



**HB**

**33**



**HOUSE COMMITTEE REPORT**

3-17-05

(7)

Date Referred to Committee: January 10, 2005

FURTHER REFERRALS: Judiciary

Date of Committee Action: March 16, 2005

The LABOR AND COMMERCE Committee considered:

HB 33

HOUSE BILL NO. 33

EFFECT OF REGULATIONS ON SMALL BUSINESSES

"An Act relating to the effect of regulations on small businesses; and providing for an effective date."

Recommends it be replaced with [ ] HCS or [X] CS for HB 33 (LTC)  
 For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR \_\_\_\_\_ [ ] Same Title [X] New Title

- [ ] attach amendments
- [ ] add new referral to \_\_\_\_\_ Committee
- [ ] Letter of Intent \_\_\_\_\_ Committee

List of Abbrev for Depts.:

- ADM
- CED
- COR
- CRT
- EED
- DEC
- DFG
- GOV
- HSS
- LEG
- LAW
- LWF
- MVA
- DNR
- DPS
- REV
- DOT
- UA

1 QFN  
5 FN  
6 GOV / all depts

NEW FISCAL NOTES				
*Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
Adm	1			✓
DPS	2		✓	
HSS	3	✓		
LWF	4	✓		
DNR	5	✓		
GOV / all depts	6	✓		

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
<i>[Signature]</i>	CRAWFORD	②		⑤	✓
<i>[Signature]</i>	LYNN				X
<i>[Signature]</i>	Kott				X
<i>[Signature]</i>	LODOUT				X
<i>[Signature]</i>	CHITENSEN				X
<i>[Signature]</i>	Roksbreg				X
Chair: <i>[Signature]</i>	ANDERSON		X		
Chair:					

24G-1  
4/5/2005  
(9:28 AM)

AMENDMENT #1 - PASSED

OFFERED IN THE HOUSE JUDICIARY  
COMMITTEE

BY REP. MCGUIRE

TO: CSHB 33(L&C)

1 Page 1, line 5:

2 Delete "an"

3 Insert "a designated state"

4

5 Page 1, line 7:

6 Delete "an"

7 Insert "a designated state"

8

9 Page 1, line 8:

10 Following "businesses, the":

11 Insert "designated state"

12

13 Following "shall":

14 Insert the following new material:

15 "(1) notify the department that the designated state agency intends to  
16 adopt the proposed regulation or has received a petition under AS 44.62.220 to adopt the  
17 proposed regulation;

18 (2)"

19

20 Page 1, line 9, following "section":

21 Delete ","

1           Insert "; and

2                               (3)"

3

4   Page 1, line 10, following "section":

5           Delete ", and notify the department that the agency intends to"

6           Insert "."

7

8   Page 1, lines 11 - 12:

9           Delete all material.

10

11   Page 1, line 13:

12           Delete "An"

13           Insert "A designated state"

14

15   Page 2, line 1, following "of the":

16           Insert "designated state"

17

18   Page 2, line 15:

19           Delete "an"

20           Insert "a designated state"

21

22   Page 2, line 23, following "the":

23           Insert "designated state"

24

25   Page 3, line 3:

26           Delete "agencies"

27           Insert "a designated state agency"

28

29   Page 3, line 5, following "regulations":

30           Delete "of"

31

1 Page 3, line 6, following "(1)":

2 Insert "of"

3

4 Page 3, lines 8-17:

5 Delete all material and insert:

6 "(2) of the Alaska Energy Authority;

7 (3) of the Department of Environmental Conservation that are adopted

8 under the authority of AS 46.03.050 - 46.03.900, AS 46.04, AS 46.08 - AS 46.14,

9 AS 46.35, or AS 46.45;

10 (4) of the Local Boundary Commission; or

11 (5) mandated by federal law as a condition for participating in or

12 implementing a federally subsidized or assisted program, or for obtaining or maintaining

13 state primacy in a federal program."

14

15 Page 3, line 18:

16 Delete "an"

17 Insert "a designated state"

18

19 Page 3, following line 25:

20 Insert the following new material:

21 "(2) designated state agency" means the

22 (A) Department of Commerce, Community, and Economic

23 Development;

24 (B) Department of Environmental Conservation;

25 (C) Department of Health and Social Services; and

26 (D) Department of Labor and Workforce Development;"

27

28 Page 3, line 26:

29 Delete "(2)"

30 Insert "(3)"

31

1 Page 3, line 30:

2 Delete "(3)"

3 Insert "(4)"

4

5 Page 4, line 1, following "regulation;":

6 Delete "or"

7

8 Page 4, line 2:

9 Delete "(4)"

10 Insert "(5)"

11

12 Page 4, line 4:

13 Delete "(5)"

14 Insert "(6)"

15

16 Page 4, line 7, following "employees;":

17 Insert "or"

18

19 ~~Page 4, lines 8 - 9:~~

20 ~~Delete all material.~~

21

22 ~~Page 4, line 10:~~

23 ~~Delete "(C)"~~

24 ~~insert "(B)"~~

25

26 Page 4, line 15:

27 Delete "an"

28 Insert "a designated state"

29

30 Page 4, line 16, following "section,":

31 Insert the following new material:

*A#1 to A#1 by Gruenberg  
PASSED*

*Delete this portion of  
the Amendment*

1                   "(1) "designated state agency" has the meaning given in AS 44.62.218,  
2                   enacted by sec. 1 of this Act;  
3                   (2)"

Amendment #2 - PASSED

to CSHRB 33(L+C)

by Rep. Gruenberg

Page 4, line 8

After "corporation"

Insert "employing fewer than 100 employees"

To CBMB 33(L+C)  
To page 2 line 3

Amendment #3  
Sponsor: Representative Gara

PASSED

delete "and an estimate of the number"

To CS11B33(L+C)  
To page 2 line 18

Amendment #4  
Sponsor: Representative Gara  
**PASSED**

delete "while accomplishing"

insert "without compromising"

**To: Representative Coghill**

**CC: Representative McGuire, Chair  
Representative Gara  
Representative Gruenberg  
Representative Kott**

**From: Michael Pawlowski, Staff to Representative Meyer**

**Re: 43 U.S.C. 1602 (j)**

**The section cited on page 4 of HB 33 relating to a definition of a "village corporation" is a citation from the Alaska Native Claims Settlement Act.**

**1602 is the definition section and (j) is the definition of a village corporation under ANCSA.**

**The definition of a "Village Corporation" is itself contingent on the *laws of the State of Alaska*.**

**j) "Village Corporation" means an Alaska Native Village Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village in accordance with the terms of this chapter.<sup>[2]</sup>**



# REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

## MEMORANDUM

**DATE:** March 17, 2004

**TO:** Representative Lesil McGuire, Chairman  
House Judiciary Committee

**FROM:** Representative Kevin Meyer

**RE:** Hearing Request for House Bill 33 *Effect of Regulation on Small Businesses*

---

Please schedule HB 33 *Effect of Regulation on Small Businesses* for a hearing in the House Labor and Commerce at your earliest convenience.

HB 33 requires regulatory agencies to consider the impact of regulations on small businesses and to consider alternative methods of reaching the same regulatory goal.

Included in this packet:

- HB 33 *Effect of Regulation on Small Businesses* v. LS-0239\S
- Sponsor Statement
- Sectional Analysis
- Fiscal Notes
- HB 33 *Effect of Regulation on Small Businesses* v. LS-0239\A
- Change Summary
- Regulatory Process Chart
- Employment Information from Department of Labor
- Small Business Profile Alaska
- State Chamber Letter
- SBA: Regulatory Flexibility Map
- SBA Office of Advocacy Model Legislation Packet
- New York: A Model for Regulatory Reform in Washington State
- North Dakota Small Entity Regulatory Analysis and Impact Statement Guidelines



# REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

## Sponsor Statement

### House Bill 33

**“An Act relating to the effect of regulations on small businesses; and providing for an effective date.”**

In 2003, 97% of all Alaskan businesses were small businesses. One out of every 14 Alaskans runs a small business, and in recent years all of the net job growth in Alaska was generated by small businesses. Small business provides the economic infrastructure that serves large development concerns and facilitates organic growth in the economy.

Regulations written to address macro issues can inadvertently create hurdles for small businesses. House Bill 33 requires state regulatory agencies to consider the impact of proposed regulations on small businesses.

The process set in HB 33 begins when an agency proposes or reviews a regulation. Before an agency adopts a proposed regulation it will prepare an economic effect statement that identifies and estimates the number of small businesses that would be subject to the proposed regulation, the costs to the businesses of complying with the regulation, and alternative methods of achieving the goal of the regulation.

HB 33 does not prohibit agencies from promulgating rational regulations that adversely impact small businesses. HB 33 simply requires agencies to consider the impact of regulation and examine alternatives.

Adding an emphasis on the impact of regulation on small businesses to the regulatory process is a broad and significant policy statement. HB 33 is a bottom up approach to economic development, a step towards creating a more responsive government, and an effort to strengthen Alaska's economy for sustainable growth.

Email: [Representative\\_Kevin\\_Meyer@legis.state.ak.us](mailto:Representative_Kevin_Meyer@legis.state.ak.us) • Toll Free: (866) 465-4945

Session: State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-4945 Fax: (907) 465-3476

Interim: 716 W. 4th Ave., Anchorage, Alaska 99501-2133 • Phone: (907) 269-0199 Fax: (907) 269-0197

## Changes to HB 33 in CS HB 33 version 24-LS 0379\

### HB 33

- **Section 1 (a)** "Before an agency adopt..."
- **Section 1 (a)** "that may have an adverse effect...."
- **Section 1 (b)** "using existing information and without conducting new studies that are extensive."
- **Section 1 (e)** "Every five years...the agency shall review..."

### CSHB 33

- **Section 1 (a)** "Before and agency adopts...or when a person petitions an agency under AS 44.62.220."  

Alaska law contains a petition provision that allows a person to raise an objection to an existing regulation.
- **Section 1 (a)** "that governs the conduct of.."  

Committee members raised the concern that an agency could not determine which regulations have an "adverse effect on" prior to conducting the economic effect statement. Changing the standard to "governs the conduct of" clarifies when the process set in section 1 should be initiated.
- **Section 1 (b) -**
  1. Using information received under the public comment process.
  2. Input from DCED.
  3. Information in the files of the agency.
- **Section 1 (b) 1 -**
  1. Added "general" before description
- **Removed**  
Rather than reviewing every regulation every five years, regulations are reviewed only upon petition per section 1 (a).

## Changes to CSHB 33 version \G in CS HB 33 version 24-LS 0379\L

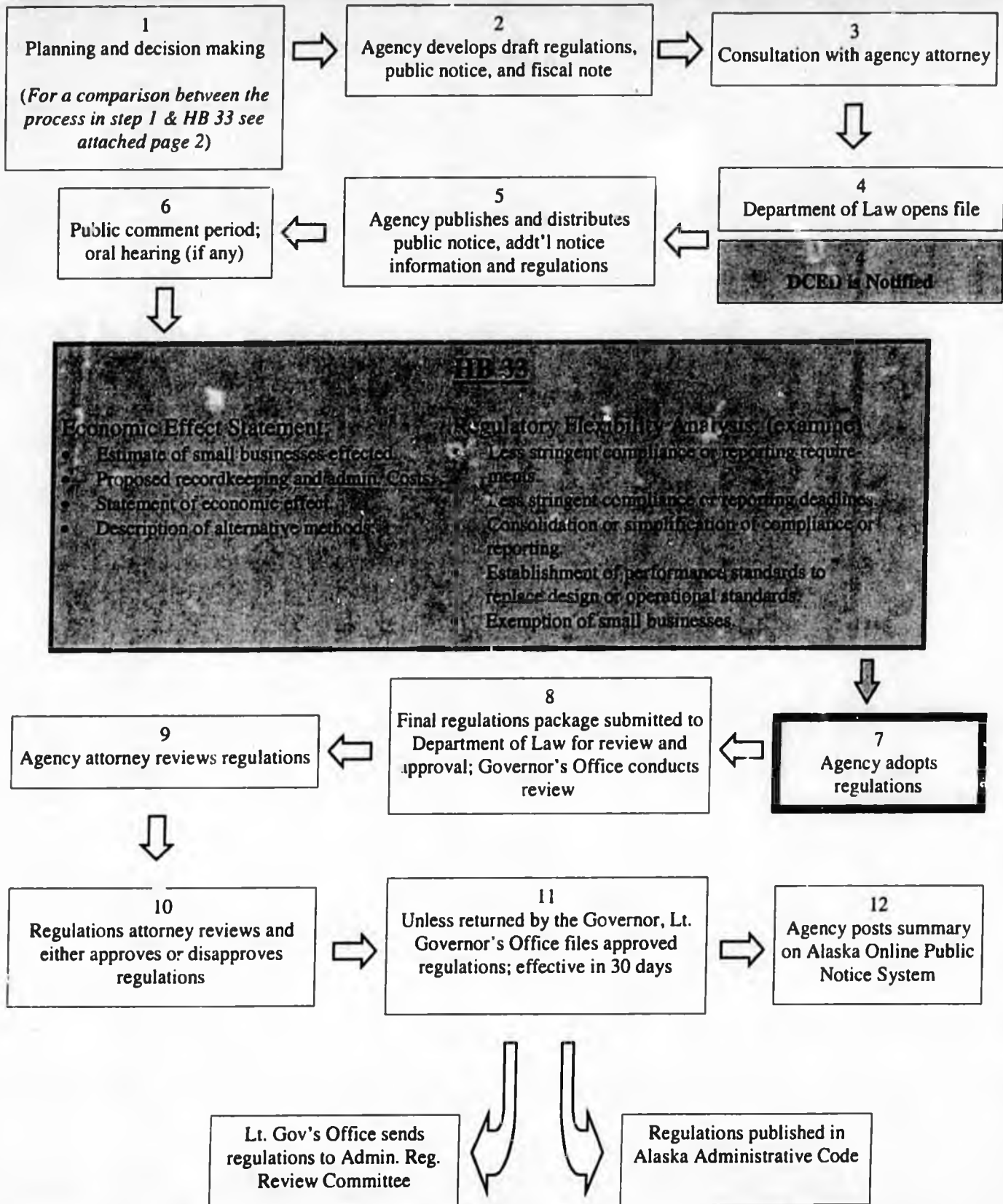
### HB 33

- Previously applied to all regulatory agencies
- Removed the judicial review provision
- Definitions

### CSHB 33

- **Section 1 (f)** - adds a list of exemptions.
- **Section 1 (g)** - included a specific prohibition on judicial review. But reiterates that review under AS 44.62.300 is not prevented.
- **Section 1 (h)**
  - 1.** Department—DCED
  - 2.** "governs the conduct of" - does not include the imposition of a fee to cover the cost of a state service if the fee is charged uniformly to all users.
  - 3.** "proposed regulation" does not include the repeal of an existing regulation.
  - 4.** "Regulation" does not include "emergency regulations."
  - 5.** "Small Business" - less than 100 employees, a village corporation, or a public utility with fewer than 100 employees.

**STEPS IN THE REGULATION ADOPTION PROCESS UNDER HB 33**  
 Shaded boxes indicate steps added by HB 33



## **DRAFTING MANUAL FOR ADMIN. REGULATIONS**

### **STEP 1: PLANNING & DECISION MAKING**

"An agency should ask itself the following questions at the beginning of any regulations project."

1. What did the legislature intend to be accomplished through the program in question?
2. In reviewing relevant statutes, are there unanswered questions, ambiguous terms, or program details that must be clarified through regulations? Does the agency intend to allow electronic applications, submissions, or signatures?
3. What does the agency want to accomplish by adopting regulations?
4. What constitutional or statutory rights of individuals will be affected?
5. Who has the statutory authority to adopt the regulations (i.e., commissioner, board, governor)?
6. Which members of the public constitute the primary audience for the regulations and how should the regulations be organized and written to be most easily understood by them? Is there a way to write the regulations to achieve the agency's intent while keeping the public's cost of compliance low?\*
7. When do the regulations need to be in effect?
8. How will the regulations impact the agency's existing budget? Will more money be needed to implement the regulations? What are the alternatives?

## **HB 33**

### **ECONOMIC EFFECT STATEMENT**

"An agency shall use information received under AS 43.02.215 information received by the department under AS 43.02.215 and other information available to the agency to prepare an economic effect statement on regulations under this section. The economic effect statement shall provide:

1. An identification (suggest replacing with a more detailed description) and estimate of the number of small businesses that would be affected by the proposed regulation.
2. The projects, including recordkeeping and other administrative costs that small businesses would be required to incur in order to comply with the proposed regulation, including an identification of the type of professional skills necessary to prepare the report or record or take administrative action.
3. A statement of the probable effect that the proposed regulation would have on small businesses whose conduct would be governed by the proposed regulation.
4. A description of any alternative methods of achieving the purpose of the proposed regulation that would be less intrusive or less costly for the small business whose conduct would be governed by the proposed regulation.

\*Underline added for emphasis by author.

**Workforce Information**  
Department of Labor and  
Workforce Development

**Employment Size in Alaska**

<b>Businesses</b>	<b>Number</b>	<b>Total number of Employees</b>
Not Affected:		
1000 and over employees	36	73,796
500 to 999 employees	54	38,137
250 to 499 employees	86	30,060
100 to 249 employees	267	40,111
50 to 99 employees	428	29,107
<b>Total:</b>	<b>871</b>	<b>211,211</b>

<b>Businesses</b>	<b>Number</b>	<b>Total number of Employees</b>
Affected:		
20 to 49 employees	1,377	41,651
10 to 19 employees	2,127	28,652
5 to 9 employees	3,348	21,961
1 to 4 employees	9,579	16,037
<b>Total:</b>	<b>16,431</b>	<b>108,301</b>

## Small Business Profile: ALASKA

Small businesses make a significant contribution to the U.S. economy, and in 2003, they were the engine of Alaska's economic performance. Nationally, half of U.S. non-farm private output and employment is generated by small firms with 500 or fewer employees; in Alaska, small business owners—including women, minorities, and home based individuals—were leaders in the state's economy in 2003. The Office of Advocacy's *Small Business Profile* reports on small businesses in the state using the most currently available data.

**Number of Businesses.** The estimated total number of small businesses in Alaska in 2003 was 629,000.<sup>1</sup> Of the 16,825 employer firms in 2003, 96.9 percent or an estimated 16,300 were small firms. The estimated number of employer businesses increased by 1.9 percent in 2003. The most recent data available show that non-employer businesses numbered 46,643 in 2001. Self-employment increased by 9.8 percent, from 28,641 in 2002 to 31,458 in 2003. (Source: U.S. Dept. of Labor, Employment and Training Administration; U.S. Dept. of Commerce, Census Bureau; U.S. Dept. of Labor, Bureau of Labor Statistics.)

**Women-Owned Businesses.** Self-employment by women increased by 10.6 percent, from 11,514 in 2002 to 12,732 in 2003 and represented 40.3 percent of self-employed persons in the state. Women-owned businesses generated \$1.9 billion in revenues, employed 16,520 workers, and constituted 16,600 firms or 25.9 percent of all firms in 1997. (Sources: U.S. Dept. of Labor, Bureau of Labor Statistics; U.S. Dept. of Commerce, Census Bureau.)

**Minority-Owned Businesses.** In 1997, 17.8 percent or 1,900 of the minority-owned businesses in the state were employer firms, and they generated 87.4 percent of the total minority-owned business revenue of \$2.2 billion. There were 1,400 Hispanic-owned businesses; 900 Black-owned businesses; 1,800 Asian and Pacific Islander-owned businesses; and 6,800 American Indian and Alaskan Native-owned businesses in 1997. (Source: U.S. Dept. of Commerce, Census Bureau.)

**Business Turnover.** The estimated number of new employer businesses was 2,441 in 2003, which is 7.5 percent more than

the previous year. Business bankruptcies increased by 0.8 percent, and totaled 121 in 2003. Business terminations decreased by 1.3 percent and numbered 2,507 in 2003. (Source: U.S. Dept. of Labor, Employment and Training Administration; Administrative Office of the U.S. Courts; U.S. Dept. of Commerce, Census Bureau.)

**Employment.** Small businesses with fewer than 500 employees numbered 15,455 in 2001 and employed 127,680 people or 59.6 percent of the state's non-farm private workforce (Table 1).<sup>2</sup> Total net employment gain in the state amounted to 9,031 between 2000 and 2001. Of that number, 6,350 are attributable to MSAs (metropolitan statistical areas). During the same time period, firms with fewer than 20 employees gained 2,824 jobs. (Source: U.S. Dept. of Commerce, Census Bureau, Statistics of U.S. Businesses. Note: Urban (MSA) and rural (non-MSA) employment data is available at: [www.sba.gov/advo/stats/data.html](http://www.sba.gov/advo/stats/data.html).)

**Small Business Income.** Small business proprietors' income in 2003 increased by 5.8 percent, from \$2.2 billion in 2002 to \$2.3 billion in 2003. (Source: U.S. Dept. of Commerce.)

**Finance.** Small firms typically use commercial bank lenders and rely on local bank services. Over the last five years there has been a gradual decline in the number of banks in Alaska (Table 3). The Office of Advocacy has identified banks in each state that make the most loans to small businesses. This information is available in its banking studies available at [www.sba.gov/advo/stats](http://www.sba.gov/advo/stats).

To learn more about the Office of Advocacy's research, data, and analyses of small businesses, visit [www.sba.gov/advo](http://www.sba.gov/advo), call (202) 205-6503 or email [advocacy@sba.gov](mailto:advocacy@sba.gov).

Sign up at <http://web.sba.gov/list> for email delivery of:

- Advocacy Communications
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- Advocacy Press
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<sup>1</sup> The Office of Advocacy's estimate of the total number of state small businesses is based on the percent of small businesses (2001 Census Bureau firm size data) multiplied by the total number of employer businesses in 2003 (Dept. of Labor). To this total, we add the 2001 number of non-employer firms (Census Bureau).

<sup>2</sup> The number of employers listed in Table 1 is not directly comparable to the figures listed in the *Number of Businesses* section due to different data sources.

**Table 1. Firms and Employment in Alaska by Industry and Firm Size, 2001 (Thousands)**

Industry	Non-employer Firms	Employer Firms			Employment		
		Total	< 100	< 500	Total	< 100	< 500
<b>Total<sup>1</sup></b>	<b>46.64</b>	<b>15.96</b>	<b>15.19</b>	<b>15.46</b>	<b>214.3</b>	<b>92.95</b>	<b>127.68</b>
Agriculture, forestry, fishing, and hunting	8.6 <sup>2</sup>	0.31	0.31	0.31	1.61	1.07	*
Mining	0.19	0.1	0.07	0.08	9.7	0.71	2.37
Utilities	0.08	0.07	0.06	0.06	1.93	*	*
Construction	3.92	2.3	2.27	2.28	15.18	10.67	12.2
Manufacturing	1.01	0.45	0.42	0.43	11.01	2.95	4.82
Wholesale trade	0.62	0.6	0.49	0.51	7.15	0.49	5.34
Retail trade	4.2	2.15	2.02	2.05	33.4	2.02	16.37
Transportation and warehousing	2.04	0.77	0.68	0.71	18.1	0.68	7.71
Information	0.45	0.23	0.19	0.2	6.43	1.72	2.77
Finance and insurance	0.8	0.4	0.34	0.35	7.08	2.33	3.32
Real estate; rental and leasing	3.58	0.68	0.65	0.67	4.86	2.96	4.86
Professional, scientific, and technical services	5.58	1.58	1.5	1.51	11.4	7.09	7.58
Management of companies and enterprises	N/A	0.08	0.04	0.06	2.77	*	0.62
Admin., support, waste mngt., and remed., services	2.07	0.87	0.79	0.81	11.26	0.79	6.04
Educational services	0.87	0.2	0.19	0.19	2.66	NA	*
Health care and social assistance	4.03	1.52	1.45	1.49	32.6	11.2	18.58
Arts, entertainment, and recreation	2.37	0.45	0.44	0.44	*	*	*
Accommodation and food services	1.48	1.54	1.49	1.52	21.93	12.13	16.84
Other services	4.73	1.63	1.58	1.6	11.35	*	*
Auxiliary, except corp, subsidiary, and regional managing offices	N/A	0.02	-	0.01	*	*	*
Unclassified	N/A	0.36	0.36	*	*	*	*

<sup>1</sup>Data suppressed to protect the confidentiality of individual firms.  
Source: U.S. Department of Commerce, Census Bureau.

**Table 2. Non-farm Establishment Job Gains and Losses by Firm Size, 2000–2001 (Thousands)**

	Firm Size (Number of Employees)			
	Total	1–19	1–499	500+
<b>Job Gains:</b>				
New establishments	12.51	4.73	7.53	4.98
Expanding establishments	25.16	8.94	17.31	7.85
<b>Job Losses:</b>				
Downsized establishments	-18.73	-5.98	-14.09	-4.64
Closed establishments	-9.91	-4.86	-8.17	-1.74
<b>Net change in employment</b>	<b>9.03</b>	<b>2.82</b>	<b>2.58</b>	<b>6.45</b>

Source: U.S. Department of Commerce, Bureau of the Census, Statistics of U.S. Businesses, 2001.

**Table 3. Number of Banks in Alaska by Asset Size, 1995 – 2003**

Number of Banks Per Year					Number of Banks by Asset Size, 2003				
1995	2000	2001	2002	2003	Below \$100M	\$100M–\$500M	\$500–\$1B	\$1B–\$10B	Over \$10B
8	6	6	6	6	1	2	1	2	0

Source: U.S. Small Business Administration, Office of Advocacy, from data collected by the Federal Reserve Board.  
The full list of small-business-friendly banks can be found on the Office of Advocacy's website at [www.sba.gov/advocacy/lending](http://www.sba.gov/advocacy/lending).

o

**Headquarters:**  
217 2nd Street, Suite 201  
Juneau, Alaska 99801  
(907) 586-2323 FAX 463-5515  
www.alaskachamber.com



**Regional Office:**  
601 W. 5th Ave., Suite 700  
Anchorage, Alaska 99501  
(907) 278-2722 FAX 278-6643

ALASKA  
★ STATE ★  
CHAMBER  
OF COMMERCE

March 15, 2005

Representative Kevin Meyer, Co-Chair  
House Finance Committee  
Capitol Room 515  
State Capitol  
Juneau, Alaska 99801

Dear Representative Meyer,

RE: HB 33

The Chamber of Commerce supports any and all legislation meant to streamline the regulatory process, which ultimately allows Alaskan businesses to prosper. While HB 33 does not streamline the process, it ultimately creates an avenue of awareness for departments during the drafting of regulations. Incorporating business awareness into the rulemaking process should ultimately create better regulations that work with business, which should lessen the impact of legal action on new regulations.

Already complicated, the rulemaking process is often obfuscating and difficult to incorporate into any private business. HB 33 certainly makes progress in creating a regulatory process that is responsive to business interests. The "L" version of HB 33 simply requires the department to compile a list of affected businesses, while also requiring an impact statement using current and readily accessible data.

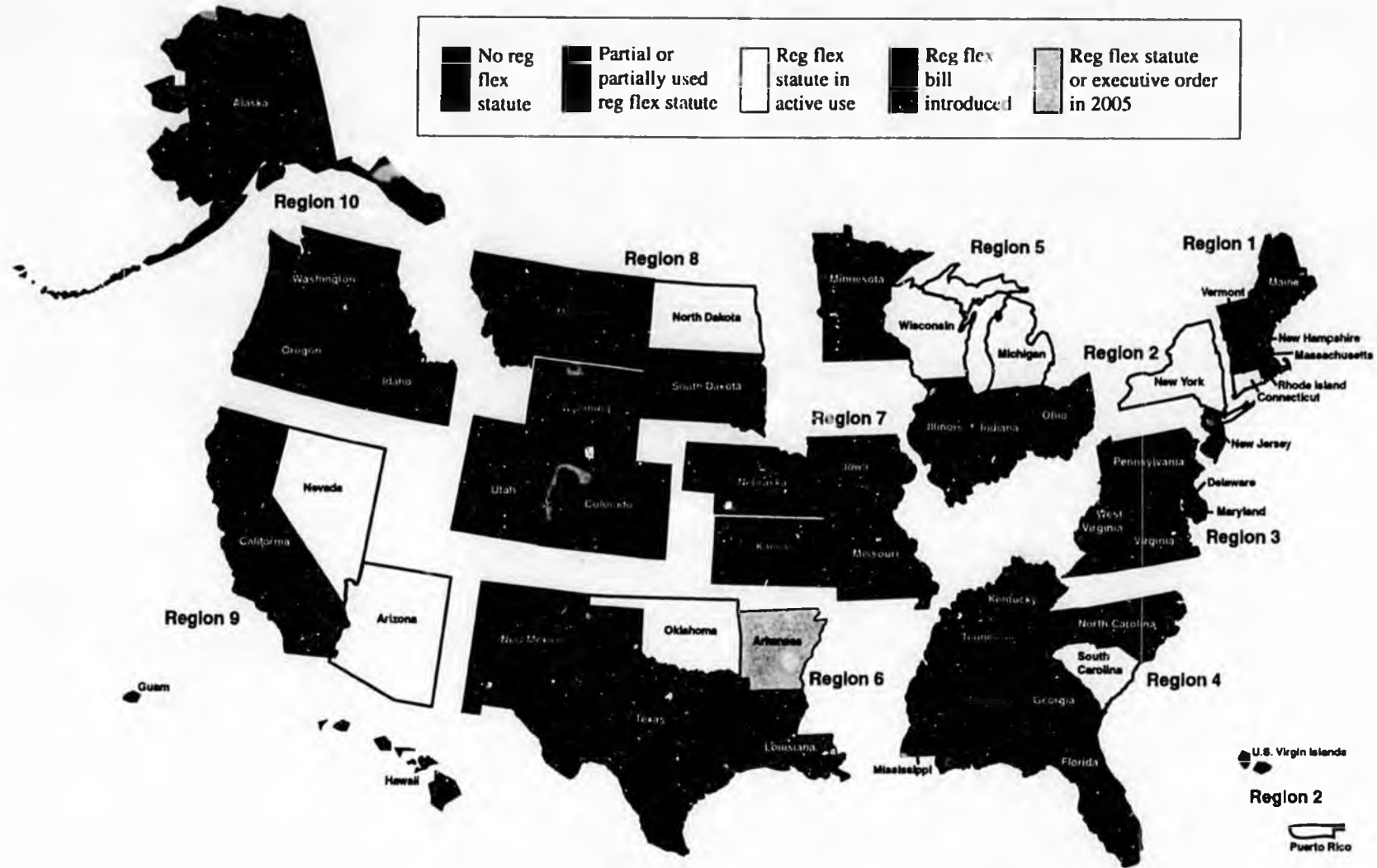
The State Chamber of Commerce strongly supports HB 33 and we are hopeful the bill will reach final passage this session. As written, HB 33 appears to be a no-brainer with its simplicity and straightforward approach in creating business awareness for the regulatory process.

Respectfully,

Wayne A. Stevens  
President/CEO

# State Regulatory Flexibility Model Legislation Initiative

## 2005 Legislative Activity





**Office of Advocacy**

*A Voice for Small Business*

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**Small Business  
Friendly Regulation  
Model Legislation  
for States**

August 2003 edition

Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. Appointed by the President and confirmed by the U.S. Senate, the Chief Counsel for Advocacy directs the office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Economic research, policy analyses, and small business outreach help identify issues of concern. Regional Advocates and an office in Washington, DC, support the Chief Counsel's efforts.

For more information on the Office of Advocacy, visit <http://www.sba.gov/advo>, or call (202) 205-6533. Receive email notices of new Office of Advocacy information by signing up on Advocacy's Listservs at <http://web.sba.gov/list>

- Advocacy Communications
- Advocacy Newsletter
- Advocacy Press
- Advocacy Research

## Foreword

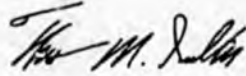
The mission of the U.S. Small Business Administration's Office of Advocacy has always been to help reduce the regulatory burden placed on small business. While the focus of that activity has been mostly at the federal level, Advocacy recognizes that state and local governments can also be a source of burdensome regulations.

A 2001 study funded by Advocacy, *The Impact of Regulatory Costs on Small Firms*, by W. Mark Crain and Thomas D. Hopkins, shows that small businesses spend nearly \$7,000 each year per employee to comply with federal regulations. That is \$2,500 more per employee than large firms spend. President Bush has an active and aggressive small business plan that includes reducing federal regulatory burdens on small business.

For that reason, the Office of Advocacy presented draft model regulatory flexibility legislation for consideration by state legislatures in December 2002. Since the introduction of this report, *Small Business Friendly Regulation: Model Legislation for States*, many states have taken steps to introduce or strengthen regulatory flexibility legislation. North Dakota took the lead in this effort and Governor John Hoeven signed a bill into law on April 29, 2003. Colorado followed, with Governor Bill Owens signing regulatory flexibility legislation into law on June 3, 2003. The Missouri legislature has sent a bill to Governor Bill Holden for signature. All told, 12 states introduced regulatory flexibility legislation during the 2003 spring legislative session.

These state initiatives are showing results. One example of how states can fix one-size-fits-all rules involved a New York Department of Motor Vehicles regulation for safety devices and road restrictions for trailers and towing. While intended to cover highway transportation, the rules covered farm equipment and imposed unreasonable mandates on farmers who hauled fertilizer spreaders across roads to reach different acreage. Due to the work of the New York State Governor's Office of Regulatory Reform, a rule change took small business concerns into account by relieving farmers of the need to undertake costly retrofitting to meet trailer standards. The rule change saves the New York farming industry as much as \$120 million and was done without compromising highway safety.

Based on inquiries Advocacy has received, this report has been updated and revised to include information on periodic review and regulatory review committees. We hope this report will continue to serve as a useful tool for state legislators who are interested in leveling the regulatory playing field for small businesses in their states.



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Chief Counsel for Advocacy  
U.S. Small Business Administration

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# Regulatory Flexibility: What it is and Why it Matters

In September 1980, Congress enacted the Regulatory Flexibility Act (RFA)<sup>1</sup>, which mandated that agencies consider the impact of their regulatory proposals on small entities, analyze equally effective alternatives, and make their analyses available for public comment.

The law was not intended to create special treatment for small business. Congress intended that agencies consider impacts on small business to ensure that, in their efforts to fulfill their public responsibilities, their regulatory proposals did not have unintended anticompetitive impacts and that agencies explored less burdensome alternatives that were equally or more effective in resolving agency objectives.

In March 1996, amendments to the RFA, in the form of the Small Business Regulatory Enforcement Fairness Act<sup>2</sup> (SBREFA) became law. SBREFA raised the stakes for regulatory agencies. Congress had finally been persuaded by 15 years of uneven compliance with the RFA, and by the repeated urging of the small business community, to authorize the courts to review agency compliance with the RFA. "Judicial review" was thought to be the incentive that was lacking in the original statute. SBREFA also reinforced the RFA requirement that agencies reach out and consider the input of small businesses in the development of regulatory proposals, subjecting this outreach to judicial review as well.

One of the clearest examples of how benefits can be derived from efforts to ensure compliance with the RFA comes from the Department of Transportation (DOT). To implement provisions of the Americans with Disabilities Act, DOT proposed a regulation in March 1998 that would have required all motor carriers, tour bus operators, and other transportation companies to provide access for people with disabilities, primarily by installing mechanical lifts. Advocacy advised DOT that its proposed rule would have a serious impact on the small bus industry and would cause these small businesses to reduce transportation services to the entire public, including the disabled (the opposite consequence of DOT's intention).

DOT staff and representatives of the affected small businesses met to discuss the regulation and its alternative, an important step in the DOT's RFA analysis. The meeting

## A Brief History of Federal Regulatory Flexibility Legislation

## Federal Regulatory Flexibility in Action

<sup>1</sup>Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 USC § 601 et seq.)

<sup>2</sup>Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 USC § 601 et. seq.)

## Regulatory Flexibility and the States

provided a meaningful opportunity for small businesses to discuss cost projections and other data relevant to the proposed rule. After the DOT met with Advocacy and small carriers, they published a final rule adopting an innovative approach recommended by small bus operators. The revised rule, published in September 1998, not only achieved the agency's objectives, but also struck a sensible balance. Essentially, DOT backed away from mandating a one-size-fits-all proposal and transitioned the redesign of all buses to accommodate passengers with disabilities while maintaining service for those who rely on small bus companies. Small businesses welcomed DOT's final rule, expected to save the small bus industry about \$180 million while guaranteeing transportation for the disabled.

The great need for reduced economic impact on small businesses does not stop at the federal level. More than 93 percent of businesses in every state are small businesses (see chart).<sup>3</sup> Therefore, small businesses should be protected from state regulations that require them to bear disproportionate costs and burdens. Small employers can help fix problems if they have a voice in the process!

In a survey of state legislation, the Office of Advocacy found that many states lack legislation that allows for regulatory flexibility.<sup>4</sup> Of the states that do have some form of regulatory flexibility, many are missing key legislative components. Advocacy has drafted model legislation to help state legislators create a structure in which small businesses can have meaningful input in the development of state policies and rules.

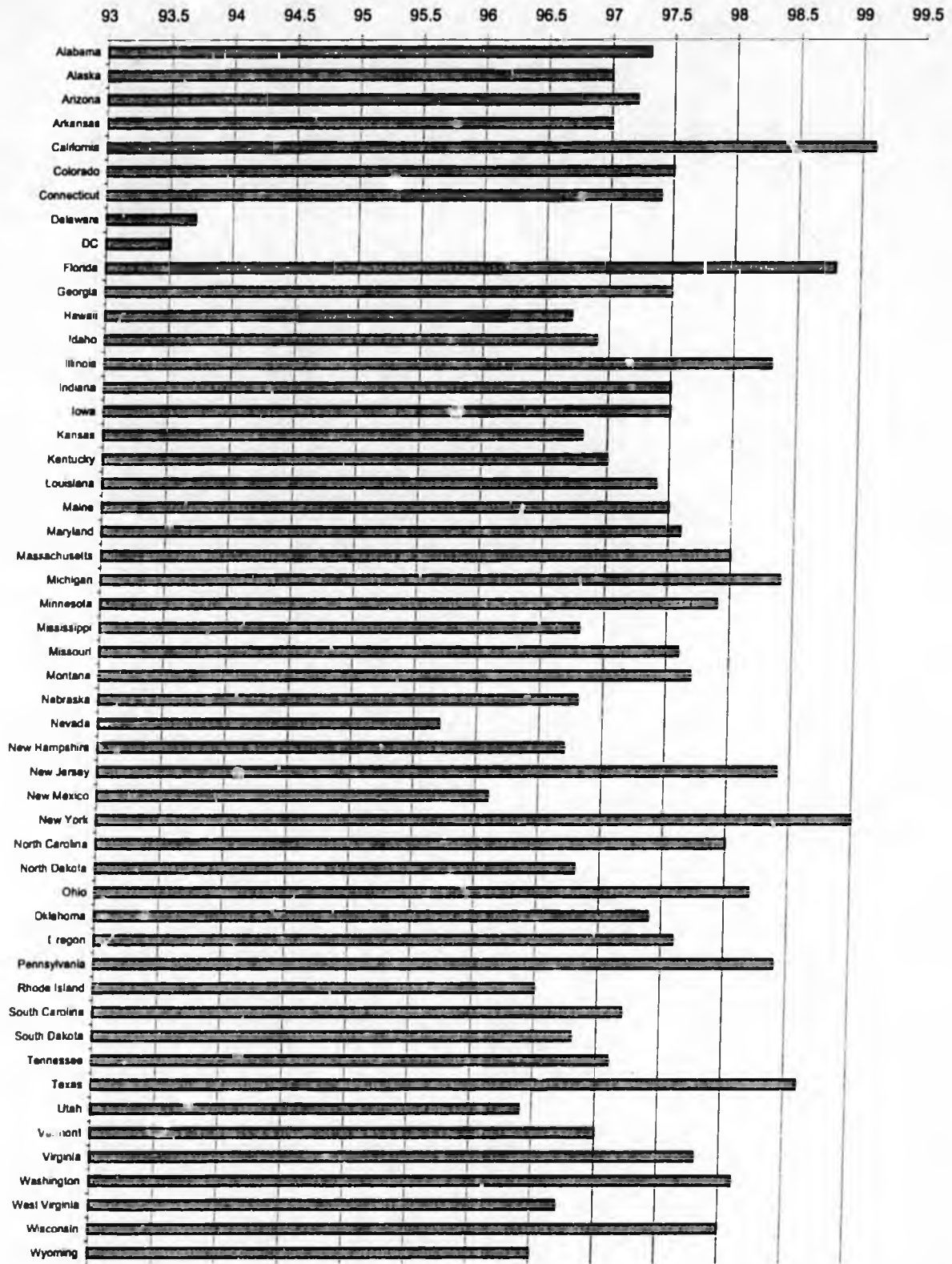
Aware of the state economic benefits of less burdensome regulations, the Office of Advocacy wants to build on the successes of federal regulatory flexibility and of states that have led the way with legislative and executive approaches of their own. In fiscal year 2002 the cost savings to small businesses from federal regulatory flexibility was more than \$21.1 billion.<sup>5</sup> The Office of Advocacy urges state policymakers to enact regulatory flexibility legislation or amend current legislation in order to pass on similar cost savings to state economies.

<sup>3</sup>The information in this chart is taken from the *2002 Small Business Profiles* published by the Small Business Administration Office of Advocacy (<http://www.sba.gov/advo/stats>) from data collected by the U.S. Dept. of Commerce, Census Bureau. The chart excludes Guam, Puerto Rico, and Virgin Islands because no data were available.

<sup>4</sup>See *Regulatory Flexibility Legislation in the States*, *infra*.

<sup>5</sup>See *Annual Report of the Chief Counsel for Advocacy on the Implementation of the Regulatory Flexibility Act, Fiscal Year 2002* (<http://www.sba.gov/advo/laws/flex/>)

## Percentage of Businesses That Are Small



## **A BILL**

To improve state rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small businesses.

### **Findings**

- (1) A vibrant and growing small business sector is critical to creating jobs in a dynamic economy;
- (2) Small businesses bear a disproportionate share of regulatory costs and burdens;
- (3) Fundamental changes that are needed in the regulatory and enforcement culture of state agencies to make them more responsive to small business can be made without compromising the statutory missions of the agencies;
- (4) When adopting regulations to protect the health, safety, and economic welfare of [State], state agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on small employers;
- (5) Uniform regulatory and reporting requirements can impose unnecessary and disproportionately burdensome demands including legal, accounting, and consulting costs upon small businesses with limited resources;
- (6) The failure to recognize differences in the scale and resources of regulated businesses can adversely affect competition in the marketplace, discourage innovation, and restrict improvements in productivity;
- (7) Unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;
- (8) The practice of treating all regulated businesses as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental, and economic welfare legislation;
- (9) Alternative regulatory approaches which do not conflict with the stated objective of applicable statutes may be available to minimize the significant economic impact of rules on small businesses;

(10) The process by which state regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, to examine the impact of proposed and existing rules on such businesses, and to review the continued need for existing rules.

### **Section 1. Short Title**

This act may be cited as the Regulatory Flexibility Act of [2003].

### **Section 2. Definitions**

(a) As used in this section:

- (1) "Agency" means each state board, commission, department, or officer authorized by law to make regulations or to determine contested cases;
- (2) "Proposed regulation" means a proposal by an agency for a new regulation or for a change in, addition to, or repeal of an existing regulation;
- (3) "Regulation" means each agency statement of general applicability, without regard to its designation, that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior regulation, but does not include (A) statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public. (B) declaratory rulings, or (C) intra-agency or interagency memoranda;
- (4) "Small business" means a business entity, including its affiliates, that (A) is independently owned and operated and (B) employs fewer than [five hundred] full-time employees or has gross annual sales of less than [six] million dollars.

### **Section 3. Economic Impact Statements**

(a) Prior to the adoption of any proposed regulation that may have an adverse impact on small businesses, each agency shall prepare an economic impact statement that includes the following:

- (1) An identification and estimate of the number of small businesses subject to the proposed regulation;
- (2) The projected reporting, recordkeeping and other administrative costs required for

compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record;

(3) A statement of the probable effect on impacted small businesses;

(4) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

#### **Section 4. Regulations Affecting Small Businesses**

(a) Prior to the adoption of any proposed regulation on and after [January 1, 2003], each agency shall prepare a regulatory flexibility analysis in which the agency shall, where consistent with health, safety, and environmental and economic welfare, consider utilizing regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small businesses. The agency shall consider, without limitation, each of the following methods of reducing the impact of the proposed regulation on small businesses:

(1) The establishment of less stringent compliance or reporting requirements for small businesses;

(2) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

(3) The consolidation or simplification of compliance or reporting requirements for small businesses;

(4) The establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and

(5) The exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

(b) Prior to the adoption of any proposed regulation that may have an adverse impact on small businesses, each agency shall notify the [Department of Economic and Community Development or similar state department or council that exists to review regulations] of its intent to adopt the proposed regulation. The [Department of Economic and Community Development or similar state department or council that exists to review regulations] shall advise and assist agencies in complying with the provisions of this section.

### **Section 5. Judicial Review**

(a) For any regulation subject to this section, a small business that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of this section.

(b) A small business may seek such review during the period beginning on the date of final agency action and ending one year later.

### **Section 6. Periodic Review of Rules**

(a) Within four years of the enactment of this law, each agency shall review all agency rules existing at the time of enactment to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of those statutes, to minimize economic impact of the rules on small businesses in a manner consistent with the stated objective of applicable statutes. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, the agency shall publish a statement certifying that determination. The agency may extend the completion date by one year at a time for a total of not more than five years.

(b) Rules adopted after the enactment of this law shall be reviewed within five years of the publication of the final rule and every five years thereafter to ensure that they minimize economic impact on small businesses in a manner consistent with the stated objectives of applicable statutes.

(c) In reviewing rules to minimize economic impact of the rule on small businesses, the agency shall consider the following factors:

- (1) The continued need for the rule;
- (2) The nature of complaints or comments received concerning the rule from the public;
- (3) The complexity of the rule;
- (4) The extent to which the rule overlaps, duplicates, or conflicts with other federal, state, and local governmental rules; and
- (5) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

# Regulatory Flexibility Legislation in the States

The Office of Advocacy surveyed state legislation looking for existing regulatory flexibility laws and identified seven key areas characteristic of strong state regulatory flexibility legislation, listed below. While 35 states and Puerto Rico have some legislation that pertains to small business regulations, many are missing key components that give regulatory flexibility its effectiveness.

## Small Business Definition

Every single state has some variety of an administrative procedures act governing regulatory protocol. Advocacy looked to see whether the state had any legislation specifically crafted for small business regulations and what the state defined as small business.

## Economic Impact Analysis

One of the critical parts of any regulatory flexibility scheme is understanding the economic impact of regulations as they relate to small businesses. Advocacy looked for legislation that required agencies to review or otherwise research the impact of the proposed regulations on small businesses.

## Examining Alternatives

In addition to examining the economic impact, agencies need to be proactive in looking for regulatory solutions that do not unduly burden small businesses. Advocacy looked for language that required agencies to examine regulatory alternatives and give reasons why such alternatives could not feasibly be implemented.

## Judicial Review

As we have learned on the federal level, having judicial review of enacted regulations that do not comply with regulatory flexibility legislation is critical. Without judicial review, agencies may not conduct a thorough and well-reasoned regulatory flexibility analysis. Advocacy looked for legislation that afforded judicial review either in the courts or through administrative review committees.

## Periodic Review

Existing regulations may also unduly burden small businesses because old rules may no longer serve their purpose, may be trumped by newer federal or state legislation, or are technologically obsolete. By periodically reviewing rules, the agencies can ensure that all of their regulations are still necessary. This ensures a streamlined and efficient regulatory environment.

Small business owners are the greatest resource agencies can use to understand how regulations affect small businesses and what alternatives may be less onerous. One way to allow small businesses to have a voice in the process is to allow them to serve on regulatory review committees where they help solve regulatory problems. While many states already have some form of committee to review regulations, most are composed of legislative members only. Advocacy supports allowing members of the small business community to serve on these review boards.

## **Regulatory Review Committee**

Even the best regulatory flexibility legislation has little value if most entities are exempted from it. Advocacy looked at any legislation that gave exceptions or exemptions for certain types of regulations and/or agencies.

## **Exemptions**

See the table on the next page for a summary of the provisions offered in the regulatory flexibility laws of the various states.

## State Regulatory Flexibility Statutes (by Statute Reference Number), June 2003

State	Citation Information	Small Business Definition	Economic Impact Analysis	Examining Alternatives	Judicial Review	Periodic Review	Exemptions	Rules Review Committee
Alabama	Ala. Code §							41-22-22
Alaska	Alaska Stat. §							44.62.125
Arizona	Ariz. Rev. Stat. Ann.	41-1001(19)	41-1052; 41-1055; 41-1056.01	41-1055	41-1034; 11-1051; 41-1052	41-1056	41-1057; 41-1005; 41-1044	41-1057
Arkansas	Ark. Code Ann. §							
California	Cal. Gov. Code §	11342.610	11346.2; 11346.3; 11346.9	11346.2; 11347.6	11349; 11350	11349.7	11346.1; 11353; 11356; 11361	
Colorado	Colo. Rev. Stat. Ann. §	24-4-102	24-4-103	24-4-103			24-4-103	
Connecticut	Conn. Gen. Stat. Ann. §	4-168a(a)(2)	4-168a(c)	4-168a(b)	4-175; 4-183	4-170(a) repealed	4-168a(d)	4-170
Delaware	Del. Code tit. 29, §	10403(3)	10404	10404	10141	10407		
Washington DC	DC Code Ann §							
Florida	Fla. Stat. Ann. §	120.54(3)(b) (2)(a); 120.52(16) & (17)	120.54(3)(b) (1) and (2)	120.54(1)(d); 120.54(3)(b) (2)(a); 120.541	120.68; 120.545; 120.56	120.74	120.50; 120.63; 120.80; 120.81	120.545
Georgia	Ga. Code Ann. §	50-13-4(a)(3)	50-13-4(a)(3) & (4)	50-13-4(a)(3)	50-13-19; 50-13-10; 50-13-13; 50-13-20		50-13-4(b)	
Guam	5 GCA		9301 <sup>1</sup>		9309			
Hawaii	Haw. Rev. Stat. Ann. §	201M-1	201M-2	201M-2	201M-6	201M-7		201M-5
Idaho	Idaho Code §					67-5291		
Illinois	5 Ill. Comp. Stat. Ann.	100/1-75; 100/1-80; 100/1-85	100/5-30(c)	100/5-30(a)		100/5-130 <sup>2</sup>		100/5-90
Indiana	Ind. Code Ann. §		4-22-2-28 <sup>1</sup>			4-22-2-46; 4-22-2-5-2 <sup>3</sup>		4-22-2-28; 4-22-2-46
Iowa	Iowa Code Ann. §		17A-4A <sup>4</sup>		17A-19	17A-33 <sup>2</sup>		17A-8
Kansas	Kan. Sta. Ann. §		77-416(b) <sup>1</sup>	77-416(b)				77-436; 77-423
Kentucky	Ky. Rev. Stat. Ann. §	13A.210(5); 13A.010	13A.240 <sup>1</sup>	13A.210	13A.337	13A.345		13A.020
Louisiana	La. Rev. Stat. Ann. §		49:953 <sup>1</sup>		49:965.1	49:968	49:967	
Maine	Me. Rev. Stat. Ann. tit 5	8052(5-A)		8052(5-A)	8058; 11001; 8072	8071; 8072	8054	
Maryland	Md. Code Ann. St. Gov.		10-124 <sup>1</sup>		10-222; 10-125	10-132.1; 10-133		2-502
Massachusetts	Mass. Gen. Law. Ann. §		30A-5	30A-5	30A-7			
Michigan	Mich. Comp. Laws Ann.	24.207a	24.240; 24.245	24.240	24.264; 24.301		24.315	24.234; 24.235
Minnesota	Minn. Stat. Ann. §		14.131 <sup>1</sup>		14.69	14.3691	14.03	
Mississippi	Miss. Code Ann. §		25-43-6(2)(d)	25-43-6(2)(g)	25-43-17		25-43-6(4)	
Missouri	Mo. Ann. Stat. §							
Montana	Mont. Code Ann. §							
Nebraska	Neb. Rev. Stat. §							84-907.07
Nevada	Nev. Rev. Stat.	233B.0382	233B.0608; 233B.0609	233B.0608; 233B.0609	233B.105; 233B.110; 233B.130	233B.050		233B.067
New Hampshire	N.H. Rev. Stat. Ann. §	541-A:5(IV)(e)	541-A:5(IV)(e)		541-A:13; 541-A:24	541-A:2	541-A:21	541-A:2
New Jersey	N.J. Stat. Ann. §	52:14B-17; 52:14B-25	52:14B-19; 52:14B-25	52:14B-18; 52:14B-25		52:14B-5.1		

State Regulatory Flexibility Statutes (by Statute Reference Number), June 2003								
State	Citation Information	Small Business Definition	Economic Impact Analysis	Examining Alternatives	Judicial Review	Periodic Review	Exemptions	Rules Review Committee
New Mexico	N.M. Stat. Ann. §							
New York	NY CLS St. Admin P Act §	102(8)	202-b(2)	202-b(1)	205	207	202-b(3)	Executive Order 20 <sup>1</sup>
North Carolina	N.C. Gen. Stat. §		150B-21.4 <sup>1</sup>					150B-21.16
North Dakota	N.D. Cent. Code §	28-32-08.1	28-32-08.1	28-32-08.1	28-32-08.1	28-32-18.1	28-32.08.1	28-32-17
Ohio	Ohio Rev. Code Ann. §	121.24(A)(9) & (10)	121.24(E); 127.18			119.032	121.24(F)	Yes
Oklahoma	75 Okla. Stat. Ann. tit. 75. §	502(4)	504	504	505	307.1; 250.10		Yes
Oregon	Or. Rev. Stat. §	183.310(9)	183.335(2)(b)	183.540	183.090; 183.480	183.720		
Pennsylvania	71 Pa. Cons. Stat. Ann.		745.5(9) & (10) <sup>1</sup>		745.12a	745.8e <sup>7</sup>		
Puerto Rico	H.B. 3038, No. 454	§2(c) & (d)	§4	§4	§11	§10		
Rhode Island	R.I. Gen. Laws §	42-35-1(i)	42-35-3(4)	42-35-3(4)	42-35-15; 42-35-7	42-35-4.2 <sup>8</sup>		
South Carolina	S.C. Code Ann. §		1-23-10(7); <sup>1</sup> 1-23-115		1-23-380; 1-23-120			
South Dakota	S.D. Codified Laws §							1-26-1.1
Tennessee	Tenn. Code Ann. §							
Texas	Tex. Govt Code Ann. §	2006.011; 2006.001	2006.002	2006.002	2006.013	2001.039	2006.012	
Utah	Utah Code Ann. §		63-46a-4(5)(1) <sup>1</sup>		63-46a-12.1	63-46a-11.5 <sup>3</sup>	63-46a-12.1; 63-46a-11	63-46a-11
Vermont	Vt. Stat. Ann. §	3-801(12)	3-838	3-832	3-815		3-816; 3-832	3-817; 3-820
Virgin Islands								
Virginia	Va. Code Ann. §					2.2-4017		
Washington	Wash. Rev. Code Ann. §	19.85.020	19.85.030; 19.85.040	19.85.030	34.05.570	34.05.630		34.05.610
West Virginia	W. Va. Code §					29A-3-16		29A-3-10
Wisconsin	Wis. Stat. Ann. §	227.114(1)(a)	227.114(2)	227.114(2)	227.52; 227.40		227.24	227.19; 227.26
Wyoming	Wyo. Stat. Ann. §							28-9-101

Note that some states' regulatory flexibility legislation is stronger than others' and their relative strengths are ascertainable only by examining the laws themselves.

<sup>1</sup>Not small-business-specific.

<sup>2</sup>Periodic review of small business rules only.

<sup>3</sup>This provision imposes expiration dates on rules rather than requiring periodic review.

<sup>4</sup>Iowa repealed its small business regulatory flexibility statute in 1998 (see 17A.31). The statute cited allows for a regulatory flexibility analysis, which includes an economic impact analysis and examination of alternatives, if requested by the Administrative Rules Coordinator or the Administrative Review Committee. An interested party can petition the ARC or ARRC to request a regulation be reviewed, but ultimately the ARC/ARRC decides whether or not to request such an analysis (see 17A.7).

<sup>5</sup>Minnesota has legislation that allows adversely affected small businesses to apply for a variance (exemption or other alternative) from an existing regulation if they can show economic hardship, among other factors. The application costs, at a minimum, \$10 (see 14.055 and 14.056).

<sup>6</sup>The Missouri legislature passed S.B. 69, which awaits the Governor's signature as of June 2003. Missouri's economic impact analysis looks at the impact of bills, rather than regulations, on small businesses (see 23.140).

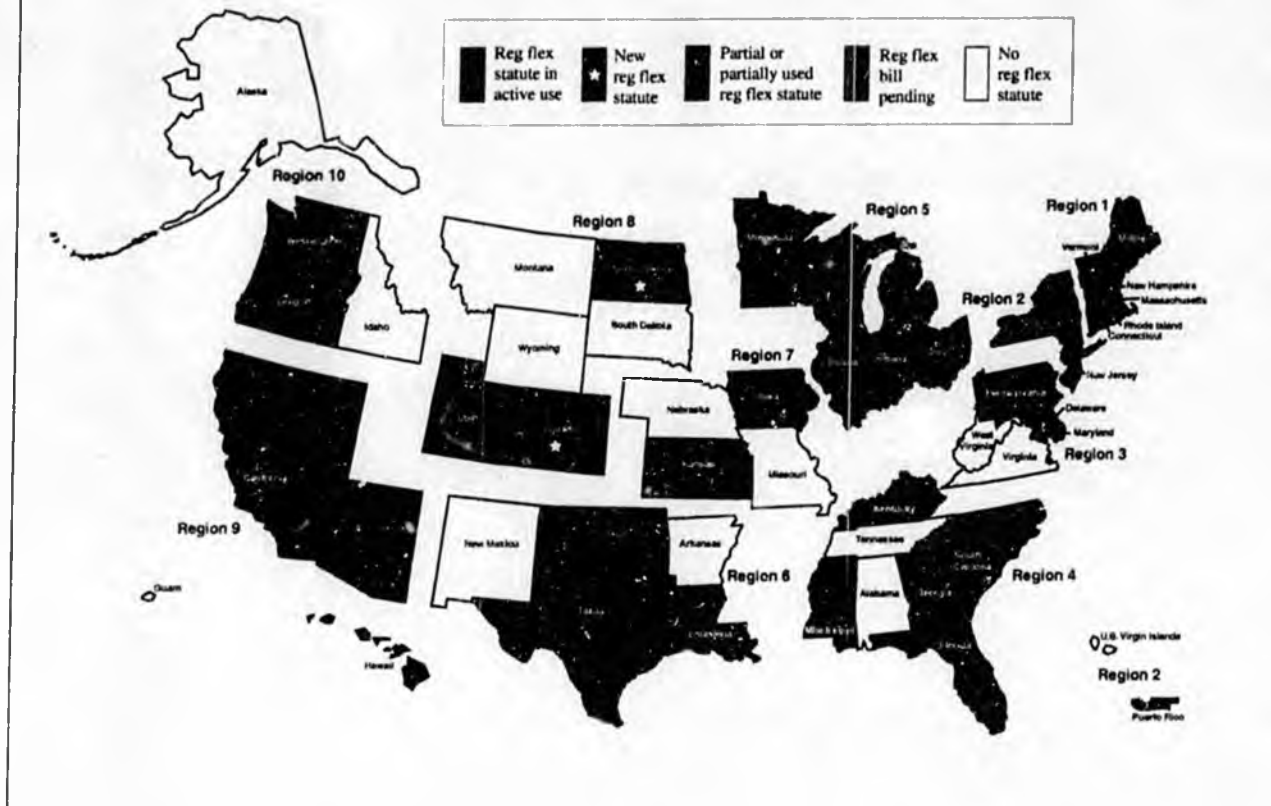
<sup>7</sup>Review of a rule is mandatory in Pennsylvania if requested by a third party.

<sup>8</sup>This Rhode Island provision requires rules to be re-filed periodically.

Source: Compiled by U.S. Small Business Administration, Office of Advocacy, from state statutory information.

## Model Legislation Initiative

Status of State Regulatory Flexibility Provisions, July 2003



### Small Business Administration Office of Advocacy Regional Advocates

The relationship between the nation's small businesses and the Chief Counsel for Advocacy is strengthened by regional advocates located in the SBA's 10 regions. They are the Chief Counsel's direct link to small business owners, state and local government bodies, and organizations that support the interests of small entities. The regional advocates help identify regulatory concerns of small business by monitoring the impact of federal and state policies at the grassroots level. Their work goes far to develop programs and policies that encourage fair regulatory treatment of small business and help ensure their future growth and prosperity.

### The Chief Counsel's Direct Link

Please contact these advocates for assistance and guidance in implementing the model legislation in your state. They are a great source for state small business information and are ready and willing to assist!

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# NEW YORK:

## *A Model for Regulatory Reform in Washington State*



Washington, like most states, has grappled with regulatory reform for years. Legislators, governors, business leaders and citizens have objected to unclear and redundant regulation; overlapping jurisdictions and inconsistent interpretations of the rules by state, local and federal agencies; and a regulatory culture that often appears hostile to industry and overly prescriptive.

In the last decade, Governors Mike Lowry and Gary Locke each issued executive orders designed to improve regulatory processes.

In 1993, Governor Lowry established the Governor's Task Force on Regulatory Reform, with representation from business, agriculture, labor, environmental groups, legislators and local government. The governor directed the task force to examine the way land-use and environment statutes interacted and review procedures for project approval and permitting. Governor Lowry also called for better interagency coordination and communication.

Governor Locke has worked to improve regulatory processes as well by calling on agencies to review existing rules, seeking greater clarity, effectiveness and a balance between costs and benefits. With Executive Order 97-02, he directed agencies to repeal unnecessary regulations and streamline regulatory processes. The governor's office reports that more than 4,600 sections of administrative rules have been repealed, and the process is yielding ongoing benefits. Nonetheless, regulation remains a key competitiveness issue in our state.

As the national recession took hold during the last 18 months, economists predicted that this state would lag national recovery. Business leaders repeatedly warned of the need to take decisive action to correct identified problems in the state's business climate. The Washington Roundtable joined with the Association of Washington Business and the Washington Research Council to launch the Washington Alliance for a Competitive Economy (WashACE) to call attention to business climate issues, including the state's approach to regulation.

Last year, Governor Locke appointed the Washington Competitiveness Council (WCC) to address these problems. After analysis by 40 business, labor and elected leaders, the state's approach to regulation received unfavorable reviews.

The Competitiveness Council, in its final report last fall, found that "the state does not have a 'business friendly' regulatory environment." The Council identified a number of specific findings (e.g., lack of coordination, conflicting standards, a focus on process rather than outcomes, regulators exceeding their jurisdiction) and recommended reforms.

The majority of Competitiveness Council members called for the appointment of a secretary of regulation, independent from the environmental agencies, with the power to force change in the agencies, terminate employees and conduct unannounced audits.

Thus far, Governor Locke has chosen not to appoint a regulatory secretary. Instead, he named Paul Isaki, a respected state administrator with experience in business and government, to the position of special assistant for business and regulatory reform. Isaki's first task is to improve regulatory processes in the state Department of Ecology, which the Competitiveness Council said, "requires a cultural change that can result only from a thorough renovation process."

Isaki has begun his work, focusing expressly on reducing delay, recognizing that time lost in regulatory review represents costs to all parties. He says he wants to "seriously examine the initiatives that must be undertaken to improve timeliness." In that regard, he believes improved communication with applicants is critical. The department must be clear about the standards for permit review and identify the relevant performance criteria.

His initial activity consists of a combination of casework and organizational development that should result in significant process improvements.

In New York, about eight years ago, the state embarked on a course that more closely resembles the Competitiveness Council's recommendations.

## **The New York Approach: Lessons in Regulatory Reform**

In the early nineties, New York struggled economically, even as the rest of the nation came out of recession. From 1991 to 1995, New York lost more than 340,000 private sector jobs. The state had a reputation as a tough place to do business. Investment had fled due to high taxes and excessive regulation.

New York's George Pataki ran for governor in 1994, promising to change the state business climate and make regulatory reform a top priority.

New Yorkers had heard the pledge before. Governors launched initiatives; legislators passed laws, but nothing seemed to work.

"Even with statutory requirements for analysis and review and gubernatorial initiatives to reform the regulatory process, the burdens of regulation in New York continued to grow," according to Robert Hahn of the AEI-Brookings Joint Center for Regulatory Reform.

Pataki said in his 1995 State of the State Message:

**"To free New Yorkers of their terrible regulatory burden, I will take several steps.**

**"First, I will sign an Executive Order declaring a moratorium on all new regulations — except regulations needed to protect the public health and safety or rules that promote new jobs and economic activity.**

**"Second, I have called upon Monroe County Executive and former Assemblyman Bob King to head our new regulatory reform effort. The goal of that effort will be to remove regulations that act as hidden taxes, hinder productivity, and stifle economic growth. Coordination of regulatory activities within and among agencies must be improved to eliminate inconsistencies, duplication and unnecessary regulatory burdens.**

**"Third, we will open the entire regulatory process to greater public scrutiny."**

Within a year of taking office in 1995, Pataki delivered, issuing Executive Order No. 20 (EO20) establishing the Governor's Office of Regulatory Reform (GORR).

At first glance, GORR represented the continuation of a long line of regulatory efforts in New York, beginning with the Office of Business Permits, established by the legislature in 1978. In 1984, the agency became the Office of Business Permits and Regulatory Assistance, with increased responsibility for regulatory review. The agency changed again in 1993, becoming the Office of Regulatory and Management Assistance. The predecessor agencies had been authorized by statute; GORR came by way of executive order, bypassing the legislative process.

The New York State Administrative Procedures Act (NYSAPA) sets out the requirements for regulatory analysis. NYSAPA had long required clarity, consideration of regulatory impacts on small business, and consistency with legislative intent, among other stipulations. It, too, evolved over the years as lawmakers attempted to control regulatory processes.

With GORR the tide turned, and decades of regulatory accretion began to recede. In an interview published in *Site Selection* magazine in 1996, Charles Gargano, chairman of Empire State Development Corporation, says, "There's been a major change in the way New York State does business. ... We have instituted much-needed fundamental economic reforms. We are ... changing and eliminating burdensome regulations and reforming our workers' compensation system."

As noted earlier, Washington has similarly experimented with various attempts to gain control over the regulatory process, with limited success. The GORR experience demonstrates a way to institutionalize and invigorate regulatory reform. The effort required gubernatorial leadership, energetic and focused administration, and a clear process for evaluating proposed regulations.

### **GORR Structure**

Establishing GORR and providing it with the power of executive oversight of state rulemaking constituted a first in the history of New York state. Previous administrations had allowed the numerous state agencies with regulatory authority to exercise their discretionary powers with few restraints.

The new combination of independence and oversight responsibility accounts for much of GORR's success. In his overview of state and federal regulatory reform efforts, Robert Hahn concludes, "The New York Administrative Procedures Act and executive orders provide the necessary authority to implement a reform program, but it took a central agency with the political backing of the governor to have a noticeable impact."

Establishing the central agency need not be an expensive proposition. According to an agency spokesman, GORR operates on an annual budget of about \$2.3 million, with 38 employees, a relatively modest cost given the size of the state, and virtually nothing when contrasted with the regulatory savings achieved through reform.

The agency works in teams assigned to four regulatory areas (i.e., development, health, labor, and permit). Each team includes a team leader, attorney and at least one research analyst.

*Annual budget :\$2.3 million*

*Employees: 38*

### **Clear Criteria and Competent Administration**

In addition to creating GORR, EO20 established the criteria that would be applied to the agency's evaluation of new rules and regulations.

For example, rules cannot exceed the authority delegated by law, duplicate or exceed existing federal or state statutes and rules, or impose unfunded mandates. Further, they must "produce public benefits which will outweigh the costs" and be based on "the best scientific, technical and economic information." Finally, "if possible and practical," rules are to favor "market-oriented solutions and performance standards over command and control regulation."

The EO20 framework, important as it is, would not have transformed the regulatory environment without strong commitment from top executives. GORR's early years were characterized by the zeal of a newly-elected governor and a politically astute administrator.

Bob King came to GORR after serving as the elected executive of Monroe County for three years. Previously he had served in the New York State Assembly and as a county prosecutor, both in New York and California. In addition to his political and prosecutorial experience, King had held senior executive positions in technology industries.

His political acumen and personal relationship with the governor appear to have been significant factors in establishing GORR's initial success. As well, King and GORR arrived on the scene when both challenges and opportunities abounded. It was a time ripe for major regulatory reform.

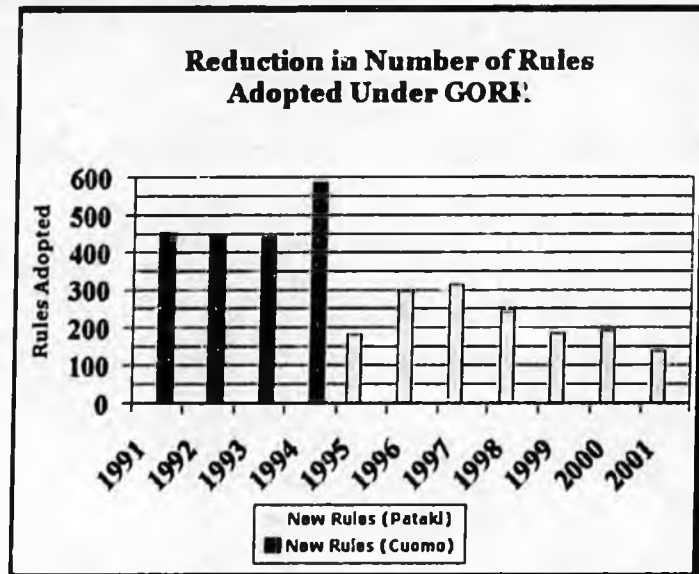
Business leaders in the state, as well as national media, cited the state's excessive regulatory burden as a reason for New York's economic stagnation. A series of focus groups conducted by Empire State Development shortly after Pataki took office confirmed the common perception.

### Fewer New Rules; Dramatic Cost Savings

The effect of the governor's moratorium and GORR's more stringent review process is clear. Under the new regime, rules were adopted at half the rate of preceding years.

The accompanying chart, published in *Reg Watch*, the GORR newsletter, in the Winter 2001-2002 issue, shows how GORR put the brakes on regulation.

While the reduction in rule-making appears dramatic, the best measure is the effect of the change on the economy. On that score, GORR reports cumulative savings to business of nearly \$3 billion and growing. These benefits have accrued without sacrificing the state's commitment to environmental standards. The effort has received recognition, both within the state and nationally. In 1998, the U.S. Small Business Administration presented GORR with its "Vision 2000 Award." The award goes to state and local initiatives that support small business growth and serve as "models of excellence."



### Industry Experience with GORR in New York

A representative of one of the state's major business organization calls the New York approach to regulation "exceptional." He cites among the successes the state's reform of the workers' compensation system, and notes that EO20 had a "tremendous initial effect" on the rulemaking process. In addition, he points out that using cost-benefit analysis has been particularly useful in assessing the consequences of regulation.

In May 2000, *Site Selection* reported 934 new and expanded corporate facilities in New York, a substantial turnaround from 1995 "when major corporate facility locations were as rare as Tiger Woods' losses on the golf course." The two factors credited with the new success: regulatory reform and tax relief.

In addition, GORR has generated a positive relationship with the business community, convincing corporate leaders that operating and expanding in New York is easier than in the past. Several business representatives interviewed for this report spoke approvingly of GORR's willingness to anticipate regulatory problems, suggest changes and contact business for input.

Business leaders also acknowledged that GORR follows through on its promise. One says, approvingly, "The changes they recommend seem to get done."

*934 new and expanded corporate facilities in New York in 2000; a substantial turnaround from 1995.*

In 1998, GORR received the U.S. Small Business Administration's "Vision 2000 Award" for excellence in regulatory reform, having been nominated by the New York Chapter of the National Federation of Independent Business. The state NFIB director said at the time, "GORR has engineered a sea-change in the state's business climate. Yards of red tape have been eliminated. Businesses are no longer micro-managed by faceless agencies and bureaucrats have exchanged the old, confrontational attitude toward business for a customer-service-type approach."

One business advocate says that the agency initially had an uphill battle. A number of lawmakers and interest groups feared that the GORR agenda involved dismantling regulation. Over time, that perception has changed, as the agency won respect for its responsible approach. In particular, he said, GORR has reflected the governor's concern with environmental protection and preservation, not always to the liking of some business groups.

### **The Casework Component**

While large projects and corporations often get the most attention, the small business dimension is important. Often, sorting out complex regulation, overlapping jurisdictions, and differing interpretations requires the mediating efforts of a caseworker. GORR has the stature to pull people together to resolve problems.

The head of a staff leasing firm in New York says, "The big guys with lobbyists are going to get access. The little guys need help."

His industry, which provides a complete human resource package for small businesses, has developed during the past 15 years. Many regulations applied to it were written prior to the industry's emergence. He says GORR was an effective conduit for getting all staff agencies to work out a better regulatory approach. Without GORR's intervention, the effort would have required difficult statutory remedies.

That casework approach is as much a hallmark of GORR's current work as the more wide-ranging regulatory reform effort. Because GORR works with all of the state regulatory agencies, it can identify trends, coordinate with the business community, and bring all affected parties together to arrive at a cooperative settlement.

A lobbyist with a state business association says GORR does a good job of identifying affected industries, circulating rules for comment, and reaching out more than the rule-making agencies.

### **Regulatory Reform & Cost-Benefit Analysis: A Critical Dimension**

Cost-benefit analysis is the heart of responsible regulation. Because of the EO20 stipulation that the benefits of rules outweigh their costs, GORR has written a clear and thoughtful manual to help agencies (and the regulated community) understand the process.

In the introduction to the 67-page Cost-Benefit Handbook: A Guide for New York State's Regulatory Agencies published in 1996, the agency director noted that New York's State Administrative Procedure Act (SAPA) had required cost-benefit analysis since 1983, but there had been no significant enforcement.

That would change. He said that New York would require cost-benefit analysis for major regulatory decisions. For more routine regulations, however, the agency would accept a less stringent standard.

"As a general rule of thumb," he wrote, "GORR does not expect to request a comprehensive cost-benefit analysis for rulemakings that do not go beyond the minimum of federal mandates (whether a federal statute, regulation, or grant condition), the minimum of state statutory requirements, minor rules ..., emergency rules or the repeal of obsolete or invalid rules."

According to the Handbook, before embarking on cost-benefit analysis, regulators should first consider five questions:

1. Do they have clear statutory authority for the regulation?
2. Were alternatives to regulation properly considered?
3. Would better enforcement of existing laws and rules achieve the goal?
4. Is the problem isolated, or is it a broad enough concern to justify regulation?
5. Is the regulation a response to a "crisis du jour" which may subside on its own?

The effect of regulation on the state's competitiveness is explicitly recognized as an important element of cost-benefit analysis.

**"An assessment should be conducted to determine if proposed regulations will adversely affect the costs and quality currently experienced in the production and distribution of products, goods, and services by either private enterprises or government entities. Similarly, any adverse effects on markets, customers, or recipients of government services also must be determined. The nature and severity of such effects need to be stated clearly in the impact analysis. Particular attention should be given to assessing adverse competitive effects relative to comparable enterprises in other states. Finally, any adverse effects on the advancement of technological innovations should be estimated."**

## **GORR Services**

In addition to regulatory reform efforts, GORR provides two basic services: permit assistance and pre-permitting. Both activities, of course, are affected by regulation and flow directly from the agency's basic regulatory reform mission. GORR views economic development as an important role. As pointed out in the agency's shovel-ready guide to pre-permitting, "one key time factor in site development is the time necessary to obtain the requisite permits."

### **1. Permit Assistance**

In GORR's early years, straightening out the process of applying for and receiving permits was a top priority. The agency reported that permit complaints came in three areas: lengthy issuing times, duplicative and unnecessarily complex application forms, and licensing schemes at variance with local marketing conditions.

Speaking at a conference in December 2000, a GORR representative told the group that the agency received 100,000 inquiries a year from people seeking information about getting started in business. To expedite their requests, GORR makes the state's 1,200 permits readily accessible in an online database, categorized by 244 business types. Applicants can also retrieve necessary permit applications and licenses for a growing number of occupations and business types and file them online using GORR's Online Permitting and Licensing system (OPAL).

*GORR makes state's 1,200 permits readily accessible online. Expedites 100,000 inquiries per year.*

### **2. Pre-permit Assistance**

Demonstrating the link between sensible regulation and development is the agency's approach to developing shovel-ready, pre-permitted sites. GORR manages three pre-permitting programs: Semi-NY, Build Now-NY, and ReBuild Now-NY. The top lobbyist for the New York Business Council says the pre-permitting activity "has been of tremendous benefit" to businesses considering relocation and expansion.

The Washington State Office of Trade and Economic Development modeled the proposed "Quick Sites" program after New York's pre-permitting programs. The state legislature did not support the effort, however, and it was dropped. OTED's current "certified communities" initiative is a more modest attempt to help regions identify their development resources and plan for development.

### Semi-NY

Pataki launched the Semiconductor Manufacturing Initiative in 1997 with the explicit goal of landing a major computer chip plant. GORR worked with community organizations and local governments to find land and helped market the sites to prospective firms. Ultimately, 13 sites were identified as particularly suitable to such manufacturing. Among the successes associated with Semi-NY is a \$2.5 billion investment in a chip-making plant by IBM that will create 1,000 new permanent jobs.

*Success: Program brings  
\$2.5 billion IBM plant and  
1,000 new jobs to New York.*

### Build Now-NY

Called by Business Facilities magazine "a premier example of a statewide program that offers rigorously certified sites to companies looking at New York," the BuildNow-NY initiative is a joint effort of Empire State Development, the state's economic development agency, and GORR. Building on the Semi-NY model, the state contracted with a site development consultant to create land-use profiles to meet business requirements. Profiles for Phase I of Build Now-NY included seven business types: research and development, business/commerce park, manufacturing, light industrial, warehouse/distribution, office park and retail. Recently-launched Phase II profiles include: light technology manufacturing, distribution logistics, e-commerce fulfillment and multi-tenant business technology parks.

The (New York) State Environmental Quality Review Act (SEQR) has been seen as a major obstacle to timely permitting, as it requires government to undertake an intensive review of environmental impacts, to coordinate with other agencies, and provide a public forum. Under BuildNow-NY, these reviews occur before a business decides to expand or locate in the area.

The process involves a Generic Environmental Impact Statement (GEIS) to examine and address environmental concerns, providing a single comprehensive review and public process. The profiles make it possible to begin the GEIS even before a developer has chosen the site. Therefore, businesses fitting the profiles will have significantly shortened the time required for permitting.

GORR then works with the developer to move swiftly through required state permits, providing comprehensive permit information and direct assistance.

The effort has been successful in business recruitment and in enhancing the competitive position of smaller communities in the state. Build Now-NY is credited with generating \$600 million in new capital investment, 2.5 million square feet of new facilities and 5,000 new or retained jobs.

*Success: \$600 million in new  
investment, 2.5 million square  
feet of facilities and 5,000 jobs.*

### ReBuild Now-NY

A pilot program geared to brownfield redevelopment, ReBuildNow-NY follows the same pattern. Pataki announced the program in May 2000 to promote cleanup and reuse of environmentally contaminated locations. The partnership between Empire State Development and GORR will identify and develop remediation plans; eventually, selected properties will be pre-permitted as shovel ready properties. According to state officials, by reclaiming polluted sites, the program helps preserve the state's uncontaminated land, while stimulating local economies by returning to productive use – and the tax rolls – property that has for too long remained unavailable for development.

## **Findings**

Several factors have contributed to GORR's accomplishments: the support of the governor, the framework for rules review established in EO20, and the independence of the agency. The three elements work together, and without any one of them, the effort would be less successful.

Regulatory reform often is approached as an event, announced with fanfare and a burst of energy. Regulations are made more readable; outdated rules are ceremoniously jettisoned; and agencies are urged to be more "customer-friendly." Eventually, however, the effort languishes, burdened by entrenched interests and bureaucratic inertia.

As in New York nearly a decade ago, the regulatory environment in Washington poses a threat to economic recovery. The New York experience demonstrates the value of an ongoing, institutional home for regulatory reform – an external check on agency initiatives. An agency expressly charged with the responsibility to ensure a responsible approach to regulation – to compel demonstration that regulations do not exceed the agency's statutory authority or impose costs disproportionate to anticipated benefits, and with the power to overrule agency rules – can dramatically alter the balance of power. The critical findings demonstrated by this overview of GORR include:

**1. Regulatory reform must come from the top.**

All assessments of New York's success refer to the strong and consistent support of the governor. While observers acknowledge GORR's independence, they are quick to point out that GORR is not independent of the governor. One business owner commented that when agencies were contacted by GORR to work with his industry, it was obvious that they treated the call as if it came from the governor himself. The level of respect and attention achieved through the governor's endorsement of GORR and his ongoing connection to the office ensures GORR's ability to resolve interagency conflict and perform casework.

**2. The staff leadership of the regulatory reform agency is critical.**

Business leaders in New York repeatedly cite Governor Pataki's appointment of Bob King as GORR's first director as a significant element in the agency's success. King combined political acumen with a strong commitment to regulatory reform. The agency must be able to command respect from other state administrators and the business community. The agency director cannot be a political novice. Access to the governor, administrative skill and an understanding of commerce are important attributes.

**3. A separate GORR provides a central point of contact for regulated industries and consumers.**

Having a single point of contact for regulatory review greatly enhances the ability of regulated industries to communicate. Often, resolution of regulatory complaints can be mediated, if all parties are involved in the discussion. With respect to environmental protection, as has been found in Washington state, resolution may frequently involve working with a number of agency regulators. When the discussions focus on desired outcomes and essential performance criteria, the process can be expedited without sacrificing environmental considerations. A separate, independent department facilitates such negotiation.

Further, by working through many of these problems, the professionals in the regulatory reform office can identify common themes and propose resolution. While agencies retain their regulatory authorities, the cabinet-level office plays a critical role in streamlining processes and resolving disputes.

**4. Regulation reform can set the stage for economic growth and development.**

As GORR achieved success in regulatory reform, it moved into a proactive effort with the state economic development agency in pre-permitting and site development. New York managed to change its image, competing successfully for new, targeted investment as well as retaining existing businesses and allowing them to grow.

## **Recommendations**

The experience with GORR in New York state government strongly supports the recommendation of the Washington Competitiveness Council: Washington should "establish state leadership for comprehensive regulatory reform."

By naming a special assistant for regulatory reform, Governor Locke has taken an appropriate first step. Similarly, the state's recent initiatives for other regulatory and permitting improvements, including expanding the Master Business Licensing program and facilitating permit processing and regulatory coordination, will undoubtedly improve on current conditions.

Nonetheless, as evidenced by GORR in New York, successful regulatory reform requires a bold, institutional response. A concentrated focus, as called for by the Competitiveness Council, is critical, and the following recommendations provide the basis for bringing that focus to state government.

- 1. The governor should establish an independent, cabinet-level office of regulatory reform, consistent with the recommendations of the Washington Competitiveness Council and modeled after New York's Governor's Office of Regulatory Reform.**
- 2. The state should adopt criteria similar to those established in New York's EO20.**
- 3. The new agency should be authorized to require cost-benefit analysis of any proposed regulation before it takes effect, and to review all regulations before they are published as proposed rules.**
- 4. To facilitate development, the state department of community, trade, and economic development should work with local governments to identify and prepare pre-permitted sites consistent with the state's economic development strategy.**
- 5. New regulations and rules should only be adopted after a determination that they do not unnecessarily duplicate or exceed existing federal or state statutes or rules.**

*The Washington Roundtable is a nonprofit public policy research and advocacy organization composed of chief executives of major Washington state companies. Formed in 1983, the Roundtable studies and makes recommendations on the state's critical public policy issues. The Roundtable's three priority issues are: state fiscal policy, economic climate and education.*

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## MEMORANDUM

TO: State Agencies, Boards, and Commissions  
Special Assistant Attorneys General with General Counsel  
Responsibilities

FROM: Wayne Stenehjem, Attorney General

RE: Guidelines Regarding Administrative Rules

DATE: July 24, 2003

The Office of Attorney General is required to review every proposed administrative rule and issue an opinion as to its legality prior to its final adoption. N.D.C.C. § 28-32-14. The attached guidelines are meant to facilitate your understanding of the legal requirements involved in the administrative rulemaking process. Included in these guidelines is a discussion of the changes made by the 2003 Legislative Assembly, as well as numerous materials you can use to guide you through the rulemaking process.

The 2003 Legislative Assembly enacted two laws that affect the rulemaking process:

1. An agency's full notice of its rulemaking must now provide a specific deadline for the submission of written comments. N.D.C.C. § 28-32-10(1)(a) (H.B. No. 1178, 2003 N.D. Leg.). An agency's abbreviated notice may now include either the telephone number or the address to use to obtain a copy of the proposed rules. The notice must also give both the address to use and the deadline to submit written comments. N.D.C.C. § 28-32-10(1)(b) (H.B. No. 1178, 2003 N.D. Leg.). This provision is effective for notices filed with the Legislative Council after July 31, 2003.
2. Other than certain specified agencies, before adopting any proposed rule that is not mandated by federal law, agencies are required to prepare a regulatory analysis in which the agency considers using regulatory methods that will accomplish the objectives of any applicable statutes while minimizing any adverse impact on small entities. A "small entity" is a small business, organization or political subdivision. A "small political subdivision" is one with a population of less than five thousand. If a proposed rule may have an adverse impact on small entities, the agency

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is also required to prepare an economic impact statement detailing how the agency believes the proposed rules will economically impact small entities before adopting the proposed rule. Small entities are entitled to seek judicial review of an agency's compliance with these requirements. Each rulemaking agency is required to give the administrative rules committee a copy of the regulatory analysis and economic impact statement, if one was created, when the committee is considering the agency's rules. These requirements will be placed in a new section in N.D.C.C. chapter 28-32, which Legislative Council has indicated will be N.D.C.C. § 28-32-08.1. H.B. No. 1212, 2003 N.D. Leg. These requirements apply to administrative rules adopted after July 31, 2003.

For the Office of Attorney General to properly perform its review of proposed administrative rules, administrative agencies requesting review of a proposed rule must provide this office with the following:

1. a copy of the proposed rules;
2. a copy of both the full and abbreviated notices of intent to adopt, amend, or repeal rules;
3. a copy of the proof of publication;
4. a copy of documentation showing filing of the notice and proposed rules with the Legislative Council;
5. a copy of each written comment, a copy of the written summary of each oral comment, and a copy of the written record of the agency's consideration of all comments, or a statement that there were no written or oral comments;
6. a copy of the takings assessment, if one was required, or a statement of the reason that a takings assessment was not required;
7. a copy of the regulatory analysis and the date upon which it was available, if one was issued, and if not, the reason a regulatory analysis was not prepared;
8. a copy of the small entity regulatory analysis; and
9. a copy of the small entity economic impact statement, if one was done, or a statement of the reason that a economic impact statement was not required.

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This office will review these materials to determine if the legal requirements have been met. To further assist your agency with the rule adoption procedures, I am enclosing a checklist, a procedure memorandum, and several sample documents concerning the general rulemaking process. Below is a brief explanation of the sample documents provided.

Enclosure 1: Section 28-32-10(1)(a), N.D.C.C., requires that the agency prepare a full notice of proposed adoption, amendment, or repeal of a rule. The full notice has several required elements. Enclosure 1 is a sample notice that contains blanks where each of the required elements of the notice may be inserted.

Enclosure 2: Section 28-32-10(1)(a), N.D.C.C., also requires that the full notice and a copy of the proposed rules be filed with the Legislative Council, which will then mail copies of the notice. Enclosure 2 is a sample letter filing the notice and the proposed rules with the Legislative Council. Please note that at least 30 days must elapse between the date the Legislative Council mails copies of any agency's notice and the date of the public hearing. Notices filed on or before the last calendar day of the preceding month are mailed on the first business day of each month. This 30-day timing requirement is separate from the 30-day timing requirement between publication of the abbreviated notice (referred to later) and the date of the public hearing.

Enclosure 3: Section 28-32-10(1)(a), N.D.C.C., also requires that an abbreviated notice be published at least once in each official county newspaper in this state. Enclosure 3 is a sample letter submitting the abbreviated notice to the North Dakota Newspaper Association (NDNA) so that it can be published once in each official county newspaper in North Dakota with the required format. Using the NDNA is convenient but not required. You should carefully review not only the notice proof prior to printing, if you get one, but also the published notice as soon as it is published in order to confirm the accuracy of the information contained in the notice as published. This office has seen several circumstances in which the notice provided for publication was accurate, but the published notice contained one or more errors.

Enclosure 4: Enclosure 4 is a sample abbreviated notice. Section 28-32-10(1)(b), N.D.C.C., requires that the abbreviated notice be in a specific format. Please note that N.D.C.C. § 28-32-10(5) requires that at least 30 days elapse between the publication of the notice and the date of the hearing. This 30-day timing requirement is separate from the 30-day timing requirement between the date the Legislative Council mails copies of the full notice and the date of the public hearing. Both of these timing requirements may be met concurrently.

Enclosure 5: Agencies are now required to prepare a regulatory analysis that considers whether the agency can use other regulatory methods to accomplish statutory objectives that minimize adverse impacts on small entities. H.B. 1212, 2003 N.D. Leg. (to be codified at N.D.C.C. § 28-32-08.1). Enclosure 5 is one possible format for that analysis. If proposed rules may have an adverse economic impact on small entities,

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agencies are also required to prepare an economic impact statement. Id. Enclosure 5 also has a possible format to use for an economic impact statement.

Enclosure 6: Enclosure 6 is a suggested public hearing format to assist the agency in conducting the public hearing. Agencies are required to tape record or otherwise preserve a transcript of rulemaking hearings. N.D.C.C. § 28-32-44(6)(g).

Enclosure 7: After the public hearing, the agency must allow a comment period of not less than 30 days during which data, views, or arguments concerning the proposed rulemaking will be received by the agency and made a part of the rulemaking record to be considered by the agency. N.D.C.C. § 28-32-12. Note that changes to N.D.C.C. § 28-32-10(1) now require an agency to provide a specific deadline for the submission of written comments in the full notice, and the deadline and an address to which someone may send the comments in the abbreviated notice. After the agency has made a written summary of any oral comments and a written record of its consideration of all written and oral submissions contained in the rulemaking record, it must submit the proposed rules and related materials to the Attorney General for an opinion as to their legality. N.D.C.C. § 28-32-14. Enclosure 7 is a sample letter submitting proposed rules to the Attorney General for approval. Please remember to include the documentation required for review.

Enclosure 8: After the Attorney General approves the proposed rule as to legality (and the agency incorporates any revisions or rewording suggested by the Attorney General), the agency must adopt the proposed rule and submit it to the Legislative Council for publication in the North Dakota Administrative Code. N.D.C.C. § 28-32-15(1). Enclosure 8 is a sample letter submitting proposed rules to the Legislative Council for publication. The rules submitted for publication by the 20th of the month will be published the following month, and become effective the first day of the month after the month of publication. N.D.C.C. § 28-32-15(2).

Please contact the assistant attorney general or special assistant attorney general assigned to your agency if you have any questions concerning this letter, the requirements of N.D.C.C. ch. 28-32, or laws that specifically relate to your agency's rulemaking authority.

Enclosures

ADMINISTRATIVE RULESChecklist for AdoptionEmergency Rulemaking: (N.D.C.C. § 28-32-03)

\_\_\_\_\_ Has the Governor approved the agency's finding that emergency rulemaking is necessary?

\_\_\_\_\_ Was the finding based on one or more of the four reasons found in N.D.C.C. § 28-32-03(2)?

Adoption of Rules by Reference: (N.D.C.C. §§ 28-32-04, 28-32-05)

\_\_\_\_\_ Has the agency adopted by reference any applicable existing permit or procedural rules?

\_\_\_\_\_ Has the agency sought authorization from the appropriate United States agency to adopt, by reference, any applicable existing permit or procedural rules that may be adopted for use in a new or existing program when the United States agency is delegating or modifying a program?

Regulatory Analysis: (N.D.C.C. § 28-32-08)

\_\_\_\_\_ Has the Governor or a member of the Legislative Assembly filed a written request for a regulatory analysis?

\_\_\_\_\_ Is the proposed rule expected to have an impact on the regulated community in excess of \$50,000?

\_\_\_\_\_ If a regulatory analysis is required, was it available on or before the date of public notice?

\_\_\_\_\_ Mail or deliver a copy of the regulatory analysis to any person who requests a copy.

Takings Assessment for Rules Limiting Use of Real Property: (N.D.C.C. § 28-32-09)

\_\_\_\_\_ Has the agency assessed the likelihood that the rule will result in a taking; identified the purpose of proposed rule; explained why proposed rule is necessary and why no alternative is available; estimated the cost to the government if a court determines the rule is a taking; identified the source of such payment within the agency's budget; and certified that the benefits exceed the compensation costs? (A "taking" is defined in the statute.)

Small Entity Regulatory Analysis: (H.B. 1212, 2003 N.D. Leg. (to be codified at N.D.C.C. § 28-32-08.1))

\_\_\_\_\_ Is the proposed rule mandated by federal law?

\_\_\_\_\_ If not, is the agency exempt from the requirement of a small entity regulatory analysis?

\_\_\_\_\_ If not, has the agency prepared a regulatory analysis in which, consistent with public health, safety, and welfare, it considers using regulatory methods to accomplish the statutory objectives while minimizing adverse impact on small entities? Included in the analysis should be consideration of the following methods for reducing a rule's impact on small entities: establishment of less stringent compliance or reporting requirements; establishment of less stringent schedules or deadlines for compliance or reporting requirements; consolidation or simplification of compliance or reporting requirements; establishment of alternative performance standards; and exemption of small entities from all or a part of any requirements.

Small Entity Economic Impact Statement: (H.B. 1212, 2003 N.D. Leg. (to be codified at N.D.C.C. § 28-32-08.1))

\_\_\_\_\_ Is the proposed rule mandated by federal law?

\_\_\_\_\_ If not, is the agency exempt from the requirement of a small entity impact statement?

\_\_\_\_\_ If not, could the proposed rule have an adverse economic impact on small entities?

\_\_\_\_\_ If so, did the agency prepare an economic impact statement that includes consideration of the following: the small entities subject to the proposed rule; the administrative or other costs required to comply with the proposed rule; the probable cost and benefit to private persons or consumers who would be affected by the proposed rule; the probable effect of the proposed rule on state revenues; whether there are less intrusive or less costly alternative methods to achieve the purpose of the proposed rule?

Contents of Full Notice: (N.D.C.C. §§ 28-32-10(1)(a), 28-32-12)

\_\_\_\_\_ Contains a short, specific explanation of both the proposed rule and the purpose of the proposed rule.

\_\_\_\_\_ Contains a determination of whether the proposed rule is expected to have an impact on the regulated community in excess of \$50,000.

\_\_\_\_\_ Identifies at least one location where the text of proposed rule may be reviewed.

\_\_\_\_\_ Provides an address to which written comments may be sent.

\_\_\_\_\_ Provides a telephone number at which a copy of the proposed rule and regulatory analysis, if issued, may be requested.

\_\_\_\_\_ If the changes are substantive, states the time and place for oral hearing.

\_\_\_\_\_ States the deadline for submission of written comments.

Filing of Notice and Rules: (N.D.C.C. § 28-32-10)

\_\_\_\_\_ File copy of the agency's full notice with Legislative Council.

\_\_\_\_\_ File copy of proposed rules with Legislative Council.

\_\_\_\_\_ Mail a copy of the full notice to each person who has made a timely request for a mailed copy of the notice.

Publication of Abbreviated Notice: (N.D.C.C. § 28-32-10(1)(b))

\_\_\_\_\_ Abbreviated notice identifies address or telephone number to use to obtain a copy of the proposed rules.

\_\_\_\_\_ Abbreviated notice includes the address to use and the deadline to submit written comments.

\_\_\_\_\_ Abbreviated notice identifies the location, date, and time of the public hearing.

\_\_\_\_\_ Publish abbreviated notice at least once in each official county newspaper in North Dakota.

\_\_\_\_\_ Publication in display-type format with a minimum width of one column of approximately two inches [5.08 centimeters] and between three inches [7.62 centimeters] to four inches [10.16 centimeters] in depth with a headline describing the general topic of the proposed rules.

Timing of Public Hearing: (N.D.C.C. § 28-32-10(5))

\_\_\_\_\_ Has at least 30 days elapsed between the latest date of publication and the date of the hearing? (The date of publication is counted, but not the date of the hearing.)

\_\_\_\_\_ Has at least 30 days elapsed between the date Legislative Council mailed copies of the notice and the date of the hearing? (The date the Legislative Council mails copies of an agency's notice is counted, but not the date of the hearing.)

Note: Both of the above requirements must be met. Publishing a notice, holding a hearing, and closing the comment period on the same day of successive months will not technically satisfy the requirements of N.D.C.C. § 28-32-10.

Public Comment Period: (N.D.C.C. § 28-32-12)

\_\_\_\_\_ Has the comment period been open at least 30 days since the conclusion of the rulemaking hearings?

\_\_\_\_\_ If no hearing was required, has the comment period been open at least 30 days since the latest date of publication and from the date Legislative Council mailed copies of notice?

Written Record: (N.D.C.C. § 28-32-15)

\_\_\_\_\_ Has the agency made a written summary of each oral comment on the rule?

\_\_\_\_\_ Has the agency made a written record of its consideration of all written and oral submissions contained in the rulemaking record?

Submit the Following Documents with a Request for the Attorney General's Opinion as to the Legality of a Proposed Rule: (N.D.C.C. § 28-32-14)

\_\_\_\_\_ A copy of both the proposed rules and, if changes to the proposed rules were made after the notice was sent to Legislative Council, a copy of the original proposed rules and a notation regarding what was changed and why.

\_\_\_\_\_ A copy of both the full and abbreviated notices of intent to adopt, amend, or repeal rules.

\_\_\_\_\_ A copy of letter or affidavit stating where and when the notice was published or copies of all affidavits of publication from all official county newspapers.

\_\_\_\_\_ A copy of letter filing notice and proposed rules with Legislative Council.

\_\_\_\_\_ A copy of all written comments and the written summary of all oral comments, or a statement that there were no comments.

\_\_\_\_\_ A copy of written record of agency's consideration of all comments.

\_\_\_\_\_ A copy of the regulatory analysis and the date on which it was available, if one was issued, or a statement of the reasons a regulatory analysis was not required.

\_\_\_\_\_ A copy of the takings assessment, if one was required, or a statement of the reasons a takings assessment was not required.

\_\_\_\_\_ A copy of the small entity regulatory analysis, if one was required, or a statement of the reasons a small entity regulatory analysis was not required.

\_\_\_\_\_ A copy of the small entity economic impact statement, if one was required, or a statement of the reasons a small entity economic impact statement was not required.

\_\_\_\_\_ The billing code to be used for review of the rules.

Filing Rule with Legislative Council: (N.D.C.C. § 28-32-03)

\_\_\_\_\_ File a copy of each rule adopted, a copy of each written comment on the rule, and a copy of the agency's written summary of each oral comment, together with the Attorney General's opinion, with the Legislative Council for publication in NDAC.

Filing Small Entity Regulatory Analysis and Economic Impact Statement with the Administrative Rules Committee: (H.B. 1212, 2003 N.D. Leg. (to be codified at N.D.C.C. § 28-32-08.1))

\_\_\_\_\_ Provide a copy of the small entity regulatory analysis and economic impact statement, if required, with the administrative rules committee when the committee is considering the associated rules.

## PROCEDURES FOR PROMULGATING ADMINISTRATIVE RULES

This memorandum sets forth the procedures that must be followed in promulgating rules under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. In addition to the requirements discussed below, some other points to consider include:

- I. Not all agencies are subject to chapter 28-32, and some agencies are only subject to chapter 28-32 in limited respects. See N.D.C.C. § 28-32-01(2).
- II. Not all agency statements are "rules" under chapter 28-32. Chapter 28-32 applies to statements of general applicability that implement or prescribe law or policy, or the organization, procedure, or practice requirements of the agency, unless one of several exceptions applies. See N.D.C.C. § 28-32-01(11). An imprecise, but more instinctive, way of thinking about this definition is that it covers most procedures you want people to follow or rules and behavior you want to enforce.
- III. The procedure outlined in chapter 28-32 is required to adopt new agency rules. The procedure also applies to amending, repealing or suspending an existing rule. N.D.C.C. § 28-32-01(11). However, a rule may be repealed or amended if its statutory authority has been amended or repealed without following the general requirements of chapter 28-32 if the procedures in N.D.C.C. § 28-32-18.1(2) are followed, as outlined in paragraph 1.2.2 below.
- IV. If a rule is not adopted in substantial compliance with N.D.C.C. ch. 28-32, it will be invalid. However, inadvertent failure to supply any person with notice does not invalidate a rule. N.D.C.C. § 28-32-13. Beware, however, under some federal laws failure to supply notice may invalidate a rule.
- V. The agency's attorney should review applicable state and federal laws that may impose additional rulemaking requirements. For example, an agency's own statutes or applicable federal laws may impose certain requirements in the rulemaking process.
- VI. Rulemaking hearings conducted in accordance with N.D.C.C. ch. 28-32 do not require the use of a hearing officer from the Office of Administrative Hearings. N.D.C.C. § 28-32-01(1). However, the agency may request that a hearing officer from the Office of Administrative Hearings preside at the rulemaking proceedings.

1. GENERAL REQUIREMENTS.

Chapter 28-32 of the Century Code sets forth the general procedure for adopting rules.

1.1. Time period allowed for rule change.

Section 28-32-07, N.D.C.C., provides that any rule change, including a creation, amendment, or repeal, made to implement a statutory change must be adopted and filed with the Legislative Council within nine months of the effective date of the statutory change. The Legislative Council may grant extensions of time.

1.2. Preliminary considerations.

An agency should consider the requirements of the regulatory analysis, the takings assessment, the small entity regulatory analysis and the small entity economic impact statement when drafting rules and must have them prepared, if necessary, before undertaking the promulgation process. The requirements for a regulatory analysis, a takings assessment, a small entity regulatory analysis and a small entity economic impact statement are discussed in detail at paragraphs 2, 3, 4 and 5 below, respectively.

1.2.1. Repeal or waiver of certain rules/adoption of rules by reference.

Sections 28-32-04 and 28-32-05, N.D.C.C., provide that an agency may not adopt rules from federal guidelines which are not relevant to state regulatory programs and shall repeal or amend any irrelevant rules adopted from federal guidelines. In some instances, agencies are required to adopt by reference existing rules. Also, an agency shall seek a waiver from the appropriate United States agency for relief from complying with or adopting non-relevant rules and shall seek authorization from the appropriate United States agency to adopt federal rules by reference.

1.2.2. Amendment or repeal by agreement with Administrative Rules Committee.

Section 28-32-18.1(2), N.D.C.C., permits an agency to amend or repeal a rule without complying with the other requirements of chapter 28-32. The agency must initiate a request to the Administrative Rules Committee, and the agency must provide the regulated community with reasonable notice of the time and place of the hearing (meeting) at which the request will be considered. Further, the agency and the committee must both agree that i) the "amendment or repeal eliminates a provision which is obsolete or

no longer in compliance with law; and ii) that no detriment would result to the substantive rights of the regulated community from the amendment or repeal."

### 1.2.3. Emergency Rulemaking.

An agency, with the Governor's approval, may have a rule declared effective on the date it is first filed with the Legislative Council if the agency finds emergency rulemaking necessary. At least one of four grounds for emergency rulemaking must be found: 1) imminent peril to the public health, safety, or welfare would be abated by emergency effectiveness; 2) a delay in rulemaking is likely to cause a loss of revenues appropriated to support a duty imposed by law on the agency; 3) it is reasonably necessary to avoid a delay in implementing an appropriations measure; or 4) it is necessary to meet a mandate of federal law. The agency must declare the rule to be an "interim final rule" and thereafter give the same opportunity for oral and written comments from the public. The agency then adopts the rule and submits it along with the agency's reasons for finding an emergency to the Legislative Council. If the rule is substantially similar to the interim final rule, the effective date will be the date of first filing. An interim final rule is effective for 180 days after its declared effective date unless first adopted as a final rule. N.D.C.C. § 28-32-03(6). The agency must take appropriate measures to inform individuals impacted by the interim rules.

### 1.3. Opportunity for public comment.

An agency must adopt a procedure allowing all interested persons an opportunity to submit comments concerning the proposed rules. In the case of substantive rules, the agency must conduct an oral hearing. The agency must consider all comments received concerning the rules, make a written summary of each oral comment on the rules, and make a written record of its consideration of all comments contained in the rulemaking record. N.D.C.C. § 28-32-15(1).

#### 1.3.1. Notice and hearing.

Section 28-32-10(1), N.D.C.C., discusses the notice requirements for rulemaking procedures. The full notice of the proposed rule must include: i) a short, specific explanation of the proposed rule and its purpose, ii) a determination of whether the proposed rulemaking is expected to impact the regulated community in excess of \$50,000, iii) a place where interested parties may review the text of the proposed rule; iv) address(es) where written comments may be sent; v) the deadline for submitting comments;

vi) a telephone number for people to call when requesting a copy of the rules and regulatory analysis; and vii) in the case of substantive rules, the time and place of each hearing.

The agency's full notice and a copy of the proposed rules must be filed with the Legislative Council, and the agency must publish an abbreviated newspaper publication notice at least once in each official county newspaper published in North Dakota.

The abbreviated newspaper publication of notice must be in a display-type format with a minimum width of one column of approximately two inches [5.08 centimeters] and between three inches [7.62 centimeters] to four inches [10.16 centimeters] in depth with a headline describing the general topic of the proposed rules. The abbreviated notice must also include the address or telephone number to use to obtain a copy of the proposed rules, the address to use and the deadline to submit written comments, and the location, date, and time of the public hearing on the rules.

Both the full notice and the abbreviated notice should also contain a statement that persons requiring special accommodations should contact the agency, in accordance with the Americans with Disabilities Act (ADA).

Guidelines adopted by the Administrative Rules Committee state "[t]he notice should state the beginning and ending dates of the period during which written comments on the proposed rules will be accepted." The agency's full notice must also be mailed to each person who requests a copy of the notice. The agency may provide a full notice of the proposed rule to any person who is likely to be interested. The agency must provide a copy of the proposed rules to any person requesting a copy. The agency may charge the actual cost of providing copies of the proposed rule.

At least 30 days must elapse between the later of the date of the publication of the notice in each county newspaper or the date the Legislative Council mails copies of the agency's notice and the date of the hearing. The 30-day period begins the first business day of the month in which notices must be mailed or on the date of the publication, whichever is later. This period does not include the date of the hearing, but ends on the last day before that date. After the hearing, a comment period of at least 30 days must be allowed. This time period does not include the date of the hearing but does include the last date the comment period is open.

### 1.3.2 Record keeping.

Section 28-32-15(1), N.D.C.C., requires the agency to file a copy of each written comment and a written summary of each oral comment on the rule with the Legislative Council. Agencies are required to tape record or otherwise preserve a transcript of rulemaking hearings. N.D.C.C. § 28-32-44(6)(g). Further, the requirement for a written summary also logically applies to comments received by telephone. Other required records are discussed in paragraph 7.2, below.

### 1.3.3. Consideration of comments.

Section 28-32-11, N.D.C.C., requires an agency to fully consider all oral and written submissions concerning the rules prior to adoption, excepting emergency rulemaking, when this consideration necessarily takes place after the rules become effective. The agency is required to make a written record of its consideration of all comments and data submitted respecting a proposed rule. These comments implicitly may lead to amendments to the proposed rulemaking. The Attorney General has approved post-hearing amendments to proposed rules when the proposed change is a logical extension of the original rulemaking and when the original notice alerts the public that the general subject matter of the post-hearing amendment is under consideration.

## 1.4 Approval by Attorney General.

Section 28-32-14, N.D.C.C., requires the submission of every proposed rule to the Attorney General for an opinion as to its legality before final adoption. The Attorney General may not approve any rule exceeding the agency's statutory authority or written in a manner that is not concise or easily understandable. The rule may not be approved when the procedural requirements for rule adoption are not substantially met. The Attorney General may suggest revision of the rule to meet objections to its legality and shall advise an agency of necessary revisions.

Many agencies are governed by a board that meets on a periodic basis, and would like to have a new rule become effective as soon as possible between meetings. Oftentimes, such a board will approve a rule after the close of the comment period, contingent upon approval by the Attorney General. In this way, the agency may submit the rule to the Legislative Council if it meets the Attorney General's approval without a need for revision.

1.5. Effective date.

After the rules are approved by the Attorney General and adopted by the agency, the administrative agency must file the Attorney General's Opinion, the rules, any written comments, and the summary of any oral comments with the Legislative Council. N.D.C.C. § 28-32-15(1). The rules become effective the first day of the month after publication of the rule, N.D.C.C. § 28-32-15(2), unless emergency rulemaking procedures have been followed. N.D.C.C. § 28-32-03(6). The Legislative Council must receive rules by the 20th day of the month to ensure publication the following month.

2. REGULATORY ANALYSIS.

2.1. When a regulatory analysis is required.

Section 28-32-08, N.D.C.C., requires an agency to issue a regulatory analysis of its proposed rules under two circumstances. First, agencies must complete a regulatory analysis if within 20 days after the last published notice of the proposed rule hearing, a written request for an analysis is filed by the Governor or a member of the Legislative Assembly. Second, if the proposed rule is expected to have an impact on the regulated community in excess of \$50,000, an analysis must be done. In this case, the analysis must be available on or before the first date of public notice. The regulatory analysis must include quantification of the data to the extent practicable. Also, the agency must provide the regulatory analysis to any person who requests a copy of the analysis. The agency, however, may charge for the actual cost of providing a copy of the analysis.

The Administrative Rules Committee adopted guidelines which state: "[i]n determining whether the rule is expected to have an impact on the regulated community in excess of \$50,000, this standard means a reasonable expectation of a reasonably foreseeable cumulative negative fiscal impact to an identifiable regulated community in excess of \$50,000 in any 12-month period, which would not occur if the rule is not adopted." Any doubt about issuance of a regulatory analysis should be resolved in favor of issuance.

2.2. What the analysis must contain.

N.D.C.C. § 28-32-08(2) requires that a regulatory analysis contain the following:

2.2.1. A description of the classes of persons likely to be affected by the proposed rule, including classes bearing the cost of the proposed rule and classes benefiting from the proposed rule.

2.2.2. A description of the probable impact, including the economic impact, of the proposed rule.

2.2.3. The estimated cost to the agency of implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

2.2.4. A description of any alternative methods of achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why the methods were rejected in favor of the proposed rule.

2.3. Other issues.

Section 28-32-08(5), N.D.C.C., makes the preparation and issuance of a regulatory analysis mandatory. However, errors in the analysis are not grounds for declaring a rule invalid.

3. TAKINGS ASSESSMENT.

3.1. When a takings assessment is required.

Section 28-32-09, N.D.C.C., requires an agency to prepare a written assessment of the constitutional takings implications of a proposed rule if the proposed rule may limit the use of private real property.

3.2. What the assessment must contain.

Section 28-32-09(1), N.D.C.C., requires that the assessment:

3.2.1. Analyze the likelihood that the proposed rule may result in a taking or regulatory taking.

3.2.2. Clearly and specifically identify the purpose of the proposed rule.

3.2.3. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available to achieve the agency's goals while reducing the impact on private property owners.

3.2.4. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.

3.2.5. Identify the source of payment within the agency's budget for any ordered compensation.

3.2.6. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

4. SMALL ENTITY REGULATORY ANALYSIS

4.1. When a small entity regulatory analysis is required.

In what will be codified as N.D.C.C. § 28-32-08.1(2), agencies that are not statutorily exempted from N.D.C.C. § 28-32-08.1 are required to prepare a small entity regulatory analysis before the adoption of any proposed rule that is adopted after July 31, 2003. H.B. 1212, 2003 N.D. Leg.

4.2. What the small entity regulatory analysis must contain.

A small entity regulatory analysis must consider each of the following possible ways in which the agency can enact rules that minimize the adverse impact on small entities:

4.2.1. Establishing less stringent compliance or reporting requirements.

4.2.2. Establishing less stringent schedules or deadlines for compliance or reporting requirements.

4.2.3. Consolidating or simplifying compliance or reporting requirements.

4.2.4. Establishing performance standards that replace design or operational standards required in the proposed rule.

4.2.5. Exempting small entities from all or part of the rule's requirements.

4.3. Other issues.

If adversely affected by an agency's final rulemaking action a small entity is entitled to seek judicial review of the agency's compliance with the small entity regulatory analysis requirement within one year of the date of the final agency action. H.B. 1212, 2003 N.D. Leg. (to be codified at N.D.C.C. § 28-32-08.1).

5. SMALL ENTITY ECONOMIC IMPACT STATEMENT.

5.1. When a small entity economic impact statement is required.

In what will be codified as N.D.C.C. § 28-32-08.1(3), agencies not statutorily exempted from N.D.C.C. § 28-32-08.1 are required to prepare a small entity economic impact before the adoption of any proposed rule adopted after July 31, 2003, if the proposed rule may have an adverse economic impact on small entities. H.B. 1212, 2003 N.D. Leg.

5.2. What the statement must contain.

A small entity economic impact statement must include consideration of the following:

5.2.1. Small entities that may be subject to the proposed rule.

5.2.2. The administrative or other costs required for small entities to comply with the proposed rule.

5.2.3. The probable cost and benefit to private persons and consumers who may be affected by the proposed rule.

5.2.4. The probable effect of the proposed rule on state revenues.

5.2.5. Whether there are any less intrusive or less costly methods of achieving the proposed rule's purpose.

5.3. Other issues.

A small entity that is adversely affected by an agency's final rulemaking action is entitled to seek judicial review of the agency's compliance with the small entity economic impact statement requirement within one year of the date of the final agency action. H.B. 1212, 2003 N.D. Leg. (to be codified at N.D.C.C. § 28-32-08.1).

6. ADMINISTRATIVE RULES COMMITTEE REVIEW.

Section 28-32-02(1), N.D.C.C., reserves to the Legislative Assembly the authority to determine when and if rules of the administrative agencies are effective.

6.1. Review of new rulemaking.

Although not required by statute, the Administrative Rules Committee will request that an entity explain the rule changes.

- 6.1.1. Section 28-32-11, N.D.C.C., requires that each agency have a procedure to allow interested parties to request and receive notice from the agency of the date and place the rule will be reviewed by the Administrative Rules Committee.
- 6.1.2. In what will be codified as N.D.C.C. § 28-32-08.1(2), agencies are required to provide the committee with copies of any small entity regulatory analysis or economic impact statement prepared by the agency. H.B. 1212, 2003 N.D. Leg.
- 6.1.3. Section 28-32-17, N.D.C.C., provides that the committee may file objections to rules it deems unreasonable, arbitrary, capricious, or beyond the authority delegated to the agency, with the Legislative Council. The Legislative Council must publish the objections in the North Dakota Administrative Code. This section also requires that the agency promulgating the rule respond to the committee's objection within 14 days after the objection is filed. The committee may then withdraw or modify its objection.

After the committee makes an objection, the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish the rule was within the authority delegated to the agency. If the agency fails to meet its burden, the court must declare the rule invalid, and award court costs, including attorney's fees, to the prevailing party. N.D.C.C. § 28-32-17(4).

6.2. Finding that rules are void. (N.D.C.C. § 28-32-18).

- 6.2.1. The Administrative Rules Committee may find that all or any portion of the rule is void. However, in order to do this the committee initially must consider the rule within 90 days after the date of the administrative code supplement in which the rule change appears. There is a special provision for rule changes appearing in the administrative code supplement from November 1 immediately preceding a regular session of the Legislative Assembly through the following May 1. In such instance, the committee may take up the rule at its first meeting following the regular session of the Legislative Assembly.
- 6.2.2. The Committee may find a rule void at the meeting at which the rule is initially considered by the committee, or it may delay consideration of the rule for one subsequent meeting.
- 6.2.3. When finding a rule or a portion of a rule void, the Committee must make any of the following specific findings:

- 6.2.3.1. An absence of statutory authority.
- 6.2.3.2. An emergency relating to public health, safety, or welfare.
- 6.2.3.3. A failure to comply with express legislative intent or to substantially meet the procedural requirements of chapter 28-32 for adoption of the rule.
- 6.2.3.4. A conflict with state law.
- 6.2.3.5. Arbitrariness and capriciousness.
- 6.2.3.6. A failure to make a written record of its consideration of written and oral submissions respecting the rule.

6.3. Notice of committee findings. (N.D.C.C. § 28-32-18(2)).

Within three business days after the Committee finds a rule or part thereof void, the Legislative Council shall provide written notice of the finding and the committee's specific findings to the adopting agency and the chairman of the Legislative Council.

Within 14 days of receipt thereof, the agency may file a petition with the chairman of the Legislative Council for review by the Legislative Council. If a petition is not filed, the rule becomes void on the 15th day after the notice from the office of the Legislative Council to the adopting agency.

If within 60 days after receipt of the petition from an adopting agency the Legislative Council has not disapproved by motion the Committee's finding, the rule is void.

6.4. Effectiveness.

If a rule is found to be void by the Administrative Rules Committee, it is void from the time provided under § 28-32-18(2). N.D.C.C. § 28-32-15(2).

6.5. Amendment or repeal of a rule by agency after consideration by the committee.

Section 28-32-18(3), N.D.C.C., provides that an agency may amend or repeal a rule or create a related rule if, after consideration by the Administrative Rules Committee, the agency and Committee agree that the rule amendment, repeal, or creation, is necessary to address any of the considerations under § 28-32-18(1).

A rule amended, repealed, or created under this subsection is not subject to the other requirements of the chapter relating to adoption and may be resubmitted by the agency to the Legislative Council for publication as amended, repealed, or created and reconsidered by the committee at a subsequent meeting at which public comment on the agreed rule change must be allowed.

7. APPEAL.

Section 28-32-42(2), N.D.C.C., allows any interested person who participated in the rulemaking process to appeal the agency's rulemaking action if the appeal is taken within 90 days after the date of publication in the North Dakota Administrative Code. Rules may still be otherwise challenged in administrative and civil actions. An appeal of an agency's rulemaking action may be taken to the district court of Burleigh County. N.D.C.C. §28-32-42(3)(b). An action to contest the validity of a rule on the grounds of non-compliance with chapter 28-32 must be commenced within two years after the effective date of the rule. N.D.C.C. § 28-32-13.

7.1. Notice of appeal.

When an appeal is taken, notice of appeal and specifications of error detailing the grounds on which the appeal is taken must be served upon the administrative agency concerned, the Attorney General or an assistant attorney general, and upon the Legislative Council. All of the parties to the proceeding need not be notified. N.D.C.C. § 28-32-42(4). Any person who participated in the rulemaking process may participate in the appeal. N.D.C.C. § 28-32-42(5).

7.2. Record on appeal.

Under N.D.C.C. § 28-32-44(6), the record on appeal must consist of the following:

- 7.2.1. All agency notices concerning proposed rulemaking;
- 7.2.2. A copy of the proposed rule upon which written and oral submissions were made;
- 7.2.3. A copy of the rule as submitted for publication;
- 7.2.4. Any opinion letters by the Attorney General regarding the rule's legality or the legality of the agency's rulemaking action;

- 7.2.5. A copy of any interim rule and the agency's findings and statement of the reasons for an interim rule;
- 7.2.6. The regulatory analysis of a proposed rule;
- 7.2.7. The transcript of any oral hearing on a proposed rule;
- 7.2.8. All written submissions made to the agency on a proposed rule;
- 7.2.9. Any staff memoranda or data prepared for agency consideration regarding the proposed rule;
- 7.2.10. Any other document that the agency believes is relevant to the appeal; and
- 7.2.11. Any other document that is not privileged and which is a public record that the appellant requests the agency to include in the record, if relevant to the appeal.

The agency is responsible for maintaining a record of the administrative proceeding and certifying the record on appeal. When an agency receives a notice of appeal, it must notify the appellant of the estimated cost of preparing and filing the record. Within 30 days after the appeal has been taken, or such longer time as directed by the court, and after the appellant has paid the estimated cost, the agency must prepare and file the entire record. N.D.C.C. § 28-32-44(2).

7.3. Scope of and procedure on appeal.

The district court's review of an appeal from an agency's rulemaking action is limited to the record filed with the court. N.D.C.C. § 28-32-47. If an appellant requests documents be included in the record and the agency does not include them, the court, upon application by the appellant, may compel inclusion.

The agency decision must be affirmed unless the court finds any of the following are present:

- 7.3.1. The provisions of chapter 28-32 have not been substantially complied with in the agency's rulemaking actions.
- 7.3.2. A rule published as a result of the rulemaking action appealed is unconstitutional on the face of the language adopted.

7.3.3. A rule published as a result of the rulemaking action appealed is beyond the scope of authority of the agency.

7.3.4. A rule published as a result of the rulemaking action appealed is on the face of the language adopted an arbitrary or capricious application of authority granted by statute.

If the court does not affirm the agency action, the court must remand the matter to the agency for disposition in accordance with the order of the court, or the rule or portion of it must be declared invalid for reasons stated by the court.

7.4. Stay of rule's effectiveness.

Section 28-32-48, N.D.C.C., provides that an appeal from a rulemaking action does not stay the effect of the rule unless the court to which the appeal is taken, upon application and after a hearing or submission of briefs, orders a stay.

7.5. Attorney's fees and costs.

Section 28-32-50, N.D.C.C., provides for an award of costs and attorney's fees for agency rulemaking action taken without substantial justification.

8. PRIVATE LANDOWNER'S REQUEST FOR RECONSIDERATION.

Section 28-32-09(2), N.D.C.C., allows any private landowner who is or may be affected by an existing rule limiting the use of the private landowner's real property to request in writing that the agency reconsider the application or need for the rule. The agency, within 30 days of receiving the request, must consider the request and inform the landowner, in writing, whether the agency intends to keep the rule in place, modify application of the rule, or repeal the rule.

9. SMALL ENTITY'S RIGHT TO JUDICIAL REVIEW

A small entity that is adversely affected by an agency's final rulemaking action is entitled to seek judicial review of the agency's compliance with the small entity regulatory analysis and economic impact statement requirements within one year of the date of the final agency action. H.B. 1212, 2003 N.D. Leg. (to be codified at N.D.C.C. § 28-32-08.1).

NOTICE OF INTENT TO  
[ADOPT, AMEND, OR REPEAL] ADMINISTRATIVE RULES

TAKE NOTICE that the [Agency] will hold a public hearing to address proposed [new, amendments to, or repeal of] N.D. Admin. Code [title, article, chapter, and section] at [time] on [day], [date], at [address where hearing(s) will be held]. The purpose of the proposed [rule, amendment, or appeal] is [purpose: e.g., implement statutes, comply with federal law, etc.] The proposed [rule, amendment, or repeal] address(es) [specific explanation of each subject of proposed rules]. The proposed [rule, amendment, or repeal] [is or is not] expected to have an impact on the regulated community in excess of \$50,000.

The proposed rules may be reviewed at the office of [agency and address]. A copy of the proposed rules and/or a regulatory analysis may be requested by writing the above address or calling [telephone number]. Written or oral comments on the proposed rules sent to the above address or telephone number and received by [date comment period closes, 30 days after public hearing] will be fully considered.

If you plan to attend the public hearing and will need special facilities or assistance relating to a disability, please contact the [Agency] at the above telephone number or address at least [the amount of prior notice required] prior to the public hearing.

Dated this \_\_\_\_\_ day of \_\_\_\_\_.

[Agency Head or Representative]

ENCLOSURE 2  
Letter to Legislative Council

[DATE]

Mr. John Walstad  
Code Revisor  
North Dakota Legislative Council  
State Capitol  
600 East Boulevard, 2nd Floor  
Bismarck, ND 58505-0360

Dear Mr. Walstad:

The Notice of Intent to [Adopt, Amend, or Repeal] Administrative Rules and a copy of the proposed rules are enclosed as required by N.D.C.C. § 28-32-10(1).

Sincerely,

Enclosures

ENCLOSURE 3  
Notice to Newspaper

[DATE]

North Dakota Newspaper Association  
1435 Interstate Loop  
Bismarck, ND 58503-0567

Please send the enclosed public notice to each official county newspaper for publication one time as soon as possible. Note that the publication of the notice must be in a display-type format with a minimum width of one column of approximately two inches [5.08 centimeters] and a depth of [between three inches [7.62 centimeters] and four inches [10.16 centimeters]]. Please also note that the notice must include a headline describing the general topic of the proposed rules.

Please send the billings along with the Affidavits of Publication to [Agency Name and Address].

Thank you for your assistance.

Sincerely,

Enclosure

[If the agency does not use the NDNA, then publication requests such as this must be sent by the agency to each of the state's official county newspapers]

ABBREVIATED NOTICE OF INTENT TO  
[ADOPT, AMEND, OR REPEAL] ADMINISTRATIVE RULES  
RELATING TO [SHORT DESCRIPTION OF PROPOSED RULES]

TAKE NOTICE that the [Agency] will hold a public hearing to address proposed changes to the N.D. Admin. Code at [time] on [day], [date], at [address where hearing(s) will be held].

A copy of the proposed rules may be obtained by [writing the [agency and address] or calling [telephone number] (note only the address or the phone number are required, not both)]. Also, written comments may be submitted to [address (note this is required for this purpose)] until [date comment period closes]. If you plan to attend the public hearing and will need special facilities or assistance relating to a disability, please contact the [agency] at the above telephone number or address at least [the amount of prior notice required] prior to the public hearing.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

[Agency Head or Representative]

Small Entity Regulatory Analysis and Economic Impact Statement

SMALL ENTITY REGULATORY ANALYSIS

(Discuss each question)

1. Was establishment of less stringent compliance or reporting requirements for small entities considered? To what result?
2. Was establishment of less stringent schedules or deadlines for compliance or reporting requirements considered for small entities? To what Result?
3. Was consolidation or simplification of compliance or reporting requirements for small entities considered? To what result?
4. Were performance standards established for small entities for replacement design or operational standards required in the proposed rule? To what result?
5. Was exemption of small entities from all or any part of the requirements in the proposed rule considered? To what result?

SMALL ENTITY ECONOMIC IMPACT STATEMENT

(Discuss each question)

1. Which small entities are subject to the proposed rule?
2. What are the administrative and other costs required for compliance with the proposed rule?
3. What is the probably cost and benefit to private persons and consumers who are affected by the proposed rule?
4. What is the probable effect of the proposed rule on state revenues?
5. Is there any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule?

PUBLIC HEARING FORMAT

1. I am \_\_\_\_\_ and I will be acting as hearing officer for this public hearing.
2. It is now \_\_\_\_\_ (time) on \_\_\_\_\_ (date), in the \_\_\_\_\_ (place) so at this time, I open this hearing.
3. This public hearing has been called for the purpose of allowing all interested individuals an opportunity to submit information concerning.

Proposed [new, amendments to or repeal of] N.D. Admin. Code

Article \_\_\_\_\_ (number) \_\_\_\_\_ (title)  
Section \_\_\_\_\_ (number) \_\_\_\_\_ (title)

4. Information gathered at this hearing will be transmitted to the \_\_\_\_\_ for its deliberation and final decision. [The \_\_\_\_\_ will not be responding to comments at this hearing. The comments received at this hearing will be considered with any written comments that are received and the \_\_\_\_\_ will present its consideration of all of the comments in writing. You may request a copy of the written response and one will be provided to you.]
5. This hearing is being taped and we ask everyone to use the podium so that the tape will be of good quality for transcribing purposes. Please identify yourself for the record before you speak.
6. Everyone present will be given an opportunity to speak. If you have a prepared statement, a written copy of your statement is appreciated and will be helpful.
7. A registration sheet has been placed next to the podium. I ask that everyone present please sign this sheet before they leave.
8. At this point, I open the hearing for comments.

Closing

1. Thank you all for coming. All of the information gathered at this hearing will be provided to the \_\_\_\_\_, which is the decision-making body.
2. The record will be held open for written comment until \_\_\_\_\_ (date).
3. At this point, I will close the hearing on:

Proposed [new, amendments to or repeal of] N.D. Admin. Code

Article \_\_\_\_\_ (number) \_\_\_\_\_ (title)  
Section \_\_\_\_\_ (number) \_\_\_\_\_ (title)

[DATE]

The Honorable Wayne Stenehjem  
Attorney General  
State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505-0040

Dear Mr. Stenehjem:

Enclosed please find the proposed [new, amendments to, or repeal of] N.D. Admin. Code [title, article, chapter] by the [Agency]. The proposed rules have been approved by [Board or Agency]. In accordance with N.D.C.C. § 28-32-14, the [Agency or Board] requests your examination of these rules as to their legality so they may be considered for formal adoption and publication in the North Dakota Administrative Code. The time for review of these rules should be recorded under [billing code].

Attached for purposes of review is a copy of the full and abbreviated Notices of Intent to [Adopt, Amend, or Repeal] Administrative Rules; and Affidavit of Publication from each newspaper in which the notice was published [or Affidavit of Publication from Newspaper Association]; a copy of the letter filing the Notice and Administrative Rules with the Legislative Council; [a copy of all written comments]; [a copy of the written summary of each oral comment]; [the Agency's written record of consideration of all public comments received]; [a copy of the regulatory analysis]; [the Agency's small entity regulatory analysis]; [the Agency's small entity economic impact statement]; and [a copy of the takings assessment if needed].

[No regulatory analysis required as the proposed rules are not expected to have an impact on the regulated community in excess of \$50,000, and neither the Governor nor any member of the Legislative Assembly requested a regulatory analysis.]

[No takings assessment was required because the rule does not limit the uses of real property.]

[No oral or written comments were received on the rules.]

[No small entity economic impact statement was required because (the agency is exempt from the requirement to prepare one); (the proposed ruled are mandated by federal law); (none of the proposed rules will have an adverse economic impact on small entities).]

[No small entity regulatory analysis was required because (the agency is exempt from the requirement to prepare one); (the proposed ruled are mandated by federal law).]

Sincerely,

Enclosures