LG1.2:R 33/1993
c2

JOINT LEGISLATIVE COMMITTEE ON REGULATORY REFORM AND ENFORCEMENT

Committee Report

Committee Members

Senator Ed Phillips
Co-Chair
Senator Tom Patterson
Senator Victor Soltero
Stephen R. Cooper
Kevin R. Kinsall
Bertram B. Putterman
Honorable Rick Romley

Representative Gary Richardson
Co-Chair
Representative Dan Schottel
Representative George Cunningham
Dick Foreman
Tracy R. Thomas
William F. Shore III

ARIZONA STATE LIBRARY
ARCHIVES & PUBLIC RECORDS

NOV 8 2002

JOINT LEGISLATIVE STUDY COMMITTEE
ON REGULATORY REFORM AND ENFORCEMENT

Table of Contents

Chapter 1
Committee Report

Chapter 2
Committee Minutes

Chapter 3
Fiscal Analysis on Full Text State Register

Chapter 4
Staff Analysis of Legislative Review of Rules

CHAPTER 1

COMMITTEE REPORT

REPORT OF JOINT STUDY COMMITTEE ON REGULATORY REFORM AND ENFORCEMENT

Creation of Committee and Its Charges

Laws 1992, Chapter 95 called for the creation of a joint legislative committee to study regulatory reform and enforcement. The charge of the committee was two-fold. The first charge was to conduct hearings and inquire into the extent to which state government has adopted unnecessary, costly, duplicative or overly burdensome rules and licensing requirements that adversely affect the interests of the state economy and state residents. Secondly, the committee was to conduct hearings and inquire into the extent to which the state relies on criminal enforcement of regulatory laws and the effectiveness of this enforcement.

The committee itself consisted of thirteen members:

1. The co-chairs who consisted of the chairmen of the house commerce committee and senate commerce and economic development committee.

2. Two additional members from each chamber of the legislature appointed by the speaker of the house of representatives and the president of the senate respectively, no more than one from the same political party in each chamber.

3. Three members appointed by the governor who each represented one of the following groups:
   (a) County attorneys
   (b) Occupational licensing boards
   (c) Regulated professions or occupations

4. Four members from the general public also appointed by the governor.

Committee Hearings and Testimony

The committee conducted seven hearings, taking testimony on the following issues:

1. The rule making process, including various aspects of the Administrative Procedures Act.

2. Inter-agency regulatory conflicts and duplications, including testimony from the business community.

3. Legislative review of rules and regulations, including state comparisons, legislative history in Arizona, and questions of constitutionality.

4. The creation of a state ombudsman office, including a comparison with current Alaska legislation and a review of H.B. 2340.

5. Amending the **State Register** to include the full text of proposed rules.

6. The role of the Small Business Connection within the Department of Commerce in facilitating the start up of new businesses in Arizona.

7. The effectiveness of criminal enforcement of rules and regulations.

Discussion of Issues

1. Rule Making Process: The committee received testimony from legislative staff, agency rule-writers and the Governor's Regulatory Review Council (GRRC) on the Administrative Procedures Act and the rule making process more generally. Several ideas for making the process more efficient and responsive to public input were discussed. The first and perhaps most significant idea consisted of increasing public input into the rule making process. Suggestions for increasing input ranged from placing the formal hearing process before GRRC review of a rule package to authorizing and/or requiring the **State Register** to publish notice of all public meetings during the informal stage of the rule making process. Also discussed was a requirement that all information and correspondence exchanged between an agency and the regulated community before the GRRC hearing be forwarded to GRRC for their consideration.

Another issue discussed at the committee hearings involved how to best streamline the rule making process in order to eliminate inefficiencies. Some suggestions included: (1) imposing a maximum limit on the time allowed between the enactment of legislation authorizing rule adoption and the subsequent opening of the agency rule docket (or start up of informal process); (2) an "express repeal" process for rules made obsolete due to statutory or federal law changes; (3) authorizing the comment period to be re-opened for rules which are "substantially" changed, rather than requiring those changed rules to be resubmitted to the entire process again.

A third suggestion was made by several agencies, GRRC and

the Attorney General's office that the rule making process would run more efficiently if proposed rules were written better in the first place. Testimony provided that this is a problem particularly for small boards that can not afford a staff of professional rule-writers. The suggestion was made that contract rule-writers be available at DOA or GRRC to help these boards. In fact, this suggestion has already been realized, as DOA has recently hired an individual to be affiliated with GRRC to help with this task.

A fourth idea discussed at the committee hearings involved authorizing the use of examples in rules. Currently, the Attorney General's office does not generally certify rules utilizing examples. The reason, they argue, is that the use of examples in rules, rather than clarifying the rule, often opens up legal avenues of ambiguity. In addition, the statutory definition of rules does non currently include the use of examples. The A.G.'s office maintains that the Department of Revenue, the agency for which examples would be most useful, may still utilize examples in brochures they publish to illustrate rules for taxpayers. However, it should be noted that at the federal level the Internal Revenue Service is authorized to use examples in their rules.

Another issue raised by the Governor's Regulatory Review Council, as well as by the Attorney General's office, was the ineffectiveness of GRRC's five year review recommendations. In these reviews, GRRC issues recommendations to agencies for changes to their rules. However, GRRC does not have any mechanism for enforcing these recommendations. One suggestion made by the A.G.'s office was to coordinate the sunset reviews with the five year reviews, requiring GRRC recommendations and agency implementation plans for these recommendations to be forwarded to the committee of reference conducting the sunset review.

Several agencies suggested that problems exist with the A.G. certification stage of the rule making process. While many agency rule-writers maintain that this stage in the process has improved over the past two years due to an assistant A.G. being assigned to GRRC, many claim that inconsistency often remains in the determinations made during the certification stage and the "front end" recommendations made by the assistant A.G. assigned to the agency. Moreover, statute does not require that the A.G.'s office provide front end input if it is requested by an agency; such input is merely authorized in statute. In fact, the A.G.'s office has claimed that it is not a rule-writing agency, nor is it necessarily enthusiastic about this function which it is sometimes requested to carry out. However, the A.G.'s office maintains that the office does provide a necessary function in certifying rules, and has urged the committee not to remove its certification from the rule making process. The suggestion was made to the committee that a time limit be placed upon the A.G. certification stage of the rule making process. For example, the A.G. would be required

to respond to the agency proposing a rule within x amount of days, or the rule would automatically become effective without certification. Another suggestion involved replacing A.G. certification with legislative review of rules, provided legislative council is involved in the review process.

Several agencies raised a seventh concern involving the inconsistency of GRRC's requirements on the economic and small business impact statements. The suggestion was made that statute clarify, perhaps in format, what is to be included on these statements.

Finally, the exempt status of many rules from the APA was discussed. There are three basic types of exemptions: (1) exemptions granted by the legislature; (2) emergency exemptions requested by an agency and authorized by the Attorney General (ARS 41-1026); and (3) rules and fees exempted by ARS 41-1005. The over-use of these exemptions was heavily discussed in the committee hearings. The suggestion was made that the legislature be more careful in granting exemptions, and that exempt rules not be renewable, but rather, must be replaced by regular rules or the opening of a rule docket within a year of adoption of exempt rules.

2. Inter-agency Conflicts: Written and oral testimony was received by members of the business community on specific duplicative and contradictory regulations among the various regulating agencies. While it was not within the purview of this committee, due to time constraints, to investigate specific regulatory and licensing requirements, these testimonies galvanized the committee to explore ways to make the regulatory process more responsive to the needs of the business community, particularly to small businesses. These ideas are delineated under the headings below.

3. Legislative Review of Rules: One of the primary concerns committee members and those of the regulated community voiced was the deviation of rules from legislative intent and statutory authority. While the A.G. currently takes these two factors into account when certifying rules, committee members maintained that the legislature itself is better placed to judge its own intent and statutory authority. Discussion thus took place over the possibility of legislative review of rules and regulations in Arizona, including past legislative attempts to enact legislative oversight of rules and regulations, the different models of legislative review in place in other states, possible constitutional difficulties, and practical concerns (see the attached papers). Two basic models of legislative review were discussed. The first consisted of an advisory model in which the legislature is not necessarily part of the rule making process, but rather is authorized to review rules for legislative intent and statutory authority, and may issue recommendations to agencies on whether these two factors are met. This particular model of

legislative oversight is rather informal, and the committee conducting any review can easily be staffed by committee of reference research staff. Variations of this model are used in several states, including Texas, Oregon and Washington. The experience in Texas has been that the legislature tends to under-utilize the review process on a day-to-day basis. Legislative review becomes an issue in Texas typically when the policies of a particular agency are being questioned. While the A.G. is not responsible for certifying rules in Texas, the suggestion has been made to the committee that Arizona may want to retain A.G. certification of rules with this model, as the model tends to be more informal, and typically not all rules are reviewed, only those which may be controversial or of specific interest to committee members. However, if the second model of legislative oversight is adopted, A.G. certification may not be necessary. Rather, in this model Legislative Council would review rules for the legislature, providing the staff for formal committee reviews. The legislature itself could veto rules provided the legislation is presented to the governor. This second model is more formal in nature, requiring all proposed rules to be reviewed by legislative committee. It is also more expensive; however, resources could be redirected from the A.G.'s office to Legislative Council, as the A.G. would no longer be required to take part in the rule making process. This model is used in many states, including Nevada and Colorado, the latter in which it has been in effect since 1976. Colorado also sunsets all its rules.

4. <u>The Creation of an Ombudsman Office</u>: The basis for discussion of the Ombudsman Office was H.B. 2340, introduced last session. This bill (see the enclosed) provided for an entity housed within the legislative branch of government which would have investigative capabilities over the administrative acts of state agencies. While many committee members expressed discomfort with the investigative powers this legislation would give to such an entity and the costs associated with these powers, committee members express interest in and support of the non-investigative functions that such an entity might serve. For example, an ombudsman office could facilitate communication between a citizen and a variety of agencies under which that person is regulated, particularly if regulations are contradictory. The ombudsman could then forward information regarding contradictory regulations to the legislature who could examine them for statutory authority, amending statutes if warranted. The ombudsman office could also provide a clearinghouse for licensing and regulatory requirements, dispensing permit forms when applicable. In addition, if housed within DOA, such an entity could provide a source of non- or quasi-judicial appeal for persons involved in disputes with regulatory agencies. A precedent for such an independent entity already exists in the area of taxation with the State Board of Tax Appeals.

Support was also expressed for requiring individual agencies and boards which have complex regulatory and licensing

requirements to provide ombudsman services. Many of these agencies already provide for such an office (such as DEQ and DOR). However, testimony was given by members of the public that these offices are not heavily publicized. The committee suggested that these offices be listed in the phone book under the government section.

5. The **State Register**: The issue was raised by several agencies, as well as the public, that the **State Register** is not very accessible to the regulated community because the full text of proposed rules is not printed there. Rather, when interested parties wish to see the full text, they must contact the individual agency. Agencies prefer a full text document as it will save them time and money in mailing out these texts to interested parties. Subject to a fiscal analysis, the committee has agreed that a full-text publication is warranted.

6. Small Business Connection: The Small Business Connection is housed in the Department of Commerce. Its purpose is to assist small businesses either starting, expanding or relocating to Arizona. The issue was raised in committee hearings that the Connection could be expanded to provide one-stop shopping for various licenses and permit forms. This issue was also raised in conjunction with the ombudsman office.

7. Criminal Enforcement of Rules and Regulations: Examining the extent to which the state relies on criminal enforcement of regulatory laws and the effectiveness thereof is one of the two charges of this committee. The concern was raised, however, that an insightful examination of this issue would entail the expertise of law enforcement officials from both rural and metropolitan areas around the state. An ad hoc committee consisting of various representatives from these jurisdictions has been formed to study this issue.

Committee Recommendations

The following recommendations have been agreed upon by committee members:

Amending the **State Register**

1. Require an Advance Notice of Proposed Rulemaking or a Notice of Docket Opening to be published for all proposed rules proceeding through regular rule-making process.

2. Require the full text of proposed and final rules proceeding through regular rulemaking to be published in the State Register, with the understanding that rules drafted as a result of supplemental notices and commentary not be published in full, but rather, a summary of changes to the original proposed rule be

published.

3. Include a preamble to all proposed and final rules proceeding through regular and summary rulemaking which states: (1) the legislative authority of the rule; (2) the issue being addressed by the rule; and (3) economic, small business and consumer impact information.

4. Require all rules exempted from the rule-making process to be noticed in the State Register.

5. Require publication in the State Register of supplemental notices for rules which have been substantially changed.

6. Include substantive policy decisions, executive orders, and Attorney General opinions in the State Register as well as notice publication of guidance documents.

7. Provide for examples within the body of a rule (committee intent is that examples will have the force of rules).

The Rulemaking Process

1. Provide for informal public input before rule-writing begins.

2. Require agency hearings and response to comments to occur before GRRC review.

3. Clarify what is to be included in economic, small business and consumer impact statements.

4. Provide for Attorney General advisory review prior to GRRC review and remove certification authority from the office of the Attorney General.

5. Limit renewals for rules granted emergency exemptions, and require regular rules to be adopted within a stipulated time period.

6. Provide a summary rulemaking process for rules made obsolete due to the elimination of an agency's statutory authority and ~~codification rules~~.

Inter-Agency Regulatory Conflicts and Duplications

1. Prohibit county and local jurisdictions from imposing rules and regulations which are more onerous to business than state regulations.

2. Strengthen standards for delegation agreements, including: (a) public notice and opportunity for comment; (b) clarification of the requirements for delegation agreements; and (c) specification of

the authority of the delegatee.

3. Require selected large scale state departments to designate an ombudsman and request that phone number of that position be published in the State Directory, State Register, and local telephone directories.

Legislative Review of Rules:

1. Provide for an advisory model of legislative oversight to review and comment on an optional basis proposed rules prior to their adoption.

Appropriations:

1. The committee members recognize that some appropriations may be necessary in order to take full advantage of the recommendations outline above.

Committee Extension:

1. It is recommended that the Joint Legislative Study Committee on Regulatory Reform and Enforcement be continued into next year.

2. It is recommended that a subcommittee of the Joint Legislative Study Committee on Regulatory Reform and Enforcement be created to further examine the efficacy of the criminal enforcement of regulatory laws.

CHAPTER 2

COMMITTEE MINUTES

Research

ARIZONA HOUSE OF REPRESENTATIVES
Forty-first Legislature - First Regular Session

JOINT STUDY COMMITTEE ON
REGULATORY REFORM AND ENFORCEMENT

Minutes of Meeting
Monday, May 17, 1993
House Hearing Room 2 - 10:00 a.m.

(Tape 1, Side A)

The meeting was called to order at 10:10 a.m. by Cochairman G. Richardson and attendance was noted by the secretary.

Members Present

Stephen Cooper, Representative of Occupational Licensing Board
Dick Foreman, Public Member
Kevin Kinsall, Public Member
Bertram Putterman, Representative of Regulated Professions
Rick Romley, County Attorney
William Shore, Public Member
Senator Victor Soltero
Senator Ed Phillips, Cochairman
Representative Gary Richardson, Cochairman

Members Absent

Representative Cathy Eden (excused)
Senator Tom Patterson (excused)
Representative Dan Schottel (excused)
Tracy Thomas, Public Member

Speakers Present

Sheila Graham, House Commerce Research Analyst
Debbie Johnston, Senate Assistant Research Analyst
Mark Bare, Legislative Liaison, Arizona Department of Commerce (DOC)
David Furrey, Superintendent, Flowing Wells Irrigation District
Jean Perusse, Wickenburg, representing himself
Chuck Shipley, Vice President of Public Affairs, Arizona Chamber of Commerce

Guest List (Attachment 1)

INTRODUCTIONS

Cochairman Richardson welcomed the Members to the first meeting of the Joint Study Committee on Regulatory Reform and Enforcement and asked each to introduce himself and describe his background and basis for serving on the Committee.

Mr. Richardson cited Chapter 95, Fortieth Legislature, Second Regular Session, which mandates that the Joint Study Committee on Regulatory Reform and Enforcement shall:

"1. Conduct hearings and inquire into the extent to which state government has adopted unnecessary, costly duplicative or overly burdensome rules and licensing requirements that adversely affect the interests of the state economy and state residents.

2. Conduct hearings and inquire into the extent to which this state relies on criminal enforcement of regulatory laws and the effectiveness of this enforcement.

3. Make recommendations as to legislative changes that may be deemed advisable based on its findings.

4. Submit a final report containing its findings and recommendations to the speaker of the house of representatives, the president of the senate and the governor on or before December 15, 1993."

Mr. Richardson said that it is his hope the Committee's efforts will culminate in solid, definable legislative recommendations in bill form that can be filed for the 1994 session.

Sheila Glenn, House Commerce Research Analyst, distributed a packet of general informational material which she explained was gathered from various sources, and includes suggestions from the two cochairmen (Attachment 2).

Mr. Richardson emphasized the importance of rules and regulations strictly heeding the letter of the law as well as the spirit of the law.

Mr. Putterman added that it is important, too, that mandates regarding rules and regulations be complied with in a timely manner.

Senator Phillips introduced the Senate Staff, comprised of Debbie Johnston, Assistant Research Analyst and Barry Wong, Commerce and Economic Development Committee Research Analyst, and offered their assistance to the Committee.

Senator Soltero introduced Claudia Acosta, Senate Democratic Staff Intern.

Mr. Richardson introduced the House Staff, comprised of Sheila Glenn, Commerce Committee Research Analyst and Trisha Korwes, Assistant Research Analyst.

Debbie Johnston, Senate Assistant Research Analyst, commented on the handout entitled "Governor's Regulatory Review Council" distributed to the Committee (Attachment 3), which is an outline and sample of the guidelines that the Governor's Regulatory Review Council (GRRC) uses in submission of proposed rule changes.

Mark Bare, Legislative Liaison, Arizona Department of Commerce (DOC), stated that DOC will make Department representatives available for participation in the activities of the Study Committee.

Senator Phillips suggested that there are two different ways to approach the study of regulatory reform; those being either to address the entire regulatory reform study strictly from a policy standpoint, or to go through the Arizona Revised Statutes and strike all the bad rules. He said that he would like to know the wishes of the Committee as to which approach is preferable. Senator Phillips concurred with Mr. Richardson's desires that the Committee will formulate recommendations that will result in meaningful legislation next session.

Mr. Bare opined that the best course of action for BOC would be to examine specific regulations that have a negative impact on businesses in Arizona.

Mr. Richardson surmised that the Committee will probably not solve all of the problems of the State in the next seven months of meetings, but said that he would like to formulate an action plan of what the Committee hopes to accomplish and narrow consideration to basic problems encountered by businesses.

Mr. Foreman contended that there is a big need for the Committee to start working through the Arizona Revised Statutes and develop a strong policy statement, and perhaps initiate a project SLIM for the rules and regulations of the State of Arizona.

Mr. Romley concurred that it is essential that a strong policy statement be forthcoming from the Study Committee, but emphasized that public comment and simplification are essential components to developing a piece of legislation that creates a process to address the thousands of issues that need to be addressed.

Mr. Kinsall agreed with previous comments and recommended that the committee explore legislative intent in its study of regulation reform, which he said is lacking at the current time.

David Furrey, Superintendent, Flowing Wells Irrigation District, explained that Flowing Wells is a political subdivision of the State, but is also similar to a small business, with a staff of nine, and a total budget of under $1 million. He submitted that one of the problems he has observed is that rules are adopted without knowledge or consideration of the cost impact on the regulated entity. Mr. Furrey suggested that there is a need for more specificity in mandates to agencies and stricter enforcement to ensure that agencies comply with the statutes. He pointed out that public testimony is worthless if a rule has already been approved by the Governor's Regulatory Review Council, and said that to go through the appeal process is too costly for a small entity.

Mr. Putterman substantiated that a public hearing held after a rule has been approved by GRRC is pointless and agreed that to fight the process is very expensive.

Mr. Richardson observed that it appears to be the Committee's desire to examine the Administrative Procedures Act and asked staff to prepare a summary of the Act, with specificity and detail relating to enforcement procedures. He added that the Committee may want to consider increasing the penalties for agencies that do not follow legislative directives.

Mr. Romley cautioned that because prosecution is very time consuming and extremely costly, prosecution of these agencies becomes a low priority, which results in no enforcement at all. He submitted that enforcement becomes much more simplified through an administrative tribunal. He pointed out that when fraud is involved, the matter moves into the traditional criminal arena, which is already covered by strong laws on the books.

Jean Perusse, Wickenburg, representing himself, commented on the conflicting rules of different agencies within the State. He described a personal experience with the Corporation Commission and the Department of Revenue. He stated that he was ordered to register as a small utility company because, as a small motel owner with two unconnected units and only one gas meter and water meter, the Corporation Commission ruled that he was selling water and gas to customers. However, the Department of Revenue has ruled that motels without restaurants or bars cannot sell products to customers. He questioned how one agency could consider him a seller and another agency rule that he is not a seller.

Chuck Shipley, Vice President of Public Affairs, Arizona Chamber of Commerce, supported previous suggestions that the Administrative Procedures Act be studied, as well as legislative intent pursuant to rules and regulations.

(Tape 1, Side B)

Mr. Shipley recommended that such areas of the Administrative Procedures Act as the taxing rules, the lack of consideration given to public testimony, and the impact of the paperwork involved with new rules and regulations be investigated. Mr. Shipley also recommended that the Committee study the relationship among city, county and state regulations, due to the apparent conflict and duplication with some of the regulations. He added that enforcement and penalty provisions should also be addressed and consideration given to whether further regulation is needed or if enforcement is the major problem. Mr. Shipley further suggested that the Committee review the Auditor General's reports, the Private Enterprise Review Board records, and question what effect regulatory burdens have on businesses considering relocating in Arizona.

Senator Phillips submitted ideas to be considered for the next meeting. He said that he would like to receive input from some of the people who do the rule-making, and would also like to hear from the Department of Commerce, Department of Environmental Quality, the Corporation Commission and the Private Enterprise Review Board as to what rules and regulations are in effect and which ones are not being enforced. Senator Phillips asked staff, if possible, to invite someone from either the American Legislative Exchange Council (ALEC), the Goldwater Institute, the Morrison Institute or the National Federation of Independent Businesses (NFIB) to speak at the next meeting.

Mr. Foreman suggested that it would be beneficial to hear from a representative of the Arizona Tax Research Association (ATRA) to present the implications of rules from the taxpayers' viewpoint.

Mr. Kinsall stated that he would like to know how rule-making impacts on economic development.

Mr. Richardson charged Committee Members to prepare a mission statement to be submitted to staff prior to the next meeting, for review at that time.

Senator Phillips asked Committee Members to also be prepared to comment on the idea of creating an ombudsman office, as described in the information packet (Attachment 2).

Mr. Richardson advised Committee Members to be prepared at the next meeting to share their suggestions for the Committee's course of action, specifically stating what, when and how.

The next meeting was scheduled for June 14, 1993, 10 a.m., in the Senate, the room to be determined later.

There being no further business to be considered, the meeting was adjourned at 11:25 a.m.

Carolyn Richter, Committee Secretary

(Attachments and tapes on file in the Office of the Chief Clerk.)

ARIZONA STATE LEGISLATURE
Forty-first Legislature - First Regular Session

JOINT STUDY COMMITTEE ON
REGULATORY REFORM AND ENFORCEMENT

Minutes of Meeting
Monday, June 14, 1993
Senate Hearing Room 1

(Tape 2, Side A)

The meeting was called to order at 10:10 a.m. by Cochairman Phillips and roll call was taken.

Members Present

Stephen Cooper, Representative of Occupational Licensing Board
Representative George Cunningham
Dick Foreman, Public Member
Kevin Kinsall, Public Member
Senator Tom Patterson
Bertram Putterman, Representative of Regulated Professions
Rick Romley, Maricopa County Attorney
Representative Dan Schottel
William Shore, Public Member
Senator Victor Soltero
Tracy R. Thomas, Public Member
Representative Gary Richardson, Cochairman
Senator Ed Phillips, Cochairman

Members Absent

None

Speakers Present

Professor Jonathan Rose, Arizona State University College of Law
Lisa Hardy, House Research Analyst, Government Operations Committee
Stuart Goodman, Legislative Liaison, Department of Administration (DOA)
Judith Bailey, Member, Governor's Regulatory Review Council (GRRC)

Guest List (Attachment 1)

Cochairman Phillips entertained corrections to the minutes of the previous meeting held on May 17, 1993. Hearing none, Senator Phillips declared the minutes approved as submitted.

Professor Jonathan Rose, Arizona State University College of Law, appeared before the Committee to share his knowledge and experience as a participant in past regulatory reform activities. He stated that his remarks will address three topics: the history of regulatory reform, the types of reform, and the process by which a state achieves regulatory reform. Professor Rose related that in

addition to involvement in regulatory reform at the State level, he has participated substantially at the national level also. He added that he has worked extensively with the Governor's Office, the Legislature and the Attorney General's Office for the past twenty years, and has been a member of many task forces dealing with this issue.

Professor Rose related that the history of regulatory reform in Arizona began in the mid-1970's, when Arizona was one of the most regulated states in the U.S. At that time the political climate started to change and through about the mid-1980's there was an onslaught of regulatory reform in such areas as transportation, construction, interstate banking, telecommunications, insurance and Arizona Health Care Cost Containment System (AHCCCS), as well as a total reform of the State's Administrative Procedures Act. He added that regulatory reform continued to occur until about the late 1980's, when it stopped, and said that nothing has happened since. Professor Rose said that he had hoped Governor Symington's Administration would show an interest in regulatory reform, but said, however, that he has not been able to stimulate any response from the Governor's Office.

Professor Rose stated that the types of regulatory reform fall into two categories, those being reform of specific industries, such as transportation, construction and insurance, and a simplified oversight control type regulatory reform, such as a sunset or Governor's Regulatory Review Council (GRRC).

Professor Rose reported that he has served on the Governor's Regulatory Review Council (GRRC) for over twelve years, but said that because he has not been reappointed to another term, his membership on the Council is now over. He said that one of the problems he observed while serving on GRRC is that the Legislature gives agencies great power in vague ways without restraining them at all. He suggested that the amount of rule-making or enforcement power the agencies get should be diminished, and then some type of oversight be followed to ensure that agencies are exercising their power appropriately. Professor Rose expressed satisfaction that these regulatory reform meetings are an indication that there is an interest on the part of the Legislature on this issue.

Professor Rose addressed the issue of how the State goes about achieving regulatory reform. He said that a couple of ways are the normal legislative process whereby a statute is passed, or the use of a task force, either legislative or gubernatorial. He further suggested that there should be a staff person in the Governor's Office responsibe for reform activity.

Mr. Romley suggested that rather than a task force, there needs to be a continuing process that goes on infinitum, and asked Professor Rose if he has any ideas for such a process. Professor Rose answered affirmatively, suggesting that there could be some kind of standing committee, perhaps something like a task force, but without a specific duration.

Lisa Hardy, House Research Analyst, Government Operations Committee, presented a flow chart depicting the Arizona Administrative Procedure Rule Making Process (Attachment 2). She went through each step of the process, noting the deviation from the normal process when a rule is deemed to be an emergency.

Stuart Goodman, Legislative Liaison, Department of Administration (DOA), pointed out that prior to his employment at DOA, he was a lobbyist for the private sector, giving him experience with both the regulated community and a regulatory agency. He emphasized the importance of a balance between making a rule too burdensome or making it too loose, and cautioned the Committee about making changes to rules prematurely before sufficient time has elapsed to effectively evaluate a rule. He also reported that arguments from the private sector have been made that providing public notification of an impending rule prior to the GRRC review would be preferable to the present process. The impact of this would be that the potentially affected party would have an opportunity to become involved in the process during the development stage of the rule rather than after the GRRC process.

Mr. Richardson asked Mr. Goodman to identify where bottlenecks are occurring in the rule-making process. Mr. Goodman opined that the bottleneck in the process is occurring in the Attorney General's Office, due to certification not being rendered in a timely manner.

Mr. Richardson said that while his intent is not to point fingers at any one office, he believes identifying bottlenecks will facilitate setting priorities for areas of improvement to speed the rule-making process.

Mr. Richardson posed the question of how the Legislature can be guaranteed that rules will reflect the intent of legislation. Mr. Goodman speculated that the Attorney General's certification is one safeguard, and said that another is by affected parties mitigating their concerns.

Mr. Richardson asked Mr. Goodman if he feels the current rule-making process is fair to the public. Mr. Goodman said that while it is not perfect, it is a much better process than what was followed in previous years.

Mr. Romley questioned whether there are any short-cuts to expedite the process of amending a rule. Mr. Goodman acknowledged that there is an expedited process that removes the GRRC review.

Mr. Romley inquired as to who makes the determination of whether a rule goes through GRRC. Mr. Goodman answered that exemption from the GRRC process is allowed for elected officials or if there is a statutory exemption.

Mr. Cunningham asked Mr. Goodman if he is aware of any states that provide for expedition of a rule through the process, if after public comment, there is no known opposition. Mr. Goodman cautioned that it is important to have provisions for removing something that appears noncontroversial at face value from the consent calendar so that something undesirable doesn't streak through the process. He noted, however, that once a rule gets to the public comment stage, very little time would be saved by expediting it at that point. In direct response to the question, Mr. Goodman said that he is not aware of any state that has such a provision as suggested.

Professor Rose reported that GRRC has a consent process when it has been determined there are no problems with a rule. Referring to legislative intent, Professor Rose pointed out that as long as agencies are given broad authority and have final say in promulgating rules, an agency can do what it wants with

a large amount of discretion and the Legislature has no control in seeing that its intent is carried out. He opined that there is no legal system that can be put in place to make the agencies do what the Legislature wants them to. He said that as far as bottlenecks and ways to expedite the rule-making process, it is his opinion that the main bottleneck is with the agencies themselves, due to poorly drafted rules. He submitted that there is no reason a well-thought-out, well-drafted rule can't be promulgated in a few months, but said that most often a lag occurs because the rule is not well-thought-out or well-drafted. He suggested that the Attorney General's Office could assist with this problem by providing agencies with assistance in developing a good product that will move through the process expeditiously.

Mr. Kinsall asked if there is any way to get information showing a timeline for getting through the rule-making process and identifying problem areas. Professor Rose cautioned about being careful with that approach because of the differences in rules and the need to separate them into appropriate categories, and look at each step of the process and determine the reasons for the delays.

Ms. Hardy interjected that the Attorney General's Office has offered assistance to agencies that request help in drafting their rules, but said that she does not know if agencies are availing themselves of this opportunity.

Judith Bailey, Member, Governor's Regulatory Review Council (GRRC), explained that she was appointed as a Member at Large of GRRC in 1992, and shared her views of the rule-making process from that perspective. She noted that the number of items going through on a consent agenda are approximately two or three out of a total twelve to fifteen rules in a month. She also noted that many times, lags in the rule-making process at the GRRC level are due to the agencies rather than GRRC, explaining that GRRC has a large file containing rules that have been placed on hold, awaiting further information or revision from the agencies. She said, however, that only in a very small number of those cases does the agency ever respond. Ms. Bailey said that in her tenure with GRRC, the concerns of the Council have focused mostly on ensuring that a rule is clear, concise and understandable, and said that the Council has not taken the position that it has the authority to address policy questions or whether the rule is a good one. She added that the Council is mandated to approve a rule only if the impact of the rule outweighs the costs. She noted that as of July 1, 1993, DOA will have the authority to hire an attorney on staff who will be charged with working with agencies and GRRC to alleviate problems and ensure that rules are drafted in a proper manner. She said that GRRC is also rewriting its own rules to be more streamlined, and is instituting a tickler system for follow-up when rules are returned to agencies.

Ms. Bailey opined that one of the bottlenecks occurs when repealing a rule. She pointed out that many times a rule is invalidated or made illegal through a change in State or federal laws, and submitted that the repeal process could be expedited by allowing an agency to submit a notice to the Secretary of State, to be published in the next register, advising that a rule will be repealed at a certain time if no objections are raised.

Mr. Romley asked Ms. Bailey if she would favor a "lapsing time" if an agency doesn't respond in a specified time to a request for additional action on a rule.

Ms. Bailey answered affirmatively, saying that this idea is already under consideration by GRRC.

Senator Patterson questioned Ms. Bailey as to whether the Council is able to keep a rule from becoming effective on the basis that it would not meet a cost-benefit standard. Ms. Bailey said that she has not seen that happen as yet, but said that it may. She opined that GRRC continues to show deference to agencies in approving a rule because of the lack of expertise on the part of Council Members and their reluctance to override what the agency presents.

Mr. Thomas asked Ms. Bailey if she feels public comment should be received before a rule is presented to the Secretary of State. Ms. Bailey said that her guess is that if the process could be fixed so that the first draft of a rule is much better than what is currently being presented, then the process could move faster and it would not matter what order the hearings are held. She said, however, that if the rule is a better product, it probably would make better sense to have the public comment first before the rule goes to the Secretary of State.

Mr. Putterman commented that currently agencies control all information that goes to GRRC, and said that this means that small businesses have no input in the process. He submitted that GRRC is merely a rubber-stamp process.

Senator Phillips announced that the next meeting will be held on Thursday, July 8, 1993, at 10:00 a.m., with a continuation of a review of the GRRC process. Mr. Cunningham requested the Cochairmen to consider meeting for a longer period of time in future meetings, rather than the current two-hour periods. Senator Phillips replied that he has intentionally kept meetings to a short time frame, but said that perhaps Mr. Richardson, who will cochair the next meeting, may want to extend the time as suggested.

The meeting adjourned at 12:08 p.m.

Carolyn Richter

Carolyn Richter, Committee Secretary

(Attachments and tapes on file in the Office of the Chief Clerk.)

ARIZONA STATE LEGISLATURE
Forty-first Legislature - First Regular Session

JOINT STUDY COMMITTEE ON
REGULATORY REFORM AND ENFORCEMENT

Minutes of Meeting
Thursday, July 8, 1993
House Hearing Room 2 - 9:00 a.m.

(Tape 3, Side A)

The meeting was called to order at 9:10 a.m. by Cochairman G. Richardson and roll call was taken.

Members Present

Representative George Cunningham
Kevin Kinsall, Public Member
Bertram Putterman, Representative of Regulated Professions
Representative Dan Schottel
William Shore, Public Member
Tracy R. Thomas, Public Member
Representative Gary Richardson, Cochairman
Senator Ed Phillips, Cochairman

Members Absent

Stephen Cooper, Representative of Occupational Licensing Board
Dick Foreman, Public Member (Excused)
Senator Tom Patterson (Excused)
Rick Romley, Maricopa County Attorney
Senator Victor Soltero (Excused)

Speakers Present

Martha Seaman, Section Manager, Rule Development, Arizona Department of Environmental Quality (DEQ)
Paul Bullis, Chief Counsel, Arizona Corporation Commission (ACC)
Kathi Knox, Legislative Liaison, Arizona Department of Revenue (DOR)
Kathleen Larson, Supervisor, Rules Division, Arizona Department of Revenue (DOR)
Joe Dean, Manager of Small Business Connection, Arizona Department of Commerce (DOC)
Clark Partridge, Administrative Service Officer III, Arizona Department of Commerce (DOC)
Sheila Glenn, House Research Analyst
Kevin McCarthy, Director, Arizona Tax Research Association (ATRA)
Tim Mooney, Director, Arizona National Federation of Independent Businesses (NFIB)
Dan Cavanagh, Group Vice President, Tucson Metropolitan Chamber of Commerce
Representative Bob Burns

Guest List (Attachment 1)

Cochairman Richardson entertained corrections to the minutes of the previous meeting held on June 14, 1993. Hearing none, Mr. Richardson declared the minutes approved as submitted.

PRESENTATIONS

Martha Seaman, Section Manager, Rule Development, Arizona Department of Environmental Quality (DEQ) distributed a packet of informational materials relating to the rule-making process performed by DEQ and briefly described each component. (Attachment 2; Packet filed in Chief Clerk's Office.)

Ms. Seaman noted that there are three sources of input into DEQ's regulatory process: 1) input from the Legislature, 2) input from interested communities, and 3) input from other agencies, such as the Governor's Regulatory Review Council (GRRC), the Attorney General's Office, and the Secretary of State. She added that DOR has instituted an informal component of its rule-making process, whereby input from interested communities relating to a potential rule is gathered up front, before the formal process begins, so as to determine how the rule will affect the community. She explained that if a rule is substantially changed following the oral proceedings and close of comment step in the process, it is then necessary to start the process all over again.

Mr. Richardson asked Ms. Seaman to comment on the need to strike a balance between providing fairness to the business community and adopting good Department rules. Ms. Seaman replied that the informal hearings she mentioned that are held prior to the formal process is one way of ensuring that fairness to the business community is addressed. She said that the Department's experience has been that the better the input into the informal part of the process, the better the rule and the higher the achievement of acceptance and enforceability.

Ms. Seaman suggested several areas of the rule-making process that could be improved, such as implementation of a full-text register to provide a better type of notice about a rule, allowing State agencies to reopen the public comment period following a substantial change to a rule which is a technique the federal government uses, rather than having to start at the beginning of the process again, and a clearer definition of what the GRRC expects the economic impact statement to be. She contended that the standard for an economic impact statement seems to shift somewhat from rule to rule, particularly if the rule is controversial. Ms. Seaman said that the Department is also concerned about the GRRC focusing on policy decisions rather than confining its determinations to the economic impact of a rule. She submitted that policy questions should be determined by the agencies involved.

Mr. Cunningham asked Ms. Seaman if the informal part of the rule-making process is mandated in the Administrative Procedures Act. Ms. Seaman replied that it is not; DEQ has developed this part of the process on its own.

Mr. Cunningham questioned the benefit of the informal part of the process in light of the time factor. Ms. Seaman acknowledged that the informal part of the process causes some delay in the rule-making process, but said that without the informal part of the process, the Department faces a greater risk of having to

start at the beginning again when a substantial change is made, which could ultimately mean a lengthy process in the long run. Discussion continued to this point, with Ms. Seaman pointing out that the informal steps in the process are not used for every rule that is considered, only the controversial ones or ones that have a great deal of public interest. She added that the Department is not always trying to push a rule through the system in the minimum amount of time, but in many instances, the Department is balancing the time frame required and the need for a rule against the need for education, acceptance and input of the public.

Mr. Thomas opined that most of the small businesses in the State don't know what is going on in the rule-making process, and submitted that through the formal process, there is no way for them to know about a potential rule unless it is controversial or published in a newspaper. He asked Ms. Seaman if there is a better way of notifying the affected industry of an impending rule, such as notifying them by using the Standard Industrial Classification Code (SICC). Ms. Seaman said that the Department recognizes that small businesses sometimes have difficulty finding out what agencies are doing, but said that in the Department's view, individual notices of impending rules is not the long-term solution to the notice problem. She said that the Department feels the solution to this problem is to move toward the federal model, which is a system whereby information is available on an equal basis for everyone who wants to participate in the regulatory process, and is known to be the source for this type of information.

Mr. Thomas argued that many small businesses do not have the resources, time or knowledge to participate in that type of process. Ms. Seaman replied that DEQ has tried to work with the regulated communities about new requirements. Mr. Thomas asked Ms. Seaman if the Department does that because it feels it is something it should do, or is this a mandate. Ms. Seaman responded that a great majority of the Department's efforts to afford notice of rules to the community are not requirements; the Department's efforts in this regard are because the Department has an interest in helping people achieve compliance with the rule.

Mr. Kinsall questioned at what point the decision is made that a rule has been substantially changed. Ms. Seaman said that this is a standard that basically applies throughout the process; it is not one person's determination to make. She said that when the point of adopting a rule is reached, the agency involved makes the determination of whether the rule has been substantially changed from what was proposed. She conceded, however, that this decision could be challenged by the public or factions of the rule-making process.

Senator Phillips noted that DEQ has the expertise to write their own rules. He asked Ms. Seaman if she would have any suggestions for smaller agencies that do not have such expertise. Ms. Seaman said that DEQ has devoted substantial resources to this area because of its importance, but conceded that smaller agencies probably could use assistance in drafting their rules.

Mr. Putterman inquired if there is a part of the process to address technical input. Ms. Seaman answered affirmatively, saying that the primary focus of the informal part of the process is on the technical basis for the regulatory program being considered.

Mr. Putterman questioned what would be considered a substantial change in a rule. Ms. Seaman said that this is a fuzzy area, but said that the agencies are pretty good at evaluating whether the subject matter has been changed or whether the regulated community will understand the rule, but said that the troublesome part is whether the change in the effect of the rule is substantial. She said that for this reason, reopening the period for formal public comment after a change has been made would be beneficial.

Paul Bullis, Chief Counsel, Arizona Corporation Commission (ACC), explained that the Corporation Commission is exempt from the GRRC review in the rule-making process but said that the Commission supports the rule-making process in the Administrative Procedures Act that provides for public hearings.

(Tape 3, Side B)

Mr. Bullis cited a problem he has experienced with the Attorney General's Office, saying that oftentimes when the Attorney General's Office provides assistance to the Securities Division of the Commission in drafting a rule, the advice given is contradictory to the determination made by the Securities Division at the time of certification. He further related that the Attorney General's Office has at times ruled contrary to the Commission in determining whether a substantial change has been made to a rule. He submitted that the agency that drafts, adopts and administers the rule should make the determination of whether a rule has been substantially changed from the proposed rule. Mr. Bullis reported that in the summer of 1992 the Court of Appeals ruled that pursuant to Article 15 of the Constitution, the Corporation Commission cannot be required to submit their rules to the Attorney General for certification. He said, however, that the Commission does abide by all other parts of the Administrative Procedures Act in the rule-making process.

Senator Phillips asked Mr. Bullis if it is his opinion that the Commission is a fourth branch of government. Mr. Bullis answered affirmatively.

Kathi Knox, Legislative Liaison, Arizona Department of Revenue (DOR), stated that DOR also conducts an informal process in its rule-making process, and said that regardless of how a rule draft is initiated, it goes through an internal review and then is submitted to a DOR review committee for discussion and approval before being sent out for public comment. She said that a list of interested parties is developed by the Department based on past requests for information, and notice of an impending rule is sent to these parties. She added that industries identified by DOR as being potentially affected by the rule are also notified. She said, too, that the Department encourages written and phone comments from the public and receives informal comments from the Attorney General's Office prior to the formal rule-making process.

Kathleen Larson, Supervisor, Rules Division, Arizona Department of Revenue (DOR), stated that DOR does receive mandates from the Legislature regarding rule-making, but said that these mandates usually relate to procedural matters. She noted that one of the biggest problems the public has is in implementing rules. She added that the biggest problem for the Department is making the determination of what is considered a substantial change to a rule, and said that the Department relies heavily on the Attorney General's Office for this determination. Ms. Larson stated that Paul Waddell, Director of the Arizona

Department of Revenue, supports the front-end, informal process of working with the public to gather input relating to a potential rule prior to the formal process. She added, however, that DOR only seeks public comment on those rules considered to be controversial. Ms. Larson noted that there has been occasion when the public comment period was extended beyond what was scheduled because of the scope of the impending rule.

Senator Phillips asked Ms. Larson if DOR has an opinion about a federal register or some type of depository whereby everyone would have access to information about rules. Ms. Larson said that while the Department does not have a formal opinion, she thinks that might be a good idea.

Mr. Kinsall questioned whether there is case law, Attorney General Opinions, or whatever, that suggest that rules cannot contain examples. Ms. Larson said that she does not know the answer.

Mr. Kinsall inquired if the Secretary of State's Office publishes the rule in its entirety. Ms. Larson said that is her understanding.

Mr. Cunningham suggested that if the option of extending the public comment period exists, it may not be necessary to consider a legislative change to permit reopening of the public comment period. He questioned whether there is any limitation on the amount of time allowed for public comment. Ms. Larson said that while there is no limitation on the time allowed for public comment, generally an agency sets a date for the public hearing and a date for the close of comments. After 180 days following the close of comments, the agency is required to submit its rule package to the Attorney General's Office for certification. Ms. Larson said that if the comment period has been formally closed, it may be questionable whether the comment period can be reopened.

Mr. Kinsall questioned whether repealing rules is a problem for DOR. Ms. Larson answered affirmatively, saying that DOR would encourage some expedited process for repealing bad rules or to address statute changes.

Mr. Kinsall asked Ms. Seaman if DEQ would find examples useful in its rules packages. Ms. Seaman answered affirmatively, but said that she is not aware of any DEQ rules that have included examples.

Joe Dean, Manager of Small Business Connection, Arizona Department of Commerce (DOC), remarked that the Small Business Connection is a one-stop service for small businesses either starting, expanding or relocating a business in Arizona. He said that currently, his office receives about 1,800 contacts a month from these small businesses, with about 70 percent of the calls from businesses considering a move into the State coming from California. He stressed that the tax climate in Arizona is critical to those businesses, and many businesses are choosing to move to Nevada because of the low tax rate there. Mr. Dean reported that he has received many complaints from business owners who come to the State to investigate possible relocation about the baseball tax imposed on car rentals. He said that another complaint is difficulty in knowing who to call in the various departments and being able to get questions answered. He submitted that an ombudsman office and accessibility to the public should be of primary importance to agencies.

Mr. Dean stated that the departments receiving the most complaints for red tape and time involved in processing paperwork are DEQ and the Registrar of Contractors.

Mr. Dean admonished that there is not a single location where minority-owned, women-owned and disadvantaged businesses are listed and said that there should be a place to obtain this information.

Clark Partridge, Administrative Service Officer III, Arizona Department of Commerce (DOC), said that DOC is not primarily a regulatory agency, but the major function of DOC is to assist businesses and promote economic development in the State. He remarked that the Department does not have adequate resources to engage in the rule-making process, and suggested that costs imposed in this process and the impact should be considered. He submitted that small businesses lack an advocacy group in some areas and said that there is a great need to have some expedited manner of repealing or review of outdated rules when there is a statutory change. Mr. Partridge advocated that examples in rules would be beneficial and enable the public to better absorb and comply with the intent of the rule.

Sheila Glenn, House Research Analyst, expounded on the comments relating to complaints about the Registrar of Contractors, saying that due to required testing at certain intervals that have to be scheduled, and complex bonding requirements, it might be difficult to reduce the processing time frame for a contractor's license.

Mr. Cunningham concurred, saying that while there may be complaints about the amount of time it takes to get a contractor's license, there may be good reason.

Mr. Partridge persisted that the complaints he has received are about the time involved in processing an application and payment of fees. Mr. Partridge said that complaints about DEQ have involved the amount of time required to process applications also.

Mr. Thomas asked Mr. Partridge if it is true that if a business decides to relocate, it is not just the state regulations that affect it, but the total tax package of city, county and state. Mr. Partridge agreed that this is true.

Mr. Thomas exhorted that the State should make rules reasonable enough to comply with without a business being required to go through a difficult process and expending large sums of money.

(Tape 4, Side A)

Mr. Thomas referred to the Ruben Furniture Company, which is facing difficulties in obtaining necessary documentation to relocate to Arizona and suggested that Mr. Partridge could document this example of problems small businesses face when attempting to relocate in Arizona for the Committee's enlightenment.

Mr. Cunningham recommended that such a report be balanced from the agencies' perspective also.

Kevin McCarthy, Director, Arizona Tax Research Association (ATRA), remarked that when agencies make substantive changes to tax practices or custom in the State, it has a chilling effect on economic development and the business community. He opined that the regulatory review process relating to taxation is a very real problem in the taxpaying community, but said that he thinks DOR has made great strides in that area.

Mr. Cunningham asked Mr. McCarthy if Arizona is unique in allowing cities to have some deviation from the State's sales tax base. Mr. McCarthy said that it is his understanding that only Louisiana and Arizona allow that authority.

Tim Mooney, Director, Arizona National Federation of Independent Businesses (NFIB), said that complaints about regulation are commonly received by his office. He submitted that silly regulations undermine all the other regulations and cause people to disregard them. He further submitted that every member of NFIB is in violation of some regulation because of ignorance of what the regulations are. He disagreed with previous testimony that more input is needed before a regulation is adopted, saying that he thinks there is more interest shown in a regulation after it is adopted and people are aware of what it does. He further submitted that advocacy groups attend the public comment hearings and make their opinions known because they are aware of the hearings, while small businesses are too busy running their businesses to keep up with what hearings are being held.

Mr. Mooney complimented Mr. Dean on the one-stop service his office provides for small businesses and suggested that there should be a one-stop shop for federal, state, county and city tax forms and information. He added that this function should be outside of the regulatory agency because of the public fear factor. Mr. Mooney urged consideration of a standing legislative committee on regulations and said that it would be helpful to remove the appeal process from the agencies and put it under the Department of Administration. He said that this would not only promote fairness and consistency, but in his opinion would save money by increasing efficiency and reducing manpower. He emphasized again that small businesses need help in understanding the rules.

Senator Phillips asked Mr. Mooney if NFIB envisions an ombudsman office as the one-stop shop he mentioned. Mr. Mooney answered affirmatively, saying that NFIB supports an ombudsman office.

Dan Cavanagh, Group Vice President, Tucson Metropolitan Chamber of Commerce, stated that the number one area of concern mentioned in calls to his office is stability with the tax rate. He commented that DOR is not mandated to respond to questions of what the tax policy is and said that there is much confusion as to what is taxable and what is not. He said, too, that there is no definition of what is under DOR's purview to regulate.

Mr. Thomas asked Mr. Cavanagh if he feels that DOR is setting policy which should be the purview of the Legislature. Mr. Cavanagh said, "absolutely." Mr. Cavanagh further commented that DOR is inconsistent in what it taxes, and suggested that taxable items should be clearly defined and any changes made be subject to a specified starting date and not retroactive.

Representative Bob Burns reported on his recent attendance at the U.S. Ombudsmen Meeting in Anchorage, which was attended by ombudsmen at the city, county, state and private industry levels. Mr. Burns said that he has observed over the years that rules seem to evolve toward the regulator's comfort level rather than legislative intent and political agendas have a tendency to work through the regulatory process. He submitted that there is a real danger if the wrong people with the wrong agenda work their way into the process, leading to overzealous regulators. He said that there needs to be some way to provide hands-on oversight to address this danger. Mr. Burns opined that the missing link in the regulatory process is an internal affairs function. He said that the person who has a problem with an agency has to go back to that same agency for redress. He submitted that this is where the ombudsman fits into the regulatory process; an ombudsman can get to the heart of the complex problems and would be an extension of the legislative staff, with authority to work on complex constituent requests and investigate and subpoena records and information. He said that the ombudsman would only have authority to report and would not have authority to take any action. Mr. Burns speculated that this would have an impact on the cost to state government and reduce the number of cases now going to court. In response to questions, Mr. Burns noted that there are four states, Iowa, Alaska, Hawaii and Nebraska, that have a legislative level ombudsman.

Mr. Cunningham asked if anyone has ever looked at the ombudsman function in terms of its consistency with separation of powers of the branches of government. He said that it looks to him like this is a police enforcement role rather than an oversight role for the Legislature. Mr. Burns disagreed, saying that he doesn't see this as a policing role, but as an oversight role. He repeated that the ombudsman would not have authority to take any kind of corrective action but would only investigate and report, working very similarly to the staff now used in the Senate and House in respect to constituent concerns. He said that the difference would be that the ombudsman would have authority to subpoena books, records, etc., but said that according to other states' experience, this authority is seldom used.

Mr. Cunningham persisted that the powers that would be given the ombudsman would seem to go beyond what would be considered legislative oversight.

Mr. Richardson announced that the next meeting of the Joint Study Committee on Regulatory Reform and Enforcement will be held on August 5, 1993 at 9:00 a.m. in the Senate.

The meeting adjourned at 12 Noon.

Carolyn Richter cr

Carolyn Richter, Committee Secretary

(Attachments and tapes on file in the Office of the Chief Clerk.)

cr
7/8/93

MINUTES RECEIVED
CHIEF CLERK'S OFFICE
8-13-93

ARIZONA STATE LEGISLATURE
Forty-first Legislature - First Regular Session

JOINT STUDY COMMITTEE ON
REGULATORY REFORM AND ENFORCEMENT

Minutes of Meeting
Thursday, August 5, 1993
Senate Hearing Room 1

(Tape 5, Side A)

The meeting was called to order at 9:35 a.m. by Cochairman Phillips and roll call was taken.

Members Present

Stephen Cooper, Representative of Occupational Licensing Board
Representative George Cunningham
Dick Foreman, Public Member
Kevin Kinsall, Public Member
Rick Romley, Maricopa County Attorney
Representative Dan Schottel
William Shore, Public Member
Senator Victor Soltero
Tracy R. Thomas, Public Member
Representative Gary Richardson, Cochairman
Senator Ed Phillips, Cochairman

Members Absent

Senator Tom Patterson (excused)
Bertram Putterman, Representative of Regulated Professions

Speakers Present

Debbie Johnston, Senate Assistant Research Analyst
Sheila Glenn, House Research Analyst
Kathleen Larson, Arizona Department of Revenue (DOR)
Joe Dean, Manager of Small Business Connection, Arizona Department of Commerce (DOC)

Cochairman Phillips entertained corrections to the minutes of the previous meeting held on July 8, 1993. Hearing none, Senator Phillips declared the minutes approved as submitted.

Debbie Johnston, Senate Assistant Research Analyst, distributed a handout entitled "Mission Statement and Action Plan" (Attachment 1), which explains the charge of the Committee and the areas of focus relating to regulatory reform, and cites targeted problems and possible solutions. Ms. Johnston went through each item, providing additional information and answering questions as presented.

Administrative Procedures Act

Item A.1.a. Mr. Thomas questioned whether the publication of new rules or rule changes will be sent to the affected parties. He said that he is fearful if this is not specifically indicated as a requirement, it will not happen, and recommended that mandating notification to the affected industry of rule changes should be a part of any legislation considered.

Item A.1.b. Mr. Kinsall raised objections to moving the public agency hearing to precede the Governor's Regulatory Review Council (GRRC) review, due to many rules being poorly written when first entered into the system. He added that GRRC was originated for the purpose of review and to ensure that rules are in order, written properly, logical, etc. He said that by moving the public hearings to precede GRRC hearings, the public could be commenting on bad rules. Ms. Johnston agreed that this could be a problem.

Mr. Thomas suggested that agencies may want to be involved in this process and could offer recommendations on how to rectify this problem. Ms. Johnston conceded that this may be worthy of consideration, but submitted that cost and necessity need to be explored to determine that.

Mr. Thomas further suggested that testimony from the smaller boards would be beneficial. Ms. Johnston concurred and said that she will follow up on this suggestion.

Item C.3. Mr. Romley stressed the importance of having an attorney involved in the front end of the process to make sure rules are written correctly.

Mr. Thomas suggested that one solution to expedite certification of rules might be to eliminate the Attorney General and designate someone in the Department of Administration (DOA) to review the rules. Mr. Romley conceded that this is a possible solution, and perhaps one that should be considered, but emphasized that it is important that whomever is designated should be an attorney, whether in the Attorney General's Office or hired by DOA.

Mr. Kinsall requested that Ms. Johnston obtain information as to what other states are doing in this regard.

Senator Phillips emphasized that legislative intent should be clear and rules should not confound that intent.

Item B.1. Mr. Thomas raised objections to the possible solution cited of authorizing legislative exemptions to address the problem of inconsistent economic impact statement or small business impact statement requirements.

Mr. Kinsall voiced concerns, also, about legislative exemptions, saying that he thinks there should be some pretty tough standards applied for granting such exemptions.

Item B.2. Mr. Foreman suggested adding an item B.2. to address whether good public input is being obtained at this point.

Mr. Cunningham asked Ms. Johnston under what circumstances she thinks exemptions would be granted. Ms. Johnston said that the reason the exemption provision was included in the Statement was for the rare instances when an economic statement is not necessary, but said that would be a legislative decision.

Mr. Cunningham requested Ms. Johnston to go through the statutes and pick out some possible examples to provide to the Committee.

Item C.1. Mr. Thomas asked Ms. Johnston to cite a suggested time frame in which a docket would be required to be opened. Ms. Johnston said that 90 days has been suggested, but opined that more testimony from agencies is required before making that determination.

Senator Phillips asked whether this time period is after passage of legislation, or after the effective date. Ms. Johnston replied that it would be after the effective date.

Item C.2. Senator Phillips questioned whether addressing obsolete rules is something that can be done legislatively. He further questioned whether the Legislature can pass something that has the effect of establishing a rule and then have the rule include an automatic repealer, or have the agencies adopt procedures for eliminating their own obsolete rules.

Mr. Romley opined that there are no strong prohibitions in this regard and suggested that it is an idea worth exploring.

Item C.2.b. Mr. Foreman said that he thinks this is possibly one of the most fundamental issues the Committee will have to consider, but said that he objects to the word "authorize" in the language in this item. He contended that authorizing something does not guarantee that it will happen, and submitted that "authorize" should be replaced with "mandate."

Item D.1. Mr. Romley questioned whether this solution isn't already in effect. Ms. Johnston pointed out that exemptions can be renewed on an on-going basis and suggested that the Committee may want to address this situation.

Sheila Glenn, House Research Analyst, interjected that these exemptions are primarily done in session law to meet a crisis situation.

Mr. Thomas questioned whether there is a time frame or limit on the number of exemptions per rule package. Ms. Johnston said that her understanding is that there is not.

Mr. Thomas suggested that these kinds of limits should be imposed, and speculated that such limits will then speed up the process.

Mr. Cooper suggested that perhaps the definition should be tightened as to what constitutes an emergency.

Item D.2. Senator Phillips asked Ms. Johnston if the use of examples is prohibited at the present time. Ms. Johnston answered affirmatively.

Senator Phillips, Mr. Kinsall and Mr. Thomas voiced their opinions that allowing the use of examples would be a positive change.

Inter-agency regulatory conflict/duplication

Item 1. Mr. Romley said that he has serious reservations about the extent of the ombudsman bill that Mr. Burns is working on for next session and the lack of guidelines in relation to investigative powers of ombudsmen.

Senator Phillips said that he thinks the ombudsman issue will be dealt with by the Committee as a separate matter from the other issues.

Mr. Thomas asked Ms. Johnston if it would make sense, when there are conflicts and disputes between agencies that affect a regulated party, to have the agencies resolve the dispute and not have the affected party involved. Ms. Johnston replied that this may be something that could be explored for the ombudsman's office; to mitigate between two agencies.

Mr. Thomas submitted that small businesses have a negative view of government, and said that he feels having an ombudsman's office to handle disputes should be explored.

Mr. Cunningham expressed encouragement for pursuing the informational role of an ombudsman's office within the different agencies.

Mr. Kinsall suggested that this topic should be expanded interjurisdictionally, saying that when cities are in disagreement about taxing policies, it would be beneficial to have a mechanism to remove the taxpayer from the dispute and have the cities settle the matter between them.

Specific Rules and Regulations

Ms. Johnston noted that there is a history of legislative review, specifically relating to the State Parks Board; however, there are no recent cases of rules being reviewed by the Legislature. Ms. Johnston stated that the primary purpose of legislative review of administrative rules and regulations is to ensure that they reflect the legislative intent of the statutes upon which their authority is based. She added that legislative review can also be used to ensure that such statutory authority is not exceeded. She pointed out that attempts have been made to extend legislative review as a means to provide a flexible response to changes in circumstances after the passage of enabling legislation; however, the constitutionality of this last provision is questionable in light of separation of powers.

Ms. Johnston distributed a handout entitled "Legislative and Committee Powers," which reflects legislative review practices of other states (Attachment 2).

Discussion continued regarding the question of which type of review process should be selected to address legislative intent.

Mr. Romley raised the question of funding, saying that although there are many noble goals presented in the "Mission Statement," making these goals meaningful will require a funding mechanism.

(Tape 5, Side B)

Mr. Cunningham asked Ms. Johnston if she would provide a written explanation of the information contained in Attachment 2. Ms. Johnston replied that she will make copies of the whole report for all members of the Committee.

Mr. Romley asked if there is a way to get a legal opinion or review of the constitutionality issue of legislative review. Senator Phillips answered that he will assign this task to Barry Wong, Senate Research Analyst.

Mr. Foreman commented on the funding issue, saying that he would not like to see businesses and taxpayers hit with additional charges as a result of the actions of this Committee.

Mr. Cunningham responded that he thinks the Committee should be conversant of the costs that will be imposed on state agencies as a result of any changes that are proposed by this Committee in the form of legislation that will require additional workload or responsibility, whether it be sending a notice to every person in the State regarding a proposed rule, or hiring an attorney to advise them in rule drafting.

Returning to the issue of an ombudsman's office, Senator Phillips noted that the legislation being drafted for next session is modeled after ~~Alabama~~ legislation. He asked Ms. Glenn if she knows what the budget is for the Alabama ombudsman's office. Ms. Glenn replied that it is $1.5 ~~billion~~, with the highest expenses of the office being for investigation and the expertise required to staff the office.

Mr. Romley submitted that the real issues that need to be addressed for the ombudsman's office are defining the role of that office and the power to be delegated.

Mr. Richardson assumed the Chair.

Mr. Richardson said that he would anticipate that these issues will be clarified when the bill is drafted.

Mr. Cunningham questioned the role of the Committee with respect to the ombudsman legislation. Mr. Richardson speculated that this may be an issue for which a full consensus of the Committee may not be reached, and said that he would hope that a great deal of time would not be spent in trying to achieve full consensus when there are so many other issues to be considered.

Item 2. Ms. Glenn stated that further information from county and city attorneys is required before making a determination about enforcement provisions, as well as identifying areas of the statutes where deletions or changes may need to be made. Mr. Romley suggested that the Attorney General also be involved in this fact-finding mission. Ms. Glenn noted that making a determination of which statutes should be amended or deleted is a vast project which she envisions as an ongoing review process, if the determination is made that deletions or changes are necessary.

Mr. Kinsall suggested that in identifying areas where penalties may be overstated it may be a good idea to solicit input from the public, as well as ad hoc committees. Mr. Richardson agreed with Mr. Kinsall's suggestion.

Senator Soltero made a request that the Committee be given a status report in relationship to the charge of the Committee.

Mr. Richardson said that he thinks the Committee has come to a better idea of what it will eventually do, and can now get started getting into specifics.

Mr. Thomas reported that, since his appointment to this Committee, he has heard from many business associations about their problems with regulations. He asked if there will be any opportunity to hear from these people.

Mr. Richardson suggested that some of these problems could be identified in a written format, similar to the list he has composed (Attachment 3), for the Committee's consideration. Mr. Richardson read his list of items requiring disposition by the Committee and invited comments:

1. The consensus of the Committee was that there is a need for a procedure to repeal obsolete rules. Mr. Richardson said that he thinks it is important for the Legislature to have oversight responsibility for all the agencies, and to take that responsibility seriously, and take some role in repealing obsolete rules; while making sure that public policy is not changed. He questioned whether agencies should be given the authority to repeal their own rules at will, saying that he thinks there should be some check and balance and repeating that there needs to be legislative oversight.

(Tape 6, Side A)

Mr. Romley said that he would like to see the simplest process possible for repealing obsolete rules.

Mr. Foreman concurred with Mr. Richardson's comments, saying that he thinks it is critical that the Legislature accept the oversight responsibility, and said that he doesn't perceive legislative oversight as a stumbling block for agencies that wish to repeal obsolete rules.

Mr. Cunningham suggested that there might be a legislative review committee to receive complaints from taxpayers who feel the need for repeal of an obsolete rule, and expedite the process.

Discussion followed as to whether legislative review will slow the process.

Mr. Schottel speculated that in many instances taxpayers would be happy if the process were slowed. He said that he definitely thinks there should be legislative oversight to protect the taxpayer.

2. Mr. Richardson asked staff to find out if equal access provisions apply to administrative procedures.

Mr. Thomas said that he thinks it should be stipulated that court costs will be paid out of an agency's budget.

Mr. Cunningham asked if the amendment mentioned in this item will be accompanied by a fiscal impact statement. Mr. Richardson replied that he thinks that would be a good idea, but said that he is not sure how the Department of Administration (DOA) could determine what that would be. Mr. Cunningham added that he thinks this is an important point.

Mr. Romley said that while he thinks this amendment would inhibit frivolous lawsuits, he thinks the agencies should have the same advantage as the public.

Mr. Cunningham submitted that another possibility is that such an amendment will actually encourage litigation, and challenges of various rules promulgated and enforcement of those rules, on both sides, and said that the only winners will be the attorneys.

Mr. Thomas pointed out that it is the decision of the person initiating the lawsuit whether to take his attorney's advice and pursue litigation, but said that he thinks it is time for government to assume responsibility for bad policy decisions and when challenged, should have to pay the costs.

Mr. Cunningham said that he would agree with Mr. Thomas as long as it works both ways.

Mr. Shore opined that it is important that government realize that if it files a frivolous lawsuit it will be responsible for costs.

3. Kathleen Larson, Arizona Department of Revenue (DOR), stated that DOR has never held that letter rulings have the power of law, but conceded that historically, there was a problem, because letters sent out were perceived by the public to be rulings.

   Mr. Romley concurred, saying that he doesn't think letter rulings have the force of law, but said that he thinks there needs to be a ruling on this issue before proceeding with a Committee position on item 3.

   Mr. Kinsall suggested that whatever is done in this area should be patterned after the Internal Revenue policy, for consistency purposes. He said, too, that he thinks the Chamber of Commerce has strong feelings on this issue, and suggested that the Committee postpone consideration of this item until their input can be obtained.

4. Already discussed with item 1.

5. Mr. Romley suggested that in order to inhibit the growth of bureaucracy, perhaps there could be a provision for an appeal to DOA of the formal ruling made by the agency in instances where that would be necessary.

   Mr. Thomas suggested that perhaps this could be a function of the ombudsman's office.

6. Mr. Thomas opined that there is a need to better define what "all permits" entails.

Joe Dean, Manager of Small Business Connection, Arizona Department of Commerce (DOC), explained that his office offers information to applicants regarding which permits they are required to have for a particular business, and then directs them to the proper offices for obtaining those permits. He cautioned the Committee that he would not like to be given the responsibility for giving out applications for permits that require investigation. Mr. Dean added that his office responds to approximately 100 requests for information per day and is in constant contact with municipalities to determine any changes in their permit requirements.

In light of Mr. Dean's remarks, Mr. Richardson said that the Committee has the options of leaving the Small Business Connection office alone and letting it function as it has been, expanding that office to include representatives from each agency, or including only representatives from selected agencies.

7. The Committee agreed with pursuing this item.

8. The Committee agreed that this item is not necessary.

9. Mr. Kinsall asked if it would be possible to pursue this item in concert with what the federal government does in its rule-making process, and suggested that staff should obtain information on the federal process.

   The Committee reached agreement that this item should be pursued.

10. The Committee agreed with pursuing this item.

11. Ms. Johnston presented copies of the Federal Register (Attachment 4) and the Arizona Administrative Register (Attachment 5) for comparison.

    Mr. Romley said that he would like to know the fiscal impact of adopting this item.

    Mr. Richardson, said that he, too, is concerned about costs, and would like to know how large such a document would be, how often it would be printed and what size mailing list would be involved. He suggested that more information is necessary before proceeding with this item.

12. The Committee agreed with proceeding with this item.

13. Several objections were raised by Committee Members to this item. Mr. Richardson requested that Committee Members submit their suggestions to this issue at the next meeting.

14. The Committee agreed that more information is necessary before proceeding with this item.

15. The Committee agreed to proceed with this item.

(Tape 6, Side B)

16. The Committee agreed to proceed with this item.

17. Mr. Richardson added this item to his list: When a rule is substantially changed, should the process preceding GRRC review be shortened so that the rule package doesn't have to go back to the beginning of the process. The Committee reached consensus to proceed with this item.

Mr. Richardson announced that due to several conflicts in schedules, the date and time for the next meeting will be determined at a later time.

The meeting adjourned at 12:40 p.m.

Carolyn Richter cr

Carolyn Richter, Committee Secretary

(Attachments and tapes on file in the Office of the Chief Clerk.)

RECEIVED
CHIEF CLERK'S OFFICE

OCT 28 1993

ARIZONA STATE LEGISLATURE
Forty-first Legislature - First Regular Session

JOINT STUDY COMMITTEE ON
REGULATORY REFORM AND ENFORCEMENT

Minutes of Meeting
Thursday, October 21, 1993
House Hearing Room 2 - 9:30 a.m.

(Tape 7, Side A)

The meeting was called to order at 9:42 a.m. by Cochairman G. Richardson and attendance was noted by the secretary.

Members Present

Stephen Cooper, Representative of Occupational Licensing Board
Representative George Cunningham
Dick Foreman, Public Member
Kevin Kinsall, Public Member
Senator Tom Patterson
Bertram Putterman, Representative of Regulated Professions
William Shore, Public Member
Tracy R. Thomas, Public Member
Senator Ed Phillips, Cochairman
Representative Gary Richardson, Cochairman

Members Absent

Rick Romley, Maricopa County Attorney (Excused)
Representative Dan Schottel
Senator Victor Soltero (Excused)

Speakers Present

Mimi Griffiths, Director of Public Services Department, Office of the Secretary of State
Stuart Goodman, Legislative Liaison, Arizona Department of Administration (DOA)
Debbie Johnston, Senate Assistant Research Analyst
Kathleen Larson, Supervisor, Rules Division, Arizona Department of Revenue (DOR)
Elizabeth Stewart, Assistant Attorney General, Attorney General's Office (AG)
Chuck Shipley, Vice President of Public Affairs, Arizona Chamber of Commerce
Kathleen Phillips, Staff Member, Governor's Regulatory Review Council (GRRC)
Fred Meister, Administrative Services Officer, Office of Policy Analysis and Coordination, Arizona Health Care Cost Containment System (AHCCCS) Administration

Guest List (Attachment 1)

APPROVAL OF MINUTES

Being advised that the minutes of the previous meeting had not been distributed to Committee Members, Mr. Richardson stated that approval of the minutes will be postponed until next meeting, and advised staff to ensure that all Members get a copy of the minutes.

REVIEW OF DRAFT ACTION PLAN

A copy of the "Draft Report for Joint Study Committee on Regulatory Reform and Enforcement" was distributed to Committee Members for their review and consideration (Attachment 2). Mr. Richardson read the list of issues on which the Committee has conducted hearings and heard testimony, as contained on pages 2 and 3 under the heading, "Committee Hearings and Testimony." He explained that each issue will be considered separately, and invited comments at the appropriate time. He further explained that no votes will be taken at this meeting, but said that he would like to get a feel for the Committee's position on each issue so that a final recommendation can be drafted to vote on at the next meeting. Mr. Richardson stated that the Committee would have five minutes to read through the draft and familiarize themselves with the information contained therein.

1. Rule-making Process

The first subject presented for discussion was the possibility of requiring the Office of the Secretary of State to publish a full-text Register. Mr. Cunningham directed the Committee's attention to the letter and supplemental information distributed by the Office of the Secretary of State (Attachment 3), particularly the pages relating to the fiscal impacts of publishing a full-text administrative Register (Appendices A, B, C and D on pages 3 through 6). He said that according to this information, it would appear that estimates for printing and mailing, plus start-up costs, are about $200,000.

Mimi Griffiths, Director of Public Services Department, Office of the Secretary of State, confirmed Mr. Cunningham's assessment of costs for printing a full-text Register. She apprised the Committee that the subscription cost for the Register will have to increase significantly in order for it to be self-sustaining.

Mr. Kinsall speculated that requiring the Office of the Secretary of State to assume the responsibility for the full-text Register would result in a savings for the various agencies, providing a trade off for the additional costs the Office of the Secretary of State will incur.

Senator Phillips submitted that the heart of the issue is the availability of the information that the public has a right to have access to. He submitted that if subscription rates need to be raised somewhat, that would be reasonable.

Mr. Cunningham stated that there is a public purpose that is served by centralizing the publication of agency rules and making them available for distribution to the general public and the entities being regulated. He submitted that, in view of the State's resources for the next fiscal year, $100,000 or so in terms of an appropriation for this purpose is a reasonable amount to consider.

Mr. Cooper proposed that publishing a full-text Register will also effect a savings in litigation costs for State agencies due to the more comprehensive publication.

The consensus of the Committee was to approve commissioning a full-text Register.

The second subject presented for discussion was how to best streamline rule making in order to eliminate inefficiencies. Mr. Cunningham submitted that it is not an unreasonable objective for the Legislature to expect that rule making be completed in a certain time frame.

Mr. Cunningham suggested that if the public and the Legislature have the expectation that obsolete rules will be eliminated through some process in the Rules and Regulations, maybe the mechanics of that amount to including in statute, in the Administrative Procedures Act, a general provision that says "where the Legislature has enacted a law which renders existing rules and regulations obsolete, our expectation is that these will be taken off the books in six months," and have an expedited hearing process to accomplish that. He added that the Legislature would have to establish what that expedited process would be.

Mr. Richardson interjected that a definition of "obsolete" would also be needed.

Senator Phillips contended that a short-circuited system needs to be considered to prevent getting into definition problems. He suggested that perhaps the Attorney General's Office should be consulted for a legal perspective.

Stuart Goodman, Legislative Liaison, Arizona Department of Administration (DOA), commented that through the Executive Branch, DOA has been working in an ad hoc committee, trying to develop a position regarding obsolete rules. He noted that a straw poll of the ad hoc committee shows support for the concept of an expedited process for the removal of obsolete rules, but said that the committee is undecided about the format for the process.

Mr. Richardson asked the Committee if the consensus is to wait for recommendations from DOA and postpone action on this issue until the next regular session.

Senator Phillips suggested that the Committee's final report include a recommendation for a short-circuited process to eliminate obsolete rules.

Senator Patterson stated that he would like to see a more aggressive approach than what has been discussed, with agencies' directors or Legislative Council being empowered to get rid of obsolete rules.

Mr. Richardson said that he thinks it will be possible for the Legislature to work with agency heads and DOA to come up with an aggressive way to get rid of obsolete rules.

Mr. Thomas inquired if it would be possible for the agencies and DOA to have some specific recommendations at the next meeting on how to expedite the process.

He said that the Committee can then come up with a definitive recommendation of how to accomplish this.

Mr. Putterman said that he would like to have the rule-making process opened up so that the regulated community could have more input. He suggested that the Committee's final report include language that deals with a process whereby the consumers have an opportunity to open up the process.

Debbie Johnston, Senate Assistant Research Analyst, cautioned that before making any decisions on the question of who will have authority for purging obsolete rules, the Committee should consider whether legislative oversight will be part of the process and, if so, what effect that step in the process will have. She pointed out that since the Committee has already approved a full-text Register, that decision has already changed the process somewhat, and suggested that the Committee may want to address other issues before deciding who has the authority to eliminate obsolete rules.

Mr. Richardson said that he definitely supports having legislative oversight as part of the rule-making process.

Kathleen Larson, Supervisor, Rules Division, Arizona Department of Revenue (DOR), said that DOA encourages an expedited process for eliminating obsolete rules. She added that DOA's recommendation would be that the elimination of obsolete rules be done at the agency director level, requiring documentation of the basis for the elimination of an obsolete rule and the director's signature to be published in the docket. She said that this will provide an opportunity for public input as to acceptance or dissent.

Mr. Richardson requested Mr. Goodman to submit DOA's recommendation for solving the problem of purging obsolete rules at the next meeting for the Committee's consideration.

Elizabeth Stewart, Assistant Attorney General, Attorney General's Office, explained that there are two kinds of situations that would be affected by an expedited process: 1) an agency no longer has authority in a particular area and an entire article could be obsolete, which would be an easy situation to expedite; or 2) the most common situation is where a law changes or technology changes causing parts of rules to be inconsistent and requiring them to be replaced with new rules. She said that this situation is the more difficult issue to address in an expedited process.

Mr. Richardson asked Mr. Goodman to take Ms. Stewart's comments into consideration in working up his recommendation for the next meeting.

Mr. Cunningham asked for a clarification of the language contained in "(3)" on page 4 of Attachment 2 relating to authorizing the comment period to be re-opened for rules which are "substantially" changed, rather than requiring those changed rules to be resubmitted to the entire process again.

Chuck Shipley, Vice President of Public Affairs, Arizona Chamber of Commerce, explained that once a rule packet is filed with GRRC and goes through the process, if substantial changes are made, the rule packet must go back to square one in the process. He suggested that there should be another public hearing

to consider only the changes made, rather than having the rule packet go all the way back to square one. Mr. Shipley said that the Chamber's experience has been that there is hesitance to make changes because of having to start the process all over again.

Mr. Kinsall remarked that there is a provision in federal law which allows for supplemental noticing, and said that he thinks that provision could be utilized to address Mr. Shipley's recommendation.

Mr. Richardson said that he thinks there is agreement on the issue of streamlining the rule-making process.

The third subject presented for discussion was that the rule-making process would run more efficiently if proposed rules were written better in the first place before going through the process.

Mr. Putterman suggested that this issue might be better dealt with through Legislative Council.

Kathleen Phillips, Staff Member, Governor's Regulatory Review Council (GRRC), explained that as a rule-writer, she begins with the initial rule-making process in writing the rules, processes them through GRRC, and then the agency is pretty much on its own.

Mr. Shipley distributed a handout of suggestions from the Chamber (Attachment 4). He speculated that the workload for writing agency rules may be too much for one rule-writer. Ms. Phillips conceded that this may be true but said that it will depend on many factors pertaining to the kind of workload that will be shifted.

Mr. Richardson asked Mr. Shipley if the issue of a legislative body writing rules for an executive agency has been addressed as to constitutionality. Mr. Shipley replied that it has not, as yet, but said that the Chamber will specifically address that issue.

Senator Phillips questioned at what point, after legislation is passed, does a law cross over to the Executive branch. He posed the question of whether a legal argument can be made that a rule only becomes a part of the Executive branch after the review process.

Mr. Cunningham submitted that he thinks this issue involves a separation of powers and branches of government and suggested that the question of constitutionality should be addressed by the Attorney General's Office as well as the Chamber.

Ms. Johnston stated that the Attorney General's Office was consulted on this issue but did not have an answer available. Ms. Stewart elaborated that the Attorney General's Office is working on getting an answer to this question for the Legislature.

Mr. Putterman pointed out that at issue is <u>drafting</u> rules and not <u>adopting</u> rules.

Mr. Cunningham said that he would like to formalize a request that the Attorney General provide an answer to the constitutional question for the next meeting and offer some perspectives so that the Committee can better address this issue.

Mr. Richardson said that he will request staff to draft a formal letter requesting an answer to this issue and hopefully an answer will be available within the next thirty days.

Mr. Cunningham suggested that another option would be not to request a formal opinion but to have the Attorney General's Office offer perspectives at the next meeting.

Mr. Richardson replied that he would like to have something more than an educated guess; he would like some solid information from the Attorney General. He asked Ms. Stewart what the time frame is for a formal response.

Ms. Stewart replied that the time frame for a response would depend on the complexity of the issue. She said that she would probably be able to provide some preliminary information at the next meeting. She added, however, that she needs more focus on what the Committee is actually asking for.

Mr. Richardson said that he will try to crystalize the question into something specific the Attorney General's Office can answer.

The fourth subject presented for discussion related to authorizing the use of examples in rules.

Ms. Stewart stated that there has to be a point where the line is drawn as to what can be inserted into the Code and said that the Attorney General's Office has been concerned that hypothetical examples don't come within the guidelines. She suggested that rather than having examples as a regulatory part of rules it would be better to attach them separately with a note explaining that the examples are not binding on agencies.

Mr. Richardson pointed out that the principle behind using examples is to show people how the rule translates from print to practice. He added that the examples demonstrate what happens in the real world.

Ms. Stewart repeated that such examples should be as an attachment rather than part of the rule.

Mr. Kinsall remarked that if the definition of a rule has to be changed to allow examples, he feels that should be done.

Mr. Putterman interjected that he thinks it is important to determine whether the discussion is about in-line examples or examples in the preamble.

Mr. Cunningham said that he thinks he is hearing that if examples are a part of the rule-making authority within the context of the rule itself, there would be extreme care exercised in the promulgation of those examples; however, if examples can be put in a comments section, there would be more freedom to provide appropriate information.

(Tape 7, Side B)

Ms. Larson noted that the concept of using examples as an addendum to the rule has worked for DOR and they would not be opposed to such a requirement. She added that response from the public is that they would like to have examples.

Senator Phillips asked Ms. Stewart if it is true that the Attorney General's Office will not certify rules with examples. Ms. Stewart replied that in most cases, yes, but said that there have been exceptions. She explained that the exceptions were because the examples were equations and not hypothetical cases. She said that when the example is something other than figures, which are definite, the example then becomes more like an opinion. She suggested that if the Committee is considering allowing the inclusion of examples, Members may want to make an exception for DOR to have examples for computations, but said that there are not many other agencies at this time that want to include examples. Ms. Stewart added that the Attorney General's Office has in the past determined that if an example is necessary for the understanding of the rule, then the example has been approved. She said, however, that rules from DOR containing examples have not been certified because the Attorney General did not feel it was appropriate to do so.

Ms. Stewart stated that the Attorney General's Office is not as concerned with DOR using examples as with other areas, such as: 1) there is no definition of "examples" at the present time, and 2) whether the example is necessary for the understanding of the rule.

Mr. Richardson asked Ms. Stewart to submit written documentation to the Committee of when examples would be detrimental or inappropriate, and why, and when they would be helpful, so Members may know the position of the Attorney General.

Ms. Stewart emphasized that examples could be handed out by an agency, but just not included in the rules.

Mr. Richardson replied that if a law is passed allowing agencies to use examples in rules, he would like to know what the Attorney General's position is - why and why not. He requested that this information be provided to Committee Members before the next meeting.

Mr. Kinsall also suggested that Ms. Stewart provide language the Attorney General's Office would be comfortable with which would allow a change in the definition of a "rule."

Senator Patterson said that he has a lot of reservations about examples being a part of the rules. He added that he thinks there should be more use of examples; just not a part of the rules.

Mr. Cunningham asked, if the examples are a part of the notes and comments section, are they considered to be in the rule. Ms. Stewart replied that at the present time there is no provision for notes or comments. She said, however, if a notes and comments section were added, it would not be considered a part of the regulatory rule.

Mr. Cunningham asked Ms. Stewart if, in order to accomplish providing examples without interfering with the rule interpretation issue, legislation would have to be enacted which specifically provides for notes and comments being allowed and not being considered as part of the rules. Ms. Stewart answered affirmatively, saying that this is one option.

Mr. Richardson asked the Committee for comments about allowing examples to be used in rules.

Mr. Cunningham expressed support for putting examples into notes and comments which are separate from rules.

Mr. Kinsall suggested that an alternative option is to allow only DOR to use examples at this point in time.

Mr. Thomas said that he thinks the problem is that DOR has made up some of their own rules about what is taxable and what is not.

Mr. Richardson said that the Committee will wait for the Attorney General's recommendation on this issue, but advised Members to ponder their decision and be ready to vote at the next meeting.

The fifth subject presented for discussion was ineffectiveness of GRRC's five-year review recommendations.

Ms. Johnston explained that a suggestion has been made that GRRC send their recommendations along with the agencies' implementation plans to the Committee of Reference so they can be utilized when the sunset reviews of the boards are done.

There was no Committee discussion of this issue.

The sixth subject presented for discussion related to problems with the Attorney General's certification of the rule-making process.

Mr. Cunningham submitted that the issue is whether the Legislature should require the Attorney General's Office to provide front-end input in the promulgation of a rule. He said that a second issue is whether a time limit should be placed on the certification and a third issue is whether Legislative Council should be involved in the review process, or even replace the Attorney General's Office.

Ms. Stewart stated that there are instances when the agencies submit rules for preview but they may not be the same rules the agencies finally adopt. She said that is one of the reasons that advice given early in the process may no longer apply when the Attorney General gets the final documents. She admitted that it would be helpful in terms of a better product for the Attorney General to preview rules, but pointed out that this is a time-consuming and costly function. She submitted that it is not the Attorney General's job to write rules for the agencies, but to provide legal advice as to whether the rule is clear and understandable and consistent with legislative intent. She pointed out that the Attorney General's Office could perform certification of rules much faster but there would be a much higher number of rules denied. She explained that over the past ten years or more the Attorney General has allowed minor changes to be

made to a rule when inconsistent with statutes. This sometimes takes a lot of time because the agency has to determine how to correct the problem and then return the rule to the Attorney General's Office, and while rules are always a priority in the Attorney General's Office, they are not always a priority with the agencies getting them back to the Attorney General.

Ms. Stewart said that she does feel certification of rules provides a service to the public to ensure that rules are understandable and consistent with legislative intent, which saves the State litigation costs, but suggested that the Attorney General be replaced by Legislative Council in the certification issue.

Mr. Cunningham asked Ms. Stewart how many full-time attorneys, over a year, are devoted to agency rule review and certification. Ms. Stewart said that she is the only person who spends pretty much full time in this process. She said, though, that a number of other attorneys are assigned to assist agencies with their rule-making, with about thirty or more involved regularly in advising agencies on their rules. She added that this takes a tremendous amount of time and is very costly.

Mr. Cunningham asked Ms. Stewart if it would be reasonable to suggest that as many as 50 equivalent full-time attorneys work on rule review and certification as well as assisting agencies with rule development. Ms. Stewart said that she doesn't believe the figure would be that high.

Mr. Cunningham suggested that if the Committee wants to pursue front-end input by the Attorney General's Office, then 25 positions should be transferred to the Attorney General's Office to effect that.

Mr. Kinsall asked Ms. Stewart to cite the four things the Attorney General's Office is required by statute to look at when reviewing a rule.

Ms. Stewart cited the following:

1) whether the rule is clear, concise and understandable,
2) whether the rule is within the authority of the agency to adopt,
3) whether the rule is adopted in compliance with established procedures, and
4) whether the rule is in proper form.

Mr. Kinsall questioned whether the Attorney General's Office is the appropriate place to determine whether a rule is understandable or in proper form. He suggested that perhaps these questions should be under the purview of GRRC.

Ms. Johnston reported that in many states the Attorney General does not certify rules, but only acts in an advisory capacity, providing opinions. She suggested that perhaps if Arizona's Attorney General were not part of the formal rule-making process, an Opinion could be published instead.

Senator Phillips said that he thinks it is of great significance that in other states, the Attorney General does not certify rules, with Arizona being among the minority of states that do. He suggested that the Committee consider making the regulatory process better by eliminating the certification process.

Mr. Shipley commented that with a lack of certification some agencies would be reluctant to draft rules, submitting them instead through the emergency process or permit process. Mr. Shipley stated that the Chamber endorses the certification process by the Attorney General, with a thirty-day time frame.

Mr. Cunningham stated that he would consider a change from the current certification process, but said that before pursuing that, he would like to have more up-to-date information in terms of practices of other states.

Fred Meister, Administrative Services Officer, Office of Policy Analysis and Coordination, Arizona Health Care Cost Containment System (AHCCCS) Administration, noted that most of the federally funded agencies have some sort of State plan which is a contract between the State agency and the federal agency as to what is approvable for purposes of federal funding. He said that when AHCCCS submits a State plan to the federal agency there is, by federal law, a ninety-day time frame that allows the federal agency to either accept intact what AHCCCS originally submitted, or the federal agency can deny it outright, or thirdly, the federal agency can, within the ninety-day time frame, make a single request for additional information. If the federal agency fails to act within the ninety-day time frame, the State plan automatically goes into effect. When the request for additional information is made, the clock stops for the ninety-day time frame. Mr. Meister stated that the good part of this is that the federal agency can only make one single request that encompasses all the stages of review, and once the State agency responds, then the clock starts running again. He said that AHCCCS feels this procedure has worked well to the mutual satisfaction of the State and the federal government.

Mr. Richardson opined that the intent of the Committee is to streamline the certification process and make it more user-friendly, while still protecting the public.

Mr. Kinsall and Mr. Putterman expressed concerns of the business community that rules must be promulgated efficiently and speedily.

The seventh subject presented for discussion pertained to the inconsistency of GRRC's requirements on the economic and small business statements.

There was no Committee discussion on this issue.

The eighth subject presented for discussion related to the exempt status of many rules from the Administrative Procedures Act (APA).

Mr. Richardson said that he thinks the Committee's intent is to require emergency situations to go through GRRC and the review process as soon as possible.

Mr. Cunningham suggested that a requirement be made that a rule docket must be opened within a year for an emergency exemption. Mr. Richardson said that a year is a long time. Mr. Putterman added that he is not happy about emergency exemptions being renewed indefinitely.

Ms. Stewart pointed out that the Attorney General does not certify rules on an emergency basis unless it is demonstrated by the agency that there is a peril

to public safety and welfare. She added, too, that the Attorney General has not been willing to extend certification in those cases unless the agency has submitted their permanent rule for review. She noted that many years ago about forty per cent of the rules were submitted as emergencies. That has now gone down to no more than ten per cent, which includes the renewals of the emergency exemptions.

(Tape 8, Side A)

Mr. Thomas asked staff what agencies, rules and fees are exempt from review. Ms. Johnston said that she has a list that she will copy and make available to each Member of the Committee.

Mr. Thomas said that he doesn't see anything wrong with the recommendations of the Chamber regarding A.R.S. 41-1005 on page 3 of Attachment 4. Mr. Cunningham concurred.

Mr. Richardson announced that the next Committee Meeting will be held on November 3, 1993 at 9:30 a.m. in the Senate.

The meeting adjourned at 11:50 a.m.

Carolyn Richter

Carolyn Richter, Committee Secretary

(Attachments and tapes on file in the Office of the Chief Clerk.)

CHAPTER 3

FISCAL ANALYSIS ON FULL TEXT STATE REGISTER

ARIZONA STATE LEGISLATURE
Forty-first Legislature - First Regular Session

JOINT STUDY COMMITTEE ON
REGULATORY REFORM AND ENFORCEMENT

Minutes of Meeting
Wednesday, December 15, 1993
House Hearing Room 1 - 1:30 p.m.

(Tape 11, Side A)

The meeting was called to order at 1:44 p.m. by Cochairman Phillips and attendance was noted by the secretary.

Members Present

Stephen Cooper, Representative of Occupational Licensing Board
Representative George Cunningham
Kevin Kinsall, Public Member
Senator Tom Patterson
Bertram Putterman, Representative of Regulated Professions
Rick Romley, Maricopa County Attorney
Representative Dan Schottel
William Shore, Public Member
Senator Victor Soltero
Tracy R. Thomas, Public Member
Senator Ed Phillips, Cochairman

Members Absent

Dick Foreman, Public Member (Excused)
Representative Gary Richardson, Cochairman (Excused)

Speakers Present

Trisha Korwes, House Research Analyst
Debbie Johnston, Senate Research Analyst
Kathleen Larson, Supervisor, Rules Division, Arizona Department of Revenue (DOR)
Roger Ferland, Attorney representing the Arizona Chamber of Commerce
Eric Hiser, Attorney, Fennemore Craig
Chuck Shipley, Vice President, Arizona Chamber of Commerce
Elizabeth Stewart, Assistant Attorney General, Attorney General's Office (AG)
Matt Ortega, Legislative Liaison, Department of Environmental Quality (DEQ)
Mike Braun, Executive Director, Legislative Council

Guest List (Attachment 1)

APPROVAL OF MINUTES

Mr. Cunningham stated that he has a couple of minor and technical changes to make to the minutes of the August 5 and October 21 meetings. He suggested that, rather than go through each change at this time, it would be more time efficient to submit his changes in writing to the Committee Secretary, who in turn would submit the corrected minutes to the two Cochairs for their approval. If the corrected minutes are approved by both Cochairs, the formal minutes filed in the Chief Clerk's Office and the Office of the Secretary of the Senate will be corrected to reflect the changes, but if the corrected minutes are not approved by both Cochairs, the minutes will be submitted at the next meeting for approval by the Committee. Following agreement by the Chair to accept a motion to this effect, Mr. Cunningham so moved. The motion was seconded by Mr. Thomas and carried unanimously.

ADOPTION OF THE JOINT STUDY COMMITTEE ON REGULATORY REFORM AND ENFORCEMENT FINAL REPORT

Senator Phillips announced that the purpose of today's meeting is to vote on the recommendations to be included in the Final Report. A list of recommendations was distributed to the Committee (Attachment 2).

Trisha Korwes, House Assistant Research Analyst, reviewed the items listed in Attachment 2 for the Committee's benefit.

Item A. Amending the State Register

1. Require an Advance Notice of Proposed Rulemaking or a Notice of Docket Opening.

   Senator Patterson moved, seconded by Mr. Shore, that this item be included in the Final Report. The motion carried.

2. Publish the full text of proposed and final rules.

   Senator Patterson moved, seconded by Mr. Thomas, that this item be included in the Final Report.

   Mr. Cunningham questioned how many times a proposed rule will be published.

   Debbie Johnston, Senate Assistant Research Analyst, explained that if a rule has been substantially changed, there could be an argument made as to why it should be published in full text, but she said that there is also the cost factor to be considered, and this is a decision the Committee will have to make.

   Ms. Korwes explained that with regard to the Federal Register, a proposed rule is published only once.

   The motion to include Item A.2. in the Final Report carried, with the understanding that only the original proposed rule and the final rule will be published in the full-text version.

3. Include a preamble to state the following:

a. legislative authority

Senator Patterson spoke against examples being required in all preambles, saying that he doesn't think it is a good idea in all instances. He suggested that in the absence of language requiring examples, it would be left to the discretion of the writer of the rule as to whether an example should be included in the preamble.

Mr. Cunningham also expressed concern with requiring examples in the preamble, saying that he recalls that previous testimony suggested that examples be included as attachments.

Kathleen Larson, Supervisor, Rules Division, Arizona Department of Revenue (DOR), suggested that it would be less confusing to have the example be an informational footnote or addendum to the rule. She stressed the importance of not having two different documents, one the rule, and the other the example, and said that DOR would recommend not requiring an example in the preamble, but allowing it in the Administrative Code.

Mr. Putterman interjected that in some cases the example is included as an appendix.

Mr. Cunningham submitted that the Committee needs to decide whether to give agencies the authority to include examples with their rules, or to require them to do so, and whether the examples will be part of the text of the rule or an attachment or addendum.

Senator Phillips pointed out that the Committee needs to get past the first question, which is whether to include examples in the preamble; whether to make that a requirement or let it be permissive.

Mr. Cunningham moved, seconded by Mr. Kinsall, that Item A.3.a. be included in the Final Report. The motion carried.

b. problem being addressed

Senator Patterson moved, seconded by Mr. Cooper, that this item be included in the Final Report, with the word "problem" being replaced with the word "issue." The motion carried.

c. examples, and

Mr. Cunningham said that he thinks examples should be permissive and should be in the form of an addendum or attachment.

Mr. Cunningham moved, seconded by Mr. Putterman, to delete examples from the preamble.

Mr. Kinsall said that while he agrees that examples should be permissive, he thinks they should be a part of the rule itself, which will be a step in making these documents more user friendly.

Mr. Putterman said that he would prefer that an example be included as an appendix to the rule.

Mr. Romley said that he, too, agrees that examples should not be included in the preamble.

Senator Phillips suggested that a problem could arise as to which example takes precedence, and they could get repetitive in the preamble.

Mr. Thomas concurred with having examples be permissive, but said that he thinks they should be in the body of the rule rather that as an attachment.

Mr. Cunningham clarified that his motion is to delete "examples, and" from the recommendations for the Final Report, which was again seconded by Mr. Putterman. The motion carried.

d. <u>economic and small business impact information.</u>

Mr. Cunningham moved, seconded by Mr. Kinsall, that this item be included in the Final Report, with the following change: After "economic" strike "and" and insert a comma; after "business" insert "and consumer". The motion carried.

4. <u>Provide notice of exempt rules.</u>

Ms. Korwes explained that there are three types of rules that can be exempt from the rulemaking process: 1) rules that are exempt from the whole process, such as fees, times for opening and shutting gates, etc., 2) emergency rules, and 3) those rules specified by the Legislature.

Mr. Schottel moved, seconded by Mr. Cunningham, that this item be included in the Final Report. The motion carried.

5. <u>Require a supplemental notice for rules which have been substantially changed.</u>

Roger Ferland, Attorney representing the Arizona Chamber of Commerce, described the history of the definition for "substantially changed" as contained in ARS 41-1025. He noted that this definition was based on case law and said that he would not advise changing the statute at this point. He pointed out

that the Attorney General construes whether the public has had adequate opportunity for input in the process when a rule has been changed and said that he thinks that is enough.

Mr. Thomas stated that his concern is that there is no way to ensure that all parties are actually noticed when a rule has been changed. Mr. Ferland replied that he doesn't think much more can be done and have the process remain practical.

Mr. Cunningham suggested that the language "to the extent practicable" could be inserted after "Require". Mr. Ferland replied that he is not sure this is the problem. Rather, the problem is determining what constitutes "substantial change". He further noted that attorneys welcome the phrase "to the extent practicable" because it creates additional ambiguity.

Mr. Schottel moved, seconded by Mr. Thomas, that item A.5. be included in the Final Report. The motion carried.

6. Include additional information such as:

   a. substantive policy decisions or guidance documents issued by agencies,

   b. executive orders, and

   c. Attorney General Opinions.

   Eric Hiser, Attorney, Fennemore Craig, explained that the intent is not to include the full text of a guidance document in the Register, but to provide notice that the guidance document has been released and to notify the public that the document exists.

   Mr. Cunningham suggested that "Identify additional information" is more descriptive of the intent of this item.

   Chuck Shipley, Vice President, Arizona Chamber of Commerce, explained that many times these documents are modified or updated, and this would provide notice of when that happens.

   Mr. Thomas moved, seconded by Mr. Kinsall, that this item be included in the Final Report. The motion carried.

   Mr. Cunningham moved, seconded by Mr. Putterman, that it be clarified that this item will read "Include substantial policy decisions and identify the publication of documents such as". The motion carried.

Item B. The Rulemaking Process

Mr. Thomas moved, seconded by Mr. Kinsall, that "Allow examples within the body of the rule" be added to this item.

(Tape 11, Side B)

Discussion ensued as to the effect of this motion.

Mr. Thomas argued that in the past there has been a tendency for rules to be less than reliable, and said that he thinks rules should include examples and be something the public can rely on.

Mr. Cunningham remarked that testimony has been that the use of examples would be desirable, but said that he thinks if examples are given the full force of a rule there will be an inclination not to use examples.

Mr. Romley stated that while he understands what is trying to be accomplished with this item, he thinks allowing examples to be a part of the rule itself will cause problems.

Mr. Shipley remarked that his experience has been to look back at the preamble and look at the examples, and said that he would support having the examples in the preamble.

Mr. Cunningham called for the question. The motion to allow examples within the body of the rule carried by a hand vote of 6 ayes and 5 nays.

1. Allow for informal public input before rule-writing begins.

   Senator Patterson moved, seconded by Mr. Cunningham, that this item be included in the Final Report. The motion carried.

2. Require the agency hearing and response to comments to occur before GRRC review.

   Senator Patterson moved, seconded by Mr. Putterman, that this item be included in the Final Report. The motion carried.

3. Clarify what is included in the economic and small business impact statements.

   Senator Patterson moved, seconded by Mr. Kinsall, that this item be included in the Final Report. The motion carried.

4. Provide for Attorney General advisory review and comment prior to GRRC review.

   Mr. Ferland said that while he is strongly in favor of the Attorney General's input in the regulatory process, he is opposed to the concept of Attorney General certification. He expressed support for Item B.4., but said that he has concerns that in the certification process the Attorney General becomes in effect a fourth branch of government. He submitted that the role of the Attorney General should be advisory and not to have absolute veto authority. He said, too, that while the Attorney General should function in an advisory capacity, that advice should not be binding.

Senator Phillips questioned how many states have Attorney General certification in their rulemaking process. Mr. Ferland said that, to his knowledge, Arizona is the only state which provides for Attorney General certification and said that there is nothing similar at the federal level either.

Elizabeth Stewart, Assistant Attorney General, Attorney General's Office (AG), distributed a letter from Attorney General Grant Woods (Attachment 3), in which he expresses concerns about removing the Attorney General's certification from the rulemaking process. Ms. Stewart emphasized the urgency in addressing emergency rules, noting that GRRC (Governor's Regulatory Review Council) meets only once a month, whereas the Attorney General's Office can respond to the emergency situation at any time. She added that the cost to the State will be tremendous because of the duplication of work that the Attorney General's Office is already doing. She pointed out that the attorneys in the Attorney General's Office would still need to review rules in order to give advice, so their work will not decrease, and in fact, will probably increase because they will not only be reviewing rules but will be making recommendations to GRRC. She added that GRRC's workload will also increase, necessitating hiring additional staff and probably meeting more often than they currently do. Ms. Stewart submitted that it would be difficult for another agency to duplicate the expertise that the Attorney General's Office has. She further submitted that the proposal to remove the Attorney General's certification will only move the veto power of the Attorney General, as objected to by Mr. Ferland, to GRRC. Ms. Stewart concluded by saying that she feels it would be extremely difficult for GRRC to efficiently and effectively assume the responsibilities regarding certification that the Attorney General now has.

Mr. Romley said that he, too, is concerned about the basic veto power of the Attorney General, but is also concerned about GRRC being staffed with private attorneys with biased opinions. He questioned whether GRRC, after going forward with a rule that the Attorney General had advised against, would lose its immunity for liability. Ms. Stewart replied that she is not sure such a situation would necessarily create liability for GRRC or that lawsuits would enjoin GRRC.

Senator Patterson suggested that a policy decision of this magnitude is one the Legislature should consider and said that he thinks the effect of including this item in the Final Report will bring the issue up for the Legislature to consider.

Senator Patterson moved, seconded by Mr. Kinsall, that Item B.4. be included in the Final Report with the addition of "and remove the certification authority for rules from the Attorney General's Office" to the end of the sentence. The motion carried.

Senator Patterson assumed the Chair.

5. Enhance standards for emergency exemptions (ARS 41-1026) with the following:

   a. limiting renewals, and

      Mr. Cunningham moved, seconded by Mr. Putterman, that this item be included in the Final Report. The motion carried.

   b. requiring regular rules to be adopted or a docket opened within a stipulated time period.

      Mr. Schottel moved, seconded by Mr. Kinsall, that this item be included in the Final Report.

      Mr. Putterman moved, seconded by Mr. Kinsall, that the motion be amended to strike "or a docket opened" from the language. The motion carried.

      Mr. Schottel moved, seconded by Mr. Kinsall, the original motion to include this item in the Final Report as amended. The motion carried.

6. Provide for a summary rulemaking process in the event of the following:

   a. repeal of obsolete rules,

      Mr. Cunningham moved, seconded by Mr. Putterman, that this item be included in the Final Report. The motion carried.

Senator Phillips resumed the Chair.

   b. federal and state mandates,

      Mr. Putterman moved, seconded by Mr. Cooper, that this item be included in the Final Report.

      Following questions about the intent of this item, Ms. Korwes explained that when this issue was identified originally, it was meant to address codification of rules.

      Senator Phillips suggested that, if that is the case, there is a duplication between B.6.b. and B.6.d.

      Mr. Hiser explained that there are times when a different approach is required for different situations.

      Mr. Romley and Senator Patterson argued against including this item in the Final Report and discussion continued as to whether federal and state laws should be provided with a summary rulemaking process. Mr. Romley submitted that item B.6.b. can be handled either through B.6.d. or incorporation by reference (B.6.e.).

Mr. Putterman withdrew his motion and Mr. Cooper withdrew his second.

Mr. Cunningham submitted that this item is so vague and confusing that he supports eliminating it from the Final Report.

Senator Phillips ruled that item B.6.b. will be deleted from the list of recommendations for the Final Report.

c. rules which have been substantially changed during the process,

Senator Patterson moved, seconded by Mr. Cunningham, that this item be included in the Final Report.

Ms. Stewart argued that adoption of this item will be inconsistent with what has already been adopted by the Committee regarding noticing of rules which have been substantially changed.

Senator Patterson withdrew his motion and Mr. Cunningham withdrew his second.

d. codification rules, and

Senator Patterson moved, seconded by Mr. Cunningham, that this item be included in the Final Report. The motion carried.

e. incorporation by reference

Senator Patterson moved, seconded by Mr. Thomas, that this item be included in the Final Report.

Ms. Stewart urged the Committee to carefully consider their actions in adopting this item. She pointed out that in order to get around going through the whole rulemaking process an agency could adopt a rule of another state.

Mr. Putterman said that he has a problem with this item and is not sure he understands "incorporation by reference."

Mr. Romley observed that the problem with "incorporation by reference" is that it can be so broad that it doesn't allow for public input and the safeguards that are necessary. He added, however, that on the other hand, it is ridiculous to go through the time-consuming process for nonsubstantial issues. He suggested that perhaps language could be added that would limit "incorporation by reference" to nonsubstantial issues.

Senator Patterson, saying that he doesn't see anything in this item that will protect the regulated community, and in fact

may actually do harm, withdrew his motion and Mr. Thomas withdrew his second.

Item C. Interagency Regulatory Conflicts and Duplications

Mr. Thomas moved that "No standards or rules can be set that are more onerous than the State's standards." be included in the Final Report.

Mr. Romley remarked that he is concerned that localities would not have control over their unique circumstances.

Mr. Thomas pointed out that in California, local jurisdictions write their own rules, which may be more onerous than the State's, and that has been a detriment to the economic condition of the State of California.

Mr. Shipley emphasized that if a local jurisdiction wants to have a rule more onerous than the State's, then the reasons should be based on scientific data and justification.

(Tape 12, Side A)

Mr. Cunningham asked Mr. Thomas if it is his intent with his motion to prevent a community from imposing a tougher standard on a toxic substance than the standard which may have been established by the State. Mr. Thomas answered affirmatively, saying that the reason is that every county could have different rules and different controls for businesses, which could mean virtually shutting down business in Arizona as it has in California. He submitted that State standards should apply Statewide.

Mr. Cunningham further inquired if it is Mr. Thomas' position that the State of Arizona knows better what standards should be adopted for the various communities of the State, and that local communities or counties have no right to establish any health or environmental standards tougher than the State's.

Mr. Thomas replied that what each community wants to do to themselves is another matter, but a company doing business in fifteen different counties shouldn't be subject to 15 different sets of regulations more onerous than the State's standards.

Mr. Romley said that he is concerned that the effect of this motion will not allow for preexisting conditions to be taken into consideration or individual communities to have their own standards considered.

The question was called and the motion that "No standards or rules can be set that are more onerous than the State's standards" carried.

1. Strengthen the standards for delegation agreements with the following:

   a. public notice and opportunity for comment,

   b. clarification of the requirements for delegation agreements, and

c. specification of the authority of the delegatee.

Senator Patterson moved, seconded by Mr. Kinsall, that this item be included in the Final Report. The motion carried.

2. Require that designated agencies create an ombudsman position.

3. Request agencies to publish ombudsman phone numbers.

Mr. Cunningham moved that these two items be included in the Final Report.

Matt Ortega, Legislative Liaison, Arizona Department of Environmental Quality (DEQ), described the function of the Ombudsman Office in DEQ. He stated that the Ombudsman position was created to help businesses to determine beforehand everything they would need to have before entering into the permit process. Mr. Ortega noted that this position has been expanded to include an office of customer service and business technical assistance. He reported that DEQ has gotten a good response from the regulated community on this position.

Senator Phillips said that he is concerned that this language is unduly vague.

Mr. Schottel stated that his observations have been that many agencies are not user friendly, which makes it difficult for the layperson to get information. He submitted that an ombudsman's office would assist and protect the public.

Mr. Romley said that he likes the idea of an ombudsman's office being a facilitator and offering technical assistance, and said that he would not like to see the idea thrown out.

Mr. Cunningham agreed that not having designated agencies identified makes this item vague and perhaps will cause confusion. He suggested that there are perhaps fifteen large-scale, identifiable departments which could better serve the public if they had a designated ombudsman's office. He added that this office could be staffed by new personnel or someone who already serves in the department.

Ms. Korwes explained that staff had hoped that the Committee would identify some of the agencies which would be included in this item.

Mr. Putterman suggested that any licensing agency should be required to have an ombudsman's office to offer assistance to small businesses and the ombudsman's office should have an investigatory role.

Mr. Cunningham withdrew his motion and moved, seconded by Mr. Thomas, to include items C.2. and C.3. in the Final Report, as

amended by striking "designated agencies" and inserting "selected large-scale state departments" in item C.2.; in item C.3., striking "Request" and inserting "Require"; after "numbers", inserting "in the state registry, state directory and phone directory". The motion carried.

Item D. Legislative Review of Rules

1. Allow for advisory model legislative oversight to review and comment prior to certification.

Mr. Romley expressed concern about micromanaging in certain areas. He said that he believes the intent of this item is to take care of the rare instances where there appears to be some type of significant problem that would not come up in the regular process. He said that he is not sure of the appropriateness of this.

Senator Phillips commented that he thinks the intent of this is that in the past agencies have drifted away from legislative intent and this would be a review that would determine whether legislative intent is being followed or not.

Mr. Cunningham submitted that this item has the potential to cause a workload problem and said that he would feel much better if he knew this was on an exception basis.

Mike Braun, Executive Director, Legislative Council, reported that he has talked to Colorado and Indiana to learn what kind of review their Legislative Councils do. He said that Colorado has a very intensive review of administrative regulations, while Indiana's reviews are more on an exception basis. Mr. Braun assured the Committee that Legislative Council is willing to do any kind of review the Legislature requires, but cautioned that they would not be geared up at the present time to assume the Colorado approach of an intensive review.

Senator Phillips stated that there are some very significant rules that have a tremendous impact that probably should be presented back to Legislative Council to determine if legislative intent is being followed.

Mr. Cunningham moved, seconded by Mr. Romley, that this item be included in the Final Report with the inclusion of language that this will be on an exception basis. The motion carried.

Item E. Appropriations

1. Secretary of State for the start-up costs of a full text register

2. Legislative Council

3. GRRC

Mr. Putterman moved, seconded by Mr. Romley that these three items be included in the Final Report. The motion carried.

Item D.1. Allow for advisory model legislative oversight to review and comment prior to certification.

Mr. Putterman asked the Chair to back up to Item D.1. so that he could make an additional motion. Mr. Putterman moved, seconded by Mr. Schottel, that a specific time period be added to this item. The motion carried.

Item F. Extension

1. Continue the full committee.

2. Create a committee to further examine the criminal enforcement of regulatory laws.

Mr. Romley moved, seconded by Mr. Thomas, that these two items be included in the Final Report. The motion carried.

The meeting adjourned at 4:20 p.m.

Carolyn Richter CL

Carolyn Richter, Committee Secretary

(Attachments and tapes on file in the Office of the Chief Clerk.)

ARIZONA STATE LEGISLATURE
Forty-first Legislature - First Regular Session

JOINT STUDY COMMITTEE ON
REGULATORY REFORM AND ENFORCEMENT

Minutes of Meeting
Thursday, November 4, 1993
Senate Hearing Room 2 - 9:30 a.m.

(Tape 9, Side A)

The meeting was called to order at 9:45 a.m. by Cochairman Phillips and roll call was taken.

Members Present

Stephen Cooper, Representative of Occupational Licensing Board
Representative George Cunningham
Kevin Kinsall, Public Member
Senator Tom Patterson
Bertram Putterman, Representative of Regulated Professions
Senator Victor Soltero
Tracy R. Thomas, Public Member
Representative Gary Richardson, Cochairman
Senator Ed Phillips, Cochairman

Members Absent

Dick Foreman, Public Member
Rick Romley, Maricopa County Attorney (Excused)
Representative Dan Schottel
William Shore, Public Member

Speakers Present

Debbie Johnston, Senate Assistant Research Analyst
Barnett Lotstein, Deputy Maricopa County Attorney
Chuck Shipley, Vice President of Public Affairs, Arizona Chamber of Commerce
Matt Ortega, Legislative Liaison, Department of Environmental Quality (DEQ)
Tom Augherton, Chief of Administration, Attorney General's Office
Rebecca Berch, Section Chief Counsel, Solicitor General & Opinions Section, Attorney General's Office
Leslie Hall, Section Chief Counsel, Consumer Protection & Antitrust Section, Attorney General's Office
Stuart Goodman, Legislative Liaison, Arizona Department of Administration (DOA)
Mike Braun, Executive Director, Legislative Council

Eric Kaiser

APPROVAL OF MINUTES

In response to Senator Phillip's call for approval of minutes of the last two meetings, Mr. Cunningham requested that approval be postponed until the next meeting. Senator Phillips so ordered.

REVIEW OF DRAFT ACTION PLAN

Mr. Kinsall distributed copies of two documents drafted by himself, Dick Foreman, Bertram Putterman and William Shore, which were presented for the Committee's consideration. He said that the first document, "Comments - Draft Report of the Joint Study Committee on Regulatory Reform and Enforcement" (Attachment 1), makes comments and recommendations based on the document entitled "Draft Report for Joint Study Committee on Regulatory Reform and Enforcement" (Attachment 2), that staff put together. He opined that the second document, "Section-by-Section Summary of Proposed Modifications As Recommended by the Draft Report" (Attachment 3), will be useful in showing where some of the Committee's recommendations will actually fit into the statutes.

Debbie Johnston, Senate Assistant Research Analyst, resumed commentary on Attachment 2 at the point of interruption at the last meeting, beginning-with item 3.

3. Legislative Review of Rules

Ms. Johnston referred the Committee to page 8 of Attachment 2, relating to "Legislative Review of Rules." She said that one of the issues the Committee has discussed is the possibility of having an oversight committee review rules and regulations. Two options of legislative review were suggested. The first option is an advisory model, with either a committee of reference or a standing committee, which would advise agencies and/or the Governor's Regulatory Review Council (GRRC) of whether the rule being considered meets statutory requirements and legislative intent. The second option is a veto model. This is a more formal approach which would allow the legislative oversight committee to suggest to the whole body which rules should be vetoed; the Legislature could then veto those rules provided they have been presented to the Governor's Office. Ms. Johnston said that staff's suggestion is that the oversight committee should be composed of members of Legislative Council, perhaps meeting in the interim; or there could be a standing committee which meets for the sole purpose of reviewing rules. Ms. Johnston suggested that another option that might be considered is to review existing rules within a sunset process.

Mr. Kinsall commented that testimony by the Attorney General's Office at the last meeting indicated that a bulk of their time is spent in determining legislative intent of a rule. He submitted that since the Legislature knows best what their intent was, an informal review process may be a better choice than the veto model, and could sidestep the separation of powers issue.

Mr. Cunningham concurred with Mr. Kinsall's comments. He said that he thinks the Committee should pursue legislative oversight but suggested that the advisory approach should be tried first.

Ms. Johnston reminded the Committee that another decision to be made is whether the oversight committee should be a standing committee or a committee of reference.

Senator Phillips responded that he thinks this issue is beyond the scope of this Committee and should be left to the entire Legislature to decide.

4. The Creation of an Ombudsman Office

Ms. Johnston explained that as provided in H.B. 2340, legislature; ombudsman-citizens aide office (introduced last session by Representative R. Burns, but not heard in committee), an ombudsman office would be located within the Legislature and would be given investigative and subpoena powers. She said that some concern has been expressed by Committee Members on this issue, but the subject is still open for discussion.

Mr. Richardson said that his understanding of the ombudsman's office is that it would only have investigative and reporting authority and would not be a judge, jury and executioner position.

Mr. Cunningham remarked that he is not sure he is comfortable with investigative authority being given to an ombudsman. He said that he would agree to giving this office inquiry power and the authority to generate information, but he is concerned about establishing investigative powers without identifying what that would include.

Barnett Lotstein, Deputy Maricopa County Attorney, said that he is speaking before the Committee in behalf of Maricopa County Attorney Rick Romley. He stated that Mr. Romley is concerned about the investigative provisions for the ombudsman's office. Mr. Romley's opinion is that the legislation introduced last year (H.B. 2340) creates an oversight agency with unlimited power and the criteria for conducting investigations is purely subjective. Mr. Lotstein said that other concerns with H.B. 2340, as drafted, are the interference with law enforcement organizations and some duplication of efforts by the Auditor General. Mr. Lotstein stated that the County Attorney's Office has contacted Alaska about their ombudsman's office legislation, which H.B. 2340 was modeled after, and it is Mr. Romley's feeling that it would not be a good idea to create an ombudsman's office with such broad subjective powers in Arizona. He added that H.B. 2340, as drafted, also provides that the Director will have a term of office longer than any elected official in Arizona; it would be almost impossible to remove a person from office with that length of term.

Mr. Kinsall asked Mr. Lotstein to provide the Committee with something in writing regarding the concerns expressed. Mr. Lotstein agreed to do so.

Senator Phillips pointed out that a different version of H.B. 2340 will be introduced next session. Mr. Lotstein replied that he hopes the Committee will not recommend an ombudsman's office with investigative powers on a Statewide basis.

Mr. Richardson explained that the ombudsman's office would operate on a complaint basis only and would not be going on fishing expeditions. He added that it is not the desire of the Legislature to pass legislation that is vague about the

ombudsman's authority to investigate or give that office unlimited authority for investigations.

Mr. Cunningham suggested that the person appointed to be the ombudsman for a particular agency should be a staff person already employed by that agency.

Mr. Richardson suggested, too, that the ombudsman's office should be publicized by being separately identified in the phone directory so that people will know of its existence and how to make contact.

5. The State Register

Ms. Johnston referred the Committee to page 11 of Attachment 2 relating to The State Register. She reminded the Committee that it has already voted to have a full-text register.

6. Small Business Connection

Ms. Johnston stated that the Committee has not made any recommendations on this issue.

Mr. Cunningham commented that previous testimony from the Department of Commerce (DOC) was that it already has a Small Business Connection that is operating effectively. He said that he is not sure what expansion of this operation would entail.

Ms. Johnston explained that DOC's Small Business Connection provides some licenses, but more than anything, provides information about licenses and permits. The office does not carry licenses which require investigation or which different jurisdictions, such as cities and counties, may require.

Mr. Cunningham suggested that perhaps each agency could have a representative assigned to the Small Business Connection in DOC to provide information about the permits and licenses required by their particular agency.

Ms. Johnston replied that this idea has been suggested, but said that because of logistics of cost factors and the investigations required of some licenses, DOC is not sure if this is a workable option.

Mr. Thomas submitted that the current system is working well; DOC tells people where to go and what they need for a particular business. He said that he doesn't think there is a need to expand the Small Business Connection.

Mr. Putterman said that he views this office as a clearing house which helps businesses work through the muddle of paperwork and helps them obtain the permits they need.

Ms. Johnston apprised the Committee that the DOC's Small Business Connection will be evaluated in November at its sunset review, so there will be an opportunity at that time to discuss this office.

Chuck Shipley, Vice President of Public Affairs, Arizona Chamber of Commerce, stated that the focus of the Chamber is on inter-agency agreements rather than

the Small Business Connection. He said that he thinks the Small Business Connection is working and maybe should be expanded. Mr. Shipley commented that the Chamber's biggest concern is the lack of availability in terms of public notice of agreements between State agencies and lower levels of government. He said that one area in particular that raises concerns is in the environmental area where there seems to be a lot of regulatory activity going on at both State and county levels. He noted that when a State agency like Environmental Quality delegates authority down to the local level, sometimes the scope of authority is expanded to include rule and regulatory authority. This raises questions for businesses of who the decision-maker is for the permits required. He submitted that there should be some kind of public notice and review where the regulated community has an opportunity to comment and be informed when a particular authority is delegated to the local level. He said that businesses need to know to whom to respond to, to whom to pay the permit fees to, what the ground rules are, and to whom they are responsible.

Matt Ortega, Legislative Liaison, Department of Environmental Quality (DEQ), agreed that there can be some gray areas in terms of inter-agency agreements, and is a problem that needs to be addressed, but said that he is not sure an added public notice is necessary.

Mr. Cunningham asked Mr. Ortega how long he thinks it would take Mr. Fox, the Director of DEQ, to address the concerns raised by Mr. Shipley. Mr. Ortega replied that he will advise Mr. Fox immediately of these concerns so he can meet with Mr. Shipley, and others, to determine the best way to address this problem.

Mr. Thomas asked Mr. Ortega if it is possible, when the State has delegated certain rules to the county, for the county to make rules more onerous than what the State is requiring. Mr. Ortega replied that, depending on what type of delegation agreement the State and county have, in some cases that could happen.

Mr. Thomas pointed out that one of the problems that businesses have is not knowing what the standard is. He submitted that businesses can be confused by an authority established by the Legislature being expanded by a lower government and said that he doesn't think a lower jurisdiction should be allowed to make a rule more onerous than a higher jurisdiction.

Mr. Ortega said that he would agree with Mr. Thomas. He added that Mr. Fox has for several years been committed to the one-stop shop concept for obtaining permits and licenses, which would eliminate a lot of the confusion. Mr. Ortega said that DEQ is willing to enter into discussions with local government to address this problem.

Mr. Richardson suggested that the Committee recommend that the Legislature develop legislation that will clarify the delegation agreements and specify the authority of the local municipalities, and also include public notice.

(Tape 9, Side B)

Mr. Shipley concurred with Mr. Richardson's suggestion.

Senator Phillips noted that there seems to be agreement among Members that this issue needs to be addressed.

7. Criminal Enforcement of Rules and Regulations

Mr. Lotstein distributed a handout entitled "Chapter 3. Barbers" (Attachment 4), which cites a law that an operator of a barber shop can be found guilty of a class 1 misdemeanor, carrying a penalty of a six-month jail sentence, if he does not provide separate receptacles for disposal of shaving papers and used towels. A similar provision, with a like penalty, that two separate receptacles for disposal of used papers and used towels applies to cosmetologists. Mr. Lotstein submitted that criminalizing all the rules the Regulatory Board has promulgated has resulted in unneeded and seldom enforced criminal penalties. He added that not only are these laws, which are all through the statutes, unenforceable, but may even be unconstitutional.

Mr. Lotstein related that an ad hoc committee comprised of prosecutors has reviewed the criminal enforcement of rules and regulations and would like to suggest to the Committee that the authority to criminalize rules, as delegated to the Regulatory Board by the Legislature, is not in the public's interest, and recommends that a legislative subcommittee be established to review the Arizona Revised Statutes.

Mr. Thomas suggested that the first step is to identify which statutes need to be amended and said that perhaps a consultant could be hired for this purpose.

Mr. Cunningham submitted that this is no small task and said that he thinks Mr. Thomas' suggestion is a good one, with the consultant working in conjunction with a committee composed of legislators and experts on this subject.

Mr. Richardson said that he thinks this is a subject that needs to be addressed and is one which fits into the mission statement for this Committee.

Senator Phillips observed that it appears to be the feeling of this Committee to recommend that a committee be established to go through the Arizona Revised Statutes and identify those areas that need to be fixed.

Senator Phillips informed the Committee that discussion will continue on as many issues as possible today, and Members should be prepared to vote at the next meeting on all of the issues that have been discussed.

Mr. Kinsall referred the Committee to the handouts distributed at the beginning of the meeting (Attachments 1 and 3). He explained that the object of these documents is to enhance on the document drafted by staff (Attachment 2). He said that one of the things he and the other drafters wanted to do was to identify some goals they thought appropriate for the Committee to consider, those being:

* a simpler and speedier rulemaking process with improved opportunities for public input and comment at the beginning and formal comment stages of the process,

* improved notice to the public and regulated community through use of "Advance Notice of Rulemaking" and full-text publication of the proposed rule, final rule, and addition of a preamble in

proposed and final rule addressing economic impact, purpose and response to major comments,

* clearer explication of economic impact statement requirements,

* increased flexibility for agencies to amend rulemakings through publication of supplemental notices or proposed rules when significant comments are received,

* improve legislative oversight of rulemaking process to ensure rules fulfill legislative intent,

* expand role for the Governor's Regulatory Review Council in protecting public and regulated community interests by determining when supplemental notices are required, when emergency is present, and whether final proposed rules fulfill legislative intent after input from joint regulatory oversight committee,

* creation of a summary rulemaking procedure for codifying statutory changes, updating incorporations by reference and other ministerial rulemaking efforts,

* expand public and regulated community notice of significant policy decisions,

* avoid duplicative and inconsistent regulation,

* avoid regulation of the same subject matter in multiple forums or at multiple levels, with the Legislature selecting the most appropriate forum for regulating particular subject matter and generally confining regulation to the designated forum,

* require public notice and an opportunity for comment before adoption of delegation agreements in order to involve the public and regulated community,

* administer delegated programs uniformly; rulemakings affecting delegated programs should be subject to the same public notice, comment and review requirements as apply to the delegating agency,

* administer delegated programs cost effectively from the governmental, public and regulated community perspectives. Programs should not be delegated from the designated agency unless another agency can perform the task more cost effectively for the government, the public and the regulated community,

* once program responsibility is delegated, the delegated agency should have final authority in all matters affecting the delegated program, and

* require agencies and political subdivisions seeking program delegation to show an adequate, independent statutory source of funding. The mere fact of program delegation should not be

presumed to authorize imposition of additional fees or taxes except as authorized by applicable statute.

Mr. Shipley led the Committee through the schematic shown on page 15 of Attachment 1, elaborating on the steps in the proposed rulemaking process. He noted that a time frame needs to be considered for this process. He said, too, that the issue of emergency rules is not addressed in this handout, but suggested that this should continue with some review by GRRC.

Mr. Cunningham observed that there is no provision for the Attorney General's certification and asked when that takes place. Mr. Shipley explained that certification is now the role of GRRC and not the Attorney General under this proposal.

Mr. Cunningham asked Mr. Shipley to estimate what staff requirements will be for Legislative Council, as well as the Joint Regulatory Oversight Committee, in order to review each and every rule that is drafted. Mr. Shipley replied that the resources required to assume this responsibility have not been determined.

Mr. Cunningham speculated that before considering incorporating the proposal presented by Mr. Kinsall into the final recommendation by the Committee, it might be desirable to hear testimony from the Attorney General's Office, as well as other agencies, and said that he would also like to have a week or so to review the proposal more carefully.

Mr. Shipley said that while the role of the Attorney General outlined in t proposal is changing, it is not inconsistent with what other states are doin

Mr. Cunningham submitted that the changes being proposed are more dramatic than just removing the Attorney General from the process. He noted that the Legislature has substantially been injected into the rulemaking process and said that he thinks this needs to be thought through very carefully.

Mr. Shipley disagreed that the Legislature has been injected substantially into the rulemaking process, saying rather that they have an advisory role to review and advise.

Tom Augherton, Chief of Administration, Attorney General's Office, introduced Rebecca Berch and Leslie Hall, who provided testimony on behalf of the Attorney General's Office.

Rebecca Berch, Section Chief Counsel, Solicitor General & Opinions Section, Attorney General's Office, disputed that the goals of the Kinsall proposal make the process simpler and easier. She pointed out that decreasing the Attorney General's involvement in the review process to only commentary, raises some concerns. She explained that it is the responsibility of the Attorney General to defend a rule in court when that rule is challenged, but said, however, that this would be difficult to do if the rule, in the opinion of the Attorney General, is unconstitutional or improper. The Attorney General would then be in the difficult position of having to try and defend the rule after having opined that the rule was unconstitutional or improper. She pointed out that the current process provides for more involvement by the Attorney General provides him with an opportunity to express concerns. Ms. Berch also voiced

concerns about removing the Attorney General from the certification process. She noted that the Attorney General reviews rules for clarity, constitutionality, etc., without pressure or concern for special interests. She suggested that Legislative Council will not have that same freedom from pressure since it serves at the pleasure of the Legislature. She added that it is not necessarily true that Legislative Council or a legislator can define the legislative intent of a rule any better than the assigned Attorney Generals who have responsibility for working on rules and regulations.

(Tape 10, Side A)

Mr. Richardson asked Ms. Berch if she has a fear that by removing the Attorney General from the rules process, GRRC will ignore the comments the Attorney General offers. Ms. Berch conceded that this is one of her fears. She said that as she understands the proposed process, the Attorney General will have no more input into the review process than any other member of the public. There will be no oversight by the Attorney Generals who deal with these rules on a daily basis, and there is a fear that their comments will not be respected.

Mr. Richardson asked Ms. Berch if the Attorney General is currently the only office that has veto authority on a rule being promulgated. Ms. Berch answered affirmatively.

Senator Phillips asked Ms. Berch if she is saying that the Executive Branch should have veto power over the Legislature through the Attorney General's Office. Ms. Berch answered that the Attorney General's Office has input into what is essentially the legislative process through cooperation rather than veto power.

Senator Phillips asked Ms. Berch if she considers it cooperation when the Attorney General's Office sits on a rule rather than certifying it. Ms. Berch responded that when a rule is held up it is not because the Attorney General's Office is sitting on it to keep it from going forward.

Senator Phillips asked Ms. Berch if she would support criminal penalties if the Attorney General does sit on a bill. Ms. Berch responded that she supports criminal penalties for very little.

Leslie Hall, Section Chief Counsel, Consumer Protection & Antitrust Section, Attorney General's Office, perceived that the Attorney General's role is to protect legislative intent, being a neutral, independent body trying to ensure that legislative intent is not expanded or changed, and that Office should not be trying to prevent the enactment of legislation. She submitted that the Kinsall proposal does not reduce the number of people involved in the rulemaking process, but will actually add people and money to the process. She said that the Attorney General's Office represents agencies on a daily basis and these lawyers are very familiar with the rules involving these agencies. These lawyers will still have to be familiar with the rules because of their involvement with the agencies; however, with the Kinsall proposal, someone else will have to become familiar with these rules also, which will be a duplication of efforts. She added that people will have to be added to Legislative Council staff, which will take more money. And, the people added to Legislative Council will have to acquire the knowledge that the Attorney General lawyers already

have. She also expressed a concern that the members of GRRC will be more influenced by the interests they represent than the Attorney General would in looking at whether a rule complies with legislative intent and constitutionality.

Stuart Goodman, Legislative Liaison, Arizona Department of Administration (DOA), reported that several executive agencies have been meeting to develop comments about the proposals of this Committee. He said that he concurs with Mr. Shipley's proposal for advance noticing. He suggested that putting the current rulemaking docket into the register and notification being provided will take care of this problem. He said that he thinks public comment happening before the GRRC process will provide incentive for agencies to change the rule before it gets to GRRC. He expressed support for the legislative advisory concept, saying that he recognizes that this already exists. He said, however, that he has concerns about Legislative Council assuming the Attorney General's role. With regard to expanding the role of GRRC, Mr. Goodman said that he has concerns about GRRC becoming the official body that is currently viewed as the Attorney General's Office.

Mike Braun, Executive Director, Legislative Council, stated that the attorneys at Legislative Council feel comfortable in reviewing rules, but would be uncomfortable with drafting every rule. He said that while his staff could probably interpret the sponsoring legislator's intent of a bill they were involved with, he doesn't think they could interpret legislative intent of the entire Legislature.

Senator Phillips asked Mr. Braun to comment on the Attorney General's role in the rulemaking process. Mr. Braun replied that he would prefer to restrict his comments to the role of Legislative Council and not the Attorney General's role.

Mr. Cunningham suggested that the intent of the Legislative body may be entirely different than that of the sponsoring legislator. He expressed concern that the legislator's intent may be overweighted in contradiction to the intent of the full body.

Mr. Braun agreed that the sponsor's intent could very well be different than the other legislators who voted on the legislation. He said that he would not feel comfortable with publicly stating the sponsor's intent, but in a review and comment mode, would know the impetus for the legislation and might be in a position to offer a piece of information that might otherwise be lacking.

Mr. Cunningham asked Mr. Braun if the attorneys who are currently working in Legislative Council are under-utilized. Mr. Braun said, "absolutely not."

Mr. Cunningham questioned whether Legislative Council will have to obtain additional resources to meet the added responsibilities of the rulemaking process. Mr. Braun agreed that this is true, saying that this responsibility cannot be accomplished with the current eight attorneys. He said, however, that in assuming the nonpartisan research role that has recently been given the Council, there will be an increase in staff to assume that function, and that additional staff could be utilized to do review and comment in the rulemaking process.

Mr. Goodman commented that DOA's rule-writers also have difficulty in determining legislative intent and suggested that perhaps a formal record or report of the actual intent would provide better insight as to the legislative intent, resulting in better input from the agencies and better rules.

Senator Phillips reminded Members that the issues on which tentative agreement has been reached will be voted on at the next meeting and agencies will be invited to present additional comments at that time.

The meeting adjourned at 11:48 a.m.

Carolyn Richter

Carolyn Richter, Committee Secretary

(Attachments and tapes on file in the Office of the Chief Clerk.)

cr
11/05/93

EXPLANATIONS

(1) In Iowa, the full text of adopted rules may be omitted if the text is identical to that published as proposed.

(2) In North Carolina, the full text of adopted rules is published if notice was not required.

(3) In South Carolina, either a synopsis or the full text of proposed rules is published.

(4) In Utah, the full text of proposed rules is published except for lengthy rules which may only be noticed.

(5) In Utah, changes in adopted rules are full text also.

(6) In Wisconsion, agencies have a statutory option of having full text or notice only of their proposed rules published.

(7) In Wisconsin, adopted rules are printed as replacement pages for the Code only.

(8) In Wisconsin, the full text of emergency rules is printed on occasion at the editor's discretion.

TOTALS

Publish Administrative Register = 35

Proposed Rules

Full text = 22

Notice Only = 13

Adopted Rules

Full text = 23

Notice Only = 12

Emergency Rules

Full text = 26

Notice Only = 8

Court-ordered Rules

Full text = 9

Notice Only = 6

Frequency of Issue

Monthly = 11

Semi-monthly = 8

Bi-weekly = 5

Weekly = 10

Semi-weekly = 1

Pages per month (average)

Notice only = 97

Full text = 351

TABLE B: COMPARISON OF STATE ADMINISTRATIVE REGISTERS

STATE	PUBLISH		PROPOSED RULES		ADOPTED RULES		EMERG. RULES		COURT-ORDERED		FREQ. of issue	PGS /issue
	Yes	No	Full	Notice	Full	Notice	Full	Notice	Full	Notice		
Alabama	✓			✓		✓		✓			Mo.	55
Alaska	✓			✓		✓		✓			Wk.	50
Arizona	✓			✓		✓		✓			Mo.	20
Arkansas												
California	✓			✓		✓		✓			Wk.	
Colorado												
Connecticut												
Delaware												
Florida	✓		✓			✓	✓				Wk.	150
Georgia		✓										
Hawaii		✓										
Idaho	✓		✓		✓		✓		✓		Bi-wk.	
Illinois	✓		✓		✓		✓		✓		Wk.	389
Indiana	✓		✓		✓		✓		✓		Mo.	200
Iowa	✓		✓		✓ (1)		✓				Bi-wk	94
Kansas	✓			✓	✓		✓			✓	Wk.	40
Kentucky	✓		✓			✓	✓				Mo.	300
Louisiana	✓			✓	✓		✓				Mo.	120
Maine		✓										
Maryland	✓		✓		✓		✓		✓		Bi-wk.	92
Massachusetts												
Michigan	✓		✓		✓		✓				Mo.	175
Minnesota	✓		✓		✓		✓		✓		Wk/semiwk	60
Mississippi	✓		✓		✓		✓			✓	Mo	5
Missouri	✓		✓		✓		✓			✓	Semi Mo	173

STATE	PUBLISH		PROPOSED RULES		ADOPTED RULES		EMERG. RULES		COURT-ORDERED		FREQ.	PGS
	Yes	No	Full	Notice	Full	Notice	Full	Notice	Full	Notice	of issue	/issue
Montana	✓		✓			✓	✓				Semi-Mo.	124
Nebraska		✓										
Nevada		✓										
New Hampshire												
New Jersey	✓		✓		✓		✓		✓		Bi-wk.	148
New Mexico	✓			✓	✓		✓				Semi-Mo.	66
New York	✓		✓		✓		✓		✓		Wk.	127
North Carolina	✓		✓		✓ (2)						Semi-Mo.	60
North Dakota		✓										
Ohio	✓			✓	✓		✓				Mo.	
Oklahoma	✓			✓	✓		✓				Semi-Mo.	166
Oregon	✓			✓		✓		✓			Mo.	
Pennsylvania	✓		✓		✓		✓				Wk.	133
Rhode Island												
South Carolina	✓			✓ (3)	✓		✓				Mo.	147
South Dakota	✓			✓		✓		✓		✓	Wk.	4
Tennessee	✓		✓			✓	✓				Mo.	92
Texas	✓		✓		✓		✓			✓	Semi-Wk.	120
Utah	✓		✓ (4)			✓ (5)	✓		✓		Semi-Mo.	150
Vermont		✓										
Virginia	✓		✓		✓		✓		✓		Bi-Wk.	168
Washington	✓		✓		✓		✓				Semi-Mo.	313
West Virginia	✓			✓		✓		✓		✓	Wk.	41
Wisconsin	✓		✓ (6)		✓ (7)			✓ (8)			Semi-Mo.	33
Wyoming		✓										

EXPLANATIONS

(a) Florida publishes full text of proposed and emergency rules but publishes notice only of adopted rules.

(b) In Illinois, emergency rules are in effect for a maximum of 150 days and the agency cannot adopt another emergency having the same purpose and effect for 2 years.

(c) In Iowa, the full text of adopted rules may be omitted if the text is identical to that published as proposed.

(d) In Iowa, there is no limit on the amount of time an emergency rule may be in effect; however, emergency rules sunset 180 days following formal objection.

(e) Kansas publishes full text of adopted and emergency rules but only the notice for proposed and court-ordered rules.

(f) Kentucky publishes full text of proposed and emergency rules but only the notice for adopted rules.

(g) In Kentucky, emergency rules are in effect 120 days from publication or until replaced by permanent regulation.

(h) Louisiana publishes full text of adopted and emergency rules but only the notice for proposed rules.

(i) In Maryland, the length of time an emergency rule remains in effect in entirely at the discretion of a legislative committee.

(j) In Minnesota, emergency rules may be adopted for 180 days with one renewal of 180 days possible.

(k) Missouri publishes full text of proposed, adopted, and emergency rules but only the notice for court-ordered rules.

(l) Montana publishes full text of proposed and emergency rules but only the notice for adopted rules.

(m) New Mexico publishes the full text of adopted and emergency rules but only the notice for proposed rules unless full text is requested.

(n) In New Mexico, emergency rules are in effect as indicated by independent law.

(o) In New York, emergency rules may be in effect for 90 days for the first emergency rule; 60 days for subsequent.

(p) Ohio publishes full text of adopted and emergency rules but only the notice for proposed rules.

(r) Oklahoma publishes the full text of adopted and emergency rules but only the notice for proposed rules.

(s) In Oklahoma, emergency rules are in effect until sine die adjournment of succeeding legislative session.

(t) South Carolina publishes the full text of adopted and emergency rules but may publish either a synopsis or the full text of proposed rules.

(u) Texas publishes the full text of proposed, adopted, and emergency rules but only the notice for court-ordered rules.

(v) In Texas, emergency rules are in effect 120 days with a 60-day extension allowed.

(w) Utah publishes the full text of proposed rules except for lengthy rules which may only be noticed; the full text of emergency and court-ordered rules; notice only for adopted rules unless text is different from proposed.

(x) In Washington, emergency rules are in effect 120 days only. No extensions or renewals are allowed.

(y) In Wisconsin, agencies have a statutory option of having full text or notice only of their proposed rules published. Adopted rules are printed as replacement pages for the Code only. The full text of emergency rules is printed on occasion at the editor's discretion.

(aa) In Wisconsin, emergency rules are in effect for 150 days only unless extended by the legislature for an additional 120 days.

(bb) Michigan has emergency rules in effect for 6 months with a 6-month extension possible.

(cc) Tennessee publishes full text of proposed and emergency rules but notice only of adopted rules.

TOTALS

Publish Administrative Codes = 36

Emergency Rules – Amount of days in effect

60 days = 1

90 days = 7

120 days = 13

150 days = 2

180 days = 3

longer = 3

unspecified = 5

Legislative Oversight = 19

Review Only = 8

TABLE A: COMPARISON OF STATE RULES AND RULES PUBLICATION

STATE	ADMIN. CODE		ADMININSTRATIVE REGISTER				EMERGENCY RULES		OVERSIGHT OR RULES REVIEW		
	Yes	No	Yes	No	Full Text	Notice Only		In effect	Review	Oversight	Type
Alabama	✓		✓			✓	Yes	120 days		✓	Legislative
Alaska	✓		✓			✓	Yes		✓		Executive
Arizona	✓		✓			✓	Yes	90 days	✓		Executive
Arkansas											
California	✓		✓			✓	Yes	120 days			
Colorado											
Connecticut											
Delaware											
Florida	✓		✓		✓	(a)	Yes	90 days		✓	Legislative
Georgia	✓			✓			No				
Hawaii		✓		✓							
Idaho		✓	✓		✓		Yes	120 days			
Illinois	✓		✓		✓		Yes	150 days (b)	✓		Legislative
Indiana	✓		✓		✓		Yes	90-365 days			None
Iowa	✓		✓		✓ (c)		Yes	no limit (d)		✓	Leg. + Exec. rev.
Kansas	✓		✓		✓ (e)	✓ (e)					None
Kentucky	✓		✓		✓ (f)	✓ (f)	Yes	120 days (g)		✓	Legislative
Louisiana	✓		✓		✓ (h)	✓ (h)	Yes	120 days		✓	Legislative
Maine		✓		✓							None
Maryland	✓		✓		✓		Yes	(i)		✓	Legislative
Massachusetts											
Michigan	✓		✓		✓		Yes	6 mo. (bb)		✓	Legislative
Minnesota	✓		✓		✓		Yes	180 days (j)		✓	Leg. & Exec. rev.
Mississippi		✓	✓		✓		Yes				None
Missouri	✓		✓		✓	✓ (k)	Yes	120 days		✓	Legislative

STATE	ADMIN. CODE		ADMININSTRATIVE REGISTER				EMERGENCY RULES		OVERSIGHT OR RULES REVIEW		
	Yes	No	Yes	No	Full Text	Notice Only		In effect	Review	Oversight	Type
Montana	✓		✓		✓	✓ (l)	Yes	120 days	✓	Exec. & Leg. rev.	
Nebraska	✓			✓							
Nevada	✓			✓							
New Hampshire											
New Jersey	✓		✓		✓		Yes	60 days	✓		Executive
New Mexico		✓	✓		✓	✓ (m)	Yes	(n)			None
New York	✓		✓		✓		Yes	90 days (o)		✓	Legislative
North Carolina	✓		✓		✓		No				None
North Dakota	✓			✓							
Ohio	✓		✓		✓	✓ (p)	Yes	90 days		✓	Legislative
Oklahoma	✓		✓		✓	✓ (r)	Yes	(s)		✓	Legislative
Oregon	✓		✓			✓	Yes	180 days			None
Pennsylvania	✓		✓		✓		Yes	120 days		✓	Legislative
Rhode Island											
South Carolina	✓		✓		✓	✓ (t)	Yes	90 days		✓	Legislative
South Dakota	✓		✓			✓	Yes	90 days	✓		Legislative
Tennessee	✓		✓		✓	✓ (cc)	Yes	120 days		✓	Legislative
Texas	✓		✓		✓	✓ (u)	Yes	120 days (v)			None
Utah	✓		✓		✓ (w)	✓ (w)	Yes	120 days		✓	Legislative
Vermont	✓			✓							
Virginia		✓	✓		✓		Yes	12 months	✓		Leg. & Exec.
Washington	✓		✓		✓		Yes	120 days (x)		✓	Legislative
West Virginia	✓		✓			✓	Yes	15 months		✓	Legislative
Wisconsin	✓		✓		✓ (y)	✓ (y)	Yes	150 ds. (z)	✓		Legislative
Wyoming		✓		✓			Yes	120 days		✓	

Appendix C – Estimated Annual Costs for Printing and Postage

The figures shown below are based on an average issue of 460 pages or two issues with a total page count of 460 pages.

Estimated costs of final printing per month based on average issue of 460 pages:

500 copies printed:	$4,600.00
800 copies printed:	$7,360.00
1000 copies printed:	$9,200.00

Estimated costs of final printing per year:

500 copies printed:	$55,200.00
800 copies printed:	$88,320.00
1000 copies printed:	$110,400.00

Postage for a full-text Register (460 pages):

	250 Registers mailed	50% increase (550 mailed)	80% increase (700 mailed)
Postage	$3.00	$3.00	$3.00
Total/mo.	$750.00	$1650.00	$2100.00
Total/yr.	$9000.00	$19800.00	$25200.00

Full text (two issues):

	250 Registers mailed	50% increase (550 mailed)	80% increase (700 mailed)
Postage	$5.66	$5.66	$5.66
Total/mo.	$1415.00	$3113.00	$3962.00
Total/yr.	$16980.00	$37356.00	$47544.00

Total costs for printing and postage annually based on an average issue of 460 pages:

Number of Registers printed	**Printing**	**Postage**	**Total**
500 Registers (250 mailed)	$55,200.00	$9000.00	$64,200.00
800 Registers (550 mailed)	$88,320.00	$19,800.00	$108,120.00
1000 Registers (750 mailed)	$110,400.00	$47,544.00	$157,944.

Appendix D – Estimated Initial Start-up Costs

No matter which route is taken in producing a full-text Register, the Secretary of State's Office, Public Services Department will have to purchase computer equipment, software, and furniture and hire at least one additional person.

Computer Equipment	
The proposed price for one additional stand-alone computer, screen, memory requirements, cables, printer, etc.	$10,100.00
Software and Training	
The proposed price for one additional license for computer software	$2,800.00
The proposed price for training staff person in software (includes training costs and travel costs; training is in California)	$2,200.00
Furniture	
Desk, computer and work area	2,500.00
Chair, secretarial	200.00
Subtotal	**17,800.00**
Personnel	
Salary and fringe benefits	$23,000.00
Miscellaneous expenses (includes tape back-up system for computer, etc.)	2,000.00
TOTAL	**42,800.00**

Appendix A – Costs of Printing a Full-text Register

Average pages per issue currently: 25

Estimated pages for full-text Register, final printing only:

Proposed rules:	100-300
Emergency rules:	50-100
Adopted rules:	100-250 (perhaps if identical to proposed, not printed; most are not identical)
Misc. Info.	10-20
TOTAL	260-670

Estimated costs of final printing per month:

500 copies printed:	$2,600.00 – $6,700.00
800 copies printed:	$4,160.00 – $10,720.00
1000 copies printed:	$5,200.00 – $13,400.00

Estimated costs of final printing per year:

500 copies printed:	$31,200.00 – $80,400.00
800 copies printed:	$49,920.00 – $128,640.00
1000 copies printed:	$62,400.00 – $160,800.00

Estimated costs of final printing per month based on average issue of 460 pages:

500 copies printed:	$4,600.00
800 copies printed:	$7,360.00
1000 copies printed:	$9,200.00

Estimated costs of final printing per year:

500 copies printed:	$55,200.00
800 copies printed:	$88,320.00
1000 copies printed:	$110,400.00

Appendix B – Estimated Costs for Postage

Current figures:

Registers mailed:	250
Cost per issue:	85¢
Postage per month:	$212.50
Postage per year:	$2550.00

Full text (450 pages):

	250 Registers mailed	50% increase (550 mailed)	80% increase (700 mailed)
Postage	$3.00	$3.00	$3.00
Total/mo.	$750.00	$1650.00	$2100.00
Total/yr.	$9000.00	$19800.00	$25200.00

Full text (two issues):

	250 Registers mailed	50% increase (550 mailed)	80% increase (700 mailed)
Postage	$5.66	$5.66	$5.66
Total/mo.	$1415.00	$3113.00	$3962.00
Total/yr.	$16980.00	$37356.00	$47544.00

FISCAL IMPACTS OF PUBLISHING A FULL-TEXT ADMINISTRATIVE REGISTER

When citing statistics in this report, the information was taken from the *1992-93 Survey of Administrative Codes and Register*, published by the Administrative Codes and Registers Section of the National Association of Secretaries of State of which the Director of Public Services in the Arizona Secretary of State's Office is a member and Executive Secretary Emeritus. (The Executive Secretary was, until 1990, the sole national officer of this organization.) Information taken from the survey also appears in Appendices C and D of this report.

In publishing a full-text Register, one must consider several aspects. These aspects include:

1. Time required to prepare the material for publishing;
2. Supply costs, including paper, toner, and envelopes for mailing;
3. Postage costs;
4. Start-up costs, including furnishings and computer equipment and software;
5. Staffing;
6. Determination of which rules are to be printed full text.

Looking at the above items:

1. The bigger the Register, that is the Register having the most pages of rules, takes longer to prepare for publication.
   - Currently, the Public Services Department publishes the Register approximately two weeks after the final deadline for material being submitted for publication.
   - Even with a dedicated staff person, this time would have to be pushed back, probably two weeks. in order for us to get the work completed. Preparation work includes computer input, proofreading twice, correcting the copy, and generating the camera-ready copy when the Register is complete.
2. Supply costs will rise as the Register increases in size.
   - Obviously, the bigger the Register, the more paper will be used to generate proofing copies and the final product. These costs will also be dependent on the number of subscribers.
   - Envelopes or shrink-wrap must also be considered for mailing purposes. If we start to use shrink-wrap, we will need the materials and the dispenser.
3. Postage costs
   - Postage costs currently are about 85¢ per copy.
   - A 460-page Register would cost about $3.00 excluding mailing material weight. This would be for a Register published once each month as is currently done.
   - A 460-page Register split between two issues would cost about $5.66 per month per single subscription for the two issues.
4. Start-up costs must also be considered.
   - Start-up costs include the purchase of a computer desk (one for desktop publishing) and chair; a computer and extra memory to handle the desktop publishing software, the software itself along with annual maintenance costs; a laser printer; and software training classes for the person operating the computer.
5. Staffing
   - Publishing a full-text Register would involve at least 1 1/2 staff people dedicated to the project. Of these, the 1/2 person is already on the staff. We would need at least one additional staff person to handle the extra work.
   - Staffing costs must. include the state's costs for benefits.

6. In determining which route Arizona should take, perhaps it's a good idea to see what other states are doing in relation to publishing a full-text Register. The table prepared for you, a *Comparison of State Administrative Registers*, is attached to this report.
   - As you can see by the table, of the 35 states listed in the *1992-93 Survey* as publishing an administrative register, 22 publish the full text of proposed rules, 23 publish the full text of adopted rules, 26 publish the full text of emergency rules, and 9 publish the full text of court-ordered rules.
   - There are more states publishing adopted and emergency rules than there are publishing proposed rules.
   - Perhaps the most critical areas are proposed and emergency rules (the first time the emergency is adopted) since these rules will not have appeared anywhere yet.
   - Secondary would be adopted rules and emergency rules which have been previously adopted.

There is a possibility that we could split the issue into two issues – printing one the middle of the month and the other on the last work day of the month. If we were to do that, the Governor's executive orders and proclamations, the Attorney General's opinions, adopted rules, emergency rules, terminated rules, rejected rules, and appointees to boards and commissions would go in the first issue and the proposed rules would have to go in the last issue by themselves. Which issue we put the Notices of Proposed Rules Submitted to GRRC would be up for discussion, but they would probably have to go in the second issue. Unfortunately, splitting the issues would almost double the postage costs.

Figures for printing a full-text register appear in Appendix A of this report.

Figures for estimated costs for postage appear in Appendix B of this report.

Figures including both printing and postage appear in Appendix C of this report.

Figures for estimated initial start-up costs appear in Appendix D of this report.

Who, What, How?

Authorizing a full-text Register would certainly benefit all the citizens/taxpayers of Arizona. Without raising taxes, money could be raised by changing a few procedures. The subscription price to the *Register* would rise, but this money would go directly into the General Fund unless a revolving fund for publication of the *Register* were instituted.

Incorporated by Reference Material:

Materials incorporated by reference include federal publications or such items as the National Electrical Code or the National Plumbing Code. These items can cost up to $500 each. An agency incorporating material by reference now must purchase, by law, four copies: three are filed with the Secretary of State; one is maintained by the agency. The Secretary of State's Office rarely has anyone ask for this material and we do not copy incorporated material. The materials are boxed and stored in another area of the building. Reducing the number of copies of incorporated material filed could result in agencies saving from just a few dollars to about $1500–2,000 per item incorporated, meaning that fewer tax dollars would be spent for this.

Reversing the Rulemaking Process:

Changing the formal rulemaking process would mean the process would go from the order on the left to the order on the right:

Current Process	Changed Process
1. Submission to G.R.R.C.	1. Publication in *Register* of full text of proposed rules
1. Publication of notice of rules submitted to G.R.R.C.	2. Public comment period
3. G.R.R.C. review/hearing	3. Public hearings
4. Submission to Secretary of State for publication as proposed rules	4. Submission to G.R.R.C.
5. Public comment period	5. G.R.R.C. review/hearing
6. Public hearings	6. Submission to A.G.
7. Submission to A.G.	7. A.G.-certified rules filed with Secretary of State
8. A.G.-certified rules filed with Secretary of State	

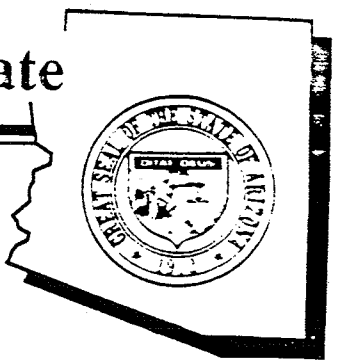
If public hearings were allowed to be held during the public comment period, steps 2 and 3 in the "Changed Process" column could be combined, resulting in a six-step process rather than the eight-step process currently.

The changed process would eliminate the need for the Notice of Proposed Rules Submitted to the Governor's Regulatory Review Council, thereby saving *Register* publication costs and agency preparation and copying costs for this Notice. Rather than an agency having to send G.R.R.C. ten copies of its rules being proposed, they would perhaps only have to send the economic impact statement, a report on comments received from the public and how those comments were resolved, and a statement about any changes to the rule since proposal. The G.R.R.C. members could have already read the rules in the *Register*. This could also eliminate the number of people who now want to comment on proposed rules at a G.R.R.C. hearing. Under the changed process, they would comment at a public hearing held by the agency or in writing to the agency, using G.R.R.C. as a last resort rather than a first resort.

Full-text Register

The taxpayers of Arizona would benefit the most from the publication of a full-text *Register*. By subscribing to the *Register*, purchasing a single issue of the *Register*, or visiting most public libraries, members of the public could see immediately the actual text of a new rule (or amendment to or repeal of an existing rule) which an agency is proposing. The public could then have the time to comment on the proposed rule without first having to contact the agency for a copy. Since the agencies would not be sending out as many copies of rules, they would save money which could be transferred to the Secretary of State's Office and be used to produce the full-text *Register*.

Office of the Secretary of State



MEMORANDUM

TO: Senator Ed Phillips, Co-Chairman
Representative Gary Richardson, Co-Chairman
Members of the Joint Legislative Committee on Regulatory Reform and Enforcement

FROM: Mimi Griffiths MG
Director, Public Services Department
Office of the Secretary of State

RE: Fiscal impact of full-text *Register*
Rulemaking comparison tables

DATE: September 27, 1993

Along with this memo, I have attached a report outlining the probable fiscal impact of the Secretary of State's Office publishing a full-text *Register*. The figures shown are estimated since production costs and postage will depend on the size of the *Register* and the resulting postage costs.

The size of each *Register* issue can vary greatly depending on the material submitted for publication. As the Administrator of the Administrative Code Division for the Illinois Secretary of State's Office for eight years, I saw our full-text *Registers* range from the smallest at about 80 pages to our largest at 1,500 pages. It is virtually impossible to guess just how large the average full-text *Arizona Register* will be.

The size of the *Register* will also depend on which rules are to be published full text. I did a comparison study of various states publishing a *Register*, gathering the information from the 1992-93 *State and Federal Survey of Administrative Codes and Registers* published by the Administrative Codes and Registers (ACR) Section of the National Association of Secretaries of State, an organization of which I have been a member for 12 years. These figures are attached as Tables 1 and 2 to this report.

As you can see, most of the states publishing full text do so for adopted rules. Fewer states publish full-text proposed rules than publish full-text adopted rules. As a point of reference, in Illinois we published the full text of all rules. The full text showed all changes being made, by use of strike-outs for language being repealed and underlining for language being added, both for proposed and for adopted rules.

As the fiscal impact report shows, a large outlay of money will be for postage. At the present time, we mail the *Register* to about 250 of the 450 *Register* subscribers. If agencies will no longer copy and mail proposed rules to the public upon request, our subscriber rolls will probably increase, although what increase in numbers we will see is unknown. Also, postage rates have a way of increasing suddenly, which could always present problems for us. Up to now, we have mailed the *Register* first class mail, but this will probably change as the *Register* grows in size. In Illinois, we mailed the *Register* under the 'Bound Printed Matter' rate.

Because of the law stating that we charge a fee for the *Register* covering publication and mailing costs, the subscription price for the *Register* would have to increase significantly. Currently, the price for a one-year subscription is $36 and includes both semi-annual indexes. This price would have to increase to about $125 for a one-year subscription.

Where to find the money for us to produce a full-text *Register* could be a problem. However, there are two ways in which agencies could save money and that money could be re-routed to the Secretary of State's Office for the *Register*.

State Capitol, West Wing, 1700 West Washington, Phoenix, Arizona 85007-2808
Telephone: (602) 542-4285 or Fax: (602) 542-1575 or 542-6172

The first way to save money involves incorporated by reference material in agency rules (A.R.S. § 41-1028).

Agencies could save some of the necessary funds if A.R.S. § 41-1028 were changed from requiring three copies of incorporated material to be filed with the Secretary of State to requiring no more than one copy to be filed. In Illinois, agencies were required only to keep a copy of any incorporated material in their principal office; no incorporated material was filed with the rules in the Secretary of State's Office.

Whether or not one copy of the incorporated material still were required to be filed with us, another change involving incorporated material could be to require that the incorporated material be submitted with the agencies' adopted rules rather than with their proposed rules. Currently, the material must be filed with proposed rules, but there is no guarantee that the rules will ever actually be adopted. If the agency terminates the rulemaking or even just amends the portion of the rule deleting the incorporation reference, the material now remains on file. This is a needless expense.

The second way to save money would be to turn the rulemaking process around.

Rather than publishing a notice of rules being submitted to the Governor's Regulatory Review Council (Council or G.R.R.C.) and then publishing another notice after review by the Council followed by public comment time and then public hearings, time and money could be saved by publishing the proposed rules first in the *Register*, followed by the public comment period and then submission of the rules to the Council. The publication of the proposed rules in the *Register* at the beginning of the rulemaking process would solve the problem of the public not knowing which rules have been submitted to the Council. Having the public comment period before Council review could eliminate some of the problems with rules which the Council now finds. And it could eliminate the growing problem the Council is now facing of members of the public wanting to comment on rules at a Council meeting and speaking about issues which are not in the Council's purview.

Another suggestion is to slightly lengthen the public comment period (in Illinois it was a minimum of 45 days) and allow the agencies to hold their public hearings during the public comment period rather than after it as is now the case. Public hearings should not, however, be held less than two or three weeks after *Register* publication in order to allow time for people who wish to comment on the rules to receive their copy of the *Register* and review the rules before the hearing.

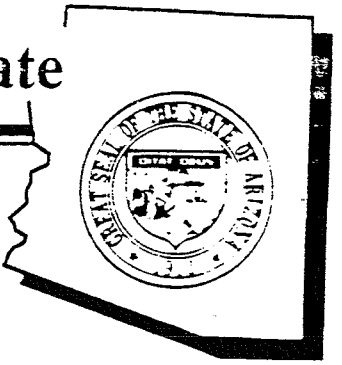
There are two other means of funding the publication of a full-text *Register*.

There is at least one state which charges the agencies for material published in its *Register*. The charge is about $10 per page or partial page of published material. While this would be another way to raise money, the agencies would then need more money in their budgets to pay for the *Register* publication of their rules.

Another alternative would be to establish a revolving fund for publication of the *Register*.

These are just some of the issues which can be raised when discussing a full-text *Register* and where to find the money to enable the Secretary of State's Office to produce a full-text *Register*. I would be happy to discuss any of these issues at the next scheduled meeting of the Joint Committee.

Office of the Secretary of State



September 27, 1993

Senator Ed Phillips
Representative Gary Richardson
Members of the Joint Legislative Committee on Regulatory Reform and Enforcement
State Capitol
Phoenix, Arizona 85007

Dear Chairmen and Committee Members:

We have attached the information you requested regarding the fiscal impacts of Arizona going to a full-text *Register*. The fiscal impact on our office would be very significant, increasing the Rules/ Publications budget by 50%-100%. Added to these ongoing costs would be sizable start-up costs.

I wanted to highlight these points to you because of Arizona's limited fiscal resources and our shared concern with you about keeping governmental costs at an affordable level for all taxpayers.

Please feel free to contact us if you would like more information or further clarification about these issues.

Sincerely,

Michael J. Wolfe
Chief of Staff

State Capitol, West Wing, 1700 West Washington, Phoenix, Arizona 85007-2808
Telephone: (602) 542-4285 or Fax: (602) 542-1575 or 542-6172

CHAPTER 4

STAFF ANALYSIS OF LEGISLATIVE REVIEW OF RULES

Historical Precedent to Legislative Review In Arizona

A.R.S. 41-511.05(9): Gives the legislature the authority to review certified rules adopted by the States Park Board. The legislature may approve, disapprove, or modify by concurrent resolution such rules. The constitutionality of this statute may be questioned on the grounds that certified rules carry the weight of law, and any modification or repeal of them is therefore a change of law. In Arizona the law-making authority rests with the legislature and the governor. Therefore, certified rule repeals or modifications should be presented to the governor to bypass a constitutional challenge.

H.B. 2258 (1980): This legislation proposed a single house veto review procedure on existing rules. It was vetoed by the governor.

S.B. 1369 (1982): This bill provided for the legislative review of rules, including the veto of existing rules of all statutory boards, commissions, and agencies, as well as constitutional agencies. Challenged rules were to be referred to the committee of reference conducting sunset reviews. The grounds for review were failure to meet legislative intent and changes in circumstances after the enactment of enabling legislation. This second grounds for review may be subject to constitutional challenge under the separation of powers doctrine.

S.B. 1143 (1983): This legislation proposed identical measures to those in S.B. 1369, and was held in committee.

Legislative Review

Purpose: The primary purpose of legislative review of administrative rules and regulations is to ensure that they reflect the legislative intent of the statutes upon which their authority is based. Legislative review can also be used to ensure that such statutory authority is not exceeded. Attempts have also been made (e.g., by S.B. 1396 introduced in 1982) to extend legislative review as a means to provide a flexible response to changes in circumstances after the passage of enabling legislation. However, the constitutionality of this last provision is questionable (separation of powers).

Which Rules/Regulations Subject to Review: Legislative review is quite flexible in this respect. Either proposed or existing rules can be reviewed. In addition, either all rules or merely those which are designated (through legislation) or challenged can be made subject to review.

Models of Legislative Review: There are three basic models of legislative review (with some overlap). The first is advisory committee. Under this model either a single joint committee or committees of reference (germane standing committees) conduct the rules review. The committee, however, does not have the power to veto or suspend rules. They only have the power to advise agencies and/or the executive branch of objectionable rules. The second model, suspension by committee, has two variations. Under the first, temporary committee suspension, the review committee can suspend the effectiveness of an objectionable rule for a limited period. The suspended regulation becomes effective if the full legislature does not act on the committee's recommendation within a stipulated time period. The second variation, suspension without required legislative affirmation, gives review committees greater authority over regulations. Here the committee can approve, modify, or repeal a rule, whole or in part, without the whole legislature affirming the committee action. This model variation would face serious challenge in the Arizona courts. In states such as Connecticut where it is in effect, the legislature has the constitutional authority to veto rules and regulations. The third model is the legislative veto model. This model has several variations, and is not necessarily incompatible with the previous two models. Here, the legislature as a whole can approve, modify or repeal rules through a joint resolution, concurrent resolution or single house resolution. The legislative review bill would specify the type of legislative action required. In Arizona, a joint resolution would probably be necessary in order to bypass constitutional challenges.

Problems Associated with Legislative Review: The major constitutional problems are those associated with the separation of powers doctrine, bicameralism, the presentation clause, and constitutional agencies.

Separation of Powers: The language of the Arizona

Constitution does not facilitate an interpretation of the separation of powers doctrine. Thus, the Arizona courts have had to construct an interpretation of it. There is a variety of case law on this subject. It would appear from these cases that so long as the legislature is focussing on legislative intent or statutory authority, a separation of powers challenge would hold little merit. The problem comes when the legislature attempts to base the review of administrative rules on something beyond this (which was the case with S.B. 1369.)

Bicameralism: The Constitution mandates a bicameral legislature. Therefore, any measures vetoing or modifying an administrative rule should pass through both chambers of the legislature.

Presentation Clause: The presentation clause in the Arizona Constitution requires the legislature to submit all bills or measures to the governor for his/her approval or veto. In essence, the law-making authority of the state rests in the executive and legislative branches of government. If the legislative veto is considered a repeal of existing law, the legislature must present such measures to the governor for approval or veto. However, case law does not provide for the certain status of legislative vetoes. But, since rules are legally binding upon certification, the legislature's veto of rules which have been certified may be construed as the repeal of a law. Therefore, in order to be within the boundary of its constitutional authority, the legislature should present rule vetoes or modifications to the governor. This would entail a joint resolution as opposed to a concurrent resolution.

Constitutional Agencies: These are entities such as the Corporation Commission which have constitutionally mandated authority. Legislative attempts to review rules which are based on these authorities (e.g., rules having to do with rate changes of public service corporations) may be subject to constitutional challenge. However, if a rule of these entities is based upon a statutory citation, a constitutional challenge to legislative review of that rule would have less merit.

It should be noted, though, that the above constitutional concerns are only related to legislative attempts to veto or modify a rule. If legislative review is to be advisory only, the constitutional issues outlined above in all likelihood would not arise. However, there remains a grey area here, and that is the attempt to veto proposed rules which have not been certified. If the legislature bases its review of rules on legislative intent, the separation of powers challenge may be bypassed. And, since the rule is not certified, the presentation clause challenge would seem to be bypassed. It would appear then, that the legislature is in a position to veto proposed rules without presentation to the governor, so long as the review of those rules is based upon legislative intent. However, the legal terrain here is not certain, and further examination into the constitutionality of such an attempt would need to be examined.

It should be noted that there are also practical problems

associated with legislative review. First, legislative review depends upon the desire of the legislature to review the rules. This is a time-consuming task, and may eventually fall down upon the list of priorities. This is a particular pitfall if committees of reference (as opposed to a separate rule review committee) are to handle reviews, particularly during a busy session or interim. An example of this may be the legislature's statutory authority to review the State Parks Board rules, which it has rarely, if ever, exercised. In addition, depending on how rules are reviewed, legislative review may add on time to an already lengthy rule-making process. One way around this is to review only challenged or stipulated rules, or to have rules automatically approved if legislature doesn't act within a certain time period. One final practical concern is the monetary cost associated with rule review. Legislative review of rules, depending upon how thoroughly it is done, has the potential of incurring significant cost. This issue is something legislative staff will be looking into.

Constitutionality of Legislative Review

I. Presentation Clause

The presentation clause in the Arizona Constitution requires the legislature to submit all bills or measures to the governor for his/her approval or veto. In essence, the law making authority of the state rests in the executive and legislative branches of government. If the legislative veto is considered a repeal of existing law, the legislature must present such measures to the governor for approval or veto. However, case law does not provide for the certain status of legislative vetoes (see p. 523 of Jonathan Rose journal and accompanying footnotes). However, because rules are legally binding upon certification, the legislature's veto of rules which have been certified, may be construed as the repeal of a law. Therefore, to be within the bounds of its constitutional authority, the legislature should present rule vetoes or modifications to the governor. This would entail a joint resolution as opposed to a concurrent resolution.

II Bicameralism

The Constitution also mandates a bicameral legislature, therefore, for reasons outlined above any measures vetoing or modifying a rule should be passed through both houses of the legislature.

III Separation of Powers

The language of the Arizona constitution does not facilitate an interpretation of the separation of powers doctrine. Thus, Arizona courts have had to construct an interpretation of it. There is a variety of case law on this subject (both within and outside of Arizona -- see, e.g., Bennett and J.W. Hancock Enterprises cases). It would seem to me, from these cases and Rose's comments, that so long as the legislature is focussing on legislative intent and statutory authority (which, by the way, the A.G. in Arizona is supposed to look into before they certify a rule), a separation of powers challenge would hold little water. The problem comes when the legislature tries to base the review of a rule upon something other than or in addition to their own intent (as they did in S.B. 1369) or the statutory authority upon which the rule is based.

IV Constitutional Agencies

There are three that I am aware of, but double check the constitution: Corporation Commission, State Board of Education, and Board of Regents. These entities have constitutionally mandated authority. Legislative attempts to review rules which are based on these authorities (e.g., rules having to do with rate changes for public corporations) may by subject to constitutional challenge. However, if a rule governing these bodies is based upon a statutory citation, a constitutional challenge to legislative review of that rule would have less merit.

Arizona State Library and Archives
20133434 1