

Presentation by Legislative Counsel

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MEMORANDUM

March 14, 2013

SUBJECT: Biennial Report Relating to Review of Proposed Regulations by the Legislative Affairs Agency under AS 24.20.105 (2011 - 2012)

TO: Senator Charlie Huggins, President of the Senate
Representative Mike Chenault, Speaker of the House
Representative Lora Reinbold, Chair, ARRC

FROM: Terri Lauterbach
Legislative Counsel



During the past biennium, I was the attorney at LAA-Legal who reviewed proposed regulations under AS 24.20.105. This memorandum is a report to you about general facts relating to that review process for the calendar years 2011 - 2012, with some comparisons to prior time periods.

Under AS 24.20.105, LAA-Legal may review regulations for their legality and constitutionality, consistency with existing statutes and legislative intent, and adequacy of statutory authority for the proposed regulations. If I find what I think may be a legal problem during review, I ask the agency about it.¹ If I don't think that the agency responds with sufficient explanation of the legal basis for the proposed regulation, I write a memo to the ARRC, the President of the Senate, and the Speaker of the House. The memo also goes to the Department of Law and to the state agency that proposed the regulations. This memo goes out to the specified people while the "public comment" period is still in effect for the proposed regulation. Because AS 24.20.105 makes my review confidential, it does not become part of the public record but the ideas in the memo might be used by legislative members to compose their own "public comment" for submission to the proposing agency or to propose legislation to clarify the statutes involved.

This review process has resulted in fairly consistent statistics in the past three biennia (2007 - 2008, 2009 - 2010, and 2011 - 2012). There were about 200 - 240 packets of

¹ Starting last fall, I may also contact the prime sponsor of the legislation that enacted a new state statute that is being implemented by proposed regulations (if that legislator is still in the legislature) to ascertain whether the prime sponsor thinks the proposed regulations are consistent with the new legislation.

regulations each two-year period with the largest number (one-third; 65 - 75) being proposed by the Department of Commerce, Community, and Economic Development (DCCED), including public corporations within DCCED. Two-thirds of DCCED's proposed regulations were related to occupational licensing. Some of these packets were simple fee changes; others were extensive re-writes of regulations governing qualifications for licensure within various professions. The Department of Education and Early Development and the Department of Health and Social Services were the agencies with the next two largest numbers of proposed regulations projects, each issuing about 15 percent of the total number of regulations proposed.

So, roughly 60 percent of all proposed regulations came from three departments each of the past three biennia. The remaining 40 percent came from other agencies: Division of Motor Vehicles, Fish and Game, Revenue, Environmental Conservation, Alaska Oil and Gas Conservation Commission, Public Safety, Corrections, Law, Transportation and Public Facilities, Labor and Workforce Development, etc. Only one-fifth or so of the proposed regulations implemented new state legislation.²

In 2007 - 2008, I found legal issues within, and thus submitted memos about, 20 percent of the total number of regulations packets. The comparable figures for the other two biennia show a decrease: only 15 percent of packets were viewed as having legal issues in 2009 - 2010 and only 7 percent in 2011 - 2012. The memos were evenly split as to whether they were written about regulations implementing "new or changed state statutes" or about regulations that were not caused by a change in state statutes.

In my opinion, the original goal of the review process under AS 24.20.105 (enacted in 2004) is being achieved: to provide an "early warning" system when the legislative and executive branches may be in disagreement about what a statute authorizes with respect to regulations. I think that some of my memos, comments submitted by legislators during the "public comment" period, and my interactions with the agencies have possibly avoided more expensive and time-consuming litigation after the regulations would have become final. The cooperation of the executive branch agencies in discussing our differing views has been extremely helpful, and the confidential nature of those "off-the-record" discussions are key to their success.

I would be happy to discuss the non-confidential aspects of the regulation review process in more detail with any of you, or to answer questions you may have about this

² Quite a number of proposed regulations implemented changes in federal law, such as changes in Medicaid and environmental standards, or they updated references to codes established by third parties, such as safety standards for mechanical and electrical systems, for which new versions come out regularly from the third party.

memorandum. I can usually be reached directly on Monday afternoons or from about 10:30 - 5:30 on Wednesdays and Thursdays at 465-6652 or you can leave a message for me at the general number for LAA-Legal: 465-2450.³

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cc: Senator Cathy Giessel, Vice-Chair, ARRC
Senator Gary Stevens, Member, ARRC
Senator Hollis French, Member, ARRC
Representative Mike Hawker, Member, ARRC
Representative Geran Tarr, Member, ARRC

Deborah Behr, Regulations Attorney, Department of Law

³ The LAA position designated for review of proposed regulations is a half-time position.