

HOUSE BILL REPORT

HB 1032

As Reported By House Committee On:
Government Reform & Land Use

Title: An act relating to regulatory reform.

Brief Description: Implementing regulatory reform.

Sponsors: Representatives Reams, Mulliken, Thompson, McMorris, Koster, DeBolt, D. Sommers, Boldt, Hickel, Sheahan, Buck, Schoesler, Honeyford, Mitchell, D. Schmidt, Sherstad, L. Thomas, Dunn, Dyer, Mielke, Cairnes, Robertson and Backlund.

Brief History:

Committee Activity:

Government Reform & Land Use: 1/14/97, 1/16/97 [DPS].

HOUSE COMMITTEE ON GOVERNMENT REFORM & LAND USE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Reams, Chairman; Sherstad, Vice Chairman; Cairnes, Vice Chairman; Bush; Mielke; Mulliken and Thompson.

Minority Report: Do not pass. Signed by 4 members: Representatives Romero, Ranking Minority Member; Lantz, Assistant Ranking Minority Member; Fisher and Gardner.

Staff: Joan Elgee (786-7135).

Background: In 1994 and 1995, the Legislature made substantial changes to agency rule-making and the legislative review of rules. Additional changes to rule-making and rules review were considered by 1996 Legislature but did not pass. During the 1996 interim, a work group looked specifically at the issue of agency use of interpretive and policy statements.

Grants of Rule-Making Authority.

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 relying solely on intent statements or the agency's enabling provisions as statutory authority to adopt a rule. All other agencies were prohibited from adopting rules based solely on intent statutes or enabling provisions 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.

The Department of Revenue has broad authority to adopt rules to enforce the tax provisions. The Insurance Commissioner may adopt rules defining unfair methods of competition, or unfair or deceptive acts or practices.

Rule-Making Requirements.

General requirements. The state Administrative Procedure Act (APA) details procedures state agencies are required to follow when adopting rules. Generally, a rule— is any agency order, directive, or regulation of general applicability which (a) subjects a person to a sanction if violated; or (b) 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. Before adopting a rule, an agency must follow specified procedures, including publishing notice in the state register and holding a hearing. For some types of rules, agencies must solicit comments and otherwise involve interested parties before publishing notice of a proposed rule. Fee setting rules are generally exempt from these pre-notice requirements.

Emergency rules. An agency may adopt an emergency rule if for good cause it finds either (1) that 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 of public notice and opportunity to comment; or (2) that state law, or a federal law, rule, or deadline for receipt of funds requires immediate adoption of a rule. The agency must include a statement of the reasons for the emergency in the rule adoption order filed with the Code Reviser. An emergency rule takes effect upon filing. No additional notice of a hearing is required.

Significant legislative rules. Before 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 and the Insurance Commissioner must make certain determinations. The Department of Fish and Wildlife must also make these determinations when adopting certain hydraulics rules. These determinations include that probable benefits exceed probable costs; the rule does not require persons to take an action which violates another federal or state law; and other determinations.

In the rule-making file, the identified agencies must place sufficient documentation to justify the determinations, as well as a rule implementation plan. They must also coordinate implementation and enforcement of the rule with other federal and state entities that are regulating the same activity or subject matter. The Joint Administrative Rules Review Committee (JARRC) may require that any state agency rule be subject to these requirements. Certain rules, including emergency rules, procedural and interpretive rules, fee setting rules, and other types of rules are exempt from these requirements.

Other rule-making provisions. Agencies must send notice to interested persons of rule-making activity. No provision is made for agencies to use electronic mail or facsimile mail in lieu of regular mail. In addition, agencies are not able to make filings with the Code Reviser by electronic mail.

Rules remain in effect until amended or repealed. The APA does not require state agencies to review their rules. An expedited repeal process allows agencies to repeal rules through a simplified process if no one objects. Agencies must annually identify rules for repeal by the expedited process.

Interpretive and Policy Statements and Other Agency Issuances.

In addition to rules, agencies also issue other types of documents. An interpretive statement— is a document titled Interpretive Statement— and states an agency’s interpretation of the meaning of a statute. A policy statement— is a document titled Policy Statement— and states an agency’s current approach to the implementation of a statute. Interpretive and policy statements are advisory only. Agencies must send copies of interpretive and policy statements to persons who request to be on a roster, and must send a description of the subject matter of the statement to the Code Reviser for publication in the register. Agencies are encouraged to convert long standing interpretive and policy statements into rules. Procedures are set forth for persons to petition agencies to request such conversions.

Other types of issuances include consumer-related guides and brochures, technical assistance documents, and tax determinations issued by the Department of Revenue. A tax determination is the Department of Revenue’s decision regarding the applicability of the law to a particular taxpayer. The department has authority to decide that a determination has precedential value for other taxpayers.

Legislative Review.

The JARRC has authority to selectively review rules, and interpretive and policy statements. If the JARRC finds that a rule is not within the intent of the legislature or has not been adopted in accordance with all provisions of law, or that an agency is using an interpretive or policy statement in place of a rule, the JARRC notifies the

agency. A process is established for the agency to respond to the JARRC's findings, and for the JARRC to take further action. Ultimately, the JARRC may recommend that the Governor suspend a rule.

The procedures for legislative review of rules do not establish a presumption as to the legality or constitutionality of the rule in subsequent judicial proceedings. In the last two legislative sessions, the Governor has vetoed provisions which would have provided that a JARRC suspension recommendation on the ground that a rule does not conform with the intent of the Legislature, establishes a rebuttable presumption that the rule is invalid.

Judicial Review.

The burden of proof for demonstrating the invalidity of an agency action, including the invalidity of a rule, is generally 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.

Adjudicative Proceedings.

When a state agency conducts a hearing which is not presided over by officials who are to render the final decision, the hearing must be conducted by an administrative law judge.

Regulatory Impact Note.

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 of state revenues or expenditures by proposed legislation. Fiscal notes do not show the impact that proposed legislation might have on businesses.

Summary of Substitute Bill:

Grants of Rule-Making Authority.

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

rules. The prohibition relating to the Department of Labor and Industries does not apply to prevailing wage rules.

The Department of Revenue's general authority to adopt rules is limited to procedural rules.

The authority for the Insurance Commissioner to define unfair methods of competition and unfair or deceptive acts or practices is modified. The commissioner shall affirm or deny a definition based upon a preponderance of facts submitted. Upon appeal, the Superior Court shall review the findings of fact upon which the regulation is based de novo on the record.

Rule-Making Requirements.

General requirements. The definition of rule— is expanded to include statements, in addition to directives, orders and regulations. Rules relating to reimbursements under Title XVIII or Title XIX of the Social Security Act are subject to the requirements relating to soliciting comments and otherwise involving interested parties before publishing notice of a proposed rule.

The Department of Revenue must index tax determinations which are precedential and publish the determinations and indexes.

Emergency rules. The authority to adopt emergency rules based on the preservation of general welfare is eliminated. The Department of Agriculture, however, may adopt an emergency rule if the failure to do so would result in substantial reduction of commodity value or substantial economic detriment.

Significant legislative rules. The Department of Social and Health Services is added to the list of agencies required to follow the procedures for significant legislative rules. Rules relating to reimbursements under Title XVIII or Title XIX of the Social Security Act are subject to the requirements.

Other rule-making provisions. An existing rule of the departments of Ecology, Employment Security, Labor and Industries, Revenue, Licensing, Health, Social and Health Services, Fish and Wildlife or the Insurance Commissioner becomes ineffective after seven years unless the agency readopts the rule. The affected agencies are directed to review their existing rules and consider whether the rules are unclear or difficult to understand, excessively costly, unauthorized, duplicative of other rules, no longer necessary, and whether several other criteria are present. Following a review, the agency must take action to repeal the rule, amend the rule, or readopt the rule.

An expedited adoption process is established which is similar to the expedited repeal process. Agencies may use the procedure to convert interpretive and policy statements into rules, and for rules which are being readopted following a review. The expedited repeal procedure is modified to require agencies to identify rules twice a year for expedited repeal.

Each agency must prepare a semiannual agenda for rules under development. The agency must send a copy to interested persons and publish it in the register.

In lieu of regular mail, an agency may send notices relating to rule making by electronic or facsimile mail when requested in writing by the person receiving the notice. If an agency is capable of receiving comments by electronic mail, facsimile transmissions, or recorded telephonic communications, the agency must state in its notice of hearing that persons may comment by these means and how they may do so. Comments shall be placed in the rule-making file.

The statute law committee is directed to convene a working group of representatives from the Office of Financial Management (OFM), other state agencies, and the public to develop proposed rules relating to agency electronic filing of rules, and to allow more information to be published in the register. This group is also directed to develop a method for noting in the statutes or codes when interpretive or policy statements have been issued.

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

Interpretive and Policy Statements and Other Types of Agency Issuances.

The definitions of interpretive and policy statements are revised and clarified. A statement that falls within the definition is covered whether or not it is titled an interpretive or policy statement. Interpretive and policy statements are for general application by the agency for the purpose of providing guidance to persons as to their obligations under the law. Consumer-related guides and brochures, technical assistance documents, and tax determinations issued by the Department of Revenue are excluded. Language is added to clarify that interpretive and policy statements do not foreclose alternative courses of action by persons in agency actions and may not be used to substantially modify existing rules. Agencies may not use interpretive or policy statements, guidelines, or other issuances in a binding manner against any person. If a court or presiding officer finds that an agency is applying an agency issuance in a binding manner, then the issuance is invalid because it constitutes a rule which was not properly adopted.

Persons may petition agencies to repeal or withdraw interpretive and policy statements in addition to requesting their conversion into rules. Agencies are not required to send notice of interpretive and policy statements which concern only internal agency procedures that do not affect private rights or procedures available to the public.

Legislative Review of Rules.

The JARRC may review interpretive and policy statements, guidelines and other issuances to determine whether an issuance constitutes a rule. If the JARRC finds that the issuance is a rule, the committee may also examine whether the rule is within legislative intent. The JARRC may recommend suspension of an issuance which is a rule. A person may petition the JARRC to review an issuance only if the person has first petitioned the agency to repeal or withdraw the issuance, or convert the issuance into a rule.

A JARRC suspension recommendation to the Governor that a rule be suspended because it does not conform with legislative intent or was not adopted in accordance with law, establishes a refutable presumption in any proceeding challenging the rule that the rule is invalid. In these cases, the agency has the burden of demonstrating the validity of the rule.

Judicial Review.

In a declaratory judgment action challenging the validity of a rule, after the petitioner has identified the defects in the rule, the burden of going forward with the evidence is on the agency.

In a proceeding involving the review of an interpretive or policy statement, the deference the court may give to the agency interpretation depends on a number of factors, including whether the statement was issued contemporaneously with the passage of the statute to which it relates and whether the agency had historically ever interpreted the statute to require the standards in the statement.

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 amount awarded to a qualified party for an appeal may not exceed \$25,000. The agency must pay any fees and other expenses from its appropriation for administration and support services, not out of any funds for program activities or service delivery.

Adjudicative Proceedings.

A hearing held by the Insurance Commissioner must be conducted by an administrative law judge unless the person demanding the hearing agrees in writing to have an employee of the commissioner conduct the hearing.

An agency rule which requires a presiding officer to apply agency rules as the first source of law is invalid.

Regulatory Impact Notes.

The OFM is required to establish a procedure to provide regulatory impact notes on bills and resolutions that affect business. The 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 based on a sampling of businesses that are regulated by the legislation. The note must contain an estimate of the fiscal impact on businesses 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 with the chair of the committee the legislation was referred to upon introduction. Copies of the notes must also be placed in the bill books or otherwise attached to the legislation and must accompany the legislation throughout the legislative process. The OFM must also provide a regulatory impact note on proposed legislation at the request of a legislator.

Other Provisions.

Prior to releasing a final report or study regarding management by a unit of local government, an agency must give a draft copy to the local legislative body and meet with the legislative body if so requested.

When issuing a citation or other written finding that a person has violated a statute, rule, or order, the agency must include the text of the statute granting the agency the authority to regulate the subject matter.

Substitute Bill Compared to Original Bill: The Department of Revenue's authority to adopt rules is limited to procedural rules. The provision modifying the Insurance Commissioner's authority to define unfair methods of competition and unfair or deceptive acts or practices is added. Fee setting under Titles XVIII and XIX of the Social Security Act is made subject to the significant legislative rules requirements

and the process for soliciting comments and otherwise involving interested parties before publishing notice of a proposed rule.

The provisions relating to review of rules are modified in several respects. A rule only becomes ineffective after seven years if the agency fails to readopt the rule, the provisions only apply to existing rules, criteria are set forth for review of rules, and the agency need not follow the significant legislative rules process on readoption, even if someone objects to expedited adoption.

A provision is added requiring the submission of draft agency reports to local governments. Agencies are directed to provide copies of statutes when citing a person for a violation. Language relating to use of electronic mail, voice mail, and facsimile mail is added. Other clarifying and technical changes are made.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: Small businesses are buried by regulations. The sunset of existing rules is a good way to clean up the mess. Regulatory impact notes will help the Legislature know what the impact of new laws will be on businesses.

Agencies need clarity as to when policy and interpretive statements can be used. People have been cited for violating these statements, which have not gone through rule-making.

The Legislature should be the place where policy decisions are made; not the agencies. Agencies should have specific, rather than general, grants of authority. The Forest Practices Board has no authority to regulate aesthetics, and the language in the bill codifies what has been a long-standing interpretation with which the current commissioner disagrees.

It's unfair to ask an employee of an agency to sit as an administrative law judge (ALJ) where the position of the head of the agency is being challenged. Agencies sometimes publish erroneous reports which cause many problems. Local governments should have a chance to first see the reports.

Testimony Against: Agencies can't handle the workload of reviewing all rules. The review will be very expensive and resources will be shifted out of direct services to comply. The inability to adopt emergency rules based on general welfare will make it difficult to head off endangered species listings, let persons know of changes in tax

laws, and make fishing season rules. The ability to adopt emergency rules relating to employment standards is a concern.

There is disagreement as to whether the Forest Practices Board can regulate aesthetics; the current Attorney General says the board does have such authority. The provisions on the JARRC go too far. Environmental safeguards will be undermined. Employees can act independently when serving as ALJs.

Testified: Leon Bowman, Kresky Auto Repair (pro); Carolyn Logue, National Federation of Independent Business (pro); Amber Balch, Association of Washington Business (pro); Tim Boyd, Washington Forest Protection Association (pro); Jan Gee, Washington Retail Association and Washington Food Industry (pro); Sandy Shaw, Haggen, Inc. (pro); Art Stearns, Department of Natural Resources (con); Claire Hesselholt, Department of Revenue (concerns with some provisions; pro on others); Bruce Wishart, People for Puget Sound (con); Jeff Johnson, Washington State Labor Council (con); Mel Sorensen, Washington Physicians Service Association and National Association of Independent Insurers (pro); Basil Badley, American Council of Life Insurance, American Insurance Association, and Health Insurance Association of America (pro); Clark Sitzes, Allstate Insurance (pro); Laura Hitchcock, Sierra Club (con); Pat Hamilton, Pacific County Commissioner (pro); Melodie Bankers, Office of the Insurance Commissioner (pro on some provisions; con on others); and Dick Ducharme, Building Industry Association of Washington, Yakima Growers and Shippers Association (pro).