HOUSE BILL REPORT
HB 2345

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

Title: An act relating to administrative law.

Brief Description: Revising administrative law.

Sponsors: House Committee on House Government Reform & Land Use (originally sponsored by Representative Reams).

Brief History:
Committee Activity:
Government Reform & Land Use: 1/19/98, 1/22/98 [DPS];
Appropriations: 2/4/98, 2/7/98 [DP2S(w/o sub GRLU)].

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; Cairnes, Vice Chairman; Sherstad, 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, as part of regulatory reform, the Legislature made substantial changes to agency rule-making and the legislative review of rules. Additional changes were adopted in 1997 in E2SHB 1032.

Rule-Making Requirements.

General provisions. The Administrative Procedure Act (APA) details procedures agencies must 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. The rule-making procedures include publishing notice of the proposed rule in the state register, sending a copy of the notice to persons requesting it 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. Agencies must maintain an official rule-making file for each rule which includes copies of all publications in the state register with respect to the rule.

Significant legislative rules. Before adopting a significant legislative rule, certain of the larger agencies must determine that the probable benefits of the rule exceed the probable costs and make other determinations. These agencies must also develop a rule implementation plan for a significant legislative rule describing how the agency intends to implement and enforce the rule, inform and educate affected persons about the rule, promote and assist voluntary compliance with the rule, and evaluate the rule. Significant legislative rules are most rules other than emergency rules, procedural and interpretive rules, and fee-setting rules. The Joint Administrative Rules Review Committee (JARRC) may also require that any rule of any agency be made subject to the significant legislative rules requirements. JARRC has 45 days after receiving notice of a proposed rule to make the requirements applicable.

Expedited process. An expedited repeal process allows agencies to repeal rules in an expedited manner if no one objects. Similarly, an expedited adoption process allows for streamlined adoption of rules which have been the subject of a process that involved substantial participation by interested parties before the development of the rule, rules which only correct typographical errors, and certain other types of rules. An agency may file for expedited adoption at any time, but is allowed only two filings (in April and October) of rules for expedited repeal.

Review of rules. Rules remain in effect until amended or repealed. The APA does not require agencies to review their rules. Under Executive Order 97-02, the Governor directed all executive agencies to review rules that have significant effects on businesses, labor, consumers, and the environment. The agencies must determine whether the rules should be retained, or amended or repealed if they do not meet specified criteria.

Economic impact statements. Under the Regulatory Fairness Act, agencies must prepare a small business economic impact statement when adopting a rule that imposes more than minor costs on businesses in an industry or if requested to do so by JARRC. Certain types of rules are exempt. The statement describes the reporting, record keeping, and other compliance requirements of the proposed rule, analyzes the costs of compliance, and addresses other matters. If the agency finds that the rule has a disproportionate impact on small businesses, the agency must reduce the costs on small businesses, where legal and feasible do to so.

Interpretive and Policy Statements. In addition to rules, agencies also issue other types of documents. An interpretive statement is a document titled "Interpretive Statement" that states an agency's interpretation of the meaning of a statute. A policy statement is a document titled "Policy Statement" that states an agency's current approach to the implementation of a statute. Unlike rules, interpretive and policy statements are advisory only. Agencies are encouraged to issue interpretive and policy statements and to convert long standing interpretive and policy statements into rules.

Legislative Review. JARRC selectively reviews rules and interpretive and policy statements. A person may also petition JARRC to review a rule or a policy or interpretive statement. If 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, JARRC notifies the agency. A process is established for the agency to respond to JARRC's findings, and for JARRC to take further action. Ultimately, JARRC may recommend that the Governor suspend a rule.

JARRC is composed of eight legislators (four senators and four representatives, with no more than two members from each house from the same political party). The President of the Senate appoints the chair in even numbered years and the Speaker of the House appoints the chair in odd-numbered years.

A JARRC determination does not establish a presumption as to the legality or constitutionality of the rule in subsequent judicial proceedings.

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.

Summary of Substitute Bill:

Rule-Making Requirements.

General provisions. Within 90 days of the effective date of a rule that imposes additional requirements on businesses that may subject a person to a sanction, an agency must make a good faith effort to notify businesses affected by the rule of the requirements and how to obtain technical assistance. Good faith means the agency at least notifies businesses in the standard industrial classifications of businesses affected by the rule that are registered with the department of revenue. Inadvertent failure to notify a business does not invalidate a rule.

Significant legislative rules. An agency must convene a meeting of persons affected by a significant legislative rule at least 20 days before the effective date to identify ambiguities and problem areas in the rule; coordinate education and public relations

efforts by all persons; obtain comments regarding agency training and enforcement plans; and obtain comments regarding appropriate evaluation mechanisms to determine the effectiveness of the rule.

Expedited process. Agencies may file proposals for the expedited repeal of rules at any time, instead of only twice a year. The contents of the rule-making file is limited so that only citations to the notices in the register are required and not copies of all the register publications, with respect to a rule.

The time period for JARRC to decide whether to impose the significant legislative rule requirements is extended from 45 to 75 days.

Review of rules. At least every four years, an agency must review a rule to evaluate whether the rule is:

- Necessary to comply with the authorizing statute;
- Providing the results that it was originally designed to achieve in a reasonable manner;
- Written and organized in a clear and concise manner;
- Consistent with the legislative intent of the authorizing statute;
- Coordinated with other agencies and governmental jurisdictions to eliminate or reduce duplication and inconsistency;
- Resulting in equitable treatment of those required to comply with it; and
- Achieving its goals in a cost-effective manner.

Some rules are exempt. Rules that have undergone executive review by 2001 are subject to review beginning in 2001. Rules are not valid unless reviewed.

Economic impact statements. An agency must prepare a local government economic impact statement when adopting a rule that imposes costs on local government. Certain types of rules are exempt. The statement must describe the reporting, record keeping and compliance requirements of the proposed rule and analyze the costs of compliance for local government. The Department of Community, Trade, and Economic Development must develop a guide to help agencies prepare the statements. Annually, an agency must submit to JARRC a list of rules for which it has prepared an economic impact statement and a summary of the costs.

Interpretive and Policy Statements. When a person contacts an agency regarding a rule, the agency must identify any associated interpretive and policy statements, and other documents of general applicability and provide copies of the documents upon request. An agency may not issue a citation or civil penalty related to a rule on which it has issued a policy or interpretive statement or other document of general applicability unless the agency has provided copies of the documents to the person being issued the citation or civil penalty at least 90 days prior to the issuance. An agency need not comply with

this requirement if the person failed to meet the obligation to have obtained a license or registration to engage in the regulated activity for which a civil penalty or citation is being issued.

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Legislative Review. JARRC composition is modified. The legislative members must select a chair, by majority vote, other than one of the eight members. The chair votes only in the case of a tie. In addition to review of rules and policy and interpretive statements, JARRC may review guidelines, and issuances of general applicability, or their equivalents to determine whether the document constitutes a rule. If the committee finds that the document constitutes a rule, it may also examine whether the rule is within legislative intent.

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 all applicable provisions of law establishes a rebuttal presumption in a proceeding challenging the validity of the rule that the rule is invalid. The burden of demonstrating the validity of the rule is then on the adopting agency.

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.

Substitute Bill Compared to Original Bill: The requirement that an agency notify persons affected by a rule is modified. Instead of applying to significant legislative rules, it applies to all rules that impose additional requirements on businesses which may subject a person to a sanction if violated. The definition of good faith is added.

The review of rules is changed to exempt certain rules and provide that rules reviewed under executive order become subject to review in 2001. The substantial compliance language is removed.

The local government economic impact statement requirement is modified to apply to rules imposing any costs, rather than "minor" costs. The Department of Community, Trade, and Economic Development's role is limited to developing a guide for agencies. The requirement of an annual report to JARRC is added.

When a person contacts an agency regarding a rule, the agency must identify all associated documents of general applicability, and not just policy and interpretive statements. Regarding the requirement to provide copies of documents of general applicability to a person before citing the person, the 90 day requirement is added, as well as the exception for persons who have failed to obtain a licence or registration to engage in the regulated activity.

The modification of JARRC membership to provide for an additional member from each house from the majority party is deleted, and the provision for selection of a chair by majority vote is added. JARRC's review of documents other than rules is limited so that JARRC must first make an initial determination that a document constitutes a rule before it examines whether the rule is within legislative intent.

Appropriation: None.

Fiscal Note: Requested on January 7, 1998.

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

Testimony For: We continue to see abuses with use of documents. Some documents, such as regional directives and technical assistance bulletins, should be adopted as rules, and JARRC needs the authority to look at these. We need more detail in the implementation plans to identify problem areas before litigation. Continuing rules review is necessary so that only absolutely necessary rules are on the books. This bill is narrower than bills in the past. Agencies need to do a better job of letting people know what is required. It's very frustrating to be told you are in violation, but you don't know what the requirements are. JARRC needs a tie-breaking mechanism. In insurance matters, an independent ALJ (as opposed to an employee of the commissioner) will provide the needed appearance of fairness. Local governments are often regulated, and it would be helpful to see the costs of regulation.

Testimony Against: We need experience under the executive order and ESHB 1010 before we make changes. Don't make the requirements so rigid that agencies can't provide assistance to people. Notifying all persons affected when a rule is adopted is unattainable (comment to original bill). The rules review provision is problematic because there may be unintended consequences if an agency inadvertently fails to review a rule. How can we provide copies of documents to people before citing them if we don't know who they are, such as unlicenced contractors? (comment to original bill). Don't further politicize JARRC (comment to original bill). Regarding insurance hearings, judges are expensive and not familiar with insurance issues. Look at problem rules rather than all rules and exempt federally mandated rules.

Testified: (Pro) Amber Balch, Association of Washington Business; Carolyn Logue, National Federation of Independent Business; Gary Smith, Independent Business Association; Mel Sorensen, Washington Physicians Service; Dave Williams, Association of Washington Business, (section on local government economic impact statements); Sandi Benbrook, Community, Trade, and Economic Development (section on local government economic statements); and Glen Hudson, Washington Association of Realtors.

(Con) George Taylor, Office of the Insurance Commissioner; Gary Moore, Labor and Industries, Governor's Office; Bruce Miyahara, Director, Department of Health; Tom Fitzsimmons, Director, Department of Ecology; Bruce Wishart, People for Puget Sound; and Jeff Johnson, Washington State Labor Council, AFL-CIO.

(Neutral) Evan Jacoby, Department of Fish and Wildlife.

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 House Government Reform & Land Use. Signed by 21 members: Representatives Huff, Chairman; Alexander, Vice Chairman; Clements, Vice Chairman; Wensman, Vice Chairman; Doumit, Assistant Ranking Minority Member; Benson; Carlson; Cooke; Crouse; Grant; Kessler; Linville; Lisk; Mastin; McMorris; Parlette; Poulsen; D. Schmidt; Sehlin; Sheahan and Talcott.

Minority Report: Do not pass. Signed by 8 members: Representatives H. Sommers, Ranking Minority Member; Gombosky, Assistant Ranking Minority Member; Chopp; Cody; Keiser; Kenney; Regala and Tokuda.

Staff: Joe Hauth (786-7271).

Summary of Recommendation of Committee on Appropriations Compared to Recommendation of Committee on Government Reform & Land Use: The requirement that agencies must identify and provide copies of documents is narrowed. Agencies must identify and provide copies only when a person asks for a copy of a rule and limits documents that the agency must provide to policy and interpretive statements associated with a rule, rather than all documents.

The requirement that agencies must provide copies of documents before issuing a citation is changed. An agency may not issue a penalty for a rule involving the same subject matter as a policy or intrepretive statement unless it has made a good faith effort to notify businesses likely to be affected by the rule at least 90 days prior to issuance.

The rule implementation meeting and rule requirements are changed. The implementation plan must describe how the agency will convene a meeting at least 20 days before the effective day of the rule and how the agency will provide appropriate training. The time requirement for agencies to notify affected businesses of new rules is changed from 90 to 200 days.

The rule review requirements are changed. The rule review process begins on July 1, 2001. The rule review is limited to rules that have significant effects on businesses, labor, consumers and the environment. The rules review criteria in Executive Order 97-02 are adopted. Agencies must report to the Joint Administrative Rules Review Committee (JARRC) on rules review efforts. If the committee receives an objection, the JARRC must determine whether the agency complied. If the JARRC does not approve the review, the rules not approved are invalid.

The composition of JARRC is changed. The ninth person to serve on the committee is not to serve as the chairperson. The documents that JARRC may review in addition to rules are limited to policy or interpretive statements, regardless of title.

Appropriation: None.

Fiscal Note: Available.

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

Testimony For: The Governor ordered agencies to implement Executive Order 97-02 with no cost. However, agencies that reviewed the proposed legislation identified cost impacts. The proposed legislation complements prior regulatory reform efforts. This legislation has been a collaborative process with the Governor. The existing process needs to be codified in law so a permanent system is in place. The criteria for rules review can be tightened. This bill will not cost more to implement and it will give people standards to evaluate rulemaking efforts.

The proposed changes to the bill should result in a much smaller impact on agencies in terms of scope, documentation, and reporting requirements. The goal is to achieve regulatory compliance. Adopting the rules review requirements in Executive Order 97-02 should reduce the significant impacts of rules review.

Testimony Against: HB 1010 was supported but balance is needed. This bill goes too far in that it is too hard to implement and is likely to result in significant litigation. The rules review criteria in Executive Order 97-02 were never meant to be put in statute. The goal is to make government more efficient; this bill goes in the opposite direction. State agencies have received their charge to improve regulatory activities. Past legislation has already resulted in many improvements in efficiency and effectiveness. There are real costs associated with this bill. The costs associated with conducting local government economic impact statements could be significant. The four-year rules review requirement is too short. The Office of the Insurance Commissioner (OIC) is singled out in this bill. The requirement for an administrative law judge for OIC hearings will be costly and impair the current hearings process.

Testified: Representative Reams, prime sponsor; Amber Balch, Association of Washington Businesses; Gary Smith, Independent Business Association; Carolyn Logue, National Federation of Independent Business (pro); Bruce Wishart, People for Puget Sound; Gary Moore, Department of Labor and Industries; Lyle Quasim, Department of Social and Health Services; George Taylor, Office of the Insurance Commissioner; and Bruce Miyahara, Department of Health (con).