

STATE INITIATIVES IN RULEMAKING REFORM (1995-2000)

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The tide of regulatory reform sweeping the states has not slowed since the issue of regulatory reform and “freeing Americans from bureaucratic red tape” was given momentum during the 1994 congressional elections. However, it has been state lawmakers and executives who have taken and maintained the lead in implementing regulatory reform. At least thirty-one states have initiated regulatory reform since 1995, and legislation was debated, if not enacted, in several other states.

The impetus behind the states’ continued interest in regulatory reform is a recognition that releasing businesses and the regulated public from undue regulatory burdens and making regulatory bodies more accountable will lead to more competitive state industries and a stronger state economy. Key to these reforms are requirements that economic impact analyses be conducted and comprehensive and specific reviews of administrative rules be undertaken. Efforts to make agencies more accountable are occurring at both the front end of the rulemaking process, as well as at the back end with monitoring and oversight measures.

Perhaps most notable in the state reform movement is the level of involvement taken by the state Governors. Executive actions are clearly paving the way for strong and immediate implementation of reform. This article will analyze those steps taken by the states over the last five years to reform the regulatory process through the removal of burdens and the emphasis on accountability and will review the active role being taken by the state executive branch.

Removing the Burdens

Economic Impact Analysis. One of the most popular reforms being implemented by the states is a requirement that agencies perform economic impact analyses to better predict costs of administrative rules. States enacting this analysis include Arkansas,² California,³ Florida,⁴ Indiana,⁵ Kentucky,⁶ Maine,⁷ Maryland,⁸ Michigan,⁹ Minnesota,¹⁰ Mississippi,¹¹ Nevada,¹² New Hampshire,¹³ New Jersey,¹⁴ New York,¹⁵ North Dakota,¹⁶ Virginia,¹⁷ and Washington.¹⁸

In New Hampshire and Washington, the analysis requires consideration of impacts on small businesses while in Arkansas and Indiana, the amendments expanded the existing small business requirements to also include impacts on large businesses. In several states, such as Minnesota, Mississippi and New Hampshire, the agencies are directed to look at fiscal costs for both state agencies and political subdivisions of the states as well as the regulated community.

Review and Oversight of Rules. Many states have found that a comprehensive review of existing and proposed rules is essential to reform. Other states are requiring a review of rules, but addressing more specific areas, such as conformity with federal regulations and potential areas for waivers or variance. States taking this approach include Maine,¹⁹ Maryland,²⁰ Minnesota,²¹ Missouri,²² Nevada,²³ New Hampshire,²⁴ New Jersey,²⁵ New York,²⁶ North Carolina,²⁷ and Pennsylvania.²⁸

Permissions for waivers or variances are now required by states including Florida,²⁹ Iowa,³⁰ and New York.³¹ Waivers and variances have been in the form of allowances for individuals and small businesses, as well as “special circumstances” where fines or regulatory requirements may be unnecessary. For example, in Iowa, agencies are now required to adopt uniform procedures authorizing waiver of rules in individual cases where the application of an otherwise justified and sound rule would be unfair and otherwise unjustified.

Streamlining Regulations and Procedures. Streamlining of regulations and rulemaking procedures is also being undertaken. For example, the Florida Legislature recently put in place an expedited permit review process. The goal of the process is one of streamlining, to encourage the economic growth of Florida while keeping intact regulatory protections.³² Minnesota also enacted a program for single unified environmental permits - the XL Project - allowing for variances from the requirements of other state and local agencies.³³ In 1997, Governor Pataki of New York established a permit-reform initiative to eliminate unnecessary permits and to simplify existing permits.³⁴ Finally, in Missouri the Legislature consolidated the rulemaking procedures for the various state agencies into a single, uniform rulemaking procedure to be utilized by all agencies.³⁵

Becoming More Accountable

Public Participation in Rulemaking. Several states have directed agencies to improve rulemaking notice requirements through improved publication or additional notice time. States imposing greater rulemaking notice requirements include Arkansas,³⁶ Georgia,³⁷ Minnesota,³⁸ Nevada,³⁹ Rhode Island,⁴⁰ and Virginia.⁴¹

In order to get the information to the public, states are increasingly moving toward the use of Internet websites and public meetings by the agencies. California,⁴² Iowa⁴³ and Virginia⁴⁴ each have specific website requirements. In Iowa, for example, state agencies are required to maintain rulemaking dockets on their websites. Information must detail the proceeding so that members of the public can monitor, effectively participate and have a fair opportunity to influence the agency in the process. Each agency must also annually adopt and publish on its website the intended regulatory and rulemaking plans for the coming year.⁴⁵ In California, the 1996 executive order forming the Regulatory Review Task Force requires that the Task Force conduct public meetings to create recommendations for further reform of the regulatory process.⁴⁶

Public Participation in Review and Oversight. Reforms have also been initiated which enhance the ability to monitor agencies, to provide for review and oversight, and to appeal agency decisions or petition for review of particular rules. States which have engaged in this type of reform include California,⁴⁷ New Mexico,⁴⁸ North Carolina,⁴⁹ Rhode Island,⁵⁰ and Washington.⁵¹

In California, customer service surveys are now routinely required for each agency to ensure continuous feedback from the regulated community.⁵² In Washington, the Legislature strengthened public oversight by allowing any person to petition the Joint Administrative Rules Review Committee of the Legislature to suspend a rule.⁵³

The Role of the Executive

Governors are actively engaging themselves in reform in many states. Direct initiatives by the executive have come forth in Alabama,⁵⁴ California,⁵⁵ Florida,⁵⁶ Iowa,⁵⁷ Maryland,⁵⁸ Massachusetts,⁵⁹ Michigan,⁶⁰ New York,⁶¹ Virginia,⁶² and Washington.⁶³

In California, the Governor required the formation of a regulatory review task force to conduct public meetings and make specific recommendations on regulatory reform.⁶⁴ A year later, over half of the task force recommendations were addressed by executive order. These recommendations included a one-time sunset review of all existing regulations, a consolidated regulatory program that includes estimated costs of all proposed regulations and customer service surveys.⁶⁵

Upon his inauguration in 1995, Governor Chiles of Florida signed two executive orders that directed all agencies to conduct a page-by-page review of all rules and to eliminate and revise them as necessary. He identified two primary goals for the reform effort: 1) to reduce rules and regulations by 50 percent within two years; and 2) to reduce the inflexibility of rules by increasing agency discretion in the rulemaking process.⁶⁶

On February 8, 1999, Iowa Governor Vilsack launched an initiative for quality and efficiency in government. A task force was created to prepare and submit recommendations to the Governor on processes for reviewing and streamlining existing state regulations and the rulemaking process. Four separate recommendations of the task force have been adopted by executive order encompassing requirements including review of all existing rules, agency maintenance of detailed websites, creation of a Quality in Rulemaking Committee to educate agency rulemaking personnel, and adoption of uniform waiver procedures.⁶⁷

In Maryland, Governor Glendening issued an executive order regarding regulatory standards and accountability. The stated purpose of the order was to stimulate private sector job growth through a customer-focused and competitive regulatory environment. The executive order required that proposals to adopt regulations providing standards that are more restrictive or stringent than federal standards must describe the restriction, identify whether or not it places an additional burden or cost on the regulated person or business and justify the need for more restrictive standards.⁶⁸

Governor Weld of Massachusetts signed his executive order to reduce unnecessary regulatory burdens in 1996. All state agencies were required to promptly undertake a review of every regulation. Only those regulations that are mandated by law or are essential to the health, safety, environment or welfare must be retained or modified.⁶⁹

In 1998, Governor Gilmore of Virginia set forth his requirements for rulemaking. Included are certain principles to guide agencies in carrying out the executive order and to ensure that the residents of Virginia are not burdened by unnecessary and excessive regulation.⁷⁰ Another executive order signed the same year requires that agencies proposing emergency regulations prepare a regulatory review package that must meet Virginia gubernatorial approval.⁷¹

Washington's Governor Locke signed a series of three executive orders relating to rulemaking in 1997. Included were requirements that all executive branch agencies participate in the rules review process, and that all state agencies develop and implement a program to improve the quality, efficiency and effectiveness of its public services. Specifically addressed were state regulations having a significant impact on labor, consumers, businesses, and the environment. A sub-cabinet on management improvement and results was created to oversee the regulatory review process. The responsibilities of the sub-cabinet are to study and make recommendations to the Governor for statutory, administrative, organizational changes and for special pilot projects that result in regulatory improvements.⁷²

Even where direct gubernatorial action was not taken, the Governors of several states exerted substantial influence over regulatory reform by way of veto power over rules or by establishing offices of regulatory reform which developed the bills offered to the Legislature. For example, in Florida, Governor Chiles vetoed a bill in 1995 which would have amended Florida's APA. The Governor's veto message plainly indicated that he supported reform, but rejected the addition of more technical procedures to the "rules-dominated system." A year later, the Legislature came back with revised amendments to the APA which the Governor approved.⁷³ Similarly, in Washington, after both houses of the legislature had passed a set of APA amendments, the Governor vetoed principal portions. In his veto message, the Governor repeated his deep commitment to meaningful regulatory improvement and concluded that some of the vetoed provisions would only add to bureaucratic red tape.

In Georgia, amendments to the open records and open meetings laws were enacted in 1999 after advocacy by the Governor.⁷⁴ Likewise, in Illinois, at the initiative of then Secretary of State George H. Ryan (now Governor Ryan), a new codification of the administrative rules was proposed.⁷⁵ Opening the door for even more direct authority by the executive branch over rulemaking are states such as Minnesota, which adopted a provision in 1999 allowing the Governor to veto all or severable portions of an agency rule.⁷⁶ An earlier governor had opposed giving this office authority to veto rules.

Such active involvement by the executive branch is not accepted with open arms by everyone in the regulated community, as a recent New York case demonstrates. In the case of *Rudder v. Pataki*, a declaratory action was brought challenging the authority placed in the Governor's Office of Regulatory Reform (GORR) as a violation of the separation of powers doctrine. The constitutional challenge was brought after GORR rejected a Health Department regulation that would have required social work departments in urban hospitals be headed by a director with a master's degree. The New York State Court of Appeals did not reach a decision on the merits but dismissed the case based on lack of standing.

Conclusion

Regulatory reform will no doubt continue as states struggle to create reforms to improve often archaic, cumbersome and burdensome regulatory systems.⁷⁷ The active role being played by the executive and the increasing ability of the public to influence rulemaking will no doubt keep this issue on the hot topic agenda for some time to come. Some of the reforms discussed in this article may be the models for legislation or executive action in other states.

Whether or not the reform efforts being taken will be successful in the long run is yet to be seen. Some have commented positively on the economic benefits gained through reform in many states. Others have noted that reform measures have actually accomplished little, if anything. Obviously, each state will face differing challenges in its reform efforts and must plan accordingly.

Endnotes

1. John A. Knapp and Julie Ann Fishel are members of the Minneapolis/St. Paul law firm of Winthrop & Weinstine, P.A.
2. 1995 Ark. Acts No. 1104 (codified at Ark. Code § 25-15-204(d)(1)).
3. California Exec. Ord. W-144-97 (1997).

4. Florida Stat. § 120.54 (2) (1996).
5. Ind. Code § 4-22-2-28.
6. Ky. Rev. Stat. Ann. § 13A.240.
7. 1995 Me. Laws 463 (codified Me. Rev. Stat. Ann. tit. 5, §§ 8071-8072).
8. Maryland Exec. Ord. 01.01.1996.03 (1996); Joint Resolution No. 9, Acts of 1999.
9. Michigan Exec. Ord. 1995-5 (1995).
10. 1995 Minn. Laws Chapter 233.
11. 1995 Miss. Laws 499, § 1 (codified at Miss. Code Ann. § 25-43-6).
12. 1995 Nev. Laws 106, 160 (codified at Nev. Rev. Stat. Ann. §§ 233 B.0603, 233B.066).
13. 1994 N.H. Laws 412, § 1 (codified at N.H. Rev. Stat. Ann. § 541-A:5).
14. 1995 N.J. Laws 65 (codified at N.J. Rev. Stat. Ann. § 52:14B-22 to -24).
15. New York Exec. Ord. 20 (1995).
16. N.D. Cent. Code § 28-32-02(4).
17. 1995 Va. Laws 677, 717 (codified at Va. Code Ann. § 9-6.14:7.1).
18. 1995 Wash. Laws 403, § 302 (codified at Wash. Rev. Code § 34.05.320).
19. 1995 Me. Laws 347 (codified at Me. Rev. Stat. Ann. tit. 38, 341-5, sub - §§ 1-A to 1-B).
20. *Supra* note 7.
21. *Supra* note 9.
22. HB 850 (codified at Mo. Rev. Stat. §§ 536.016, .021, and .041); HB 873 (amending Chap. 620 Mo. Rev. Stat.).
23. *Supra* note 11.
24. *Supra* note 12.
25. 1995 N.J. Laws 65 (codified at N.J. Rev. Stat. Ann. § 52:14B-1 et seq.).
26. 1995 N.Y. Laws 628 (codified as N.Y. A.P.A. § 202a).
27. HB 230, Reg. Sess. (N.C. 1995) (codified at N.C. Stat. §§ 120. 70.100 to .103; 150B21.1 to .27).
28. SB 7, Session of 1997 (Public Law 633, No. 181) (codified at PA Stat. .71 P.S. § 745.2-.12).
29. *Supra* note 3.
30. Iowa Exec. Ord. 11 (1999).
31. *Supra* note 26.

32. SB 206 (amending Florida Stat. § 120.536).
33. Minn. Stat. § 114C.11.
34. Permit Reform in New York State, a report to Governor George E. Pataki, New York State Governor's Office of Regulatory Reform (1997).
35. 1995 Mo. Laws 3 (codified at Chap. 536, R.S. Mo. (administrative procedures)).
36. 1995 Ark. Acts 884 (codified at Ark. Code § 25-15-204(a)).
37. 1999 Ga. Laws 549 (codified at O.C.G.A. §§ 14-1 to -4).
38. *Supra* note 9.
39. *Supra* note 11.
40. 1995 R.I. Laws 95-300 (codified at R.I. Gen. Laws § 42-35-3).
41. 1995 Va. Laws 677, 717 (codified at Va. Code Ann. § 9-6.14:7.1).
42. Located at <http://ccr.oal.ca.gov/> (posting regulations and explanations of their legal effects).
43. Iowa Exec. Ord. No. 9 (1999) (requiring each state agency to maintain rulemaking dockets on its website).
44. Located at <http://www.townhall.state.va.us> (detailed information provided throughout the regulatory process).
45. *Supra* note 46.
46. California Exec. Ord. W-131-96 (1996).
47. *Supra* note 2.
48. NMSA § 39-3-1.1 (amendments of 1998 and 1999).
49. *Supra* note 27.
50. *Supra* note 16.
51. Washington Exec. Ord. 97-02 (1997).
52. *Supra* note 2.
53. 1995 Wash. Laws 403, § 505 (codified at Wash. Rev. Code § 34.05).
54. Alabama Exec. Ord. 42 (1998).
55. *Supra* notes 2, 49.
56. Florida Exec. Ords. 95-74 and 95-256 (1995).
57. Iowa Exec. Ords. 8-11 (1999).
58. Maryland Exec. Ord. 01.01.1996.03 (1996).
59. Massachusetts Exec. Ord. 384 (1996).

60. Michigan Exec. Ords. 1995-5 and 2000-1.
61. New York Exec. Ords. 2, 7, 20 (1995).
62. Virginia Exec. Ords. 24-98 and 25-98 (1998).
63. Washington Exec. Ords. 97-01 to -03 (1997).
64. *Supra* note 49.
65. *Supra* note 2.
66. *Supra* note 60.
67. *Supra* note 61.
68. *Supra* note 62.
69. *Supra* note 63.
70. Virginia Exec. Ord. 25-98 (1998).
71. Virginia Exec. Ord. 24-98 (1998).
72. *Supra* note 67.
73. Florida Stat. § 120.54 (1996).
74. 1999 Ga. Laws 549; 1999 Ga. Laws 552; 1999 Ga. Laws 809; 1999 Ga. Laws 1222 (codified at various sections of O.C.G.A. §§ 50-18-70 to -77 and -14-1 to -4).
75. 22 Ill. Reg. 5416 (1998).
76. Minn. Session Laws 1999, Chapter 129-H.F. No. 1905, amending Minn. Stat. 1998, § 14.05, by adding a subdivision 14.16, subd. 3; 14.26 subd. 3; 14.386; and 14.389, subd. 3.
77. In Michigan, the reform efforts appear very close to comprehensive APA reform. *See* Croley, Steven P., *State Administrative Law Reform: Recent Experience in Michigan*, 8 *Widener J. Pub. L.* 347 (1999). In Mississippi, an APA bill introduced in 1999 was reintroduced in the 2000 session. Governor Musgrove has now established an Advisory Group to make recommendations for APA reform in Mississippi. *See* Asimow, Michael, *Administrative and Regulatory Law News*, News from the States, Vol. 24, No. 4.