1032-S2
Sponsor(s): 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 Title: Implementing regulatory reform.

HB 1032-S2.E - DIGEST

(DIGEST AS ENACTED)

Revises provisions relating to grants of rule-making authority of labor and industries to prohibit adoption of rules based solely on a statute's statement of intent or purpose.

Specifies procedures for the insurance commissioner to declare acts and practices of business to be unfair or deceptive.

Designates procedures for the expedited adoption of rules.

Requires each state agency to prepare a semiannual agenda for rules under development.

Encourages agencies to review existing rules.

Calls for the design of a pilot project for the consolidation of rules on the same subject.

Directs the code reviser to study the feasibility of accepting agency rule filings electronically.

Revises procedures for judicial review of rules.

VETO MESSAGE ON HB 1032-S2

May 19, 1997

To the Honorable Speaker and Members,
The House of Representatives of the State of Washington
Ladies and Gentlemen:

I am returning herewith, without my approval as to sections 101, 102, 104, 105, 106, 201, 202(9) and (10), 203, 204, 205, 207, 210, 301, 303, 304, 401, 402, 403, 404, 501, 502, 503, 602, and 604, Engrossed Second Substitute House Bill No. 1032 entitled:

"AN ACT Relating to regulatory reform;"

On March 25, 1997, I issued Executive Order 97-02, which set the stage for a thorough review of agency regulations based on need, effectiveness, clarity, statutory intent, coordination and consistency, cost, and fairness. The order also directs agencies to review their reporting requirements for businesses and their policy and interpretive statements and other similar documents. It was not by accident that I chose regulatory reform as the subject of the first executive order of my administration. It is a top priority of my office and all state agencies, and I am firmly committed to ensuring that it results in effective and meaningful regulatory improvements throughout state government.

Despite this demonstrated commitment, the legislature chose to proceed with legislation that in many cases does not measure up to what I consider effective and meaningful regulatory reform. Regulatory reform should reduce inefficiencies, conflicts, and

delays in the regulatory process. It should not increase costs, cause inefficiencies, or sacrifice continued protection of our environment and the health and safety of our citizens. While some of the proposals in Engrossed Second Substitute House Bill 1032 meet these goals, many do not.

I have approved a number of provisions in the bill that I hope will improve the regulatory process. Those sections will clarify rule making authority for the Department of Labor and Industries, improve the Insurance Commissioner's procedures for adopting rules governing unfair practices, and initiate an expedited rule adoption process. Other sections that I have approved will provide better advance notice of rule making, improve opportunities for expedited repeal of rules, encourage all state agencies to engage in a formal rule review process, and provide greater public access to Department of Revenue tax determinations. I have also signed sections that set the stage for possible consolidation of agency rules on the same subject matter, remove legal ambiguities regarding judicial review of rules, provide more local government input on state agency reports, and facilitate the preparation of small business economic impact statements. I applaud the legislature for initiating these improvements to the regulatory process.

However, other sections of the bill are not consistent with meaningful and effective regulatory reform. Sections 101 and 102 would limit the authority of the Forest Practices Board to adopt rules regarding scenic beauty. Proponents argue that these sections merely clarify the current rule making authority of the Board and ensure that its authority is consistent with standards applied to other agencies. In fact, these sections could well be interpreted as a substantive reduction of Board authority and possibly jeopardize ongoing negotiated rule making over sensitive visual impacts in the Columbia River Gorge Scenic Area. For these reasons, I have vetoed sections 101 and 102.

Sections 104 through 106 pose similar risks to the rule making authority of the Office of the Insurance Commissioner, by limiting the general rule making authority of that office. In the insurance code, effective regulatory action and consumer protection depend on a combination of specific statutory directives and general rule making authority. To eliminate general authority, as is proposed in sections 104, 105, and 106, could compromise the capacity of that agency to effectively regulate insurance companies, health care service contractors, and health maintenance organizations. In addition, sections 303 and 304 require the use of administrative law judges for adjudicative proceedings within the Office of the Insurance Commissioner. I have not been presented with sufficient evidence that the current system has created results that were unfair to aggrieved parties. It appears that existing procedures are both cost-effective and efficient. For these reasons, sections 104, 105, 106, 303, and 304 are vetoed.

Section 201 and other related sections in the bill are designed to clarify the difference between rules and other documents that agencies issue. These sections restructure the definition of "rule" within the Administrative Procedure Act (APA). Proponents believe that this language would resolve problems that

businesses have when agencies issue policy statements or other documents that should be adopted as rules. I am sympathetic with these concerns and recognize that problems do exist in this area. For that reason, in Executive Order 97-02, I directed agencies to review these kinds of documents with the Attorney General's office and affected members of the regulated community, and take appropriate corrective action. I will be monitoring that effort and will determine if legislation is necessary in 1998.

I believe this problem can be more effectively addressed on an issue-by-issue basis, not by a restructuring of the definition of "rule," as is proposed in this bill. Section 201 could substantially increase rule making in areas where rules may not be the best answer for reasons of cost, timeliness and urgency of the decision, and the sheer number of decisions that must be made in many state programs. Also, sections 202(9) and (10), 301, 401, 402, 403, and 602 contain changes that cross-reference the terms "issuance" or "de facto rule" that are defined only in section 201. Since section 201 is vetoed, these changes would be confusing and obsolete. For these reasons, I have vetoed sections 201, 202(9) and (10), 301, 401, 402, 403, and 602.

Section 203 would authorize agencies to send out the contents of regulatory notices by electronic mail or fax. This was authorized in Substitute House Bill 1323, which I have already signed.

Section 204 mandates that agencies receive and accept comments on proposed rules via voice mail if they have the equipment to receive comments by this method. Current law authorizes agencies to receive comments by voice mail. This is preferable to the mandate contained in section 204.

Section 205 requires the Department of Social and Health Services to adopt a large portion of its rules using significant legislative rule making requirements. This provision is identical to one contained in Substitute House Bill 1076, which I will sign. Section 205 also provides the Joint Administrative Rules Review Committee (JARRC) with 90 days to direct an agency to adopt rules using significant legislative rule making requirements. If an agency completes rule making before the 90 days have elapsed, it is uncertain what the legal effect of the rule would be if JARRC subsequently mandates that the rule should have been adopted under these more stringent requirements. For these reasons, I have vetoed section 205.

Section 207 requires the governor's signature on every emergency rule adopted by all agencies under the general welfare criterion. This section introduces excessive bureaucratic process and paperwork into crucial agency operations. It is also impractical to require the governor to review and approve hundreds of emergency rules, many of which require a same day turn around time. For these reasons, I have vetoed section 207.

Section 210 requires a review of all newly adopted rules within seven years, and a review of existing rules after the governor's rule review is completed. Without this review, the rules would no longer be effective. This section creates a major workload that, in most cases, will duplicate rule review efforts of agencies under Executive Order 97-02. And because the requirement

would be part of statutory rule adoption provisions of the APA, it could add substantial legal uncertainty and risk regarding the validity of many rules that may be subject to court challenge. For these reasons, I have vetoed section 210.

Section 301 shifts to agencies the burden of going forward with evidence in rule validity challenges. The purpose of this change is to make it easier for people with limited resources to challenge rules. While I am sympathetic to this concern, there is already provision in the APA to address the problem.

Section 404 gives five members of JARRC the power to establish a rebuttable presumption in judicial proceedings that a rule does not comply with legislative intent or was not adopted in accordance with all applicable provisions of law. The burden of proof to establish the validity of the rule would then fall to the agency, rather than to the person challenging the rule. I have vetoed this section because it violates the state Constitution, which requires that legislative acts be performed by the entire legislature with presentment to the governor for approval. It also raises constitutional separation of powers questions.

Sections 501 through 503 make major changes in the Equal Access to Justice Act, which was recently enacted in 1995 under ESHB 1010. The proposed changes expand the program to judicial review of all agency actions, not just APA issues; modify the standard for allowing attorney's fees; substantially increase awards and the net worth of persons who can qualify for awards; and make other changes regarding the payment of fees. I am not convinced that such changes are justified in a program that is less than two years old and has been applied to only a handful of cases. The current law, with its existing limits and standards, was intended to cure the evils the legislature sought to eliminate. For these reasons, I have vetoed sections 501, 502, and 503.

Finally, section 604 requires that agencies print on their citations the entire text of laws authorizing those citations. This may turn the "ticket books" used by some agencies into rather lengthy treatises.

For these reasons, I have vetoed sections 101,102, 104, 105, 106, 201, 202(9) and (10), 203, 204, 205, 207, 210, 301, 303, 304, 401, 402, 403, 404, 501, 502, 503, 602, and 604 of Engrossed Second Substitute House Bill 1032.

With the exceptions of sections 101,102, 104, 105, 106, 201, 202(9) and (10), 203, 204, 205, 207, 210, 301, 303, 304, 401, 402, 403, 404, 501, 502, 503, 602, and 604, Engrossed Second Substitute House Bill 1032 is approved.

Respectfully submitted,
Gary Locke
Governor