedure; or affects property values and constitutes a takings.¹⁷

The reviewing committee then recommends the legislature authorize all or part of the rule, authorize the rule with amendments, or disapprove the rule.¹⁸ The governor must sign such legislation for the rule to take effect.¹⁹ If the legislature fails to act on a rule during the legislative session when the rule was submitted, the agency may proceed with final adoption.²⁰

Regulatory Agenda Review: The appropriate joint standing legislative committee must review agencies’ regulatory agendas.²¹ If an agency proposes a rule not in its current regulatory agenda, it must file an amendment to the agenda with Legislature and Secretary of State at time of rule proposal.²²

Petition for Review: Any group of one hundred voters with a substantial interest in a rule, or any person directly, substantially, and adversely affected by a rule, may apply to the Legislative Council for a review of whether an existing rule is inappropriate or unnecessary.²³ Such applications are referred to the appropriate joint standing committee; committees may also review rules on their own motion.²⁴ If one-third of committee members decide that public interest would be served by a full review, the committee can meet and make a determination on a rule within ninety days of receiving the application.²⁵ In addition to any issues raised by the applicant, the committee reviews whether: the rule is consistent with and necessary to effect statutory intent; the rule’s effects are reasonable, including benefits and costs; circumstances have changed; the rule promotes abuse of discretionary powers; fees are reasonable and related to cost of administration.²⁶ If the committee determines the rule is inappropriate or unnecessary, it directs the Office of Policy and Legal Analysis to draft legislation to amend the law.²⁷

Maine’s Process in Practice

Impact Statements: By the Secretary of State’s own admissions, Maine’s statutes offer little guidance on the required contents of impact analyses or the difference between “fiscal impacts” and “economic impacts.”²⁸ Requiring additional analysis only for “existing rules” with a million dollar effect is particularly confusing; the Rule-Making Fact Sheet form requires such additional details generally “for rules with fiscal impact of \$1 million or more.”²⁹ The Legislative Council’s checklist for filing major substantive rules asks for a “[s]tatement of the fiscal impact of the rule on the State, local units of government, the regulated community and the public ([which] may be same as [the] estimate of fiscal impact and analysis required for notice of proposed rules by 5 MRSA §8057-A.” The attorney general’s office also consults with agencies on the preparation of regulatory impact analyses.³⁰

Agencies’ fiscal impact estimates do not consistently reflect the same level of detail or scope. Sometimes costs are simply characterized as “moderate”³¹ or “nominal.”³² Sometimes only government costs are reviewed, without mentioning broader economic effects. For example, when the Department of Marine Resources proposed to increase the area available for shellfish harvest, the fiscal impact statement only noted “existing enforcement personnel will monitor compliance,” and did not mention effects on the fishing industry.³³ Also noticeably absent from that statement was any discussion on environmental effects. Discussions of benefits are typically short and focus on economic benefits. For example, in a Department of Environmental Protection rule on storm water discharge permits, the agency reported that “[t]he ultimate benefit of the rule will be streams

with water quality that meets the State's Water Quality Classification Standards. Improved water quality has been shown to increase adjacent property values.³⁴

Executive Review: The attorney general wields substantial power through the review process. "If the [Assistant Attorney General] asks for changes or will not authorize a particular rule filing, these decisions will prevail."³⁵

Legislative Review: In practice, the legislature does not review any rules besides new, major substantive rules. There is no ex post review of existing regulations.³⁶ Controversy can sometimes erupt over what types of actions agencies try to move through the "routine technical rule" process instead of the "major substantive rule" process.³⁷

The Legislative Council staffs the joint standing committees when they review rules, but typically each committee has only one staff analyst to handle not only all regulatory reviews but also the committee's many other legislative duties. As a result of these limited resources, legislative review is generally limited and focused on questions of policy and legislative intent.³⁸ In effect, Maine's review of major substantive rules works as a temporary suspension, since if the legislature fails pass a bill (with the governor's signature) disapproving the rule before its session ends, the rule may still go forward. Still, committees do review major substantive rules and sometimes the legislature blocks regulatory proposals.³⁹

Analysis and Grade

Maine lacks the resources to effectively carry out its regulatory review process. The analytical capacity at the legislative staff level is stretched thin, and agencies are not able to meet the spirit of the economic impact requirements. The legislature has some capacity to calibrate rules using its authority to propose amendments, but given its limited review resources and focus on legislative intent, the legislative review is more likely to act as a check against major rules than to calibrate them.

Though legislative review has the potential to drag on for an entire session, the session does provide a clear deadline after which, if the legislature has not acted, rules can still move forward. On the executive side, the pre-approval process probably helps prevent unnecessary delays.

All rules are subject to the same, consistent review process. Some of the legislature's criteria for review are vague (for example, the "convenience of the general public," see Florida), but most of its standards are substantive and specific, as are the attorney general's criteria.

Reviews of the regulatory agenda and the petition process might help combat agency inaction, but Maine offers no explicit guidance on reviews of inter-agency conflicts. The petition process also makes the review process publicly accessible, and the availability of rulemaking fact sheets adds to transparency.

The paper requirements for review of existing regulations offer balanced standards that look to both costs and benefits. Unfortunately, the legislature reports there is no real review of existing regulations.

By statute and executive order, agencies must begin thinking about regulatory costs and benefits early in their decisionmaking process. But in actuality, there is no thorough analysis of benefits, alternatives, or distributional effects.

Overall, Maine's Guiding Principles Grade is a C+. The state could benefit from promoting the

consistent analysis of regulatory benefits and giving the legislature the resources it needs to more carefully compare the costs and benefits of regulatory proposals.

Notes

- ¹ 5 ME. REV. STAT. (“MRS”) § 8052(4).
- ² *Id.* § 8057-A(1).
- ³ *Id.* § 8053-A(1), 8057-A(1).
- ⁴ *Id.* § 8057-A(2).
- ⁵ *Id.* § 8052(5-A).
- ⁶ *Id.* § 8063.
- ⁷ *Id.* § 8056(1)(A).
- ⁸ *Id.* § 8056(6).
- ⁹ *Id.* § 8052(7).
- ¹⁰ Exec. Order 17 FY 02/03.
- ¹¹ 5 MRS § 8064; except for emergency and federally mandated rules, 5 MRS §§ 8073, 8074.
- ¹² *Id.* § 8053-A.
- ¹³ *Id.* § 8071.
- ¹⁴ *Id.* § 8072(1).
- ¹⁵ *Id.* § 8072(2).
- ¹⁶ *Id.* § 8072(3).
- ¹⁷ *Id.* § 8072(4).
- ¹⁸ *Id.* § 8072(5).
- ¹⁹ Survey from Patrick Norton, Dir. of Legislative Office of Policy & Legal Analysis (2010, on file with author).
- ²⁰ 5 MRS § 8072(7).
- ²¹ *Id.* § 8060(5).
- ²² *Id.* § 8064.
- ²³ *Id.* § 11112.
- ²⁴ *Id.* § 11116.
- ²⁵ *Id.* § 11113.
- ²⁶ *Id.* § 11114.
- ²⁷ *Id.* § 11115.
- ²⁸ Survey from Don Wismer, APA Coordinator, Sec’y of State (2010, on file with author).
- ²⁹ Sec’y of State, Rule-Making Fact Sheet (2009).
- ³⁰ Survey from Wismer, *supra* note 28.
- ³¹ *E.g.*, Dept. of Env’tl. Prot., Rule-Making Fact Sheet on Chapter 409 Rule, Solid Waste Recycling (2010), <http://www.maine.gov/dep/rwm/rules/pdf/409rule50factsheet.pdf>.
- ³² Board of Licensure in Medicine, Rule-Making Fact Sheet on Chapter 4 Rule, Insurance of Citation <http://www>.

docboard.org/me/administrative/rulemaking/rulemakingfactsheet.pdf.

- ³³ Department of Marine Resources, Rule-Making Fact Sheet on Chapter 95.03 (2009) <http://www.maine.gov/legis/execdir/.../marineemer%2095%2096.pdf>.
- ³⁴ Dept. of Env'tl. Prot., Rule-Making Fact Sheet on Chapter 521 Rule, Storm Water Discharge Permits (2009), http://www.maine.gov/dep/blwq/rules/stormwater/2009.../521_fact_sheet.pdf.
- ³⁵ Survey from Wismer, *supra* note 28.
- ³⁶ Survey from Norton, *supra* note 19.
- ³⁷ *E.g.*, Editorial, *DEP Rules Change a Needless Burden*, PORTLAND PRESS HERALD, July 20, 1999.
- ³⁸ Survey from Norton, *supra* note 19; Interview with Patrick Norton, Office of Policy and Legal Analysis, Feb. 4, 2010.
- ³⁹ Office of Policy and Legal Analysis's list of Major Substantive Rule-Making Authority Granted (2009) shows several cases over the years when rules were not authorized for final adoption.

Maryland

Maryland features one of the most thorough review processes for existing regulations.

Maryland's Process on Paper

Economic Impact Analyses: Notices of proposed rules must state the estimated economic impacts on government revenues, consumers, industry, taxpayers, and trade groups.¹

Before adopting a proposed rule, agencies must also evaluate whether the rule has any impact on business, by considering the costs imposed on businesses of various size.² In particular, for every regulation, agencies must prepare and publish an “economic impact analysis rating”: either a rule has “minimal or no economic impact on small business,” or else it has “meaningful economic impact on small business.”³ If there is a meaningful impact, either the agency or the Department of Legislative Services must develop a complete written economic impact analysis.⁴ The analysis must estimate effects on the costs of goods and services; the workforce; housing cost; investment, taxation, competition, and economic development; and consumer choice.⁵ The Department of Legislative Services comments on ratings and analyses prepared by agencies,⁶ but the validity of regulation is not affected by the absence or content of the analysis.⁷

Executive Review: Regulations may not be adopted unless the attorney general approves their legality.⁸

Children's Health Review: Before proposal of any rule with impacts on environmental hazards affecting children's health, agencies must submit the rule to the State Children's Environmental Health and Protection Advisory Council for review.⁹ The Council consists of members from the legislature, state agencies, the medical community, private sector, and the general public.¹⁰

Legislative Review: Before proposal, agencies must submit rules to the Joint Committee on Administrative, Executive, and Legislative Review (“AELR Committee”) and the Department of Legislative Services.¹¹ The AELR Committee consists of ten senators and ten delegates, with proportional political party representation, and has general power to review any proposed or adopted rule.¹² (The AELR Committee has a different, mandatory role in the approval of emergency regulations.)

A rule cannot be adopted until after submission to the AELR Committee and at least forty-five days after notice was published in the *Register*.¹³ The AELR Committee may, but need not, act during this preliminary review period.¹⁴ If the AELR Committee determines it cannot reasonably conduct an appropriate review within that forty-five-day window, it may extend the review period for about sixty additional days.¹⁵ Agencies are encouraged to submit regulations to the AELR Committee even earlier and to consult on form and content.¹⁶

During the review period, the AELR Committee may, by majority vote, oppose the adoption of the regulation based on statutory authority or legislative intent.¹⁷ The AELR Committee then sends notice of its objection to the governor and the agency. The agency may withdraw or modify the regulation, or else it can submit a statement of justification to the governor. The governor next consults with the AELR Committee and the agency “in an effort to resolve the conflict,” and finally either instructs the agency to withdraw or modify, or else approves the regulation over the AELR Committee's objection.¹⁸ Unless the governor approves, an agency cannot adopt a rule opposed by the AELR Committee.¹⁹

Maryland courts have discussed this legislative review structure favorably without questioning its constitutionality.²⁰

Periodic Review: Maryland established a highly detailed, systematic process under the Regulatory Review and Evaluation Act to determine whether existing rules remain necessary, statutorily supported, and not obsolete.²¹ Every eight years, agencies must submit to the governor and the AELR Committee a schedule of regulations to be reviewed.²² Based on those schedules, the governor, by executive order, provides for review of regulations.²³ Agencies then develop a work plan that describe their intentions to solicit input from the public, stakeholders, and other agencies, as well as their procedures for studying recent scientific information and comparative regulatory structures. The AELR Committee can comment on agency work plans.²⁴

As the review progresses, agencies prepare evaluation reports, including a description of any inter-agency conflicts reviewed and the proposed resolution of such conflicts; a summary of comments received; a summary of data gathered; and any recommended rule changes.²⁵ Agencies provide for sixty days for public comment and may hold public hearings on the evaluation reports.²⁶ The AELR Committee also reviews the report and may solicit additional public comment. The agency must then review the AELR Committee's comments and attempt to resolve any disagreements.²⁷ If a disagreement cannot be solved within thirty days, the agency submits its evaluation report to the governor. The governor then either approves the report or instructs the agency to modify it.²⁸ Within 120 days of the evaluation report's final approval, the agency must propose any recommended amendments or repeals.²⁹

In 2003, Executive Order 01.01.2003.20 implemented the Regulatory Review and Evaluation Act, creating an ongoing process in which an eight-year cycle is set to end and re-start in July 2011.³⁰ The Order also encouraged agencies to review their policy statements and guidelines.

Maryland's Process in Practice

Economic Impact Analyses: The AELR Committee staff reports that, typically, only direct costs and benefits are considered.³¹ Impact analyses published in the Register mostly confirm this. Estimates of Economic Impact in the Register follow a standard template, in which agencies first identify whether effects on government, effects on industry, and direct or indirect effects on the public will be positive, negative, or non-existent. Next, for each category, the agency describes the magnitude of the effect: minimal, substantial, indeterminable, or (usually only for regulations involving fees) in actual dollar terms.³²

The occasional estimate will provide quantification and a qualitative discussion of costs, assumptions, and even benefits. For example, a Human Resources rule aimed at simplifying the food supplement application process for disabled elderly individuals estimated the number of eligible individuals and the size of their benefits. Moreover, its small business impact estimate explored indirect effects: "The new program for disabled elderly individuals will increase the number of eligible households. The increase in the income standards will also slightly increase the number of persons eligible to receive benefits. This increase in eligible households will bring additional business to food stores."³³

But overall, "indeterminable" is the most common answer for the magnitude of economic effects, and benefits are discussed only in general, qualitative terms, if at all.³⁴ The majority of small business impact statements are exceedingly brief. One characteristic example reads: "The proposed action has a meaningful economic impact on small business. An analysis of this economic impact follows:

The proposed action has an economic impact on the agency and regulated industries.”³⁵

Legislative Review: Though the AELR Committee has a more prominent and sometimes controversial role in the approval of emergency regulations (which in past years have comprised as many as one-fifth of regulatory proposals),³⁶ the legislature generally occupies a weaker role in regulatory review. The Department of the Environment claims “It’s very rare for the AELR not to approve a regulation. The bottom line is the governor has authority to move forward with a rule regardless of what outcome AELR has.”³⁷ A few years ago, one newspaper dismissed the committee as “marginal.”³⁸

That said the AELR Committee does sometimes vote to reject proposed regulations, only to be overturned by the governor. In one controversial case, the AELR Committee voted 12 to 7 to reject a proposed regulation reinstating bear hunting in the state, “citing a need for more scientific review, yet Governor Ehrlich and the [agency] thumbed their noses at the legislature and pushed forward anyway.”³⁹ Other times, the AELR Committee is able to orchestrate rule changes through meetings with trade associations, interest groups, and the agency.⁴⁰ Some AELR Committee hearings can be packed, three-hour events.⁴¹ Then again, during other debates expected to attract public attention, like the definition of “domestic partner” in a state insurance rule, the AELR hearing room remained surprisingly “half-empty.”⁴²

Children’s Health Review: The Children’s Environmental Health and Protection Advisory Council does review regulations,⁴³ but its level of activity and impact are unclear.⁴⁴

Periodic Review: Agencies continue to make progress on their periodic review work plans.⁴⁵ While some changes prompted by the review process are technical or just bring regulations into conformity with new statutes, agencies have also conducted stakeholder outreach and studied comparative regulations, and there have been some substantive results. For example, in 2009, the Board of Pharmacy reviewed its rules on inpatient institutional pharmacies and found, that compared to other state regulations, Maryland’s regulations “are simply out of date. Maryland’s regulations include no provisions that take into consideration the extensive advances in inpatient pharmacy technology or pharmacy practice since 1995.” The Board recommended establishing a workgroup to extensively revise the chapter.⁴⁶

Analysis and Grade

Given the state’s thorough and detailed periodic review process, it seems Maryland agencies would have the capacity to more consistently and formally analyze the benefits of proposed regulation. Currently, Maryland does not make the best use of its resources, and so scores a C.

Despite the clear statutory provision of only two review criteria (authority and intent), the AELR Committee has reviewed and rejected rules based on unlisted criteria, such as the sufficiency of scientific data. The statute should give the AELR Committee broader but enumerated standards. All rules are subject to at least some basic, consistent level of review,⁴⁷ but ultimately review is discretionary and largely advisory. Given the AELR Committee’s limited power, the review structure has little chance of helping to calibrate rules. While there have been complaints about the delayed approval of emergency regulations, the AELR Committee’s review of regular regulations is governed by deadlines and so limited that it is unlikely to burden or discourage rulemaking efforts.

The AELR Committee can and does solicit public comment, and other aspects of the regulatory review structures—such as impact statements and periodic review documents—are publicly

available. But Maryland does not combat agency inaction, and the states analytical requirements include no real discussion of benefits, alternatives, or distributional effects.

Maryland's periodic review requirements do stand out. Though the standards should explicitly state that reviews can identify both ways to increase the net benefits of regulation as well as decrease compliance costs, the process is guided by clear standards, and the practice seems balanced and meaningful. Indeed, periodic reviews even include steps to identify and resolve potential inter-agency conflicts. Maryland should build on the successes of its periodic reviews to design a more balanced approach to the analysis and review of proposed regulations as well.

Notes

- ¹ MD. CODE ANN., STATE GOV'T § 10-112(A)(3).
- ² *Id.* § 10-124.
- ³ *Id.* §§ 2-1505.2(a)-(b), (i).
- ⁴ *Id.* § 2-1505.2(c).
- ⁵ *Id.* § 2-1505.2(d).
- ⁶ *Id.* § 2-1505.2(f).
- ⁷ *Id.* § 2-1505.2(j).
- ⁸ *Id.* § 10-107.
- ⁹ *Id.* § 10-110(b).
- ¹⁰ See H.B. 313 (Md. 2000), available at http://fha.maryland.gov/pdf/mch/HOUSE_BILL_313.pdf.
- ¹¹ MD. CODE ANN., STATE GOV'T § 10-110(c).
- ¹² *Id.* §§ 2-502, 2-503, 2-506.
- ¹³ *Id.* § 10-111(a)(1).
- ¹⁴ *Id.* § 10-110(d).
- ¹⁵ *Id.* § 10-111(a)(2) (laying out the exact process and dates for suspensions).
- ¹⁶ *Id.* § 10-110(e).
- ¹⁷ *Id.* §§ 10-111.1(a)-(b).
- ¹⁸ *Id.* § 10-111.1(c).
- ¹⁹ *Id.* § 10-111.1(d).
- ²⁰ See *Evans v. State*, 396 Md. 256, 348 (Ct. of App., 2006); *Delmarva Power & Light Co. v. Public Serv. Comm'n of Md.*, 370 Md. 1, 27-28 (Ct. of App., 2002).
- ²¹ MD. CODE ANN., STATE GOV'T § 10-132.
- ²² *Id.* § 10-132.1(a). Rules adopted by federal mandate or within the last eight years, where review would not be effective or cost-effective, are exempt. *Id.* §§ 10-132.1(b)-(c).
- ²³ *Id.* § 10-133.
- ²⁴ *Id.* § 10-134.
- ²⁵ *Id.* § 10-135(a).
- ²⁶ *Id.* § 10-135(b).
- ²⁷ *Id.* § 10-135(c).
- ²⁸ *Id.* § 10-136.
- ²⁹ *Id.* § 10-138.
- ³⁰ Exec. Order No. 01.01.2003.20 (2003), available at <http://www.dsd.state.md.us/comar/comarhtml/01/01.01.2003.20.htm>.
- ³¹ Survey from Susan McNamee, Senior Policy Analyst and Co-Counsel to AERL Comm., & Laura McCarty, Fiscal

Note Manager (2010, on file with author).

- ³² See, e.g., *Maryland Register*, Aug. 2004, available at <http://www.dsd.state.md.us/MDRegister/3714/Assembled2.htm>.
- ³³ See *Maryland Register*, Aug. 2010, <http://www.dsd.state.md.us/MDRegister/3718/Assembled.htm>.
- ³⁴ See, e.g., Dept. of Natural Resources Proposal on Oysters, in *Maryland Register*, Aug. 2004, <http://www.dsd.state.md.us/MDRegister/3714/Assembled2.htm>.
- ³⁵ Dept. of Natural Resources Proposal on Shellfish Aquaculture, in *Maryland Register*, July 2, 2010, <http://www.dsd.state.md.us/MDRegister/3714/Assembled2.htm>.
- ³⁶ See John Nethercut, Commentary, *No Surprises, Please*, THE DAILY RECORD, MAY 21, 2004.
- ³⁷ Pamela Wood, *Ehrlich Targets Power Pollution*, THE CAPITAL, NOV. 17, 2005 (quoting Richard McIntire, a spokesman for the Maryland Department of the Environment).
- ³⁸ Christopher Sherman, *Rural Maryland Looks to Governor-Elect Ehrlich to Protect Their Interests*, THE DAILY RECORD, DEC. 21, 2002.
- ³⁹ Press Release, Humane Society, *HSUS Calls on Governor Ehrlich to Cancel Bear Hunt* (Oct. 24, 2005); see also John Wagner, *Ehrlich Pressed to Cancel Cuts in Medicaid*, WASHINGTON POST, Oct. 5, 2005 (“A legislative committee, meanwhile, voted last week against permanently barring immigrant children and pregnant women from the Medicaid program during their first five years of legal status.”).
- ⁴⁰ Ben Mook, *Change in Stormwater Regulation Could Avert Delays*, DAILY RECORD, Apr. 15, 2010. See also John Biemer, *Agreement Reached on Crab Regulations*, AP STATE & LOCAL WIRE, Mar. 31, 2003 (“Lawmakers accepted the compromise after the DNR huddled with watermen and Chesapeake Bay Foundation representatives in the front of the hearing room.”).
- ⁴¹ Pamela Wood, *Vote Ends Stormwater Debate*, MARYLAND GAZETTE, Apr. 10, 2010.
- ⁴² Eric Hartley, *Gay Marriage Opponents Already Lost*, THE CAPITAL, Jan. 13, 2008 (with no supporters of gay rights showing up to testify).
- ⁴³ See Children’s Env’tl. Health & Prot. Advisory Council, http://fha.maryland.gov/pdf/mch/CEHPAC_legislative_rpt.pdf.
- ⁴⁴ See Minutes of a 2008 CEHPAC Meeting, available at http://fha.maryland.gov/pdf/mch/ceh_Minutes_2008.pdf (“Although there was a great deal of concern about the chemicals, no specific action or vote was taken regarding the regulation.”).
- ⁴⁵ Md. Dept. of Health, Work Plan, available at <http://dhmh.maryland.gov/regs/pdf/workplan1010.1410.50.pdf>.
- ⁴⁶ Board of Pharmacy, Evaluation Reports, http://dhmh.maryland.gov/regs/pdf/2009/10.31-10_EvaluationRpts.pdf.
- ⁴⁷ Survey from McNamee & McCarty, *supra* note 31.

Massachusetts

Massachusetts relies principally on its Executive Office for Administration and Finance to conduct regulatory reviews.¹ Though the Administrative Procedure Act does require a basic fiscal impact statement and regulatory flexibility statement,² regulatory review in the Commonwealth mostly proceeds according to various Executive Orders. The latest, Executive Order 485, requires agencies to ensure that all rules are clear, do not conflict with other law, and are consistent with the fiscal needs and administrative abilities of Massachusetts. Before a rule is proposed, it is submitted to the Secretary of Administration and Finance for a ten-day review.³

Also still in effect are Executive Orders 145 and 453. The first requires agencies, before initiating a rulemaking, to submit regulations and preliminary cost estimates to a Local Government Advisory Committee for review of possible significant impacts on municipalities.⁴ The second, Executive Order 453, expands on the statutory requirement for a regulatory flexibility analysis. Agencies are to thoroughly review draft rules to minimize any unnecessary or duplicative costs to small business. Each agency appoints a small business liaison to coordinate with the Executive Office of Administration and Finance, as well as with a Small Business Advocate (created in what was the Department of Economic Development, and now is the Department of Housing and Economic Development). Rules with significant effects on small business require a Small Business Impact Statement, detailing impacts and alternative methods that might be less burdensome. The Small Business Advocate can comment on the statement, and may also make recommendations on any existing rules with unduly negative impacts on small businesses.⁵

Some of these requirements may have fallen by the wayside. The Executive Office of Administration and Finance identified only Executive Order 453 as governing rule reviews,⁶ though the attorney general did also refer to Executive Order 145.⁷ Other processes from time to time spring up to fill the void: in 2007, for example, Governor Deval Patrick and Attorney General Martha Coakley announced that the attorney general's office, collaborating with the Department of Housing and Economic Development, would review existing regulations to identify "unnecessary, overly burdensome, or inconsistent" rules that "serve as undue hindrances to economic investment and development."⁸

But Executive Order 485 remains the workhorse of regulatory review in Massachusetts. While issues like legality and procedural compliance are left up to individual agencies, the Office of Administration and Finance reviews all rules for their fiscal impact and for policy considerations. Agencies cannot move a rule forward without approval, and the Office of Administration and Finance can, by request, extend its ten-day deadline for review. Administration and Finance may deny a rule or instruct an agency to resubmit it with amendments, but no information on such reviews is disclosed until a regulation is finalized, and there is no opportunity for public participation in the review process.⁹

The checklist for submission to the Office of Administration and Finance asks agencies to categorize the proposed rule change by its purpose; available categories focus on purposes like "eliminating requirements" and "saving resources." Agencies also identify any issues of overlapping jurisdiction and summarize comments received from other agencies. If cross-jurisdictional issues exist or if the rule may create substantial costs, agencies must, where possible, quantify the costs and benefits to government, regulated parties, and general public. The checklist asks agencies to avoid just saying "any new costs should be insignificant."¹⁰ Consideration of non-economic costs and benefits is not required; the focus is on the fiscal impact to the Commonwealth or affected stakeholders.¹¹

Massachusetts has a consistent but limited review of new regulations. Review is not very transparent or open to the public. Though review does try to address issues of cross-jurisdictional conflict, review does not target agency inaction, and there is no periodic review. Analytical requirements are integrated into the proposal, but do not require the agency to assess benefits, alternatives, or equity, and so are not well designed to help calibrate rules. Massachusetts could likely do more with its review resources, and so it receives a C-.

Notes

- ¹ A legislative joint committee on state administration and regulatory oversight has limited review responsibilities. *E.g.* MASS. GEN. LAWS CH. 21A § 4C(i) (review of ocean management rules); *Id.* CH. 111L § 10(D). *See also* Dennis O. Grady & Kathleen M. Simon, *Political Restraints and Bureaucratic Discretion: The Case of State Government Rule Making*, 30 POL. & POL'Y 646, 659 (2002) (“The Massachusetts legislature maintains a joint committee that reviews only rules that have an impact upon agriculture, and it provides no formal mechanism for the full legislature to review rules.”).
- ² No rule can become effective until an estimate of fiscal effect on public and private sector (for the first two years, and projection over five years), is filed. Also, no rule can become effective until a statement considering impacts on small businesses is filed, including description of compliance requirements, the appropriateness of performance standards, and potential duplications or conflicts. MASS. GEN. LAWS CH. 30A § 5.
- ³ Exec. Order No. 485 (2007) (superseding Exec. Order No. 384 (1996)).
- ⁴ Before initiating a rulemaking, agencies must provide the Local Government Advisory Committee and the Department of Community Affairs with a description, including, when feasible, preliminary cost estimates; those entities then have twenty-one days to notify the agency whether the rule presents the potential for a significant impact on municipalities. Then, the agency has fourteen days to convene a meeting with the LGAC and the DCA to review any significant impacts. Exec. Order No. 145 (1978).
- ⁵ Exec. Order No. 453 (2003).
- ⁶ Survey from David E. Sullivan, General Counsel, Exec. Office for Admin. & Finance (2010, on file with author).
- ⁷ Survey from Jim Barretto, Attorney General’s Office (2010, on file with author).
- ⁸ Press Release from Gov. Deval Patrick & Attorney General Martha Coakley (2007).
- ⁹ Survey from Sullivan, *supra* note 6.
- ¹⁰ Dept. of Admin. & Fin., 485 Regulation Checklist.
- ¹¹ Survey from Sullivan, *supra* note 6.

Michigan

Its legislative review powers weakened by a court ruling in 2000, Michigan now relies principally on executive review and an elaborately detailed regulatory impact statement.

History of Michigan's Legislative Veto

A 1963 amendment to Michigan's constitution explicitly granted the legislature the power to suspend agency rules during the interim between legislative sessions.¹ In 1977, Michigan's legislature augmented the state Administrative Procedure Act to require approval of all new rules by its Joint Committee on Administrative Rules ("JCAR"). Though the governor immediately asked the state's Supreme Court to issue an advisory opinion on the constitutionality of this legislative veto, the Court declined to do so.² But the attorney general did issue an opinion that the procedure was unconstitutional, and voters twice rejected ballot proposals to codify the legislative veto in the constitution.³

Over two decades later, the showdown between the executive and legislative branches finally came to a head when the Department of Corrections moved to finalize rules without going through JCAR review. The rules' validity was challenged in court, and following the U.S. Supreme Court's decision in *Chadha*, Michigan Supreme Court found that mandatory legislative approval was unconstitutional. The temporary rule suspension powers granted to the legislature by the state constitution did not authorize a permanent block; rather, the Court inferred from the limited grant that the people of Michigan intended to restrict the legislature's power over agency rulemaking.⁴

The ruling left the role of the legislature uncertain. Even some Republicans resented Governor John Engler (also a Republican) for this restriction on JCAR's power.⁵ JCAR then shifted to a more advisory role, with only the capacity to issue formal objections.

Michigan's Process on Paper

State Office of Administrative Hearings and Rules ("SOAHR"): Through its Administrative Rules Manager, SOAHR exercises all the authority that the state Administrative Procedure Act and Executive Orders originally gave the Office of Regulatory Reform,⁶ including most of the significant rule review functions.⁷

SOAHR has multiple review points. First, agencies submit initial requests for rulemaking to SOAHR for approval, stating the rule's legal basis and the significance of the targeted problem.⁸ Next, agencies must get SOAHR's approval of draft regulations and regulatory impact statements. Notices of public hearings also go through SOAHR, and SOAHR again reviews any revised rules before their final adoption.⁹ SOAHR's criteria for review are not defined in the statute, though Executive Order 1995-6 says SOAHR can determine whether a rule is "necessary."

SOAHR is also responsible for transmitting rules to the Legislative Services Bureau and to JCAR at the required times for legislative review.¹⁰

Regulatory Impact Statements: Under Executive Order 1995-6, agencies must design rules to achieve their objectives in the most cost-effective manner allowed by law. Agencies are instructed to conduct a comprehensive analysis of all direct and indirect costs and benefits, both social and economic, and to review all viable alternatives, including market-based solutions. SOAHR is empowered to seek any additional information required from agencies.

The specific requirements for the Regulatory Impact Statement are set out by statute, and agencies

must submit the document to SOAHR and JCAR before holding a public hearing on a proposed rule.¹¹ The statement must:¹²

- compare parallel federal rules and accreditation association standards;
- estimate how the rule will change the behavior that is causing the harm targeted by the proposal;
- identify businesses, groups, and individuals who will directly benefit or bear costs;
- identify reasonable alternatives that would achieve similar goals, and in particular discuss the feasibility of market-based mechanisms;
- estimate government’s implementation costs;
- estimate statewide compliance costs;
- identify any disproportionate impacts on small businesses, analyze the compliance costs and impacts for small businesses, and discuss any impacts on public interest that a small business exemption would create;
- estimate primary and direct benefits, including cost reductions or increased revenues; and
- estimate any secondary or indirect benefits.

A separate provision also requires agencies to reduce any disproportionate economic impacts on small business, where lawful and feasible in meeting statutory objectives.¹³

Legislative Review: The Legislative Service Bureau reviews and certifies a rule’s form.¹⁴ Any standing committee may hold hearings on rules,¹⁵ and any legislator may, of course, introduce standard legislation to amend or rescind a rule that is “unauthorized, not within legislative intent, or inexpedient.”¹⁶ But, even without its veto power, JCAR exercises most of the legislature’s review authority.¹⁷

SOAHR is responsible for forwarding to JCAR all requests for rulemaking¹⁸ and notices of public hearings.¹⁹ Rules are officially transmitted to JCAR for review after the public hearing is held.²⁰ JCAR then has fifteen session days to consider the rule and object by filing notice. JCAR can only object if a concurrent majority votes that:

- the agency lacks statutory authority;
- the agency exceeded statutory scope;
- an emergency warrants disapproval;
- the rule conflicts with state law;
- circumstances have substantially changed since the relevant statute was enacted;
- the rule is arbitrary or capricious; or
- the rule is unduly burdensome to the public.²¹

If JCAR objects, the committee chair introduces bills (which requires the governor’s signature) to rescind the rule upon its effective date, repeal the underlying statute, or stay the effective date of the rule for one year.²² Any JCAR objection automatically stays the ability of SOAHR to finalize and

file a rule for fifteen session days (unless JCAR rescinds the objection, or the legislation introduced is defeated).²³ Finally, JCAR has constitutional and statutory authority to suspend a rule during the interim between sessions.²⁴

Agendas, Periodic Reviews, and Inaction: By statute and Executive Order 1995-6, agencies must prepare annual Regulatory Plans that propose review of existing regulations that are duplicative, unnecessarily burdensome, or no longer necessary.²⁵ The plan must also identify anticipated rule proposals for the upcoming year, as well as any mandatory statutory rule authority the agency has not yet exercised. SOAHR reviews and approves these agendas.²⁶ The public may also petition SOAHR for review of existing rules.²⁷

Michigan's Process in Practice

SOAHR Reviews: Agencies report an “open line of communications” with the SOAHR Rules Manager.²⁸ Though SOAHR does not directly modify proposals, agencies “seriously consider all [SOAHR’s] comments,” and usually make the recommended changes.²⁹ SOAHR claims to exercise both formal and informal review powers,³⁰ and “can reject rules on largely discretionary grounds, since there are no criteria for accepting rules in the statute.”³¹ For both draft proposals and regulatory impact statements, SOAHR can approve, disapprove, or ask for more information.³² Still, most of SOAHR’s edits are for clarity, consistency, and statutory compliance.³³

SOAHR’s predecessor, the Office of Regulatory Reforms, claims to have rescinded 4,979 rules, amended 3,118 rules, and coordinated the promulgation of 1,311 rules over a seven-year.³⁴ Agencies report that existing regulations are typically reviewed only when a statutory or other change occurs.³⁵ Overall, agencies feel the review process “works well,” though at times it can be slightly burdensome, and agencies could use more resources.³⁶

Impact Analyses: SOAHR has created forms to guide agencies through compliance with the elaborate series of statutory criteria for Regulatory Impact Statements.³⁷ The forms expand on some of those criteria, specifying that “primary and direct benefits” should include impacts on the environment, worker safety, and consumer protection. The forms also ask agencies whether the direct and indirect benefits of the rule are likely to justify its costs.³⁸

Agencies do not employ economists in the preparation of impact statements.³⁹ Agencies will discuss costs and alternatives with stakeholder workgroups early in the rulemaking process.⁴⁰ Regulatory Impact Statements do address all the statutory criteria, and often include thorough discussions of qualitative costs and benefits.⁴¹ Quantification is less strong, especially on benefits, and monetization of benefits is rare.⁴²

JCAR Review: Direct communication between agencies and JCAR is uncommon, because SOAHR acts as a liaison to the legislature.⁴³ JCAR often chooses not to review rules. A typical press release from the Department of Energy, Labor and Economic Growth reads “Because JCAR did not take any action to prevent the rules from being transmitted to the Secretary of State, the [agency] today formally adopted the rules.”⁴⁴

One example demonstrates the frustration some legislators feel with their limited review powers. The Office of Financial and Insurance Services proposed rules banning the practice of “insurance scoring”—the use of credit information to help insurance companies set car and home premiums. On February 17, 2005, JCAR objected to the rules, determining that “[t]he agency is exceeding the statutory scope of its rule-making authority” and that the rule “is arbitrary or

capricious.”⁴⁵ Republican legislators had hoped the formal JCAR objection would “open the door [to negotiations] with [the agency] and the executive branch.”⁴⁶ Bills were then introduced to rescind the rules before they took effect. But after Governor Jennifer Granholm (a Democrat) indicated her intention to veto these bills, the legislative actions were dropped.⁴⁷ Senator Mike Bishop stated during a March 9, 2005 session that “it would be futile for us to take up these bills

But even before JCAR lost its legislative veto, the evidence suggests that legislative review was a “neglected function.”⁵⁰ Already by 1997, the legislature was losing power to the governor, and JCAR members started spending less time on rule monitoring than they had previously. JCAR members believed legislative review to be an important responsibility, but were “disgusted by their lack of efficacy”—a problem compounded by the loss of the legislative veto in 2000. By 2004, surveys with individual legislators revealed a “startl[ing] . . . knowledge vacuum regarding the institutional checks and balances embodied in legislative monitoring of the executive branch.”⁵¹

Analysis and Grade

Michigan loses points for lack of standards and transparency in its executive review, and the state might need to rethink the legislature’s revised role, but Michigan scores high on the strength of its regulatory impact statement requirements. Overall, its Guiding Principles Grade is a B-.

Though agencies seem able to comply with Michigan’s detailed impact statement requirements, some agencies complain about a lack of resources and how burdensome the process can be. SOAHR’s multiple review points may be duplicative and wasteful, and Michigan’s highly professional legislature⁵² could be more engaged in the review process. A lack of deadlines for SOAHR reviews in particular might burden and delay rulemakings.

“It would be futile for us to take up these [rule review] bills and pointless to pursue passage.”

—Senator Mike Bishop

SOAHR’s discretionary review standards and claim of informal review powers is also troubling and reduces transparency; JCAR’s reviews are similarly inconsistent. Michigan does not have a structure in place to coordinate inter-agency conflicts, and the state’s periodic review process lacks balanced standards and is not consistently exercised in practice. Annual agendas do have to identify any statutory rulemaking authority not yet exercised, which could help combat agency inaction.

Michigan’s main strength is its analytical requirements. Agencies are clearly instructed to analyze benefits, alternatives, and even some basic distributional consequences. The balance of Michigan’s analytical mandates is exemplified by its small business impact statements, which require agencies to weigh the negative public impacts of creating any small business exemptions. Given the analytical attention to net benefits and the collaborative nature of SOAHR reviews, Michigan has the potential to utilize its rule review structure to calibrate regulations.

Notes

- ¹ MICH. CONST. ART. 4 § 37 (adopted in 1963).
- ² Request for Advisory Op. on Constitutionality of 1977 PA 108, 260 N.W.2d 436 (Mich. 1977).
- ³ Marjorie Sarbaugh-Thompson et al., *Legislators and Administrators: Complex Relationships Complicated by Term Limits*, 35 LEGIS. STUD. Q. 57, N.10 (2010).
- ⁴ Blank v. Dep't of Corr., 611 N.W.2d 530 (Mich. 2000).
- ⁵ Sarbaugh-Thompson et al., *supra* note 3, at n.10.
- ⁶ Exec. Order No. 2005-1 (2005), available at http://www.michigan.gov/gov/0,1607,7-168-21975_21979-108169-,00.html (transferring all authority of the Office of Regulatory Reform by "Type III Transfer" (i.e., abolishing old agency) to the Administrative Rules Manager at the State Office of Administrative Hearings and Rules).
- ⁷ MICH. COMP. LAWS § 24.234(2).
- ⁸ *Id.* §§ 24.239(1)-(2).
- ⁹ *Id.* § 24.245.
- ¹⁰ SOAHR submits rules to LSB for certification of their form (SOAHR can certify if LSB does not within twenty-one days).
- ¹¹ *Id.* § 24.245(4). JCAR transmits to Senate and House Fiscal Agencies for review of effect on appropriations. *Id.* § 24.245(5).
- ¹² *Id.* § 24.245(3). Requirements do not apply to rules mandated by federal law. *Id.* § 24.240(4).
- ¹³ *Id.* § 24.240(1).
- ¹⁴ SOAHR can certify a rule's form if LSB does not within twenty-one days.
- ¹⁵ *Id.* § 24.250.
- ¹⁶ *Id.* § 24.251.
- ¹⁷ JCAR consists of five senators and five representatives, with at least two from each house's minority party. *Id.* § 24.235(1).
- ¹⁸ *Id.* § 24.239(4).
- ¹⁹ *Id.* § 24.239a.
- ²⁰ *Id.* § 24.245(2).
- ²¹ *Id.* § 24.245a(1).
- ²² *Id.* §§ 24.245a(3), (6).
- ²³ *Id.* §§ 24.245a(4)-(5).
- ²⁴ The suspension must be authorized by concurrent resolution. *Id.* § 24.252; see also MICH. CONST. ART. 4, § 37 (adopted in 1963).
- ²⁵ MICH. COMP. LAWS § 24-253; Exec. Order No. 1995-6.
- ²⁶ MICH. COMP. LAWS § 24-253.
- ²⁷ Exec. Order No. 1995-6.
- ²⁸ Survey from Sue Maul & LuAnn Klont, Regulatory Affairs Officers, Dep't of Natural Res. & Env't (2010, on file with author); accord. Survey from Luttrell Levingston, Legal Affairs Dir., Dep't of Human Serv. (2010, on file with

- author).
- ²⁹ Survey from Levingston, *supra* note 28.
- ³⁰ SOAHR has informal approval powers before public hearings and formal approval powers after public hearings. Survey from Peter L. Plummer, Exec. Dir. SOAHR (2009, on file with author).
- ³¹ *Id.*
- ³² *Id.*
- ³³ Survey from Maul & Klont, *supra* note 28; *accord.* Survey from Levingston, *supra* note 28.
- ³⁴ PAUL TESKE, REGULATION IN THE STATES 211, 213-14 (2004) (reporting on 1995-2001 period).
- ³⁵ Survey from Maul & Klont, *supra* note 28.
- ³⁶ *Id.*
- ³⁷ MICH. STATE OFFICE OF ADMIN. HEARINGS & RULES, REGULATORY IMPACT STATEMENT (2005), available at http://www.michigan.gov/documents/Regulatory_Impact_StatementJuly-06_169277_7.doc.
- ³⁸ *Id.*
- ³⁹ Survey from Maul & Klont, *supra* note 28; Survey from Levingston, *supra* note 28. The Department of Education reports a decentralized process, in which each of the department's divisions is responsible for rule preparation and submission to SOAHR. Interview with Anonymous Official within Dep't of Ed., July 1, 2010.
- ⁴⁰ Survey from Levingston, *supra* note 28; *see also* Survey from Maul & Klont, *supra* note 28 (noting that alternatives are considered "before the regulatory process").
- ⁴¹ See various regulatory impact statements available at, e.g., <http://www.state.mi.us/orr/emi/arcrules.asp?type=Numeric&id=2008&> (archived 2008 rulemaking materials).
- ⁴² Survey from Levingston, *supra* note 28 (explaining that the agency considers harms but does not monetize by value of statistical life).
- ⁴³ *Id.*; Survey from Maul & Klont, *supra* note 28. The same is true of communications with the Legislative Service Bureau, which does offer helpful comments on rule language, *id.*
- ⁴⁴ MPSC Formally Adopts Gas Safety Standards, STATE NEWS SERVICE, Apr. 16, 2009.
- ⁴⁵ *Ins. Inst. of Mich. v. OFIS Comm'n*, 486 Mich. 370, 378-79 (Mich. 2010).
- ⁴⁶ David Eggert, *Panel Objects to Granholm's Proposed Credit Scoring Ban*, AP STATE & LOCAL WIRE, Feb. 17, 2005.
- ⁴⁷ *Ins. Inst. of Michigan*, 486 Mich. at 378-79.
- ⁴⁸ *Id.*
- ⁴⁹ Journal of the Michigan Senate, Mar. 9, 2005, p 247-48.
- ⁵⁰ Sarbaugh-Thompson et al., *supra* note 3.
- ⁵¹ *Id.*
- ⁵² *Id.*

Minnesota

Formally, Minnesota’s Administrative Law Judges take a lead role in rule review. But since 1999, Minnesota governors have used their post-adoption veto power over regulations to impose an extensive informal review on agency rulemakings.

Minnesota’s Process on Paper

Statement of Need and Reasonableness (“SONAR”): When agencies give notice of proposed rules, they must, to the extent reasonable, include:

- a description of the classes of persons who will bear costs or will benefit;
- the probable costs to the agency and any anticipated effect on state revenues;
- a determination of whether there are less costly or intrusive ways of achieving the proposed rule’s purpose;
- any alternative methods seriously considered (including performance-based systems) and why they were rejected;
- the compliance costs, separated by class of businesses, government entities, and individuals;¹
- the costs of not adopting the proposed rules, again separated by class; and
- a comparison between the proposed rule and any existing federal regulations.²

To develop the fiscal analysis, the agency must consult with the Commissioner of Management and Budget.³ SONARs must be sent to the relevant legislative committees.⁴

Before adopting rules that affect farming operations, agencies must submit a copy of the rule to the Commissioner of Agriculture.⁵

Office of Administrative Hearings: The Administrative Law Division of the Office of Administrative Hearings conducts certain rule review functions. The Chief Administrative Law Judge (“ALJ”) is appointed by the governor with consent of the Senate, and can only be removed for cause.⁶ All ALJs must be free of political or economic association that would impair their judgment.⁷

If a rule was proposed using a public hearing, the Chief ALJ reviews whether the agency established the rule’s need and reasonableness based on the record at the public hearing. If not, the rule is submitted to the Legislative Coordinating Commission and the relevant legislative standing committees for additional advice and comment. After sixty days, the agency can finalize the rule.⁸

If no public hearing was required, the agency must submit notices, comments, the SONAR, and the adopted rule to the Chief ALJ, who assigns it to an ALJ. The ALJ then has fourteen days to review and approve the rule’s legality and form, including whether the record demonstrates a rational basis of need for and reasonableness of the rule.⁹ If the ALJ disapproves and the Chief ALJ concurs that the need for and reasonableness of the rule were not established, the rule is submitted to the Legislative Coordinating Commission and the relevant legislative standing committees for additional advice and comment. The agency must consider the advice of the legislators, but can move forward with the rule adoption after sixty days.¹⁰

Gubernatorial Veto: The governor received authority to veto rules in 1999.¹¹ The governor can veto a rule within fourteen days of receiving a final copy of the adopted rule from Secretary of State.

Legislative Review: The Legislative Coordinating Commission has jurisdiction over all rules.¹² The Commission may hold public hearings to investigate any meritorious complaints it receives about rules.¹³

Either the Commission or the House and Senate committees on state governmental operations may object to any adopted rule for being beyond the agency's procedural or substantive authority.¹⁴ The agency then has fourteen days to respond to the objection.¹⁵ The Commission may also request that the agency hold a public hearing on its recommendations.¹⁶ If the legislature does not withdraw its objection, the burden shifts to the agency at any subsequent judicial review proceeding to prove the rule's validity.¹⁷

Relevant standing committees also receive copies of SONARs. Anytime between proposal and notice of adoption, the committees may vote to advise an agency that a proposed rule should not be adopted. Upon majority vote of both relevant standing committees, a rule is suspended, and the agency may not adopt it until the legislature adjourns that session.¹⁸

The legislature can, of course, repeal or amend a rule through a bill.¹⁹

Ex-Post Review: Agencies must send a list of rules that are obsolete, unnecessary, or duplicative every year by December 1st to the governor, Legislative Coordinating Commission, and legislative committees with jurisdiction, with a timetable for those rules' repeal.²⁰

Executive Order 93-10 further specifies that agencies should review regulations that directly affect business, and amend those rules that are no longer appropriate, effective, or efficient. Under the Order, "appropriate" means "demonstrated need which can only or best be met by . . . regulation"; "effective" means "maximizes the net benefits to the citizens of Minnesota"; and "efficient" means "maximizes the net benefits to Minnesota citizens at the least net cost."

In addition to the general public's right to petition agencies for rulemakings,²¹ local governments can petition agencies and the Office of Administrative Hearings to amend or repeal a rule. Specifically, petitions may be submitted if significant new evidence relates to the need for or reasonableness of a rule, or if a less costly method of achieving the purpose exists.²² Denials of such petitions are reviewed by an ALJ,²³ and the ALJ can rescind a rule.²⁴

Minnesota's Process in Practice

Legislative Review: The legislature seldom reviews rules.²⁵

SONARs: Generally, the explanation of need and reasonableness equates to an arbitrary and capricious standard. To some extent, "need" has come to mean that a problem exists that requires administrative attention, and "reasonableness" means that the solution proposed by the [agency] is appropriate."²⁶

SONARs vary in detail, length, and quality.²⁷ But even one of the more thorough examples suggests that Minnesota's analytical requirements do not encourage quantification of benefits or extensive analysis of alternatives, and instead focus principally on costs. In a recent SONAR, the Pollution Control Agency wrote:

[I]t is most important and of greatest interest to the regulated community to identify and evaluate the expected costs of each of the rules. Although there is some discussion provided regarding the benefits of the rules, the following discussion of the economic impact will focus on the costs.²⁸

By contrast, although the benefits “can be assigned an economic value and evaluated as part of the economic impact of the rules, in this SONAR, the MPCA will not attempt to assess the value of these benefits in economic terms.”²⁹ While the agency made a point of expressing its “belie[f] that the overall benefit of the amendments will exceed the cost of adopting them,”³⁰ it felt “[a] formal cost-benefit analysis is not possible for this rulemaking because of the difficulties in estimating environmental benefits.”³¹

ALJ Reports: ALJ reports are uniformly written, outlining all aspects of the hearing, including public comments and the agencies’ SONARs.³² At the end of each report, the ALJ either recommends that the proposed rule be adopted in full or that the proposed rule be adopted “except where specifically otherwise noted above,” which indicates suggested changes.³³ If there are suggested changes, the ALJ report specifically states the parts of the proposed rule that do not meet statutory requirements.³⁴ Paired with each ALJ report suggesting changes is a report from the Chief ALJ.³⁵ In the past three years, the Chief ALJ has always approved the findings of the ALJs, suggesting that this review is more of a formality.³⁶

Executive Review: On very rare occasions, the governor will exercise his veto power over rules. In 2008, Governor Tim Pawlenty vetoed a rule from the Secretary of State relating to voter registration.³⁷ But the veto is a rather blunt instrument that can only be wielded after a rule has been adopted; seeking more of a scalpel, Minnesota governors since 1999 have created an informal but mandatory review process.

According to the Minnesota Rulemaking Manual—edited by the Department of Health but containing the advice from a collection of agency rule drafters—letting the governor exercise review authority earlier instead of only at the very end “avoid[s] wasting everyone’s time and effort. Or, if the Governor wants the rules to take a different direction, the agency can redirect the rules at a point in the process where the advisory committee and the public have a chance to respond to the Governor’s decision.”³⁸ The extra, early process also helps agencies focus their attentions on clear and specific goals.³⁹

A memorandum from the Office of the Governor spells out the executive review process. When an agency first develops an idea for a rule, it submits a Preliminary Proposal Form to the Governor’s Office of Legislative and Cabinet Affairs (“LACA”). This first form identifies possible controversies and the rule’s most basic fiscal impact on the state: agencies just check “yes,” “no,” or “undetermined.” At this early stage, the governor’s policy advisors cannot perform a substantive review, so the agency need not wait for a response before moving forward.⁴⁰

When the final draft of a rule is nearly complete, agencies submit to LACA a Proposed Rule and SONAR Form. This stage is “crucial.”⁴¹ At this point, agencies are no longer permitted to answer “undetermined” for fiscal impact, and under “executive summary,” agencies should list all fiscal information for individuals, businesses, and the government. An agency may not proceed with proposing a rule until it receives official approval from LACA. Though there is no official deadline, LACA tries to complete its review within three weeks,⁴² and the governor’s office has been “reliably timely” in its reviews.⁴³

“This way, if the Governor is opposed to the rules, the agency can stop the rules project early in the process and avoid wasting everyone’s time and effort.”

—Patricia Winget, Rulemaking Manual Editor

Lastly, before adopting the rule, agencies complete the Final Rule Form, which focuses on new information or late changes. This provides one final opportunity for the governor to make changes before having to resort to the veto. Though this third review is technically the last, agencies should keep the governor's office updated throughout, and "additional review may be necessary if a rule suddenly becomes controversial." Interestingly, the governor's office does not review rule repeals.⁴⁴

Agencies also informally use the attorney general's office to review legality.⁴⁵

Analysis and Grade

Considering the extent of the unofficial but mandatory review structure Minnesota has layered on top of a formal, on-the-books system, some of the state's process is likely duplicative. Minnesota could also make better use of its agencies' resources by focusing analytical requirements on only the most significant rules.

Minnesota's off-the-books executive review has both pros and cons. Though the governor's office claims its reviews are timely, the unofficial nature leaves the process open to uncertainty and delay, and the lack of any substantive standards reduces transparency. But the governor's review does seem to be relatively consistent, and agencies claim that early executive review helps them focus their regulatory goals and allows for rule calibration.

Minnesota does not combat inter-agency conflicts or agency inaction. Executive Order 93-10 sets up a substantive and balanced structure for periodic review, focused on maximizing net benefits; unfortunately, it is unclear whether any meaningful periodic review occurs in practice.

Though the governor's review does encourage agencies to think about costs and benefits early and often, analysis of benefits and alternatives typically falls by the wayside. Consideration of distributional effects is limited, but it at least does not overemphasize small business impacts.

Overall, Minnesota earns a C.

Notes

- ¹ Agency must determine, subject to Administrative Law Judge approval, whether the first-year compliance costs of a rule exceed \$25,000 for any single small business or any small local government. If so, the small business or city may claim a temporary waiver. MINN. STAT. § 14.127.
- ² *Id.* §§ 14.131 (1)-(6).
- ³ *Id.* § 14.131 (7).
- ⁴ *Id.* § 14.116.
- ⁵ *Id.* § 14.111.
- ⁶ *Id.* § 14.48(3)(a).
- ⁷ *Id.* § 14.48(3)(b); see also Hon. Bruce H. Johnson, *Strengthening Professionalism within an Administrative Hearing Office: The Minnesota Experience*, 53 ADMIN. L. REV. 445 (2001).
- ⁸ MINN. STAT. § 14.15(4).
- ⁹ *Id.* § 14.26(a).
- ¹⁰ *Id.* § 14.15(4).
- ¹¹ *Id.* § 14.05(6).
- ¹² *Id.* § 3.842(2).
- ¹³ *Id.* § 3.842(3).
- ¹⁴ *Id.* § 3.842(4a)(a).
- ¹⁵ *Id.* § 3.842(4a)(d).
- ¹⁶ *Id.* § 3.843.
- ¹⁷ *Id.* § 3.842(e).
- ¹⁸ *Id.* § 14.126.
- ¹⁹ *Id.* § 14.05(1).
- ²⁰ *Id.* § 14.05(5).
- ²¹ *Id.* § 14.09.
- ²² *Id.* § 14.091(a).
- ²³ *Id.* § 14.091(c).
- ²⁴ *Id.* § 14.091(d).
- ²⁵ Survey from Paul Marinac, Deputy Revisor of Statutes (2009, on file with author).
- ²⁶ See Minn. Pollution Control Agency, SONAR on Subsurface Sewage Treatment Systems (2010), <http://www.leg.mn/archive/sonar/SONAR100014.pdf>.
- ²⁷ See Minnesota Legislative Reference Library, SONARs-Statements of Need and Reasonableness, <http://www.leg.state.mn.us/lrl/sonar/sonar.asp> (last visited Feb. 27, 2010). Compare Dept. of Ed., SONAR on Science Academic Standards (2010) (consisting of sixty-one pages of analysis), with Bd. of Pharmacy, SONAR on Scheduling of Controlled Substances (2009) (totaling just six pages).
- ²⁸ Minn. Pollution Control Agency, SONAR, *supra* note 26, at 113.

- ²⁹ *Id.* at 112-13.
- ³⁰ *Id.* at 119.
- ³¹ *Id.* at 112-13.
- ³² *See, e.g.*, Report of Administrative Law Judge, *In the Matter of the Proposed Rules of the Board of High Pressure Piping Systems Relating to High Pressure Piping*, Minnesota Rules Chapter 5230 (2009) (“The Board has adequately considered the cost of revisions to the high pressure piping code, and it has adequately considered the other factors in the regulatory analysis required by Minn. Stat. § 14.131.”).
- ³³ *See, e.g., id.*
- ³⁴ *See, e.g., id.* at finding 43 (“[The agency] has not demonstrated that it has made any analysis of the cost of compliance for small business owners with its proposed definition of ‘repairs to existing installations.’”).
- ³⁵ Office of Admin. Hearings, Cases Page, <http://www.oah.state.mn.us/cases/cases.html> (last visited Feb. 28, 2010).
- ³⁶ *E.g.*, Report of Chief ALJ, *In the Matter of the Proposed Rules Governing Health Risk Limits for Groundwater*, Minnesota Rules, Chapter 4717 (Dec. 11, 2008) (“Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves the Report of the Administrative Law Judge . . . in all respects.”); Report of Chief ALJ, *In the Matter of the Proposed Amendments to Rules of the Department of Labor and Industry, Labor Standards Unit, Relating to Prevailing Wage Determinations, Master Job Classifications, Minnesota Rules Parts 5200.1030 to 5200.1100* (Sept. 22, 2008) (“Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves the Report of the Administrative Law Judge . . . in all respects.”).
- ³⁷ 32 Minn. Reg. 2060 (May 19, 2008).
- ³⁸ PATRICIA WINGET, MINN. DEP’T OF HEALTH, MINNESOTA RULEMAKING MANUAL 5 (2009), <http://www.health.state.mn.us/rules/manual/manual09.pdf>. The Manual is put together with input from the Interagency Rules Committee, an informal cadre of state agency rules staff that meets quarterly to discuss common issues related to rulemaking.
- ³⁹ *Id.* at 10.
- ⁴⁰ OFFICE OF THE GOVERNOR, ADMINISTRATIVE RULE REVIEW PROCESS (2005) <http://www.governor.state.mn.us/stellent/groups/public/public/documents/system/prod008392.doc>.
- ⁴¹ *Id.*
- ⁴² *Id.*
- ⁴³ MINNESOTA RULEMAKING MANUAL, *supra* note 38, at 38.
- ⁴⁴ ADMINISTRATIVE RULE REVIEW PROCESS, *supra* note 40.
- ⁴⁵ MINNESOTA RULEMAKING MANUAL, *supra* note 38, at 18.

Mississippi

Mississippi offers no centralized, substantive review of agency regulations.¹ Though the Secretary of State prepares templates and handles filings, “[t]he Secretary of State’s Office does not participate in a state agency’s decision-making process when it proposes administrative rule changes. The final decision about whether to implement a new rule or changes to an existing rule is entirely up to the agency making the proposal.”²

Agencies do have to prepare economic impact analyses for any new rule or “significant” rule amendment, meaning an amendment to a rule where total aggregate compliance costs exceed \$100,000.³ Agencies must consider the economic impact of a proposed rule on the state’s citizens, as well as any benefits that will accrue to those citizens.⁴ The economic impact statement must detail the need for and benefits of the action; the costs to government; the costs or economic benefits to all persons directly affected; the impacts on small business; a comparison of the probable costs and benefits of not acting; a determination whether less costly, reasonable, legal alternatives exist; a description of the reasons for rejecting any reasonable alternatives; and a statement of data and methodology for the estimates.⁵

Agency dockets must include information on how the public can inspect any economic impact statement,⁶ a summary of the statement must be filed in the administrative bulletin, and the public must be given at least twenty days to comment after publication of that summary.⁷

The public can also challenge a rule on the basis of its economic impact statement. The challenger must first have raised the issue in the agency proceeding and must have provided the agency with sufficient information on the specific concerns. If those criteria are met, a court can invalidate a rule based on an agency’s failure to adhere to procedure in preparing the statement or failure to consider information submitted on the statement, if that failure substantially impaired the fairness of the rulemaking proceedings.⁸ If a statement was prepared in good faith, it cannot be invalidated for sufficiency or accuracy.⁹

Before recent changes, the Secretary of State’s Concise Summary of Economic Impact Statement form once provided agencies with a series of questions and short boxes in which to overview the rule’s costs and benefits. Given the form’s brevity, the level of detail was limited; and given the form’s call for open-ended answers, consistency was variable. The full text of statements was only available by reaching out to the listed agency contact.¹⁰

As of September 2010, the Secretary of State has created a new form. This form still gives the agency short boxes to “briefly summarize the benefits” and “briefly describe the need.” But agencies can then address nearly all questions on costs and impacts by checking off a multiple-choice answer: “nothing,” “minimal,” “moderate,” “substantial,” or “excessive.”¹¹ While the updated form may improve consistency, it could also restrict the level of analytical detail made available to the public.

Every five years, agencies are supposed to review all their existing rules.¹² But according to the Secretary of State, there is no *ex post* review of regulations “*per se*.”¹³

Mississippi’s analytical requirements are promising. They may come early enough in the process, with enough chance for public review and sufficient attention to benefits and alternatives, to actually be integrated into the decision-making process. Mississippi should move the full text of all economic impact statements online, to improve transparency. But since Mississippi has

no centralized review structure and its periodic review is both standard-less and unrealized, its Guiding Principles Grade is a D.

Notes

- ¹ Survey from Amy Foster, Senior Regulation and Enforcement Attorney, Sec'y of State (2010, on file with author). The Secretary of State's model rules on administrative procedure do not offer any additional details on internal review processes. MISS. CODE ANN. § 25-43-2.105; SEC'Y OF STATE, MODEL RULES ON ADMIN. PROCEDURE, *available at* http://www.sos.ms.gov/links/reg_enf/admin/Admin_Procedures_Rules&Regs_Part02.pdf.
- ² SEC'Y OF STATE, MISSISSIPPI ADMINISTRATIVE BULLETIN.
- ³ MISS. CODE ANN. § 25-43-3.105(7) (except rules expressly required by law or temporary rules).
- ⁴ *Id.* § 25-43-3.105(1).
- ⁵ *Id.* § 25-43-3.105(2).
- ⁶ *Id.* § 25-43-3.102(3).
- ⁷ *Id.* § 25-43-3.105(4).
- ⁸ *Id.* § 25-43-3.105(3).
- ⁹ *Id.* § 25-43-3.105(6).
- ¹⁰ *See, e.g.*, <http://www.sos.state.ms.us/busserv/AdminProcs//PDF/00016127b.pdf>.
- ¹¹ Sec'y of State, Concise Summary of Economic Impact Statement Form (2010), *available at* http://www.sos.ms.gov/links/reg_enf/admin/CONCISE_SUMMARY_OF_ECONOMIC_IMPACT_STATEMENT.pdf.
- ¹² MISS. CODE ANN. § 25-43-3.114.
- ¹³ Survey from Foster, *supra* note 1.

Missouri

Though the legislature’s rules review committee lost its veto power in a 1997 court case, it still wields indirect and behind-the-scenes power.

History of Missouri’s Process

In 1975, the Missouri legislature created the Joint Committee on Administrative Rules (“JCAR”). At first, the committee exercised only advisory powers, but the legislature wanted more direct control. Missouri citizens twice voted against proposed constitutional amendments expanding legislative review of administrative rules, and so the legislature used statutes to enhance its authorities, granting JCAR powers to suspend rules, nullify existing rules, and veto proposed rules.¹

“The legislature’s goal of seeking to corral overzealous bureaucratic intrusion in citizens’ lives is certainly laudable. However, it does not warrant an equally overzealous concentration of power in the legislature.”

—Missouri Supreme Court

In 1997, the state Supreme Court heard a case on the veto authority over proposed rules. Finding the veto violated the constitutional separation of powers, the Court stated “legislative actions, whether by committee, by resolution of one house, or by joint resolution of the whole legislature, cannot amend, modify, rescind, or supplant any rule promulgated by an agency unless the legislature follows the bill passage requirements.”²

Missouri’s Process on Paper

Legislative Review: Following the state Supreme Court ruling that struck down its veto power, the legislature reacted by enacting a complex mesh of statutory provisions to preserve some legislative review.³ Working in concert with Executive Order 97-97,⁴ the state Administrative Procedure Act first requires submission of all proposed rules to JCAR. JCAR may hold hearings at any time, but in particular reviews final rules before they are filed and adopted.

Agencies cannot file final rules until thirty days after submitting them to JCAR. JCAR may, by majority vote,⁵ recommend that the General Assembly disapprove and annul any rule. JCAR can base its vote on any grounds, but in particular should consider factors such as whether a rule: exceeds statutory authority; conflicts with state law; is likely to substantially endanger public health, safety, or welfare; is more restrictive than necessary to carry out the purpose; or is so arbitrary and capricious as to create substantial inequity for and unreasonable burdens on affected parties.⁶

If JCAR objects, the rule is stayed for thirty legislative days, to give the General Assembly time to adopt a concurrent resolution disapproving and annulling the rule.⁷ Such resolutions must be presented to the governor for signature or veto.⁸

Fiscal Impact Statements: Generally, agencies are to base their rulemakings on “reasonably available empirical data” and should assess “the effectiveness and the cost of rules both to the state and to any private or public person or entity affected.”⁹ If a proposed rule would impact public funds by more than \$500, the agency must prepare a fiscal note estimating costs to government.¹⁰ If a

proposed rule would require an expenditure from or reduce the income of any person or business by more than \$500 in aggregate, the agency must prepare a fiscal note estimating the number of affected parties (classifying businesses by type) and their aggregate compliance costs.¹¹

For rules that affect the use of real property, agencies must perform a takings analysis.¹²

Small Business Regulatory Fairness Board: If a proposed rule affects small business, agencies must determine the practicability of less-restrictive alternatives that would achieve the same results, and must prepare a small business impact statement. The statement provides a reasonable determination of: any methods considered to reduce impacts on small business; how the agency sought small business input; the probable, direct, monetary costs and benefits to government; the adverse effects on small business; the direct and indirect monetary costs; the businesses that will directly bear costs or directly benefit; and a justification for exceeding the stringency of any comparable federal, state, or county standards.¹³

These statements must be submitted to JCAR and the Small Business Regulatory Fairness Board before scheduling a public hearing. The Board consists of small business owners from different geographic regions and industries, appointed by the governor and the legislature.¹⁴ Agencies must also summarize small business comments for the Board after public hearings.¹⁵ The Board reviews proposals, and can also review existing rules based on complaints that: the rule creates an undue barrier to business that significantly outweighs the rule's public benefits; new economic information exists; circumstances have changed; or the actual effects on small business significantly exceeded the estimated impact statement.¹⁶ Agencies should consider the Board's recommendations and must explain if they do not follow the suggested actions.¹⁷

Any affected small business may also petition the agency to reconsider an existing rule. Denied petitions may be appealed to the Board, which evaluates and reports to the governor and the General Assembly.¹⁸ The Board also provides agencies with a list of rules that have generated public complaints, including rules that the Board determines duplicate, overlap, or conflict with other law. Agencies must report back to the Board within forty-five days, stating the continued need for the rules. The Board then reports to the governor and the General Assembly.¹⁹

Missouri's Process in Practice

JCAR has only two staff analysts,²⁰ and on average receives nearly two thousand rule filings per year.²¹ Though JCAR can convene hearings at any time, it tries to meet during its thirty-day window between submission of a final rule and its filing.²² Given those limited resources and quick deadlines, "we do our best to review the rules, check procedural issues like whether they filed the fiscal note, but we do rely on the public to bring attention if they see a problem with the rule."²³

JCAR usually schedules a hearing at the request of any committee member or of five other legislators. The public also plays a role in requesting hearings.²⁴ However, sometimes JCAR has been accused of scheduling hearings at inconvenient times for the public: one meeting started at 10p.m. and was deliberately kept "very short."²⁵

Often JCAR works without scheduling a hearing. According to staff, JCAR may not look very active based on public records on hearings, but in fact is hard at work reviewing regulations.²⁶ Informal negotiations frequently occur, as JCAR staff both communicates directly with the agency and facilitates negotiations between the agency and the public.²⁷

In part because of such behind-the-scenes activity, JCAR has been called "powerful but obscure."²⁸

Some critics feel lobbyists use JCAR's review to kill regulations that they could not have openly targeted in public.²⁹ And even though JCAR cannot directly veto anymore, a signal from the committee that it plans to disapprove a rule is sometimes enough to prompt the agency to withdraw and modify the regulation.³⁰

Case Study: One Day in August 2008

On August 11, 2008, JCAR reviewed two rules. The first came from the Health Department, proposing improved fire safety (sprinklers, alarms, and smoke partitions) standards at nursing homes. Citing costs of up to \$80,000 per facility, trade association lobbyists convinced JCAR to vote 9 to 0 to disapprove the rules as "so arbitrary and capricious that they created an undue burden." Rep. Bryan Stevenson said he supported safety, "but it's got to be cost-effective."

Next, consumer groups testified in opposition to Insurance Department rules that could limit state investigations into insurance company records. JCAR chose not to take action. Senator Joan Bray said she would have made a motion, but knew she would have no support.

All in all, according to JCAR member Bryan Stevenson, "The industry had a good day."³¹

The Small Business Regulatory Fairness Board and the small business impact statement processes are active.³²

Analysis and Grade

Beyond deadlines that may help prevent delays, Missouri's regulatory review structure fails to meet most of this report's guiding principles. With only two analysts to review two thousand filings per year, JCAR lacks resources, which leads to somewhat inconsistent and ad hoc reviews. JCAR's statutory criteria for review are optional, and so much of JCAR's efforts take place behind the scenes that the formal review criteria are largely irrelevant anyway. Far from a model of transparency, JCAR's informal review process has been called "obscure." Though informal, JCAR's review does not typically occur until an agency is nearly ready to adopt a rule, giving JCAR little opportunity to do anything but object if a rule is more stringent than necessary.

Missouri's structure has no process to coordinate inter-agency conflicts, combat agency inaction, or conduct periodic review beyond efforts to eliminate existing rules with small business impacts.

Missouri's economic analysis requirements are at once too broad (applying to any rule imposing at least \$500 in compliance costs) and too narrow (focusing almost exclusively on economic costs, and ignoring benefits). Given these serious deficiencies, Missouri earns a D.

Notes

- ¹ See Kenneth D. Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus*, 57 MO. L. REV. 1157 (1992).
- ² Mo. Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125, 134 (Mo. banc 1997).
- ³ See generally MO. REV. STAT. §§ 536.019, 536.021, 536.024, 536.028.
- ⁴ Exec. Order No. 97-97 (1997), available at http://www.sos.mo.gov/library/reference/orders/1997/eo1997_097.asp.
- ⁵ JCAR consists of five senators and five representatives, with at least two minority party members from each chamber. MO. REV. STAT. § 536.037.
- ⁶ *Id.* § 536.028(5). JCAR can also consider whether a substantial change in circumstances has occurred since enactment of the underlying law.
- ⁷ *Id.* §§ 536.028(7), (9).
- ⁸ MO. CONST. ART. IV § 8.
- ⁹ MO. REV. STAT. § 536.016(2).
- ¹⁰ *Id.* § 536.200.
- ¹¹ *Id.* § 536.205. Any challenge based on failure to meet these requirements must be made within five years.
- ¹² *Id.* § 536.017. Also, the Department of Natural Resource must file a regulatory impact report for certain rulemakings. Survey from Cindy Kadlec, General Counsel to JCAR (2010, on file with author).
- ¹³ MO. REV. STAT. § 536.300.
- ¹⁴ *Id.* § 536.305.
- ¹⁵ *Id.* § 536.303.
- ¹⁶ *Id.* § 536.310.
- ¹⁷ *Id.* § 536.315.
- ¹⁸ *Id.* § 536.323.
- ¹⁹ *Id.* § 536.325.
- ²⁰ Survey from Kadlec, *supra* note 12.
- ²¹ JCAR, <http://www.senate.mo.gov/jcar/>.
- ²² *Id.*
- ²³ Interview with Cindy Kadlec, General Counsel to JCAR, Feb. 24, 2010.
- ²⁴ JCAR website, *supra* note 21.
- ²⁵ Michael D. Sorkin, *Consumer Groups Can Get a Hearing Only Late at Night*, ST. LOUIS POST-DISPATCH, Apr. 4, 2008 (quoting JCAR Chair Jason Smith).
- ²⁶ Interview with Kadlec, *supra* note 23.
- ²⁷ *Id.*; see also JCAR website, *supra* note 21 (“Each rule filing is reviewed for compliance and if necessary, members of the regulated community are contacted regarding their position on the prospective rule.”).
- ²⁸ Michael D. Sorkin, *Lobbyists 2, Consumers, 0*, ST. LOUIS POST-DISPATCH, Aug. 15, 2008.

²⁹ *Id.*

³⁰ Chris Blank, *Missouri Gaming Commission Withdraws Rule on Casino Locations*, AP, Mar. 13, 2008 (describing how the Gaming Commission withdrew rule after several JCAR members discussed repealing it).

³¹ Michael D. Sorkin, *Lobbyists 2, Consumers, 0*, St. Louis Post-Dispatch, Aug. 15, 2008; *see also* Editorial, *Two Steps Back*, ST. LOUIS POST-DISPATCH, Jan. 23, 2007 (on similar rules and JCAR action in 2006-2007).

³² Small Business Regulatory Fairness Board, <http://www.sbrfb.ded.mo.gov/>.

Montana

Montana's legislature only meets for ninety days every other year. In the interim, various committees are empowered to carry out certain duties, including rule review.

Montana's Process on Paper

Legislative Review: When an agency begins to work on the substantive content of any rule that initially implements legislation, the agency must contact the primary legislative sponsors to obtain comments.¹

All interim committees may act as administrative rule review committees for the agencies under their jurisdiction, with discretion to obtain an agency's rulemaking records; prepare recommendations for adopting, amending, or rejecting a rule; require a rulemaking hearing to be held; and carry out other review functions.²

Interim review committees also have the power to conduct a legislative poll by mail to determine whether the proposed rule is consistent with legislative intent. If twenty or more legislators object, the committee must poll the entire legislature.³

An interim committee can review and object to a rule for failure to substantially comply with administrative procedure. If the committee objects, the agency has fourteen days to respond.⁴ The committee can then withdraw or modify its objection.⁵ If it does not withdraw or modify its objection, the committee sends the objection to the secretary of state, who will publish the objection next to the notice of adoption of the rule. This published objection shifts the burden to the agency at any subsequent judicial proceeding to prove that the rule is within its authority.⁶

The interim committee also has the ability to suspend a rule. If a majority of committee members alert the committee to a potential objection, the rule is stayed for up to six months or until the committee meets and drops its objection.⁷

The legislature can, of course, repeal any rule through a bill.⁸ The legislature may also by joint resolution request the adoption, amendment, or repeal of any rule.⁹

Economic Impact Statement: The interim committees can request an economic impact statement for a proposed rule. If a majority of the members of a committee at an open meeting require an economic statement, the agency must prepare one. The agency must also prepare an economic statement if requested by at least fifteen legislators. As an alternative, the committee may, by contract, prepare the estimate itself. The request must be made before the final agency action, and the statement must be filed with the committee within three months.¹⁰ An environmental impact statement can, if it addresses all factors, satisfy the requirement.¹¹

Unless expressly waived, the economic statement must include:

- a description of the classes of people who will bear costs or will benefit;
- a description and quantification of the economic impact on affected classes of persons, including but not limited to state contractors and small businesses;
- the costs to the agency and any anticipated effect on state revenue;
- an analysis comparing the costs and benefits of the proposed rule to the costs and benefits of inaction;

- an analysis that determines whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule;
- an analysis of any alternative methods for achieving the rule’s purpose and why they were rejected; and
- a determination of whether the rule represents an efficient allocation of public and private resources.¹²

Internal Review: Each agency must appoint an attorney or other qualified employee to review rules, including the adequacy of the statement of reasonable necessity, and whether the proposal contradicts any comments submitted by the primary legislative sponsor.¹³

Ex-Post Review: Agencies must biennially determine if a new rule should be adopted or a current rule should be modified or abolished. If an interim committee considers such a change necessary, the committee may recommend the changes to the legislature.¹⁴

Montana’s Process in Practice

Legislative Review: Because legislative interim committees perform many tasks, each committee determines at the start of its fourteen-month tenure how thoroughly it will review proposed rules.¹⁵ Each committee can choose: a detailed examination of all proposed rules by the full committee; a summary of proposed rules prepared by the committee’s legal staff; or notification from the committee’s legal staff only of any significant or unusual proposed rules.¹⁶ For example, at a 2005 meeting of the Interim Committee on Education and Local Government, the committee’s lead staff person explained that she “does not review [rules] for substance but reviews them for compliance with the Montana Administrative Procedure Act.” The Committee then moved for the staff to review all appropriate rules and highlight those that “may become an issue.”¹⁷

Before the committee receives rule notices, the committee staff studies the notice for any technical or legal problems.¹⁸ The staff attorney for a particular committee usually prepares a summary of proposed regulations.¹⁹ Each interim committee chooses how aggressively it will prioritize regulatory review. For example, a recent work plan for the Economic Affairs Interim Committee only denotes “moderate” involvement in rule review, meaning it will “[r]equest [a] written, one-sentence description prior to committee meetings of all rules.”²⁰

According to the agendas of the legislative meetings, committees may sometimes spend less than an hour each quarter reviewing administrative rules; of course, this does not include the time put in by the staff attorney.²¹ When a controversial rule comes up, committees will vote on objections. Committees may use their suspension powers to give agencies a chance to revise a rule in line with the legislature’s preferences.²²

Legislative polls are rarely conducted. In one instance where a poll was initiated, the interim committee seemed confused on how to conduct a legislative poll. In fact, the agency’s counsel disagreed with the committee’s counsel on whether the poll became mandatory upon a certain number of objections.²³ After the poll was conducted, the agency amended the rule to exclude the part that had prompted the committee’s objections.²⁴

Economic Impact Statements: Interim committees will sometimes request an impact statement, perhaps most frequently for rules with environmental effects. Agencies sometimes choose to prepare—or even commission from an outside contractor—an economic impact statement as

part of their environmental impact statements.²⁵

Agencies have “broad leeway” on what to include in their economic impact analyses, and may negotiate specific content with interim committees.²⁶ Submitted economic impact statements are available for public comment, and the agency responds accordingly.²⁷

The Department of Environmental Quality (“DEQ”) uses economic impact statements to compare the efficiency and effectiveness of various alternatives.²⁸ While the agency is roughly looking for the option that maximizes benefits, actual quantification of benefits is limited. The agency does its best with limited time and resources. For example, in one statement, the department explained “accurate estimation of the monetary value of all potential beneficial uses . . . require[s] surveys, modeling and other analytical tools for which DEQ had neither the resources nor time.”²⁹ The agency did “briefly” discuss benefits, and made a statement on distributional impacts: “Compared to those who would bear costs, the beneficiaries of this petition would be a far more narrow and geographically concentrated group and most likely a lower-income group than the national state average.”³⁰

Legislators sometimes take an active interest in economic impact statements. One legislator publicly critiqued a DEQ statement for its “lack of incremental net benefit assessments” and “unhelpful” discussion of unquantified benefits. While the legislator unfortunately believed unquantified benefits should be excluded from the statement (since they are “speculative” and unscientific),³¹ the general legislative interest in economic impacts is notable.

“Given the time and staff limitations of completing the economic impact statement, simplifications had to be made.”

—Montana Department of Environmental Quality

Executive Review: The governor may be able to exercise informal review powers and stop any rules that conflict with administration policy.³²

Analysis and Grade

The legislative interim committees may too little time to exercise their rule review responsibilities. Legislators in Montana usually work full-time jobs in other professions, taking ninety days off every two years to serve in the legislature.³³ The interim committee is charged with five separate tasks including administrative rule review,³⁴ and there simply may not be enough time to prioritize regulatory review. On the other hand, given that legislative calendar, the committees limited suspension powers are reasonable and do not unnecessarily delay the rulemaking process.

The tight legislative resources also means committees are likely to prioritize objecting to controversial rules, rather than consistently calibrating rules. Indeed, with multiple legislative committees reviewing the rules of several agencies each, the depth and practice of regulatory review can be quite inconsistent.

Committees are supposed to review for substantive compliance with administrative procedure, but it is unclear what that entails. Most committees rely upon rule summaries distributed by their staff attorneys. Though likely a necessity, the summaries boil down rule proposals, which can easily stretch to over a hundred pages in length, into just a single paragraph or sentence.³⁵ As a result, it is not always clear what information or criteria legislators are basing their review judgments on.

Committee meetings are public, and agencies do respond to public comments on their economic impact statements. Though perhaps not exercised, there is potential in their statutory authority for legislative committees to recommend new rules and help combat agency inaction.

Periodic review requirements have no substantive standards, and given resources it is unrealistic for agencies to fully review all their rules every two years.

Economic analysis is typically conducted by request only, after a rule's proposal, creating a high potential for post-hoc justifications. Most examples come from environmental rules. While analysis of benefits and alternatives could be improved, the approach is generally balanced and focused on identifying the most efficient allocation of resources. Montana should consider expanding the scope of its requirements to cover any rule with a significant economic impact. Montana would benefit from more consistency across the board, but its analytical requirements show promise, and earn the state a C+.

Notes

- ¹ MONT. CODE ANN. § 2-4-302(2)(d).
- ² *Id.* § 2-4-402. The committees can also review interpretive rules and declare them advisory only. *Id.* § 2-4-308.
- ³ *Id.* § 2-4-403. The poll must include the agency’s justification for the proposed rule.
- ⁴ *Id.* §§ 2-4-406(1)-(2).
- ⁵ *Id.* § 2-4-406(2).
- ⁶ *Id.* § 2-4-406(3); *see also id.* § 2-4-404.
- ⁷ *Id.* § 2-4-305(9).
- ⁸ *Id.* § 2-4-412(1).
- ⁹ *Id.* § 2-4-412(2).
- ¹⁰ *Id.* § 2-4-405. Rules cannot be challenged in court for inaccuracy or inadequacy of the statement.
- ¹¹ *Id.* § 2-4-405(7).
- ¹² *Id.* § 2-4-405(2).
- ¹³ *Id.* § 2-4-110.
- ¹⁴ *Id.* § 2-4-314.
- ¹⁵ Each legislative interim committee develops a work plan in its first few meetings. *See, e.g.*, Economic Affairs Interim Committee, Draft Work Plan for the 2009-2010 Interim, at 13 (2009), *available at* http://leg.mt.gov/css/committees/interim/2009_2010/Economic_Affairs/Meeting_Documents/meetings.asp.
- ¹⁶ *See* Education and Local Government Interim Committee, 2009-2010 Interim Summary of Statutory Duties and Proposed Work Plan, at 12 (2009), *available at* http://leg.mt.gov/css/committees/interim/2009_2010/Education_and_Local_Government/Meeting_Documents/meetings.asp.
- ¹⁷ Minutes of Interim Committee on Education and Local Gov’t Meeting, July 15, 2005, *available at* http://leg.mt.gov/content/Committees/interim/2005_2006/edu_local_gov/minutes/07152005MEETING.pdf.
- ¹⁸ *See, e.g.*, Children, Families, Health, and Human Services Interim Committee, DPHHS Administrative Rule Activity (June 2, 2009) *available at* http://leg.mt.gov/css/committees/interim/2009_2010/Children_Family/Meeting_Documents/meetings.asp.
- ¹⁹ *See, e.g., id.*
- ²⁰ Economic Affairs Draft Work Plan, *supra* note 15, at 13.
- ²¹ *See, e.g.*, Minutes of Environmental Quality Council Meeting, Jan. 8, 2010, *available at* http://leg.mt.gov/css/committees/interim/2009_2010/environmental_quality_council/Meeting_Documents/meetings.asp#meeting3 (the Department of Environmental Quality proposed a greenhouse gas

emission rule, followed by 24 minutes of public comment, 45 minutes of committee discussion, and then a vote 10-6 for a formal objection to the rule).

- ²² See, e.g., Sen. Rick Ripley, *Legislator: Citizens must pay attention to climate change rules*, GREAT FALLS TRIBUNE, Feb. 15, 2010 (“However, the Environmental Quality Council, an interim legislature oversight [sic] committee, intervened and said, ‘No. Wait a minute, slow down.’ They voted to suspend the rulemaking process until June. We believe state-specific rules are premature since the EPA hasn’t even finished its work on the greenhouse gas rules. This allows for time to resolve several legal issues that were raised concerning the proposed rulemaking process. After the six months are up the state Environmental Quality agency can take another run at the rulemaking process and hopefully citizens are more involved in the process at that time.”).
- ²³ Minutes of the State Administration and Veterans’ Affairs Interim Committee Meeting at 3, June 9, 2005, available at http://leg.mt.gov/content/Committees/interim/2005_2006/st_admin_vet_affairs/minutes/meeting06092005.pdf (“There is some disagreement between counsel for the Board and counsel for the Committee on whether or not the statutes (2-4-403 and 4-4-404) require, rather than allow, the poll. Counsel for the Board felt that the poll is only allowed; Mr. Niss felt that on the basis of the two statutes that the Committee has no choice but that the poll is required by law.”).
- ²⁴ Minutes of the State Administration and Veterans’ Affairs Interim Committee Meeting, at 11, Sept. 9, 2005, available at http://leg.mt.gov/content/Committees/interim/2005_2006/st_admin_vet_affairs/minutes/meeting09092005.pdf.
- ²⁵ See, e.g., ECONORTHWEST, THE POTENTIAL ECONOMIC IMPACTS OF PROPOSED CHANGES TO LEASE FEES FOR THE STATE OF MONTANA’S CABINSITES (2010), available at http://dnrc.mt.gov/env_docs/may/CabinsiteRules.pdf.
- ²⁶ Survey from Rusty Harper, Deputy, Administrative Rules and Notary Services (2009, on file with author).
- ²⁷ See, e.g., Minutes of Board of Environmental Review Meeting, Sept. 30, 2005, available at http://www.deq.mt.gov/ber/2005_Agendas/ApprovedMinutes/2005Sept30.pdf; Comments on Economic Impact Statement and Responses, Coalbed Methane Rules, available at http://www.deq.mt.gov/ber/2006_Agendas/Mar06/IIIA3CommentsEISResponses.pdf.
- ²⁸ See Dept. of Env’tl. Quality, Economic Impacts of Proposed Amendments and Additions to the CECRA Rules (2010), available at <http://leg.mt.gov/content/.../Interim/.../cecra-economic-impact-statement.pdf>.
- ²⁹ Dept. of Env’tl. Quality, Coalbed Methane Rule Economic Impact Statement (2006), http://deq.mt.gov/ber/2006_Agendas/Mar06/IIIA3ExecutiveSummary.pdf (“Due to limited time and resources, the study does not incorporate time discounting—even though that is a common technique used in economic analysis.”).
- ³⁰ *Id.*
- ³¹ Letter from Alan Olson, District #45 Representative, to Montana Board of Environmental Review, *republished in* ROUNDUP RECORD-TRIBUNE & WINNETT TIMES, Nov. 1, 2006.
- ³² Virginia Admin. Law Advisory Comm., Legislative Powers of Rules Review in the States and Congressional Powers of Rules Review (2001) (“The Governor has the power to review each rule for compliance with gubernatorial policy if he chooses. He may choose to veto any rule.”).
- ³³ See *generally State Senator Resigns Seat, Takes Top Legal Post*, AP, Feb. 10, 2010 (noting one senator maintained fulltime job as staff attorney for state auditor during his tenure as state senator).
- ³⁴ MONT. CODE ANN. § 5-5-215.

³⁵ See DPHHS Administrative Rule Activity, *supra* note 18, at 3 (“TECHNICAL NOTE: The proposed rules (all 130 pages!) were skimmed by legal staff and no technical problems were noted.”).

Nebraska

The executive branch controls the regulatory review process in Nebraska. After a rule is proposed but before it can be adopted, the attorney general must approve its statutory authority and constitutionality.¹ The regulation then goes to the governor for “policy review and final approval.”² No rule can become effective without the governor’s approval.³ Agencies must submit to the governor an explanation of the rule’s necessity and consistency with legislative intent, as well as a description of impacted entities and a quantification of fiscal impacts on the government and regulated parties.⁴

There are no statutory criteria for the governor’s review, except that the governor must consider whether specifically affected geographic areas were adequately notified.⁵ Executive Order 95-6, which was mostly codified into the state Administrative Procedure Act in 2005 and so rescinded by Executive Order 05-04,⁶ put the Governor’s Policy Research Office in charge of regulatory review.⁷

Transmission of proposed rules to and approval by the attorney general and the Governor’s Policy Research Office are reflected on the Secretary of State’s website; sometimes rules are disapproved and returned to the agency, but the reasons for such actions are not listed.⁸

Proposed rules are also sent to the Legislative Council,⁹ and from there referred to the relevant standing committees and, if practical, to the primary legislative sponsor of the underlying bill.¹⁰ Any legislator who “feel[s] aggrieved” or believes the rule exceeds agency authority, is unconstitutional, or is inconsistent with legislative intent may file complaint with Legislative Council. If the relevant standing committees or primary sponsor believe the complaint has merit, they may request a written response from the agency, which must then respond in sixty days. But, the legislature has no direct power to block the adoption of rules.¹¹

Given limited transparency in the review process, it is difficult to assess Nebraska’s structure. The review process does seem to be consistently applied, but it does not obviously meet any other Guiding Principles: D.

Notes

- ¹ NEB. REV. STAT. § 84-905.01.
- ² Survey from Colleen Byelick, Asst. General Counsel, Sec'y of State (2009, on file with author).
- ³ NEB. REV. STAT. § 84-908.
- ⁴ *Id.* § 84-907.09. Agencies must also submit a statement of how public comment will be solicited. Notice and rulemaking record must contain a description, including quantification, of the fiscal impact on government and regulated parties. *Id.* §§ 84-906.01(2)(h), 84-907. A rule's validity cannot be challenged on the basis of the fiscal impact description. *Id.*
- ⁵ *Id.* § 84-908.
- ⁶ See Exec. Order No. 05-04 (2005), available at <http://www.nlc.state.ne.us/docs/pilot/pubs/eofiles/05-04.pdf>.
- ⁷ Exec. Order No. 95-6 (1995), available at <http://www.nlc.state.ne.us/docs/pilot/pubs/eofiles/95-6.pdf>.
- ⁸ Sec'y of State, Proposed Rules and Regulations Docket, <http://www.sos.ne.gov/rules-and-regs/regtrack/index.cgi>; see also NEB. REV. STAT. § 84-133 on creation of the Policy Research Office. The Governor's Policy Research Office declined to complete a survey.
- ⁹ *Id.* § 84-907.06.
- ¹⁰ *Id.* § 84-907.07.
- ¹¹ *Id.* § 84-907.10.

Nevada

In 1996, the people of Nevada granted their legislature the constitutional right to review the statutory authority of all new regulations before they can take effect.¹

Nevada's Process on Paper

Legislative Approval: To propose a new rule, agencies must prepare a notice of intent, describing, *inter alia*, the rule's need and purpose; the rule's estimated economic effects on regulated businesses and the public, including both immediate and long-term adverse and beneficial impacts; and the agency's justification for overlapping or duplicating any other state or local regulations.²

Notices of intent are submitted to the Legislative Counsel for review.³ The Legislative Counsel is empowered to revise the language of a rule for clarity and form, but not to alter its meaning or effect without consent of the agency.⁴

When an agency is ready to adopt a regulation, it submits an informational statement to the Legislative Counsel, which largely contains the same type of detail as the notice of intent.⁵ The Legislative Counsel then refers the rule to the Legislative Commission for review. The Legislative Commission consists of twelve members of the legislative leadership. The Commission—or its Subcommittee to Review Regulations—must either approve or object to a rule after assessing statutory authority and legislative intent.⁶ If the Commission objects, the agency must revise and resubmit the rule.⁷ The Commission must affirmatively approve a regulation for it to become effective: since the adoption of a new statute in 2009, a rule no longer takes effect merely upon the failure of the Commission to object.⁸

The Legislative Commission may, in select cases, choose to give an earlier review of a rule, before it has been adopted by an agency.⁹ Each agency must review its regulations at least once every ten years, and report to the Legislative Counsel.¹⁰

Temporary Regulations: Nevada's legislature does not sit year-round. When the legislature is not in session, agencies must generally issue temporary regulations instead of permanent regulations.¹¹ Temporary regulations are not submitted to the Legislative Counsel for review,¹² but by the request of a legislator, the Legislative Commission may still examine temporary regulations for statutory authority and legislative intent.¹³

Small Business Analysis: A small business impact requirement was added in 1999. Agencies must consult with small business owners; consider methods to reduce the impact on small businesses; estimate “without limitation” the economic effects on small businesses, including both direct and indirect adverse and beneficial impacts; estimate administrative costs; and justify exceeding any minimum federal, state, or local requirements.¹⁴

Any small business can object to a regulation by petition within ninety days of its adoption, if the agency failed to prepare a small business impact statement, or if the agency failed to consider or significantly underestimated economic effects. But the promulgating agency retains discretion to determine whether the petition has merit.¹⁵

Nevada's Process in Practice

Though not statutorily mandated, the Legislative Counsel reviews legislative intent and authority in addition to (and, in fact, before) its review of a rule's mechanics and style.¹⁶ The Counsel tries to discuss and resolve potential problems with the agency early on, well before the Legislative

Commission’s review begins.¹⁷ This informal process resolves the “majority” of potential problems.¹⁸

Perhaps because of such additional, informal duties, the Legislative Counsel faces increasing pressure to review all of Nevada’s rules within statutory deadlines. Brenda Erdoes, legislative council, has testified: “My office is not always able to get the regulation back to the agency within thirty days. We do our best, but there are more and more regulations.”¹⁹

Reviews by the Legislative Commission or its Subcommittee can be quite substantive,²⁰ and therefore can monopolize an “overwhelming amount of [the Commission’s] time.”²¹ Senator Valerie Wiener became concerned that the Legislative Commission’s review process was “inefficien[t] and inadequa[te],”²² and introduced a series of bills from 2005 through 2009—successfully enacted—to modify the process.²³ In particular, Senator Wiener was concerned that “more than 70% of agencies would process regulations that did not meet legislative intent.”²⁴ Meanwhile, in many years, the Commission did not have time to review more than 22% of all regulations submitted to it.²⁵ Other legislators agreed that the process had become confusing to the public,²⁶ and that there were too many “opportunities for things to slip through the cracks unviewed or unvisited.”²⁷ The effect of these recent reforms remains to be seen.

“My office is not always able to get the regulation back to the agency within thirty days. We do our best, but there are more and more regulations.”

—Brenda Erdoes, Legislative Council

Regulatory impact statements vary in quality from agency to agency; but, consistent with statutory instructions, none really explore non-economic effects.²⁸ And it seems a low threshold has been set for an acceptable level of an analysis. The attorney general’s office, which prescribes the form of regulatory proposals,²⁹ offers the following circular statement as an example of sufficient economic analysis: “Local governments and other persons who benefits from the use of state volume cap, including the public, will benefit in the immediate and long term.”³⁰ Some legislators have expressed frustration with the quality of impact statements, noting “I have seen some determinations which have said there is no impact on small business, but it is not possible there was no impact on businesses,” and wondering whether the requirement can simply be satisfied by “some bureaucrat somewhere checking a box.”³¹

Analysis and Grade

The effects of very recent changes to Nevada’s legislative review structure should reveal themselves in the coming years. Those reforms largely focused on ensuring the Legislative Counsel and Legislative Commission would have sufficient time and authority to review and approve every regulations. However, the reforms may not do much to improve the quality of review, and mandatory legislative approval may burden the rulemaking process. Nevada may need to revisit and improve its requirements for impact analyses, which currently overemphasize economic and small business effects and deemphasize social and non-economic benefits. Moreover, there is no general statutory requirement to consider policy alternatives or study distributional impacts.³² If Nevada continues its reforms efforts, its regulatory review process may become more balanced and effective; currently, Nevada only scores a D+ based on this report’s guiding principles.

Notes

- ¹ NEV. CONST. art. 3 § 1(2).
- ² NEV. REV. STAT. § 233B.0603(1)(a). Some agencies are exempt. *Id.* § 233B.039.
- ³ Agencies must resubmit to the Legislative Counsel before a rule can be adopted if the rule's text changes, for example in response to public comments. *See id.* § 233B.063(2). Interestingly, Nevada statutes require each agency to reimburse the Legislative Counsel Bureau for the cost of the examination.
- ⁴ *Id.* § 233B.063.
- ⁵ *Id.* §§ 233B.066, 266B.067. Note that emergency regulations are not exempt from the required statement of economic effects. *Id.* § 233B.066(2). A regulation cannot become effective unless an agency submits the informational statement. *Id.* § 233B.0665.
- ⁶ *Id.* §§ 233B.067(3)-(5).
- ⁷ *Id.* § 233B.0675.
- ⁸ S.B. 267 (Nev. 2009), amending NEV. REV. STAT. § 233B.0675; *see also* Hearing on S.B. 267 before the S. Comm. on Gov't Affairs (Mar. 30, 2009) (testimony of Brenda Erdoes, legislative council) (explaining the legislation "flip-flops" the voting procedure). But under NEV. REV. STAT. § 233B.0681, the Commission may waive review for administrative convenience or necessity.
- ⁹ NEV. REV. STAT. § 233B.0681.
- ¹⁰ *Id.* § 233B.050.
- ¹¹ *See* ATTORNEY GENERAL, ADMINISTRATIVE RULEMAKING: A PROCEDURAL GUIDE (6th ed., 2007) for more on when temporary regulations are issued instead of permanent regulations, and how long temporary regulations stay in effect.
- ¹² *Id.*; NEV. REV. STAT. § 233B.063(3).
- ¹³ NEV. REV. STAT. § 233B.0633.
- ¹⁴ *Id.* § 233B.0608 (also requiring a determination of the likeliness of a direct and significant economic burden or restriction on operation, and a description of methodology); *see also id.* § 233B.0609.
- ¹⁵ *Id.* § 233B.105.
- ¹⁶ ADMINISTRATIVE RULEMAKING, *supra* note 11, at 20 n.16; *see* Survey from Debra L. Corp, Legal Division, Legis. Counsel Bureau (2009, on file with author).
- ¹⁷ ADMINISTRATIVE RULEMAKING, *supra* note 11, at 20.
- ¹⁸ *Id.*
- ¹⁹ Erdoes testimony, *supra* note 8.
- ²⁰ *See, e.g.,* Minutes of Legislative Comm'n and Subcomm. Meetings, *available at* <http://www.leg.state.nv.us/74th/interim/Scheduler/committeeindex.cfm?ID=10092>; <http://www.leg.state.nv.us/interim/75th2009/Committee/Scheduler/committeeindex.cfm?ID=14>.

- ²¹ Hearing before the S. Comm. on Gov't Affairs on S.B. 267 (Apr. 1, 2009) (statement of Senator Townsend).
- ²² Hearing before the S. Comm. on Legis. Ops. and Elections (Mar. 27, 2007).
- ²³ The bills were widely supported by Nevada unions, the Nevada Taxpayers Association, the local ACLU, and editorial pages. *See* Hearings from Mar. 30, 2009 (before Senate) and May 4, 2009 (before Assembly Comm. on Gov't Affairs); *Regulatory Reform*, LAS VEGAS REVIEW-JOURNAL, May 6, 2009. S.B. 17 (Nev. 2005) required a dedicated Subcommittee to Review Regulations, and other laws in 2007 and 2009 focused on deadlines and transparency.
- ²⁴ Hearing before the Assembly Comm. on Gov't Affairs (May 4, 2009) (testifying based on investigation by Brenda Erdoes).
- ²⁵ *See* Brenda Erdoes, Administrative Regulations Filed with the Legislative Commission (2005) (showing in some years between 2000 and 2004, up to 78% of regulations were not reviewed).
- ²⁶ Townsend testimony, *supra* note 21.
- ²⁷ Hearing before S. Comm. on Legis. Ops. & Elections (Feb. 15, 2005) (statement of Senator Hardy).
- ²⁸ *See* <http://www.leg.state.nv.us/register/Indexes/RegsReviewed.htm> (where rule informational statements are available).
- ²⁹ NEV. REV. STAT. § 233B.0603(2).
- ³⁰ ADMINISTRATIVE RULEMAKING, *supra* note 11, at Appendix.
- ³¹ Hardy testimony, *supra* note 27. In 2005, a requirement for agencies to identify the methodology of their small business impact statements was added, NEV. REV. STAT. § 233B.0608(3), but Hardy's concerns could apply with equal force to the economic impact statements.
- ³² Survey from Corp, *supra* note 16.

New Hampshire

New Hampshire’s courts and its governors have both kept the legislature from claiming veto power over agency regulations.

History of New Hampshire’s Process

In 1981, at the request of the legislature, New Hampshire’s Supreme Court issued a non-binding advisory opinion on the constitutionality of a proposed legislative veto. The Court found that to some extent, the legislature may condition its grants of rulemaking authority, and a legislative veto is “not *per se* unconstitutional.” But any definitive review taken by only a legislative committee and not involving the executive branch is problematic: “this wholesale shifting of legislative power to such small groups in either house cannot fairly be said to represent the ‘legislative will.’” On the other hand, allowing a committee to temporarily suspend rules seemed fine to the Court.¹

“We’re not ‘professional legislators.’ We don’t need anything in New Hampshire to say let’s look at small business; we’re doing that now.”

—New Hampshire Senate Majority Leader Robert Clegg

The Joint Legislative Committee on Administrative Rules (“JLCAR”) was established in 1983, with suspension powers but no direct legislative veto. However, in 2005, the legislature tried to expand JLCAR’s ability to block regulatory proposals. Governor John Lynch vetoed the plan, saying “[t]he Bill would add another layer of legislative oversight to our already cumbersome administrative rulemaking process.”²

In 2006, the U.S. Small Business Regional Advocate for New England tried to push forward a regulatory flexibility act in New Hampshire. The Senate Majority Leader, Republican Robert Clegg, resisted, claiming “There’s no need for it. We already have all the bases covered. . . . We’re very close to the communities. We’re not ‘professional legislators.’ We don’t need anything in New Hampshire to say let’s look at small business; we’re doing that now.”³

New Hampshire’s Process on Paper

Fiscal Impact Statements: After a rule is drafted, the agency must obtain a fiscal impact statement from the Legislative Budget Assistant.⁴ Statements are not limited to dollar amounts,⁵ and must consider both short- and long-term fiscal consequences.⁶ The statement must include:⁷

- a narrative stating the costs and benefits to citizens and to government;
- a conclusion on the cost or benefit to the state general fund;
- a comparison of the cost of the proposed rule with the cost of any existing rule; and
- an analysis of the general impact of the proposed rule upon any independently owned businesses, including a description of the specific reporting and recordkeeping requirements upon small businesses which employ fewer than ten employees.

The statement is published as part of the rule’s public notice,⁸ and is subject to public comment.⁹

Legislative Review: Rules cannot take effect unless they are submitted to the Joint Legislative Committee on Administrative Rules (“JLCAR”), which is staffed by the Office of Legislative

Services.¹⁰ JLCAR meets at least once per month and, on its own initiative, may hold public hearings as well as consult with standing legislative committees.¹¹

Once a final rule is filed with Legislative Services, JLCAR usually has forty-five days to review and take action; otherwise the rule is automatically approved.¹² JLCAR can choose to approve a rule, conditionally approve a rule (conditioned on the agency making amendments), or preliminarily object.¹³ Because JLCAR may only vote once on an objection,¹⁴ Legislative Services can notify agencies of potential objections in advance of JLCAR's scheduled hearing.¹⁵

JLCAR has no veto power, but may object to a proposed rule as:¹⁶

- beyond the authority of the agency;
- contrary to the intent of the legislature;
- determined not to be in the public interest; or
- deemed to have a substantial economic impact not recognized in the fiscal impact statement.

Agencies must respond in writing to a preliminary objection if they want to pursue that rule. If JLCAR makes a final objection, the burden of proof shifts to the agency at any subsequent action for judicial review or enforcement of the rule. JLCAR may also effectively suspend a rule's adoption by referring its objections to the full legislature as a joint resolution.¹⁷ Such resolutions are subject to the governor's veto.

Inaction: JLCAR may petition agencies to adopt a rule for which they have unexercised rulemaking authority.¹⁸ If that agency fails to commence a rulemaking within a year of a JLCAR petition, JLCAR may file legislation to repeal that agency's rulemaking authority.¹⁹

Expedited Repeals: Rulemakings to repeal existing regulations may move through an expedited process. Under this structure, no fiscal impact statement is required, and JLCAR's review is limited to objections for authority, legislative intent, and procedural compliance. If JLCAR objects to an expedited repeal, the repeal cannot be adopted unless the agency goes through the standard rulemaking process.²⁰

Sunsets: All rules automatically sunset after eight years. However, agencies are permitted to adopt identical rules,²¹ and are encouraged to initiate the replacement rulemaking before the existing rule expires, to allow adequate time for JLCAR review.²²

New Hampshire's Process in Practice

JLCAR Review: Since its creation in 1983, JLCAR has objected to 143 rules.²³ JLCAR has subsequently introduced joint resolutions for some, but not all of its objections.²⁴ JLCAR has defined some of its vague criteria for objection that were set forth by the statute. For example, a rule is "not in the public interest" if it is not responsiveness to public comments or public need (on issues such as clarity), or if its structure is not likely to result in uniform application and enforcement.²⁵

JLCAR tries to keep policy and politics out of its hearings, restricting debates to legal issues—thorny policy issues are "not a decision that a majority of six people on this committee can make," according to JLCAR's current chair.²⁶ Still, some votes inevitably break down along party lines.²⁷

JLCAR may hold hearings on existing rules, but this is rarely done.²⁸

Fiscal Impact Statements: Fiscal impact statements are, as their name should imply, “limited to fiscal impact.”²⁹ Though level of detail somewhat varies depending on the data provided by agencies, preparation by the Legislative Budget Assistant keeps statements relatively uniform.³⁰ The Budget Assistant tries to complete statements within ten working days of receiving the agency’s submission.³¹ Indirect costs and benefits are not usually considered,³² and while a fiscal impact statement must include costs and benefits, “it does not actually weight costs and benefits.”³³

Some statements can be quite sparse. For example, the Public Utilities Commission proposed interim rules for administering the proceeds from a greenhouse gas emissions auction. Even though the rule defined key terms like “cost effective” technologies, the fiscal impact statement attributed no costs or benefits to the rule, since it merely implemented a statute.³⁴ (JLCAR approved the interim rules.³⁵) Other estimates include more details, such as high and low cost estimates, as well as quantified, monetized environmental benefits in terms of additional incomes from the resources, fishing, and recreational opportunities of more diverse aquatic ecosystems.³⁶

Analysis and Grade

Though Governor Lynch called the administrative process “cumbersome,” and the scope of fiscal statements certainly could be broader, New Hampshire’s review structure is reasonable and appropriate to its resources. The legislative committee has interpreted its statutory authority to permit consideration of only substantive review criteria, and its ability to consider the public need and analyze the fiscal statements give it the potential to help calibrate regulations. Reviews are consistent and mostly transparent. While the state lacks a process to help coordinate inter-agency conflicts, the statute does create some mechanisms to combat agency inaction. Deadlines occasionally get waived but do exist, and the review process does not needlessly delay or deter rulemaking.

On the other hand, the standard-less sunset provision is not an effective mechanism for periodic review. Analytical requirements also need improvement. Though benefits are sometimes considered, there is no real consideration of alternatives, and ultimately the analysis does not weigh costs and benefits.

New Hampshire earns a B-.

Notes

- ¹ Opinion of the Justices, 431 A.2d 783, 789 (N.H. 1981).
- ² *Lynch Vetoes Bill on Agency Rules*, AP STATE & LOCAL WIRE, July 5, 2005.
- ³ Denis Paiste, *Federal Official: Small Business Gets Short Shrift*, THE UNION LEADER, Jan. 16, 2006.
- ⁴ N.H. REV. STAT. ANN. § 541-A:5.
- ⁵ *Id.* § 541-A:5(IV) (but requiring detail on whatever methodology is used to establish any such dollar amounts).
- ⁶ *Id.* § 541-A:1(VII).
- ⁷ *Id.* §§ 541-A:5(IV)(a)-(e).
- ⁸ *Id.* § 541-A:6(I)(i).
- ⁹ *Id.* § 541-A:11.
- ¹⁰ *See id.* § 541-A:2; *see also* New Hampshire General Court, Administrative Rules, <http://www.gencourt.state.nh.us/rules/index.html>. JLCAR is a joint House-Senate committee, with ten regular members and ten alternates. *See* N.H. REV. STAT. ANN. § 541-A:2 for membership details. The Director of the Office of Legislative Services (“OLS”) also has oversight responsibilities over rule filing by agencies with OLS, including publication of rulemaking notices in the *N.H. Rulemaking Register*, and preparing adopted rules for publication. *See id.* § 541-A:6-19(a).
- ¹¹ N.H. REV. STAT. ANN. § 541-A:2 contains the organic statutory authority for JLCAR.
- ¹² *Id.* § 541-A:13(I); *but see id.* § 541-A:12(I-a).
- ¹³ *Id.* §§ 541-A:13(II)(c)(1)-(3).
- ¹⁴ *Id.* § 541-A:13(I).
- ¹⁵ *Id.* §§ 541-A:13(II)(a), 541-A:11.
- ¹⁶ *Id.* §§ 541-A:13(19), 541-A:13(IV)(a)-(d).
- ¹⁷ *Id.* § 541-A:13(VII).
- ¹⁸ *Id.* §§ 541-A:4, 541-A:2(IV)(a).
- ¹⁹ *Id.* § 541-A:4(II).
- ²⁰ *Id.* § 541-A:19-a.
- ²¹ *Id.* § 541-A:17(I).
- ²² *Id.* § 541-A:20-a.
- ²³ Office of Legis. Serv., Final Objections by the JLCAR, http://www.gencourt.state.nh.us/rules/jlcar/final_objections.htm.

- ²⁴ See Garry Rayno, *Plan for Bids on Child Insurance Rejected*, THE UNION LEADER, Sept. 2, 2004 (noting that JLCAR introduced a joint resolution on a competitive bid rule but not on a Medicaid co-pay rule, which it also formally objected to).
- ²⁵ Office of Legis. Serv., Rules for the JLCAR, <http://www.gencourt.state.nh.us/rules/jlcar/rules.htm>.
- ²⁶ Tom Fahey, *LLC Tax Collection Rules OK'd*, THE UNION LEADER, Feb. 20, 2010 (quoting Rep. Maurice Pilotte).
- ²⁷ *Id.* (reporting a 6-4 JLCAR vote on party lines).
- ²⁸ Survey from Scott F. Eaton, Admin. Rules Dir., Office of Legis. Serv. (2009, on file with author).
- ²⁹ *Id.*
- ³⁰ *Id.*
- ³¹ OFFICE OF LEGIS. SERV., NEW HAMPSHIRE DRAFTING AND PROCEDURE MANUAL 27 (2001).
- ³² Survey from Eaton, *supra* note 28.
- ³³ Minutes of MSAPA Drafting Committee Meeting, June 2008 (reporting survey from New Hampshire).
- ³⁴ Public Utilities Comm'n, Fiscal Impact Statement Request Form for the Adoption of 2600 Rule on "Greenhouse Gas Emission Reduction Fund" (2008).
- ³⁵ *Carbon Nets NH \$4.02 Million*, THE UNION LEADER, Dec. 20, 2008.
- ³⁶ Dept. of Envtl. Serv., Request for Fiscal Impact Statement on Protecting Instream Flow on Designated Rivers (2000), http://des.nh.gov/organization/divisions/water/wmb/rivers/instream/documents/fis_11142k.pdf.

New Jersey

Despite constitutional review authorities and countless analytical requirements, New Jersey “[a]gencies march on, writing regulations regardless of their political or procedural environment.”¹

History of New Jersey’s Process

The 1981 passage of the Legislative Oversight Act—with the legislature dramatically overriding the governor’s veto of the bill—was “noteworthy and short lived.”² In 1982, the state Supreme Court handed down two rulings on the same day. While the second upheld a limited, context-specific legislative veto of agency project approvals,³ the first found that a general legislative veto was an unconstitutional violation of the presentment clause and the separation of powers. Noting that not all legislative input impermissibly intrudes on the executive’s rulemaking authority, the Court did leave some room for legislative oversight.⁴

The legislature did not want to take any more constitutional chances, and sought an amendment in 1985. Though that attempt failed, the legislature won its ballot measure in 1992 by a wide margin.⁵ The constitution now provides for legislative review by concurrent resolution.

Other efforts to reform the rulemaking process have “evolved through fits and starts,” and over the last twenty years have focused on multiplying the number of required impact statements.⁶

New Jersey’s Process on Paper

Legislative Review: The state constitution provides that the legislature may review a rule’s consistency with legislative intent. Every proposed rule is submitted by the Office of Administrative Law to the legislature, and is immediately referred to the appropriate standing committees.⁷ By a concurrent resolution, the legislature can send a rule back to the agency and the governor. The agency then has thirty days to amend or withdraw the rule; if it does not, the legislature may invalidate the rule by a majority vote.⁸

Impact Analyses: New Jersey features a truly dizzying array of required impact statements, including a socio-economic impact statement, a jobs impact statement,⁹ a regulatory flexibility analysis,¹⁰ a state mandate flexibility analysis for small municipalities,¹¹ an agriculture industry impact statement,¹² a housing affordability impact statement, a smart growth development impact statement,¹³ and a cost-benefit analysis to support any rules that exceed federal requirements.¹⁴

Executive Review: The Office of Administrative Law approves all filings, mostly for procedural compliance.¹⁵ The Smart Growth Ombudsman, appointed by the governor to serve in the Department of Community Affairs, must approve all rules before their proposal, checking for their consistency with the State Development and Redevelopment Plan.¹⁶

Sunsets and Inaction: Every rule expires every five years; agencies may readopt rules, and the governor may extend their expiration date.¹⁷

If an agency fails to meet the time frames for responding to a public petition, the Office of Administrative Law can schedule a public hearing on the petition.¹⁸

New Jersey’s Process in Practice

Executive Review: Considering that New Jersey is one of the few states with a unitary executive branch, it is perhaps surprising that there is no substantive regulatory review exercised by the governor or attorney general. The Office of Administrative Law conducts some review for

statutory authority.¹⁹

Legislative Review: Legislative review is rare. Over the past twelve years, only about thirteen concurrent resolutions on rule review are even introduced in the average legislative session; only three resolutions to send a rule back to an agency have passed during that time, and none were followed up by a vote to actually invalidate the rule.²⁰

Inaction: The required deadlines for responding to public petitions for rulemaking have had little effect on the rate with which agencies approve petitions and begin rulemakings.²¹

Impact Statements: The “depth and complexity of analysis varies with the subject of the rulemaking and the resources available to the proposing agency.”²² Some impact statements may discuss indirect costs and benefits, but health benefits, for example, are never monetized.²³

In 2009, Debra Borie-Holtz and Stuart Shapiro published a study of 1,707 New Jersey regulations issued during two separate two-year periods (1998-1999 and 2006-2007). Of the thirty rules that had attracted a substantial number of public comments, only four had impact statements that contained actual numbers to describe economic impacts, and even those had quite limited presentations. The rest featured, at most, vague and qualitative discussions, exemplified by one excerpt: “This may have a negative impact on those truckers and shippers since it may take longer to arrive at their destinations, thus making it more costly or it could cost more in tolls compared to some parallel routes.”²⁴

Analysis and Grade

New Jersey’s process on paper does not translate into effective practice. The criteria for legislative review are clear, and the enforceable deadlines to respond to public petitions have the potential to help combat agency inaction (even if that potential has not yet been fully realized). But otherwise, New Jersey fails to achieve this report’s guiding principles. The state wastes resources and risks causing delays by requiring multiple analyses that have no real effect on rulemaking decisions. Analyses are conducted post hoc, contain little detail, and at best give the illusion of attention to benefits and distributional impacts. Legislative review is too limited and too rare to help calibrate rules. The public does not meaningfully participate in reviews, and the pro forma re-adoption of rules triggered by a sunset provision is not an effective way to study the ongoing need of existing regulations. New Jersey’s guiding principles grade is a D.

“Substantive changes to agency proposals as a result of comments are rare. Impact analyses are pro forma at best. Legislative review has not been used by the New Jersey state legislature to invalidate an executive branch regulation since 1996.”

—Debra Borie-Holtz
and Stuart Shapiro

Notes

- ¹ Debra Borie-Holtz & Stuart Shapiro, *In the Regulatory Weeds of the Garden State: Lessons from New Jersey's Administrative Process* 26 (Policy Integrity Working Paper No. 3, 2009).
- ² *Id.* at 9.
- ³ *Enourato v. Building Authority*, 448 A.2d 449 (N.J. 1982) (upholding a legislative veto limited to building projects that would require continuing appropriations from the legislature, so legislative oversight was appropriate in supporting the statutory scheme, and the governor had full control over the initial decisionmaking).
- ⁴ *General Assembly v. Byrne*, 90 N.J. 376 (1982).
- ⁵ Borie-Holtz & Shapiro, *supra* note 1, at 10.
- ⁶ *Id.* at 8.
- ⁷ N.J. STAT. ANN. § 52:14B-4.1.
- ⁸ N.J. CONST., art. V § IV(6); *see also* N.J. STAT. ANN. § 52:14B-4.3.
- ⁹ N.J. STAT. ANN. § 52:14B-4(a)(2).
- ¹⁰ Agencies must accomplish statutory objectives while minimizing adverse economic impacts on small businesses. *Id.* § 52:14B-18. In proposing a rule that will require small business compliance, agencies must issue a regulatory flexibility analysis that estimates the number of small businesses affected and compliance costs, *id.* § 52:14B-19, quantifying impacts where practical and reliable, *id.* § 52:14B-21.
- ¹¹ The requirements are similar to the regulatory flexibility analysis, except regulatory exemptions should only be created if public health, safety, and general welfare is not thereby endangered. *Id.* § 52:14B-25.
- ¹² *Id.* § 4:1C-10.3.
- ¹³ *Id.* § 52:14B-4.1b. The smart growth impact statement is also required under Exec. Order No. 4 (2002).
- ¹⁴ N.J. STAT. ANN. § 52:14B-23.
- ¹⁵ Survey from Mark J. Stanton, Div. of Admin. R. Manager, Office of Admin. Law (2009, on file with author).
- ¹⁶ N.J. STAT. ANN. § 52:27D-10.4(d).
- ¹⁷ *Id.* § 52:14B-5.1 (largely mirroring Exec. Order No. 66 (1979)). On August 2, 1993, Exec. Order No. 97 directed a review of existing regulations to maximize efficiency and eliminate duplicative regulations, but no consequential action followed. Borie-Holtz & Shapiro, *supra* note 1, at 8.
- ¹⁸ N.J. STAT. ANN. § 52:14B-4(f).
- ¹⁹ Survey from Stanton, *supra* note 15.
- ²⁰ Borie-Holtz & Shapiro, *supra* note 1, at 25-26.

²¹ *Id.* at 24.

²² Survey from Stanton, *supra* note 15.

²³ *Id.*

²⁴ Borie-Holtz & Shapiro, *supra* note 1, at 22-23.

New Mexico

New Mexico does not have any requirement for centralized, substantive review of new rules.¹ In fact, New Mexico has no uniform rulemaking procedure: when enacted, the state Administrative Procedure Act was not self-enforcing on agencies.² “The plan was for agencies to ‘opt in,’ but that never really happened”;³ instead, some 226 agencies established their own administrative procedures for rulemaking.⁴ As a result, “[a]gencies are solely responsible for the content of their rules,” and agencies have all set up different processes for internally vetting rules: “Some require legal counsel review, others do not. Some agencies have internal review committees, others do not. . . . Some agencies may perform [economic analysis,] but there is not a uniform way.”⁵

Though one statutory provision (still on the books from the largely repealed Sunset Act) does require agencies to review their rules every three years and file annual reports on this periodic review with the Legislative Finance Committee and the Department of Finance and Administration,⁶ there is no real external review of an agency’s compliance with this provision.⁷

In 2005, the legislature created a Small Business Regulatory Advisory Commission to review rules that might adversely affect small businesses. Agencies were also instructed to consider methods to accomplish statutory objectives while minimizing adverse effects,⁸ including periodic reviews of existing rules to reduce economic burdens on small business.⁹ But the Commission, which consists of nine small business owners appointed variously by the governor, Senate leadership, and House leadership,¹⁰ reportedly has not met in at least two years.¹¹ For example, one submission from the Environment Department in 2009 noted the agency had complied with its obligations but “[t]o date, the Commission has not responded.”¹² Even when the Commission was technically active, it did not review many rules. Administrative Law Division Director John Martinez estimates that “less than 10 rules were actually reviewed by the SBRAC in the short time that it met regularly. During that time period, over 800 rule actions took place.”¹³

Since no review structure really exists in New Mexico, not surprisingly its Guiding Principles Grade is a D-.

Notes

- ¹ Survey from John Martinez, Director of Administrative Law Division, New Mexico Commission of Public Records (2010, on file with author).
- ² See N.M. STAT. § 12-8-2, defining “agency” to mean those which are “specifically placed by law under the Administrative Procedure Act,” and *id.* § 12-8-23, saying the provisions apply to agencies made subject to its coverage by law.
- ³ Survey from Martinez, *supra* note 1.
- ⁴ See Presentation by Louis W. Rose, *Closer to Home: The New Mexico Picture* (2008).
- ⁵ Survey from Martinez, *supra* note 1.
- ⁶ N.M. STAT. § 12-9-22.
- ⁷ Survey from Martinez, *supra* note 1.
- ⁸ N.M. STAT. § 14-4A-4.
- ⁹ *Id.* § 14-4A-6.
- ¹⁰ *Id.* § 14-4A-5. The Commission is administratively attached to the Economic Development Department.
- ¹¹ Survey from Martinez, *supra* note 1.
- ¹² See Env’t Dept., Triennial Review Notice of Compliance (2009), available at ftp://ftp.nmenv.state.nm.us/www/HearingOfficer/TriennialReview/05_NoticeComplianceSBARRA02-27-09.pdf.
- ¹³ Survey from Martinez, *supra* note 1.

New York

Historically, some have perceived New York's powerful executive rule review office as the place where regulations go to die, and the office has had little success motivating agencies to prepare detailed, balanced cost-benefit analyses. Last year, the state began an experiment with a new, aggressive retrospective review process.

New York's Process on Paper

Impact Analyses: Public notice of a proposed rule must include a regulatory impact statement, a regulatory flexibility analysis, and a rural area flexibility analysis. With a few exceptions,¹ regulatory impact statements must contain a statement of needs and benefits, a statement or best estimate of compliance and administrative costs, a statement indicating whether any significant alternatives were considered, and an explanation if the rule exceeds existing federal standards.² Agencies must assess and respond to any public comments received that project significantly different cost estimates.³

Generally, agencies are instructed to “avoid undue deleterious economic effects or overly burdensome impacts” on the government or any citizens, particularly citizens in rural areas.⁴ Agencies must conduct regulatory flexibility analysis for small businesses and local governments, as well as for rural areas. Adverse economic impacts on such groups should be avoided by creating exemptions, “so long as the public health, safety, or general welfare is not endangered.”⁵ Analysis must estimate the number of affected entities, estimate their compliance costs (in quantitative terms if quantification is practicable and reliable), and assess the economic and technological feasibility of compliance.⁶

Agencies must also conduct a jobs analysis, minimizing any unnecessary impacts on employment, and describing any substantial adverse impacts (defined as a loss of more than one hundred full-time jobs). The Commissioners of Labor and Economic Development may review rules and, if they both concur, may require an agency to delay its rulemaking for up to ninety days to perform additional analysis or consider recommendations to minimize impacts.⁷

The Governor's Office of Regulatory Reform (see below) can require any agency to prepare a cost-benefit analysis, risk assessment, jobs analysis, or impact analysis for public health, safety, or welfare.⁸

Legislative Review: A joint Administrative Regulations Review Committee can examine any adopted or proposed rule for its statutory authority, legislative intent, impact on the economy, impact on the government, impact on affected persons, or any other appropriate issues.⁹ From time to time, the committee should report its findings to the governor and the legislature, and make recommendations to agencies.¹⁰

Executive Review: Governor George Pataki made regulatory reform a top priority and so created the Governor's Office of Regulatory Reform (“GORR”) in 1995 with Executive Order 20.¹¹ Each successive governor so far has renewed the Order.¹²

Before proposing a new rule, agencies must submit the regulation and all analyses to GORR. If GORR determines a submission is not complete, it can return the rulemaking package to the agency with directions to amend or prepare additional analysis. GORR also reviews submission according to substantive criteria, including consistency with authority and legislative intent, clarity, inclusion of flexible compliance methods, minimization of regulatory burdens, and whether public

benefits will outweigh the costs.

There is no deadline for GORR's pre-proposal review. GORR can recommend that the governor's senior advisors (the Secretary to the Governor, the Counsel to the Governor, the Director of State Operations, and the Director of the Division of the Budget) either approve or disapprove the rule; those officials have authority to allow or prohibit the proposed rule's publication in the *Register*. Before a final rule is published, GORR can again review the rulemaking for new information or new factors. This second review period does have deadlines, and GORR can temporarily suspend a rule's adoption to allow the same group of senior executive officials the chance to consider whether the rule should be finalized.

GORR may also issue an advisory determination on whether any agency guidance documents actually constitute rules that should be proposed and adopted through regular administrative procedures, and GORR can request that an agency initiate a policy dialogue with interested parties to start a rulemaking process.

In 1996, a New York state trial court ruled that requiring GORR's approval did not interfere with the separation of powers or the legislature's authority to prescribe the rulemaking process by statute. Three years later, the New York Court of Appeals found that plaintiffs did not have standing to sue, and the court did not address the constitutional merits of the case.¹³

Periodic Review: Every five years, agencies must either modify or justify the continuation of their existing regulations, after analyzing the continued need and legal basis, soliciting public comments, and considering changes in technology, economic conditions, or other factors.¹⁴

Under Executive Order 20, GORR is also empowered to make recommendations for simplifying regulations, to request the preparation of additional impact analyses on any existing regulation, and to propose that any agency consider amending any rule that is obsolete, harmful to the economy, or excessive in view of state and federal law.

In 2009, Governor Paterson issued Executive Order 25.¹⁵ The Order creates a "Review Committee," consisting of GORR and the Secretary to the Governor, the Counsel to the Governor, the Director of State Operations, and the Director of the Division of the Budget. The Review Committee carries out the "Review Program," an initiative established to "evaluate, reform, or repeal, where necessary, rules and paperwork requirements in order to reduce substantially unnecessary burdens, costs and inefficiencies." State agencies are required to invite public comments on whether any of the agency's existing regulations are "unnecessary, unbalanced, unwise, duplicative or unduly burdensome." Agencies must identify between two and ten rules that generated the "most widespread or substantive criticism and opposition." Agencies then consider possible amendments, and the Review Committee may direct an agency to alter, reappraise, or repeal any rule.

New York's Process in Practice

Legislative review: Despite the intention to create a joint rule review committee, in practice each house of the Legislature has its own Administrative Regulations Review Commission.¹⁶ Legislative review is advisory only¹⁷ and operates sporadically, with long periods of inactivity.¹⁸

GORR: GORR has ten analysts and four lawyers on staff.¹⁹ There are no deadlines for GORR's pre-proposal review, and GORR determines the length and depth of its review on a case-by-case basis.²⁰ In 2010, the *Times Union*, an Albany newspaper, analyzed 776 rules submitted to

GORR over a five-year period, and found that most rules took about five months to go through the executive review process (though under Governor Paterson, the average rule's review time climbed up to eight months). But some politically contentious rules get caught in the review process for over a year, sometimes held on the governor's desk even after receiving approval from GORR staff.²¹ Agencies do complain about delays and recommend that GORR adopt mandatory time frames for its reviews and triage the process so non-controversial rules move through more quickly.²²

Some agencies feel that GORR focuses more on clarifying regulatory language than on substance,²³ or that GORR's comments almost always address the contents of impact analyses and not the regulatory proposal.²⁴ Others report that GORR does inquire about statutory authority,²⁵ and GORR will substantially modify substance if they spot a legal vulnerability.²⁶ Characterizations of agency interactions with GORR run the gamut, from "cordial"²⁷ communications that mostly "seek approval,"²⁸ to more informal²⁹ or substantive collaborations earlier in the rule-drafting process.³⁰ Some agencies are reluctant to let GORR participate early in the rule-drafting process.³¹ GORR's communications with agencies are not publicly disclosed, nor are its recommendations to the governor's senior advisors.³²

Some advocacy groups feel that GORR "has been the killing field for good regulations,"³³ and at one point GORR did brag that it had led to a fifty percent decline in the issuance of new regulations.³⁴ But at least some agencies feel that the review process "works quite well."³⁵

As of 2000, GORR claimed to have saved the regulated community over \$800 million in annual compliance costs, through interventions such as rejecting a proposed rule to make buildings more earthquake resistant (on the grounds that scientific data did not support the stricter building code) and repealing archaic existing rules (like restrictions keeping hearses off certain roads).³⁶

Case Study: Hotel Evacuations

According to Robert Hahn, GORR "repealed a 1994 regulation requiring the installation of reflective signs on the *bottom* of hotel and dorm room doors to indicate the room number. The rule was a result of a suggestion from a concerned sixth grader who believed the signs would aid people crawling through the halls during an evacuation. The agency implemented the rule without any scientific evidence to show its dedication to improving safety. The repeal of this rule produced a one-time compliance cost savings of \$340,000 and annual savings of \$11,000."³⁷

Impact Statements: In 2008, GORR determined that many agency analyses were "skimpy, anecdotal and variable in quality and clarity."³⁸ Consequently, GORR revised its guidance to agencies on cost-benefit analysis, attempting to clarify when and how agencies should consider costs and benefits. Though not perfect,³⁹ the updated guidelines do instruct agencies on how to assess and quantify the direct and indirect costs and benefits of a range of regulatory alternatives.⁴⁰

GORR feels a few agencies are starting to incorporate more analysis into their regulatory decisions, but most New York agencies either do not believe they have the capacity to conduct cost-benefit analysis,⁴¹ or else do not believe that cost-benefit analysis is a useful decisionmaking tool.⁴² For its part, GORR has not been very aggressive in pushing for additional analysis: from 1996 through 2008, GORR only ever required one supplemental risk assessment.⁴³

Mostly agencies only prepare the statutorily required regulatory impact statements, and GORR works with agencies to ensure compliance with all requirements. The breadth and depth of

“In the past, and despite some guidance. . . , agency drafts analyzing costs and benefits have at times been skimpy, anecdotal and variable in quality and clarity.”

—Governor’s Office of Regulatory Reform

analysis is left up to agencies’ discretion, though GORR will look for more rigorous analysis for proposals that impact the economy, public health, or the environment.⁴⁴ Agencies analyze costs and benefits “as best we can, but we are scientists and policy experts, not accountants or statisticians.”⁴⁵ Indeed, most agencies have few or no economists, and economists are rarely involved in the preparation of impact statements.⁴⁶ Agencies report that while GORR “sometimes asks for more numbers, they don’t tell [us] what to do, they don’t challenge our numbers—they aren’t statisticians either.”⁴⁷

Regulatory impact statements do not normally compare the costs and benefits of alternative options. For example, the Department of Environmental Conservation’s impact statement on the regulation of outdoor wood boilers discussed in very broad terms the negative health effects

of smoke and pollution, but then concluded the “primary benefit” of reducing emissions would be “that the number of complaints regarding the operation of [boilers] will be significantly reduced as existing [boilers] are replaced with new, cleaner [boilers].”⁴⁸ The possible health effects of the regulation were not discussed. A more stringent regulatory option was rejected without analysis, simply “because the Department believes that the provisions of [the proposal] are [sufficiently] protective of public health.”⁴⁹

In 2010, the Public Health Council proposed new regulations requiring all public and private surf beaches and swimming facilities to maintain an on-site automated external defibrillator (“AED”) and ensure the supervision of a lifeguard trained in the use of AEDs. Benefits were simply stated as improved emergency response to sudden cardiac arrest; the agency was uncertain how many of the ninety-five surf beach operations already had AEDs.⁵⁰ In general, the Department of Health reports that health benefits are “difficult” to analyze and are quantified “very rarely at the most.”⁵¹ The rule proposal also mentioned that some beaches may voluntarily choose to provide more than one AED, but did not analyze the possible benefits of requiring multiple AEDs, nor did it analyze whether the requirement of one AED was really justified.⁵²

Executive Order 25: While Governor Paterson’s executive order won praise from the business community,⁵³ advocacy groups felt the new review process was bound to be biased in industry’s favor, giving them a second bite at the apple on every environmental and health regulation they originally opposed—according to Robert Moore, executive director of Environmental Advocates of New York, “This is going to be an unpopularity contest.”⁵⁴ And though some advocacy groups have tried to use Executive Order 25 to encourage agencies to review regulations they feel are not stringent enough or do not promote public welfare,⁵⁵ agencies understand the Order’s focus to be on streamlining, not expanding regulations.⁵⁶ Agencies also worry the new review process will waste resources, since they will “just be hearing from the same parties that we already hear from, they’re the only ones with the staff and resources to participate; the review is not going to bring new people in to the process.”⁵⁷

Analysis and Grade

Agencies seem to lack the resources necessary to produce the thorough, balanced analyses that

GORR envisions and technically requires. Part of the problem may be that agencies are already over-burdened with multiple regulatory flexibility analyses and job impact analyses. Whatever the cause, the result is an inattention to benefits and alternatives, which makes it difficult for GORR to exercise its review of whether benefits justify costs.

Historically, the focus of regulatory review in New York has been blocking burdensome rules, not calibrating regulation. Executive Order 25 is the latest incarnation of New York's biased regulatory review process. Instead of substantive standards or analysis, the Order prioritizes rules for review based on how loudly the public or regulated community has complained. Under Executive Order 25, rules are targeted for repeal, not for improvement.

While GORR does have clear, consistent criteria for the review of new rules, the absence of deadlines has sometimes delayed and politicized the review process. A lack of transparency about GORR's recommendations compounds the problem. GORR also does not have much authority to combat inter-agency conflicts. But GORR can request the initiation of a rulemaking. Though there is not much evidence of its practice, that potential to fight inaction is built into GORR's powers, and New York will get the benefit of the doubt in satisfying that guiding principle.

Through executive orders, New York has granted its executive branch tremendous review powers. GORR has undeniably had some positive influences on the rulemaking process, helping to repeal or block rules that were unsupported by science and economics. Unfortunately, GORR's promising guidance on cost-benefit analysis has not translated into consistent analytical practices, and the newly created retrospective review regime is riddled with biases. New York scores a D+.

New York should consider revising its review structure by adopting a new executive order. This report's specific recommendations to New York have been distilled into a new Draft Executive Order on Government Effectiveness, featured in the Appendix.

Notes

- ¹ N.Y. APA § 202-a(5) (2010).
- ² *Id.* § 202-a(3).
- ³ *Id.* § 202.
- ⁴ *Id.* § 202-a(1).
- ⁵ *Id.* § 202-b(1); *see also id.* § 202-bb(1).
- ⁶ *Id.* § 202-b(2).
- ⁷ *Id.* § 201-a.
- ⁸ Exec. Order 20, Nov. 30, 1995, *available at* <http://www.gorr.state.ny.us/RegulatoryReform/Executive%20Order20.htm>.
- ⁹ N.Y. LEGIS. §§ 86, 87(1).
- ¹⁰ *Id.* § 88.
- ¹¹ Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 29 J. LEGAL STUD. 873, 903 (2000).
- ¹² Governor Eliot Spitzer renewed Executive Order 20 with his Executive Order 5 in January 2007; Governor David Paterson renewed Executive Order 20 with his Executive Order 1 in March 2008.
- ¹³ *Rudder v. Pataki*, 93 N.Y.2d 273 (1999).
- ¹⁴ N.Y. APA § 207.
- ¹⁵ Exec. Order 25, Aug. 6, 2009, *available at* http://www.state.ny.us/governor/executive_orders/xeorders/eo_25.html.
- ¹⁶ Survey from Amelia Stern, Acting Director of GORR (2009, on file with author).
- ¹⁷ Letter from Ruben Diaz, Assembly Chair of the ARRC, Aug. 2, 2006, *available at* <http://assembly.state.ny.us/comm/ARRC/20060802> (“The Assembly Chair of ARRC frequently comments on proposed rules that fail to follow the requirements of state law or to serve the public interest. While agencies are usually not required to follow ARRC’s recommendations, many times common sense prevails and the problems with the rules are fixed.”).
- ¹⁸ *See* Assembly ARRC, <http://assembly.state.ny.us/comm/?sec=mem&id=44> (last visited July 16, 2010).
- ¹⁹ GORR, Staff Directory, <http://www.gorr.state.ny.us/AgencyInfo/GORRStaffDirectory2.htm>. In 2003, GORR reported 40 full-time employees and a budget of \$3.7 million. PAUL TESKE, REGULATION IN THE STATES 211, 213-14 (2004).
- ²⁰ Survey from GORR, *supra* note 16.
- ²¹ Brian Nearing, *Lake George Stream Rules Float in Limbo*, TIMES-UNION, Aug. 6, 2010.

- ²² Survey from Kathleen L. Martens, New York Office of Parks, Recreation, and Historical Preservation associate counsel (2010, on file with author).
- ²³ Survey from Joan Connell, New York State Department of Labor deputy counsel (2010, on file with author).
- ²⁴ Survey from Alan Black, New York State Department of Transportation legal assistant (2010, on file with author).
- ²⁵ Interview with Jean Quarrier, New York State Department of Health (2010, on file with author).
- ²⁶ Survey from OPRHP, *supra* note 22.
- ²⁷ Interview with Health, *supra* note 25.
- ²⁸ Survey from OPRHP, *supra* note 22.
- ²⁹ Survey from Transportation, *supra* note 24.
- ³⁰ *See* Survey from New York Insurance Association (2009).
- ³¹ Interview with GORR officials, Sept. 10, 2008.
- ³² Survey from GORR, *supra* note 16.
- ³³ Brian Nearing, *Paterson Bottling Up Mercury Ban at Plant*, Times-Union, May 22, 2010 (quoting Blair Horner, legislative director of the New York Public Interest Research Group).
- ³⁴ TESKE, *supra* note 19, at 211, 213-14.
- ³⁵ Survey from Labor, *supra* note 23.
- ³⁶ Hahn, *supra* note 11, at 904; *but see id.* at 908 (cautioning on the interpretation of these figures).
- ³⁷ *Id.* at 904.
- ³⁸ GORR, COST-BENEFIT ASSESSMENT IN RULEMAKING: A GUIDE FOR STATE AGENCIES 3 (2008); *but see* Survey from N.Y. Ins. Assoc. *supra* note 30 (reporting that it regularly reviews impact statements and finds them helpful to evaluating its position on a regulation).
- ³⁹ *See* Institute for Policy Integrity Comments on GORR's Cost-Benefit Guidelines (2008), *available at* <http://policyintegrity.org/projects/documents/CommentsonGORRsGuidelines.pdf>.
- ⁴⁰ *See* GORR, A GUIDE FOR STATE AGENCIES, *supra* note 38.
- ⁴¹ Interview with GORR, *supra* note 31.
- ⁴² *See* Interview with New York State Department of Environmental Conservation officials, Sept. 10, 2008.
- ⁴³ Interview with GORR, *supra* note 31.
- ⁴⁴ Survey from GORR, *supra* note 16.
- ⁴⁵ Interview with Health, *supra* note 25.
- ⁴⁶ Survey from Transportation, *supra* note 24; Survey from OPRHP, *supra* note 22; Interview with DEC, *supra* note 42.

- ⁴⁷ Interview with Health, *supra* note 25.
- ⁴⁸ N.Y. Dep't of Env'tl. Conserv., Regulatory Impact Statement 6 NYCRR 247, Outdoor Wood Boilers (2009), *available at* <http://www.dec.ny.gov/regulations/64478.html>.
- ⁴⁹ *Id.*
- ⁵⁰ N.Y. Public Health Council, Regulatory Impact Statement on Ocean Surf Bathing Beaches and Automated External Defibrillators (AEDs), *available at* http://www.health.state.ny.us/.../2010-04-21_bathing_beaches_and_aeds.pdf.
- ⁵¹ Interview with Health, *supra* note 25.
- ⁵² *See* Regulatory Impact Statement, *supra* note 50 (considering not having an AED requirement, and rejecting that alternative without much explanation).
- ⁵³ Jonathan D. Epstein, *Paterson Orders Agencies to Cut Red Tape that Chokes Businesses*, BUFFALO NEWS, Aug. 8, 2009 (“We applaud Governor Paterson’s effort to eliminate regulations that make it hard for businesses in New York to create jobs,” said Kenneth Adams, president and CEO of the Business Council of New York State).
- ⁵⁴ Brian Nearing, *Rule Changes Feared*, TIMES-UNION, Aug. 14, 2009.
- ⁵⁵ Advocacy groups have sent in hundreds of comments on Executive Order 25, *see, e.g.*, listing of 597 e-mail from Environmental Advocates of New York to DEC, *available at* <http://www.dec.ny.gov/regulations/60768.html>.
- ⁵⁶ Interview with Health, *supra* note 25.
- ⁵⁷ *Id.*

North Carolina

North Carolina’s regulatory review process is run by a unique entity that is not quite executive, not quite legislative, not quite independent, and of debatable constitutionality.

History of North Carolina’s Process

In 1977, the North Carolina General Assembly established an Administrative Rules Review Committee, composed of nine legislators.¹ That original incarnation could only recommend legislation to fix issues in proposed regulations.² After several more iterations of legislative oversight, in 1985 the legislature created an appointed body, the Rules Review Commission (“RRC”).³ The RRC’s creation was supposed to be contingent on an opinion from the North Carolina Supreme Court approving its constitutionality, but no opinion was ever issued,⁴ and the General Assembly soon stepped over conditional approval and permanently established the RRC.⁵

Despite an opinion from the state’s Attorney General that augmenting the RRC’s authority—for example, letting it indefinitely delay rules—would violate the separation of powers,⁶ the General Assembly did expand the RRC’s authority, essentially giving it veto power in 1995.⁷

In 2006, the state Supreme Court heard a case challenging the constitutionality of the structure but decline to rule on it, claiming challengers were estopped from raising the issue because they had not presented constitutional objections at the appropriate time in the proceedings.⁸

North Carolina’s Process on Paper

Fiscal Notes: Different fiscal notes are required in different circumstances; in all cases, the Office of State Budget Management (“OSBM”) plays a role in approval.

If a proposed rule would change the expenditure or distribution of state funds, an agency must submit a fiscal note on such effects to the OSBM, which certifies whether the necessary funds are available.⁹ If a proposed rule would have financial impacts on local government, an agency must submit a fiscal note on such effects to the OSBM, the governor, and local government associations.¹⁰ The governor reviews these rules, weighing potential costs against the risks to the public of inaction.¹¹

If a proposed rule would have a substantial economic impact—defined as an aggregate financial impact on all persons of more than \$3 million over a twelve-month period—agencies can either obtain a fiscal note from the OSBM (which is given ninety days to prepare the statement) or can submit a fiscal note to the OSBM for approval (which is given fourteen days to review submitted statements). These fiscal notes must describe all affected people, estimate the compliance costs, and describe benefits.¹²

Rules Review Commission: The RRC consists of five members appointed by the Senate and five appointed by the House. Commission members can be officers or employees of the state,¹³ but cannot be legislators.¹⁴ The statute is silent on grounds and process for dismissal of members.¹⁵ Though in some respects the RRC is treated as an executive agency, and it is staffed by the Office of Administrative Hearings, the appointment process has led to some debate over whether the RRC is an administrative or a legislative body.¹⁶ Given this debate and the fact that Commission members tend to be drawn from the public, for these purposes the RRC will be labeled as an independent review body.

Final rules must be submitted to and approved by the RRC before they can take effect.¹⁷ The RRC

reviews rules for whether they are within delegated authority, clear and unambiguous, necessary to implement the law, and adopted according to required procedures. The RRC does not review the quality or efficacy of the rule.¹⁸ The RRC does not perform any economic analysis, but can ask the OSBM to determine if a rule has a substantial economic impact and so requires a fiscal note.¹⁹

Within certain deadlines,²⁰ the RRC must either approve a rule, object to a rule, or extend its review period for seventy days to gather more information.²¹ If the RRC extends its review, it can call for a public hearing, which extends review by an additional seventy days. Ultimately, the RRC must either approve or object to every rule.²²

If the RRC objects to a rule, the agency must either amend the rule and submit a revised version, or else inform the RRC that it refuses to change the rule.²³ If an agency explains its refusal but the RRC still objects, the agency can ask the RRC to return the rule, but the rule cannot go into effect. The RRC must report such objections and returned rules to the Joint Legislative Administrative Procedure Oversight Committee.²⁴

Legislative Review: The public can also submit “objection letters” to the RRC, requesting review of a rule by the General Assembly. If, by the day after the RRC approves a rule, it has received ten objection letters, the rule is sent to the legislature for review.²⁵ The rule’s effective date is delayed until either: the thirty-first legislative day of the next session; the day of adjournment; a bill introduced to disapprove the rule fails;²⁶ or the governor issues an executive order finding the rule is necessary to protect public health, safety, or welfare.²⁷ Any member of the General Assembly can introduce a bill during the first thirty legislative days to disapprove a rule that has been approved by the RRC.²⁸ Agencies may try to adopt a rule as temporary during this period.²⁹

North Carolina’s Process in Practice

Fiscal Notes: The vast majority of fiscal notes are prepared by the agencies themselves, though the OSBM consults during the process.³⁰ The OSBM also provides agencies with very detailed instructions.³¹ In particular, the OSBM requires more rigorous analysis of any “significant” rule, including rules with a significant effect on the economy, but also rules that may cause an inconsistency with another agency’s actions or that create novel policy issues. For “significant” rules, fiscal notes must do more than just describe costs and benefits; they must include a cost-benefit analysis that finds the discounted, net present value of the regulatory proposal; they must detail small business impacts; they must include a risk analysis; and they must consider policy alternatives.³²

While the OSBM only certifies whether fiscal notes correctly assess costs and benefits, and does not judge policy or determine whether the benefits justify the costs, the OSBM does hold agencies to a high standard. Agencies are instructed to make assumptions and estimate all costs and benefits, and are strongly discouraged from claiming that impacts cannot be determined. Benefits must be quantified in dollars to the greatest extent possible, but all non-monetized benefits must be listed as well. The OSBM does believe that health impacts cannot be quantified, and so instead encourages use of cost-effectiveness analysis (dollars per life saved) and recommends agencies always present benefits as “\$Quantifiable Benefits + Qualitative Benefits.” The OSMB applies a 7% discount rate for calculating net present values.³³

Though not always consistent or perfect, at least some fiscal notes do meet the OSBM’s high standards. Notes quantify benefits where possible, discuss intangible benefits, try to identify alternatives, and present net social benefits.³⁴

RRC Review: The power of the RRC has created concern both in the public eye and among former administrative officials.³⁵ Critics accuse the RRC of susceptibility to political pressures. In particular, the RRC is not subject to restrictions on lobbying, which normally apply to agency officials.³⁶ Though the public has no formal right to comment at RRC meetings, meetings are open to the public, and the RRC’s practice has been to accept comments, “within limits.”³⁷ Still, not all members of the public are aware of the RRC’s role: the review process has been called “archaic”³⁸ and “obscure.”³⁹

Although the RRC approves most proposed rules, the RRC has vetoed several controversial rules.⁴⁰ For example, the RRC objected to stormwater regulations after a trade group, the North Carolina Builders Association, vigorously protested the rule. The RRC believed the rules were vague and lacked statutory authority, even though the Attorney General issued an opinion on the rule’s validity.⁴¹ Courts have sometimes overturned the RRC’s objections.⁴² In particular, one court case showed how long the review process can delay a rule: after RRC objections and litigation, the debate on rules from the North Carolina Board of Pharmacy took over eight years to resolve.⁴³

Even if a rule wins the RRC’s approval, it still may attract enough objection letters to trigger legislative review.⁴⁴ Though the General Assembly does sometimes use its power to override regulations, more often legislative review is a time for brokered compromises rather than outright rule rejections.⁴⁵

Analysis and Grade

North Carolina’s regulatory review process is reasonable given resources. Fiscal notes are only prepared for rules with substantial economic impacts, and the OSBM only rigorously reviews significant rules. Though RRC has been criticized for delays, and its constitutionality and appropriateness may be debated, there is nothing inherently unreasonable about the independent review entity.

Both the OSBM and the RRC have the potential to help calibrate rules. The OSMB encourages agencies to consider the net benefits of alternatives to significant rules, and the RRC process allows for amendments and public hearings. The preparation and review of fiscal notes is consistent, and while the RRC has been accused of partisanship, it does apply the same review process to all rules. However, the RRC’s review criteria are somewhat vague (for example, “necessary”), and the Commission has been accused (and found in court) to have erred in applying its criteria. Increased transparency, especially with more formal rules on public participation and ex parte meetings, might help the RRC combat the perception of partisanship.

“The [RRC] will be asked to pass upon rules about heavy metals in fish flesh, cadmium exposure in the workplace, conductive hearing loss and the appropriate space between beds in migrant housing to avoid the spread of tuberculosis. With practically no review of their decision to veto, the members of the Rules Review Commission wield more power than most elected officials.”

—Harry E. Payne, Jr., former North Carolina Commissioner of Labor⁴⁶

North Carolina lacks a process to deal with the periodic review of existing regulations,⁴⁷ agency inaction, or inter-agency coordination.

North Carolina scores high on its analytical requirements. Monetary thresholds to trigger analysis help conserve resources, and the OSBM uses its guidance to encourage agencies to consider the costs and benefits of alternatives early in its decisionmaking process. The state would benefit from a more official push for agencies to maximize net benefits and from more support on the quantification of benefits, but the only element really lacking is systematic distributional analysis.

North Carolina features strong analytical requirements with an appropriate scope, but its regulatory review process needs to work on transparency and delay. As such, the state earns a C+. That grade does not reflect any judgment on the constitutionality or propriety of the RRC's basic structure.

Notes

- ¹ Charlotte A. Mitchell, *The North Carolina Rules Review Commission: A Constitutional Quandary*, 82 N.C. L. REV. 2092, 2098-99 (2004).
- ² *Id.*
- ³ N.C. GEN. STAT. § 143B-30.1. The governor's Administrative Rules Review Commission was repealed in 1985, *see id.* § 143B-29.1.
- ⁴ Mitchell, *supra* note 1, at 2099.
- ⁵ N.C. GEN. STAT. § 143B-30.1(a).
- ⁶ *See* Opinion of Attorney General to Henson P. Barnes, President Pro Tempore, Senate, 60 N.C.A.G. 70 (1991) ("An act vesting in the Administrative Rules Review Commission (ARRC), a commission appointed by the General Assembly, the power to delay indefinitely the effective date of duly adopted agency rules which it deems in excess of statutory authority would likely be held to violate this section by vesting the ARRC with judicial powers reserved to the court and with supreme legislative powers reserved to the General Assembly.").
- ⁷ The General Assembly repealed a previous provision, which stated that an RRC objection did not prevent the enactment of a rule. N.C. GEN. STAT. § 150B-21.12(b) (1991), amended by N.C. GEN. STAT. § 150B-21.12 (1995).
- ⁸ N.C. Bd. of Pharm. v. Rules Review Comm'n, 174 N.C. App. 301 (2005), *rev'd in part on other grounds, remanded, review improvidently allowed*, 360 N.C. 638 (2006).
- ⁹ N.C. GEN. STAT. § 150B-21.4(a).
- ¹⁰ *Id.* § 150B-21.4(a).
- ¹¹ *Id.* § 150B-21.26.
- ¹² *Id.* §§ 150B-21.4(b1)-(b2). These requirements are not applicable if the proposed rules are identical to federal regulation, and there is a good faith exception to the judicial review of fiscal notes. *Id.* § 150B-21.4(c).
- ¹³ *Id.* § 143B-30.1.
- ¹⁴ *Id.* § 120-123.
- ¹⁵ *See* Mitchell, *supra* note 1, at 2100.
- ¹⁶ *See id.* at 2106 (finding it to be a legislative body, but noting that the General Assembly deems it an executive entity).
- ¹⁷ N.C. GEN. STAT. §§ 150B-21.8, 150B-21.3(b1).
- ¹⁸ *Id.* § 150B-21.9(a).
- ¹⁹ *Id.*
- ²⁰ *See id.* § 150B-21.9(b).

- ²¹ *Id.* § 150B-21.10.
- ²² *Id.* §§ 150B-21.13, .14.
- ²³ *Id.* § 150B-21.12(a).
- ²⁴ *Id.* § 150B-21.12(d).
- ²⁵ *Id.* § 150B-21.3 (1995); 26 N.C. ADMIN. CODE § 05.0101(2).
- ²⁶ N.C. GEN. STAT. § 150B-21.3(b1).
- ²⁷ *Id.* § 150B-21.3(c).
- ²⁸ *Id.* § 150B-21.3(b1).
- ²⁹ *Id.* § 150B-21.3(b2).
- ³⁰ Survey from Will Crumbley, Economic Analyst, Office of State Budget and Management (2009, on file with author).
- ³¹ See OSBM, Fiscal Note Training, available at http://www.osbm.state.nc.us/files/pdf_files/FiscalNoteTraining.pdf.
- ³² Survey from Crumbley, *supra* note 30; OFFICE OF STATE BUDGET & MGMT., NORTH CAROLINA STATE BUDGET MANUAL 172 (2009), available at http://www.osbm.state.nc.us/files/pdf_files/2003_budget_manual.pdf; Fiscal Note Training, *supra* note 31.
- ³³ Survey from Crumbley, *supra* note 30; NORTH CAROLINA STATE BUDGET MANUAL, *supra* note 32, at 172; Fiscal Note Training, *supra* note 31.
- ³⁴ See various fiscal notes, available at <http://www.osbm.state.nc.us/osbm/RuleChanges.html>.
- ³⁵ See Jennifer Strom, *Growth Rules!*, INDY WEEK, Jul. 6, 2005, available at <http://www.indyweek.com/gyrobase/Content?oid=oid%3A24666>; Harry E. Payne, Jr., *Regulatory Reform: An Administrator's Viewpoint*, 31 WAKE FOREST L. REV. 789 (1996).
- ³⁶ See Strom, *supra* note 35.
- ³⁷ Survey from Bobby Bryan, Office of Admin. Hearings, Rules Review Comm'n (2009, on file with author).
- ³⁸ Gareth McGrath, *One of the Towns that Lobbied Hard...*, STAR-NEWS, Nov. 23, 2008.
- ³⁹ Mike Marsh, *Obscure NCWRC Process Delays Many Hunting Rules*, STAR-NEWS, Aug. 8, 2009.
- ⁴⁰ See Strom, *supra* note 35.
- ⁴¹ CHRISTOPHER ALAN COOPER & H. GIBBS KNOTTS, THE NEW POLITICS OF NORTH CAROLINA 263 (2008).
- ⁴² See Editorial, *Stormwater Bill Would Help Preserve N.C. Water Quality*, THE CHARLOTTE OBSERVER, July 13, 2006.
- ⁴³ National Association of Boards of Pharmacy, *Newsletter*, Feb. 2007, 11, available at <http://www.nabp.net/ftpfiles/newsletters/NABP/nabp022007.pdf>; see also N.C. Bd. of Pharm. v. Rules Review Comm'n, 360 N.C. 638 (2006).
- ⁴⁴ Rules approved by the RRC and subject to legislative review are posted online at <http://reports>.

oah.state.nc.us/subjectToLegislativeReview.pl (in April 2009, dozens of rules were listed; in August 2010, only one rule was listed); objection letters are posted at <http://www.oah.state.nc.us/rules/rrc/meetings>.

⁴⁵ See Mark Binker, *Jordan Lake Rules Could Cost Triad*, NEWS & RECORD (GREENSBORO), Nov. 28, 2008 (“That threshold was met months ago, although it is worth noting that the legislature has never completely rejected or accepted a set of environmental rules. Rather, compromises have been crafted in prior cases.”); Gareth McGrath, *One of the Towns that Lobbied Hard...*, STAR-NEWS, Nov. 23, 2008 (“State legislators have overridden coastal regulators in the past, most notably in 2002 when the General Assembly overturned attempts by the CRC to ban oceanfront swimming pools because of fears they can turn into dangerous and damaging debris during hurricanes. But more often controversial issues are reopened for some massaging and tweaking, such as what happened with the coastal stormwater rules this summer.”).

⁴⁶ Payne, *supra* note 35, at 795.

⁴⁷ Survey from Bryan, *supra* note 37.

North Dakota

North Dakota's legislature keeps expanding its rule review authority, with a backup plan in place just in case the courts ever declare the structure unconstitutional.

North Dakota's Process on Paper

Attorney General Review: Every proposed rule must be submitted to the attorney general to determine its legality. The attorney general may not approve a rule if it exceeds the statutory authority of the agency or is ambiguous.¹

Impact Statements: Agencies must issue a regulatory analysis if the governor or any legislator requests one,² or if the proposed rule is expected to have an impact on the regulated community in excess of \$50,000.³ The regulatory analysis must contain:

- a description of the classes of persons affected by the rule;
- a description of the impact, including economic impact, of the rule;
- the costs to the agency of the rule and any anticipated effect on state revenues;
- a description of alternative methods and why they were rejected;⁴ and
- quantification of the data to the extent possible.⁵

If a proposed rule will affect small entities (small businesses, small organizations, or small political subdivisions), the agency must minimize such impacts to the extent consistent with public health, safety, and welfare, and must prepare an economic impact statement. This statement details the entities subject to the proposed rule, the compliance costs, the costs and benefits to private persons and consumers, the effects on state revenues, and any less intrusive alternative methods of achieving the purpose of the rule.⁶

Agencies must also assess the likelihood that their proposed rule will result in a regulatory takings. The takings statement must identify the purpose of the rule, explain why it is necessary and no alternative action is available, estimate the cost to government if a court finds that the proposed rule constitutes a taking, and certify that the rule's benefits exceed any such court-ordered compensation costs.⁷

Legislative Review: The main rules review body in North Dakota is the Administrative Rules Committee ("ARC").⁸ The ARC generally can review administrative rules to determine whether agencies are implementing legislative intent, whether "there is dissatisfaction with administrative rules," or whether the statutes relating to the rules are unclear or ambiguous.⁹

More specifically, proposed rules cannot take effect until the ARC has had a chance to meet.¹⁰ The ARC can hold a rule's consideration for one additional meeting, but otherwise the rule can then take effect if the ARC has not voided it. The ARC's failure to review does not prevent rules from taking effect.¹¹ The ARC can consider oral and written comments.¹²

The ARC can object to any proposed rule as unreasonable, arbitrary, capricious, or beyond statutory authority. Agencies are given fourteen days to respond to objections, but afterwards, the burden of proof shifts to the agency at any subsequent judicial proceeding on the rule's validity.¹³

The ARC also received veto power in 1995.¹⁴ The ARC may void a rule if it lacks of statutory authority, does not comply with legislative intent or required procedure, or conflicts with law,

or if there is an emergency relating to the public health, safety, or welfare.¹⁵ If the ARC voids a rule, the agency has fourteen days to petition the Legislative Management to review that decision; if Legislative Management does not disapprove the ARC’s motion after sixty days, the rule is voided.¹⁶

Because the legislature recognized the constitutionality of this structure may be questionable, if the state Supreme Court ever rules that the ARC’s veto power is unconstitutional, an alternative structure automatically takes effect, under which the ARC may instead suspend rules pending review by the full legislature.¹⁷

Inaction: Agencies only have nine months to implement by rule any statutory changes, but they can apply to the legislative council for an extension.¹⁸

Ex-Post Review: In 2001, Governor John Hoeven vetoed legislation that tried to expand the ARC’s veto authority to cover existing rules as well.¹⁹ The bill only passed the legislature by a slim margin in the first place, and many agencies came out against the bill.²⁰ Hoeven rejected it, saying, “I believe we are on the right track regarding administrative rules. I do not want to inject uncertainty into the private sector, that needs confidence in the rules upon which it makes decisions.”²¹

Agencies are required to brief the ARC on existing rules and point out any parts that appear to be obsolete or where statutory authority has changed.²² The ARC can generally review rules for “dissatisfaction,” and can make recommendations.²³

“I believe we are on the right track regarding administrative rules. I do not want to inject uncertainty into the private sector, that needs confidence in the rules upon which it makes decisions.”
— Governor John Hoeven (2001), vetoing legislation to expand regulatory review

North Dakota’s Process in Practice

North Dakota’s impact analyses do not require much beyond basic cost estimates,²⁴ and agency statements conform to the statutory criteria.²⁵

The ARC does not have formal authority to return rules to agencies for further consideration, but it can carry over consideration of a rule for one additional meeting, and in the interim it is expected that the agency will reconsider its proposal.²⁶ The ARC also can informally negotiate with agencies in advance of meetings, to work things out before having to resort to objecting to or voiding rules; however, negotiations are not always collaborative, and some agency officials are frustrated by what they perceive to be legislative interference.²⁷

The ARC has very infrequently exercised its veto power since 1995.²⁸ From 2003 to 2008, only two rules were voided by the ARC.²⁹

Analysis and Grade

North Dakota does conserve agency resources by using a monetary threshold to trigger analytical requirements. But those requirements need to encourage more consistent attention to regulatory benefits, alternatives, and distributional impacts.

The ARC only meets once each calendar quarter, giving it little time to consistently and meaningfully review rules, and increasing the chance for delays. Behind-the-scenes activity has

reduced transparency and frustrated agency officials. North Dakota's lack of a regularly published administrative register also significantly reduces transparency.³⁰

The ARC's statutory criteria are vague (for example, "dissatisfaction"), and the review process is geared more toward objecting to rules than allowing agencies to reconsider and recalibrate. Though North Dakota has some protections against agency inaction and some requirements for periodic review,³¹ periodic review is ad hoc and focused mostly on repealing obsolete rules instead of on improving regulations and maximizing net benefits.³²

Overall, North Dakota scores a D as its Guiding Principles Grade.

Notes

- ¹ N.D. CENT. CODE § 28-32-14.
- ² *Id.* § 28-32-08(1)(a) (request must be made within twenty days of the notice of the rule hearing).
- ³ *Id.* § 28-32-08(1)(b).
- ⁴ *Id.* § 28-32-08(2).
- ⁵ *Id.* § 28-32-08(3). Quantitative errors are not grounds to invalidate a rule. *Id.* § 28-32-08(5).
- ⁶ *Id.* § 28-32-08.01(2). Statements can be challenged in court if a petition is filed within one year. *Id.* § 28-32-08.01(4). These requirements do not apply to rules mandated by federal law. *Id.* § 28-32-08.01(6).
- ⁷ *Id.* § 28-32-09(1).
- ⁸ *Id.* § 54-35-02.5. The ARC must have at least one legislator from each standing committee during the legislative session in either the House of Representatives or the Senate. The ARC operates like other legislative management interim committees. However, the ARC is not disbanded during the next legislative session like other interim committees, but has the freedom to meet during the session. Background Memorandum from the North Dakota Legislative Council on Administrative Rule Review to the Administrative Rules Committee, 2 (Sept. 2009) *available at* <http://www.legis.nd.gov/assembly/61-2009/docs/pdf/19115.pdf>.
- ⁹ N.D. CENT. CODE § 54-35-02.6.
- ¹⁰ The legislature reserves authority to determine when and if rules become effective. *Id.* § 28-32-02.
- ¹¹ *Id.* §§ 54-35-02.6, 28-32-15(2).
- ¹² *Id.* § 54-35-02.6.
- ¹³ *Id.* § 28-32-17.
- ¹⁴ Background Memorandum, *supra* note 8, at 2.
- ¹⁵ N.D. CENT. CODE § 28-32-18(1).
- ¹⁶ *Id.* § 28-31-18. An agency can amend or offer a new rule to satisfy the ARC's veto, and these rules do not go through the normal rulemaking and review procedure, but anyone can petition for the ARC to review these revisions.
- ¹⁷ Background Memorandum, *supra* note 8, at 3.
- ¹⁸ N.D. CENT. CODE § 28-32-07.
- ¹⁹ H.R. 1468, 59th Legis. Assem. (N.D. 2005).
- ²⁰ *See* Melissa Hauer, General Counsel, Testimony before the Senate Political Subdivisions Committee (Mar. 11, 2005), *available at* <http://www.legis.nd.gov/assembly/59-2005/bill-text/FBMP0100.pdf>.
- ²¹ Dale Wetzel, *Hoeven Wiolds Veto Pen for First Time*, AP STATE & LOCAL WIRE, Apr. 5, 2001.

- ²² N.D. CENT. CODE §28-32-18.1.
- ²³ *Id.* 53-35-02.6; *but see id.* § 28-32-06.
- ²⁴ The attorney general has prepared guidance on complying with impact statement requirements. Memorandum from Attorney General Wayne Stenehjem on Procedures for Adopting Administrative Rules to State Agencies, Boards, and Commissions (June 22, 2009), *available at* <http://www.ag.nd.gov/manuals/Adminrules/Adminrulesmemo.pdf>.
- ²⁵ *See, e.g.*, Lisa Fair McEvers, Commissioner of Labor, Testimony on Administrative Code Prepared for the Administrative Rules Committee (Dec. 10, 2009), *available at* <http://www.legis.nd.gov/assembly/61-2009/docs/pdf/ar121009appendixc.pdf>; Memorandum from Commissioner Timothy J. Karsky on Rules Published in the July 2009 Supplements of the ND Administrative Code to the ARC (June 10, 2009), *available at* <http://www.legis.nd.gov/assembly/61-2009/docs/pdf/ar061109appendixc.pdf>; Melissa Hauer, General Counsel, Adoption of Administrative Rules Regarding Medicare Supplement Insurance Minimum Standards (June 11, 2009), *available at* <http://www.legis.nd.gov/assembly/61-2009/docs/pdf/ar061109appendixf.pdf>.
- ²⁶ Survey from John Walstad, Code Revisor (2009, on file with author).
- ²⁷ *E.g.*, Deena Winter, *Drug Panel in Turmoil*, BISMARCK TRIBUNE, Aug. 7, 2004 (noting that the ARC chair met with agencies in advance of hearings to work out differences, but that such tactics prompted several regulatory board members to resign their positions).
- ²⁸ Survey from Walstad, *supra* note 26; Minutes of the N.D. Legis. Council's Admin. Rules Comm., Sept. 14, 2009, *available at* <http://www.legis.nd.gov/assembly/59-2005/interim-info/minutes/ar091406minutes.pdf>.
- ²⁹ *See* ADMINISTRATIVE RULES COMMITTEE, 2003-2004 FINAL REPORT, *available at* <http://www.legis.nd.gov/assembly/58-2003/interim-info/final-reports/arfinal.html> (no voided rules); ADMINISTRATIVE RULES COMMITTEE, 2005-2006 FINAL REPORT, *available at* <http://www.legis.nd.gov/assembly/59-2005/interim-info/final-reports/arfinal.pdf> (one voided rule); ADMINISTRATIVE RULES COMMITTEE, 2007-2008 FINAL REPORT, *available at* <http://www.legis.nd.gov/assembly/60-2007/interim-info/final-reports/ar.pdf> (one voided rule).
- ³⁰ *See* NAT'L ASSOC. OF SEC'YS OF STATE, 2007-2009 STATE & FEDERAL SURVEY (2010).
- ³¹ The ARC's biennial reports list any obsolete rules that have been repealed by an agency with the ARC's consultation. *E.g.*, 2005-2006 FINAL REPORT, *supra* note 29, at 21.
- ³² *See* Survey from Walstad, *supra* note 26 (noting agencies are "expected to review and update rules as needed").

Ohio

Fiscal analysis and a legislative committee have been the cornerstones of Ohio's regulatory review process for decades. But with a recent executive order and bills passed by both chambers of the state legislature in 2009, "regulatory reform" is the motto of the moment, and Ohio's process is bound to undergo more changes in the near future.

Ohio's Process on Paper

Rule Summary and Fiscal Analysis: A new rule's proposed and final text, summary, fiscal analysis, and other documentation must be filed with the Legislative Services Commission for publication in the *Register of Ohio*, as well as with other entities like the legislature's Joint Committee on Agency Rule Review ("JCARR").¹ By statute, the fiscal analysis must include, among other things:²

- a dollar estimate of any change in government revenues or expenditures;
- a summary of estimated compliance costs to all directly affected persons;
- for any rule with fiscal effects on school districts, counties, townships, or municipal corporations, additional details on costs, the government's ability to pay, and impacts on economic development;³ and
- any other information JCARR considers necessary to understand the fiscal effect.

JCARR has authority to prescribe the form of the rule summary and fiscal analysis.⁴ JCARR has used that authority to require agencies to disclose their sources for estimated compliance costs.⁵

Joint Committee on Agency Rule Review ("JCARR"): Ten members of the Ohio legislature serve on JCARR, assisted by a small staff.⁶ Created in 1977, JCARR has no power to approve or veto regulation; instead, JCARR may only recommend that the full legislature pass a concurrent resolution to invalidate a proposed or effective rule, or any part thereof.⁷ JCARR can only make such a recommendation if a rule fails a four-part test: (1) does the rule exceed the agency's statutory authority?; (2) does the rule conflict with another rule?; (3) does the rule conflict with legislative intent?; or (4) has the agency "failed to prepare a complete and accurate rule summary and fiscal analysis," or to file required text and incorporated material?⁸

JCARR is given a limited window of time to hold a public hearing and make its recommendation on a rule, and then the legislature has a similarly limited period to adopt any concurrent resolution that JCARR might recommend. If the legislature invalidates a rule, the regulatory agency cannot try to adopt any version of that rule for the duration of the current two-year legislative session.⁹

JCARR generally meets every three weeks to review rules; agency contacts and technical experts are expected to attend.¹⁰ Though JCARR recommends that the public direct comments principally to agencies, it does allow the public to submit oral or written comments on a rule under review.¹¹

In certain cases, JCARR has additional power to order an agency to revise an incomplete fiscal analysis, in lieu of recommending invalidation.¹² In addition to reviewing a rule upon its initial proposal, JCARR also has an opportunity to review any rule that an agency has "substantially revised" between proposal and final publication. But notably, JCARR cannot review the completeness or accuracy of the fiscal analysis for a substantially revised final rule.¹³

Five-Year Review: Agencies must review all their existing regulations about every five years (with some exceptions).¹⁴ Applying four factors—the original statute's purpose and scope, the need

for local flexibility, the desire to eliminate unnecessary paperwork, and the goal of preventing duplicative or conflicting regulations—agencies are to assess whether each rule should be left in place, amended, or rescinded.¹⁵ During this review process, agencies must consider the rule’s continued need, any complaints or comments received about the rule, and any relevant circumstances that may have changed.¹⁶ If an agency chooses to leave the rule intact, it must file its determination with JCARR, along with an accurate rule summary and fiscal analysis.¹⁷ JCARR can recommend invalidation of the rule if it finds by a two-thirds vote that the agency improperly applied the criteria for review; but the agency must first be afforded an opportunity to show cause to keep the rule.¹⁸ JCARR gives the public a four-week notice of the review process.¹⁹

Executive Order: In 2008, Democratic Governor Ted Strickland ordered all agencies to implement a new “Common Sense Business Regulation approach.”²⁰ Under the Executive Order, proposed rules should not impose any more costs on business than necessary to achieve the regulatory objective. Agencies must consider whether the proposed rule “and the cumulative effect of related rules” impact Ohio’s economic competitiveness. If appropriate, agencies must propose a sunset date for new rules and must create exemptions for small businesses. Each agency’s chief legal officer must review compliance with the Order before a rule is submitted to JCARR.

The Order also requires agencies to apply its principles to all existing rules, adding a new layer to the standard five-year review process.²¹ Agencies are instructed to determine “as if for the first time” the rule’s need, and to amend or rescind any rules that are “unnecessary, ineffective, contradictory, redundant, inefficient, needlessly burdensome, that unnecessarily impede economic growth, or that have had unintended negative consequences.” A worksheet prepared by the governor’s office to guide agencies through this process advises them to prioritize for review those rules that have received the most complaints or that impose the highest costs.²²

Other Reviews: If an agency reasonably believes a new rule will affect small businesses, it must file the rule and fiscal analysis with the Office of Small Business sixty days before proposing the rule. The Office of Small Business, the chair of a legislative committee on small business, or any other interested person may then submit comments to the agency or to JCARR about how the rule will affect small business; the agency must consider such comments.²³

The Department of Aging has thirty days to review and comment on any rule primarily affecting people over sixty years old. If the Department recommends changes that the rulemaking agency ignores, the agency must give the Department written notice of its reasons.²⁴

The Legislative Services Commission’s Administrative Rules Unit is statutorily required to review all adopted rules; though not formally required to do so, the Unit also reviews proposed rules when it has the time and resources. The Unit is given thirty days to recommend corrections for technical or formatting errors, and to identify substantive errors for JCARR’s review.²⁵

Environmental protection rules must be accompanied by a special form, which JCARR reviews for completion.²⁶ The form requires agencies to consult with stakeholders and to “[c]onsider documentation relevant to the need for, the environmental benefits or consequences of, other benefits of, and the technological feasibility of the proposed rule.”²⁷

Ohio’s Process in Practice

JCARR members and staff communicate informally with agencies about questions and potential problems in advance of JCARR’s public hearings on proposed rules.²⁸ Agencies may work closely

with JCARR to shape a rule's scope, substance, and timing.²⁹ Agencies are “usually” warned if JCARR might recommend invalidation of a rule, and agencies are encouraged to withdraw a rule or agree to refile it to avoid such an outcome.³⁰ When it becomes apparent during the course of a meeting that JCARR members have lingering concerns with a rule or its fiscal analysis, the agency often announces its intentions to withdraw and refile.³¹ JCARR staff director William Hills believes that keeping most deliberations and decisions out of the public spotlight helps reduce partisan sparring and improve the quality of decisionmaking.³²

Most rules are either not controversial or are addressed informally and, as such, do not generate much discussion at JCARR meetings.³³ However, when a rule is debated at a meeting, quite often business interests, advocacy groups, or members of the public testify, and agency representatives are always present.³⁴ JCARR meetings are typically “serene affairs that don’t get much notice.”³⁵ But controversial rules can occasionally elicit political rancor and voting along party lines.³⁶

JCARR membership may rotate from legislative session to session, and sometimes substitutions are made for absences. As a result, not every legislator on JCARR is always familiar with the committee’s precise and limited scope of review.³⁷ Generally, members do recognize that the committee “is very limited in its oversight.”³⁸ That said, JCARR exercises considerable discretion in deciding what constitutes a complete fiscal analysis.³⁹ For example, Ohio courts will not second-guess JCARR’s judgment on the adequacy of a fiscal analysis.⁴⁰

Historically, agencies have not completed their fiscal analyses with a high level of thoroughness, detail, or consistency.⁴¹ JCARR has been active recently in reminding agencies that “answering ‘no’ on the fiscal analysis is not sufficient, even if the departments are unable to determine an exact amount; they have a responsibility to provide the Committee with the scenarios that could result in a fiscal impact.”⁴² Still, quality varies greatly from agency to agency, with Ohio’s Environmental Protection Agency often submitting the most detailed fiscal analyses.⁴³

While the fiscal analysis forms do not require agencies to analyze a rule’s benefits, JCARR sometimes uses its discretion to examine benefits. Agencies might caution JCARR “not [to] lose sight of the consumer side of the argument” when reviewing a rule’s fiscal analysis and potential impacts on business.⁴⁴ Similarly, some members of JCARR interpret the scope of the fiscal analysis requirements more broadly.⁴⁵ For example, on a rule that would have caused school districts to fire certain employees, Senator Tim Grendell interpreted “cost of compliance” to include not just the cost to school districts, but the impacts “for those individuals that will lose their jobs as a direct result of the rule.”⁴⁶ Another time, Senator Grendell sharply asked “if benefits to the consumer in water quality were worth the cost.”⁴⁷ More often, however, benefits are ignored or at best hidden in the fiscal analysis. For instance, when a Department of Natural Resources regulation would have required fishermen to buy new equipment, the agency still reported no compliance costs because the agency expected other elements of the rule “should result in an [overall] operational savings to commercial fisherman.”⁴⁸

Though JCARR has no official authority to review compliance with Governor Strickland’s new Executive Order, the committee does sometimes remind agencies of its existence and principles.⁴⁹ According to the governor’s website, the Order has resulted in over 2800 reviews so far, leading to 220 rule rescissions and over a thousand amendments.⁵⁰

Outlook for the Future

The heightened attention to small business costs could become further enshrined into Ohio’s

laws and regulatory processes if recent recommendations for reform are finalized. In December 2008, a bipartisan government task force on regulatory reform issued a report based on testimony gathered mostly from business interests.⁵¹ The report found that costs of some regulations exceeded the benefits, and that excessive regulation especially burdened small businesses. The task force recommended instituting a formal economic impact analysis for all proposed rules, to determine the costs to business, along with a regulatory flexibility analysis of all existing rules, to make compliance easier. Such analyses would be reviewed by a new Regulatory Advisory Board, represented by small business interests and the general public. The task force also suggested allowing judicial review of the failure to consider small business impacts.⁵²

In 2009, each chamber of the state legislature unanimously passed its own bill on regulatory reform.⁵³ Senate Bill 3 would require a cost-benefit analysis specifically to determine if a rule's effects on small business outweigh benefits, and to ensure the analysis of less intrusive alternatives and small business exemptions. A small business ombudsperson would collect public comments, and a small business regulatory review board would review the analysis and file with JCARR any findings of non-compliance. JCARR could recommend invalidation based on failure to comply.⁵⁴

House Bill 230 would require an agency's head or chief legal officer to ensure each rule proposal had formally considered many of the principles set forth in Governor Strickland's Executive Order.⁵⁵ Failure to conduct such a review would be grounds for JCARR to recommend invalidation. The bill would also establish semiannual meetings for the public to comment on any agency regulatory process that causes unreasonable impediments for small business.

Though the two chambers continue to bicker over who gets to take credit for such initiatives (the Republican-controlled Senate or the Democrat-controlled House),⁵⁶ some legislative package could pass soon. Moreover, this flurry of legislative activity suggests that in today's political climate, both parties are eager to take up the mantle of regulatory reform—a political phenomenon likely to continue shape the future of regulation in Ohio and across the nation.

Analysis and Grade

Ohio's current process for regulatory review focuses almost entirely on costs—especially costs to local government and small businesses. Little attention is given to a rule's benefits, with the exception of the supplemental form for environmental protection rules (which interestingly does mention all “other” benefits in addition to environmental consequences, but which nowhere requires rigorous analysis or quantification).⁵⁷ Still, agencies have had difficulty complying with even those minimal, cost-centric analytical requirements. On the other hand, the limited analytical burdens, together with the deadlines for JCARR review, probably help prevent delays.

Though JCARR on occasion looks into benefits, mostly the legislative review process is oriented toward rejecting, not calibrating rules. JCARR suffers from turnover problems and so its reviews lack consistency. Politics sometimes creeps in to JCARR deliberations, but more or less there

With a recent executive order and bills passed by both chambers of the state legislature in 2009, “regulatory reform” is the motto of the moment, and Ohio's process is bound to undergo more changes in the near future.

are clear standards for review. JCARR appears to at best tolerate, rather than seek out, public comment. There is no process for interagency coordination or to combat agency inaction.

The original five-year review process set up by statute had standards, but as modified by executive order, periodic review in Ohio now features an anti-regulatory bias. Governor Strickland's Executive Order provides a good example of the unequal emphasis on costs versus benefits. Agencies are instructed to amend or rescind existing rules that have "unintended negative consequences."⁵⁸ Yet many if not all rules will have unintended consequences, and some of those will be negative. It is just as likely that a rule will have unintended positive consequences, or that the rule's intended benefits will outweigh even some additional unintended costs. Similarly, the Governor's worksheet on the Order asks agencies to examine whether a rule reasonably balances costs and benefits, but only advises agencies to rescind burdensome regulations,⁵⁹ not to strengthen regulations where improvements could increase net benefits.

Largely because of its persistent inattention to benefits, Ohio scores a D+ as its Guiding Principles Grade.

Notes

- ¹ OHIO REV. CODE [hereinafter ORC] § 119.03. For more on Ohio's general rulemaking process, exceptions for temporary/emergency regulations, and so forth, see ORC §§ 115, 119; Ohio Legis. Serv. Comm'n, *An Overview of Administrative Rule-Making Procedure in Ohio*, 121 MEMBERS ONLY 15 (2008).
- ² ORC § 127.18(B).
- ³ Additional required detail for this class of rules includes: monetized estimate of cost of compliance (or explanation why monetization is impossible); comprehensive cost estimate; explanation of government's ability to pay; statement of any impact on economic development; and, if the rule is in response to a federal requirement, a clear explanation that the rule does not exceed the federal requirement, or else an estimation and justification of the excess costs. *Id.*; OHIO JOINT CMTE. ON AGENCY RULE REVIEW (hereinafter JCARR), RULE SUMMARY AND FISCAL ANALYSIS FORM 4 (2002).
- ⁴ ORC § 127.18(E).
- ⁵ RULE SUMMARY AND FISCAL ANALYSIS FORM, *supra* note 3, at 3.
- ⁶ See ORC § 101.35 for more on the selection of members and voting requirements. JCARR currently has a staff of four. JCARR, Staff, <https://www.jcarr.state.oh.us> (last visited Feb. 1, 2010).
- ⁷ JCARR, PROCEDURES MANUAL 4, 17 (2010).
- ⁸ ORC § 119.03(I).
- ⁹ ORC § 119.03(I)(3). If either JCARR or the legislature does not act within their windows of time, the agency may proceed with the proposed rule.
- ¹⁰ PROCEDURES MANUAL, *supra* note 7, at 4.
- ¹¹ JCARR, Frequently Asked Questions, <https://www.jcarr.state.oh.us> (last visited Feb. 1, 2010).
- ¹² ORC § 119.03(I)(4) (granting this one-time power for rules that have a fiscal effect on school districts, counties, townships, or municipal corporations). JCARR has used this power. *See, e.g.*, Andrew Welsh-Huggins, *Legislative Committee Orders Cost Analysis*, AP, Dec. 3, 2007 (reporting a 9-1 vote by JCARR ordering the Ohio Civil Rights Commission to redo its fiscal analysis on a maternity leave rule, which originally reported no fiscal impact on schools).
- ¹³ ORC § 119.031(C) (letting JCARR temporarily suspend a rule and recommend invalidation for reasons (a), (b), and (c), but not (d)).
- ¹⁴ Any rule exempt from this general requirement that also might affect small business must undergo a five-year review "so as to minimize the economic impact." ORC § 121.24(D).
- ¹⁵ ORC § 119.032(C).
- ¹⁶ ORC § 119.032(D).
- ¹⁷ ORC § 119.032(E)(2).
- ¹⁸ ORC § 119.032(E)(3); §119.032(F).
- ¹⁹ PROCEDURES MANUAL, *supra* note 7, at 18.

- ²⁰ Ohio Exec. Order No. 2008-04S, Feb. 12, 2008, *available at* <http://governor.ohio.gov/Portals/0/Executive%20Orders/Executive%20Order%202008-04S.pdf>. The Order also seeks to improve consistency and minimize burdens of enforcement, enhance the quality of information used to develop rules, increase coordination between agencies to minimize compliance costs, and establish a centralized electronic system to give interested parties notice of new regulatory proposals. The Order will expire at the end of Governor Strickland’s time in office.
- ²¹ Incorporation into the five-year process is optional; the Executive Order review may be conducted separately. *Id.*
- ²² Ohio Business Gateway, Common Sense Business Regulation Review Implementation Worksheet (2008), *available at* <http://business.ohio.gov/reform>.
- ²³ ORC § 121.24(B). The legislative committees may also call the agency to testify.
- ²⁴ ORC § 173.01(C).
- ²⁵ LEGIS. SERV. COMM’N, RULE DRAFTING MANUAL 55 (2006).
- ²⁶ ORC § 121.39; ORC § 121.39(A) (defining scope of “environmental protection”); PROCEDURES MANUAL, *supra* note 7, at 15.
- ²⁷ JCARR, ENVIRONMENTAL RULE ADOPTION/AMENDMENT FORM (2000).
- ²⁸ PROCEDURES MANUAL, *supra* note 7, at 15.
- ²⁹ *See* Henry Gomez, *State Likely to Raise the Price for Doing Background Checks*, PLAIN DEALER, Nov. 26, 2007 (noting that the Attorney General expected approval from JCARR because his office had worked closely with the committee to shape the rule); *cf.* T.C. Brown, *Plan to Hike Record-Check Costs Halted*, PLAIN DEALER, Sept. 30, 2003 (reporting that a similar rule was pulled on the eve of consideration in 2003 because of JCARR’s concerns).
- ³⁰ PROCEDURES MANUAL, *supra* note 7, at 16 (“If the committee is planning to recommend invalidation of a rule(s) at a meeting, the particular agency is *usually* advised of this prior to the meeting. In order to prevent a recommendation of invalidation, an agency may always withdraw the rule or agree to refile the rule at a later date. However, this should be done prior to the meeting if possible. It should be noted that JCARR does not like to recommend invalidation of a rule, but will not hesitate to act when and if necessary.”) (emphasis added).
- ³¹ *See, e.g.*, JCARR Minutes of Jan. 28, 2009 Meeting, *available at* <https://www.jcarr.state.oh.us> (noting that Department of Public Safety announced it would change a rule’s status to “To Be Refiled” after a line of questioning from JCARR); *compare* JCARR Minutes of July 9, 2009 Meeting (noting that JCARR Chair Rep. Michael Skindell advised Department of Education to refile a rule, because the fiscal analysis inaccurately reported there would be no expense to school districts) *with* JCARR Minutes of July 30, 2009 Meeting (noting that Department of Education had refiled a new fiscal analysis, and noting no additional opposition from JCARR).
- ³² Paul Kostyu, *Once-Staid State Committee Meeting Erupts in Response to Rule Changes*, COPLEYS NEWS SERV., July 3, 2006 (reporting that Hills describes JCARR as “the ‘best good-government organization’ in part because troubles are worked out before the committee meets in public. ‘Generally, votes are not along party lines.’”).
- ³³ JCARR staff director William Hills claims that most JCARR meetings last only about fifteen minutes. Carrie Spencer, *Legislative Panel’s Hands Tied in Policy Debates*, AP, Mar. 14, 2005.
- ³⁴ *See, e.g.*, JCARR Minutes of July 9, 2009 Meeting (JCARR staff director Hills noting that a witness from an advocacy group was present to testify and had e-mailed written testimony that morning); JCARR

Minutes of Nov. 16, 2009 Meeting (including a fair amount of public testimony on both sides of a Public Utility Commission rule).

- ³⁵ Kostyu, *supra* note 32.
- ³⁶ See Ted Wendling, *Legislative Panel Approves Tough Rules on Voter Signup*, PLAIN DEALER, June 27, 2006.
- ³⁷ See JCARR Minutes of Jan. 28, 2009 Meeting (noting that Rep. Mike Moran asked JCARR’s staff director William Hills to explain the scope of the rule summary and fiscal analysis).
- ³⁸ See John McCarthy, *Keno Idea to Get Legislative Hearing*, AP, Apr. 10, 2008 (quoting JCARR chair Sen. Tom Niehaus).
- ³⁹ See JCARR Minutes of Jan. 28, 2009 Meeting (“Sen. Faber stated that while the agency can determine how they respond to questions on the Rule Summary and Fiscal Analysis, it is ultimately up to the committee members to determine whether the answers satisfy the statutory requirements.”).
- ⁴⁰ Ne. Ohio Reg. Sewer Dist. v. Shank, 58 Ohio St. 3d 16 (Ohio 1991).
- ⁴¹ See JCARR Minutes of June 1, 2009 Meeting (“Chairman Skindell said that when he began as Chair of JCARR, a concern brought to his attention was to ensure that the rules’ fiscal analyses were completed with sufficient detail. He asked all agencies to be thorough so that committee members have the information they need in front of them.”)
- ⁴² JCARR Minutes of July 7, 2009 Meeting (Chair Rep. Michael Skindell). According to JCARR’s Procedures Manual, JCARR will not accept a fiscal analysis that merely states the impacts are “indeterminate”—if the calculation is difficult, the agency must explain why. PROCEDURES MANUAL, *supra* note 7, at 27. *But see* JCARR Minutes of Nov. 16, 2009 Meeting (Sen. Grendell noted he did not see in the fiscal analysis a calculation of the costs to taxpayers or the savings generated by reduction in power usage; the Public Utility Commission responded that such consequences could not be predicted).
- ⁴³ See JCARR Minutes of Nov. 16, 2009 Meeting (both Senator Tim Grendell and Chair Rep. Michael Skindell praising OEPA for providing “more detail than many of the fiscal notes the Committee has seen before,” but still criticizing the analysis for ignoring certain elements).
- ⁴⁴ JCARR Minutes of Jan. 28, 2009 Meeting (David Raizk of the Dealer Licensing Board).
- ⁴⁵ Not all agree with the broader interpretations, and JCARR members have been rebuked for asking “pointed question[s]” outside the Committee’s powers. Carrie Spencer, *Legislative Panel’s Hands Tied in Policy Debates*, AP, Mar. 14, 2005.
- ⁴⁶ JCARR Minutes of July 9, 2009 Meeting; *see also* JCARR Minutes of Aug. 24, 2009 Meeting (Sen. Grendell asking whether the fiscal analysis, “which refers to ‘directly affected persons,’ was filled out incorrectly because those individuals who are unable to retroactively enroll in the Assisted Living program will be forced to pay...”).
- ⁴⁷ JCARR Minutes of Nov. 16, 2009 Meeting.
- ⁴⁸ JCARR Minutes of Oct. 5, 2009 Meeting.
- ⁴⁹ See JCARR Minutes of Jan. 28, 2009 Meeting (Sen. Faber); JCARR Minutes of July 30, 2009 Meeting (Sen. Niehaus noted that the issue of compliance with the Executive Order does not fall under JCARR’s authority, but was curious about it).
- ⁵⁰ Ohio Business Gateway, <http://business.ohio.gov/reform> (last visited Feb. 1, 2010).
- ⁵¹ OHIO REGULATORY REFORM TASK FORCE, REPORT 1 (2008).

⁵² *Id.* at 4-5.

⁵³ The Senate voted 30-0 on Mar. 11, 2009; the House voted 94-0 on Oct. 28, 2009.

⁵⁴ Ohio S.B. 3, 128th Gen. Assembly (2009). The bill would also replace current small business regulatory review and comment process, and would change the standard for review from those rules “likely to affect” small business to those rules that “may have adverse impact” on small business.

⁵⁵ Including the rule’s need, potential conflicts, notice to stakeholders, use of best information, understandability, reasonable balance of costs and benefits, and inclusion of a sunset date. Ohio H.B. 230, 128th Gen. Assembly (2009).

⁵⁶ Jeff Bell, BUSINESS FIRST OF COLUMBUS, Oct. 29, 2009.

⁵⁷ ENVIRONMENTAL RULE ADOPTION/AMENDMENT FORM, *supra* note 27.

⁵⁸ Exec. Order No. 2008-04S, *supra* note 20.

⁵⁹ Common Sense Business Regulation Review Implementation Worksheet, *supra* note 22.

Oklahoma

Oklahoma's governor and legislature have both been granted strong veto powers over regulations.

Oklahoma's Process on Paper

Rule Impact Statements: Agencies must issue a rule impact statement within fifteen days of publishing notice of a proposed rule, unless the governor waives the requirement because the analysis is unnecessary or contrary to the public interest, or because the rule is a straightforward implementation of law without any agency interpretation or discretion. Statements must include:

- a description of the rule's purpose;
- a description of the classes of people who will bear costs or will benefit;
- a description of probable economic impact on those classes or political subdivisions, as well as the probable costs and benefits to state government;
- a determination of whether implementation will have an economic impact on political subdivisions or small business;
- an explanation of the measures taken to minimize compliance costs, and a determination of whether any less costly or non-regulatory alternatives would achieve the purpose; and
- a determination of effects on public health, safety, and environment, as well as detrimental effects on the public health, safety, and safety if the proposed rule is not implemented.¹

Before adopting any rule, agencies must consider the possible effects on various types of businesses and government entities. Except where prohibited, agencies may exclude adversely affected types from compliance or may "tier" requirements according to size. For business entities, agencies must describe probable quantitative and qualitative impacts, economic or otherwise, taking into account both short- and long-term consequences.² In the notice of proposal, agencies are specifically required to call for business entities to submit comments on compliance costs, in dollars.³

Before adopting any rule, agencies must consider possible effects on various consumers.⁴

Executive Review: All adopted rules must be filed with the governor,⁵ along with the rule impact statement, a statement of need, a summary of supporters and opponents, and any other information requested by the reviewer.⁶ The governor then has forty-five days to approve or disapprove the rule. Failure to approve a rule within the specific review period constitutes disapproval. Rules not approved by the governor cannot become effective unless otherwise approved by a joint resolution of the legislature (which is subject to the governor's veto).⁷

Legislative Review: At the beginning of the state Administrative Procedure Act, the legislature explicitly reserves for itself powerful rights:

- By joint resolution, to approve, delay, suspend, veto, or amend any existing or proposed rule at any time;
- By concurrent resolution, and without any approval from the governor, to disapprove any proposed rule during the legislative review period; and
- To disapprove any permanent or emergency rule at any time as either creating imminent harm to the health, safety, or welfare of the public, or as inconsistent with legislative

intent.⁸

All adopted rules must be filed with the legislative leadership,⁹ along with the rule impact statement, a statement of need, a summary of support and opposition, and any other information requested by the reviewer.¹⁰ Each legislative chamber may establish a rule review committee or designate standing committees to review. Each committee may review any rule and make recommendations to the agency or to the legislature.¹¹

The legislature has thirty days to review adopted rules after they are filed. By concurrent resolution, the legislature may disapprove a proposed rule during the thirty-day period. Concurrent resolutions do not require the governor's signature, and they can void rules even if the governor has approved them.¹² The legislative review period, during which time rules are effectively suspended, can be carried over into the next legislative session.¹³

Generally, failure to disapprove within the review period constitutes approval.¹⁴ (In 2010, the legislature unsuccessfully tried to switch from default approval to default disapproval in the case of no action.¹⁵) But no rule can take effect until the legislature has had an opportunity to review it.¹⁶ And even after a rule takes effect, the legislature can disapprove it at any time by joint resolution (which is subject to the governor's veto).¹⁷

Independent Review Bodies: If an agency identifies a possible economic impact on any political subdivision, it must file a copy of the rule with the Oklahoma Advisory Committee on Intergovernmental Relations. That committee can make recommendations on proposed rules to the governor or the legislative leadership during their review periods.¹⁸

The Small Business Regulatory Review Committee, established within the Department of Commerce, consists of members appointed by the governor, the lieutenant governor, the Senate, and the House, drawn from the small business community (plus legislators sit as ex officio members).¹⁹ The Committee can review rules and make recommendations to the agency, governor, or legislature within the public comment period.²⁰

Existing Rules: The governor (by executive order), either legislative chamber (by resolution), a small business, or the Small Business Regulatory Review Committee may request an agency review its rules. Agencies must respond to requests from the governor or the legislature within ninety days.²¹

Adversely affected small business may petition an agency to amend or repeal a rule if: the actual effects on small business significantly exceeded the estimate in the rule impact statement; small business impacts were not considered; or conditions changed. The agency must respond within sixty days; denials can be appealed to the Small Business Regulatory Review Committee, which submits a report of its findings to the legislature.²²

Oklahoma's Process in Practice

Legislative Review: In the House, a dedicated Administrative Rules and Agency Oversight Committee reviews every rule, usually meeting once a week during the legislative session. The committee assigns individual members to review new rules and report back,²³ but recommendations to the House are advisory only, and the legislature may choose not to take up a committee objection.²⁴ Any legislator may, during the review period, file a resolution to disapprove a rule for any reason; for the committee's part, its primary concern is consistency with legislative intent.²⁵

The House committee will occasionally hold public hearings, but more generally engages in open communication with agencies, working with agency staff to correct deficiencies before the legislative review period ends. If a committee member indicates intent to seek legislative disapproval, it is not uncommon for the agency to withdraw the rule and attempt address the committee's concerns.²⁶

The Senate has no dedicated review committee and uses standing committees instead.²⁷ Action in one chamber to disapprove a rule does not guarantee action in the other: in April 2010, the House passed a resolution to disapprove a proposed fee increase on groundwater permits, but the Senate never scheduled a hearing, and so the fee will take effect.²⁸

Executive Review: The governor and his staff do review rules before approving them,²⁹ and the review is not necessarily just a rubber stamp.³⁰ Reportedly, the governor has one staff person who reviews rules for content and legality.³¹ But overall, the executive review lacks transparency.

Independent Review: Though Oklahoma was hailed by the U.S. Small Business Administration for being among the first states to adopt a regulatory flexibility act,³² the activity and impact of the Small Business Regulatory Review Committee are unclear.³³

Rule Impact Statements: Rule impact statements are prepared for virtually all rules, since the governor almost never waives the requirement. Non-regulatory alternatives and non-economic costs and benefits are supposed to be considered, but agencies are given little guidance.³⁴

Generally, impact statements contain little detail. One recent rule impact statement from the Department of Agriculture on bovine trichomoniasis did not analyze any health, safety, or environmental benefits, only concluding “No adverse effect upon the public health, safety, or the environment will occur through the implementation of these rules.”³⁵ Another from the Department of Transportation provided only single-sentence answers to most questions, analyzed no alternatives, and concluded in part, with no elaboration, “The new rule will affect public health and safety by allowing the movement of extra legal oversize or overweight vehicles without routing or authorization for each move.”³⁶

Analysis and Grade

Though clear deadlines apply to both the executive and legislative reviews, Oklahoma has given multiple actors tremendous powers to veto regulations. Impact requirements apply to too many rules, resulting in little detail and no real treatment of alternatives or distributional effects. Reviews come late in the rulemaking process and are not informed by any analysis of net benefits, making it unlikely for review to help calibrate rules. The executive review process in particular lacks substantive standards, transparency, and consistency. Periodic review of existing regulations occurs only ad hoc.³⁷ Oklahoma fails to meet nearly all of this report's guiding principles, and so earns a D.

Notes

- ¹ OKLA. STAT. tit. 75 § 303(D).
- ² *Id.* § 303(A)(4).
- ³ *Id.* § 303(B)(6).
- ⁴ *Id.* § 303(A)(5).
- ⁵ *Id.* § 303.1(A).
- ⁶ *Id.* § 303.1(E).
- ⁷ *Id.* §§ 303.2, 308.1.
- ⁸ *Id.* § 250.2
- ⁹ *Id.* § 303.1(A).
- ¹⁰ *Id.* § 303.1(E).
- ¹¹ *Id.* § 307.1.
- ¹² *Id.* § 308(B)(2). If a rule is so voided, the agency cannot resubmit an identical rule, except during the first sixty days of the next legislative session. *Id.* § 308(C).
- ¹³ *Id.* § 308(E).
- ¹⁴ *Id.* § 308(E).
- ¹⁵ *Bill Requires Legislative Approval of Rules*, AP STATE & LOCAL WIRE, Mar. 10, 2010.
- ¹⁶ OKLA. STAT. tit. 75 § 308(G).
- ¹⁷ *Id.* § 308(B)(1).
- ¹⁸ *Id.* § 303.1(B).
- ¹⁹ *Id.* § 503.
- ²⁰ *Id.* § 504.
- ²¹ *Id.* § 250.10.
- ²² *Id.* § 505.
- ²³ Survey from Amy L. Alden, General Counsel, Okla. House of Representative (2010, on file with author).
- ²⁴ *E.g., Panel Opposes Well Fee Proposal*, THE OKLAHOMAN, Apr. 28, 2010.
- ²⁵ Survey from Alden, *supra* note 23.
- ²⁶ *Id.*

- ²⁷ Okla. Legis., <http://www.lsb.state.ok.us>.
- ²⁸ *Water Fees May Increase*, THE OKLAHOMAN, Apr. 15, 2010.
- ²⁹ See Paul English, *Governor is Urged to Veto Eye Surgery Rule*, TULSA WORLD, Oct. 6, 2004 (Governor's spokesman said "Before making a final determination, the governor and his staff will thoroughly review the proposal, considering all available information").
- ³⁰ Chad Preovich, *Rule Targets Fertilizer Buyers*, THE OKLAHOMAN, Jan. 21, 2005 ("Paul Sund, spokesman for Henry, said the governor most likely will approve the rule."); *but see* Angel Riggs, *Agency Backs Prenatal Car*, TULSA WORLD, Oct. 12, 2007 (quoting the governor's spokesman, "The governor appreciates the board's work and will approve the rule as soon as he receives the paperwork").
- ³¹ Virginia Admin. Law Advisory Comm., *Legislative Powers of Rules Review in the States and Congressional Powers of Rules Review* (2001).
- ³² Press Release, U.S. Small Business Admin., *Oklahoma Takes Major Steps for Small Business*, June 7, 2002, <http://www.sba.gov/advo/press/02-29.html>.
- ³³ See Small Business Regulatory Review Committee, <http://www.okcommerce.gov/Businesses-And-Employers/Small-Business-Advocacy> (listing committee members, but giving no detail on recent activity).
- ³⁴ Survey from Alden, *supra* note 23.
- ³⁵ Department of Agriculture, Food, and Forestry Rule Impact Statement on Title 35 Rule (2010), *available at* <http://www.ag.ok.gov/proposedrules/RIS%20Trich%20FY10.pdf>.
- ³⁶ Dep't of Transportation, Rule Impact Statement on Title 730 Rule (2009), *available at* http://www.okladot.state.ok.us/title730/pdfs/730-30-9-16_ris.pdf.
- ³⁷ Survey from Alden, *supra* note 23.

Oregon

Though Oregon is committed to assessing the ongoing effectiveness of its rules, there is little analysis or review for proposed rules.

Oregon's Process on Paper

Notice and Analysis: Notice of a proposed rule must include: a statement of need; a list of documents or studies relied upon; a statement of fiscal impact, including economic effects on government, the public, and small businesses; and a request for public comment on alternatives to reduce business impacts.¹ “Economic effect” means the economic impact on affected businesses by and the costs of compliance with a rule.²

Agencies are encouraged to convene public advisory committees to assist in drafting rules.³ If an agency does not do so, and if at least ten people object to the agency’s fiscal impact statement, the agency must appoint a fiscal impact advisory committee to provide recommendations on the rule’s potential economic effects.⁴

If a significant adverse effect upon small businesses is discovered, “to the extent consistent with the public health and safety purposes of the rule,” the agency must reduce that impact by tailoring the rule or exempting small businesses.⁵

If at least five people make a request, an agency must also identify how it will determine if the rule is, in fact, accomplishing its objective once it takes effect.⁶

Legislative Review: Agencies must submit rules to the Legislative Counsel after their adoption.⁷ The Counsel may review any rule on its own motion or at the request of any affected person, and must review a rule if requested by a legislator.⁸

The Counsel may issue a “negative determination” only if it finds a rule is unconstitutional or not within the intent or scope of the enabling legislation.⁹ The negative determination is then sent to the agency, asking for a response within thirty days.¹⁰ If concerns are not resolved, the Counsel sends the rule to an interim committee of the Legislative Assembly with jurisdiction over that agency, which holds a hearing. If the committee agrees with the Counsel’s determination, the determination is accepted and posted online;¹¹ but the rule is not repealed or invalidated and remains in effect unless the Oregon Court of Appeals, upon petition, determines the rule is invalid.¹²

Ex Post Review: Agencies review their own rules every five years.¹³ In particular, and relying on any available information, an agency must review whether the rule has had its intended effect, whether the anticipated fiscal impact was underestimated or overestimated, and whether there is continued need for the rule.¹⁴ If petitioned by the public to amend or repeal an existing rule, the agency must invite public comments, specifically on ways to minimize economic burdens on business, and must consider the rule’s continued need, public complaints received, and changes in technology, economic conditions, or other relevant factors.¹⁵

By Executive Order, Governor Kulongoski directed agencies to assess, on an ongoing basis, ways to streamline regulations and reduce burdens on businesses “without compromising regulatory standards.”¹⁶

Oregon's Process in Practice

The legislature rarely reviews proposed rules.¹⁷ “Only a small portion of the rules reviewed annually by Legislative Counsel result in a negative determination that a rule is not authorized by the enabling legislation or raises constitutional concerns. The vast majority of rules are found to be in compliance with these requirements.”¹⁸ Legislative Counsel does not generally review for procedural compliance or for reasonableness.¹⁹

If an interim committee meets to consider the proposed negative rule determination, presentations are made by Legislative Counsel and the agency. The committee may request subsequent meetings with agency representatives.²⁰

At last check, there were three negative rule determinations pending that had not been resolved by a change in the rule, a change in the legislation, or a court determination.²¹

Analysis and Grade

While there is nothing inherently unreasonable about Oregon's current review structure, the system fails to help calibrate rules by providing no real opportunity for constructive legislative input and by ignoring benefits in the economic analysis.

Legislative review is consistent and guided by substantive standards, but there is not much chance for public input. The public can comment on fiscal analyses (which might help integrate analysis into the decisionmaking), but otherwise the analytical requirements focus on little besides costs. The only reason the system presents no threat of delay to rulemakings is because review is so discretionary and rare. Oregon does not provide for inter-agency coordination or help prevent agency inaction.

There are promising elements to Oregon's periodic review requirements. For example, analyzing whether the original fiscal analysis over- or under-estimated impacts is a balanced approach, and the public can force agencies to set clear criteria to evaluate the ongoing effectiveness of their regulations. Unfortunately, the Executive Order review establishes a biased system, focused more on minimizing business impacts than on maximizing net benefits, and the practical effects of the review structure remain unclear. Overall, Oregon earns a C.

Notes

- ¹ OR. REV. STAT. § 183.335(2)(b). Oregon also requires a housing cost statement from select agencies. *Id.* §§ 183.530, 183.534. See *id.* § 183.336 for details on what the statement of small business compliance costs must include.
- ² *Id.* § 183.310(3).
- ³ *Id.* § 183.333(1).
- ⁴ *Id.* § 183.333(5).
- ⁵ *Id.* § 183.540.
- ⁶ *Id.* § 183.335(3)(d).
- ⁷ *Id.* § 183.715.
- ⁸ *Id.* § 183.720(1)-(2). Any legislator may request that the Legislative Counsel review a proposed rule. Survey from Bealisa Sydlik, Deputy Legislative Counsel (2010, on file with author); OR. REV. STAT. §§ 183.335(16)(a), 183.725.
- ⁹ OR. REV. STAT. § 183.720(3).
- ¹⁰ See Survey from Sydlik, *supra* note 8; OR. REV. STAT. § 183.720(6); Legislative Counsel, Administrative Rule Review Process, <http://www.lc.state.or.us/arrs.htm>. Negative determinations from the Legislative Counsel are not generally made available to the public unless and until the interim committee of the Assembly accepts the determination. Survey from Sydlik, *supra* note 8.
- ¹¹ Legislative Counsel, Administrative Rule Review Process, *supra* note 10; OR. REV. STAT. § 183.722.
- ¹² OR. REV. STAT. § 183.400. Final resolution on a rule is only by court ruling, rule modification, or modification of enabling legislation. *Id.* § 183.722.
- ¹³ *Id.* § 183.405.
- ¹⁴ *Id.* § 183.405.
- ¹⁵ *Id.* §§ 183.390(2)-(3).
- ¹⁶ Exec. Order No. 09-10, June 25, 2009.
- ¹⁷ Survey from Sydlik, *supra* note 8.
- ¹⁸ Legislative Counsel, Administrative Rule Review Process, *supra* note 10.
- ¹⁹ Survey from Sydlik, *supra* note 8.
- ²⁰ Legislative Counsel, Administrative Rule Review Process, *supra* note 10.
- ²¹ *Id.* (last visited July 15, 2010).

Pennsylvania

An independent commission is largely responsible for regulatory review in Pennsylvania, even though its constitutionality and its independence have been questioned since it was first created.¹

Pennsylvania's Process on Paper

Goals of Pennsylvania's Regulatory Review: The legislative statement of intent for the Regulatory Review Act is worth quoting in full:

The General Assembly has enacted a large number of statutes and has conferred on [agencies] authority to adopt rules and regulations to implement those statutes. The General Assembly has found that this delegation of its authority has resulted in regulations being promulgated without undergoing effective review concerning cost benefits, duplication, inflationary impact and conformity to legislative intent. The General Assembly finds that it must establish a procedure for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania. It is the intent of this act to establish a method for ongoing and effective legislative review and oversight in order to foster executive branch accountability; to provide for primary review by a commission with sufficient authority, expertise, independence and time to perform that function; to provide ultimate review of regulations by the General Assembly; and to assist the Governor, the Attorney General and the General Assembly in their supervisory and oversight functions. To the greatest extent possible, this act is intended to encourage the resolution of objections to a regulation and the reaching of a consensus among the commission, the standing committees, interested parties and the agency.²

Independent and Legislative Review: Pennsylvania's Independent Regulatory Review Commission ("IRRC") is composed of five members: one appointed by the governor who serves at the governor's pleasure, and one each appointed by the Senate majority leader, Senate minority leader, House majority leader, and House minority leader. These last four members serve three-year terms and may not be removed except for cause. No legislator or government employee may serve as a commissioner.³ Though some have argued its composition is skewed toward the legislative branch,⁴ the IRRC was designed as an independent reviewer: it may not always live up to that goal of non-partisanship, but it will be categorized as an independent entity for purposes of this report.

The IRRC and standing legislative committees are authorized to convey comments to agencies early in the rulemaking process, especially right after the public comment period.⁵ Agencies then submit their final proposals to the IRRC for review.⁶ Agencies may not promulgate their final regulations until completion of the review process.⁷ The IRRC has up to thirty days to approve or disapprove the regulation; lack of action constitutes default approval.⁸

Statute spells out the IRRC's criteria for review. "First and foremost," the IRRC must review statutory authority and legislative intent, considering comments from legislators and the attorney general. The IRRC then can determine whether the regulation is in the public interest, assessing such factors as economic or fiscal impacts (including the impact on the public interest of exempting small businesses from the regulation); the protection of public health, safety, welfare, and natural resources; the rule's clarity, feasibility, and reasonableness; whether the regulation deserves legislative review; and procedural compliance.⁹ The IRRC accepts public comments during its review.¹⁰

If the IRRC disapproves of a regulation, it must specify which review criteria triggered the disapproval. The IRRC's objection temporarily bars promulgation of the regulation, unless the attorney general certifies that the regulation is required by court order or federal law, or if the governor certifies that the regulation is required to meet an emergency.¹¹

If the IRRC disapproves, the agency may decide to withdraw the rule, revise it, or move forward notwithstanding the objection. If it wants to move forward or revise the rule, the agency has forty days to submit a report to the IRRC and the relevant standing committees.¹² The IRRC then has fifteen days to approve or disapprove of the agency's response (reports are approved by default if the IRRC does not act) and report to the committees.¹³

The legislative committees then have fourteen days to consider introducing a concurrent resolution. If a resolution is introduced, the legislature then has about thirty days to adopt it. If the resolution is adopted by majority vote in each chamber, it is presented to the governor. If the governor does not veto the resolution within ten days, it is approved; if the governor does veto, the general assembly may override by a two-thirds vote. If concurrent resolution does not pass, the agency may promulgate its original rule. The General Assembly may also adopt a concurrent resolution that does not bar promulgation but simply indicates its disapproval.¹⁴

Executive Review: By statute, the attorney general must review the form and legality of proposed rules. If the agency disagrees with the attorney general's assessment, it can still move forward, but the attorney general can appeal by filing a petition for review in court and requesting a stay.¹⁵ The governor's general counsel also has a similar statutory role for the review of regulations issued by all non-independent executive agencies.¹⁶ The Department of Aging can also review rules for effects on the elderly.¹⁷

But most of Pennsylvania's executive review process is specified by Executive Order.¹⁸ Under Executive Order 1996-1, regulations must address a definable risk and a compelling public interest, and their benefits must outweigh their costs. The Order details some pre-drafting guidelines, and senior officials in the governor's office review agencies' regulatory agendas.¹⁹

Before proposing a rule, agencies must submit a regulatory analysis to the General Counsel, Secretary of Budget, and Governor's Policy Director. The General Counsel reviews the rule's legality and whether it exceeds federal standards; the Policy Office reviews the rule's public interest, possible policy alternatives, and whether the proposed costs reasonably relate to benefits; and the Budget Office evaluates the cost analysis. Approval is mandatory, and the review must be conducted in fair and timely manner.²⁰

Periodic Review: The IRRC may, on its own or by petition, review any existing regulation that has been in effect at least three years. The IRRC must give high priority to the review of regulations requested by a legislative committee. The IRRC may recommend changes, according to the same review criteria outlined above.²¹ The IRRC also acts as clearinghouse for complaints on regulations, and publishes the complaints it receives in an annual report.²²

By executive order, agencies must develop a plan to review existing regulations, but they are given flexibility to construct this program. Agencies make recommendations for the repeal of regulations to senior officials in the governor's office.²³

Regulatory Analysis: When publishing notice of a proposed rule, agencies must submit to the IRRC and designated standing committees a regulatory analysis. The analysis must include a statement

of need; estimates of direct and indirect costs to the government and private sector (or a fiscal note prepared by Office of the Budget);²⁴ identification of the financial, economic, and social impact on individuals, businesses, and organizations; when practicable, an evaluation of the benefits; details on special provisions to meet the needs of particular needs groups, including minorities, elderly, small businesses, and farmers; a description of rejected alternatives; a statement that the least burdensome acceptable alternative has been selected; and a plan for evaluating continued effectiveness.²⁵ By Executive Order, agencies must also generally conduct a cost-benefit analysis, identify the individuals likely to benefit or required to comply with the rule, and submit the analysis to senior officials in the governor’s office.²⁶

Pennsylvania’s Process in Practice

IRRC Reviews: The IRRC has a staff of rule analysts, but none are economists, and the commission wishes it had more resources.²⁷ IRRC staff sometimes tours farms, mines, industries, and other parties effected by Pennsylvania’s regulations, in order to gather more information about the issues they are reviewing.²⁸ Similarly, staff may attend the meetings of agencies where regulations are being developed.²⁹ The staff also holds seminars on rule analysis and review for the public and government officials.³⁰

From 2003 through 2008, the IRRC claims to have approved about 99% of the final regulations it considered, “a reflection of the considerable work and cooperation between IRRC and the agencies during the review of the proposed regulation.”³¹ Recently, however, the IRRC may have started disapproving more regulations. In 2009, the IRRC held 17 public meetings and reviewed 60 final regulations: it voted to approve 47 of them, filed disapproval orders for 6, and the remaining 12 were “deemed” approved.³²

“Despite its name, the IRRC is by no means ‘independent.’ It is well known that special interests lobby IRRC in order to influence decisions concerning which regulations are challenged.”

—David Pascal
Zambito (1997)

While the IRRC cannot directly modify rules, agencies report that its comments and objections are highly influential, and agencies often follow its recommendation to “toll” a regulation and allow time to make changes.³³ Often the IRRC focuses on issues of clarity, but at least one agency reports that the IRRC “most frequently recommends changes based on the costs of the regulations.”³⁴

Though it has been called an “obscure commission” that “ordinarily do[esn’t] get much attention,”³⁵ over 500 members of the public and government officials attended the IRRC’s various meetings in 2009.³⁶ Indeed, the IRRC has been criticized for attracting too much attention, from special interests in particular: “Despite its name, the IRRC is by no means ‘independent.’ It is well known that special interests lobby IRRC in order to

influence decisions concerning which regulations are challenged.”³⁷ Both the IRRC and agencies report that the review commission routinely reaches out to consult with stakeholders.³⁸ However, at least one environmental group criticizes the IRRC for never reaching out to it, and believes the review commission gives industry “disproportionate influence.”³⁹

Some agencies are pleased with the current review system, noting that the IRRC’s comments

are “consistently insightful”⁴⁰ and that the process “generally results in a better product than was originally submitted by the agency.”⁴¹ However, other agencies feel that the process is “too burdensome and complex and time consuming,” and, as a result, agencies may try to avoid rulemaking and use non-regulatory alternatives whenever possible.⁴²

“Pennsylvania’s regulatory review process, although somewhat convoluted appears to have all the appropriate checks and balances necessary to make it effective. The process runs smoothly, and most times without a hitch.”

— Sherri DeBiondo,
Public Utility
Commission

Legislative Review: The General Assembly often just acts as a conduit for comments received from the public, and the legislature rarely, if ever, uses concurrent resolutions to disapprove rules.⁴³ Still, some agencies consult with the legislature on as many as one in five regulations, and legislative feedback “quite often” impacts final rule content.⁴⁴

Executive Review: The governor’s general counsel may question any aspect of a proposed rule as a matter of policy or law, including the correctness of the regulatory analysis. No time limits apply to this review.⁴⁵ Agencies report that the governor’s policy office reviews rules “in great depth,” and effectively wields a veto power.⁴⁶ Others feel that the governor’s office usually only gets involved in the most controversial regulations.⁴⁷

Periodic Review: “Regulations are reviewed on a rolling basis, but resource limitations prevent there from being a formal schedule for this review.”⁴⁸

Regulatory Analysis: Regulatory analyses are not typically published in the state *Bulletin*, but they are available for public inspection.⁴⁹

Most agencies report having no economists on staff,⁵⁰ and one agency acknowledges that “[o]ur cost/benefit analyses are not that sophisticated.”⁵¹ Some advocacy groups criticize agency analysis as “minimal” and “politically influenced,”⁵² and agencies generally do not quantify benefits.⁵³ Nevertheless, as the following two case studies demonstrate, analysis and regulatory review in Pennsylvania can influence final rule content.

Case Study #1: Hypodermic Needles

In 2007, the State Board of Pharmacy proposed regulations to allow pharmacists to sell up to thirty hypodermic needles without a prescription to anyone over the age of eighteen. The Board generally cited studies showing that better access to clean needles reduced the spread of hepatitis C and HIV without increasing drug use. But, in its regulatory analysis, the Board did not quantify the public health benefits or health cost savings, and only generally noted “it is difficult to estimate the costs and savings to the regulated community . . . [and] to the government.”⁵⁴ The Board broadly concluded that the benefits would outweigh any minimal adverse effects.

At one point the Board considered not placing a limit on the number of needles sold, and did note that several other states had different or no limits. However, the Board dismissed such options and selected a thirty-needle limit because “each time someone comes to a pharmacy to purchase hypodermic needles and syringes is a teachable moment where counseling can be provide for drug rehabilitation.”⁵⁵ The Board did not analyze the costs and benefits of various alternatives or the

possibility of formally implementing a counseling requirement.

The attorney general objected to the regulation's policy, but did not oppose the rule based on legal concerns.⁵⁶ In its initial comments on the proposal, the IRRC questioned how keeping the sale of needles without a prescription off-limits to Pennsylvanians under the age of eighteen would protect the health of citizens. The review commission also questioned whether the proposal would really have no negative fiscal impact, and urged the Board to work with the regulated community and study how the rule might affect current prescription needle sales and insurance provisions for the coverage of diabetes and other diseases.⁵⁷

Two years later, the Board's revised regulation was finally approved by the IRRC.⁵⁸ In its final rule, the Board eliminated both the age limit and the needle limit, noting "commentators convinced the Board that the limit served no compelling public health interest."⁵⁹

Case Study #2: Raw Milk

In 2009, the Department of Agriculture proposed new regulations on milk sanitation. The federal Food and Drug Administration had warned Pennsylvania that its regulations were out of sync with best practices and with other states; the agency had also noticed a dramatic rise in the amount of raw milk sold for human consumption. The department felt that both public health and milk producers would greatly benefit from better regulation, but those benefits "are not readily quantifiable."⁶⁰ The agency "d[id] not expect that there will be adverse effects," but did quantify some slight additional testing costs for a small group of dairy processors, at most about \$120 per year per processor.⁶¹ The agency strongly believed the "benefit far outweighs any costs."⁶²

The IRRC objected in its early comments, criticizing the agency for failure to quantify the fiscal impacts to raw milk producers specifically. The IRRC also questioned the need, legal authority, and clarity of various provisions.⁶³

The agency issued a final regulatory analysis in 2010, this time quantifying the potential testing costs to raw milk producers, using a high estimate of \$740 per raw milk permit holder per year. The department again noted that testing will help reveal and avoid public health problems, but did not quantify such impacts.⁶⁴

At a hearing before the IRRC, small farmers testified that the testing requirements were "excessive" and would run small producers of raw milk out of business.⁶⁵ One legislator observed: "Heck, raw milk is all people drank until they started pasteurizing milk. Some small farmers can only keep their farms going with the revenue from raw milk sales."⁶⁶ The IRRC voted 3-2 to disapprove the rule, indicating that public comments had led it to believe that the agency's cost estimate for raw milk producers was inaccurate and low.⁶⁷ One legislator, pleased with the outcome, declared "Liberties and freedoms are at stake when government regulations attempt to tell us what to do in every aspect of our lives. Today, freedom won."⁶⁸

Analysis and Grade

Overall, Pennsylvania scores well, earning a B-. But its review process could be streamlined, and the consistency and balance of its analytical statements should be improved.

The IRRC meets regularly and has clear standards for review. It promotes public participation, accepting and responding to public comments, and it can sometimes help calibrate regulations. But agencies feel the process is burdensome and subject to delays; similarly, there are no time

limits on the reviews conducted by the General Counsel.

Periodic review in Pennsylvania has clear standards, but is conducted on a somewhat ad hoc basis. Pennsylvania lacks an effective procedure to combat agency inaction coordinate inter-agency conflicts.

Pennsylvania's analytical mandates could be improved by setting a threshold, so that full analysis is only required for the most significant rules. As things stand, analysis is somewhat inconsistent, perhaps due to limited resources. In particular, benefits are only analyzed "when feasible," and in practice there is not much or consistent quantitative attention to benefits. On the other hand, Pennsylvania's requirements for distributional analysis are balanced, agencies do sometimes look at alternatives (especially the policies of other states and alternatives proposed by commenters and reviewers), and analysis does seem to be integrated into both the review process and the agency's regulatory decisions.

Notes

- ¹ David Pascal Zambito, *An “Irrc-some” Issue: Does Pennsylvania’s Regulatory Review Act Violate the Separation of Powers*, 101 DICK. L. REV. 643, 643-44 (1997).
- ² 71 PA. STAT. § 745.2(a).
- ³ *Id.* § 745.4.
- ⁴ *See* Dept. of Env’t Res. v. Jubelier, 567 A.2d 741 (Pa. Commw. Ct. 1989), *vacated*, 614 A.2d 204 (Pa. 1992); *see also* Zambito, *supra* note 1, at 653.
- ⁵ 71 PA. STAT. §§ 745.5(d), (g) (standing committees may comment and object anytime; IRRC may comment and object within thirty days of comment period).
- ⁶ There is a different procedure for “final-omitted” regulations, which do not go through standard public notice and comment. *Id.* § 745.5a(c).
- ⁷ *Id.* § 745.5a(l) (but usually lack of review action constitutes default approval).
- ⁸ *Id.* § 745.5a(e).
- ⁹ *Id.* § 745.5b.
- ¹⁰ *Id.* § 745.5a(j).
- ¹¹ *Id.* § 745.6.
- ¹² If the legislature is not in session, the rule can be automatically suspended.
- ¹³ *Id.* § 745.7.
- ¹⁴ *Id.*; *see also id.* § 745.5a(j.1)-(j.3).
- ¹⁵ *Id.* § 732-204(b).
- ¹⁶ *Id.* § 301(10).
- ¹⁷ *Id.* § 581-3.
- ¹⁸ *Id.* § 745.12a (giving the governor authority to institute review procedures).
- ¹⁹ Exec. Order No. 1996-1 (1996).
- ²⁰ *Id.*
- ²¹ 71 PA. STAT. § 745.8a.
- ²² *Id.* § 745.12.
- ²³ Exec. Order No. 1996-1.
- ²⁴ *See* 71 PA. STAT. § 232 (Office of Budget may prepare a fiscal note).
- ²⁵ *Id.* § 745.5
- ²⁶ Exec. Order No. 1996-1.
- ²⁷ Follow-Up Survey from Kim Kaufman, Exec. Dir., IRRC (2009, on file with author) (“IRRC would benefit from additional funding.”).
- ²⁸ IRRC, 2009 ANNUAL REPORT 9, 12 (2010).
- ²⁹ Follow-Up Survey from Kaufman, *supra* note 27 (“IRRC staff attends (but does not participate in) agency advisory council meetings, State Board meetings, and other agency meetings that will affect the development of regulations.”).

- ³⁰ *Id.*; IRRRC, 2009 ANNUAL REPORT, *supra* note 28, at 12-13.
- ³¹ IRRRC, THE REGULATORY REVIEW PROCESS IN PENNSYLVANIA 13 (2008).
- ³² *Id.*
- ³³ Survey from Ruth O'Brien, Deputy Chief Counsel, Dept. of Public Welfare (2009, on file with author); *accord.* Survey from Dwight Smith, Asst. Counsel, Dept. of Ag. (2009, on file with author); Survey from Stephen F.J. Martin, Asst. Counsel, Dept. of Transp. (2009, on file with author).
- ³⁴ Survey from O'Brien, *supra* note 33.
- ³⁵ Editorial, *Drilling Could Harm Water*, PHILA. INQUIRER, June 17, 2010.
- ³⁶ 2009 ANNUAL REPORT, *supra* note 28, at 11.
- ³⁷ Zambito, *supra* note 1, at 655.
- ³⁸ Kim Kaufman, Exec. Dir., IRRRC (2009, on file with author); Survey from Christine Dutton, Chief Counsel, Dept. of Health (2009, on file with author).
- ³⁹ Survey from Nancy F. Parks & Tom Au, Sierra Club Pennsylvania Chapter (2009, on file with author).
- ⁴⁰ Survey from Martin, *supra* note 33
- ⁴¹ Survey from Smith, *supra* note 33.
- ⁴² Survey from Dutton, *supra* note 38.
- ⁴³ Survey from Smith, *supra* note 33; *accord.* Survey from Dutton, *supra* note 38; Survey from Martin, *supra* note 33.
- ⁴⁴ Survey from Smith, *supra* note 33; *accord.* Survey from O'Brien, *supra* note 33 (reporting that the General Assembly's role is "crucial" and that legislative feedback often results in changes, even though concurrent resolutions have not been used).
- ⁴⁵ IRRRC, THE REGULATORY REVIEW PROCESS IN PENNSYLVANIA 3 (2008).
- ⁴⁶ Survey from Smith, *supra* note 33; *accord.* Survey from Martin, *supra* note 33 (explaining that a rulemaking will not go forward without approval from the Policy Office and General Counsel).
- ⁴⁷ Survey from O'Brien, *supra* note 33.
- ⁴⁸ Survey from Smith, *supra* note 33; *accord.* Survey from Dutton, *supra* note 38 (explaining periodic review is done "as necessary, when it becomes obvious through the application of the regulations, or through industry or legislative complaints, that he regulations are out-of-date or otherwise unsatisfactory").
- ⁴⁹ IRRRC, THE REGULATORY REVIEW PROCESS IN PENNSYLVANIA 7 (2008).
- ⁵⁰ *See* Survey from Smith, *supra* note 33; Survey from Dutton, *supra* note 38; Survey from Martin, *supra* note 33; Survey from O'Brien, *supra* note 33; *but see* Survey from Sherri DelBiondo, Regulatory Review Asst., Public Utility Comm'n (2009, on file with author) (reporting the PUC has two economists on staff, but they do not participate in the preparation of regulatory analyses).
- ⁵¹ Survey from Martin, *supra* note 33.
- ⁵² Survey from Parks & Au, *supra* note 39 (criticizing analyses from Department of Conservation and Natural Resources).
- ⁵³ *See, e.g.*, Survey from Dutton, *supra* note 38 ("The agency does not weigh the value of mortality risk reduction.").
- ⁵⁴ State Board of Pharmacy, Regulatory Analysis on the Sale of Hypodermic Needles (2007), *available at* <http://www.irrc.state.pa.us/Documents/SRCDocuments/Regulations/2625/AGENCY/Document-5450.pdf> (but also noting that there would be no costs or cost savings).
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*

- ⁵⁷ Comments from IRRC on State Board of Pharmacy Regulation on the Sale of Hypodermic Needles (2007), available at <http://www.irrc.state.pa.us/Documents/SRCDocuments/Regulations/2625/IRRC/Document-5982.pdf>.
- ⁵⁸ Approval form IRRC on State Board of Pharmacy Regulation on the Sale of Hypodermic Needles (2009), available at <http://www.irrc.state.pa.us/Documents/SRCDocuments/Regulations/2625/IRRC/Document-12757.pdf>
- ⁵⁹ State Board of Pharmacy, Final Regulatory Analysis on the Sale of Hypodermic Needles (2009), available at <http://www.irrc.state.pa.us/Documents/SRCDocuments/Regulations/2625/AGENCY/Document-12651.pdf>.
- ⁶⁰ Department of Agriculture, Regulatory Analysis on Milk Sanitation (2009), available at <http://www.irrc.state.pa.us/Documents/SRCDocuments/Regulations/2777/AGENCY/Document-12746.pdf>.
- ⁶¹ The agency also estimated about \$180,000 per year in new government costs. *Id.*
- ⁶² *Id.*
- ⁶³ Comments from IRRC to Department of Agriculture on Milk Sanitation (2009), available at <http://www.irrc.state.pa.us/Documents/SRCDocuments/Regulations/2777/IRRC/Document-14505.pdf>.
- ⁶⁴ Department of Agriculture, Final Regulatory Analysis on Milk Sanitation (2010), available at <http://www.irrc.state.pa.us/Documents/SRCDocuments/Regulations/2777/AGENCY/Document-19651.pdf>.
- ⁶⁵ Press Release, Pennsylvania House of Representatives, Republican Caucus, Roae, *Local Resident Help Defeat Burdensome Milk Overregulation*, Oct. 7, 2010.
- ⁶⁶ *Id.* (quoting Rep. Brad Roae, republican).
- ⁶⁷ Disapproval Order from IRRC, Department of Agriculture Regulation on Milk Sanitation (2010), available at <http://www.irrc.state.pa.us/Documents/SRCDocuments/Regulations/2777/IRRC/Document-20357.pdf>.
- ⁶⁸ Press Release, *supra* note 65 (quoting Rep. Brad Roae, republican).

Puerto Rico

In 2000, Puerto Rico adopted a regulatory review structure for rules with substantial economic impacts on small businesses. Agencies must prepare a regulatory flexibility analysis for such rules, providing a statement of need; an account of the potential impacts on small businesses; an opportunity for public comment on the potential small business impacts; and an explanation of alternatives adopted or rejected that might minimize significant financial impacts for small businesses.¹ Ideally, the analyses also discuss non-economic costs and benefits as well as ancillary costs and benefits, but approaches may vary among agencies.²

Those regulations and analyses are then reviewed by the Procuranduría de Pequeños Negocios (“PPN,” or Small Business Advocate), a special branch of Puerto Rico’s Ombudsman Office. PPN has discretion to interpret the term “substantial economic impact” and chooses which regulations it will scrutinize.³ PPN reviews concentrate on the regulations’ language, legality, and compliance with statutory intent, and in particular are focused on promoting small business development; the reviews are, to some degree, less concerned about compliance with administrative process.⁴

PPN is also involved in the review of existing regulations. Every five years, agencies must review their existing regulations with potential impacts on small businesses, assessing the regulations’ continued need in light of public complaints and changed circumstances.⁵ PPN can, at its discretion, participate in such reviews—a decision that is “highly influenced by focal group’s complaints.”⁶

PPN can only recommend changes during its reviews,⁷ but it has been active and has achieved substantive regulatory changes through its reviews. In one example touted by the U.S. Small Business Administration’s Office of Advocacy, PPN helped small businesses in Puerto Rico address their concerns about a Department of Health regulation that barred the printing of company logos on bagged ice (on the theory that transparent bags facilitate health inspections). Through PPN’s advocacy, small businesses convinced the agency to allow some printed logos, which would not only let businesses advertise their product but also could help the Department of Health identify the ice’s source and so crack down on black market ice manufacturers.⁸

Still, overall Puerto Rico’s regulatory review structure is rather limited by its focus on only small business impacts. The Commonwealth might benefit from a more rigorous review process that builds on its required regulatory flexibility analyses and environmental impact analyses,⁹ and that applied broader and balanced economic analysis and review to all major regulations. Based on its current and limited review structure, Puerto Rico scores a C+.

Notes

- ¹ P.R. LAWS ANN. tit. 3 §§ 2254, 2258.
- ² Survey from Edison Negrón Ocasio, Acting Small Business Ombudsman (2010, on file with author).
- ³ *Id.*
- ⁴ *Id.*
- ⁵ P.R. LAWS ANN. tit. § 2559.
- ⁶ Survey from Negrón Ocasio, *supra* note 2.
- ⁷ *Id.*
- ⁸ U.S. Small Business Administration's Office of Advocacy, An Example of the Value of Reviewing Existing Regulations Periodically 2 (2007), http://www.sba.gov/advo/laws/pr_example.pdf.
- ⁹ Puerto Rico also requires Environmental Impact Statements for governmental actions with substantial environmental impacts. 12 LPRA § 1124.

Rhode Island

Though Rhode Island’s legislature until recently retained unusually broad authority over the appointment of agency directors and has been criticized for not treating the executive as a co-equal branch of government,¹ the state has never experimented with extensive regulatory review powers.

Rhode Islands’ Process on Paper

Prior to adoption of a rule, an agency must give public notice and demonstrate that “there is no alternative approach among the alternatives considered during the rulemaking proceeding which would be as effective and less burdensome.”²

Beyond the “rigorous” and sometimes “tedious” requirements for public comment and filing in Rhode Island, “there is no provision for any review of an agency’s adoption or amendment of a regulation by some other governmental body or official.”

—Marcy Coleman, Dept. of Administration Legal Counsel

Agencies must also notify the governor’s office and the Economic Development Committee (“EDC”) of any proposed regulations. If either entity believes the proposal may have a significant adverse economic impact on small businesses, the agency must submit to EDC a regulatory flexibility analysis. The analysis must, consistent with “health, safety and environmental and economic welfare,” consider methods of minimizing those burdens;³ yet, at the same time, agencies are told to consider such methods “without limitation.”⁴

EDC helps supply the agency with data and advises the agency on possible policy alternatives.⁵ EDC’s small business advocate conveys to the agency specific concerns raised by small businesses and, when appropriate, acts as an advocate for those concerns.⁶ The Department of Administration’s Budget Office also reviews proposals and issues fiscal notes, outlining any financial impacts on state coffers.⁷

Since the start of 2009, agencies must review regulations every five years to ensure they are still necessary, agree with recent changes to state law, and do not pose undue burdens on small businesses. Agencies are to consider

the nature of public complaints received and any changes in economic conditions, technology, or other relevant factors.⁸

Rhode Island’s Process in Practice

Although the Secretary of State is involved in the filing of rules and refiling during the five-year review, it does not review an agency’s determinations regarding a rule’s necessity.⁹ Any review of legality, statutory authority, or procedural compliance is left up to various agencies’ legal counsels or, ultimately, to the courts.¹⁰ Agencies seem to set their own standards for complying with statutory requirements on the proposal of regulations. For example, while agencies might technically consider other policy alternatives, as required by statute, sometimes the only alternative considered is maintaining the status quo.¹¹

The Economic Development Committee (“EDC”) tries to help agencies complete thorough and

accurate regulatory flexibility analyses, and “agencies rely on guidance and input from EDC.”¹² Often, EDC sets up meetings between the agency and industry representatives.¹³

Still, not every agency is necessarily aware of the regulatory flexibility requirements and may not always conduct such reviews.¹⁴ For example, a recent Senate task force commented on the need to “establish[] a formal process to study the impact, effectiveness, and necessity of any proposed or existing rule and regulation affecting small businesses,”¹⁵ even though such a process already technically exists. Testimony received by the task force suggested that budget cuts might have made it difficult for EDC to always coordinate the small business impact reviews effectively.¹⁶ And some agencies have difficulty complying with the requirements. The Department of Health, for instance, testified that balancing regulatory flexibility analysis with its mandate to protect health and safety is “challenging.”¹⁷

Analysis and Grade

In 2003, Rhode Island amended its constitution to formally incorporate the doctrine of separation of powers.¹⁸ The legislature and governor may still be feeling out the boundaries of their new relationship, but they could take this opportunity to rethink the appropriate division of roles for the oversight of administrative regulations. Additionally, Rhode Island should review whether its agencies have the necessary resources to fully analyze policy options and whether its statutory instructions are clear and balanced (particularly on how agencies are to balance regulatory flexibility review with the protection of “health, safety and environmental and economic welfare”).

Interest in safeguarding and promoting small businesses has recently surged in Rhode Island,¹⁹ and it is possible that either the governor or the legislature may move soon to enhance the regulatory flexibility requirements. Rhode Island should ensure that any such requirements are balanced and focus on maximizing net social benefits, not just minimizing compliance costs.

Given that Rhode Island struggles to consistently carry out even its limited review structure, the state earns a D as its Guiding Principles Grade.

Notes

- ¹ See Carl Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77 (2004).
- ² R.I. GEN. LAWS § 42-35-3(a)(3). Agencies must also demonstrate the rule’s need and justify any overlap with existing state regulations. *Id.*
- ³ *Id.* § 42-35-3.3.
- ⁴ See *id.* § 42-35-3.3(b) (instructing agencies to consider such means “without limitation”).
- ⁵ *Id.* § 42-35-3.3(c).
- ⁶ *Id.* § 42-35-3.3.
- ⁷ Survey from Marcy Coleman, Dept. of Admin. Legal Counsel (2010, on file with author); R.I. GEN. LAWS § 22-12-1.1.
- ⁸ R.I. GEN. LAWS § 42-35-3.4. Agencies must also refile rules with the Secretary of State every five years, although refiling does not require repeating the entire rulemaking process. *Id.* §§ 42-35-4.1 to -4.2.
- ⁹ Survey from Coleman, *supra* note 7.
- ¹⁰ *Id.*
- ¹¹ *E.g.*, Dept. of Env’tl. Mgmt., Fact Sheet on Proposed Air Pollution Control Regulation No. 48 (2010).
- ¹² Survey from Coleman, *supra* note 7.
- ¹³ *Id.*
- ¹⁴ See Survey from Jim Lee, Division Chief, Attorney General (2009, on file with author); Interview by Maggie MacDonald with Asst. Attorney General Paul Roberti, Mar. 9, 2009.
- ¹⁵ SENATE TASK FORCE ON SMALL BUSINESS GROWTH AND DEVELOPMENT, FINAL REPORT 6 (2010). The governor has also recently convened a task force to study ways to simplify and streamline the regulations and licensing requirements that small businesses face. See Minutes from Governor’s Regulatory Review Task Force, June 2, 2009.
- ¹⁶ SENATE TASK FORCE, *supra* note 15, at 9.
- ¹⁷ *Id.* at 12.
- ¹⁸ Bogus, *supra* note 1.
- ¹⁹ See *supra* note 15.

South Carolina

Most of South Carolina's new regulations must go through legislative review. However, substantive regulatory review is usually discretionary, except that small business impacts are scrutinized with more regularity and intensity.

South Carolina's Process on Paper

Notice Requirements: To propose new regulations, agencies must first post a drafting notice in the State Register,¹ containing a synopsis of the rule and its statutory authority. If requested by two legislators, the Budget and Control Board (a special institution that brings together both executive and legislative officials)² will conduct an assessment report on the effects of the proposed rule.³

The second step is for agencies to give the public more detailed notice and an opportunity to comment. Specifically, the agency must publish the rule's full text and a narrative preamble that includes a statement of need and reasonableness,⁴ as well as a preliminary impact statement.⁵

BCB Assessment Reports: If requested and if the regulation has a "substantial economic impact,"⁶ the Budget and Control Board ("BCB") will provide a report that must include, among other things:

- a description of the rule, its purpose, its legal authority, and a plan for its implementation;
- a determination of the rule's need and reasonableness based on these factors and on the expected benefit;
- a determination of the costs and benefits and an explanation of why the regulation is the most cost-effective, efficient, and feasible means for achieving the stated purpose; and
- a statement of effects on the environment and public health, as well as any detrimental effects that may result if the regulation is not implemented.⁷

The report may also address the following topics:

- effects on employment, competition, cost of living, or cost of doing business;
- sources of revenue for implementing and enforcing the rule;
- short- and long-term economic impacts on all persons substantially affected, including a description of which persons will bear costs and which will benefit, directly or indirectly.⁸

Statutory mandates exclude the consideration of benefits or burdens on out-of-state governments or business. Qualitative terms are acceptable for any factor the BCB finds not precisely quantifiable. Indeed, the BCB is not required to perform "numerically precise cost-benefit analysis."⁹

General Assembly Review: After the notice requirements have been met, the enacting agency will submit the full text and narrative preamble for the proposed regulation (as well as the BCB assessment report, if requested) to the General Assembly for review. The leaders of the House and Senate delegate further review to the appropriate committees of jurisdiction in each chamber.¹⁰ The Legislative Council makes preliminary studies and recommendations on proposed regulation when requested by committees or members of the Assembly.¹¹

Legislative committees then have 120 days to act before the regulation takes effect by default. A committee may choose to introduce a joint resolution approving or disapproving the regulation.¹² A committee cannot disapprove a regulation by itself, as only the full General Assembly can vote

on a joint resolution of disapproval (which requires the governor’s signature). But a committee may request that an agency withdraw its proposed regulation and resubmit it with recommended changes; such requests for modification are not binding on the agency. Any introduction of a joint resolution or the issuance of a request for modification temporarily tolls the 120-day count before a regulation becomes effective by default.¹³

Small Business Regulatory Review Committee: Since the 2004 passage of the “South Carolina Small Business Regulatory Flexibility Act,” the state has prioritized minimizing the regulatory burden on small businesses.¹⁴ The Small Business Regulatory Review Committee (“SBRRC”) may direct an agency to submit an economic impact statement including an estimate of the number of businesses subject to proposed regulation, the costs of compliance, the economic impact on small businesses, and a description of less intrusive alternatives.¹⁵ The SBRRC may request an assessment report from the BCB if it needs more information.¹⁶

Five-Year Review: On a five-year basis, agencies must conduct a general review of all regulations that they administer, and then inform the Legislative Council of which regulations they intend to repeal, amend, or maintain.¹⁷ Additionally, each regulation that took effect after 2004 is subject to a five-year review specifically to ensure that it minimizes economic impacts on small businesses.¹⁸ A reviewing agency must consider:

- the continuing need for the regulation in light of changing technology and conditions;
- the nature of feedback on the regulation from the public;
- the complexity of the regulation;
- the extent of regulatory overlap or conflict with other federal or local rules.¹⁹

South Carolina’s Process in Practice

General Assembly Review: There are seventeen legislative committees available to review regulation, and in practice, each has different standards of review. Although reviewing committees do not technically have the power to force an agency to withdraw and revise its regulation, agencies usually comply with requests to do so.²⁰

Committees do frequently consider joint resolutions both approving and disapproving of regulations (for example, five joint resolutions of disapproval and dozens of joint resolutions of approval were introduced during the most recent legislative session), but joint resolutions of disapproval rarely pass into law (two against Department of Health and Environmental Control rules passed in 2004).²¹

Legislative Council: Agencies must file all notices and regulations with the Legislative Council, in its role as maintainer of the State Register. The Legislative Council checks for compliance with certain procedural requirements and general filing information,²² and it can decline to publish a regulatory notice if an agency fails to comply with procedural requirements.²³

Impact Analyses: The legislature has little experience reviewing assessment beyond the fiscal impact statements on costs to governments.²⁴ Assessment reports from the BCB are rarely requested by the appropriate legislative committee, in part because most of the subject matter in the assessment reports is already provided by the agency in its narrative preamble.²⁵

Agency narrative preambles vary in quality and detail, but do not typically quantify costs or benefits, or assess alternatives. When amending the design and construction requirements for

public swimming pools, the Department of Health and Environmental Control reported no fiscal costs to government, no operation costs to pool facilities, an undefined amount of “add[itional] capital costs to some projects,” and general “positive impacts on pool water quality, safety, and emergency response” that will “protect public health through bather safety.” The agency did not quantify any impacts or assess any alternatives, though it admirably did acknowledge that the uncertainty of its estimates was “moderate.”²⁶ Other statements are even sparser. When updating school nutritional standards to require healthier milk choices and allow state programs to qualify for federal subsidies, the State Board of Education listed no fiscal impacts to government and no public health impacts and, under “determination of costs and benefits,” simply wrote “N/A.”²⁷

Analysis and Grade

Delegating review authority to multiple legislative committees has resulted in standardless, inconsistent, and opaque regulatory review. While some discussion of environmental and public health effects is mandatory, the explicit lack of a requirement for “numerically specific cost-benefit analysis” seems to invite agencies to present to their legislative reviewers only abstract assessments of a regulation’s costs, benefits, and efficiency. South Carolina earns a D.

Notes

- ¹ S.C. CODE ANN. § 1-23-110.
- ² The Budget and Control Board (“BCB”) is composed of the Governor, Treasurer, Comptroller General, Chairman of the Senate Finance Committee, and Chairman of the House Ways and Means Committee. BCB, About the BCB, <http://www.bcb.sc.gov/BCB/BCB-about.phtm>.
- ³ S.C. CODE ANN. § 1-23-115(A). The assessment is prepared by the BCB’s Division of Research and Statistical Services. No assessment report may be requested for regulations controlling hunting and fishing. *Id.* § 1-23-115(E).
- ⁴ *Id.* § 1-23-110(A)(3)(f) (mandating that the statement of need and reasonableness must be based on the analysis of the factors listed in S.C. CODE ANN. § 1-23-115(C)). These are the same factors addressed in the BCB assessment report.
- ⁵ *Id.* § 1-23-110(A).
- ⁶ *Id.* § 1-23-10 (defining “substantial economic impact” as any financial impact on commercial enterprises, retail businesses, service businesses, industry, customers, tax payers, or small businesses).
- ⁷ *Id.* §§ 1-23-115(C)(1)-(3) & (9)-(11) (describing the factors which must be included in the assessment report).
- ⁸ *Id.* §§ 1-23-115(C)(4)-(8) (describing the factors which may be included at the discretion of BCB).
- ⁹ *Id.* § 1-23-115(C).
- ¹⁰ *Id.* §§ 1-23-120(B)-(C). Any regulations proposed to maintain compliance with federal law and certain revenue rulings are not subject to General Assembly Review. *Id.* § 1-23-120(H); *but see id.* § 1-23-115(E)(1) (holding that regulations promulgated to comply with federal laws that are more stringent than federal laws are not exempt from assessment reports). However, agencies are still required to post notice on these regulations with the State Register. *See* Lynn P. Bartlett, South Carolina State Editor, THE REGULATORY PROCESS IN SOUTH CAROLINA, available at <http://childcare.sc.gov/main/docs/laws/regflow.pdf>.
- ¹¹ S.C. CODE ANN. §§ 1-23-50, 2-11-50. The Legislative Council is also responsible for maintaining the State Register.
- ¹² If the committee takes no action on the regulation for 30 of the 120 days, any member of the General Assembly may introduce a joint resolution to approve or disapprove of the regulation. *Id.* §§ 1-23-120(D), (F).
- ¹³ *Id.* § 1-23-125. The clock resumes when the resolution is voted on or when the modification is made or rejected by the agency.
- ¹⁴ 29-2 S.C. Reg. 13 (Feb. 25, 2005). Small businesses are defined as a retail service, industrial entity, or nonprofit corporation with less than one hundred full-time employees or annual revenues of under five million dollars. S.C. CODE ANN. § 1-23-270. The act further allows a special cause of action for small businesses adversely impacted or aggrieved by new regulation to seek judicial review as soon as the new rule is enacted. *Id.* § 1-23-270(E).
- ¹⁵ *Id.* § 1-23-270(C).

- ¹⁶ *Id.* § 1-23-280(A)(2)(b).
- ¹⁷ *Id.* § 1-23-120(J).
- ¹⁸ *Id.* § 1-23-270(F)(2).
- ¹⁹ *Id.* § 1-23-270(F)(3).
- ²⁰ Survey from Anne Cushman, Staff Attorney, Editor of the State Register (2009, on file with author).
- ²¹ South Carolina Legislative Multi-Criteria Search, http://www.scstatehouse.gov/cgi-bin/Multi_Search.exe?screen=FIRST.
- ²² *Id.*; see S.C. CODE ANN. § 1-23-10.
- ²³ Survey from Carlisle Roberts, Jr., General Counsel, S.C. Dept. of Health and Environmental Control (2009, on file with author).
- ²⁴ Survey from Cushman, *supra* note 20 (noting that the legislature has more experience using fiscal notes in various contexts).
- ²⁵ *Id.*
- ²⁶ Dept. of Health & Evntl. Control, Proposed Regulations to R.61-51 Public Swimming Pools, 32 S.C. State Register 25 (Oct. 24, 2008).
- ²⁷ State Bd. of Ed., Proposed Regulations to R. 43-168 Nutrition Standards for Elementary (K-5) School Food Service Meals and Competitive Foods, 32 S.C. State Register 10 (Dec. 26, 2008).

South Dakota

With authority to make agencies repeat any step in the rulemaking process, South Dakota’s legislative review committee effectively has veto power over regulations.

South Dakota’s Process on Paper

Impact Statements: In order to propose a new rule, an agency must hold a public hearing.¹ At least twenty days before the hearing, the agency must serve the director of the Legislative Review Council (“LRC”) and the commissioner of Bureau of Finance and Management with a copy of the rule, a fiscal note, and a statement of the impact of the regulation on small businesses.² The fiscal note must enumerate the effect of the proposed rule on revenues, expenditures, or financial liability of the state, and explain how these effects were computed.³ If the regulation will have an impact on small businesses, the agency must make a statement including:

- a narrative explanation of the rule in plain language;
- the type and quantity of businesses subject to the proposed rule;
- a statement of the probable effect on impacted small businesses; and
- a description of less costly alternatives of achieving purpose of the proposed rule.⁴

In preparing the small business impact statement, the agency is required to use only “readily available information and existing resources.”⁵

Case Study: Adoption of Regulatory Flexibility Act

In 2004, Republican Senator Eric Bogue introduced legislation to require agencies to consider small business impacts when proposing regulations. As a member of the Interim Rules Review Committee, Bogue often received complaints from the business community and felt “[t]here’s a hidden side effect to many of the rules.”⁶ Industry agreed that it lacked an effective vehicle to influence agency decisionmaking: Bob Riter, lobbyist for the National Federation of Independent Businesses, complained that “[t]here’s not much give and take” with agencies once a rule is proposed.⁷

Governor Mike Rounds initially opposed the new law, concerned it would place more burdens on agencies. A spokesman for the governor argued “It looks like a good idea, but I’m not sure everybody realizes how complicated it is.”⁸ But eventually, Governor Rounds did sign the bill into law.⁹ Perhaps the governor was influenced by arguments from lobbyists like Jerry Wheeler, executive director of the South Dakota Retailers Association, who claimed the law would not be an undue burden on regulations, because ultimately it is not difficult to come up with numbers for analysis—“They’ve either got some numbers they can pull out of a drawer, or somebody just snaps them out of the air.”¹⁰

At the public hearing on a new rule, the agency must allow all interested persons reasonable opportunity to submit amendments, data, opinions, or arguments concerning the new regulation. The hearing must be attended by a majority of the members of the agency authorized to pass the rules under discussion. After the hearing, the agency must fully consider all input from the public on the proposed rule.¹¹

Interim Rules Review Committee: The legislative Interim Rules Review Committee (“IRRC”) is a group of congressmen that reviews proposed rules.¹² The IRRC exists to review and make

recommendations on all proposed rules. All meetings of the IRRC are open to the public, and the public must have an opportunity to be heard and present evidence on proposed regulations.¹³

The IRRC has the power to remand a proposed rule for a new public hearing or additional rulemaking procedures if the committee finds that the rule is deficient in any of the following respects:¹⁴

- a rule has been substantially changed since the initial public hearing, in ways that are not the result of input from the public;
- the rule does not follow the intent of the agency or the relevant legislative authority;
- the rule should be rewritten to meet the recommendations of the IRRC;
- the rule is not in proper form; or
- the rule is unreasonable because it inconveniences those it affects.¹⁵

The IRRC may also suspend rules that have not yet been adopted. To suspend a rule, the IRRC must hold a hearing, with at least two weeks' notice for the promulgating agency. At that hearing, the agency carries the burden of proof to show that the rule is necessary and does not violate its legal authority or the legislative intent. After the hearing, the IRRC will file resolution of the action with the Secretary of State, and the rule is suspended until July of the following year.¹⁶

Legislative Research Council: The Legislative Research Council's ("LRC") executive board appoints a director,¹⁷ who assists in regulatory review.¹⁸ The director of the LRC (or his delegates) reviews proposed rules for compliance with requirements for form, style, clarity, and legality.¹⁹ The director must give the agency notice in writing prior to hearing if dissatisfied with some aspect of a proposed rule.²⁰ If the agency does not like the director's corrections, it may appeal to the IRRC.²¹

Adoption: After the public hearing and review by the LRC of the proposed rule have occurred, the rule must be signed by the appropriate representatives of the agency and the director of the LRC. For a permanent rule, the rule must be presented to the IRRC. The rule will then be effective twenty days after filing with the secretary of state.²² A rule may only be adopted if filed with the secretary within seventy-five days of its public hearing. If the IRRC fails to meet on the proposed rule within that period, the agency may complete the process by skipping IRRC review.²³

South Dakota's Process in Practice

Agency Reporting: The procedure and necessary forms for agencies to adopt rules are available through the website of the Legislative Research Council ("LRC").²⁴ The form for the determination of fiscal impact has small boxes where agencies can report the cost and revenue changes for various state agencies, local subdivisions, and small businesses. The form gives little specific guidance for determining how the effects should be computed.²⁵ The small business impact statement form is a two-page series of checkboxes and questions about the justifications for the rule. Any rule that does not have a "Direct Impact" on small businesses needs no additional information.²⁶ Agencies are not required to consider regulatory alternative, include qualitative costs in the analysis, or to use cost-benefit analysis generally. Distributional impacts of regulation (beyond small businesses) are not considered. Indirect or ancillary costs of regulation are not considered. Doug Decker of the LRC reports that "agency analysis is not consistent."²⁷

Legislative Research Council: The LRC plays an active role in advising agencies on proposed rules.²⁸

IRRC Review: The minutes of all meetings of the IRRC are posted on the LRC website.²⁹ These minutes reveal that most rules are disposed of quickly, and that regulations are unanimously approved when no public testimony is present, though minutes do not reflect informal negotiations.³⁰ In a recent meeting, Senator Hunhoff commissioned a study to discover a better way for agencies to give notice of their public hearings, so that more interested parties would attend the IRRC meetings.³¹

IRRC has only occasionally ever used its constitutionally-granted suspension powers. Instead, IRRC is much more likely to require agencies to revert to earlier steps in the rulemaking process, and especially to hold additional public hearings.³² This remand authority is powerful and essentially operates as a second suspension or quasi-veto authority. For example, requiring additional hearings can effectively delay a proposed rule for months or years.³³

The IRRC has the authority to designate any agency for comprehensive review and evaluation of the agency's rules and rule making authority,³⁴ but this power is rarely used.³⁵

Analysis and Grade

The IRRC's ability to remand rules for additional public hearings does hold the promise of helping agencies to calibrate regulations. But the same power can also be wielded to delay regulations or as a back-door veto.

South Dakota has great agency transparency and standardization of its rulemaking process, with an abundance of forms available on the LRC website for agencies, wide requirements for public notice, opportunity for public comment, and open access to the reviewing minutes of the IRRC. However, the requirements of the fiscal impact statement and corresponding small business impact statements are brief, and agency valuations of risks and benefits are not consistent. Efficiency could be improved by subjecting new rules to something closer to cost-benefit analysis.

South Dakota earns a D.

“When the Legislature grants rulemaking authority to the executive agencies, it is delegating a quasi-legislative power. In spite of this, few legislators have had much opportunity to learn about the rules promulgation process.”

—Legislative Research Council

Notes

- ¹ S.D. CODIFIED LAWS § 1-26-4.1.
- ² *Id.* § 1-26-4.
- ³ *Id.* § 1-26-4.2.
- ⁴ *Id.* § 1-26-2.1. The agency is also required to explain the basis for the rule and the reason the rule is needed, as well as the types of professional skills necessary for preparation of the rule.
- ⁵ *Id.*
- ⁶ Joe Kafka, *Bill Would Help Small Businesses*, AP STATE & LOCAL WIRE, Feb. 4, 2004.
- ⁷ *Id.*
- ⁸ *Id.* (quoting Dustin Johnson).
- ⁹ Senate Bill 112 History, <http://legis.state.sd.us/sessions/2004/112.htm>.
- ¹⁰ Kafka, *supra* note 6.
- ¹¹ S.D. CODIFIED LAWS §§ 1-26-4(5) & (7). Some types of agencies must accept further comments for a ten-day period after the public hearing. *Id.* § 1-26-4(6).
- ¹² The IRRC consists of three members each from the South Carolina Senate and the House of Representatives, appointed by the heads of the respective chambers. No more than two members from each chamber may be of the same political party. *Id.* § 1-26-1.1.
- ¹³ *Id.* § 1-26-1.2.
- ¹⁴ The statute actually gives the IRRC the right to remand the agency to any step in the initial rulemaking process. *Id.* § 1-26-4.7.
- ¹⁵ *Id.*
- ¹⁶ *Id.* § 1-26-38.
- ¹⁷ The Legislative Research Council consists of all members of the South Dakota Legislature. *Id.* § 2-9-1. The executive board of the LRC consists of fifteen members of the legislature, chosen as described in *id.* § 2-9-2.
- ¹⁸ *Id.* §§ 2-9-4 & 2-9-8.
- ¹⁹ *Id.* § 1-26-6.5; *see also* LEGISLATIVE RESEARCH COUNCIL, THE ADMINISTRATIVE RULES PROMULGATION PROCESS: A PRIMER (2009), *available at* <http://legis.state.sd.us/IssueMemos/IssueMemos/im96-15.pdf>.
- ²⁰ S.D. CODIFIED LAWS § 1-26-6.5.
- ²¹ *Id.* § 1-26-4(4).
- ²² *Id.* § 1-26-6.

- ²³ *Id.* § 1-26-4.3.
- ²⁴ SOUTH DAKOTA LEGISLATURE, PROCEDURE FOR ADOPTING PERMANENT RULES, *available at* <http://legis.state.sd.us/rules/RulesForms.pdf>.
- ²⁵ *Id.* at 49. The form enjoins the user to “Attach: Copy of proposed rules; separate sections for: 1) explanation of rules effect, i.e., what procedures, schedules, activities, etc. will change with its adoption 2) statistics used, and their source, 3) assumptions that were made to arrive at fiscal impact, 4) computations that were made, and 5) small business impact statement.”
- ²⁶ *Id.* at 60.
- ²⁷ Survey from Doug Decker, Code Counsel, Legislative Research Council (2009, on file with author).
- ²⁸ *See* Kevin Woster, *Game Agency Lets Road Hunting Stand*, ARGUS LEADER, Jun. 6, 2006, at 1A (LRC informs Game, Fish, and Parks Commission that it did not have the authority to establish which rights-of-way are open to hunting).
- ²⁹ *E.g.*, South Dakota Legislature, 2009 INTERIM MINUTES AND AGENDAS, *available at* <http://legis.state.sd.us/interim/2009/documents.aspx?Committee=62> (containing links to the rules review agendas and meetings from 3/13/2009 through 12/21/2009); South Dakota Legislature, 2008 INTERIM MINUTES AND AGENDAS, *available at* <http://legis.state.sd.us/interim/2008/documents.aspx?Committee=62> (containing links to the rules review agendas and meetings from 1/7/2008 through 3/13/2009).
- ³⁰ *See e.g.* Legislative Research Council, RULES REVIEW COMMITTEE MINUTES: THREE HUNDRED FIRST MEETING, (Nov. 18, 2009) *available at* <http://legis.state.sd.us/interim/2009/minutes/MRUL11182009.pdf>.
- ³¹ *Id.* at 7. *See* Legislative Research Council, Rules Review Committee Minutes: Three hundred second meeting, (Dec. 21, 2009) *available at* <http://legis.state.sd.us/interim/2009/minutes/MRUL12212009.pdf> for the staff report in response to Senator Hunhoff’s request.
- ³² THE ADMINISTRATIVE RULES PROMULGATION PROCESS: A PRIMER, *supra* note 19.
- ³³ *E.g.*, Chet Brokaw, *Legislative Panel Approves Taxidermy Rules*, AP STATE & LOCAL WIRE, Aug. 7, 2003 (noting rules were first proposed by agency a year earlier, but initially remanded by IRRRC).
- ³⁴ S.D. CODIFIED LAWS § 1-26B-2.
- ³⁵ Survey from Decker, *supra* note 27.

Tennessee

Despite a potentially powerful, quasi-veto authority, Tennessee’s legislative review process has—at least until recently—been “plagued by squabbling or indifference.”

Tennessee’s Process on Paper

Impact Statements: When an agency files a final rule with the Secretary of State, it must submit: a brief summary; an identification of persons, organizations, corporations, or government entities most directly affected (and whether they support or oppose the rule); and an estimate of the impact on government revenues and expenditures.¹

Before initiating a rulemaking, agencies must review the possible effects on small business and minimize any adverse impacts, consistent with public health, safety, and well-being.² If there is a small business effect, agencies must prepare an economic impact statement detailing the types and numbers of businesses that will benefit or be burdened; the compliance costs; the impact on small business and consumers; any less burdensome alternatives; a comparison with any comparable federal or state regulations; and an analysis of effect of creating any small business exemptions.³

Attorney General: No rule can be filed with secretary of state until Office of the Attorney General and Reporter reviews the legality and constitutionality.⁴

Effective Date: Rules that are proposed without a rulemaking hearing cannot take effect until about 150 days after they are filed with the Secretary of State. Rules that are proposed with a rulemaking hearing become effective ninety days from when they are filed, but the House or Senate Government Operations Committee may stay the running of that period for up to sixty days.⁵

Legislative Review and “Sunset”: Despite an Attorney General opinion from 2001 finding that giving legislative review committees too much veto authority could violate the state constitution’s separation of powers,⁶ Tennessee has granted its legislative review committees substantial power, most recently amending the authority in 2009.⁷

The committees’ review powers are partly tied to a short and automatic sunset period for all new rules. All new rules expire on June 30 of the year after they were finalized, unless legislation is enacted to continue a rule. Expiring rules can be continued for another short period or indefinitely.⁸

All rules can be reviewed by the House and Senate Government Operations Committees. Committees are supposed to try to review rules within ninety days of their submission to the Secretary of State (during which time rules are still not yet in effect).⁹ Committees must hold at least one public hearing, at which the agency has the burden of justifying the rule’s continued existence.¹⁰ The Committees are given a list of factors to consider: authority, clarity, consistency, justification (defined as “the diligent, knowledgeable, zealous and timely efforts of the agency . . . to produce all pertinent and relevant documents . . . needed to justify continuation”), and necessity (defined as “need for and usefulness of a regulation as dictated by public policy considerations”).¹¹

Based on those factors, a Committee may disapprove a rule and vote either to allow it to expire or to request the agency repeal, amend, or withdraw it. If the agency does not comply with a request to repeal, amend, or withdraw its rule within a reasonable time, the Committee may vote to request the General Assembly suspend, by legislative enactment, any of the agency’s rulemaking authority for a reasonable period of time.¹² Committees can also recommend that the General Assembly

terminate any rule that imposes environmental requirements on local government that are more stringent than federal requirements.¹³

Tennessee's Process in Practice

Some of Tennessee's legislative review powers are relatively new,¹⁴ and until recently the House and Senate Government Operations—"[p]lagued by squabbling or indifference"—had some trouble scheduling joint meetings to review rules.¹⁵ However, the review committees are now "back on course"¹⁶ and have begun meeting regularly to review rules.¹⁷ As such, it remains to be seen exactly how Tennessee will exercise its legislative review powers going forward.¹⁸

But historically, Tennessee has not aggressively used its power to sunset rules. In the 1990s, the legislature voted to extend nearly all rules beyond the expiration date of the sunset provision, "defeating its original purpose."¹⁹ From 2005 through 2010, only one rule has not been extended by the annual legislation on sunset rules.²⁰

Analysis and Grade

Though it remains to be seen how Tennessee will use some of its new and recently reorganized review powers going forward, based on recent practices, Tennessee earns a D.

Tennessee's structure is not reasonable. The effective date for regulations is delayed for quite a long period, even for routine or non-controversial rules. Reviewing rules by forcing them to expire after one year is not the most straightforward or efficient approach to regulatory review. The system also only gives the legislature the binary choice of letting a rule expire or not, instead of helping to calibrate regulations. Though there are some substantive standards for review, historically review has been inconsistent and not transparent. There is no effective periodic review, inter-agency coordination, or protection against agency inaction. Analytical requirements are extremely weak, though at least the regulatory flexibility analysis looks at the consequences of creating small business exemptions.

Tennessee seems ready and willing to reinvent its regulatory review structure. The state should take this opportunity to ensure that, going forward, its process is transparent, consistent, and focused on maximizing net benefits.

Notes

- ¹ TENN. CODE ANN. § 4-5-226(i). The statement must also include a simple declarative sentence on whether rule may have a financial impact on local government. *Id.* § 4-5-228.
- ² *Id.* § 4-5-402.
- ³ *Id.* § 4-5-403.
- ⁴ *Id.* § 4-5-211.
- ⁵ *Id.* §§ 4-5-207, 4-5-215.
- ⁶ Op. of the Attorney General 01-086 (May 23, 2001).
- ⁷ 2009 Tenn. Session Laws, ch. 566 § 25.
- ⁸ TENN. CODE ANN. § 4-5-266(a).
- ⁹ *Id.* § 4-5-226(c).
- ¹⁰ *Id.* § 4-5-226(d).
- ¹¹ *Id.* §§ 4-5-226(e)-(f).
- ¹² *Id.* 4-5-226(j).
- ¹³ *Id.* 4-5-226(l).
- ¹⁴ 2009 Tenn. Session Laws, ch. 566 § 25.
- ¹⁵ Andy Sher, *Two Legislative Oversight Panels Reassert Themselves*, CHATTANOOGA TIMES FREE PRESS, Oct. 11, 2009.
- ¹⁶ *Id.*
- ¹⁷ Committees sometimes meet independently, sometimes jointly. See schedules, *available at* <http://www.capitol.tn.gov/joint/committees/gov-opps>. Committees also have many other duties, including sundown reviews of entire agencies.
- ¹⁸ Tennessee's Government Operations Committee, unfortunately, did not complete a survey.
- ¹⁹ Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 29 J. LEGAL STUD. 873, 883, n.17 (2000) ("In 1997, for example, the legislature allowed only seven rules adopted in 1996 to expire. Six of the rules were regulations regarding fees by various medical boards, and the seventh was a regulation of book-keeping procedures for the Registry of Election Finance.").
- ²⁰ In 2010, ch. 1085 § 1, extended all but one rule (liens for child support); all rules were extended in 2009 Tenn. Session Laws ch. 560 § 1, 2008 Tenn. Session Laws ch. 1071 § 1, 2007 Tenn. Session Laws ch. 546 § 1, 2006 Tenn. Session Laws ch. 918 § 1, and 2005 Tenn. Session Laws ch. 464 § 1.

Texas

The review process in Texas is decentralized and largely non-existent.

Texas's Process on Paper

Legislative Review: Agencies submit proposed rules to the Lieutenant Governor and Speaker of the House of Representatives, who refer the rules to the appropriate legislative standing subcommittees for review. By a majority vote, a subcommittee can submit a statement of support or disapproval to the relevant agency.¹

Notice and Impact Statements: Public notice of proposed rules must include, *inter alia*,² an explanation of the rule, a fiscal note, a note about public benefits and costs, and a local employment impact statement (if required).³

The fiscal note must include the foreseeable government costs, revenues, or savings from enforcement of the regulation for at least five years.⁴ The note on public costs and benefits must include the public benefits expected from adoption of the rule as well as the probable compliance costs.⁵ If a localized impact is forecasted, a local employment impact statement is required, to describe in detail the effect on employment for the first five years in each geographic area affected.⁶

House Bill 3430, adopted in 2007, requires agencies to assess the impact of regulations on small businesses. Agencies must prepare a regulatory flexibility analysis that considers alternative methods of achieving the purposes of the rule if it will have adverse economic consequences on small or “micro” businesses, but exemptions must be consistent with the public health, safety, and environmental and economic welfare of the state.⁷

Major environmental rules undergo special review.⁸ Such proposals must identify the problem the rule is intended to address; determine whether a new rule is necessary to address the problem; and consider the benefits and costs of the proposed rule in relationship to state agencies, local governments, the public, the regulated community, and the environment. Agencies must prepare a “draft impact analysis,”⁹ which requires a description of costs and benefits “in as quantitative a manner as feasible, but including a qualitative description when a quantitative description is not feasible or adequately description.” The analysis must also describe reasonable alternatives that were considered, and identify the data and methodology used.¹⁰

Review of Existing Rules: Every four years, agencies must determine whether the reasons for initially adopting the rule still exist.¹¹

Texas's Process in Practice

Though legislative subcommittees have authority to review rules, this decentralized review process has rarely, if ever, been activated.¹²

While major environmental rules have officially been singled out for additional scrutiny (a requirement pushed through, in part, by lobbying from the Texas Chemical Council),¹³ Texas agencies typically try to avoid the additional analytical requirements for major environmental rules.¹⁴ Determinations about whether the additional analysis is required have sometimes attracted criticism.¹⁵ Generally, the discussion of costs and benefits for environmental rules is brief. For example, in a 2010 proposal from the Commission on Environmental Quality to allow the continued use of pesticides in the Highland Lakes area, the section on public benefits and costs found no fiscal impact and that “the public benefits anticipated . . . will be continued protection of

the public health and the environment in the Highland Lakes area”—the proposal did not assess any potentially negative environmental consequences from the ongoing pesticide use.¹⁶

Most other rule proposals include only the standard fiscal impact statement. For example, when the Department of Health and Human Services submits rules, it fills out forms providing a rule summary, an estimate of costs or revenues to state and local government, a statement on impacts to small and micro businesses, a list of other cost impacts, and an assessment of impacts to property and local employment—but no benefits estimate.¹⁷

The attorney general’s office has released guidelines instructing agencies on compliance with the regulatory flexibility analysis requirements. In detailing how agencies should balance small business exemptions against public health, safety, and environmental and economic welfare, the only concrete example given is that agencies should not creation exemptions to fees or standards mandated by state statute or federal law.¹⁸

Analysis and Grade

Though the idea of a single oversight authority with the power to return regulations has been the subject of proposed legislature, currently there is no single oversight authority in Texas.¹⁹ Moreover, the individual legislative subcommittees with authority to review rules rarely exercise that power. Periodic review requirements exist, but without clear standards or meaningful enforcement. Even for rules with environmental effects, where statutory requirements are theoretically more stringent, in practice costs, benefits, and alternatives are not rigorously analyzed. Further, singling out environmental rules is not an appropriate way to tailor analytical requirements: all significant rules, regardless of their subject matter, could benefit from economic scrutiny. Texas should look beyond the compliance costs to small businesses and the compliance costs for environmental rules. Texas scores a D-.

Notes

- ¹ TEX. GOV'T CODE § 2001.032.
- ² *Id.* § 2001.024(a).
- ³ *Id.* § 2001.022.
- ⁴ *Id.* § 2001.024(a)(4).
- ⁵ *Id.* § 2001.024(a)(5).
- ⁶ *Id.* § 2001.022.
- ⁷ *Id.* § 2006.002.
- ⁸ *Id.* §§ 2001.0225(a)(1)-(4). Major environmental rules are with the specific intent to protect the environment or reduce risks to human health from environmental exposure and which may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the State or a sector of the State; analysis is required if such rules: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) were adopted solely under the general powers of the agency instead of under a specific state law. *Id.* § 2001.0225(g)(3).
- ⁹ *Id.* §§ 2001.0225(c)(1)-(6).
- ¹⁰ *Id.* § 2001.0225(g)(1).
- ¹¹ *Id.* § 2001.039.
- ¹² Dennis O. Grady & Kathleen M. Simon, *Political Restraints and Bureaucratic Discretion: The Case of State Government Rule Making*, 30 POL. & POL'Y 646, 659 (2002) (noting that, as of 2002, legislative review authority had never been used).
- ¹³ Jim Morris, *Chemical Council Counts on Relationships with State Lawmakers to Safeguard Industry*, HOUSTON CHRONICLE, Oct. 25, 1998.
- ¹⁴ See, e.g., Texas Comm'n on Env'tl. Quality, Rule Proj. No. 2007-003-080-LS (2007), available at http://www.tceq.state.tx.us/assets/public/legal/rules/hist_rules/Complete.07s/7003080_ado_clean.pdf ("even if the adopted rule is a major environmental rule, a draft regulatory impact assessment is not required . . .").
- ¹⁵ See Michael Hofrichter, *Texas's Open Beaches Act: Proposed Reforms Due to Coastal Erosion*, 4 ENVTL. & ENERGY L. & POL'Y J. 147, 154 (2009) (noting that Galveston County questioned the Land Commissioner's finding that no major environmental rule analysis was required).
- ¹⁶ Texas Comm'n on Env'tl. Quality, Rule Proj. No. 2010-055-311-OW (2010), available at http://www.tceq.state.tx.us/assets/public/legal/rules/rule_lib/proposals/10055311_pro.pdf.
- ¹⁷ HHS, Rulemaking Fiscal Impact Form (2005).

¹⁸ Texas Attorney General, Small Business Impact Guidelines (2008).

¹⁹ Survey from Dan Proctor, Texas Register (2009, on file with author).

Utah

Utah features an aggressive sunset clause, under which no rule lasts longer than one year without reauthorization from the legislature.¹

Utah's Process on Paper

Proposal and Impact Analysis: Before filing a proposed rule, agency heads must consider and comment on any possible fiscal impact on businesses:² the legislature intended for a politically accountable official at each agency to review such regulatory effects.³

If the agency reasonably expects a proposal will have a measurable, negative fiscal impact on small businesses, the agency must consider means of reducing that impact. Public comment can also trigger such analysis, if the agency receives testimony that the proposed rule will cost small business more than one day's average gross receipts.⁴ These additional small business safeguards were adopted in 2008, at the urging of the U.S. Small Business Administration.⁵

Agencies must file proposed rules and rule analysis with the Division of Administrative Rules.⁶ Rule analyses must contain a summary of the rule and its purpose, and a description of anticipated costs or savings to government, small businesses, and other persons.⁷ By Executive Order, agencies are also supposed to examine the "non-fiscal impact" to "citizens, businesses, state government, and local political subdivisions."⁸ The Division of Administrative Rules assists agencies in rulemaking and may make (after notifying the agency) non-substantive changes to rules.⁹ Agencies must work with the Governor's Office of Planning and Budget ("GOPB") to implement executive review of all rules.¹⁰

Legislative Review: When notice of a proposed rule is published, agencies simultaneously submit the rule to the legislature's Administrative Rules Review Committee ("ARRC").¹¹ ARRC consists of ten permanent members, five appointed from each legislative chamber.¹² ARRC is authorized to examine rules for their statutory authority; their compliance with legislative intent; their impact on the economy and government operations; and their impact on affected people.¹³

ARRC can examine any issues it considers related to its duties and may have the Office of the Legislative Fiscal Analysts prepare a fiscal note on any rule.¹⁴ ARRC prepares written findings of its reviews, where it may recommend changes to the agency or legislative action.¹⁵

Sunset and Reauthorization: Except rules mandated by federal law or authorized by the state constitution, all rules sunset every year unless reauthorized by the legislature.¹⁶ ARRC prepares omnibus legislation generally reauthorizing all rules, but listing those select rules that it determines should expire.¹⁷ If the legislation is passed, ARRC sends a letter to the governor and the relevant agencies explaining why it believes certain rules should expire.¹⁸ If an agency disagrees and insists a sunset rule is necessary and authorized by statute, it may petition the governor to extend the rule. The governor has power to make such declarations,¹⁹ and may extend all rules should the legislature fail to pass the omnibus reauthorization bill.²⁰

Ex Post Review and Deadlines: Every five years, all agency rules are reviewed.²¹ If the agency continues or amends a rule, it must file a reasoned justification, including why the agency disagrees with any comments received in opposition to the rule.²² Agencies can file for extensions of the review deadline, but if an agency fails to meet a deadline, the rule expires and the Division of Administrative Rules will remove it from the state code.²³

If an agency does not initiate rulemaking proceedings on a statutorily required rule within certain deadlines, the agency must explain its delay to the legislative Administrative Rules Review Committee.²⁴

Utah's Process in Practice

Rule analyses focus on costs, and the regulatory experts at each individual agency are responsible for estimating compliance costs.²⁵ As such, analytical approaches may vary from agency to agency,²⁶ even though the Division of Administrative Rules holds training sessions for agency staff on rule analysis preparation.²⁷ Benefits are not discussed in rule analyses, and no discount rate is applied to the cost estimates.²⁸ Costs must be monetized, unless data is unavailable and obtaining it would entail a “substantial unbudgeted hardship,” in which case the agency may substitute a narrative description of costs.²⁹

The Governor's Office of Policy and Budget (“GOPB”) has one rules analyst.³⁰ GOPB reviews focus on a rule's impacts, costs, purpose, and legality,³¹ and the office reviews both proposed and effective rules.³² GOPB aims to work collaboratively with agencies and ARRC, and may review early rule drafts or assist in rule development.³³

ARRC meets about a dozen times each year,³⁴ and is involved at all points of the regulatory process: from helping to draft authorizing statutes,³⁵ to substantive review of agency regulation,³⁶ to recommending the suspension of problematic rules.³⁷

Neither ARRC nor GOPB can veto or change a proposed rule, but both “exercise a good deal of political pressure if they believe something should be changed.”³⁸ ARRC especially can also use the sunset structure to wield influence. In most years, the vast majority of rules are reauthorized by the legislature. In 2010, all but one rule—the Department of Human Services rule on related-parties conflict investigation procedure, for which statutory authority had been amended—was reauthorized;³⁹ in 2009, all but three were reauthorized,⁴⁰ and in 2008, all but two were reauthorized.⁴¹ But ARRC can use the reauthorization process to encourage agencies to reconsider issues raised by ARRC's review.⁴²

ARRC may sometimes investigate and make recommendations on broader regulatory issues, such as the use of the phrase “liberally construed” as it appears throughout Utah's statutes and regulations,⁴³ or the criminal penalties for violating administrative rules.⁴⁴

Analysis and Grade

Early efforts by both GOPB and ARRC to work collaboratively with agencies gives Utah's review process hope of calibrating regulations, and both reviewers consistently apply substantive criteria. Utah's review structure has also achieved transparency, in large part thanks to the Division of Administrative Rule's comprehensive website. But Utah's annual sunset provision is likely wasteful and burdensome, not the optimal way to periodically assess regulations.

The design of Utah's small business review process may conserve agency resources better than some other states. Instead of requiring a detailed quantitative analysis of impacts unique to small businesses, agencies simply consider means of reducing impacts if it reasonably expects a measurable, negative impact. This structure may reduce analytical burdens, but it alone does not rectify Utah's overall biased focus on compliance costs and neglect of regulatory benefits. Utah should look at reinvigorating its Executive Order's call to consider non-fiscal impacts to citizens, businesses, and government. Meanwhile, Utah earns a C.

Notes

- ¹ The sunset provision passed in 1989 as part of an agreement between the legislature's review committee and the governor. *See* Admin. Rules Review Comm., Committee Overview, <http://le.utah.gov/asp/interim/Commit.asp?Year=2010&Com=SPEADM>.
- ² UTAH CODE ANN. §§ 63G-3-301(5)-(7).
- ³ Division of Admin. Rules, FAQ: Completing the Rule Analysis, <http://www.rules.utah.gov/agencyresources/faqs/faq-proposed.htm#Q12>.
- ⁴ UTAH CODE ANN. §§ 63G-3-301(5)-(7).
- ⁵ Division of Admin. Rules, Rules News, <http://www.rules.utah.gov/rulesnews/?p=185>.
- ⁶ UTAH CODE ANN. § 63G-3-301(4).
- ⁷ *Id.* § 63G-3-301(8).
- ⁸ Executive Order signed March 22, 1988 by Gov. Bangerter, *available at* <http://www.rules.utah.gov/law/eo1988-03-22.htm>.
- ⁹ UTAH CODE ANN. § 63G-3-402(1)(l), (2).
- ¹⁰ 1988 Executive Order, *supra* note 8; *see also* Executive Order signed Feb. 3, 1986, directing agencies to significantly reduce the volume of their rules (by 25% if possible), *available at* <http://www.rules.utah.gov/law/eo1986-02-03.htm>.
- ¹¹ UTAH CODE ANN. § 63G-3-501(2).
- ¹² *Id.* § 63G-3-501(1). Five permanent members appointed by the Senate president (including two from the minority party); five permanent members appointed by the House speaker (including two from the minority party); and four ex officio members.
- ¹³ *Id.* § 63G-3-501(3)(b).
- ¹⁴ *Id.* §§ 63G-3-501(3)(c), (4). ARRC may also refer matters to legislative interim committees with jurisdiction over the agency and rule in question. *Id.* § 63G-3-501(3)(c).
- ¹⁵ *Id.* § 63G-3-501(6).
- ¹⁶ *Id.* § 63G-3-502(2) ("every agency rule that is in effect on February 28 of any calendar years expires on May 1 of that year unless it has been reauthorized").
- ¹⁷ *Id.* §§ 63G-3-502(3)(a),(b), (d). ARRC can list any rule, provision, or paragraph. Reauthorization does not constitute approval, nor is it admissible in any proceeding as evidence of legislative intent. *Id.* § 63G-3-502(4).
- ¹⁸ *Id.* § 63G-3-502(3)(c).
- ¹⁹ *Id.* § 63G-3-503(5).
- ²⁰ *Id.*; *see* Exec. Order signed May 21, 1997, *available at* <http://www.rules.utah.gov/execdoks/1997/e1997-05-21.htm> (reauthorizing all rules).

- ²¹ UTAH CODE ANN. § 63G-3-305(1).
- ²² *Id.* §§ 63G-3-305(3)(a), (c).
- ²³ *Id.* §§ 63G-3-305(5)-(8).
- ²⁴ *Id.* § 63G-3-301(13).
- ²⁵ Survey from W. Hunter Finch, Analyst, Governor’s Office of Policy & Budget (2009, on file with author).
- ²⁶ *Id.*
- ²⁷ See Division of Admin. Rules, Rules News, <http://www.rules.utah.gov/rulesnews/?p=766>.
- ²⁸ Survey from Finch, *supra* note 25.
- ²⁹ UTAH ADMIN. CODE r. 15-4-10(1), (4).
- ³⁰ Survey from Finch, *supra* note 25.
- ³¹ GOPB, Administrative Rules, <http://governor.utah.gov/gopb/adminrules.html>.
- ³² Division of Admin. Rules, Rulemaking Process, <http://www.rules.utah.gov/agencyresources/rulemakingprocess-overview.pdf>.
- ³³ GOPB, Administrative Rules, *supra* note 31.
- ³⁴ See Meeting Schedules available at, e.g., <http://le.utah.gov/asp/interim/Commit.asp?Year=2009&Com=SPEADM>.
- ³⁵ See, e.g., Judy Fahys, *New Penalties in the Works for Tailpipe Testing*, THE SALT LAKE TRIBUNE, Aug. 17, 2009 (ARRC members agree to draft a bill capping penalties on tailpipe-testing program).
- ³⁶ UTAH CODE ANN. § 63G-3-501.
- ³⁷ See, e.g., Lisa Schencker, *Utah Lawmakers Say Parent Involvement Rule Goes Too Far: Charter Schools? Legislators Want to See the Regulation End*, THE SALT LAKE TRIBUNE, Jan. 16, 2009, (ARRC votes to recommend that the legislature end a state rule requiring charter school boards to have a parent representative).
- ³⁸ Memorandum to MSAPA Drafting Committee on Rules Review Issues, Apr. 17, 2007 (reporting survey of Utah).
- ³⁹ Division of Admin. Rules, Rules News, <http://www.rules.utah.gov/rulesnews/?p=739> and <http://www.rules.utah.gov/rulesnews/?p=730> (explaining the Dept. of Human Service’s procedure for conflict investigations had been changed by statute).
- ⁴⁰ H.B. 197 (Utah 2009), available at <http://le.utah.gov/~2009/bills/hbillenr/hb0197.htm>.
- ⁴¹ Division of Admin. Rules, Rules News, <http://www.rules.utah.gov/rulesnews/?p=185>.
- ⁴² Division of Admin. Rules, Rules News, <http://www.rules.utah.gov/rulesnews/?p=651> (“The committee chair asked staff to hold the bill until Education has addressed the issue discussed at its 12/21/2009 meeting regarding Section R277-470-15 entitled, ‘Satellite School for Approved Charter Schools.’”).
- ⁴³ Division of Admin. Rules, Rules News, <http://www.rules.utah.gov/rulesnews/?p=840>.

⁴⁴ Division of Admin. Rules, Rules News, <http://www.rules.utah.gov/rulesnews/?p=369>.

Vermont

Vermont uniquely requires a greenhouse gas impact statement in addition to its economic impact statements.

Vermont's Process on Paper

Impact Statements: Proposed rules must be filed with the Secretary of State, along with an economic impact statement. The statement generally analyzes anticipated costs and benefits. The statement must list categories of people, enterprises, and government entities potentially affected, and estimate their costs and benefits; compare the economic impact of the rule with the economic impact of alternatives (including small business exemptions); explain how the rule was crafted to reduce direct and indirect greenhouse gas emissions; and conclude that the rule is the most appropriate method of achieving the regulatory purpose.¹ Agencies are instructed to prepare statement using their own employees and only information available at a reasonable cost.²

If a rule regulates small businesses, agencies should consider ways to reduce their compliance costs, so long as such actions would not significantly reduce the effectiveness of the rule, be inconsistent with statutory language or purpose, increase risk to the health, safety, or welfare, or compromise environmental standards.³

If a rule regulates public education, agencies must evaluate cost implications to local school districts and school taxpayers, and evaluate alternatives.⁴

Executive Review: The governor appoints executive branch staff to an Interagency Committee on Administrative Rules (“ICAR”). Rules must be “pre-filed” with ICAR fifteen days before notice of a proposed rulemaking.⁵ ICAR can review any proposed or existing rule for style or consistency with other laws, legislative intent, or the governor’s policies. ICAR principally works with agencies to develop strategies to maximize public input into the rulemaking.⁶

Legislative Review: The Legislative Committee on Administrative Rules (“LCAR”), a joint committee of the House and Senate, meets as often as necessary and can hold public hearings on both proposed and existing rules.⁷ All proposed rules must be filed with LCAR, and relevant legislative standing committees can also review and make recommendations to LCAR.⁸ LCAR has forty-five days to review a rule, unless the agency consents to an extension. Within that time LCAR may vote to object to a rule as lacking authority, inconsistent with legislative intent, or arbitrary, or for not adhering to ICAR’s recommendations on public input.⁹

If LCAR objects, the agency has fourteen days to respond. After that, if the objection stands, the burden of proof shifts to the agency at any subsequent judicial proceeding on the rule’s validity.¹⁰ LCAR may also object to a rule if the economic impact statement failed to recognize a substantial economic impact, but that kind of objection does not shift burdens of proof, and the agency can still finalize the rule.¹¹ LCAR may also object to any proposed rule if the local school cost statement is inadequate.¹²

Periodic Review: LCAR can review and object to existing rules.¹³ Upon a request from LCAR, any existing rule that has not been substantially changed in the last six years is given one more year, and then expires. But the agency can readopt the same rule during that final year.¹⁴

Vermont's Process in Practice

Impact Statements: The Secretary of State’s forms on the preparation of economic impact

statements advise agencies that “Costs and benefits can include any tangible or intangible entities or forces which will make an impact on life without this rule.”¹⁵ The form offers even more detailed instructions on the greenhouse gas impact section, requiring sector-by-sector analysis of transportation, land use, building infrastructure, waste generation, and other emissions.¹⁶ Still, the greenhouse gas requirements are new, and ICAR may have to remind agencies to include this analysis.¹⁷

Many economic impact statements are sparse and much more likely to identify affected groups than to actually estimate their costs and benefits. For example, one characteristic economic impact statement from the Department of Labor listed broad categories of affected parties, but ignored instructions to estimate their specific costs and benefits: “Employees and employers, insurance carriers and their agents, attorneys, vocational rehabilitation providers, and interested groups representing labor, business and insurance interests. . . . This rule is expected to have minimal economic impact, overall, however, it is anticipated that the vocational rehabilitation dollars that are spent will be better utilized.”¹⁸

However, other statements, most notably from the Department of Environmental Conservation, do contain more analysis. For example, that agency commissioned a study on impacts from its proposed rule on outdoor wood-fired boilers in 2006. And while it found an aggregate benefits estimate was not feasible, “it is useful to consider the benefits required to exceed the estimated costs of the proposed emissions standard.” The agency found that its rule would breakeven on costs if benefits included at least three to fifteen fewer cardiovascular hospitalizations, ten to fifty fewer respiratory hospitalizations, or a 7% decrease in the risk of premature mortality for a single individual.¹⁹

Reviews: ICAR does meet regularly to review rules,²⁰ and will especially look at whether the rulemaking has solicited enough public input. ICAR may also play some role in reviewing public petitions for rulemaking.²¹

LCAR is staffed by one attorney and one assistant, who split their time working for other committees as well; additional Legislative Council attorneys may help review rules.²² LCAR meets regularly to review rules,²³ and will object to rules as arbitrary, poorly written, or not in compliance with public hearing policy. But, reportedly, LCAR approves most rules.²⁴

Case Study: ATVs on State Lands

In 2009, the Department of Natural Resources proposed allowing the use of all-terrain vehicles (“ATVs”) on state lands. The agency’s economic impact statement spent little time identifying possible environmental costs and focused on economic benefits. Specifically, the statement discussed increased ATV sales, increased business for establishments offering goods and services to ATV riders, and increased registration fees. The agency also mentioned possible government costs from increased demands on staff time and resources. None of these costs were quantified.²⁵

The only environmental effects discussed were those required by the greenhouse gas statement. Here, the agency wrote: “This rule has the potential to impact the emissions of greenhouse gases if a statewide trail system results in greater ATV use. Conversely, it may allow Vermont residents the opportunity to ride ATVs instate and not have to travel for ATV riding opportunities.”²⁶

After months of public debate, the agency finalized the rules and filed them with the legislature in late 2009. When the rule came before LRAC, the committee’s chair expected a vote against the

rules, and so released draft findings first to give the agency and the public time to respond before taking a formal vote. But the agency did not amend or withdraw its rules, and soon the committee unanimously voted to object.²⁷ LRAC based its objection not on the underlying policy question, but on the process through which the rule was promulgated. The media commented that the action reflected the frequent clashes between a Republican governor and a Democrat-dominated legislature.²⁸

LRAC members speculated that the full legislature would consider enacting a bill to overturn the rule as soon as it reconvened in early 2010.²⁹ The new rules took effect in January 2010, but the agency predicted there would be no immediate consequences and no ATV trails planned for approval in the near future.³⁰ No legislation on ATVs was passed before the legislature adjourned its session in 2010.³¹

Analysis and Grade

Though many agencies have some trouble meeting the full analytical requirements, the statute does advise agencies to limit their analysis to information available at reasonable costs. And while LRAC may face resource constraints as well, it can extend its timeline for review when necessary. Overall, Vermont's structure does reasonably fit the state's resources.

Vermont's review process also has the potential to help calibrate rules. Both reviewers meet regularly. IRAC reviews for administration-wide policy (which also helps coordinate inter-agency conflicts) and to increase public input (which also helps increase transparency and participation). LRAC reviews according to clear substantive standards, including whether the analytical statements missed an important economic impact.

Those analytical statements show promise, but the requirements could still be improved. Treatment of benefits and costs is roughly balanced. For example, small business exemptions are weighed against health, safety, welfare, and environmental effects. In fact, if anything, environmental effects may be given too much weight, with greenhouse gas impacts singled out for special attention. But without consistent quantification, even a requirement to analyze alternatives and select the most appropriate option will not help agencies integrate analysis into their decisionmaking and maximize net benefits. Agencies at best wave their hands at distributional impacts.

Vermont lacks a process to combat agency inaction, and any periodic review is ad hoc and lacks substantive standards.

Vermont has many redeeming and unique features in its regulatory review structure, and so scores a B as its Guiding Principles Grade.

Notes

- ¹ VT. STAT. ANN. tit. 3 § 838(c).
- ² *Id.* § 838(c)(2).
- ³ *Id.* § 832a.
- ⁴ *Id.* § 832b.
- ⁵ *Id.* § 837; Exec. Order No. 04-10 (2010) (requiring pre-filing with ICAR).
- ⁶ VT. STAT. ANN. tit. 3 § 820.
- ⁷ *Id.* § 817.
- ⁸ *Id.* § 841.
- ⁹ *Id.* §§ 841, 842(a)-(b).
- ¹⁰ *Id.* §§ 842(a)-(b).
- ¹¹ *Id.* § 842(d).
- ¹² *Id.* § 832b.
- ¹³ *Id.* § 817.
- ¹⁴ *Id.* § 834.
- ¹⁵ Secretary of State, Form on Economic Impact Statement (2010).
- ¹⁶ *Id.*
- ¹⁷ See ICAR Approval of Vermont Wetland Rules, Jan. 12, 2010, *available at* <http://www.nrb.state.vt.us/wrp/rulemaking/wetlands2010/filedruledocs/ICARapproval011110.pdf> (“approved subject to . . . inclu[sion of] greenhouse gas emissions statement”).
- ¹⁸ Department of Labor, Economic Impact Statement on Workers’ Compensation Vocational Rehabilitation Rules, <http://159.105.83.167/Portals/0/WC/VReconstate.pdf>.
- ¹⁹ Robert Black, for Vermont Department of Environmental Conservation, Supplemental Economic Impact Statement for Vermont’s Proposed Rule on Outdoor Wood-Fired Boilers (2006), <http://www.anr.state.vt.us/air/docs/OWB%20EIS.pdf>
- ²⁰ See E-mail from Susan Harritt, AHS, to Bill Dalton, SOS, Nov. 10, 2009 (referencing ICAR meeting) (on file with author).
- ²¹ State Water Resources Board, In Re: Petition to Amend the Rules Regulating the Use of Waterbury Reservoir (2003).
- ²² Survey from Brian Levin, Legislative Counsel (2009, on file with author).
- ²³ See Committee Schedules, *available at* <http://www.leg.state.vt.us/schedule/schedule2.cfm>.

- ²⁴ See Howard Weiss-Tisman, *Agency Proposes ATV Rule on Trails*, BRATTLEBORO REFORMER, Oct. 21, 2009.
- ²⁵ Dept. of Natural Res. Economic Impact Statement on Regulation on All Terrain Vehicle Use on State Land (2009), <http://www.prtvt.org/pdfs/AllTerrainVehicleUseStateLand.pdf>.
- ²⁶ *Id.*
- ²⁷ Dave Gram, *Vt. Legislative Panel Opposes ATVs on State Land*, AP, Dec. 15, 2009.
- ²⁸ Dave Gram, *Committee Leans Against ATVs on Vt. State Lands*, AP, Nov. 30, 2009.
- ²⁹ *Id.*
- ³⁰ *ATVs to be Allowed on State Land*, AP STATE & LOCAL WIRE, Jan. 7, 2010.
- ³¹ See Vt. Legis., <http://www.leg.state.vt.us/database/search/search.cfm>.

Virginia

In recent years, Virginia has tried to streamline its regulatory process and make it easier for agencies to deregulate.

Virginia's Process on Paper

Impact Statements: In the 1990s, Virginia agencies complied with the statutory requirements on regulatory cost estimates for fewer than twenty percent of their proposed rules. Consequently, the legislature amended the requirements and gave a centralized entity the primary responsibility for the production of impact statements.¹

Before proposing a new rule, agencies must submit a copy to the Department of Planning and Budget (“DPB”). The DPB then has forty-five days to determine the rule’s public benefits and prepare an economic impact analysis, assessing the number of regulated parties, the impacts to the use of private property, and the projected compliance costs, including fiscal impacts to localities.²

If the regulation may have an adverse effect on small businesses, the DPB’s economic impact analysis must also detail the compliance costs to small businesses and describe any less intrusive methods of achieving the regulatory purpose, consistent with “health, safety, environmental, and economic welfare.”³

Public notice of the proposed regulation must contain the agency’s justification for the rule, the primary advantages or disadvantages for the public, and the agency’s response to the DPB’s economic impact analysis.⁴ A family impact statement is also required.⁵

Executive Review: Statute requires each new governor to adopt an executive order on regulatory review. The order must provide for review by the attorney general of statutory authority, and the governor must judge each proposed rule to be necessary to protect public health, safety, and welfare. By statute, agencies can initially ignore comments submitted by the governor, but the governor has some authority to formally object and, in conjunction with the legislature, to suspend the effective date of regulations.⁶

On June 29, 2010, Governor Bob McDonnell issued Executive Order 14 on regulatory review.⁷ The Order specifies that only regulations necessary to interpret laws or protect health, safety, and welfare should be issued, and the policies chosen should represent the most efficient, most cost-effective, and least intrusive options from among the reasonably available alternatives. The DPB enforces compliance with these guiding principles and can start reviewing proposals early, during the notice of intended regulatory action. Later, when the rule is ready for proposal, agencies must get the attorney general’s certification, the DPB’s economic analysis, and the governor’s approval. The attorney general and the DPB can again review the rule before finalization.

Legislative Review: The Joint Commission on Administrative Rules (“JCAR”) consists of five members from the Senate and seven from the House.⁸ JCAR can review rules for their statutory authority and legislative intent, impact on the economy, protection of natural resources, and impact on government operations or affected persons.⁹ Any legislative standing committee or JCAR can meet and object to proposed regulations; agencies must respond to objections within twenty-one days. The legislature may, with the governor’s concurrence, suspend the effective date of a regulation through the end of the following legislative session.¹⁰ JCAR also has authority to review the failure to adopt a rule, and can recommend adoption of a new rule.¹¹

Periodic Review: By statute, each new governor must issue an executive order on the periodic review of existing regulations. The attorney general must review to ensure ongoing statutory authority, and the governor may require agencies to analyze whether new regulations should be adopted or old regulations should be repealed, to protect the public health, safety, or welfare.¹² Governor McDonnell's Executive Order 14 specifies that this review process must occur every four years.¹³

Agencies must also review all existing regulations for small business impacts. At least every five years, regulations with small business impacts must be reassessed based on their continued need, public complaints, complexity, and changed technology or economic conditions.¹⁴

Recent Procedural Innovations: Virginia has adopted some innovative practices to increase transparency in their rulemaking and regulatory review procedures. Agencies must annually file in the *Register* a list of their guidance documents.¹⁵ Virginia has also developed an interactive, online portal called the Regulatory Town Hall: agencies communicate with the Department of Planning and Budget through the Town Hall, and the website serves as a conduit for public comments.¹⁶

Virginia has also been active recently trying to streamline its rulemaking process and reduce regulatory burdens. Agencies can use an expedited procedure to make amendments to rules to allow regulated parties to submit documents or payments electronically.¹⁷ Agencies are also encouraged to develop pilot programs to study and reduce regulatory mandates on local governments.¹⁸

Finally, Virginia has been expanding the categories of proposals available for fast-track rulemakings. Non-controversial rules can be issued through a fast-track procedure, with concurrence of the governor and written notice to the legislature and JCAR.¹⁹ In 2007, on the recommendation of then-attorney general Bob McDonnell, the Virginia legislature expanded the fast-track process to allow for the repeal of certain regulations as well.²⁰ Executive Order 14 has further defined the review process for fast-tracked regulations.²¹

Virginia's Process in Practice

Attorney General's Task Force: Starting in 2006, Attorney General Bob McDonnell's task force on regulatory reform reviewed 8,700 pages of regulations and made 350 recommendations for amendments or repeals. The task force was looking for regulations that no longer made sense in the twenty-first century, lacked legal authority, were redundant, were not necessary to protect health, safety, or welfare, or posed unreasonable costs. Concerned that "it is much easier to promulgate regulations than it is to repeal them," the task force helped push through legislation to expand use of the "fast track" process to repeal regulations. Since 2007, over forty-five percent of all regulatory amendments have been accomplished by the fast track process.²²

Though agencies generally report compliance with the attorney general's recommendations,²³ some non-government organizations felt the task force "never really gained much traction"²⁴ and was "business- and politically-driven."²⁵

Economic Analysis by the DPB: Six employees work in the DPB's economic and regulatory analysis division. The DPB claims to use thorough cost-benefit practices, for example including health and recreation benefits as non-monetized benefits with detailed qualitative descriptions, and addressing differential effects by socioeconomic status.²⁶

The DPB can withhold regulations, but prefers to work collaborative with agencies.²⁷ Agencies

report that sometimes the DPB will make suggestions on how “to lessen[] impact based on overly burdensome economic costs to the regulated community.”²⁸ When the DPB determines a proposal’s costs exceed its benefits, it attempts to have the agency change the proposed language before the analysis is published.²⁹ “Thus, in practice, much of the benefit of review (increasing the benefit-cost ratio) is invisible to the public.”³⁰

Robert Hahn found that, in the late 1990s, only five percent of the DPB’s economic analyses quantified benefits, and only four percent monetized benefits.³¹ Hahn felt that many analyses had sufficient information given their scope and purpose, but some analyses were “obviously inadequate,” and the DPB lacked resources to give significant rules the more sophisticated analysis they deserved.³²

Mostly, Hahn’s observations still hold true today. Though some agencies feel that the “[c]entralization of economic expertise in DPB is an economical and effective way of creating and maintaining specialization,”³³ others believe that the DPB lacks sufficient staff economist resources to consistently meet the statutory requirements for economic analysis.³⁴ For example, deregulations are no subject to the same level of economic analysis.³⁵ DPB analyses still tend not to include much quantification of benefits.³⁶

Executive Review: There is no deadline for the governor’s reviews, and “[l]ong regulatory delays, intentional or unintentional, can occur in the reviews conducted by the Governor’s Office.”³⁷

*Legislative Review:*³⁸ JCAR is largely inactive.³⁹

Town Hall: Non-governmental organizations are generally pleased with the Regulatory Town Hall.⁴⁰ Some agencies report that the website has facilitated public input⁴¹ and “dramatically improved the management of the state regulatory process,”⁴² but others feel its impact has been limited so far.⁴³

Analysis and Grade

Though some think the DPB should hire more economists, consolidating analytical expertise in one review entity likely makes the best use of limited resources. But there are multiple steps in Virginia’s review process, and some complain about delays. The Regulatory Town Hall holds promise to increase transparency and public participation, and perhaps even to help streamline the process.

Excluding the largely inactive JCAR, regulatory review in Virginia is consistent and substantive. In particular, the DPB claims it helps to calibrate rules, increasing the benefit to cost ratio. Analysis does seem well integrated into the decisionmaking process, but there is no real consistent analysis of benefits, alternatives, or the full range of distributional impacts.

On the other hand, much of Virginia’s overall process is too focused on deregulation as an end goal, instead of more generally on improving the efficiency of regulations (which would entail, from time to time, identifying areas where regulation is missing as well). For example, while there are standards for periodic review, the attorney general’s task force set the tone in prioritizing regulations for repeal. With Bob McDonnell now bringing his deregulatory agenda to the governor’s office, Virginia will have to be careful to maintain balance in its regulatory review structure. Currently, Virginia scores a B-.

Notes

- 1 Robert W. Hahn, *State and Federal Regulatory Reform: A Comparative Analysis*, 29 J. LEGAL STUD. 873, 908-09 (2000).
- 2 VA. CODE ANN. § 2.2-7004.04(A)(1).
- 3 *Id.* §§ 2.2-4007.1, -4007.04(A)(2).
- 4 *Id.* § 2.2-4007.05.
- 5 *Id.* § 2.2-606.
- 6 *Id.* § 2.2-4013.
- 7 Exec. Order No. 14 (2010); *compare* Exec. Order No. 107 (2009) (Governor Tim Kaine's largely similar executive order).
- 8 VA. CODE ANN. § 30-73.2
- 9 *Id.* § 30-73.3
- 10 *Id.* § 2.2-4014.
- 11 *Id.* § 30-73.3.
- 12 *Id.* § 2.2-4017.
- 13 Exec. Order No. 14 (2010).
- 14 VA. CODE ANN. §§ 2.2-4007.1(D)-(F).
- 15 *Id.* § 2.2-4008.
- 16 *See id.* § 2.2-4007.04(A)(1).
- 17 *Id.* § 2.2-4007.2.
- 18 *Id.* § 2.2-4010.
- 19 *Id.* § 2.2-4012.1.
- 20 ATTORNEY GENERAL'S GOVERNMENT AND REGULATORY REFORM TASK FORCE, FINAL REPORT (2009).
- 21 Exec. Order No. 14 (2010).
- 22 ATTORNEY GENERAL'S GOVERNMENT AND REGULATORY REFORM TASK FORCE, FINAL REPORT (2009).
- 23 *See* Survey from Roy Seward, Dept. of Agriculture and Consumer Serv. (2010, on file with author).
- 24 Survey from Madge Bush, Dir. of Advocacy, AARP Virginia (2009, on file with author).
- 25 Jim Leaman, President Virginia AFL-CIO (2009, on file with author).
- 26 Survey from Melanie West & Lawrence Getzler, DPB Assoc. Dir. and Chief Economic Analyst (2009, on file with author).
- 27 Survey from Douglas R. Harris, Adjudication Officer, Dept. of Health (2010, on file with author); Survey from Judith Kirkendall, Regulatory Coordinator, Dept. of Criminal Justice Services (2009, on file with author); *but see* Survey from David C. Dowling, Policy, Planning, and Budget Dir., Dept. of Conservation and Recreation (2010, on file with author) (noting the DPB cannot modify proposals "per se").

- 28 Survey from Jay Withrow, Dir. of Legal Support, Dept. of Labor and Industry (2010, on file with author).
- 29 *But see* Survey from David B. Spears, Regulatory Coordinator, Dept. of Mines, Minerals, and Energy (2009, on file with author) (“By the time [regulations] reach DPB, they are typically in pretty good shape. I cannot think of a substantive change requested by DPB in the [last] four years.”).
- 30 Survey from West & Getzler, *supra* note 26.
- 31 Hahn, *supra* note 5, at 909.
- 32 *Id.* at 910.
- 33 Survey from Douglas R. Harris, Adjudication Officer, Dept. of Health (2010, on file with author); *accord.* Survey from Dowling, *supra* note 27 (“Each regulatory analysis is unique. . . . The bottom line for each analysis is to be as thorough as possible.”).
- 34 Survey from Withrow, *supra* note 28.
- 35 *Id.*
- 36 *See, e.g.*, DPB Economic Impact Analysis for 9 VAC 20-80: Virginia Solid Waste Management Regulations (2002); DPB, Economic Impact Analysis for 8 VAC 20-40: Regulations Governing Educational Services for Gifted Students (2007).
- 37 Survey from Withrow, *supra* note 28; *see also* Survey from Spears, *supra* note 29 (reporting the process is “somewhat length” at twenty-two to twenty-four months, but that “I wouldn’t want less review”).
- 38 JCAR declined to complete a survey.
- 39 Survey from Withrow, *supra* note 28 (reporting JCAR asked the agency to brief it on one proposed regulation in the last five years); Survey from Spears, *supra* note 29 (reporting he has never heard from JCAR); Survey from Kirkendall, *supra* note 27 (“Not aware of [JCAR].”).
- 40 *See* Survey from Tyler Cradock, Dir. of Gov’t Affairs, Va. Chamber of Commerce (2009, on file with author).
- 41 Survey from Withrow, *supra* note 28.
- 42 Survey from Roy Seward, *supra* note 23 (“It has provided the public greater access to information about the process, as well as a new avenue for input into the process.”); Survey from Spears, *supra* note XX (reporting that the Town Hall “has been a wonderful improvement [that has] greatly streamlined the entire process, especially the review process. I don’t think, however, that the public has really embraced it yet. We receive very few public comments through the Town Hall, and they are typically not substantive.”).
- 43 Survey from Dowling, *supra* note 27 (“Several technical limitations” have limited full use of Regulatory Town Hall); Survey from Cindy M. Berndt, Dir. of Regulatory Affairs, Dept. of Env’tl. Quality (2009, on file with author) (reporting that the Town Hall is a wonderful tool but the agency has received no significant public feedback yet, maybe because website “can seem a little overwhelming when you first start to use it”); Survey from Kirkendall, *supra* note 27 (noting the Town Hall has made the process easier and smoother for regulatory coordinators, but the agency has never received public comment through it).

Washington

Washington agencies conduct among the most thorough cost-benefit analyses of proposed rules. Lately, controversial economic analyses may have rekindled the legislative review process.

Washington's Process on Paper

Agencies must publish notice of proposed rules, giving a short explanation of the rule, its purpose, and its anticipated effects, and including—if required—a small business economic impact statement and information on obtaining the preliminary cost-benefit analysis for significant rules.¹

Cost-Benefit Analysis for Significant Rules: Additional analysis is required of any “significant legislative rule”—defined rather broadly—from listed agencies,² as well as of any rule from any agency if so requested by the Legislature’s Joint Administrative Rules Review Commission.³ Before an agency can adopt any such rule, it must, *inter alia*:

- state, in detail, the rule’s goals and determine the rule’s need;
- analyze policy alternatives and the consequences of not adopting the rule;
- determine that probable benefits exceed probable costs, accounting for both qualitative and quantitative effects and any statutory directives, and make such analysis available;
- determine that, after considering alternatives and the cost-benefit analysis, the rule is the least burdensome means of achieving the intended goals; and
- justify any difference from analogous federal regulations and coordinate, to the extent possible, with other federal, state, and local laws.⁴

In making those determinations, the agency must produce documentation of sufficient quantity and quality as to persuade a reasonable person.⁵ The agency must also develop an implementation plan that describes the expected resources needed to enforce the rule; the agency’s intended efforts to educate the public about the rule and to promote voluntary compliance; and any interim milestones and measurable outcomes that can be used to assess the rule’s progress.⁶

The Office of Financial Management is instructed to prepare biennial reports on the effects of these requirements on the regulatory system, particularly on the administrative costs and whether agencies notice any improved acceptance of their regulations by the public as a result.⁷

Small Business Economic Impact Statements: If a proposed rule will impose more than minor costs on businesses, an agency must prepare a small business impact statement.⁸ Specifically, agencies must compare small business compliance costs with the compliance costs for the largest ten percent of businesses,⁹ and then (where feasible and legal) adopt measures to reduce a rule’s disproportionate impacts on small business.¹⁰

Agencies must also periodically review all existing rules with economic impacts on more than twenty percent of industries or on more than ten percent of businesses within a single industry. The periodic review determines whether the agency should continue, amend, or rescind rules in order to minimize small business impacts, considering the rule’s ongoing need, public complaints received, and changed circumstances.¹¹

Legislative Review: The Joint Administrative Rules Review Committee (“JARRC”) is a bipartisan body composed of four senators and four representatives.¹² By selective review, the JARRC may

review any proposed or existing rule for consistency with legislative intent and administrative procedure; it may also review any interpretative statement or guideline for whether an agency should have proposed a formal rule instead.¹³ The JARRC’s review is not mandatory. Anyone can also petition the JARRC to review a specific proposed or existing rule or policy statement.¹⁴

The JARRC sends its findings to the promulgating agency, which must then hold a hearing and notify the JARRC of any intended actions.¹⁵ If the JARRC is not satisfied with the agency’s response, it can file a formal objection, recommend that the governor move to suspend the rule, or recommend that the legislature amend a rule’s authorizing statute.¹⁶

Other Regulatory Review Procedures: Agencies must publish semiannual regulatory agendas and distribute them to interested stakeholders, the Director of Financial Management, the JARRC, and any other relevant agencies.¹⁷ Agencies must also maintain a rulemaking docket.¹⁸

Anyone can petition an agency to adopt, amend, or repeal a regulation. If an agency denies a petition, the petitioner may appeal to the governor. If an agency denies a petition to amend or repeal (but not one to adopt a new regulation), the petitioner may appeal to the JARRC to review the rule’s compliance with legislative intent and administrative procedure.¹⁹

Washington agencies only turn to qualitative analysis when quantification is near impossible. “An example of a rule that required the department to rely on qualitative data was the rule that established an endorsement for massage practitioners to offer animal massage.”

—Department of Health
(2006)

In 1997, Governor Gary Locke signed Executive Order 97-02, to provide a “systematic review of [existing regulations’] need, effectiveness, [and] reasonableness.” Each agency was to begin review of rules with significant effects on business, labor, consumers, and the environment, concentrating on rules that drew public complaints and petitions. The Executive Order mostly encouraged agencies to amend or repeal rules that were no longer necessary or that could be replaced with more efficient means of achieving the same goals. But the Order also had agencies investigate whether the qualitative and quantitative benefits of a rule had been considered in relation to costs, and whether a rule should be strengthened to provide additional protections. Agencies were instructed to provide for an ongoing review process after the Order’s initial requirements had been satisfied.²⁰

Washington’s Process in Practice

Economic Analysis: In general, Washington agencies produce cost-benefit analyses quite consistently and thoroughly. Agencies try to quantify costs and benefits as best they can and report that they only rely on

qualitative analysis when benefits are impossible to quantify without “significant and expense studies.”²¹

Most agencies agree that, while it is difficult to determine whether such analysis directly affects the substance of rules, the additional administrative process required for significant rules helps make staff more “thoughtful and deliberative” and creates a framework for public dialogue.²² Some agencies also report that Executive Order 97-02 has had an enduring impact on their

decisionmaking.²³ But the additional procedures do cost staff time and resources,²⁴ and agencies are unsure “whether the delay in rule-adoption [is] an equitable trade for the improved quality of the rule.”²⁵

Others are less convinced about the value of Washington’s administrative process requirements. The Office of the Insurance Commissioner insists public acceptance of a rule depends not on perfunctory compliance with statutes, but rather on an agency’s real commitment to making the process fair and open.²⁶ The Office believes the statutory requirement do more to confuse rather than enlighten the public.²⁷ Some public stakeholders agree with this negative interpretation. The Washington Chapter of the National Federation of Independent Business feels “state agencies have become experts at conjuring analyses justifying their preconceptions,” and that they conduct only superficial efforts, leaving the public seek recourse from the legislature and the courts.²⁸

Though most agencies do not track costs of the rulemaking process, the Department of Health found that significant rules cost about ten times as much money to develop as non-significant rules.²⁹ Similarly, the Office of Insurance Commissioner found statutory requirements added about \$235,000 to its annual costs and increased the time spent on rule development by twenty-five percent, largely because conducting cost-benefit analyses required hiring a full-time economist.³⁰ More specifically, the Office explained:

Performing a cost-benefit analysis that meets generally accepted economic analysis standards as set out in the statute requires access to an economist. The Office now has an economist on staff, but notes that without the requirements of the statute, it might not have retained one, which would have had a negative impact on its rule-making analysis.³¹

JARRC Review: Washington’s legislature only sits part-time, and the JARRC does not typically meet during the legislative session, instead meeting only during the interim.³² Even then, the JARRC holds formal hearings quite infrequently: since 1996, it has met less than a dozen times (although recently has been more active, with three hearings in 2009).³³ In fact, when the JARRC met in June 2008 for an “orientation meeting,” the purpose was to re-familiarize Committee members with their basic powers and responsibilities.³⁴ When the JARRC does meet, the adequacy of the small business economic impact statement or the cost-benefit analysis is often a central topic.³⁵

Nevertheless, the legislative review process does have a broader impact through informal reviews. The JARRC’s staff—which it borrows from other legislative committees³⁶—tries to review all proposed and adopted rules for consistency with legislative intent (although workload conflicts during the legislative session can result in some rules going un-reviewed).³⁷ The JARRC’s staff often make informal agency contacts as they prepare to advise the JARRC on whether to invoke its selective review authority,³⁸ and the JARRC uses those contacts to work “collaboratively”³⁹ and “seek negotiations” with agencies, resolving potential problems without holding formal hearings.⁴⁰

Theoretically, the JARRC is not supposed to make policy judgments, and its “authorization does not include testing or validation of economic impact methodology.”⁴¹ But JARRC staff and members alike find it difficult to draw a bright jurisdictional line and sometimes cross over into the realm of policy review,⁴² as perhaps demonstrated in the following case study.

Case Study: Building Energy Codes

In 2009, the State Building Code Council proposed a set of code amendments aimed at improving energy efficiency. The Council is not one of the statutorily listed agencies that normally prepares a

full cost-benefit analysis. But the Council did prepare a small business economic impact statement and compiled data on costs.⁴³ The Council's initial small business statement said the "number of jobs created or lost as a result of compliance with the proposed rule is unknown."⁴⁴

Some republican lawmakers worried that implementing the proposals in the near future would hurt the state's construction industry, already on unstable footing.⁴⁵ Consequently, a rare JARRC meeting was held at the request of House Republican Caucus Chair and JARRC Vice-Chair, Rep. Dan Kristiensen, who was formerly a small business owner of a construction company.⁴⁶

At the October 1, 2009 hearing, Vice-Chair Kristiensen spoke of his concern that the Council's small business statement and costs data were "theoretical," not based in "on-the-ground" facts, and possibly inaccurate. He wanted to ensure that the code was not modified too quickly, and that ultimately the energy savings of any new regulations would offset the up-front capital costs.⁴⁷

On October 14, by a unanimous vote, the JARRC instructed the Council to expand its preliminary small business economic impact statement. In particular, the JARRC wanted a "rigorous cost analysis of the cumulative impact of all the changes," as well as a "reasonable estimate of how many jobs will be lost or created."⁴⁸ The JARRC felt the Council needed more real-world data and advised the Council to solicit industry for "cost estimates based on current market rates."⁴⁹ The JARRC also exercised its authority to require the Council to complete a formal cost-benefit analysis.⁵⁰

The Council held additional hearings on the JARRC's concerns, but responded on November 19 that its original small business statement was a reasonable estimate of costs.⁵¹ On November 20, the Council adopted the proposals, with some additional amendments to mitigate small business impacts.⁵² But generally, the Council felt it would have been irresponsible to "guess" about job impacts and include any additional or different economic analysis.⁵³

At a December 2 meeting, JARRC Chair Rep. Hasegawa wondered whether the Council's documentation really showed that benefits outweighed costs. The Council felt its submissions fully addressed that.⁵⁴ The JARRC ultimately disagreed, found that the Council had failed to submit sufficient impact statements, and recommended that the governor and the full legislature move to suspend the regulations.⁵⁵ Some Council members felt that the JARRC had an honest complaint over procedural requirements; but many other Council members felt the JARRC's objection was mostly a disagreement with the data and with the policy.⁵⁶

At first, the governor's office backed the Council in its decision to resist the JARRC's request to suspend the regulations until more economic analysis could be produced.⁵⁷ But on June 8, 2010, after meeting with her Council of Economic Advisors and with some regret, Governor Christine Gregoire determined that the state's economic climate and condition of the construction industry simply could not currently support the added pressures of the regulations, and she instructed the Council to suspend the code modifications.⁵⁸ On June 11, the Council enacted an emergency rule to suspend the new rules, and it plans to revisit the issue in the future.⁵⁹

Analysis and Grade

Washington's cost-benefit analyses are among the more thorough and balanced in the nation, attending to both qualitative and quantitative impacts. Still, it is not clear whether all agencies have the resources to hire the economists that at least some feel are necessary to comply with the statutory requirements. Though some agencies question whether the analysis actually has an

impact on rule content, most agree it does contribute to useful public dialogue.

By contrast, the formal legislative review process is quite inconsistent and sporadic. While the JARRC has begun to meet more regularly, it is unclear whether this trend will continue. If the JARRC does continue to meet and review rules, it may need to revisit the thorny issue of how to draw its jurisdictional line between reviewing legality and procedure and reviewing policy choices. If the JARRC does continue to review the sufficiency and adequacy of economic data, it should be careful not to make recommendations that might actually unbalance an agency's cost-benefit analysis. For example, the JARRC advised the State Building Code Council to base its compliance cost estimates on industry projections using current market rates: yet such an approach would be insensitive to the fluctuating energy market and to the ability for industry to adapt to and bring down costs over time.

Even the legislature's informal review procedures seem to lack sufficient staff resources. On the other hand, Washington does feature periodic review requirements with at least some balanced standards, and the state's requirements on regulatory agendas and public petitions should help promote inter-agency coordination and combat inaction.

Largely on the strength of its analytical requirements, and in spite of its inconsistent legislative review, Washington earns a B.

Notes

- ¹ WASH. REV. CODE § 34.05.320.
- ² *Id.* § 34.05328(5). The requirement applies automatically to significant rules from the Departments of Ecology; Labor and Industries; Health; Revenue; Social and Health Services; Natural Resources; and Employment Security, as well as to the Forest Practices Board, the Insurance Commissioner, and select Fish and Wildlife rules. A “significant” rule is “is a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.” *Id.* 34.05328(5)(c)(iii).
- ³ *Id.* § 34.05.328(5). JARRC has forty-five days from the rule’s notice to make such a request.
- ⁴ *Id.* § 34.05.328(1).
- ⁵ *Id.* § 34.05.328(2).
- ⁶ *Id.* § 34.05.328(3).
- ⁷ *Id.* § 34.05328(6).
- ⁸ *Id.* § 19.85.030 (also required if JARRC requests an impact statement within forty-five days of the rule’s notice). Instead of complying with the regulatory fairness act, if certain conditions are met, an agency may instead test the feasibility and efficiency of policy alternatives through volunteer pilot projects. *See id.* § 34.05.313.
- ⁹ *Id.* § 19.85.040.
- ¹⁰ *Id.* § 19.85.030.
- ¹¹ *Id.* § 19.85.050.
- ¹² *Id.* § 34.05.610.
- ¹³ *Id.* §§ 34.05.620-630
- ¹⁴ *Id.* § 34.05.655.
- ¹⁵ *Id.* § 34.05.620-640. For proposed rules, agencies consider JARRC’s comments during their regular public hearings on the proposed rule.
- ¹⁶ *Id.* §§ 34.05.640-650. JARRC’s determinations and review procedures do not establish a presumption of legality on constitutionality at a subsequent judicial proceeding. *Id.* § 34.05.660.
- ¹⁷ *Id.* § 34.05.314.
- ¹⁸ *Id.* § 34.05.315.
- ¹⁹ *Id.* § 34.05.330.
- ²⁰ Exec. Order No. 97-02 (1997).

- ²¹ OFFICE OF FINANCIAL MGMT., REGULATORY REFORM UNDER ESHB 1010, 2004-05, at 22-23 (2006) (statement of Dept. of Health); *see also* Dept. of Ecology, Final Cost Benefit Analysis for the Electronic Product Recycling Program (2007), *available at* <http://www.ecy.wa.gov/biblio/0707040.html>.
- ²² REGULATORY REFORM UNDER ESHB 1010, *supra* note 21, at 15 (citing statement of Dept. of Ecology); *id.* at 4 (saying stakeholders comment more often and better understand agency decisionmaking); *see also* OFFICE OF FINANCIAL MGMT., IMPACTS OF SIGNIFICANT LEGISLATIVE RULE-MAKING REQUIREMENTS 2006-09, at 3 (2010).
- ²³ *See* REGULATORY REFORM UNDER ESHB 1010, *supra* note 21, at 36 (statement of Dept. of Social and Health Services).
- ²⁴ *Id.* at 3.
- ²⁵ *Id.* at 17 (statement of Dept. of Ecology).
- ²⁶ *Id.* at 72.
- ²⁷ IMPACTS OF SIGNIFICANT LEGISLATIVE RULE-MAKING REQUIREMENTS, *supra* note 22, at 126.
- ²⁸ *Id.* at 14 (letter from Patrick Connor, NFIB/WA, Dec. 30, 2009); *see also id.* at 15 (letter from Christian McCabe, Association of Washington Businesses) (noting the quality of cost-benefit analyses varies between and even within agencies, especially on the Department of Ecology's consideration of alternatives).
- ²⁹ *Id.* at 4.
- ³⁰ *Id.* at 123, 125.
- ³¹ *Id.* at 6.
- ³² Survey from Kathryn Leathers, JARRC counsel (2009, on file with author); JARRC, Rule Review Process, <http://www.leg.wa.gov/JointCommittees/JARRC/Pages/Process.aspx> (meets only during interims "except in rare instances").
- ³³ *See* Wash. State Public Affairs TV Network, <http://tvw.org/search/SiteSearch.cfm> (documenting only seven JARRC meetings); Video of JARRC Meeting, June 28, 2008, *available at* <http://tvw.org/> (statement of Kathryn Leathers) (discussing two additional hearings, in 2000 and 2005). JARRC was created in 1981. *Id.*
- ³⁴ Video of JARRC Meeting, June 28, 2008, *supra* note 33 (statement of JARRC Chair Rep. Hasegawa).
- ³⁵ *See id.* (Kathryn Leathers discussing reviews of analysis during JARRC's 2000 and 2005 hearings); Minutes of Economic and Regulatory Assessment Committee of the State Building Code Council, Oct. 23, 2009 (statement of Brian Minnick, Building Industry Association of Washington) (discussing JARRC hearings in the 1990s on Department of Health septic system rules, when the adequacy of the small business statement became a key issue).
- ³⁶ JARRC has no separate budget or staff, Survey from Leathers, *supra* note 32, even though JARRC is authorized to hire staff. WASH. REV. CODE § 34.05.671.
- ³⁷ Survey from Leathers, *supra* note 32.
- ³⁸ JARRC, Rule Review Process: Petition for Review (2002).
- ³⁹ Video of JARRC Meeting, June 28, 2008, *supra* note 33 (statement of JARRC Chair Rep. Hasegawa).
- ⁴⁰ JARRC, Rule Review Process, *supra* note 32; Video of JARRC Meeting, June 28, 2008, *supra* note 33

(testimony of staff that there is a lot of behind-the-scenes review work that Committee members may never directly see).

- ⁴¹ JARRC, Request for Review of Administrative Rule Form, <http://www.leg.wa.gov/JointCommittees/JARRC/Pages/ReviewReport.aspx>.
- ⁴² Video of JARRC Meeting, June 28, 2008, *supra* note 33 (statement of Kathryn Leathers that the line between policy, procedure, and legislative intent is not a bright one, and staff feels sometimes it is crossed).
- ⁴³ The Council's economic statements combined its own findings with Department of Commerce analysis, NW Energy Efficiency Alliance materials, and data collected from meetings with stakeholders; the Office of Financial Management also weighed in, sending an e-mail to the Council and the governor on the potential costs to businesses and homebuyers. SBCC Dec. 18, 2009 Minutes; *Kretz, Kristiansen Agree with Governor in New Building Energy Code Delay*, State News Service, June 15, 2010 (describing Nov. 20, 2009 e-mail from Office of Financial Management).
- ⁴⁴ Video of JARRC Meeting, Oct. 1, 2009, *available at* <http://tvw.org/> (testimony of Kathryn Leathers); *Kretz, Kristiansen Agree with Governor in New Building Energy Code Delay*, STATE NEWS SERVICE, June 15, 2010.
- ⁴⁵ *Kretz, Kristiansen Agree with Governor in New Building Energy Code Delay*, STATE NEWS SERVICE, June 15, 2010.
- ⁴⁶ *Legislative Committee Approves Motion for Detailed Analysis of Proposed Building Code Changes*, U.S. STATE NEWS, Oct. 12, 2009.
- ⁴⁷ Video of JARRC Meeting, Oct. 1, 2009, *supra* note 44.
- ⁴⁸ JARRC, Notice of Action to the Washington State Building Code Council, Oct. 14, 2009.
- ⁴⁹ *Id.*
- ⁵⁰ *Id.*
- ⁵¹ Minutes of State Building Code Council Meeting, Dec. 18, 2009.
- ⁵² Video of JARRC Meeting, Dec. 2, 2009, *available at* <http://tvw.org/> (testimony of the State Building Code Council).
- ⁵³ Minutes of State Building Code Council Meeting, Dec. 18, 2009.
- ⁵⁴ Video of JARRC Meeting, Dec. 2, 2009, *supra* note 52.
- ⁵⁵ JARRC, Motion on Energy Codes, Dec. 2, 2009 (passed 5-0-2).
- ⁵⁶ *See* Minutes of State Building Code Council Meeting, Dec. 18, 2009.
- ⁵⁷ *See* Nathalie Weinstein, *Builders Fight Washington Energy Code Changes*, DAILY J. COMMERCE, Jan. 19, 2010.
- ⁵⁸ Letter from Gov. Gregoire, to SBCC, June 8, 2010.
- ⁵⁹ State Building Code Council, <http://sbcc.wa.gov>; *Kretz, Kristiansen Agree with Governor in New Building Energy Code Delay*, STATE NEWS SERVICE, June 15, 2010.

West Virginia

West Virginia’s regulatory review scheme concentrates virtually all regulatory power in the hands of the legislature. While the arrangement is designed to ensure that regulatory decisions are made by democratically accountable legislators, the system often seems to take regulatory power away from independent agencies experts and exposes the rulemaking process to political influence.

West Virginia’s Process on Paper

Legislative Review: West Virginia has perhaps the most legislatively-focused regulatory review of any state. When an agency proposes a new rule, it in fact is merely “applying to the legislature for permission . . . to promulgate such a rule.”¹ The power to determine the rule’s substance and to authorize its promulgation rests ultimately with the legislature.²

Agencies must submit proposals to the Legislative Rule-Making Review Committee (“LRMRC”), a joint committee consisting of six members of the Senate and six members of the House of Delegates.³ The LRMRC evaluates the proposed rule, not only for legality and compliance with legislative intent, but also for substantive factors such as whether the rule is necessary and reasonably constructed.⁴ The LRMRC then issues its recommendation to the full legislature: either to adopt the rule, adopt parts of the rule, adopt the rule with amendments, or reject the rule.⁵ If the full legislature authorizes the rule’s adoption, the agency then must promulgate the rule within sixty days.⁶ If the legislature rejects all or part of a rule, no regulatory agency may take any action along the lines of the rejected rule, other than to resubmit another proposal to the LRMRC.⁷

The centralization of rulemaking authority in the legislature raises significant separation of powers questions, and the West Virginia Supreme Court of Appeals has twice struck down key rulemaking provisions as unconstitutional legislative vetoes.⁸ Both times, however, the legislature responded by making only minor changes to the process: the first time by placing the authority to reject a rule in the full legislature, rather than with the LRMRC; the second time by changing the law so that agencies are stopped from promulgating rules only if the legislature explicitly disapproves them, rather than if the legislature simply fails to act.⁹

This review structure is the product of deliberate design. Rather than delegate authority to independent but unelected agencies, West Virginia is committed to keeping rulemaking power in the hands of legislators who can be held accountable by voters. Former LRMRC Chairman Brian Gallagher explained: “The way other states do it and the way the federal government does it, is they allow bureaucrats to make law without any oversight by the legislature. . . . [West Virginia may have a] much more difficult and cumbersome process, but it does not allow people who have never been elected to anything to make law.”

“The way other states do it and the way the federal government does it, is they allow bureaucrats to make law without any oversight by the legislature. . . . [West Virginia may have a] much more difficult and cumbersome process, but it does not allow people who have never been elected to anything to make law.”

—Former Legislative Rule-Making Review Committee Chairman, Brian Gallagher

does not allow people who have never been elected to anything to make law.”¹⁰

Economic Analysis: West Virginia law does not require formal cost-benefit analysis, although agencies must prepare fiscal notes summarizing the costs and economic impacts of proposed rules on the state and its residents.¹¹ However, the fiscal note forms supplied by the LRMRC and the Secretary of State for agency use do not even require that much, instead focusing only on the financial and revenue impacts for state government.¹²

Executive Order 20-03 requires additional economic analysis for any proposed rule that may adversely impact small business. Agencies must submit details to the Small Business Development Center (a part of the Department of Commerce) on the estimated number of small businesses affected, a projection of direct impacts, and whether any less intrusive regulatory alternatives exist.¹³ The Order also proposes a regular review of existing regulations for effects on small businesses.¹⁴

West Virginia’s Process in Practice

Legislative Review: On paper, the West Virginia process emphasizes decisionmaking by accountable, elected officials. But in practice, the process tends to result in politicized decisionmaking often dictated by the policy agendas of interest groups.

The LRMRC begins its review process early, encouraging informal submissions by agencies for preliminary reviews, “to anticipate problems which might otherwise arise during the formal review process.”¹⁵ LRMRC staff primarily review legal questions, but they may also gather factual information and point out policy alternatives to committee members.¹⁶ The LRMRC “may” hold public hearings and may allow public comment.¹⁷

A few examples demonstrate how agency intentions sometimes clash with industry interests during LRMRC review:

- In 2001, the LRMRC abandoned a rule about water purity that had been carefully negotiated by industry, environmental, and agency representatives, and instead substituted a rule drafted by industry groups like the state’s Chamber of Commerce and the West Virginia Coal Association.¹⁸
- In 2004, during its review of limits on aluminum in West Virginia waterways, the LRMRC instructed the regulatory agency to reach out to coal, business, and manufacturing groups, but not environmentalists.¹⁹
- In 2008, the state Ethics Commission proposed restrictions on how law enforcement associations like the Fraternal Order of Police could raise money. The LRMRC voted to adopt instead amendments written by a regulated party, the West Virginia Troopers Association.²⁰
- The LRMRC sometimes uses its authority to kill a rule through delay.²¹ For instance, when the LRMRC considered rules that would require pharmaceutical companies to disclose their marketing expenditures, PhRMA exerted influence to delay and then scuttle the rule.²² Emergency rules are sometimes used as temporary measures while the LRMRC and legislature review the proposed permanent rule.²³

Notably, the legislature does not always follow the LRMRC’s recommendation and sometimes votes to restore the agency’s original proposal.²⁴ But there is a tendency for both the LRMRC and the legislature to get overwhelmed by the politics and technical details of regulations. Former

LRMRC chair Virginia Mahan once noted that competing scientific claims from agencies and industry were too difficult to wade through, asking “How do you make policy on things you don’t understand?”²⁵

Similarly, Rita Pauley, general counsel for the Senate Judiciary Committee, recently explained:

[S]ome [legislators] become confused by the process. I will let you in on the secret. There are between 100 and 125 bills of authorization for rules each year. Those bills will be introduced within the first 20 days of the session. The bill does not provide you with any of the substance of the rule, nor does it have the rule attached to the bill. . . . When the rule is being discussed, some committees provide copies of the rule and the bill to the members while some do not. . . . The Legislature is a political creature, not a scientific peer review group. Neither is it a full-time legislative body with unlimited resources like Congress. It is not designed nor equipped to establish scientific evidence to support amendments to science-based standards. [For example, one recent set of controversial rule amendments] were the result of political compromise and negotiation, not scientific study.²⁶

Economic Analysis: Though fiscal notes are required for proposed rules, there is no standard procedure for how economic impacts should be measured.²⁷ Recent editions of the *State Register* suggest that fiscal notes and another rulemaking questionnaire required by the LRMRC are at least inconsistently included in published materials; very likely, they are inconsistently filed by agencies; and almost certainly they are inconsistently filled out by agencies.²⁸ For example, a few recent fiscal notes admitted that proposed rules would result in some administrative costs, but simply estimated the costs at zero because “we do not know how much those costs will be.”²⁹

“How do you make policy on things you don’t understand?”

—Virginia Mahan,
Legislative Reviewer

Though Executive Order 20-03 technically remains on the books, the Small Business Development Center has not conducted any reviews since 2005, when the Center’s point person for reviews retired.³⁰ One member of the committee that helped design the small business review process commented that he was unsure whether most agencies ever really cooperated with the process, and he questioned whether the new governor’s administration was aware of the process or had any plans to revive it.³¹

Analysis and Grade

By keeping most regulatory power with the legislature, West Virginia may ensure greater democratic accountability, but the state risks exposing the regulatory process to politics. The state has no significant requirement for cost-benefit analysis, so regulatory decisions are often made in a vacuum, with much of the information (and sometimes even the regulation itself) coming from lobbyists. While some hail the state’s regulatory review process as the most accountable in the nation,³² others fear that the process has left West Virginia as the country’s “political backwater.”³³ Speculating about the future of West Virginia’s regulatory review process, one key legislative staffer recently wondered: “What will be the next challenge facing rule-making?”³⁴ West Virginia’s legislative review committee does meet and work consistently, but the state fails to meet any other guiding principles. West Virginia earns a D.

Notes

¹ W. VA. CODE § 29A-3-9. This provision applies to all non-emergency “legislative” rules. Procedural or interpretive rules do not generally go through the same legislative review. *See id.* §§ 29A-3-4, 29A-3-8, 29A-3-16 (authorizing LRMRC review of procedural and interpretive rules); *but see* Survey from Debra A. Graham, Chief Counsel of the West Virginia Legislative Rule-Making Review Committee (2009, on file with author) (noting that procedural and interpretive rules are generally excluded from review). All non-emergency rules—along with accompanying fiscal notes and any alternative drafts the agency chooses to file—must also be submitted to the Secretary of State for publication in the State Register. W. VA. CODE § 29A-3-5. Agencies must also submit to the LRMRC a statement of the circumstances which require the rule, a copy of any relevant federal laws, and any other information the committee may request. *Id.* § 29A-3-11(a).

Though contacts with the LRMRC suggest that deregulatory rules are not subject to review, *see* Survey from Graham, *supra*, the state code’s definition of “rule” clearly includes amendments and repeals, W. VA. CODE §29A-1-2.

The LRMRC has authority to review existing regulations, *id.* § 29A-3-16, but as a general matter does not do so, *see* Survey from Graham, *supra*.

² W. VA. CODE § 29A-3-9.

³ *Id.* § 29A-3-10. The Senate President and the House Speaker sit on the committee as nonvoting members. No more than four of the voting members of the committee from each house can be from the same political party. *Id.*

⁴ *Id.* § 29A-3-11(b). The LRMRC’s review of reasonableness is to “especially” consider how the rule “affects the convenience of the general public or of [particular] persons.” *Id.*

⁵ *Id.* § 29A-3-11(c).

⁶ *Id.* § 29A-3-13(a).

⁷ *Id.* § 29A-3-12(b)

⁸ State *ex rel.* Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981); State *ex rel.* Meadows v. Hechler, 462 S.E.2d 586 (W. Va. 1995).

⁹ *See Meadows*, 462 S.E.2d at 591 n.17 & 592 (detailing the move to place the power to reject rules in the full legislature and noting that the change was not particularly significant). *Compare id.* at 589 (detailing the provision that the court found unconstitutional, which held that administrative agencies cannot promulgate a rule if the legislature “fails . . . to act upon all or part of [that] rule”), with W. VA CODE § 29A-3-12(b) (providing that administrative agencies cannot promulgate a rule if the legislature “disapproves all or part of [that] rule”). Interestingly, the LRMRC’s current rulemaking manual indicates that the committee might still interpret state code to mean the same thing as the provision struck down as unconstitutional in *Meadows*. *See* W. VA. LEGISLATIVE RULE-MAKING REVIEW COMMITTEE, THE RULE-MAKING PROCESS IN WEST VIRGINIA 15 (2009) (stating that “if a proposed rule is disapproved or not contained in a bill of authorization, the agency may not promulgate the proposed rule”) (emphasis added).

¹⁰ Jennifer Bundy, *In Interim Meetings, Making the Rules is Making the Law*, CHARLESTON GAZETTE, July

16, 1995, at 9A.

- ¹¹ W. VA. CODE § 29A-3-4(b).
- ¹² W. VA. SEC'Y OF STATE, FISCAL NOTE FOR PROPOSED RULES, *available at* www.sos.wv.gov/administrative-law/modified/. The form requires a concise statement of impact on costs and revenue of state government, an explanation of long-range revenue effects, an explanation for why the proposed rule might not have a fiscal impact, and other relevant information.
- ¹³ W. Va. Exec. Order No. 20-03, §§ (3)(A) & (C) (2003); W. VA. SMALL BUSINESS DEVELOPMENT CTR., HOW TO COMPLY WITH EXECUTIVE ORDER 20-03, 13 (2005), *available at* <http://www.sbdcwv.org/pdf/AdverseImpactAnalysisProcess.pdf>.
- ¹⁴ W. Va. Exec. Order No. 20-03, §§ (3)(A) & (C) (2003); W. VA. SMALL BUSINESS DEVELOPMENT CTR., *supra* note 13, at 40 (proposing a five-year review schedule).
- ¹⁵ LRMRC, PROCEDURES FOR FILING EMERGENCY AND PROPOSED LEGISLATIVE RULES 2 (1997).
- ¹⁶ *Id.* at 4.
- ¹⁷ W. VA. CODE. § 29A-3-11(b); PROCEDURES FOR FILING EMERGENCY AND PROPOSED LEGISLATIVE RULES, *supra* note 15, at 5.
- ¹⁸ Ken Ward, Jr., *Industry Stream Rule Provides Little Protection; State Could Take 'Step Backward'*, *Feds Warn*, CHARLESTON GAZETTE, Mar. 25, 2001, at 1A; *Industry's Water Bill Replaces State Agency's Version*, GREENWIRE, Feb. 14, 2001.
- ¹⁹ Ken Ward, Jr., *Environmentalists Get Left Out of West Virginia's Water-Rule Review*, CHARLESTON GAZETTE, May 7, 2004.
- ²⁰ Phil Kabler, *State Ethics Rules Gutted; Law Officers May Solicit Donations*, CHARLESTON GAZETTE, Jan. 11, 2008, at 1A.
- ²¹ Stephen Singer, *Blasting Rules Submitted; Separate Proposals Delayed*, AP, June 23, 1998 (noting potential for LRMRC to kill a regulation through delay).
- ²² *See* Phil Kabler, *Drug Company Spending Rule Killed; Governor Wants Clean Slate so Consensus Can Be Reached*, CHARLESTON GAZETTE, Feb. 2, 2007, at 1C (explaining how the LRMRC pushed back the effective date of the rule until one day after the agency administering it would be dissolved, rendering the rule "essentially . . . moot"); *West Virginia Drug Regulation "All but Dead"*, PHARMA MARKETLETTER, Dec. 25, 2006 (detailing how PhRMA lobbying led the LRMRC to delay).
- ²³ Randy Coleman, *Emergency Video Lottery Rules Filed*, AP, June 19, 2001.
- ²⁴ *E.g.*, *DNR's Beer, Wine State Park Plan Endorsed by Committee*, AP, Mar. 7, 2006 (noting that the LRMRC rejected a proposal, but a legislative committee of jurisdiction had voted in favor of it).
- ²⁵ Gavin McCormick, *Legislature Declines to Update Water Quality Rules*, AP, Jan. 24, 2004.
- ²⁶ RITA PAULEY, LEGISLATIVE RULE-MAKING: WHERE ARE WE NOW? (2009), *available at* http://www.legis.state.wv.us/Joint/Bill_Drafting/seminar/LEGISLATIVE%20RULEMAKING%20WHERE%20ARE%20WE%20NOW%20.pdf.
- ²⁷ Survey from Debra A. Graham, *supra* note 1.
- ²⁸ *See* W. Va. Sec'y of State, Agency Approved and Modified Rules, <http://www.sos.wv.gov/administrative-law/modified>.

- ²⁹ Work Force West Virginia, Fiscal Note on Rule for Employer Violator System (filed Sept. 24, 2009), available at 9/24/09; <http://www.sos.wv.gov/administrative-law/modified>; accord. West Virginia Office of Miner's Health, Safety, and Training, Fiscal Note on Rules and Regulations Covering the Safety of Minters Employed in and around River Load-Outs (filed 2009) (“[F]iscal impact is unknown at this time and cannot be determined until fully implemented. Any increase in administrative costs will be minimal.”).
- ³⁰ See W. Va. Small Business Development Ctr., Regulatory Review, <http://www.sbdcwv.org/regulatorySearch.php#pagetitle> (listing no reviews after 2005); Interview with Kevin Twohig, W. Va. Small Business Development Ctr. (Feb. 11, 2010).
- ³¹ Interview with Twohig, *supra* note 30 (explaining that the center may have plans to revisit the process, but that there were budgetary considerations).
- ³² See Bundy, *supra* note 10 (quoting Former LRMRC Chairman Brian Gallagher).
- ³³ Editorial, *Our Views; Raising Funds Means Reporting; Why Should West Virginians Give to Organizations that Won't be Open?*, CHARLESTON DAILY MAIL, Jan. 14, 2008, at 4A.
- ³⁴ PAULEY, *supra* note 26.

Wisconsin

Wisconsin's legislature has enjoyed the power to review and suspend existing regulations since 1965, and the authority to review all new rules since 1979.¹ According to the state's Supreme Court, "As a matter of public policy, it is incumbent on the legislature . . . to maintain some legislative accountability over rulemaking . . . so that the people of this state, through their elected representatives, will continue to exercise a significant check on the activities of nonelected agency bureaucrats."²

Wisconsin's Process on Paper

Scoping Statements and Impact Reports: An agency begins the rulemaking process by publishing a statement of the scope of a proposed rule. That statement must analyze policy alternatives, describe all entities who might be affected by the potential rule, and estimate the amount of time and resources the state expects to spend on the development of the potential rule.³

After the statement of scope has been published, but before a rule is officially proposed, a municipality, association, or group of five citizens can petition the Department of Administration to require an economic impact report from certain (but not all) regulatory agencies.⁴ Petitioners must be directly and uniquely affected by the potential rule, and economic impact reports can only be requested if compliance costs would exceed \$20 million during each of the rule's first five years, or if the rule would adversely affect the state's economy or jobs, the environment, public health or safety, or local governments.⁵

If those criteria are satisfied, the Department of Administration can require the rulemaking agency to report on the effects on business and the state's economy; to analyze and quantify the problem being addressed, including risks to health or the environment; to analyze and quantify the rule's impacts, including costs; and to analyze the benefits.⁶ The Department of Administration then reviews the economic impact report, and must approve it before the agency can submit its proposed rule. The review covers whether the report's findings are well documented and support the regulatory approach chosen, as well as whether the rule is consistent with statutory authority and existing laws.⁷

Legislative Review: When an agency is ready to propose a rule, it must include in its notice:

- a comparison with similar federal rules and rules from Illinois, Indiana, Michigan, and Minnesota;
- a summary of the data and methodologies that support the rule;
- any required small business or economic impact analyses;⁸ and

"As a matter of public policy, it is incumbent on the legislature . . . to maintain some legislative accountability over rulemaking . . . so that the people of this state, through their elected representatives, will continue to exercise a significant check on the activities of nonelected agency bureaucrats."

—Wisconsin Supreme Court
(1992)

- a fiscal estimate, detailing fiscal effects on the government, any significant private fiscal effects from anticipated compliance costs, and the assumptions used in the analysis.⁹

The rule is then submitted to the Legislative Council for an initial review.¹⁰ The Council acts as a “clearinghouse,” reviewing a rule for statutory authority, procedure, format, and potential conflicts, and maintaining a searchable website for all proposed rules.¹¹ The Council also prepares an annual report with recommendations for streamlining the overall rulemaking process and for eliminating obsolete regulations.¹²

After a rule has been cleared by the Legislative Council, a final draft can be submitted to the legislature, along with a detailed statement of purpose, an explanation of how the rule advances statutory goals, and the agency’s responses to public comments and to the Legislative Council’s recommendations.¹³ The rule is then referred to at least one standing committee in each house of the legislature. The committees can review the rule, meet with the agency, hold hearings, or enter into rule modification agreements with the agency.¹⁴

The committees may object to any portion of the rule for lack of statutory authority, for an emergency, for inconsistency with legislative intent, for a legal conflict, for a change in circumstances, for arbitrariness, or for undue hardship.¹⁵ If a committee objects, the rule is referred to the Joint Committee for the Review of Administrative Rules (“JCRAR”). JCRAR can object to a rule on those same grounds, or it can seek rule modifications from the regulatory agency.¹⁶ If JCRAR objects to a rule, it must introduce bills designed to prevent the enactment of the regulation;¹⁷ such legislation requires the governor’s signature to take effect.

JCRAR also has authority to review existing regulations.¹⁸ JCRAR holds public hearings to investigate any meritorious public complaints about existing rules, and it can introduce legislation based on those hearings.¹⁹

The legislature reserves the right to delay or suspend any existing or proposed rule while under legislative review.²⁰ More specifically, an agency cannot promulgate any portion of a proposed rule that a legislative committee objected to during its review, until either JCRAR has formally disagreed with the objection, or else the bills introduced to prevent the rulemaking have failed.²¹ Also, JCRAR can temporarily suspend any rule on the basis of sufficient public testimony that JCRAR would have statutory grounds to object to the rule. If an existing rule is temporarily suspended, JCRAR must introduce legislation to achieve a permanent suspension.²² Wisconsin’s Supreme Court has upheld these suspension powers as constitutional.²³

Other Impact Analyses: If a proposed regulation may affect small businesses, the proposing agency must consider alternative options to reduce that impact. When the rule is proposed, the agency must submit the proposal and analysis to the Small Business Regulatory Review Board. The Board is an independent review entity composed of six representatives of small business, eight state agency representatives, one Senate representative, and one Assembly representative. Administratively, the Board is attached to the Department of Commerce.²⁴

The Board is authorized to use cost-benefit analysis to determine the fiscal effects on small businesses. The Board submits its suggestions to the agency and to the Legislative Council.²⁵ If a rule is expected to affect a substantial number of small businesses, a final regulatory flexibility analysis must be submitted to the legislature for review before the rule can be adopted. The final analysis must include as much information as the agency can feasibly obtain and analyze with existing staff and resources. The analysis covers such topics as potential costs, public comments,

reasons for rejecting alternative policy options, and the costs and benefits of any proposed exemption for small businesses.²⁶ The Board may also review existing rules and guidelines for unnecessary burdens, and may submit reports to JCRAR.²⁷

If a proposed regulation affects housing, the Department of Commerce prepares a housing impact report before the rule is submitted to Legislative Council.²⁸ By request of the legislative leadership, the Public Service Commission will prepare a report to determine a proposed rule's impact on the cost and reliability of electricity.²⁹

Wisconsin's Process in Practice

The state's provisions for the preparation of various impact reports may have little practical effect on the rulemaking process. Through 2009, the Department of Administration has never ordered the preparation of an economic impact report.³⁰ And while the Small Business Regulatory Review Board produced a great deal of review documentation and guidelines during its early years, including a detailed handbook for regulatory agencies on cost-benefit analysis,³¹ it is unclear how active the Board has been since 2008.³²

Meanwhile, the legislature continues to exercise its review powers regularly and intervenes on "numerous" rulemakings.³³ For the 123 rules submitted in 2009, the Legislative Council commented on 14 occasions regarding statutory authority; on 5 occasions on potential conflicts; and 83 times for clarity.³⁴ Also in 2009, legislative committees held hearings on 16 rules, sought modifications on 4 rules, and issued no formal objections (resulting in no JCRAR reviews).³⁵ But since 1979, over the course of 5,883 rules, 699 have been subject to modification by legislative recommendation; 103 have been objected to by committee review; 34 have been objected to by JCRAR review; and 13 have been barred by legislation (another two dozen such bills failed to pass, and one bill was vetoed).³⁶

"If we don't try to work with them, it's asking for no rule at all."

—Agency board member, on the need to cooperate with JCRAR

Those numbers testify both to the legislature's formal powers to object to rules, as well as its ability to win rule modifications without formal objection. Once JCRAR objects to a rule, an agency cannot move forward until the bills introduced to block the rule have failed—a prospect that can serve as a powerful motivator for agencies to compromise with the legislature. For example, minutes from a Department of Natural Resources meeting reveal that agency board members worried that if they did not comply with JCRAR's wishes, JCRAR would have

to introduce a bill in the next legislative session, and that bill "could sit untouched the entire legislative session, which would prevent [the agency] from starting the rule process until June of 2008 [nearly two years later]."³⁷ One board member said, "if we don't try to work with them, it's asking for no rule at all"—although not all agency officials agreed with that sentiment.³⁸

JCRAR hearings can be quite active and contentious affairs, with large numbers of industry representatives and members of the public showing up at times to testify.³⁹ Politicians have also accused JCRAR members of being influenced by partisan concerns and of "using JCRAR to accomplish what they can't accomplish through the [regular] legislative process."⁴⁰

Analysis and Grade

The tremendous detail of Wisconsin’s analytical requirements belies the frequency with which they are invoked: taking great pains to specify precisely when and how economic impact reports must be prepared accomplishes little when no impact report has ever, in fact, been prepared.

By contrast, the state’s legislative review process is quite active and consistent. Wisconsin’s review process gives the legislature several chances and significant power to win regulatory changes from agencies—perhaps most notably through the threat of delaying or suspending a rule. The Legislative Council may consider devoting one of its annual reports to investigating if the legislative review process might be streamlined without losing its effectiveness, and whether modifications might increase the transparency of the review. Wisconsin’s structure has been criticized as demonstrating “undue complexity.”⁴¹ Nevertheless, using legislative committee objections to trigger JCRAR review is a unique process for trying to conserve legislative resources.

The legislative review process also might benefit from increased and more balanced use of impact reports. For instance, it may currently be difficult for a legislative committee or JCRAR to assess whether a rule imposes an “undue hardship” without a full accounting of both costs and benefits; the rule’s fiscal estimate may reveal the private compliance costs, but assessing whether such burdens are “undue” is impossible without a full accounting of the rule’s benefits. Until Wisconsin better integrates analytical requirements into the rulemaking process, the state earns a C.

Notes

- ¹ WISCONSIN LEGISLATIVE COUNCIL, WISCONSIN LEGISLATOR BRIEFING BOOK 2009-2010—REVIEW OF ADMINISTRATIVE RULES 1 (2009).
- ² *Martinez v. DILHR*, 478 N.W.2d 582, 587 (Wisc. 1992).
- ³ WISC. STAT. § 227.135.
- ⁴ *Id.* § 227.137. Covered agencies include the Departments of Agriculture, Trade, and Consumer Protection; Commerce; Natural Resources; Transportation; and Workforce Development.
- ⁵ *Id.* § 227.137.
- ⁶ *Id.* § 227.137.
- ⁷ *Id.* § 227.138.
- ⁸ *Id.* § 227.14(2). See *infra* for more detail on small business reports.
- ⁹ WISC. STAT. § 227.14(4).
- ¹⁰ The initial review is a twenty-day review; the Legislative Council can extend the review for another twenty days, but extensions are “very rarely necessary.” WISC. LEGIS. COUNCIL, WISCONSIN LEGISLATOR BRIEFING BOOK 2009-10, at 2 (2009).
- ¹¹ WISC. STAT. § 227.15.
- ¹² The report is submitted to the legislature and governor. *Id.* § 227.15.
- ¹³ *Id.* §§ 227.19(2)-(3).
- ¹⁴ *Id.* § 227.19.
- ¹⁵ *Id.* § 227.19(4).
- ¹⁶ JCRAR can also “non-concur” with the committee’s objection. *Id.*
- ¹⁷ *Id.* § 227.19(5)-(6).
- ¹⁸ JCRAR can also require an agency to promulgate a statement or interpretation as an emergency rule.
- ¹⁹ *Id.* § 227.26.
- ²⁰ *Id.* § 227.19(1)(b)(4).
- ²¹ *Id.* § 227.19 (5)(c). Agencies can promulgate portions of the proposed rule that were not objected to.
- ²² *Id.* § 277.26.
- ²³ While generally finding legislative review powers over agency rulemakings were constitutional and necessary “as a matter of public policy,” the court also emphasized the temporary nature of the suspension powers, the procedural safeguards, and the fact that a permanent suspension would have to be passed by the legislature and signed by the governor. *Martinez v. DILHR*, 478 N.W.2d 582, 587 (Wisc. 1992).
- ²⁴ WISC. STAT. § 227.114.
- ²⁵ *Id.* § 277.14(2g). The SBRRB’s review criteria specifically ask whether public benefits outweigh business costs.
- ²⁶ *Id.* § 277.19(3).
- ²⁷ *Id.* § 227.30; see also Robert Fassbender & Paul Kent, *The 2003 Jobs Creation Act: Changing Wisconsin’s*

Regulatory Climate, 77 WISC. LAW. 15 (2004) (“The Jobs Creation Act of 2003 (2003 Wis. Act 118) was signed into law by Gov. Doyle on Jan. 22, 2004 and became effective on Feb. 6, 2004. It has been called ‘the most significant reform of the state regulatory process in decades, perhaps ever.’ The new law is sweeping, ambitious, and controversial. While the regulatory reform bills as introduced contained a broad range of business initiatives, ultimately the expansive legislation was trimmed to address air and water permitting and the procedures for developing administrative rules.”).

²⁸ WISC. STAT. § 227.115. The report must include discussion of relative impacts on low- and moderate-income communities.

²⁹ *Id.* § 227.117.

³⁰ Survey from Ron Sklansky, Wisconsin Legislative Council staff attorney to the Joint Committee for Review of Administrative Rules (2009, on file with author).

³¹ SBRRB, COST-BENEFIT HANDBOOK FOR WISCONSIN REGULATORY AGENCIES (2005).

³² Phone numbers listed in directory no longer work; phone calls to officials in the Department of Commerce were not returned.

³³ BRIEFING BOOK, *supra* note 10, at 1. On the other hand, the State Supreme Court noted in 1992 that “[r]ule suspension has occurred relatively infrequently over the past 25 years.” *Martinez v. DILHR*, 478 N.W.2d at 587.

³⁴ WISCONSIN LEGISLATIVE COUNCIL, 2009 ANNUAL REPORT: LEGISLATIVE COUNCIL RULES CLEARINGHOUSE 9 (2010).

³⁵ *Id.* at 10.

³⁶ *Id.* Since 1979, Wisconsin agencies have submitted more than 5,000 draft rules to the Legislative Council Rules Clearinghouse. WISCONSIN LEGISLATIVE COUNCIL, 2003 ANNUAL REPORT: LEGISLATIVE COUNCIL RULES CLEARINGHOUSE (2004). Over the past few years, the Department of Natural Resources (“DNR”) was far and away the top rule generator, drafting about 25 percent of the rules submitted.

³⁷ Minutes of Natural Resources Board Meeting, Sept. 5, 2006, available at <http://dnr.wi.gov/org/nrboard/minutes/M06/0906ccminutes.pdf>.

³⁸ *Id.*

³⁹ See, e.g., Wisconsin Wetlands, http://www.wisconsinwetlands.org/alerts/alert_20040603.htm (noting the large numbers that turned up to a JCRAR hearing on June 29, 2004).

⁴⁰ *Sen. Miller Rips Republicans for Abusing JCRAR Powers to Bypass Legislature*, U.S. FED. NEWS, May 26, 2005. Similarly, it was noted as “ironic” that Tommy Thompson, who was a strong supporter of JCRAR when he served in the legislature, later as Governor instructed his agencies to ignore JCRAR’s actions, thus leading to the Supreme Court case in 1992. See Cary Segall, *High Court Says Gov. Wrong on Low-Wage Order*, WIS. STATE J., Jan. 16, 1992.

⁴¹ David S. Neslin, *Quis Custodiet Ipsos Custodes?: Gubernatorial and Legislative Review of Agency Rulemaking under the 1981 Model Act*, 57 WASH. L. REV. 669, 686 n.105 (1982).

Wyoming

After years of relatively little inter-branch tension—because the state’s part-time legislature did not forcefully compete for power with a full-time executive from the same political party—conflicts between Wyoming’s governor and its legislature multiplied in the 1970s, as different political parties took control of the two branches.¹ One response to the new political dynamic was passage of the Administrative Regulation Review Act in 1977: a compromise to divvy up oversight of agency rulemaking authority, and the nation’s first joint executive-legislative rule review procedure.²

Wyoming’s Process on Paper

Except for explanatory statements for when proposed rules exceed minimum statutory requirements,³ Wyoming does not require agencies to substantially justify or analyze new regulations. Regulatory review focuses more on legality and authority than on policy choices.

Legislative Review: Agencies must submit notice of an intended rulemaking to the Legislative Service Office (“LSO”), but the legislature’s formal review does not begin until an agency actually adopts a rule and submits the final version to the LSO.⁴ An adopted rule can be—and often is—filed with the Secretary of State and becomes effective (with the governor’s approval) before the legislature has completed its review.⁵

The LSO conducts the initial rule review on behalf of the legislature’s Management Council, a body compromised primarily of the legislative leadership from each party. The LSO reviews all new rules to determine if they implement legislative intent, are within the scope of statutory authority, and were lawfully adopted.⁶ The LSO submits its rule review reports to the Management Council, as well as to the agency, the governor, and the attorney general. The LSO also compiles comments on the rule from other legislators.⁷

Since 1995, the Management Council has used an expedited procedure to review rules by mail, rather than waiting for its next official meeting. If the LSO does not identify a potential legal problem, rules are approved by default, though Council members can always object to a rule. If the LSO identifies a potential problem, Council members vote by mail either to recommend the LSO’s changes, to approve the rule as is, or to postpone action until their next meeting.⁸ At Council meetings, agency officials are called forward to answer questions about their rules.

The Council submits its final rule review reports to the relevant legislative committee, the rulemaking agency, and the governor.⁹ If the Council recommends changes, the governor must respond in one of three ways:

- If the rule has not yet been approved and filed, the governor can use his line-item veto powers to excise the problematic portions of the rule before giving his approval;
- If the rule has already been approved and filed, the governor can direct the regulatory agency to amend or rescind the rule; or
- The governor can submit written objections back to the Council.¹⁰

If the governor does not implement the recommended changes, the Council can introduce legislation to nullify the regulation or change the statutory authority; such legislative orders require the governor’s approval to become law.¹¹

Executive Review: The attorney general advises agencies in drafting regulations.¹² The governor

must approve a rule before it can be filed with the Secretary of State and become effective; the governor may disapprove any individual portion of a rule for exceeding statutory authority, for inconsistency with legislative purposes, or for failure to comply with procedural requirements.¹³

Sunset Periods and Ex Post Review: Wyoming’s legislature has only applied sunset periods to a few, very limited regulatory cases;¹⁴ the main statute on sunset periods was repealed in 1988.¹⁵ The Management Council may choose to review any existing rule on its own initiative or the request of any legislator,¹⁶ but the LSO reports there is no formal review of existing regulation.¹⁷

Wyoming’s Process in Practice

The LSO does not typically review rules until after they have been adopted, partly because the LSO believes its statutory duty is one of oversight and not drafting. But equally limiting is the LSO’s constrained resources: the LSO simply lacks the staff to review rules more than once and worries a rule might change substantially between the initial proposal and final adoption.¹⁸ Indeed, there is no dedicated rule review staff in Wyoming; the LSO attorneys spend only about 3% of their time on rule review.¹⁹

But the LSO will work with the governor’s office and agency staff in limited instances to provide early, informal review of controversial issues.²⁰ The LSO staff also often speaks informally to agency officials and the attorney general’s office while preparing their rule review reports.²¹ As one former LSO analyst said, “[b]ehind and between the official steps, a great deal more goes on.”²²

“Behind and between the official steps, a great deal more goes on.”

—T. Thomas Singer, former
Legislative Service Office
analyst (1980)

The governor may choose to delay his approval and the rule’s filing until receipt of the LSO and Management Council review reports, but often he does not wait.²³ Even though most rules are already filed and effective when the LSO and Management Council review them, the legislature still believes the review process is beneficial.²⁴ Future review and the threat of a legislative response may make agencies more careful during the drafting process. While legislative responses are subject to the governor’s veto, the threat of a legislative response is real: the Management Council has in the past successfully proposed legislative orders in response to problematic regulations.²⁵ As such, agencies often voluntarily comply with LSO recommendations,²⁶ and the governor often exercises his veto authority in response to a legislative recommendation.²⁷ Early, informal discussions between agencies and LSO staff also have resolved “numerous” potential problems with rules.²⁸ And rule review helps to identify administrative difficulties, policy concerns, and statutory deficiencies: the Management Council has at times adopted legislation to correct problematic statutes identified during the rule review.²⁹

In addition to strict legal questions of statutory authority, legislative intent, and proper procedure, the LSO will also review for reasonableness, in terms of a rule’s susceptibility to litigation for arbitrariness or capriciousness.³⁰ In theory, the LSO and the Management Council are not supposed to substitute their policy judgments for an agency’s choices;³¹ but historically, the Management Council has not always been successful in quarantining its review from policy and political considerations.³² One former LSO analyst thought that the Management Council, composed of party leadership, was in fact more vulnerable to the influence of partisan politics than a more independent review committee might be.³³

Analysis and Grade

Wyoming’s regulatory review structure does not reasonably use resources. There are no analytical requirements, and the Legislative Service Office has few resources to perform its duties. Some have criticized Wyoming as demonstrating “undue complexity. . . . [T]heoretically, the rule may be reviewed six times, three times by the governor alone.”³⁴

When Wyoming first began experimenting with regulatory review in 1977, “[n]either the legislature nor the Governor [were] completely comfortable with the rule review process.”³⁵ The basic review structure has not substantially changed in the last thirty years: Wyoming’s Administrative Regulation Review Act consolidates most rulemaking and review powers in the executive branch, leaves the legislature with few direct review powers, and requires little in the way of justification or analysis of new and existing regulations. Wyoming likely has grown more comfortable, or at least more accustomed, to the rule review process since 1977, and the review process does sometimes impact the substance of rules. But too much may occur behind the scenes, without clear standards, public input, or deadlines.

Wyoming’s regulatory review structure may be overdue for an update: currently, it scores a D.

Notes

- ¹ T. Thomas Singer, *Administrative Regulation Review—Act II*, 15 LAND & WATER L. REV. 207, 208 (1980). Singer was a former analyst for the Legislative Services Office.
- ² *Id.* at 209.
- ³ WYO. STAT. ANN. § 16-3-103(a)(i)(G).
- ⁴ *Id.* § 28-9-103.
- ⁵ Wyo. Legis. Serv. Office, Explanation of Administrative Rules Review Process, <http://legisweb.state.wy.us/leginfo/exorders/adminrr/explain.htm>.
- ⁶ WYO. STAT. ANN. § 28-9-104. Emergency rules get less scrutiny: they are given to the Management Council only for informational purposes, though LSO does perform an abbreviated review. Survey from Dave Gruver, Asst. Dir. of the Wyoming Legis. Serv. Office (2009, on file with author); LEGIS. SERV. OFFICE, ADMINISTRATIVE RULES REVIEW HANDBOOK 25 (2007).
- ⁷ WYO. STAT. ANN. § 28-9-104(a).
- ⁸ LSO, Explanation of Administrative Rules Review Process, *supra* note 5.
- ⁹ WYO. STAT. ANN. § 28-9-105.
- ¹⁰ *Id.* § 28-9-106(b).
- ¹¹ *Id.* § 28-9-107. Any legislative power to veto or hold a rule in abeyance without the governor's approval was given up as part of the original compromise to enact the Administrative Regulation Review Act. Singer, *supra* note 1, at 209 (explaining that the sponsor of the legislation gave up such power to bring the governor on board, who was not eager to cede agency oversight authority to the legislature).
- ¹² WYO. STAT. ANN. § 16-3-102(c); Survey from Gruver, *supra* note 6.
- ¹³ WYO. STAT. ANN. § 16-3-103(d).
- ¹⁴ Survey from Gruver, *supra* note 6.
- ¹⁵ 1988 Wyo. Sess. Laws ch.58 § 2.
- ¹⁶ WYO. STAT. ANN. § 28-9-104(b).
- ¹⁷ Survey from Gruver, *supra* note 6.
- ¹⁸ ADMINISTRATIVE RULES REVIEW HANDBOOK, *supra* note 6, at 13.
- ¹⁹ Survey from Gruver, *supra* note 6.
- ²⁰ ADMINISTRATIVE RULES REVIEW HANDBOOK, *supra* note 6, at 14 (if the attorney general requests review of specific portions of a rule).
- ²¹ LSO, Explanation of Administrative Rules Review Process, *supra* note 5.
- ²² Singer, *supra* note 1, at 221.
- ²³ *See* ADMINISTRATIVE RULES REVIEW HANDBOOK, *supra* note 6, at 18.
- ²⁴ LSO, Explanation of Administrative Rules Review Process, *supra* note 5.
- ²⁵ Singer, *supra* note 1, at 222 (noting at least two such orders passed early in the rule review process's history).
- ²⁶ *See, e.g.*, LEGIS. SERV. OFFICE, ADMINISTRATIVE RULE REVIEW REPORT #AR08-068 (2008), *available*

at <http://legisweb.tate.wy.us/ARULES/2008/AR08-068.htm> (pointing out a rule exceeded statutory authority and noting that “[t]he agency has been contacted and is in agreement with this recommendation” to remove the offending provision).

²⁷ ADMINISTRATIVE RULES REVIEW HANDBOOK, *supra* note 6, at 12-13.

²⁸ LSO, Explanation of Administrative Rules Review Process, *supra* note 5.

²⁹ Singer, *supra* note 1, at 225.

³⁰ ADMINISTRATIVE RULES REVIEW HANDBOOK, *supra* note 6, at 16.

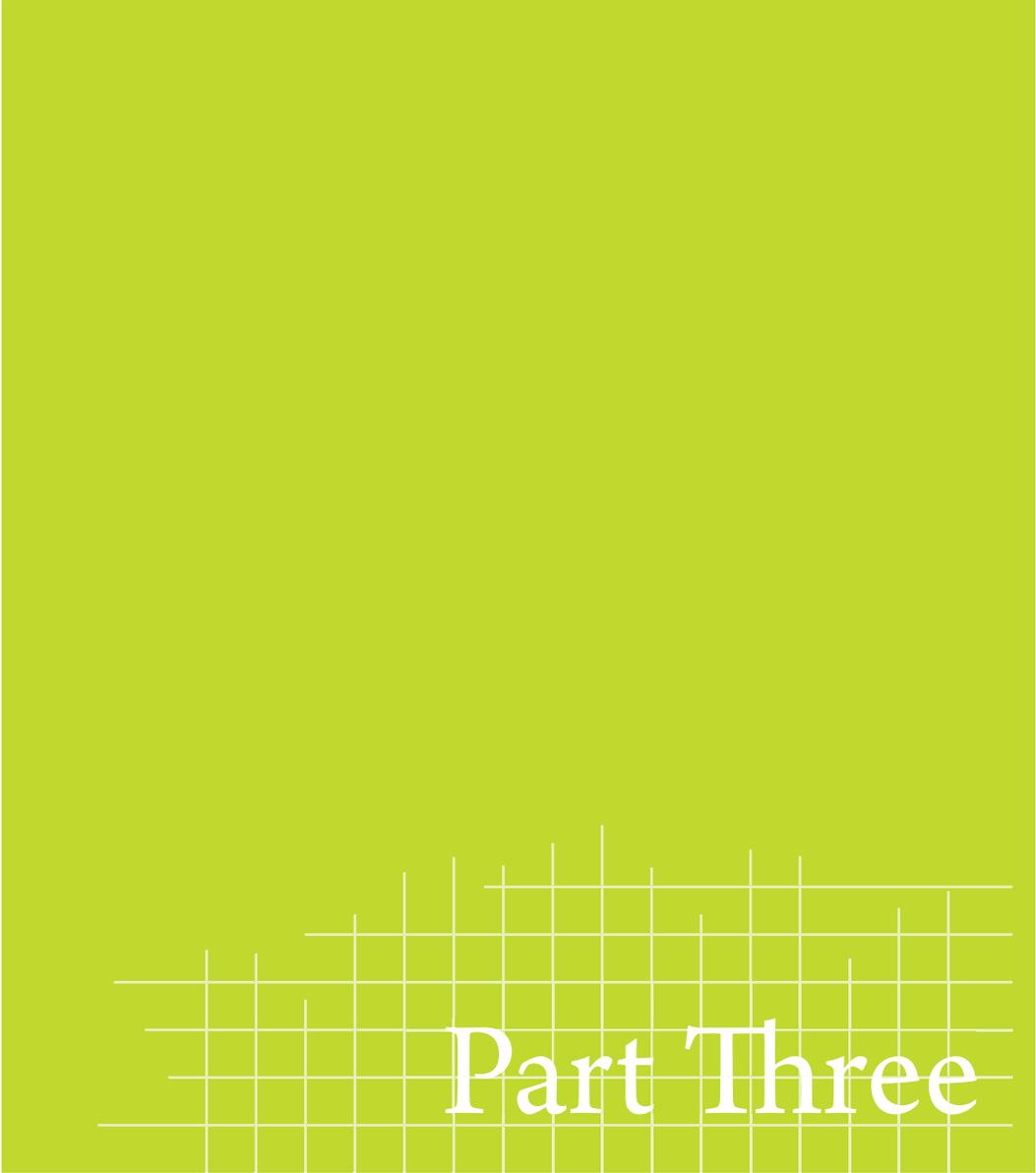
³¹ *Id.* at 16-17, 20.

³² Singer, *supra* note 1, at 229.

³³ *Id.* at 229 n.108. The Management Council can refer rules to the relevant legislative committee for assistance in the review, but that power is seldom exercised. ADMINISTRATIVE RULES REVIEW HANDBOOK, *supra* note 6, at 20.

³⁴ David S. Neslin, *Quis Custodiet Ipsos Custodes?: Gubernatorial and Legislative Review of Agency Rulemaking under the 1981 Model Act*, 57 WASH. L. REV. 669, 686 n.105 (1982).

³⁵ *Id.* at 213 n.31.



Part Three

Where To Go and How to Get There

[A]dministrative reform does not occur in a vacuum. Federal reformers may be able to learn some lessons by examining administrative law reform in our veritable laboratories of democracy, and state reformers might learn from glancing horizontally at their neighbors rather than above.

—Jim Rossi¹

Chapter Nine

Innovative Practices

This chapter does not contain an exhaustive list of every innovative practice in every state, nor are all listed practices necessarily recommended for adoption in other states. Instead, this chapter simply highlights some states that are experimenting with regulatory review.

Training and Transparency: In Arizona, the Governor’s Regulatory Review Council hosts regular seminars on rule-writing, periodic reviews, and preparing impact statements.² Arizona’s Administrative Procedure Act also features a “regulatory bill of rights.” Though it may not add any substantive rights, it may improve the public’s ability to understand their options and role in the process.³

Well-designed websites can similarly help both agencies and the public understand the nuances of the regulatory review process. Utah’s Division of Administrative Rules website is a model of transparency.⁴

Balance in Analysis: Vermont’s impact analyses are particularly thorough when it comes to environmental effects. The state’s Department of Environmental Conservation sometimes employs “breakeven” analysis when benefits are hard to quantify, calculating at what point benefits would at least equalize known costs, and then assessing whether benefits are likely to exceed that point. Vermont also requires a greenhouse gas impact statement, which is certainly unique and singles out a particular category of impacts.

The analytical requirements of Iowa and Washington are also praiseworthy. Alabama instructs agencies to attend to the uncertainties associated with the estimation of particular benefits and burdens and the difficulties involved in the comparison of qualitatively and quantitatively dissimilar benefits and burdens.

While Washington’s executive order on periodic review largely focuses on eliminating burdensome and obsolete rules, it does require agencies to ask, under the “fairness” criterion, whether a rule “should be strengthened to provide additional protection.”

Regulatory flexibility analysis is one area where balance is crucial and all too infrequent. But some states have structured their small business reviews to focus slightly less on just reducing costs and more on maximizing net benefits. Delaware, Wisconsin, and Michigan all requires consideration of any additional costs created by small business exemption. In Rhode Island, Vermont, and a few other states, alternatives to minimize small business impacts must be consistent with health, safety, and environmental welfare. Washington and Utah restrict the

number of rules for which a full quantification of small business impacts must be performed.

Preliminary Analysis and Triggers: Wisconsin requires a preliminary statement of the amount of time and resources that will be spent developing the rule, as well as a preliminary analysis of policy alternatives. While many states do not require publication of a regulatory agenda, a few states, like Maine and Michigan, allow for their regulatory reviewers to comment on agendas.

Wisconsin is also among the few states that requires an economic impact report only upon petition. This tactic is perhaps too effective in conserving agency resources: it has never been used. Arkansas uses another approach, letting each agency decide whether the development of a financial impact statement will be so speculative as to be cost prohibitive. A more traditional route is taken by North Carolina: a substantial economic impact of \$3 million triggers analysis, and the executive reviewer reserves its more rigorous review for “significant” rule changes, meaning rules creating a significant economic impact, conflict, or novel policy. Washington proposes a meta-analysis to assess the costs and benefits of requiring cost-benefit analysis.

Periodic Review of Rules and Process: A few states require agencies to evaluate the effectiveness of their rules when conducting their periodic reviews. Washington agencies must develop a plan for all significant rules to identify interim milestones and assess measurable outcomes to judge the rule’s progress. Every five years, Oregon agencies, relying on any available information, must review whether the rule has had its intended effect, and whether the anticipated fiscal impact was underestimated or overestimated. If at least five people make a request, Oregon agencies must also identify how they will determine if the rule is, in fact, accomplishing its objective once it takes effect.

Maryland’s system is among the most thorough. Every eight years, agencies must submit to the Governor and the legislative review committee a schedule of regulations to be reviewed.⁵ Based on those schedules, the Governor, by executive order, provides for review of regulations. Agencies then develop a work plan that describe their intentions to solicit input from public, stakeholders, and other agencies, as well as their procedures for studying recent scientific information and comparative regulatory structures. The legislative review committee can comment on agency work plan.

Finally, some states, like Maine, have procedures whereby the Secretary of State reports annually to the governor on the agencies’ experiences with procedural requirements for rulemakings and reviews.

States may want to emulate some of these best practices as they work to reform their own regulatory review structures. The next chapter outlines more specific, step-by-step recommendations on how all states can start moving down that path.

Notes

- ¹ Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Rulemaking Revolution or Counter-Revolution?* 49 ADMIN. L. REV. 345, 369 (1997).
- ² Governor's Regulatory Review Council, Council Seminars, <http://grrc.az.gov/mainpages/grrcsem.asp>.
- ³ But actual, sophisticated public participation, like petitioning to object to economic analysis, may be rare. *See supra*, Arizona.
- ⁴ Division of Admin. Rules, <http://www.rules.utah.gov>.

Chapter Ten

Recommendations

Based on the guiding principles developed in this report, no state earns a perfect score. In every state's regulatory review structure, at least some areas could stand improvement. Each state faces different legal and resource constraints on their options, and even if they did not, there still is no one-size-fits-all solution to regulatory review. Yet every state could take a few simple steps toward reassessing and redesigning its review structure.

Step-by-Step Recommendations
#1: Low-Hanging Fruit <ul style="list-style-type: none">• Transparency: post more impact statements and agendas online• Training: host seminars for rule writers, rule reviewers, and the public• National Professional Association: create a body to facilitate interstate communication• Inter-State and Intra-State Sharing: share resources and best practices
#2: Research and Resource Prioritization <ul style="list-style-type: none">• Conduct deeper survey of individual state practices• Prioritize agencies or reviewers that would benefit most from additional resources
#3: Stroke of the Pen Changes <ul style="list-style-type: none">• Adopt off-the-shelf recommendations, like the Draft Order featured in the Appendix• Or design original guidance documents, promoting balance in analysis and reviews
#4: Process-Intensive Changes <ul style="list-style-type: none">• Update the state's Administrative Procedure Act• Reform the state's Regulatory Flexibility Act to promote balanced analysis
#5: Continual Reevaluation <ul style="list-style-type: none">• Monitor individual state practices• Support academic, empirical research into what works

Step #1 — Low-Hanging Fruit: Transparency, Training, and Sharing

Some key improvements can be made without expending many state resources, and may help states make the most of their limited resources.

Transparency: In many states, the full text and underlying data for regulatory impact statements are only available upon request: state *Registers* may include only summaries, and internet access may be sporadic. With minimal resources, every state can move toward making more information publicly and automatically available online. With time, states should move to indexed, searchable,

and linked databases of their regulatory impact materials.

Similarly, more states should explore posting regulatory agendas online. Most states still do not require agencies to publish annual agendas of their planned activities, but doing so would increase transparency and aid the review process. Both the public and reviewers could help agencies brainstorm regulatory alternatives earlier in the process, before agencies lock in their preferred choice.

Training: Especially with high rates of turnover among both rule writers and rule reviewers, not everyone involved in a state's rulemaking process necessarily understand all its analytical and rule review features. Central review entities should host regular training sessions, to guide new agency analysts and rule reviewers through the process. Some training materials could also be placed online, to increase understanding among the general public and non-governmental organizations of the role of regulatory review. Trainings should in particular walk agency analysts through how to keep analytical requirements manageable but meaningful. For example, trainings could introduce default values for key costs and benefits, explain how to tailor the level of analytical detail to the significance of the rule's anticipated effects, and teach how to employ "breakeven analysis" to compare impacts when benefits are hard to quantify.

Inter-State Sharing and Training: States should share resources and best practices. The National Association of Secretaries of State has an Administrative Codes and Register Section ("ACR"), which holds meetings on substantive regulatory review.¹ ACR members include rule filers and editors, rule reviewers (both legislative and executive), legal counsels, and agency rule writers, from the states, territories, and federal government. Many agency employees report a keen interest in learning more about what other states are doing,² but despite the efforts of the ACR and other organizations, inter-state contact has been minimal. The Executive Director of Florida's legislative review body, for example, has only had "limited contacts with other states."³ There is a strong need to either expand the capacities, memberships, and substantive training opportunities provided by organizations like the ACR, or else create a new national entity.

The literature supports that interstate professional associations play a valuable role in the diffusion of new policy ideas across the states. A recent survey of state government policymakers confirmed an obvious truth: state officials are overwhelmed by the volume of information they receive, and so seek out concise presentations from trusted sources. Forty-eight percent of respondents named professional associations like the National Conference of State Legislatures as a trusted source, because they "don't have a stake in the outcome" and can provide state-to-state comparisons.⁴ Indeed, state officials often rely on analogy to make policy choices, which helps explain the regional diffusion of policy innovations across neighboring states.⁵ Professional associations can encourage the diffusion of policy innovations by providing the institutional foundations and resources (research, hearings, recommendations) that give officials the opportunity to learn, and by facilitating communication among states that do not share borders.⁶ Empirical evidence bears out that participation by states in professional associations can increase the likelihood of adopting innovative policies.⁷

The first problem to overcome in interstate sharing is non-commensurable terminology. Not every state—and perhaps not even every entity within a state—means the same thing when it says it performs a "substantive review" of "fiscal notes" that measure "direct costs." Without a common language, it is difficult for states to begin communicating and sharing ideas.

A national organization of rule reviewers can most importantly take a lead in developing default values for use in regulatory assessments, as well as recommendations on simplified procedures for tailoring the level of analytical detail to the significance of the rule's anticipated effects. The creation of a national organization would thus help conserve and maximize the potential of states' limited analytical resources.

States can also directly share data, tactics, and analyses with each other. Of course, not all data would seamlessly apply from one state to another, but states could better share both predictive estimates and hard information about the potential costs and benefits of various regulatory alternatives. A national organization could help coordinate the sharing of information, so that not every state has to reinvent the wheel. Some states already require a comparison of new regulatory proposals with the existing regulatory requirements in surrounding states.⁸ In such cases, it would undoubtedly be beneficial if states had access to all the regulatory analyses and underlying data used when those surrounding states developed their regulations.

Intra-State Sharing: Finally, individual states could better coordinate the sharing of data, economic models, and economic resources among their own agencies. Part of this effort will be conditioned on assessing the state's current resources.

Step #2: Research and Resource Prioritization

Once the low-hanging fruit have been picked, states need to start making critical choices about if and how they want to reform their regulatory review processes. This decision should start with gathering more information. The central review entity—or, if none exists, the governor's office—should undertake a survey of its state's current regulatory review and impact analysis requirements. This report can serve as a jumping off point, but states should conduct their own surveys of reviewers, agencies, and non-governmental stakeholders to get a more complete picture of what works and what does not. As discovered while researching and interviewing for this report, the promise of some anonymity may encourage more candid responses.

Part of this assessment should be identifying available resources. Which agencies have economists on staff or have relationships with academic centers that could assist in economic analysis? What data do agencies have on file that can help assess costs and benefits? Do reviewers have sufficient staff to assist their efforts, and how often are deadlines missed or are rules not substantively reviewed? No agency is likely to possess all the resources it ideally would want, but recent budget cuts have strained the resources of many states (which were already in short supply). States will therefore need to prioritize which agencies or reviewers are most in need of additional resources, where the benefits of better analysis and review would have the largest impact.

Step #3: “Stroke of the Pen” Changes

Once states have identified the changes they want to pursue, they must decide how best to accomplish those improvements. On the assumption that the legislative process in most states can at times move excruciatingly slow and succumb to political squabbling, it will typically make sense to pursue first those tactics that can achieve change with the stroke of the pen: namely, guidance documents and executive orders. That said, no significant change to a state's regulatory review process should ever be made covertly. Even if public comment is not normally required for guidance documents or executive orders, states should make every effort to include a meaningful comment process when using “stroke of the pen” changes.

In designing reforms to the regulatory review process, states should first look to what works in other states. Iowa, for example, may offer a useful template for constructing a new executive order. The recommendations of this report are also enshrined in a sample executive order developed based on New York's structure and needs. See Appendix A for a Draft Executive Order on Government Effectiveness as well as an explanatory chart justifying the choices made. States with the resources and inclination may want to adopt such executive orders off the shelf. Others will need to modify the recommendations to fit their particular needs. But any new design for regulatory review should consider such improvements as:

- Limiting requirements for detailed economic analysis to the most significant proposals;
- Balancing treatment of costs and benefits, with the goal of selecting the regulatory alternative that maximizes net benefits;
- Facilitating inter-agency coordination through inter-agency reviews of agendas and regulations, or else through regular meetings convened by a review entity;
- Combating agency inaction, by developing a review mechanism for denied public petitions for rulemakings; and
- Making periodic reviews more meaningful and balanced.

Step #4: Process-Intensive Changes

Depending on a state's existing legal structure, not all desired changes can be achieved with the stroke of a pen. Other changes will require new regulation or even legislation. For states interested in new legislative options, the latest version of the Model State Administrative Procedure Act provides an excellent template. States should also consider how to tailor that template to their needs and to better achieve the recommendations of this report.

Adopting or expanding regulatory flexibility statutes should not be a high priority. If the entire regulatory process is designed to take into account distributional consequences, no additional analytical burden is necessary to protect the interests of special groups like small businesses—their impacts will already be accounted for. But if a state does wish to pursue new or amended regulatory flexibility statutes, the process should be as balanced as possible. Agencies should not be forced to adopt any alternative that lowers the costs to small business, unless the benefits outweigh the potential public harm and administrative costs of such small business exemptions.

Step #5: Continual Reevaluation

Reform is only the first step. States, assisted by a national organization, should continually reevaluate whether their regulatory reviews are being practiced consistently.

Academics also need to continue their research. More quantitative work is necessary—in the mode of researchers like Neil Wood, Stuart Shapiro, Marcus Ethridge, and others—to assess the actual impacts of various review requirements on the content and quality of regulation. The central theme of this report is that state regulatory review structures are powerful and poorly understood, and therefore deserve much more attention than they have received to date.

Notes

- ¹ *E.g.*, Agenda for Meeting of the ACR, Feb. 2008, *available at* <http://www.administrativerules.org>.
- ² See various interviews conducted with state rule reviewers, cited *supra*.
- ³ Follow-Up Survey with Scott Boyd, JAPC Executive Director (2009, on file with author).
- ⁴ Richard Sorian & Terry Baugh, *Power of Information: Closing the Gap Between Research and Policy*, 21 HEALTH AFFAIRS 264, 268 (2002).
- ⁵ Steven J. Balla, *Interstate Professional Associations and the Diffusion of Policy Innovations*, 29 AM. POL. RES. 221, 221 (2001).
- ⁶ *Id.* at 223.
- ⁷ *Id.* at 235.
- ⁸ For example, Wisconsin.

Appendices

Appendix A—Draft Executive Order on Government Effectiveness (tailored to New York’s structure and needs)

WHEREAS, a responsive and balanced regulatory system is vital to promote the State’s economy and the welfare of its citizens;

WHEREAS, agencies should prioritize the use of evidence-based programs and promote the rigorous evaluation of programs in a variety of settings;

WHEREAS, an efficient and effective regulatory process should maximize net benefits, ensure the fair distribution of regulatory costs and benefits, foster sustainable private sector development, facilitate public input, encourage innovation and experimentation, and direct agency resources to the most pressing public problems while ensuring that old or outdated regulations or programs are continually evaluated and updated;

WHEREAS, the State Administrative Procedure Act establishes procedures for the adoption of regulation and directs agencies to examine the positive and negative consequences of their rules;

WHEREAS, appropriate additional procedures and substantive standards can improve the decisionmaking of agencies for the benefit of all New Yorkers;

NOW, THEREFORE, I, [NAME], Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the laws of the State of New York, do hereby establish the position of State Director of the Office of Government Effectiveness and order as follows:

A. Definitions

1. “Director” shall mean the Director of the Office of Government Effectiveness.
2. “Agency” shall mean any agency as defined in Section 102(1) of the State Administrative Procedure Act.
3. “Rule” shall have the same meaning as defined in Section 102 of the State Administrative Procedure Act.
4. “Significant rule” shall mean any rule that may:
 - a. Have an annual economic effect of \$50 million or more or will substantially affect the environment, public health or safety, local or tribal governments, an important economic sector, or employment;

- b. Raise novel legal or policy issues, or create an inconsistency with action taken or planned by another agency.

Significant rules may consist of actions that impose additional compliance costs or stricter regulatory standards, as well as those that relax protections or reduce compliance costs. Annual effect should be calculated on an aggregate (rather than net) basis and should include all quantifiable and non-quantifiable effects, including effects on well-being, public health, safety, or the environment.

B. Evidence-Based Decisionmaking

1. Agencies shall engage in an ongoing program of self-evaluation to ensure that state resources are directed toward achieving programmatic goals in the most efficient and effective manner possible.
2. To understand what policy approaches work, for whom, and under what conditions, it is vital to increase the knowledge base on effective government, to develop metrics and measurement tools, and to carry out rigorous testing of state programs;
3. All agencies shall develop an evidence-based decision plan that identifies all programs whose effectiveness can be subject to rigorous testing, and establishes a procedure for integrating evidence-based decisionmaking into all relevant program areas. The Director shall review this information and compile a unified evidence-based decisionmaking plan and make it available to the public in an easily accessible electronic format.
4. The definition of “evidence-based” shall be determined by applying established scientific criteria.
5. In applying scientific criteria, agencies shall consider the following standards:
 - a. Evidence for efficacy or effectiveness of programs should be based on designs that provide significant confidence in the results. The highest level of confidence is provided by multiple, well-conducted randomized experimental trials, and their combined inferences should be used in most cases. Single trials that randomize individuals, places, or time, can contribute to this type of strong evidence for examining intervention impact.
 - b. When evaluations with such experimental designs are not available, evidence for efficacy or effectiveness cannot be considered definitive, even if based on the next strongest designs, including those with at least one matched comparison. Designs that have no control group (e.g., pre-post comparisons) are even weaker.
 - c. Priority should be given to programs with evidence of effectiveness in real-world environments, reasonable cost, and manuals or other materials available to guide implementation with a high level of fidelity.
6. The Director shall from time to time establish procedures and guidelines on evidence-based decisionmaking to provide clarity for agencies on the requirements of this section.
7. To the extent consistent with law, all agency programs that distribute subsidies, award grants, or provide waivers must be designed and implemented to promote effectiveness, efficiency, and fairness, and to advance the general public good. The Director may from time to time require agencies to evaluate such programs for their compatibility with the principles of this Part and of the Order generally. Agencies must report such evaluations to the Director, in a

time and manner chosen by the Director. The Director may then recommend to the agency such changes consistent with this Order, and may recommend to the Secretary to the Governor, the Counsel to the Governor, the Director of State Operations, and the Director of the Division of the Budget that the agency be directed to adopt such changes.

C. Regulatory Principles and Standards

1. Agencies shall promulgate rules that are required by law, that are necessary to interpret the law, or that advance the public good by: correcting failures of private markets, improving public health or the environment, promoting economic growth, protecting public safety or security, or otherwise enhancing the well-being of New Yorkers. In deciding whether and how to regulate, agencies shall assess the costs and benefits of feasible regulatory alternatives. Costs and benefits shall be understood to include both quantified and unquantified effects on the economy, environment, public health and safety, and overall well-being. In choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits, unless a statute requires another regulatory approach.
2. When choosing between regulatory alternatives, agencies shall take due account of distributional impacts, including impacts on future generations, and equity. Agencies should consider how tailoring regulatory requirements to protect vulnerable populations, geographic regions, or economic sectors would augment net benefits.
3. New York businesses and interested individuals and groups will be given ample opportunity to comment on regulatory alternatives, and the regulatory process will be conducted expediently, without unnecessary delay, and with sufficient coordination between state agencies and with federal, local, and tribal governments.
4. Agencies shall base their decisions on the best reasonably available scientific, technical, and economic information. Each agency shall pursue an agenda of research and training to ensure that its staff has the background, knowledge base, and relevant data to make accurate regulatory decisions.
5. Agencies shall take account of the effect of regulation on technical change and innovation and shall ensure that estimates of compliance costs and anticipated benefits reflect the ability of market actors to adapt to new regulations.
6. Agencies shall consider regulatory approaches that encourage innovation, utilize economic incentives (such as user fees or marketable permits), achieve regulatory goals through disclosure of information, and allow for flexibility in achieving performance objectives, rather than specifying the precise manner of compliance that regulated entities must adopt.
7. Agencies shall identify the purpose of proposed rules and, where possible, create metrics or other tools to facilitate the evaluation of their effectiveness in achieving regulatory objectives.
8. Agencies shall draft rules to be simple and easy to understand to minimize the potential for uncertainty.
9. Agencies shall favor rules that are straightforward to enforce, that maximize the efficient deployment of state enforcement resources, and that minimize the risk of non-compliance.
10. Agencies shall avoid rules that are inconsistent, incompatible, or duplicative with the agency's

other rules or those of other state or federal agencies.

D. Planning, Regulatory Impact Analysis, and Review

1. Any person may petition any agency for the adoption, amendment, or repeal of any rule by submitting a form prescribed for that purpose by the Director. Not later than 60 days after submission of a petition, the agency must either (1) initiate rulemaking proceedings in accordance with the State Administrative Procedure Act, or (2) deny the petition in a written statement explaining the reasons for denial. All petitions, denials, and other documents relating to the review of petitions must be submitted to the Director at regular intervals as specified by the Director, and made available to the public in an indexed, searchable, and easily accessed electronic format.
2. In order to identify efficient new regulatory proposals, update and revise regulations on a timely basis, and provide for coordination between agencies, the following procedures shall be followed:
 - a. Each agency shall prepare an agenda of all rules under development or review, at a time and in a manner specified by the Director. The description of each rule shall contain a brief summary of the action, the relevant legal authority and any appropriate deadlines, and the name, telephone number, and means of electronic communication with a knowledgeable agency official. The Director shall compile this information into a unified regulatory agenda and make it available to the public in an indexed, searchable, and easily accessed electronic format.
 - b. At a time and in a manner specified by the Director, each agency shall prepare a list of all petitions for rulemaking that are currently pending before it and all rules that are due for periodic review in the coming year under the State Administrative Procedure Act or other law or administrative procedure. Included in this list shall be all relevant administrative materials, including prior regulatory impact analyses, which shall be compiled by the Director into a unified list that is made available to the public in an indexed, searchable, and easily accessed electronic format.
 - c. At a time and in a manner specified by the Director, agencies will open a comment period and accept public comments on their regulatory agendas, pending petitions, actions on petitions in the past year, and rules undergoing periodic review. Public comments received during this period will be made available by the Director to the public in an easily accessed electronic format. The Director will also establish an opportunity for all agencies to comment on the regulatory agendas of other agencies.
3. In order to facilitate rational agency decisionmaking, these procedures, which augment the requirements of section 202-a of the State Administrative Procedure Act, shall be followed prior to proposal and adoption of a rule:
 - a. The agency shall identify the problem that it attends to address as well as assess the significance of that problem.
 - b. The agency shall identify and assess all feasible regulatory alternatives identified by the agency or the public, especially the use of economic incentives and information disclosure.

- c. The agency shall assess both the costs and the benefits of the intended rule and shall propose or adopt a rule only, to the extent permitted by law, upon a reasoned determination that the benefits of the intended rule justify its costs. In making this determination, the agency shall consider both quantified and unquantified costs and benefits. The agency shall also give due regard to the distributional impacts of the intended regulation and shall take appropriate steps to mitigate negative distributional effects.
 - d. The agency shall make available to the public the information collected and assessments made pursuant to this provision in an indexed, searchable, and easily accessed electronic format. This information shall also be made available during all notice-and-comment proceedings under the State Administrative Procedure Act, with relevant opportunity for public comment.
4. For significant rules as defined in this order and determined by the Director, prior to adoption or proposal of an intended rule, the agency shall prepare a regulatory impact analysis, which includes the following information:
 - a. An assessment, including the underlying analysis, of costs and benefits anticipated from the rule. Benefits include, but are not limited to, direct benefits for the economy and private markets, health and safety, the natural environment, and the elimination or reduction of discrimination or bias, as well as indirect economic, environmental, health and safety, or other benefits. Costs include, but are not limited to, direct costs both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity and employment), health, safety, and the natural environment. To the extent feasible, the assessment will include a quantification of benefits and costs. Where it is difficult or impossible to quantify a category of benefits or costs, the assessment will include a qualitative analysis of such benefits or costs.
 - b. An assessment, including the underlying analysis and quantification to the extent possible, of costs and benefits of feasible alternatives to the planned regulation, identified by the agency or the public, and an explanation why the planned regulatory action is preferable to the identified potential alternatives.
 - c. An assessment of the distribution of costs and benefits anticipated from the rule, and the impact of the rule on vulnerable populations, small businesses, local governments, low-income New Yorkers, and employment.
 - d. The agency shall make all regulatory impact assessments available to the public in an indexed, searchable, and easily accessed electronic format. This information shall also be made available during all notice-and-comment proceedings under the State Administrative Procedure Act, with relevant opportunity for public comment.
5. All analysis shall be proportional in detail to the significance of anticipated effects of an intended rule, and shall be done in a timely manner. Lack of full certainty or gaps in scientific, technical, or economic understanding shall not be used as a reason for postponing cost-effective measures to prevent harm to the economy, public health, safety and security, or the environment.
6. Prior to the adoption or proposal of an intended rule, all agencies shall submit the text of the rule and all relevant assessments and analyses to the Director, and the Director (or an appropriate

designee) shall review the rule and supporting material for compliance with the directives of this Order. In carrying out these responsibilities, the Director shall adhere to the following guidelines:

- a. The Director shall carry out review within the following time periods:
 - A. For all non-significant rules, within 45 calendar days after the date of submission.
 - B. For all significant rules, within 90 calendar days after the date of submission.
 - C. The review process may be extended once by no more than 30 calendar days upon the written approval of the Director.
 - D. When the specified time periods expire, the Director's review of a rule will be deemed complete for purposes of subsection (b) of section 6 of this part.
- b. No regulation may be proposed or adopted until review by the Director is complete. If the Director finds that the rule or supporting documents fail to meet the principles and requirements of this Order, the Director may return the rule to the issuing agency for further consideration. At that time, the Director shall provide the issuing agency a written explanation for such return, setting forth pertinent provisions of this Order where appropriate.
- c. During the review period, the Director may solicit comments on the proposal from relevant state agencies, local and tribal governments, or legislative committees. This process does not restrict the ability of any state agency, local or tribal government, or legislator to otherwise participate during any period of public comment under this Order or the State Administrative Procedure Act.
- d. To ensure greater transparency, accessibility, and openness in the regulatory review process, the Director shall be governed by the following disclosure requirements:
 - A. Only the Director (or a designee) shall receive oral communications from persons not employed by the executive branch of the state government regarding the substance of a rule under review;
 - B. A representative from the issuing agency shall be invited to any meeting between the Director (or designee) and any such persons;
 - C. The Director shall forward to the issuing agency, and publish in an easily accessible electronic format, all written communications between the Director and such persons within 10 days, and the dates, subject matters, and names of individuals involved in all substantive communications.
 - D. The Director shall maintain and publish a log, in an easily accessible electronic format, of the status of all rules currently under review and a notation of all written communications forwarded to the issuing agency pursuant to paragraph C of section (6)(d).
 - E. After a rule has been adopted, or the agency has announced its decision not to issue a rule previously under review, the Director shall publish in an indexed, searchable, and easily accessible electronic format, all documents exchanged between the Director and the issuing agency during the period of regulatory review.
7. Annually, the Director will review currently pending petitions for rulemakings to determine

whether there are appropriate regulatory actions that should be undertaken. The Director will also review petitions rejected over the course of the past year. On the basis of these petitions, public comments, or other sources, the Director may issue written recommendations to any agency requesting regulatory action. Within 30 days of receipt of a written communication under this paragraph, a receiving agency must issue a written reply. The Director shall publish, in an indexed, searchable, and easily accessible electronic format all communications issued and received under this paragraph.

8. Annually, the Director will review whether agencies have proposed the regulations necessary to implement recently enacted or amended statutes. The Director will also review any egregious cases of agency non-compliance with statutory or judicial deadlines for rulemaking, and whether agencies are undertaking the regulatory actions scheduled by their annual agendas. Giving due consideration to agencies' resources and their discretion to prioritize their own rulemaking dockets, the Director may issue written recommendations to any agency requesting regulatory action on the basis of these reviews. The Director must also send such recommendations to the Secretary to the Governor, the Counsel to the Governor, the Director of State Operations, and the Director of the Division of the Budget.

E. Duties of the Director of Office of Government Effectiveness

1. To carry out the provisions of this Order, the Director shall have the following responsibilities:
 - a. To encourage agencies to eliminate, consolidate, simplify, expedite, or otherwise improve permits, permitting procedures, and paperwork burdens affecting business and local government undertakings and to offer permit assistance to businesses and local governments;
 - b. To analyze or require agencies to analyze the impact of proposed and existing rules;
 - c. Within available amounts, and subject to the approval of the Director of the Budget, to enter into contracts and expend money, and to employ such personnel as the Director of Government Effectiveness deems necessary and desirable to carry out the powers and responsibilities provided for in this Executive Order, and provide them with compensation and reimbursement of their expenses;
 - d. To entertain requests for and to issue determinations regarding whether any action taken by an agency should be taken pursuant to a rule;
 - e. Consistent with parts C and D of this Order, to direct any agency not to adopt on a temporary basis any rule that is the subject of a notice of proposed or revised rulemaking published in the State Register that, as proposed or revised, in the Director's judgment does not meet the criteria contained in Parts C and D of this Order. Any such action pursuant to this paragraph shall be in writing and shall be binding on such agency unless subsequently superseded pursuant to Part F of this Order;
 - f. To propose to any agency that it consider for amendment or repeal any existing rule which may be obsolete in view of State or federal law or otherwise inefficient, and to recommend to the Secretary to the Governor, the Counsel to the Governor, the Director of State Operations, and the Director of the Division of the Budget that any agency be directed to develop a rulemaking to amend or repeal any such rule;

- g. To propose to any agency that it consider adoption of a rule to address a significant risk that is not regulated, or is regulated through overly lax standards, and to recommend to the Secretary to the Governor, the Counsel to the Governor, the Director of State Operations, and the Director of the Division of the Budget that any agency be directed to develop a rulemaking to adopt such rule;
 - h. To convene inter-agency meetings to discuss coordinated approaches to proposed regulations, to significant risks that are not regulated or are under-regulated, and to paperwork requirements;
 - i. To exclude a particular rule or category of rules, at the Director's initiative or at the request of an agency, from all or part of the requirements contained in this Order, based on a determination by the Director that the application of the requirements of this Order to such rule or category of rules lacks a substantial public benefit; and
 - j. To develop procedures for the conduct of activities and the discharge of responsibilities established in this Order.
2. From time to time, the Director shall issue guidance documents to provide further clarity for agencies on the regulatory process, regulatory impact analysis, and compliance with the provisions of this Order. Such guidance documents should include default values for use in regulatory assessments, as well as recommendations on simplified procedures for tailoring the required level of analytical detail based on the significance of the rule's anticipated effects.
 3. From time to time, the Director should make recommendations to agencies on sharing information and rulemaking resources for purposes of complying with this Order and with the requirements under the State Administrative Procedure Act. The Director should also identify agencies that lack the necessary resources or personnel to comply consistently with such requirements, and should report recommendations on the need for additional agency resources to the Secretary to the Governor, the Counsel to the Governor, the Director of State Operations, and the Director of the Division of the Budget. The Director must offer agencies technical advice and must, at regular times, hold training sessions for agency staff on compliance with this Order and the preparation of regulatory assessments.

F. Determinations on Rule Adoptions

Upon issuance of a notification pursuant to subsection (1)(e) of Part E of this Order, the Director shall promptly advise the Secretary to the Governor, the Counsel to the Governor, the Director of State Operations, and the Director of the Division of the Budget so they may consider the matter in consultation with the Director. Agencies should be given an opportunity to justify and explain the proposed rule. After consideration of the Director's determination and any additional information presented by the agency, the Secretary to the Governor, the Counsel to the Governor, the Director of State Operations, and the Director of the Division of the Budget may confirm or modify the Director's determination or authorize the agency to adopt the rule in whole or in part.

G. Construction

The powers and responsibilities provided by this Order to the Director of Government Effectiveness, the Secretary to the Governor, the Counsel to the Governor, the Director of State

Operations, and the Director of the Division of the Budget shall be construed and exercised consistently with the duty of the Executive to ensure that the laws of the State are faithfully executed.

Nothing in this Order shall be deemed to require agencies or to authorize the Director of Government Effectiveness, the Secretary to the Governor, the Counsel to the Governor, the Director of State Operations, or the Director of the Division of the Budget to act in contravention of statutory or constitutional requirements.

Nothing in this Order shall affect any otherwise available judicial review of agency action. This Order is intended only to improve the internal management of the State Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the State, its agencies or instrumentalities, its officers or employees, or any other person. No determination or recommendation made under this Order as to the legality of agency action shall be given any weight in any judicial proceeding.

H. Rescission of Previous Orders

The Executive Order revokes and supersedes the prior orders, promulgated on November 30, 1995, and August 6, 2009.

Explanatory Chart for Draft Executive Order on Government Effectiveness

SECTION & CONCEPT	SOURCE MATERIAL	POLICY JUSTIFICATION
Preamble	Adapted from current New York Executive Orders 20 (in effect since 1995) and 25 (issued 2009).	States need a rational regulatory process that will emphasize efficiency, maximize the potential of their administrative resources, grow their economy, and deliver the most benefits to their citizens—all the more so during an economic downturn.
A(1)-(3): Basic Definitions	Adapted from current New York Executive Order 20 § I (in effect since 1995).	All states can build upon current practices. In New York, for example, a new Office of Government Effectiveness would build on the Office of Regulatory Reform’s 15 years of experience, preserving its most successful review powers while enhancing its abilities to rationalize government decisionmaking.
A(4): Definition of “Significant”	Adapted from Federal Executive Order 12,866 § 3(d) (in effect since 1993) and informed by Federal Circular A-4 (OMB’s guidance document since 2003). Moving from a nationwide to a state-specific perspective, the threshold for economic significance is reduced from \$100 million; but given the large economic footprint of states like New York and the need to protect agencies from overly burdensome analysis, the threshold is kept appropriately high, at \$50 million. (Smaller states should set lower thresholds.)	Rigorous analytical requirements and regulatory review should be reserved for the most significant proposals, to direct agency resources to those rules that will benefit the most from these additional processes.

SECTION & CONCEPT	SOURCE MATERIAL	POLICY JUSTIFICATION
B: Evidence-Based Decisionmaking	Adapted from the National Research Council and Institute of Medicine Recommendation on Criteria for Establishing Strong Evidence of Effectiveness	All agencies programs should be based on evidence of what works. Agencies must therefore pursue rigorous research into such evidence.
C: Principles and Standards	Adapted from Federal Executive Order 12,866 §§ 1 (a)-(b) (in effect since 1993) and informed by current New York Executive Order 20 § III (in effect since 1995).	Agencies need clear, substantive standards to guide their decisionmaking, and the Director needs clear, substantive standards to review regulatory proposals. These principles promote efficient, effective, evidence-based regulations that are responsive to the state's electorate, economy, and overall welfare.
D(1): Public Petitions for Rulemaking	Adapted from Model State Administrative Procedure Act § 318 (public right to petition dates back to the 1946 version of MSAPA).	Public petitions can prompt agencies both to regulate in long-ignored areas where regulation would be beneficial, and to modify existing regulations that are no longer up-to-date or efficient, given changed legal, technological, economic, or other factors. New York state currently lacks a centralized mechanism for public petition.
D(2): Agendas, Periodic Reviews, Coordination, and Comments	Adapted from Federal Executive Order 12,866 § 4 (in effect since 1993) and informed by current New York Executive Order 25 (issued 2009).	A unified agenda helps to rationalize agencies' own regulatory plans and to harmonize inter-agency actions. The periodic review of existing regulations also becomes more meaningful under a systematic process open to public comment.
D(3): Assessing Alternatives for All Rules	Adapted from Federal Executive Order 12,866 § 1 (b) (in effect since 1993) and informed by current New York Executive Order 20 § III (in effect since 1995).	Before proposing any regulation, agencies should think through the important impacts of various alternative options. But to conserve resources, only significant regulations should be subject to more rigorous or formal analysis.
D(4): Analysis of Significant Regulations	Adapted from Federal Executive Order 12,866 § 6(a)(3) (in effect since 1993) and informed by current New York Executive Order 20 § II (in effect since 1995).	For "significant" proposals, the benefits (i.e., regulatory quality, efficiency, and fairness) will outweigh the burdens of more rigorous analysis of anticipated economic impacts, distributional impacts, and alternative options.
D(5): Proportionality of Analysis	Informed by current New York Executive Order 20 § III (in effect since 1995), Federal Executive Order 12,866 § 1 (a) (in effect since 1993) and Federal Circular A-4 (OMB's guidance document since 2003).	Agencies should analyze rules based on the best reasonably available information; but sometimes the costs of developing additional information—including any harm from delay in protecting the public or correcting the market failure—would exceed the value of that information.
D(6): Regulatory Review	Adapted from Federal Executive Order 12,866 § 6(b) (in effect since 1993) and informed by current New York Executive Order 20 §§ III-IV (in effect since 1995).	Regulatory review should be consistent, timely, and transparent, and should help coordinate between agencies.
D(7)-(8): Agency Inaction	Informed by the federal practice of prompt letters and the practices of several states on the review of agendas, petitions, and un-exercised statutory authority (e.g., Michigan).	Regulatory review should target agency inaction in areas where beneficial regulation is missing.

SECTION & CONCEPT	SOURCE MATERIAL	POLICY JUSTIFICATION
E(1): Office of Government Effectiveness Powers and Responsibilities	Adapted from current New York Executive Order 20 § II (in effect since 1995) and informed by New York Executive Order 25 (issued 2009).	Regulatory review encompasses the analysis and review of existing regulations and the coordination of inter-agency efforts to make the regulatory regime and paperwork requirements simple and efficient.
E(2)-(3): Analytical Training and Resources	Informed by the practices of several states on analytical training (e.g., Arizona).	Agencies require sufficient resources, training, and guidance to conduct regulatory analysis in a meaningful way.
F: Appeal of Review Decisions	Adapted from current New York Executive Order 20 § V (in effect since 1995).	Agencies should be able to appeal regulatory review determinations; the final decisionmaking authority should rest with the Governor's office.
G: Legal Construction	Adapted from current New York Executive Order 20 § VII (in effect since 1995) and Federal Executive Order 12,866 § 10 (in effect since 1993).	To ensure regulatory review is conducted honestly and transparently, no determinations made under the Order should create any judicially enforceable rights or otherwise influence judicial proceedings.
H: Rescissions of Previous Orders	Adapted from current New York Executive Order 20 § VIII (in effect since 1993).	This Order will take the place of New York Executive Order 20 (in effect since 1993) and Executive Order 25 (issued 2009).

Appendix B—MSAPA Text and Comparisons

This appendix includes the relevant text of the various versions and drafts of the Model State Administrative Procedure Act. Each subsequent draft is compared to the earlier version, with changes noted in red.

Relevant Text of the 1981 MSAPA

§ 3-105. [Regulatory Analysis].

- (a) An agency shall issue a regulatory analysis of a proposed rule if, within [20] days after the published notice of proposed rule adoption, a written request for the analysis is filed in the office of the [secretary of state] by [the administrative rules review committee, the governor, a political subdivision, an agency, or [300] persons signing the request]. The [secretary of state] shall immediately forward to the agency a certified copy of the filed request.
- (b) Except to the extent that the written request expressly waives one or more of the following, the regulatory analysis must contain:
 - (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
 - (2) a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons;
 - (3) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
 - (4) a comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction;
 - (5) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule; and
 - (6) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.
- (c) Each regulatory analysis must include quantification of the data to the extent practicable and must take account of both short-term and long-term consequences.
- (d) A concise summary of the regulatory analysis must be published in the [administrative bulletin] at least [10] days before the earliest of:
 - (1) the end of the period during which persons may make written submissions on the proposed rule;
 - (2) the end of the period during which an oral proceeding may be requested; or
 - (3) the date of any required oral proceeding on the proposed rule.
- (e) The published summary of the regulatory analysis must also indicate where persons may obtain copies of the full text of the regulatory analysis and where, when, and how persons may present their views on the proposed rule and demand an oral proceeding thereon if one is not already provided.
- (f) If the agency has made a good faith effort to comply with the requirements of subsections (a) through (c), the rule may not be invalidated on the ground that the contents of the

regulatory analysis are insufficient or inaccurate.

Comment: The preparation of such a regulatory analysis is clearly very burdensome. It is also hazardous because of the large potential for disagreement about the accuracy of its contents. Furthermore, the right to require the issuance of such a regulatory analysis in particular instances of rule making could be subject to great abuse. In light of this, states may want to require its issuance *only* upon demand by directly elected officials with general responsibility for state government. The governor and/or a legislative committee specifically charged with administration agency oversight are the most obvious examples of politically responsible state officials of this type. In subsection (a) the directly politically responsible state officials entitled to make the requirement operative in a given case of rule making are bracketed so that each state may determine independently how it wants to solve that problem. Some states may also wish to permit members of the public and/or other agencies or political subdivisions to invoke this requirement even though there is a danger that such a power in the hands of those persons might be abused. For these states, other bracketed alternatives are included. In states desiring to permit members of the public to invoke this requirement, consideration might also be given to authorizing a waiver of the requirement in particular cases by the administrative rules review committee or the governor once it has been invoked by members of the public. A waiver device of this kind might act as effective check on invocation of the regulatory analysis requirement by members of the public seeking only to delay issuance of a clearly justifiable rule or to harass the issuing agency.¹

§ 3-201. [Review by Agency].

At least [annually], each agency shall review all of its rules to determine whether any new rule should be adopted. In conducting that review, each agency shall prepare a written report summarizing its findings, its supporting reasons, and any proposed course of action. For each rule, the [annual] report must include, at least once every [7] years, a concise statement of:

- (1) the rule's effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached;
- (2) criticisms of the rule received during the previous [7] years, including a summary of any petitions for waiver of the rule tendered to the agency or granted by it; and
- (3) alternative solutions to the criticisms and the reasons they were rejected or the changes made in the rule in response to those criticisms and the reasons for the changes. A copy of the [annual] report must be sent to the [administrative rules review committee and the administrative rules counsel] and be available for public inspection.

[§ 3-202. [Review by Governor; Administrative Rules Counsel].

- (a) To the extent the agency itself would have authority, the governor may rescind or suspend all or a severable portion of a rule of an agency. In exercising this authority, the governor shall act by an executive order that is subject to the provisions of this Act applicable to the adoption and effectiveness of a rule.
- (b) The governor may summarily terminate any pending rule-making proceeding by an executive order to that effect, stating therein the reasons for the action. The executive order must be filed in the office of the [secretary of state], which shall promptly forward a certified copy to the agency and the [administrative rules editor]. An executive order terminating a rule-making proceeding becomes effective on [the date it is filed] and must be published in the next issue of the [administrative bulletin].

- (c) There is created, within the office of the governor, an [administrative rules counsel] to advise the governor in the execution of the authority vested under this Article. The governor shall appoint the [administrative rules counsel] who shall serve at the pleasure of the governor.]

[§ 3-203. [Administrative Rules Review Committee].

There is created the [“administrative rules review committee”] of the [legislature]. The committee must be [bipartisan] and composed of [3] senators appointed by the [president of the senate] and [3] representatives appointed by the [speaker of the house]. Committee members must be appointed within [30] days after the convening of a regular legislative session. The term of office is [2] years while a member of the [legislature] and begins on the date of appointment to the committee. While a member of the [legislature], a member of the committee whose term has expired shall serve until a successor is appointed. A vacancy on the committee may be filled at any time by the original appointing authority for the remainder of the term. The committee shall choose a chairman from its membership for a [2]-year term and may employ staff it considers advisable.]

§ 3-204. [Review by Administrative Rules Review Committee].

- (a) The [administrative rules review committee] shall selectively review possible, proposed, or adopted rules and prescribe appropriate committee procedures for that purpose. The committee may receive and investigate complaints from members of the public with respect to possible, proposed, or adopted rules and hold public proceedings on those complaints.
- (b) Committee meetings must be open to the public. Subject to procedures established by the committee, persons may present oral argument, data, or views at those meetings. The committee may require a representative of an agency whose possible, proposed, or adopted rule is under examination to attend a committee meeting and answer relevant questions. The committee may also communicate to the agency its comments on any possible, proposed, or adopted rule and require the agency to respond to them in writing. Unless impracticable, in advance of each committee meeting notice of the time and place of the meeting and the specific subject matter to be considered must be published in the [administrative bulletin].
- (c) The committee may recommend enactment of a statute to improve the operation of an agency. The committee may also recommend that a particular rule be superseded in whole or in part by statute. The [speaker of the house and the president of the senate] shall refer those recommendations to the appropriate standing committees. This subsection does not preclude any committee of the legislature from reviewing a rule on its own motion or recommending that it be superseded in whole or in part by statute.
- [(d)(1) If the committee objects to all or some portion of a rule because the committee considers it to be beyond the procedural or substantive authority delegated to the adopting agency, the committee may file that objection in the office of the [secretary of state]. The filed objection must contain a concise statement of the committee’s reasons for its action.]
- (2) The [secretary of state] shall affix to each objection a certification of the date and time of its filing and as soon thereafter as practicable shall transmit a certified copy thereof to the agency issuing the rule in question, the [administrative rules editor,

- and the administrative rules counsel]. The [secretary of state] shall also maintain a permanent register open to public inspection of all objections by the committee.
- (3) The [administrative rules editor] shall publish and index an objection filed pursuant to this subsection in the next issue of the [administrative bulletin] and indicate its existence adjacent to the rule in question when that rule is published in the [administrative code]. In case of a filed objection by the committee to a rule that is subject to the requirements of Section 2- 101(g), the agency shall indicate the existence of that objection adjacent to the rule in the official compilation referred to in that subsection.
 - (4) Within [14] days after the filing of an objection by the committee to a rule, the issuing agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.
 - [(5) After the filing of an objection by the committee that is not subsequently withdrawn, the burden is upon the agency in any proceeding for judicial review or for enforcement of the rule to establish that the whole or portion of the rule objected to is within the procedural and substantive authority delegated to the agency.]
 - (6) The failure of the [administrative rules review committee] to object to a rule is not an implied legislative authorization of its procedural or substantive validity.]
 - (e) The committee may recommend to an agency that it adopt a rule. [The committee may also require an agency to publish notice of the committee's recommendation as a proposed rule of the agency and to allow public participation thereon, according to the provisions of Sections 3-103 through 3-104. An agency is not required to adopt the proposed rule.]
 - (f) The committee shall file an annual report with the [presiding officer] of each house and the governor.

April 2007 Draft Language

SECTION 305. REGULATORY ANALYSIS. (Major, relevant changes compared to 1981 version)

- (a) An agency shall prepare a regulatory analysis for a rule proposed by the agency having an estimated economic impact of more than [\$]. (Automatic requirement added for rules with certain effects.)
- (b) An agency is not required to prepare a regulatory analysis for a rule proposed by the agency having an estimated economic impact of less than [\$], unless, within [20] days after the notice of the proposed adoption of the rule is published, a written request for the analysis is filed in the office of the [publisher] by [the Governor], [a political subdivision], [an agency], [or] [a member of the Legislature]. The [publisher] shall immediately forward a certified copy of a request for regulatory analysis to the agency proposing the rule. The agency shall then prepare a regulatory analysis of the proposed rule. (Political official may still request analysis of any rule; public request for analysis no longer recommended.)
- (c) A regulatory analysis must contain: (Portions of analysis no longer waivable by request.)
 - (1) a description of any persons or classes of persons that would be affected by the rule and the costs and benefits to that class of persons; (Standard for distributional analysis changed from "probably will be affected" to "would be affected.")
 - (2) an estimate of the probable impact, economic or otherwise, of the rule upon affected classes; (Language on "quantitative or qualitative impact" deleted.)

- (3) a comparison of the probable costs and benefits of the rule to the probable costs and benefits of inaction; and (Separate section on government costs and revenues deleted.)
- (4) a determination of whether there are less costly or less intrusive methods for achieving the purpose of the rule. (Separate section requiring description of seriously considered alternatives deleted.)

(Requirement to quantify data “to the extent practicable” deleted.)

- (d) An agency preparing a regulatory analysis under this section shall also prepare a concise summary of the regulatory analysis.
- (e) An agency preparing a regulatory analysis under this section shall file the analysis with the [publisher] in the manner provided in Section 315 [and submit it to the [regulatory review agency] [department of finance and revenue] [other]]. (Submission to regulatory reviewers added.)
- (f) A concise summary of a regulatory analysis required under this section must be published in the [administrative bulletin] at least [20] days before the earliest of:
 - (1) the end of the period during which persons may make written submissions on the rule proposed to be adopted;
 - (2) the end of the period during which an oral proceeding may be requested; or
 - (3) the date of any required oral proceeding on the rule proposed to be adopted.
 (Good faith exception for judicial review deleted.)

Comment: Regulatory analyses are widely used as part of the rulemaking process in the states. The subsection also provides for submission to the rules review entity in the state, if the state has one.

[ARTICLE 7] RULE REVIEW (Entire article made optional.)

NOTE: A state may choose one, two or all of the alternative forms of rule review in this article. (Regular, ongoing review of rules by agencies deleted.)

[SECTION 701. GOVERNOR’S VETO. (Similar to 1981 version’s provision allowing the governor to terminate a pending rulemaking, though this draft more formally gives the agency a chance to respond.)

- (a) Upon receiving notice from the agency under Section 304(c), the Governor shall review a rule proposed to be adopted by an agency. The Governor shall inform the agency of his or her intention to veto the proposed rule within [] days after receiving notice, and shall concisely state the grounds for the veto. If the agency does not remedy the Governor’s grounds for veto by changes to the rule and give notice to the Governor of the remedial action taken within [] days after receiving notice from the Governor, the Governor by executive order may veto the rule.
- (b) Upon issuance of the executive veto order, the Governor shall transmit copies to the agency [Rules Review Committee] [Attorney General] [Speaker of the House of Representatives and President of the Senate] and the [publisher], which shall publish the veto in the [administrative bulletin].
- (c) A rule vetoed by the Governor is void and may not be published in the [administrative bulletin].

(Governor’s power to rescind or suspend any existing rule deleted.)

(Creation of governor’s advisory counsel on administrative rules deleted.)

[SECTION 702. GOVERNOR’S OBJECTION. (Gives states another option for executive review procedures, by adapting the 1981 version’s legislative review powers, wherein a formal

objection shifts the burdens of proof during any subsequent litigation.)

- (a) Upon receiving notice from the agency under Section 304(c), the Governor shall review a rule proposed to be adopted by an agency. The Governor shall inform the agency of his or her intention to object to the proposed rule within [] days after receiving notice, and shall concisely state the grounds for the objection. If the agency does not remedy the Governor's grounds for objection by changes to the rule and give notice to the Governor of the remedial action taken within [] days after receiving notice of objection from the Governor, the Governor by executive order may object to the rule.
- (b) Upon issuance of the executive order of objection, the Governor shall transmit copies to the agency [Rules Review Committee] [Attorney General] [Speaker of the House of Representatives and President of the Senate] and the [publisher], which shall publish the objection in the [administrative bulletin] together with the rule to which it pertains.
- (c) If the Governor publishes objection to a rule or any part of a rule under this section, then the agency bears the burden of proving, in any action challenging the legality of the rule or portion of a rule objected to by the Governor, that the rule or portion of the rule objected to was not unreasonable, arbitrary, capricious, not adopted in compliance with Article [3], or otherwise beyond the authority delegated to the agency.]

Comment: An agency may adopt Section 701 or 702, which provide for two different types of gubernatorial checks on agency rulemaking. Section 701 creates a pure gubernatorial veto that invalidates a rule in the same fashion as a gubernatorial veto invalidates bills enacted by the legislature. Section 702 creates a gubernatorial "objection" to a rule, which shifts the burden of proof to the agency to demonstrate that the rule meets the procedural and substantive requirements of Article 3 in subsequent litigation involving the rule. This is a device that is used in several states, and may avoid the problems of unconstitutionality of the pure gubernatorial veto...[T]he supreme courts of several other states, in the course of deciding that legislative vetoes are unconstitutional, have indicated in dicta their belief that executive vetoes are unconstitutional. The gubernatorial veto is an important potential check on agency rulemaking. Several states have adopted the gubernatorial veto in order to exercise a check on agency action by a single elected official. A gubernatorial veto creates a potentially efficient, unitary executive who is politically accountable. That executive check on agency action is likely to reflect the wishes of the electorate. Section 701 creates an executive veto in its purest form. It is drawn from the Hawaii APA...and the Louisiana APA. [Indiana, Nebraska, and Arizona also have variations on the executive veto.]

[SECTION 703. LEGISLATIVE [RULES REVIEW COMMITTEE.]

- (a) There is created a joint standing [Rules Review Committee] of the Legislature designated the [Rules Review Committee].
- (b) The [Rules Review Committee] shall consist of six members, appointed as follows: Three members of the House of Representatives, at least one of whom shall be a member of the minority party appointed by the Speaker of the House; and three members of the Senate, at least one of whom shall be a member of the minority party, appointed by the President of the Senate. The [Rules Review Committee] shall elect a chair and vice chair from among its members.
- (c) Members shall serve for [] year terms or until their successor is appointed. A vacancy shall occur when a member of the [Rules Review Committee] ceases to be a member of the Legislature or when a member resigns from the committee. Vacancies shall be filled

by the appointing authority and the replacement shall fill out the unexpired term.

- (d) The [Rules Review Committee]:
 - (1) Shall maintain continuous oversight over agency rulemaking; and
 - (2) Shall exercise other duties assigned to it under this [article].
- (e) The [Rules Review Committee] may hire staff to carry out the duties and powers assigned to it.
- (f) The [Rules Review Committee] shall have the power to adopt rules necessary for its organization and that of its staff, consistent with general law and the rules of the Legislature.

[SECTION 704. [RULES REVIEW COMMITTEE] DUTIES.

- (a) The [Rules Review Committee] shall examine proposed agency rules and shall review existing rules on an ongoing basis to determine whether: (No longer directly states that review may be “selective[.]” Clarifies authority over existing rules.)
 - (1) The rule is an invalid exercise of delegated legislative authority.
 - (2) The statutory authority for the rule has expired or been repealed.
 - (3) The rule is in proper form.
 - (4) The notice given prior to adoption was adequate.
 - (5) The rule is necessary to accomplish the apparent or expressed intent of the specific statute that the rule implements. (Explicitly gives Committee power to review for legislative intent, not just statutory authority.)
 - (6) The rule is a reasonable implementation of the law as it affects persons particularly affected by the rule. (Explicitly gives Committee power to review for reasonableness of rule’s effects on public.)
 - (7) The rule does not impose cost on the regulated person which could be reduced by the adoption of less costly methods that substantially accomplish the statutory objective. (Explicitly gives Committee power to review costs and alternatives.)
- (b) The [Rules Review Committee] may request from an agency such information as is necessary to carry out the duties of subsection (a). The [Rules Review Committee] shall consult with standing committees of the Legislature with subject matter jurisdiction over the subjects of the rule under examination.]

(No longer gives the Committee the power to affirmatively recommend to agencies the adoption of new rules, or to require agencies to begin public proceedings pursuant to such recommendations.)

[SECTION 705. [RULES REVIEW COMMITTEE] PROCEDURE AND POWERS.

- (a) Within [] days of receiving notice of a proposed rule from an agency under Section 304(c), the [Rules Review Committee] may object to a rule by giving notice of objection in writing to the agency with a concise statement of the reasons for the objection. The [Rules Review Committee] shall also send notice of objection and reasons for the objection to the [Speaker of the House of Representatives and President of the Senate] [Governor] [Attorney General][standing committees of the legislature with subject matter jurisdiction] and publisher.
- (b) In case of receipt of notice of objection from the [Rules Review Committee], an agency within [] days in writing shall notify the [Rules Review Committee] and publisher that the agency:
 - (1) withdraws the rule;
 - (2) amends the rule; or

- (3) refuses to amend or withdraw the rule.
- (c) If the agency withdraws the rule, it shall give notice of withdrawal to the publisher for publication in the [administrative bulletin] and shall notify the [Rules Review Committee] of withdrawal in writing at the same time. The rule shall be withdrawn without public hearing. Withdrawal is effective on the date of publication of the notice of withdrawal in the [administrative bulletin].
- (d) If the agency amends the rule to comply with the [Rules Review Committee] objections, it shall make only the changes necessary to meet the objections, and shall resubmit the rule, as amended, to the [Rules Review Committee]. The agency shall also give notice to the publisher for publication in the [administrative bulletin] of the change made to comply with the [Rules Review Committee] objection that shall include the text of the rule as changed and the objection to which it is directed. The agency is not required to hold a public hearing on an amendment made under this subsection.
- (e) If the agency refuses to withdraw or amend the rule in response to the objection of the [Rules Review Committee], the agency shall give notice of the refusal to the [Rules Review Committee] and the publisher within [] days of receiving the [Rules Review Committee] objection. If the agency fails to respond to the objection within [] days, or if an amendment that an agency makes in response to [Rules Review Committee] objections in the opinion of the [Rules Review Committee] does not correct the objection, the [Rules Review Committee]:
- (1) may post notice of the detailed objections of the [Rules Review Committee] to the rule in the [administrative bulletin] together with a reference to the location in the [administrative bulletin] where the full text of the rule can be found. Posting notice of the detailed objections shall place upon the agency the burden of proving, in any later action challenging the legality of the rule or portion of the rule objected to by the [Rules Review Committee], that the rule or portion of the rule objected to was not unreasonable, arbitrary, capricious, not adopted in compliance with [Article] 3, or otherwise beyond the authority delegated to the agency; and
 - (2) may submit a recommendation to the Speaker of the House of Representatives and the President of the Senate that legislation be enacted to annul or modify the rule together with proposed legislation to accomplish it.
 - (3) Within [] days of recommending annulling or modifying legislation under this subsection the [Rules Review Committee] shall notify the agency of the recommendation and request that the agency temporarily suspend the operation of the rule.
- (f) Within [] days of receiving request for temporary suspension, the agency shall reply in writing to the [Rules Review Committee] either agreeing to temporarily suspend the rule or refusing to do so.
- (1) If the agency agrees to temporarily suspend the rule, then it shall cause notice of the suspension to be published in the [administrative bulletin].
 - (2) If the agency refuses to temporarily suspend the rule, then the [Rules Review Committee] shall cause notice of the refusal to suspend operation of the rule in the [administrative bulletin]. Posting notice under this subparagraph shall suspend the operation of the rule for [[] days] [until the end of the next regular session of the Legislature]. (Gives Committee power, under certain circumstances, to temporarily suspend a rule, not just ability to recommend a suspension to the legislature.)

Comment: This is a type of veto that provides for cooperation between the Legislature and the Governor, and attempts to avoid the *Chadha v. I.N.S.* problem of unconstitutionality by delaying the effective date of the rule until the legislature has the opportunity to enact legislation to annul or modify it. The governor may veto the act by which the legislature seeks to annul or modify the rule. This type of veto provision is widely used in the states.

[SECTION 706. ATTORNEY GENERAL REVIEW. (Adds review by Attorney General for legality and procedure.)

- (a) Upon receiving notice from the agency under Section 304(c), the Attorney General shall review a rule proposed to be adopted by an agency.
- (b) The Attorney General may not approve any rule as to legality when the rule exceeds the statutory authority of the agency, or when the procedural requirements for adoption of the rule in this [act] are not substantially met.
- (c) The Attorney General shall advise an agency of any revision or rewording of a rule necessary to correct objections as to legality.]

July 2010 Update, Approved by NCCUSL

Section 305. (Comparison to April 2007 draft)

- (a) An agency shall prepare a regulatory analysis for a proposed rule that has an estimated economic impact of more than [\$]. The analysis must be completed before the notice of proposed rulemaking is published. The summary of the analysis prepared under subsection (d) must be published with the notice of proposed rulemaking. (Changes timing of publication of analysis.)
- (b) If a proposed rule has an economic impact of less than [\$], the agency shall prepare a statement of minimal estimated economic impact. (Removes ability of political officials to request a full analysis of minor rules.)
- (c) A regulatory analysis must contain:
(The requirement to describe classes of people affected and to estimate impacts has been deleted.)
 - (1) an analysis of the benefits and costs of a reasonable range of regulatory alternatives reflecting the scope of discretion provided by the statute authorizing the rule; and (Explicitly requires analysis of alternatives.)
 - (2) a determination whether:
 - (A) the benefits of the proposed rule justify the costs of the proposed rule; and (Explicitly requires determination of whether benefits justify costs, not just a “comparison” of benefits and costs.)
 - (B) the proposed rule will achieve the objectives of the authorizing statute in a more cost effective manner, or with greater net benefits, than other regulatory alternatives. (Changes emphasis of the analysis of alternatives from minimizing costs to maximizing net benefits.)

(Note: a draft from November 2008 had included a requirement to cite and summarize every scientific and statistical study, report, or analysis that served as the basis for a rule, a requirement adapted from New York law and federal practice.)
- (d) An agency preparing a regulatory analysis under this section shall prepare a concise summary of the analysis.
- (e) An agency preparing a regulatory analysis under this section shall submit the analysis to the [appropriate state agency]. *Legislative Note: State laws vary as to which state agency or*

body that an agency preparing the regulatory analysis should submit that analysis to. In some states, it is the department of finance or revenue, in others it is a regulatory review agency, or regulatory review committee. The appropriate state agency in each state should be inserted into the brackets.

- (f) If the agency has made a good faith effort to comply with this section, a rule is not invalid solely because the contents of the regulatory analysis of the rule are insufficient or inaccurate. (Reinserts good faith exception for judicial review.)

Comment: Regulatory analyses are widely used as part of the rulemaking process in the states....States should set the dollar amount of estimated economic impact for triggering the regulatory analysis requirement of this section at a dollar amount as they deem appropriate or by other approach make the choice to prepare regulatory analyses carefully so that the number of regulatory analyses prepared by any agency are proportionate to the resources that are available. (Recommends a high threshold to trigger analysis, consistent with resources.) The subsection also provides for submission to the rules review entity in the state, if the state has one. States that already have regulatory analysis laws can utilize the provisions of Section 305 to the extent that this section is not inconsistent with existing law other than this act. Agencies may rely upon agency staff expertise and information provided by interested stakeholders and participants in the rulemaking process. Agencies are not required by this act to hire and pay for private consultants to complete regulatory impact analysis. The concise summary of the regulatory analysis required by subsection (d) means a short statement that contains the major conclusions reached in the regulatory analysis. Subsection (f) is based on 1981 MSAPA Section 3-105(f).

[ARTICLE 7] RULE REVIEW

(Deletes options for separate executive review by governor.)

SECTION 701. [LEGISLATIVE RULES REVIEW COMMITTEE]. There is created a standing committee of the Legislature designated the [rules review committee]. *Legislative Note: States that have existing rules review committees can incorporate the provisions of Sections 701, and 702, using the existing number of members of their current rules review committee. Because state practice varies as to how these committees are structured, and how many members of the legislative body serve on this committee, as well as how they are selected, the act does not specify the details of the legislative review committee selection process. Details of the committee staff and adoption of rules to govern the rules review committee staff and organization are governed by law other than this act including the existing law in each state.*

SECTION 702. REVIEW BY [RULES REVIEW COMMITTEE].

- (a) An agency shall file a copy of an adopted rule with the [rules review committee] at the same time it is filed with [the [publisher]]. An agency is not required to file an emergency rule adopted under Section 309(a) with the [rules review committee].
- (b) The [rules review committee] may examine rules in effect and newly adopted rules to determine whether the:
- (1) rule is a valid exercise of delegated legislative authority;
 - (2) statutory authority for the rule has expired or been repealed; (Deletes separate power to review the rule's form.)
 - (3) rule is necessary to accomplish the apparent or expressed intent of the specific statute that the rule implements;

- (4) rule is a reasonable implementation of the law as it applies to any affected class of persons; and
 - (5) agency complied with the regulatory analysis requirements of Section 305 and the analysis properly reflects the effect of the rule. (Rather than just reviewing costs and alternatives, Committee may now review entire regulatory impact analysis.)
- (c) The [rules review committee] may request from an agency information necessary to exercise its powers under subsection (b). The [rules review committee] shall consult with standing committees of the Legislature with subject matter jurisdiction over the subjects of the rule under examination.
- (d) The [rules review committee]:
- (1) shall maintain oversight over agency rulemaking; and
 - (2) shall exercise other duties assigned to it under this [article].

Comment: This section adopts a rules review committee process that is widely followed in state administrative law as a method for legislative review of agency rules... Subsection (b) allows the legislative rules review committee to review currently effective rules and newly adopted rules. The rules review committee may establish priorities for rules review including review of newly adopted or amended rules, and may manage the rules review process consistent with committee staff and budgetary resources. If the content of the rule changes because of legislative amendments, the agency will be required to file the amended rule with the publisher, and the amended rule will replace the original rule that was filed with the publisher. The rules review process applies to rules adopted following the requirements of Sections 304 to 307. This process does not apply to emergency rules adopted under Section 309(a) nor to direct final rules adopted under Section 310....

SECTION 703. [RULES REVIEW COMMITTEE] PROCEDURE AND POWERS.

- (a) Not later than [30] days after receiving a copy of an adopted rule from an agency under Section 702, the [rules review committee] may:
- (1) approve the adopted rule;
 - (2) disapprove the rule and propose an amendment to the adopted rule; or
 - (3) disapprove the adopted rule. (More explicitly gives Committee power to approve, disapprove, or propose amendments, rather than just object.)
- (b) If the [rules review committee] approves an adopted rule or does not disapprove and propose an amendment under subsection (a)(2) or disapprove under subsection (a)(3), the adopted rule becomes effective on the date specified for the rule in Section 317.
- (c) If the [rules review committee] proposes an amendment to the adopted rule under subsection (a)(2), the agency may make the amendment and resubmit the rule, as amended, to the [rules review committee]. The amended rule must be one that the agency could have adopted on the basis of the record in the rulemaking proceeding and the legal authority granted to the agency. The agency shall provide an explanation for the amended rule as provided in Section 313. An agency is not required to hold a hearing on an amendment made under this subsection. If the agency makes the amendment, it shall also give notice to the [publisher] for publication of the rule, as amended, in the [administrative bulletin]. The notice must include the text of the rule as amended. If the [rules review committee] does not disapprove the rule, as amended, or propose a further amendment, the rule becomes effective on the date specified for the rule under Section 317.

- (d) If the [rules review committee] disapproves the adoption of a rule under subsection (a)(3), the adopted rule becomes effective on adjournment of the next regular session of the [Legislature] unless before the adjournment the [Legislature] [adopts a [joint] [concurrent] resolution] [enacts a bill] sustaining the action of the committee. *Legislative Note: State constitutions vary as to whether or not a joint resolution is a valid way of disapproving an agency rule. In some states, the legislature must use the bill process with approval by the governor. In other states the joint resolution process is proper. States should use the alternative that complies with their state constitution.... (Replaces the Committee's objection-burden shifting powers with powers to temporarily suspend the rule and recommend legislative action.)*
- (e) An agency may withdraw the adoption of a rule by giving notice of the withdrawal to the [rules review committee] and to the [publisher] for publication in the [administrative bulletin]. A withdrawal under this subsection terminates the rulemaking proceeding with respect to the adoption, but does not prevent the agency from initiating a new rulemaking proceeding for the same or substantially similar adoption.

Comment: This is a type of veto that provides for cooperation between the Legislature and the Governor, and attempts to avoid the *I.N.S. v. Chadha* (1983) 462 U.S. 919, 103 S.Ct. 2764, problem of unconstitutionality by delaying the effective date of the rule until the legislature has the opportunity to enact legislation to annul or modify it. The governor may veto the act by which the legislature seeks to annul or modify the rule. This type of veto provision is widely used in the states...For disapproval of a rule to be effective, the legislature as a whole must adopt a joint resolution, and in many states the governor must be presented with the joint resolution for approval or disapproval. While the rules review committee can recommend disapproval, the committee recommendation must be approved by the legislature by joint resolution. In some states, the legislature must comply with the legislative process for enacting a bill including presentation to the governor to exercise the power of legislative veto over an agency regulation. In at least one state use of a joint resolution without the governor's participation violates the state constitution. *State v. A.L.I.V.E. Voluntary* (Alaska, 1980) 606 P.2d 769. The rules review committee has the power to temporarily suspend an agency rule pending enactment of a permanent suspension by action of both houses of the state legislature, and presentation to the governor. *Martinez v. Department of Industry, Labor, & Human Relations* (Wisconsin, 1992) 165 W.2d 687, 478 N.W.2d 582 (temporary suspension statute held not to violate state constitution separation of powers doctrine). (Deletes provisions on Attorney General review.)

¹ Language of comment stitched together from excerpts in Arthur Earl Bonfield, *Rule Making under the 1981 Model State Administrative Procedure Act: An Opportunity Well Used*, 35 ADMIN. L. REV. 77, 83-84 (1983).

Appendix C: Survey Information

List of Completed State Surveys and Interviews

To protect the wishes of survey respondents who wanted to remain anonymous, as well as to respect those agencies and non-governmental organizations that could not complete a survey due to resource limitations, the following list is not comprehensive, and it does not include the names of the dozens of agencies, reviewers, and non-governmental organizations that were sent surveys but chose not to participate.

Alabama	Legislative Reference Service
Alaska	Department of Law; Legislature's Administrative Regulation Review Committee
Arizona	Multiple surveys from the Governor's Regulatory Review Council; Department of Agriculture; Department of Health Services
Arkansas	Bureau of Legislative Research, Administrative Rules Review Section
California	Multiple surveys from the Office of Administrative Law; California Environmental Protection Agency; Department of Housing and Community Development; Department of Insurance; Department of Public Health; Department of Transportation
Colorado	Office of Legislative Legal Services; Office of Policy, Research, and Regulatory Reform
Connecticut	Legislature's Regulation Review Committee
Delaware	State Registrar of Regulations
District of Columbia	Department of Consumer and Regulatory Affairs
Florida	Multiple surveys from the Joint Administrative Procedures Committee; Agency for Health Care Administration; Agriculture and Consumer Services Department; Fish and Wildlife Conservative Commission; Education Department; Florida Medical Association
Georgia	Office of Legislative Counsel
Hawaii	Small Business Review Board; Department of Budget and Finance
Idaho	Administrative Rules Coordinator
Illinois	Joint Committee on Administrative Rules
Indiana	Office of Management and Budget; Department of Homeland Security; Department of Health; Economic Development Corporation
Iowa	Office of the Governor; Legislative Services Agency
Kansas	Attorney General; Joint Committee on Administrative Rules and Regulations
Kentucky	Administrative Regulation Review Subcommittee
Louisiana	Legislative Fiscal Office
Maine	Legislative Office of Policy and Legal Analysis; Secretary of State
Maryland	Joint Committee on Administrative, Executive, and Legislative Review
Massachusetts	Executive Office for Administration and Finance; Attorney General
Michigan	Joint Committee on Administrative Rules; State Office of Administrative Hearings and Rules; Department of Education; Department of Human Services; Department of Natural Resources and Environment

Minnesota	Legislature's Office of Revisor of Statutes
Mississippi	Secretary of State
Missouri	Secretary of State; multiple surveys from the Joint Committee on Administrative Rules
Montana	Administrative Rules and Notary Services
Nebraska	Secretary of State
Nevada	Legislative Counsel Bureau
New Hampshire	Office of Legislative Services, Administrative Rules Division
New Jersey	Office of Administrative Law
New Mexico	Commission of Public Records, Administrative Law Division
New York	Governor's Office of Regulatory Reform; Department of Health; Department of Labor; Department of Transportation; Office of Parks, Recreation, and Historical Preservation; Energy Consumers Council; New York Insurance Association
North Carolina	Office of State Budget and Management; Office of Administrative Hearings Rule Review Commission
North Dakota	Legislative Counsel
Ohio	Joint Committee on Agency Rule Review
Oklahoma	Legislative Staff
Oregon	Legislative Counsel
Pennsylvania	Multiple surveys from the Independent Regulatory Review Commission; Department of Agriculture; Department of Health; Department of Public Welfare; Department of Transportation; Public Utility Commission; Sierra Club Pennsylvania Chapter
Puerto Rico	Office of the Ombudsman, Small Business Advocate
Rhode Island	Attorney General; Budget Office; Governor's Regulatory Review Task Force
South Carolina	State Register and Legislative Council; Department of Health and Environment
South Dakota	Legislative Research Council
Tennessee	Secretary of State
Texas	Secretary of State
Utah	Governor's Office of Policy and Budget
Vermont	Secretary of State; Legislative Committee on Administrative Rules; Interagency Committee on Administrative Rules
Virginia	Department of Planning and Budget; Department of Mines, Minerals, and Energy; Department of Environmental Quality; Department of Criminal Justice Services; Department of Agriculture and Consumers Services; Department of Health; Department of Labor and Industry; Department of Conservation and Recreation; AARP Virginia; Virginia AFLCIO; Virginia Chamber of Commerce
Washington	Joint Administrative Rule Review Committee
West Virginia	Legislative Rulemaking Review Committee; Small Business Development Center
Wisconsin	Legislative Counsel
Wyoming	Legislative Services Office



State Name:

Respondent's Name:

Title & Affiliation:

Contact Information:

1. Regulatory Review Obligations

Does your state have a statute or an executive order authorizing or requiring review of regulations prior to their finalization? If so, can you provide a name or citation for the relevant source or detail where a copy might be obtained?

Are there regulations implementing regulatory review statutes/executive orders or providing guidance for a regulatory review process, or otherwise of relevance to regulatory review? If so, where might a copy be obtained?

2. Oversight of Regulatory Review

Is there a specific government body that oversees that regulatory review process (legislative committee, attorney general, executive agency, etc.)? Is information on that body's staffing and budget available, and where might such details be obtained?

If oversight is not conducted by government officials (i.e. a committee of private individuals appointed to a regulatory review commission by the Governor or legislature) how are individuals chosen to serve on regulatory review commissions? Are there minimum qualification requirements, such as representativeness of certain constituent groups (i.e. small businesses, public health organizations, etc.)?

Do good governance restrictions (i.e. limitations on ex parte contacts, restrictions on lobbying, conflict of interest policies) apply to the centralized oversight entity, and where might a copy of related policies be obtained?

If there is not a centralized oversight entity, who reviews proposed regulations (the agencies issuing those rules)? Are there minimum qualifications for reviewers within agencies?

What authority do oversight entities have? Do they ensure that agencies comply with applicable requirements?

Do overseers substantively examine agency analyses for informational omissions, miscalculations and errors, and other problems?



Is the oversight authority able to return regulations to agencies for further review or to veto a regulation? Is the exercise of such authority documented and publically disclosed, and where might such documentation be obtained?

3. Scope of Review

Are all proposed regulations subject to the same level of review? If not, what triggers regulatory review (cost to the agency or to private parties; department issuing the regulation; specific request of the Governor, the legislature, an agency, or the public)?

What types of regulations, if any, are excluded from review?

Are deregulatory actions subject to review?

Are voluntary agency programs, guidance documents, or other non-binding agency actions subject to review?

Are all regulations for which review is available or mandatory actually reviewed? If not, how are regulations prioritized for review?

What are the differences in the types of review (i.e. for guidance documents versus regulations)?

Are there deadlines or mandatory timelines for various phases of the review process? If not, how does the reviewing entity decide how much time and resources to spend on each regulation?

4. Reviews for Legality

Are regulations reviewed to ensure that they contain non-ambiguous language?

Are regulations reviewed for conflicts with existing laws or rules, at either the state or national level? Are regulations reviewed for redundancies with existing laws or rules, at either the state or national level?

Does review consider compliance with procedural requirements?

Does review consider observance of statutory authority or legislative intent?



5. Regulatory Impact Analyses (RIA)

Is preparation of a regulatory impact analysis (or other formal analysis, such as fiscal analysis) required for some or all proposed regulations?

Who prepares regulatory impact analyses?

Beyond the statutes or rules mandating review mentioned above, are there guidelines, rules, or standard forms that guide regulatory evaluation/analysis? If so, who establishes those guidelines, rules, or forms, and how might copies of relevant documentation be obtained?

Is consideration of regulatory or non-regulatory alternatives required in a regulatory impact analysis? Are there guidelines, rules, or standard forms on how to identify alternative regulatory and non-regulatory options? If alternatives must be considered, are baselines specified (i.e. full compliance with status quo regulations v. “current practice” or actual compliance)?

Are deregulatory proposals subject to the same regulatory impact analysis as newly proposed regulations?

Must non-economic (qualitative) costs and benefits be included in a regulatory impact analysis? If so, is their use in regulatory review governed or restricted by guidelines or law?

Are approaches to regulatory impact analysis, and particularly economic analysis, consistent among agencies? For example, might agencies assign different values to the same risks or benefits?

6. Economic Analysis

Does the RIA require the use of formal tools such as risk-assessment, cost-benefit analysis, or cost-effectiveness analysis? If so, please specify which analytical tools are required or commonly used.

Are the calculations of costs and benefits limited to impacts on state government, or do they cover costs and benefits to private industry and the public at large? Are they limited to impacts within state borders, or do they cover effects on other states or on other nations?

Are indirect or ancillary costs of a regulation factored into the cost-benefit analysis? Are indirect or ancillary benefits considered?

How do regulators estimate costs to industry? Is the capacity of industry to innovate or adapt when faced with a regulatory mandate taken into consideration? How so?



For regulations that save lives, how is the value of mortality risk reduction or the “value of a statistical life” (VSL) calculated?

For regulations that harm or benefit the environment, are “existence values” covered? If so, how are they calculated, and are procedures consistent across state agencies?

Do regulators apply a discount rate to future costs and future benefits? If so, what discount rate is used? Is the same discount rate used for intragenerational and intergenerational benefits?

7. Distributional Impacts

Does the reviewing entity consider the distributional impacts of a proposed rule (varying impacts across different communities or populations within the state, such as minorities, small businesses, or local governments)?

If distributional impacts are considered, how so, and what weight are they given?

8. Public Information

Is the final regulatory analysis available as a written document?

Are there opportunities for the public to review and comment on regulatory impact analyses before a regulation is finalized? If public comment is ensured because of a statute, regulation, or some other authority, where might those materials be obtained?

Is the underlying data for regulatory impact analysis available to the public? If so, how is underlying data made available to the public? Is there a state register that contains this information? Is it available on a central web site? Must it be requested from a state agency?

Are regulatory oversight authorities covered under freedom of information or similar laws? If so, where might a copy of transparency requirements be obtained?

Are meetings of oversight authorities and members of those authorities documented, and if so, is related documentation publicly available?

9. Ex Post Review

Is there ex post review of existing regulations? If so, how often are such reviews conducted and how are

rules selected for review?

Who conducts ex post review of existing regulations and for what purpose?

Is there a state-level statutory sunset clause covering all or some state regulations? If so, where might a copy be obtained? If so, which regulations are covered? If not, are sunset clauses frequently found in individual state statutes?

10. Additional Comments



State name: Virginia

Respondent's name, title, affiliation, and contact information:

Preparation of Economic Analyses

Who on your staff is responsible for analyzing the economic impact of proposed regulations and responding to economic impact analyses prepared by the Department of Planning and Budget?

How many economists do you have on staff? Does your agency ever consult with outside economists in analyzing the economic impact of a proposed regulation or responding to the economic impact analyses prepared by DPB? Are economists always, sometimes, or never involved in these tasks?

Do you have any internal requirements or guidelines for economic analysis, beyond those general requirements applicable to all state agencies?

Have you ever consulted the federal EPA's economic analysis guidelines or the federal Office of Management and Budget's guidelines in conducting your own economic analysis?

Does your agency prepare economic impact analyses for all proposed new regulations and all proposed deregulations? If not, which regulations are exempt, and what triggers the preparation of an analysis?

Interactions with the Department of Planning and Budget

How often does your agency communicate with DPB before or outside of the official review process? Always, sometimes, or never? Why or why not? Would you characterize the communications as giving notification, as seeking approval, or as collaborative?

Are all your proposed regulations subject to the same level of regulatory review? If not, which types or regulations are excluded from review, and what triggers regulatory review?

What powers—formal or informal—does DPB have to modify your regulatory proposals?

For regulations subject to a review process, how often does DPB return comments to you? Always, usually, sometimes, seldom, or never? What is your agency's responsibility in responding to those comments?

For regulations subject to a review process, how often have you changed a proposal based on feedback from DPB? Always, usually, sometimes, seldom, or never? On what grounds does DPB most frequently

recommend a change?

What are your impressions of the Virginia Regulatory Town Hall website <http://www.townhall.state.va.us>? Has your agency received significant public feedback about proposed regulations via the website? Have such public comments led to changes in the proposed regulation?

Contents of Economic Analyses

Do any statutes limit your ability to consider costs or benefits when proposing new regulations? Do any statutes otherwise limit your ability to participate in the standard regulatory review process in your state? Please list the relevant statutes and briefly explain the limitation.

In analyzing the economic impact of a proposed regulation or responding to the DPB's economic impact analyses, how does your agency:

- *determine which and how many regulatory or non-regulatory alternatives to consider?*
- *incorporate and weigh non-economic or qualitative costs and benefits?*
- *determine which and how many indirect or "ancillary" costs and benefits to consider?*

How does your agency typically estimate the compliance cost for a regulation? In consultation with industry, in consultation with academic experts, by examining existing peer-reviewed studies, by commissioning or conducting an independent study, or by another method? How does your agency consider the capacity of industry to innovate or adapt when faced with a regulatory mandate?

When calculating costs and benefits, which of the following regulatory impacts does your agency typically consider:

- *impacts on state and local government,*
- *impacts on Virginia's private industry or economy,*
- *impacts on Virginia's citizens,*
- *impacts on Virginia's natural resources,*
- *impacts on other states,*
- *impacts on other nations.*

For regulations that save lives, how is the value of mortality risk reduction or the "value of a statistical life" (VSL) calculated?

For regulations with human health costs or benefits, does your agency ever consider impacts in terms of "life-years" or "quality-adjusted life-years"?

For regulations that harm or benefit the environment, how does your agency consider "existence values"? How far into the future does your agency look when analyzing costs and benefits? Does your agency apply a discount rate to future costs and benefits? If so, what rate? Is the same rate used for both intra-generational and inter-generational benefits?

Other Regulatory Procedures

Does your agency consider the distributional impacts of a proposed rule (varying impacts across different

communities or populations within the state, such as minorities, small businesses, or local governments)? If distributional impacts are considered, how so, and what weight are they given?

Pursuant to statute or internal policy, does your agency conduct “ex post” review of existing regulations (e.g., a recurring review every so many years of the efficacy, efficiency, fairness, or legality of existing regulations)? If so, how often are such reviews conducted and how are rules selected for review?

Does your state have a centralized or agency-specific process through which the public can petition for rulemakings?

Do you think your state would benefit from more or less centralized regulatory review? Why? What changes would you most like to see made to improve your state’s regulatory review process?

What role does the Joint Commission on Administrative Rules play in reviewing your agency’s regulations? What powers does the Commission have to object to or alter a proposed regulation? How often do you make changes to a regulation based on the response of the Commission?

What impact does the Attorney General’s Government and Regulatory Reform Task Force have on your agency’s regulations? How often have you made changes to a regulation based on the response of the Task Force?

How well do the Department of Planning and Budget, the Joint Commission on Administrative Rules, and the Attorney General’s Government and Regulatory Reform Task Force work together? How are their priorities and methods of analysis similar to or different from one another?

Thank you for your time and assistance!

Instructions: Please base your responses only on your experience with state-level regulatory review, as opposed to any federal-level experiences. Also, please base your responses only on your experiences with regulatory review practices, as distinct from the broader rulemaking process. (Refer back to our cover letter for more details on which practices constitute “regulatory review” in your state.) Please specify if any of your responses are particular to individual state agency or agencies.

Organization name:

Respondent’s name, title, and contact information:

Which state agencies propose new regulations of the greatest interest to your organization?

When a proposed regulation interests your organization, how often do you review the state government’s regulatory impact analyses or cost-benefit analysis for that proposal? Always, usually, sometimes, seldom, never, or not applicable because such analyses are not publicly available?

Has a state agency ever asked for your assistance in estimating the costs or benefits of a proposed regulation? If so, please explain.

Have you ever independently submitted to a state agency your own assessment of the costs or benefits of a proposed regulation? If so, how was your submissions received by the agency?

When a proposed regulation interests your organization, how often do you engage in the state regulatory review process (as distinct from the state rulemaking process)? Always, usually, sometimes, seldom, never, or not applicable because there is no opportunity for public input?

How do you normally engage in the state regulatory review process:

- *submitting public comments to the reviewing body,*
- *submitting public comments to the regulatory agency about the impact analyses,*
- *attending public hearings or meetings of the reviewing body,*
- *scheduling private meetings with the reviewing body,*
- *scheduling private meetings with the regulatory agency about the impact analyses,*
- *scheduling private meetings with another decision-maker,*
- *or some other strategy?*

Have you ever criticized a regulatory proposal for failure to:

- *accurately calculate costs or benefits?*

- *consider indirect/ancillary costs or benefits?*
consider qualitative costs or benefits?
- *consider regulatory and non-regulatory alternative proposals?*
- *apply an appropriate discount rate?*
- *consider distributional impacts?*
- *conduct a cost-benefit analysis or other impact analysis?*
- *Or for any other reason?*

Please explain your main criticisms.

Do you feel new regulatory proposals and deregulatory proposals are given the same level of scrutiny in your state?

For the state agencies you deal with most frequently, are procedures for regulatory review followed consistently within and among the various agencies? Are certain agencies more or less likely than others to engage in regulatory review, conduct regulatory impact statements, or conduct cost-benefit analyses? When conducting regulatory impact analyses, do different agencies take different approaches to the calculation or consideration of costs and benefits? Please explain.

Do you think your state would benefit from more or less centralized regulatory review? Why? What changes would you most like to see made to improve the review process?

Virginia has several sources of regulatory review. Please give us your organization's impression of the strengths and weaknesses of the following review bodies:

- *The executive branch review conducted by the Department of Planning and Budget.*
- *The legislative branch review conducted by the Joint Commission on Administrative Rules.*
- *The Attorney General's Government and Regulatory Reform Task Force.*

Do these review bodies work well together? What differences do you perceive in the reviews conducted by each body?

Have you ever formally petitioned a government agency for a rulemaking? How? Did you include any impact analyses?

What other organizations in your state are active on issues of regulatory review?

Any additional thoughts on your state's regulatory review process?

Thank you for your time and assistance!



Institute for
Policy Integrity
new york university school of law

Institute for Policy Integrity • New York University School of Law
Wilf Hall, 139 MacDougal Street • New York, New York 10012 • www.policyintegrity.org