

# HOUSE BILL REPORT

## E2SHB 2221

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**As Passed House:**

February 8, 1996

**Title:** An act relating to regulatory reform.

**Brief Description:** Implementing regulatory reform.

**Sponsors:** By House Committee on Appropriation (originally sponsored by Representatives Reams, Schoesler, Mastin, Koster, Campbell, Horn, L. Thomas, Sheahan, D. Schmidt, Elliot, Mitchell, Thompson, Stevens, Goldsmith, Backlund, Hargrove and McMahan).

**Brief History:**

**Committee Activity:**

Government Operations: 1/9/96, 1/16/96 [DPS];

Appropriations: 1/29/96, 2/3/96 [DP2S(w/o sub GOVT)].

**Floor Activity:**

Passed House: 2/8/96, 71-27.

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### HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Reams, Chairman; Cairnes, Vice Chairman; Goldsmith, Vice Chairman; Hargrove; Honeyford; Hymes; Mulliken; D. Schmidt and Van Luven.

**Minority Report:** Do not pass. Signed by 6 members: Representatives Rust, Ranking Minority Member; Scott, Assistant Ranking Minority Member; Conway; R. Fisher; Scheuerman and Wolfe.

**Staff:** Bill Lynch (786-7092).

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### HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Government Operations. Signed by 24 members: Representatives Huff, Chairman; Clements, Vice Chairman; Pelesky, Vice Chairman; Basich; Beeksma; Brumsickle; Carlson; Chappell; Cooke; Crouse; Dellwo; Dyer; Foreman; Grant; Hargrove; Hickel; Kessler; Lambert; Linville; McMorris; Reams; Sehlin; Sheahan and Talcott.

**Minority Report:** Do not pass. Signed by 6 members: Representatives H. Sommers, Ranking Minority Member; Valle, Assistant Ranking Minority Member; Jacobsen; Poulsen; Rust and Wolfe.

**Staff:** Jim Lux (786-7152).

**Background:** During the 1994 and 1995 sessions, the Legislature passed legislation that made substantial changes to the state agency rule-making process, the legislative review of rules, the Regulatory Fairness Act, and state agency technical assistance. The Governor vetoed a number of sections contained in this legislation.

**Rule Adoption:** ESHB 1010 as passed by the Legislature during the 1995 session prohibited the departments of Labor and Industries, Revenue, Ecology, Social and Health Services, Health, Licensing, Employment Security, and Agriculture, as well as the Fish and Wildlife Commission, the Forest Practices Board, the Commissioner of Public Lands, and the Insurance Commissioner from solely relying upon the agency's enabling provisions and/or statement of intent as statutory authority to adopt a rule. All other agencies were prohibited from adopting rules based solely on enabling provisions and/or statements of intent when implementing future statutes, except to interpret ambiguities in a statute. The Governor vetoed the sections pertaining to the Forest Practices Board, the Department of Labor and Industries, and the Insurance Commissioner.

When adopting significant legislative rules, the departments of Labor and Industries, Revenue, Ecology, Health, Employment Security, and Natural Resources, as well as the Forest Practices Board must make certain determinations and place sufficient documentation into the rule-making file. These determinations include whether the probable benefits exceed the probable costs, whether the rule conflicts with federal or state law, and other determinations. A rule-implementation plan must be filed before adopting a significant legislative rule. The Joint Administrative Rules Review Committee (JARRC) may also require that any state agency rule be subject to these determinations. Certain rules, including emergency rules, procedural rules, rules adopting federal or state laws by reference, and other certain types of rules are exempt from this determination process.

An agency may adopt emergency rules if for good cause it finds that either: (1) the immediate adoption, amendment, or repeal of a rule is necessary for the preservation

of the public health, safety, or general welfare, and that it would be contrary to the public interest to observe the time requirements for permanent rule adoption; or (2) that state or federal law or a federal deadline for receipt of federal funds requires immediate adoption of a rule. The agency must include a statement of the reasons for the emergency in the rule adoption filed with the Code Reviser's Office. The emergency rule takes effect upon filing with the Code Reviser if no other date is specified. An emergency rule may not remain in effect for more than 120 days. A person may petition the Governor asking for immediate repeal of a rule adopted on an emergency basis.

Agencies may use an expedited process for repealing rules which are obsolete or unnecessary. Notice must be sent to the Code Reviser and any person requesting notice of expedited repeal of rules. The Code Reviser must publish all rules proposed for expedited repeal in a separate section or in a special edition of the Washington State Register. If no one objects to the expedited repeal of a rule within 30 days of publication, the agency may enter an order repealing the rule.

Challenges to Agency Actions: The burden of proof for demonstrating the validity of an agency action, including the validity of a rule, is on the person asserting its invalidity.

A court is required to award fees and other expenses, including reasonable attorneys' fees, to a qualified party who prevails against a state agency in a challenge of an agency action unless the court finds that the agency action was substantially justified or that circumstances would make an award unjust. The amount awarded may not exceed \$25,000. The court may reduce the award to the extent that a qualified party unduly or unreasonably protracted the final resolution of the matter. The law does not address the awarding of fees and other expenses if the agency appeals the Superior Court decision.

Regulatory Impact Notes: The Office of Financial Management (OFM) acts as the coordinating entity for the preparation of fiscal notes by state agencies. Fiscal notes show the expected increase or decrease on state revenues or expenditures by proposed legislation. Fiscal notes do not show the impact that proposed legislation might have on businesses.

### **Summary of Bill:**

Rule Adoption: The Forest Practices Board, the Department of Labor and Industries, and the Insurance Commissioner are prohibited from relying solely on a statement of intent and/or the agency's enabling provisions as statutory authority for adopting a rule. The Insurance Commissioner may use enabling/intent provisions to adopt procedural or interpretive rules.

The prohibition against the Department of Labor and Industries relying on enabling/intent provisions as statutory authority for adopting a rule does not apply to rules pertaining to prevailing wage.

The Department of Social and Health Services must follow the process established for the adoption of significant legislative rules.

No rule adopted by the departments of Ecology, Employment Security, Labor and Industries, Revenue, Licensing, Health, Social and Health Services, Fish and Wildlife, or the Office of the Insurance Commissioner is effective for more than seven years after its adoption or the effective date of this legislation, whichever is later. Each of these agencies must review their rules within seven years of the effective date of this legislation. Rules that become ineffective may be readopted through the process for adopting significant legislative rules.

No board or commission established under Title 18 whose sole function is to perform regulatory or licensing functions with respect to a profession or occupation may adopt or enforce a rule that requires more than a bachelor's degree in order to be licensed, unless the additional education is required by statute. This prohibition does not apply to boards or commissions that regulate health-related professions.

An agency must publish in the Washington State Register the subject matter of any new directive, policy statement, or interpretative statement at least 20 days before it takes effect. The full text of the directive or statement must be available at public libraries in the state. No agency interpretive statement, policy statement, or directive is admissible as evidence in a lawsuit involving the interpretation of state law where the agency is not a party to the action.

Each agency must prepare an annual fiscal year agenda for significant legislative rules under development. The agenda must be adopted by June 30 of each year and published in the Washington State Register. The agenda must be made available to any person upon request and must be submitted to the Office of Financial Management and any other state agency reasonably expected to have an interest.

An agency which has rules that delay full compliance with their provisions beyond 90 days after this act's effective date must prepare a small business economic impact statement in those rules before full compliance can be required.

An agency may no longer adopt emergency rules on the basis that it is necessary to preserve the general welfare, except that the Department of Agriculture may adopt an emergency rule on this basis if failing to adopt an emergency rule would result in substantial reduction of commodity value or substantial economic detriment.

An expedited rule readoption process is established for rules which have no opposition. The process is the same as the process used for the expedited repeal of obsolete rules.

Challenges to Agency Actions: The burden of proof for demonstrating the validity of a rule is on the agency.

If an agency appeals a decision of the superior court, the agency must pay the subsequent fees and other expenses incurred by the qualified parties that prevailed in Superior Court. The agency must pay the fees and other expenses from its appropriation for administration and support services and not out of any funds for program activities or service delivery. The amount awarded to a qualified party for an appeal may not exceed \$25,000.

Regulatory Impact Notes: The Office of Financial Management (OFM) is required to establish a procedure to provide regulatory impact notes on bills and resolutions that affect business. OFM is directed to act as the coordinating body for the development of these notes by state agencies. The notes must show the expected impact of bills and resolutions that increase or decrease regulations on the operation of businesses subject to the state business and occupation tax.

A regulatory impact note must be prepared on the basis of a sampling of businesses that are regulated by the legislation. The note must contain an estimate of the fiscal impact to the affected business for the biennium in which the legislation will take effect as well as the fiscal impact for the succeeding two fiscal years.

Copies of regulatory impact notes must be filed with the House and Senate fiscal committees and the chair of the committee to which the legislation was referred upon introduction. Copies of the notes must also be placed in the bill books or otherwise attached to the legislation and accompany the legislation throughout the legislative process. OFM must provide a regulatory impact note at the request of a legislator on proposed legislation.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** (Government Operations) Regulatory reform is an on-going process. The seven-year sunset is particularly important because there is no review currently required of existing rules. Many rules are outdated and don't reflect changes in technology. An advanced calendar of proposed rule-making establishes what was in a previous executive order. Agencies have the experts, so they should have the burden

of proving that a rule is valid. Agencies over-use emergency rules under the guise of protecting the general welfare. Regulatory impact notes are a good opportunity for agencies and businesses to exchange information.

(Appropriations) This legislation is necessary to level the growth in regulations and should reduce government regulation obstacles impeding business.

**Testimony Against:** (Government Operations) Sunsetting all agency rules every seven years will be very costly. There are petition processes for reviewing rules. Last year's bill should be given a chance to work. Emergency rules are good only for 180 days, and information sometimes needs to go out quickly. Businesses want stability and certainty of rules. Most rules are at the request of some interest group. The burden of proof should stay on the challenger. The general welfare has been a longstanding basis for emergency rules, and it is unclear what will be affected if this is removed.

(Appropriations) This legislation is heading in the wrong direction. The state should be placing its resources where there are regulatory problems. Substitute House Bill 1010 should be given a chance to operate. Sections of this bill will have a deleterious effect on worker safety, as rules will not be reapproved. Additional rules review work will be created at the expense of new rules and enforcement. New rules covering new chemicals will not get adequate attention.

**Testified:** (Government Operations) Representative Reams, prime sponsor; Representative Mastin; Carol Monohan, Association of Washington Business; Bruce Wishart, Sierra Club; Steve O'Donnell, The Coalition for Public Trust; Gary Smith, Independent Business Association; Carolyn Logue, National Federation of Independent Business; Basil Badley, American Council on Life Insurance; Claire Hesselholt, Department of Revenue; Scott Merriman, Washington Environmental Council; Jim Cason, Firefighters Association; and Robert Dilger, Washington State Building Trades.

(Appropriations) Representative Bill Reams, prime sponsor; Jan Gee (with amendment), Washington Retail Association (in favor). Ted Slatten, Independent Business Association; Bruce Wishart, Sierra Club; Robby Stern, Washington State Labor Council (opposed).