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**State Government & Tribal Affairs  
Committee**

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**HB 2276**

**Brief Description:** Regarding administrative procedures that promote accountability, transparency, and economic relief.

**Sponsors:** Representatives Taylor, Overstreet, Orcutt, Kristiansen, Short, Smith, Johnson, Rivers, Buys, Harris, Schmick, Shea, Condotta, Haler, Warnick and Alexander.

**Brief Summary of Bill**

- Imposes a general moratorium on state agency rule-making lasting until at least July, 1, 2015, which is subject to specified exceptions.
- Requires that the text of any bill, act, ordinance, resolution, or rule enacted by any governmental entity: 1) limit its provisions to those expressly authorized by specific language set forth in the federal or state Constitution; and 2) include a citation and explanation of the federal or state constitutional provision expressly providing such authorization.
- Requires that significant legislative rules be adopted by an agency before December 1 of any year and may not take effect until the end of the next regular legislative session.
- Requires that significant legislative rules be signed by the Governor before they may be adopted by an agency.
- Requires that proposed rules with "significant economic impacts" may not take effect unless enacted by the Legislature.
- Requires each agency to annually assess whether or not any of its existing rules have resulted in a specified economic impact in the preceding year and, if so, the agency must cease enforcing the rules until such time as the rules are enacted into law by the Legislature.
- Requires that rules passed by thirty specified state agencies must be based only upon express grants of specific authority as set forth in statute.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Hearing Date:** 1/26/12

**Staff:** Thamas Osborn (786-7129).

**Background:**

Overview of the Administrative Procedure Act.

Washington's Administrative Procedure Act (APA) establishes procedures under which state agencies adopt rules and conduct adjudicative proceedings. The APA also sets out procedures for judicial and legislative review. Generally, a rule is any agency order, directive, or regulation of general applicability which: (1) subjects a person to a sanction if violated; or (2) establishes or changes any procedure or qualification relating to agency hearings, benefits or privileges conferred by law, licenses to pursue any commercial activity, trade, or profession, or standards for the sale or distribution of products or materials.

An agency may not adopt rules absent a grant of authority by the Legislature. Such rule making authority may be derived through a broad, general grant of such authority in the enabling statutes pertaining to an agency or it may be explicitly conferred by statute in order to enable an agency to implement a specific legislative provision.

Before adopting a rule, an agency must follow specified procedures, including publishing notice in the state register and holding hearings.

Significant Legislative Rules.

The APA designates certain types of rules as being "significant legislative rules", which are subject to special requirements and procedures before they may be adopted by an agency. A "significant legislative rule" is a rule other than a procedural or interpretive rule that:

- 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;
- establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or
- adopts new, or makes significant amendments to, a policy or regulatory program.

Generally speaking, the requirements controlling the adoption of significant legislative rules are applicable only to those rules proposed or adopted by specified regulatory agencies and which meet the statutory definition. The specified state agencies are the:

- Department of Ecology;
- Department of Labor and Industries;
- Department of Health;
- Department of Revenue;
- Department of Social and Health Services;
- Department of Natural Resources;
- Employment Security Department;
- Forest Practices Board;
- Office of the Insurance Commissioner; and
- Department of Fish and Wildlife.

## Legal Challenges to Agency Rules.

Under the APA, the validity of any rule adopted by an agency may be challenged by a petition for declaratory judgment when it appears the rule or application of the rule interferes with or impairs the legal rights or privileges of the petitioner. The petitioner has the burden of demonstrating the invalidity of the rule. The court may declare a rule invalid only if it finds that the rule: (1) violates the Constitution; (2) exceeds the statutory authority of the agency; (3) was adopted without compliance with rule-making procedures; or (4) is arbitrary and capricious. The petition for declaratory judgment on the validity of an agency rule must be filed in Thurston County Superior Court.

## **Summary of Bill:**

### Rule Making Moratorium.

Subject to specified exceptions, rule making by all state agencies is suspended until either July 1, 2015, or such time as the Economic and Revenue Forecast Council reports that for three consecutive quarters state revenue collections have increased above the amounts predicted in the preceding yearly forecast, *whichever occurs later*. However, rule making is allowed if:

- a rule is needed to implement a federal law;
- a rule is needed in response to a state of emergency;
- the Department of Health (DOH) needs a rule to respond to a public health emergency;
- a rule is needed to set times for fishing and hunting seasons; or
- legislation enacted after January 1, 2012, directs that rule making is allowed. (Rules adopted pursuant to such legislation must be approved by the Legislature in the ensuing legislative session before they may take effect.)

### Constitutional Basis for Governmental Acts.

The text of every bill, act, ordinance, resolution, or rule adopted or enacted by an executive or legislative body, or the people [to be collectively referred to as "governmental acts"], must:

- include the citation of specific language from either the federal or state Constitution expressly establishing the constitutional basis for the governmental act;
- ensure that the provisions of the governmental act fall squarely within the authority expressly provided by the pertinent constitutional citation; and
- include a brief explanation of how the provisions of the governmental act are expressly authorized under the specific language provided by the federal or state Constitution, which may include contextual references regarding constitutional history and the intent of the drafters of the federal and state Constitutions.

### Significant Legislative Rules.

Significant legislative rules must be adopted by an agency before December 1 of any year and may not take effect until the end of the next regular legislative session.

A significant legislative rule must be signed by the Governor before it may be adopted by an agency.

### Rules With Specified Economic Impacts.

Before adopting a rule, an agency must determine if the rule will result in a "specified economic impact". Rules that have a "specified economic impact" are those that either:

- impose annual costs of at least \$1,000 on an individual; or
- impose annual costs of at least \$5,000 on any business, partnership, corporation, association, or public or private organization.

If an agency determines that a *proposed* rule has a specified economic impact, the following requirements apply:

- the agency may not enforce the rule until the rule is enacted into law by the Legislature; and
- the agency must "provide notification" to both the Code Reviser (for publication) and the appropriate committees of the Legislature, which must include the text of the rule, any findings regarding the economic impacts, and any relevant public comments.

Each agency is required to annually assess whether or not any of its existing rules have resulted in a specified economic impact in the preceding year. If so, the agency must:

- cease enforcing the rule until such time as the rule is enacted into law by the Legislature; and
- "provide notification" to both the Code Reviser and the appropriate Legislative committees.

An individual may bring a court action against an agency to bring the agency in compliance with the procedural requirements applicable to rules with specified economic impacts.

### Prohibition Against the Retroactive Imposition of Fines and Penalties.

Agencies are prohibited from imposing fines or penalties for rules violations under the following circumstances:

- if an initial inspection of a regulated party is approved by the agency, but a subsequent reevaluation of the inspection identifies a rule violation; or
- if an agency initially approves documentation provided by a regulated party, but subsequently determines that the party failed to provide the requisite documentation.

Agencies are prohibited from adopting rules authorizing the imposition of fines or penalties under the circumstances outlined above.

If rules violations are identified by an agency subsequent to its approval of an inspection or approval of documentation, then the agency must provide technical assistance to the regulated party so as to allow the regulated party an opportunity to correct the problem underlying the rules violation.

### Limits on the Delegation of Authority to an Agency by the Legislature.

Unless expressly provided otherwise in statute, the Legislature's delegation of its authority to an agency is limited to:

- the minimum authority necessary for the agency to implement the clear directives set forth in the legislation; and
- the authority necessary for the agency to address the circumstances and behaviors foreseeable at the time of the legislation's enactment.

Agency Rulemaking and Grants of Legislative Authority.

After August 1, 2012, rules adopted by specified agencies must be based upon a specific grant of legislative authority for each rule as explicitly set forth in statute. Such rules must include the citation of the specific statutory sections from which the authority is derived, and may not be based solely upon the statute's intent or the general enabling statutes authorizing the activities of the agency. The agencies subject to this requirement include the:

1. Department of Social and Health Services;
2. Department of Ecology;
3. Department of Labor and Industries;
4. Department of Agriculture;
5. Department of Fish and Wildlife;
6. Department of Transportation;
7. Department of Licensing;
8. Department of Enterprise Services;
9. Department of Commerce;
10. Department of Veterans Affairs;
11. Department of Revenue;
12. Department of Retirement Systems;
13. Department of Corrections
14. Department of Health;
15. Department of Financial Institutions;
16. Department of Archaeology and Historic Preservation;
17. Department of Early Learning;
18. Puget Sound Partnership;
19. Department of Natural Resources;
20. State Finance Commission;
21. State Investment Board;
22. Traffic Safety Commission;
23. Veterans Rehabilitation Council;
24. Criminal Justice Training Commission;
25. State Commission on Hispanic Affairs;
26. State Commission on Asian Pacific American Affairs;
27. Public Works Board;
28. Community Economic Revitalization Board;
29. Liquor Control Board; and
30. Utilities and Transportation Commission.

**Appropriation:** None.

**Fiscal Note:** Requested.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.