

# SENATE BILL REPORT

## E2SHB 1032

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As Reported By Senate Committee On:  
Government Operations, April 4, 1997  
Ways & Means, April 7, 1997

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

**Brief Description:** Implementing regulatory reform.

**Sponsors:** House Committee on Appropriations (originally sponsored by 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 Operations: 3/25/97, 4/4/97 [DPA-WM, DNP].  
Ways & Means: 4/4/97, 4/7/97 [DPA, DNP].

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### SENATE COMMITTEE ON GOVERNMENT OPERATIONS

**Majority Report:** Do pass as amended and be referred to Committee on Ways & Means.  
Signed by Senators McCaslin, Chair; Hale, Vice Chair; Anderson and Horn.

**Minority Report:** Do not pass.  
Signed by Senator Swanson.

**Staff:** Diane Smith (786-7410)

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### SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** Do pass as amended.  
Signed by Senators West, Chair; Deccio, Vice Chair; Strannigan, Vice Chair; Hochstatter, Long, McDonald, Roach, Rossi, Schow, Swecker and Zarelli.

**Minority Report:** Do not pass.  
Signed by Senators Brown, Fraser, Kohl, Sheldon, Spanel and Thibaudeau.

**Staff:** Maura Sullivan (786-7431)

**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.

*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 or 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.

*Review of Rules.* Rules remain in effect until amended or repealed. The APA does not require state agencies to review their rules.

*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. 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— which states an agency’s interpretation of the meaning of a statute. A policy statement— is a document titled Policy Statement— which 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. JARRC has authority to selectively review rules, and interpretive and policy statements. 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.

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. With certain exceptions, 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 Amended 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 authority for the Insurance Commissioner to define unfair methods of competition and unfair or deceptive acts or practices is modified. The commissioner must review all comments received during rule-making, include his or her reasons for finding a practice unfair or deceptive in the adopted rules and include in the concise explanatory statement all facts both relied or not relied upon. Upon appeal, the superior court must review the findings of fact upon which the regulation is based de novo on the record.

Rule-Making Requirements. *General Requirements.* 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. The Department of Fish and Wildlife may adopt emergency rules governing seasons and harvest limits for hunting and fishing.

*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. Its rules concerning client eligibility and liability for dependent care are exempt.

*Review of Rules.* All agencies must 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. A seven-year schedule is established. Rules which are not reviewed within seven years are ineffective. Following a review, an agency must take action to repeal or amend any rules which do not meet the criteria. An agency may not rely on a rule which does not meet the criteria beginning in seven years.

New rules must also be reviewed within seven years of adoption or they are ineffective. An agency must review a new rule to evaluate the achievement of the goals and objectives of the rule, technological changes that impact the rule, actual costs undergone by the regulated community, and other matters.

The seven-year review period for existing rules reviewed by the executive begins on July 31, 2001.

*Other Rule-making Provisions.* An expedited adoption process is established which is similar to the expedited repeal process. It does not apply to policy or interpretative statements. An objection to expedited adoption converts the proceeding to a statement of inquiry and the significant legislative rule-making analysis may become applicable. This section expires December 31, 2000. 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 must be placed in the rule-making file.

The Code Reviser is directed to conduct a feasibility study for accepting agency rule filings in an electronic format and report to the Legislature and the Governor by July 1, 1998.

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.

De Facto Rule. The term *de facto rule* is created to mean all agency issuances that are not adopted as rules but which meet the definition of a rule in existing statute. Rules are defined as agency issuances which have been adopted as rules.

Persons may petition agencies to repeal or withdraw interpretive and policy statements in addition to requesting their adoption as rules.

Legislative Review of Rules. JARRC may review issuances to determine whether an issuance constitutes a *de facto rule*. JARRC may recommend suspension of an issuance which is a *de facto 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 rebuttable 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.

The provision for payment of attorneys' fees in agency actions is modified. A qualified party is entitled to \$50,000 for fees and other expenses incurred in superior court, and

\$50,000 for the fees and other expenses incurred in each court of appeal to a maximum of \$75,000. A party who is awarded fees is entitled to those fees, regardless of whether the party ultimately prevails. The agency must pay any fees awarded within 30 days. A qualified party is defined as an individual with a net worth less than \$2 million or as an owner of an unincorporated business with a net worth less than \$7 million.

The award of attorneys' fees is based on a standard that requires the award unless the court finds that circumstances make an award grossly unjust.

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.

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.

According to the fiscal notes, the main fiscal impact is from Part II Rule Making Requirements. Specifically, reviewing rules within seven years is the most significant part for agency expenditures. Under Part IV Fees and Expenses, the increase in attorney fees and expenses is another provision with fiscal impact. The regulatory impact notes account for the other main expenditure. Also, the Department of Revenue indicated an expected revenue loss from the limitation on its authority to adopt administrative rules.

**Amended Bill Compared to Substitute Bill:** The sections which limit DOR's rule-making authority to procedural rules and require regulatory impact notes are removed. This should eliminate nearly all of the expected revenue loss for DOR. In addition, regulatory impact notes had accounted for about \$1.3 million of the fiscal note.

The modification of the Insurance Commissioner's authority to define unfair methods of competition and unfair or deceptive acts or practices are procedural disclosures required during the rule-making process. These disclosures by the commissioner must state his or her reasons for finding a practice unfair or deceptive and include all facts both relied and not relied upon. The commissioner must review all comments received during rule-making.

DSHS rules concerning client eligibility and liability for dependent care are exempt from the significant legislative rule-making analysis.

The seven-year review for existing and new rules applies to all rules of all agencies. The recurring seven-year review of new rules applies, effective July 31, 2001, to rules which have undergone executive rules review.

The expedited rule adoption section expires December 31, 2000. It does not apply to policy or interpretative statements. An objection to the expedited adoption process converts the

proceeding into a statement of inquiry and the significant legislative rule-making analysis may be applied.

The working group assigned to propose rules for electronic filing of rules is converted to a feasibility study to be conducted by the Code Reviser.

Various provisions regarding policy and interpretative statements are deleted. The relevant clarifications regarding the legal effect of these and other agency issuances are made by reference to the term *de facto* rule.–

The term *de facto* rule– is in contradistinction to the term *rule*.– The definitions relate to whether or not the issuance has been adopted as a rule. JARRC may recommend to the Governor that an agency’s use of a *de facto* rule be suspended.

Attorneys’ fees must be awarded unless the court finds that circumstances make an award grossly unjust. The parties to whom an award may be made are individuals with a net worth less than \$2 million or owners of unincorporated businesses with a net worth less than \$7 million. The amounts are adjusted upward to \$50,000 for each count of appeal to a maximum of \$75,000.

**Ways & Means Amended Bill Compared to Government Operations Amended Bill:** A technical amendment added a section number reference.

**Appropriation:** None.

**Fiscal Note:** Available.

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

**Testimony For: (Government Operations)** Small businesses are buried by regulations. The sunset of existing rules is a good way to clean up the mess.

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 Practice 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 is unfair to ask an employee of an agency to sit as an administrative law judge 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 (Government Operations):** 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 administrative law judges.

The agencies fully embrace the executive order and see no reason for the bill. This bill will act like a filibuster.

**Testified (Government Operations):** PRO: Pat Hamilton, Pacific County Commissioner; Basil Badley, ACLI, AIA, HIAA; Amber Balch, AWB; Mel Sorensen, Washington Physicians Service; Carolyn Logue, NFIB; Gary Smith, IBA; Larry Keller, Washington Community Mental Health Council; Tim Boyd, Washington Forest Protection Association; Scott Sigmon, WHCA; Jan Gee, Washington Food Industry/Washington Retail Association; CON: Bruce Wishart, People for Puget Sound; Richard A. King, IBEW 46; Joe Dear, Governor's office; Gary Moore, Department of Labor and Industries; Robert Stern, Washington State Labor Council; Dan Sexton, United Association of Plumbers and Pipe Fitters; Kevin Corbin, NW Aids Foundation; Deborah Senn, Insurance Commissioner; Jeff Van Burkico, Costo; Trish Johnson, practitioner.

**Testimony For (Ways & Means):** Most of the fiscal impact comes from the rules review within seven years provision. Massachusetts reviewed their rules within existing resources. The fiscal impact should not be as large as the fiscal notes indicate. The expedited adoption of rules process should save money. Administrative law judges will cost extra but are a worthwhile expense due to their independence.

**Testimony Against (Ways & Means):** This legislation creates a complicated new set of processes which could undermine health and environmental safeguards. The bill is burdensome, costly, and will generate new lawsuits. Also, it will divert resources away from programs into bureaucracy. Using an administrative law judge will be much more costly than the present system. It would be better to work within regulatory reform passed in 1995 and the Governor's executive order than this bill.

**Testified (Ways & Means):** PRO: Amber Balch, Association of Washington Business, Gary Smith, Independent Business Association, Carolyn Logue, National Federation of Independent Business, Tim Boyd, WA Forest Protection Association, Basil Badley, ACLI, AIA, HIAA; CON: Bruce Wishart, People for Puget Sound, Melodie Banker, Office of the Insurance Commissioner.