PERFORMANCE AUDIT

GOVERNOR'S REGULATORY REVIEW COUNCIL

Report to the Arizona Legislature
By the Auditor General
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DOUGLAS R. NORTON, CPA
AUDITOR GENERAL

STATE OF ARIZONA
OFFICE OF THE
AUDITOR GENERAL

DEBRA K. DAVENPORT, CPA
DEPUTY AUDITOR GENERAL

June 4, 1996

Members of the Arizona Legislature

The Honorable Fife Symington, Governor

Ms. Gail A. Parin, Chair
Governor's Regulatory Review Council

Transmitted herewith is a report of the Auditor General, A Performance Audit of the Governor's Regulatory Review Council (GRRC). This report is in response to a May 17, 1996, resolution of the Joint Legislative Audit Committee. The performance audit was conducted as part of the sunset review set forth in A.R.S. §§41-2951 through 41-2957.

The report addresses the extent to which recent legislative changes to the rule review process have improved Arizona rulemaking. In 1995, numerous reforms to the rulemaking process were implemented based on recommendations made by a Joint Study Committee on Regulatory Reform and Enforcement. Specifically, the Committee's recommendations addressed concerns about the lack of public participation in the rulemaking process, the extensive amount of time it took to promulgate rules, the perception that agencies deviated from legislative intent when promulgating rules and the lack of periodic review of existing rules.

Overall, we found that the Committee's intended process improvements have, for the most part, been realized, with the most significant changes impacting GRRC. For example, GRRC now has staff to help agencies submit better-written and more thoroughly considered rules. In addition, GRRC's review has been moved to the end of the process to ensure public input has been considered and all necessary rule changes are made. Despite these improvements, we identified the need to establish a core group of rulewriters to assist the many agencies that lack expertise in drafting quality rules. Moreover, we found that other reforms outside of GRRC's control have achieved only marginal success. For example, while there are now increased opportunities for the public to participate in the

2910 NORTH 44TH STREET • SUITE 410 • PHOENIX, ARIZONA 85018 • (602) 553-0333 • FAX (602) 553-0051

rulemaking process, citizen involvement has not increased. Additionally, although GRRC reviews rules in a timely manner, rule packages to date, have not been completed any quicker. However, we did not identify any additional reforms that would provide further improvements in these areas.

My staff and I will be pleased to discuss or clarify items in the report.

This report will be released to the public on June 5, 1996.

Sincerely,

Douglas R. Norton

Douglas R. Norton
Auditor General

Enclosure

SUMMARY

The Office of the Auditor General has conducted a performance audit and sunset review of the Governor's Regulatory Review Council (GRRC), pursuant to a May 17, 1995, resolution of the Joint Legislative Audit Committee. The audit was conducted under the authority vested in the Auditor General by Arizona Revised Statutes (A.R.S.) §§41-2951 through 41-2957.

Arizona has established an extensive rulemaking process to ensure state agencies promulgate rules that are in the public interest. The process begins after agencies are granted authority to promulgate rules regarding their functions or services. There are five mandatory steps, including 1) notification of the start of the process; 2) publication of the full text of the rules; 3) a mandatory minimum 30-day public comment period; 4) review and approval by GRRC; and 5) submittal of rules to the Secretary of State for publication in the *Arizona Administrative Code.*

GRRC performs extensive review of rules. The Council was established to ensure that rules and regulations avoid duplication and adverse impact upon the public. The Council, assisted by a staff of seven FTEs, considers the following factors in its review of rules:

- The language of the rule is clear and understandable,
- The agency has statutory authority to make the rule,
- The rule does not conflict with existing law,
- The benefits of the rule outweigh its costs, and
- The rule is consistent with legislative intent.

GRRC's current role stems from the Legislature's sweeping changes to the rulemaking process that went into effect in 1995. Specifically, these reforms moved GRRC to the end of the rulemaking process, so the Council can review rules in their final form. The legislation also established GRRC as the final approval authority for proposed rules. Finally, the reforms added staff, which allows the Council to conduct more thorough reviews.

Reforms Have Improved Arizona Rulemaking (See pages 5 through 12)

GRRC's new authority, staffing, and position in the process have significantly improved Arizona rulemaking. For example, GRRC staff have helped agencies submit better-written and more thoroughly considered rules. Specifically, staff have developed a rulewriter's guideline and conducted two training sessions for a total of 173 agency representatives. These training sessions were designed to help agencies understand how to write their rules and determine the rule's economic impact.

GRRC now provides more efficient and meaningful reviews of both proposed and existing rules. For example, the Council now reviews proposed rules in their final form, whereas previously, rules could be changed after GRRC's review. Also, adding staff to preview rules for the Council allows GRRC to thoroughly review significant issues such as agencies' proper authority and the economic impact of rules. Under the previous system, the Council focused on how clearly the proposed rules were written and had abandoned its review of rules' economic impact. Finally, GRRC's previous analysis of existing rules was superficial and agencies sometimes did not change problem rules. GRRC now thoroughly analyzes existing rules and has an effective mechanism for ensuring that agencies change those that are outdated or no longer needed.

Yet, certain reforms outside of GRRC's control have achieved only marginal success. For example, while reforms have added more opportunities for public participation in the rulemaking process, citizen involvement has not increased. Likewise, measures to ensure that proposed rules do not exceed the Legislature's intent have yet to identify rules packages that significantly depart from legislative intent. Finally, because agencies are now conducting more research and evaluation of their rules packages, the length of time to promulgate rules has not significantly changed. While on the surface, concerns regarding these issues do not appear to have been addressed, we did not identify any additional reforms that would provide further improvement in these areas.

However, despite the significant improvements already made, and the newness of the current system, one area needing further enhancement has emerged. Specifically, a central core of rulewriters should be considered to assist the many agencies that lack expertise in drafting quality rules. Currently, many small agencies must turn to consultants to draft rules, which has proven in some instances to be costly and ineffective.

GRRC Could Benefit from More Diversified Representation (See pages 13 through 15)

To provide a broader perspective to GRRC's reviews, the Governor should consider appointing members with a variety of backgrounds and expertise. While statutes specify that one attorney be represented on the Council, four of the six voting council members are attorneys from prominent law firms, and a fifth member is a non-practicing attorney. Having this many attorneys on the Council sometimes inhibits its review of agency rules. For example, while legal expertise is certainly valuable to GRRC's reviews, these attorneys may be ineligible to vote because of conflicts of interest involving their firms' clients. Further, most individuals involved in the process agree that more diversified perspectives on the Council could enhance GRRC's review of rules concerning economic, business, and consumer impacts.

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INTRODUCTION AND BACKGROUND

The Office of the Auditor General has conducted a performance audit and sunset review of the Governor's Regulatory Review Council (GRRC), pursuant to a May 17, 1995, resolution of the Joint Legislative Audit Committee. This audit was conducted as part of the sunset review as set forth in A.R.S. §§41-2951 through 41-2957.

Overview of Arizona Rulemaking

Arizona has established an extensive rulemaking process to ensure rules are promulgated in the public interest. The process begins after agencies are given statutory authority to promulgate rules that offer more detailed guidelines governing their operation. There are five mandatory steps for rules that go through the normal rulemaking process. The first step is to establish a docket and publish a notice in the *Arizona Administrative Register* that a rulemaking proceeding has begun. This provides the public with information about the rule's subject matter, the name of a contact person, the procedure for submitting comments, and the process timetable. Second, the agency submits the proposed rule's exact wording to the Secretary of State for publication in the *Register*. Third, a minimum 30-day public comment period begins to determine if affected parties find the rule objectionable. Most rulemakings allow for public comment to be taken until the close of record, which is generally well beyond 30 days. Fourth, the agency submits a rules package to GRRC including the rule, a preamble, an explanatory statement, and an economic, small business, and consumer impact statement.[1] Finally, once GRRC reviews and approves the rules, the agency submits them to the Secretary of State, who publishes them in the *Arizona Administrative Code*.

While the general public, the regulated community, the Attorney General's Office, and the Secretary of State are involved in rule review to some degree, GRRC performs the most extensive review. The Council was specifically established to assure that rules and regulations avoid duplication and adverse impact upon the public. When reviewing rules, GRRC considers whether:

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1 Certain rules that are exempt from GRRC's review are reviewed by the Attorney General's Office as to form, clarity, consistency with statutory authority, and compliance with procedures. These include rules promulgated by units of state government headed by an elected official, the Corporation Commission, the State Board of Directors for Community Colleges, the State Board of Education, the State Board for Vocational and Technological Education, the Industrial Commission when adopting federal occupational safety and health standards, and certain rules of the Arizona State Lottery. Certain other rules, including those promulgated by the Department of Corrections, are exempt from the entire rulemaking process. Additionally, the Legislature may grant a specific exemption as part of the creation of a program.

- The language of the rule is clear and understandable,
- The agency has statutory authority to make the rule,
- The rule does not conflict with existing law,
- The benefits of the rule outweigh its costs, and
- The rule is consistent with legislative intent.

GRRC's Role in Rule Review Has Changed

While GRRC's primary objective and purpose has remained virtually unchanged since its inception, its role has been enhanced. GRRC was initially created in 1981 by executive order to examine new rules that agency directors determined would have an economic impact on a state or municipal agency. In 1986, its authority was written into law, and its role was expanded to review all proposed rules and periodic review of existing rules.

The Legislature made sweeping changes to the rulemaking process that went into effect in 1995 based on recommendations from the Joint Legislative Study Committee on Regulatory Reform and Enforcement. Due to numerous concerns about the rulemaking process, the Committee was convened in 1993 to study the process and recommend improvements. Among the concerns were lack of public participation in the rulemaking process; the extensive time it took to promulgate rules; the perception that agencies deviated from legislative intent and statutory authority when creating rules; and the lack of periodic review of existing rules to identify those that were obsolete, onerous, or duplicative.

While the Committee made numerous recommendations, the most significant changes impacted GRRC. Specifically, GRRC's authority was strengthened and it was provided with staff to assist it in its enhanced rule review function. For example, GRRC had been at the beginning of the review process and saw only the agency's proposed rule. GRRC's review now comes at the end of the process, after the agency has obtained public input. Additionally, while the Attorney General's Office once had to certify rules before they were final, GRRC now has final approval authority. Therefore, the Secretary of State cannot publish a rule until GRRC approves it.

Organization and Budget

The Council consists of seven members; six are appointed by the Governor and one is an ex officio member representing the Director of the Department of Administration. When selecting individuals to serve on the Council, the Governor must appoint at least one who is a licensed attorney, one who represents the business community, and one who represents the

public interest. To assist the Council in its duties, it is authorized seven FTEs, including an administrator, three staff attorneys, an economist, an administrative assistant, and a secretary.

GRRC is housed and funded within the Department of Administration's Management Services Division. Prior to the 1995 legislative changes, it had a budget of approximately $100,000. Under the current structure, its budget has more than doubled. In fiscal year 1995, GRRC expended approximately $214,000; and in fiscal year 1996, it projects expenditures of $367,546.

Scope and Methodology

Due to the significance of the recent changes to the rule review process, our audit primarily focused on the changes made to the process and whether these changes achieved the improvements intended by the Committee. The scope of the audit was limited to GRRC's role in reviewing rules, rather than the entire process by which an agency creates a rule.

Numerous methods to ascertain the extent to which the new process is an improvement over the previous one were employed. For example, we interviewed many individuals who were knowledgeable about the process, including council members, GRRC staff, rulewriters from various state agencies, and members of the Joint Study Committee. A file review was also conducted on 20 rule packages evaluated under the previous process and 21 under the current system to determine the impact of the changes. We attended Arizona rulewriters' meetings to understand their perspective of the process. Ten other states were surveyed regarding their approaches to rule review for comparison with Arizona. Finally, we conducted a focus group that included rulewriters, former council members, and members of the regulated community to obtain their input on the impact of the legislative changes and need for additional changes.

Our report presents findings and recommendations in two areas:

- The need to consider establishing a core group of rulewriters to assist agencies in drafting rules, and
- The need to consider broadening the Council's perspective through diversifying its membership.

This report also contains a response to the 12 Sunset Factors.

This audit was conducted in accordance with government auditing standards.

The Auditor General and staff express appreciation to the members of the Council and its staff for their assistance during the audit.

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FINDING I

REFORMS HAVE IMPROVED ARIZONA RULEMAKING

Recent legislative changes to the Arizona rulemaking process have improved the system. The most dramatic improvements are those made to the GRRC giving it increased authority and resources. Meanwhile, more moderate improvements have been demonstrated in the areas of public participation, agency accountability, and rulemaking efficiency. While most individuals involved in state rulemaking favor the new process, additional reform may be needed to improve agencies' rule drafting.

Background

As previously mentioned, the Joint Study Committee on Regulatory Reform and Enforcement (Joint Study Committee) proposed numerous changes to the rulemaking process, which eventually led to sweeping reforms taking effect in 1995. These reforms included:

- **An Enhanced Role for GRRC** that 1) adds staff to ensure rules are properly developed before the Council reviews them; 2) concentrates rule review and approval responsibilities within the Council; and 3) moves the Council's review to the end of the rulemaking process, where it can approve rules in their final form. Previously, GRRC had a staff of two who essentially did administrative work. GRRC and the Attorney General's Office split review and approval responsibilities, and GRRC's review was at the beginning of the process, which meant changes could be made after its review.

- **Measures to Address Public Concerns** that require agencies to publish the full text of their proposed rules in the *Administrative Register,* which documents all agencies' rulemaking activity. Previously, the public had to request the full text of proposed rules from the agencies.

- **Several Appeals Processes** that allow further public input into agency rulemaking. For example, the public can 1) petition against agencies' current policies or practices that may be restrictive and should be subjected to the rulemaking process, 2) object to agencies' delegation of authority to a local jurisdiction if the delegation is unclear or the local jurisdiction lacks the resources to perform the function efficiently, and 3) appeal for a rule's amendment or repeal if an agency significantly underestimates its economic impact. These appeals processes addressed specific concerns about agency rulemaking lacking accountability to the public.

- **Standards for Economic Impact Statements** to ensure clear requirements for estimating rules' economic impact. For example, if numerical information is not readily available, agencies are specifically allowed to estimate probable impacts qualitatively. Before the reforms, agencies complained that the requirements for these statements were unclear.

- **Streamlined Procedures** that simplify the processes for eliminating existing rules and altering proposed rules during the rulemaking process. Previously, these efforts were subject to the full rule review process.

- **An Administrative Rules Oversight Committee (AROC)** to provide a process by which the Legislature can review and comment on whether agencies' existing and proposed rules conform to legislative intent and statutory authority. Prior to the reforms, the Attorney General's Office was performing this review.

GRRC Changes Have Significantly Improved Rulemaking Review

GRRC's enhanced role has significantly improved Arizona's rulemaking process. For example, Council staff help agencies propose better-drafted and more thoroughly examined rules. The depth and significance of GRRC's reviews have also increased since it now reviews rules at the end of the process, and has additional staff to preview rules for it. Finally, GRRC has enhanced the State's system of reviewing and improving agencies' existing rules.

Agencies propose better-written rules—Agencies' drafts of rules have improved since the 1995 reforms, in part because of better guidance and assistance from GRRC staff. Prior to the reform, the Attorney General's Office and the Governor's Office of Strategic Planning and Budgeting (OSPB) provided assistance to agencies. However, agencies considered the reviews untimely and insufficient for agencies needing the most help. Furthermore, guidelines for economic impact statements were not strictly enforced, leading one GRRC member to admit that the Council had stopped considering economic impact when it reviewed rules. However, under the new process, council staff have provided training and guidance to agencies to clarify how they should write their rules and analyze economic impact issues. To date, GRRC staff, in conjunction with the Secretary of State's Office, have helped develop a rulewriters' guideline and held two all-day training sessions for 173 agency representatives. In addition, the staff economist and lawyers are available to informally preview agencies' drafts for wording and grammar problems, inconsistencies with other laws or rules, or insufficient cost/benefit analysis. Once the rules are formally submitted for review, GRRC staff continue to work with agencies to resolve any remaining problems with the rules before the Council reviews them.

Therefore, once the rules reach the Council, much less editing is done during the council meetings, which makes the meetings shorter and decreases the possibility of making hasty changes. For example, council meetings under the current system have lasted between 35 minutes and almost 2 hours, with the Council making very few amendments to the rules. By

comparison, our review of 10 GRRC meetings under the prior system revealed that meetings lasted as long as 7 hours, with dozens of wording and punctuation amendments being made to the proposed rules. Besides improving efficiency, reducing the number of edits made at the council meetings also decreases the likelihood that GRRC's changes will introduce problems into rules. For example, a decision to clarify the language of one portion of a rule could make that portion inconsistent with another. If this change were made during the council meeting there would be little time to catch the problem. However, if it were done in the weeks prior to the meeting, the staff and the agencies would have time to consider the impact of the change.

***Council reviews more meaningful*—** Another significant improvement has been the Council's ability to conduct more meaningful reviews due to its placement in the process, and the added analysis provided by staff. For example, moving GRRC to the end of the process has improved its reviews in the following ways:

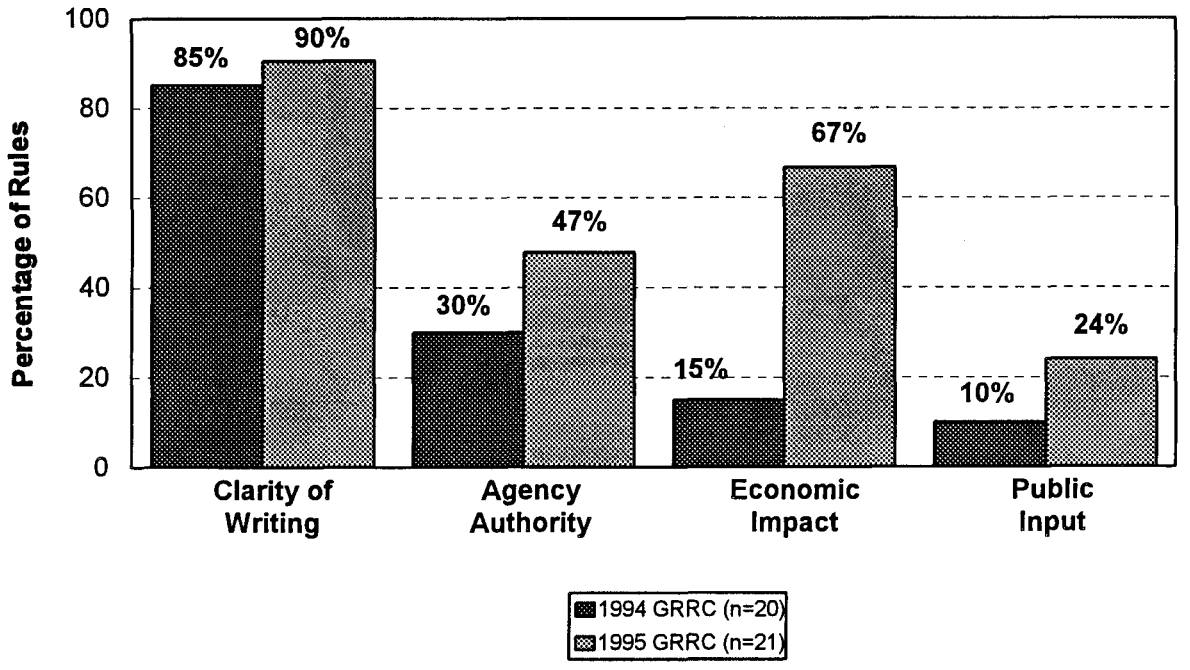
- The Council now reviews rules in their final form; previously, the rules could be changed after GRRC's review.
- GRRC's assessment of the burden and impact of rules is improved through its review of comments made by affected parties during public hearings. Furthermore, GRRC can check the agencies' responsiveness to this public input.
- The Legislature can assess compliance with intent and statutory authority through the AROC, and has more time to determine and inform GRRC if agencies' proposed rules would overstep their authority.

In addition, staff analysis, combined with the Council's review, allows for a more thorough and focused examination of significant issues, such as agencies' proper authority and the economic impact of rules. As previously described, the added GRRC staff offer a more concentrated and dedicated ongoing analysis of agency rules than existed before. This in turn allows the Council to review rules that are free of obvious errors. Furthermore, the Council benefits from staff highlighting the most pertinent issues. Therefore, as indicated by the chart on the following page, agencies are more likely to receive feedback on all aspects of their rules, particularly on issues other than clarity of writing. Specifically, agencies received feedback on the economic impact of their rules in only 3 of the 20 cases reviewed under the old system. By comparison, the staff and the Council questioned agencies on this issue in 14 of the 21 packages reviewed under the current system. This combined analysis is illustrated by a recent State Land Department rule relating to the Department paying real estate brokers' commissions:

- Prior to officially proposing the rule, the Agency submitted a draft to GRRC staff. The Agency then made the staff's suggested changes to make the rule more clear and concise; ensure that the rule was consistent with statutory authority, and that sufficient cost/benefit analysis was conducted. Then, during the rulemaking process, the Agency made additional changes suggested by staff. Finally, the rule reached the Council, which focused its questions on how the Agency determined the appropriate size of commissions and its reasons for believing that paying commissions would benefit the State.

Figure 1

Comparison of Issues Addressed in GRRC Reviews Before and After 1995 Reforms



Source: Auditor General review of Governor's Regulatory Review Council minutes, recordings, and documentation regarding comments on 20 agency rule packages under the system prior to the 1995 reforms, and 21 packages under the current system. This chart compares portions of rules packages that received at least one comment in the identified areas. Percentages reflect the portion of all rule packages reviewed that received comment.

More diligence applied to review of existing rules—In addition to its improved review of proposed rules, GRRC's process for reviewing existing rules is also stronger. Agencies were required to review existing rules every five years under the previous system, However, there was little the Council could do to analyze those efforts and suggest changes. Without staff, GRRC conducted only superficial reviews and could not readily ensure that agencies amended rules. In fact, agency rulewriters admit they agreed to make changes in front of GRRC, but sometimes never made them.

Now, GRRC has an effective system in place to ensure that agencies are more responsive to these five-year reviews. For example, GRRC staff have developed guidelines to assist agencies in preparing their five-year rule review packages. Additionally, similar to the process for reviewing proposed rules, GRRC staff review existing rules for the Council to determine their clarity, cost and benefit, continued effectiveness, wisdom, and public criticisms. Moreover, agencies commit to target dates for submitting changes and GRRC staff monitors the rules being submitted. If agencies are overdue in submitting their rules packages and are unresponsive to GRRC's request, the Council chair will inform the Legislature. To date, all agencies have agreed to submit their changes under this system.

Although it is too soon to determine if agencies consistently make agreed-upon changes, recent five-year reviews illustrate that agencies are reviewing existing rules and committing to changing those with problems. For example, reviews of 441 rules between June 1995 and February 1996 revealed 64 ineffective rules, and 84 rules that were inconsistent with other laws, rules, or agency policies. The agencies involved in these reviews indicated to GRRC that they plan to amend 177 rules, repeal 31, and make unspecified changes to another 36.

Marginal Improvements in Public Participation, Checking Legislative Intent, and Timeliness

While certain reforms within GRRC's control have resulted in significant improvements, other reforms have achieved only marginal success. For example, despite increased opportunity, reforms have not resulted in greater public participation in the rulemaking process. Likewise, new and supposedly stronger reviews have not yet subjected rules to greater scrutiny to prevent them from going beyond the Legislature's intent. Finally, the new process is streamlined, but there is little evidence to suggest agencies typically promulgate rules any faster.

Increased opportunities have not led to greater public participation—Although reforms increased the amount of information and appeals available to the public, they have not caused increased public participation to date. The Joint Study Committee recommended, and the Legislature approved, changes to the rulemaking process that would allow greater public input by establishing an appeals process and by requiring the full text of proposed rules to be published in the *Administrative Register*. In addition, agencies are now permitted to meet with interested parties on an informal basis to solicit their input and reach a consensus before

submitting a proposed rule to the formal process. Moreover, large agencies are required to designate an ombudsman for citizens to contact regarding regulatory issues.

GRRC routinely checks to ensure that agencies meet the statutory requirements for public participation. Also, as indicated in Figure 1 (see page 8), the Council has significantly increased its inquiry into the extent of public participation and the agencies' responsiveness. However, GRRC has no direct impact on whether agencies go beyond their statutory obligation.

While the agencies have been conscientious in their efforts to solicit public input, the recent reforms have had little direct effect on actually obtaining more citizen involvement in the process. We found agencies documented some form of public input in 13 of the 21 rule packages heard under the new system. In 11 of those cases, changes were made to the rules based on public comments. However, according to agency rulewriters, there has been minimal additional public input outside of those individuals already interested in the rulemaking process. For example, new requirements to expand information in the *Administrative Register* do little to increase public awareness when the *Register's* only subscribers are the agency representatives and lobbyists. In addition, while the appeals processes have been in place for only seven months, there has been little demonstrated interest from the public to challenge agency rules or policies.

Agencies are not held more accountable to legislative intent—Reforms have also had limited effect on ensuring that agencies do not promulgate rules that overstep legislative intent. This was a major concern of the Joint Study Committee, which recommended creating a legislative rule review committee to get legislators' direct interpretation of their intent. As a result, the Administrative Rules Oversight Committee (AROC), consisting of 10 legislators and a Governor appointee, was created to review rules' consistency with legislative intent.[1] However, the committee has held only one meeting since its establishment in July 1995. During the meeting, one case involved an agency's possible departure from legislative intent, but the primary issues discussed were whether the rules were onerous or duplicated other rules. Further, the Committee is not required to review all rules packages for conformance with legislative intent. Rather, its attention to particular rules would generally stem from complaints it receives about duplicative or onerous agency rules.

In addition to creating AROC, the reforms also gave GRRC responsibility for reviewing legislative intent. However, while it is standard procedure for GRRC to review for legislative intent, agency rulewriters indicated they have not observed increased discussions during council meetings regarding whether agency rules adhere to legislative intent. GRRC staff and council members indicate that generally legislative intent is clear or any concerns regarding legislative intent usually are addressed prior to the Council's formal review.

Despite the reforms' lack of identifiable impact on legislative intent issues, there are no clear-cut improvements to be made. Arizona's current review for legislative intent is similar to the

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1 Currently, the individual appointed to AROC by the Governor is the GRRC administrator.

model suggested by a national association seeking uniformity in state laws, and those found in other states. Specifically, the current structure provides an executive and legislative branch check and balance over the rulemaking process. Moreover, agency rulewriters indicate that the regulated communities are effective at working with regulating agencies to ensure the agencies do not develop stronger rules than the Legislature intended.

Effect on timeliness mixed—Although GRRC reviews proposals in a timely manner, rule packages do not appear to move through the complete rulemaking process any faster. Prior to the reforms, when the Attorney General's Office certified rules, agencies complained that the Office was untimely in reviewing rules and submitting them back to the agencies for revision. No comparison has been made between the Attorney General's certification process and GRRC's approval process. However, when agencies have submitted rules to GRRC staff that did not require abundant revision, the Council has approved them in five weeks or less.[1] Despite GRRC's efficiency, we found no change in the overall timeliness of the rulemaking process. In fact, our review of 31 rules that took effect under the previous system revealed that the process took an estimated average of 211 days from the date the agency officially started the rulemaking process until the rule became effective. There were, however, 8 rules packages that we reviewed but excluded from this average, that took over 400 days to complete.[2] By comparison, 19 rules adopted by GRRC under the new process took an average of 214 days.

While it is not yet clear whether the current process will be any quicker, it is evident that more diligent review and evaluation occurs in the same amount of time. For example, in addition to the previously mentioned improvements, GRRC is enforcing statutory requirements such as the economic impact estimate, which causes the agencies to perform more research than previously done. Furthermore, some agencies are holding informal hearings with interested parties at the beginning of the rulemaking process, which can also increase the time required.

Potential Need for Core Group of Rulewriters

Although the current rulemaking process has been in effect for a limited time, the State should consider offering a central core of rulewriters for the many agencies that lack the expertise to draft quality rules.

While all agencies go through the rule-drafting process, smaller agencies' staff often lack the necessary knowledge and expertise required to draft rules. Instead, the agencies often must

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1 There have been three rules needing revisions that could not be completed prior to a council meeting. In two of the cases, the agencies voluntarily postponed their official hearings to make staff-identified changes. In the third case, GRRC postponed voting on the agency's set of rules. Then, when the agency adopted the necessary changes, the rules were approved at the next meeting.

2 At the time of our review, the rule review process had been in place for approximately 400 days. Therefore, since it was not possible for rule packages to take longer than 400 days to go through the rule review process we excluded these 8 rule packages to ensure comparability.

hire consultants to draft rules for them. In some cases, this has proven to be an expensive alternative. For example, GRRC has documented eight cases in which small boards and agencies paid consultants between $50 and $95 per hour to draft rules. Not only did these agencies incur combined expenses totaling over $28,000, each of these rule packages had significant drafting problems when submitted to GRRC. When this occurs, GRRC staff and the Council must spend considerable time editing these rules, which limits their ability to focus on higher-level analysis.

To meet agencies' needs for drafting assistance, the State could develop sources of consistent, quality rule-drafting assistance. There are several options Arizona might consider. For example:

- **Central Group within the Department of Administration (DOA)**—DOA, as the central service provider to other state agencies, could hire the needed core of rulewriters and hire them out to the other agencies. In fact, DOA is already assessing the viability of such a group by developing estimates for the amount of money spent by agencies contracting for rulewriters.

- **Approved List of Contractors**—Alternatively, DOA could develop a list of "approved" contractors to be used for agencies. The Department is considering this option as well.

- **Attorney General Representatives**—The Attorney General's Office could take a strong role in writing rules. One administrative law expert argued this made sense because the Office ultimately has to enforce or defend the rules, and its attorneys have intimate knowledge of the various agencies. However, based on the Office's testimony to the Joint Study Committee, this may not be a viable option. For example, the Office indicated that it did not want to write rules for agencies. Furthermore, agencies have resisted assistance from the Attorney General's Office in the past, fearing intervention with their policymaking.

Finally, while some might consider GRRC itself to be a logical place for these rulewriters, this would raise concerns about the organization's objectivity in reviewing rules that it took part in writing.

RECOMMENDATION

GRRC, in conjunction with the Department of Administration, should consider establishing a core group of rulewriters.

FINDING II

GRRC COULD BENEFIT FROM MORE DIVERSIFIED REPRESENTATION

The Governor should consider diversifying GRRC membership to enhance the Council's overall review of rules. Currently, the Council is composed primarily of attorneys from prominent law firms. While their expertise is valuable, it also increases the likelihood that members will not be able to vote due to conflicts of interest. A broader representation of backgrounds could help address this issue and offer additional perspectives that would enhance GRRC's reviews.

Council Composition Sometimes Poses Conflicts

The number of attorneys currently on the Council exceeds statutory requirements and may inhibit GRRC's review of agency rules. Currently, four of the six voting council members are attorneys working for prominent law firms. Of the two remaining council members, one is a non-practicing attorney, and the other is a business executive. However, statutes require the Governor to appoint only one attorney. This requirement is useful because the majority of GRRC's review involves legal issues, such as a rule's consistency with existing state and federal constitutions and the agency's statutory authority.

Despite the value of having an attorney's perspective, the current council composition can limit GRRC's review. Specifically, GRRC members may not vote on rules that involve conflicts of interest (i.e. rules that could benefit themselves, their employers, or their clients).[1] As a result, from January 1995 to February 1996, 21 percent of the rules appearing on GRRC's agenda created a conflict of interest with at least one council member. If enough of these conflicts occur, GRRC may be unable to reach a quorum. Also, disqualified council members cannot contribute to the discussion of agency regulations, thus limiting the Council's perspectives on issues. For example:

- In July 1995, GRRC delayed the acceptance of two Department of Revenue rules after two members who were attorneys disqualified themselves due to conflicts of interest. Since two

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1 Under the "Rules of Necessity" defined in A.R.S. §38-508, if conflicts of interest prevent the Council from gaining a quorum, members can vote anyway. However, this rule only applies if conflicts of interest are the *only* reason GRRC cannot gain a quorum. If members are absent, then GRRC must delay its review.

other members did not attend the meeting, GRRC failed to reach a quorum, delaying the review of the rules for another month.

- In a September 1995 meeting, conflicts forced three of the six voting council members to disqualify themselves from discussing and deliberating over rules governing a Department of Environmental Quality fund. All three members represented law firms that either had clients impacted by the rules or had claims against money in the fund. Moreover, during the same meeting, two of the same attorneys had to disqualify themselves from reviewing a set of Department of Liquor License and Control rules. While these individual council members were precluded from providing any input at the meeting, the Council was still able to take action in both cases.

Alternative Perspectives May Benefit GRRC

To address the limitations associated with the current council composition, the Governor should consider appointing some future council members from fields outside the legal profession. Many individuals involved in the rulemaking process agreed that further diversification would be beneficial. For example, our focus group of rulemaking experts agreed that GRRC could benefit from additional viewpoints when it reviewed agency regulations.

To provide these alternative perspectives, it has been suggested that the Governor appoint members from several different backgrounds:

- **Economics**—The Council currently lacks economic expertise, yet one of GRRC's most important functions is to evaluate a rule's economic impact. Therefore, appointing an individual with a strong economic background could improve the Council's review of these issues.

- **Business**—While the current Council has one member with a background in business, previous councils included a stronger business representation. According to former council members, past business representatives helped bring GRRC's attention to the rules' economic impact.

- **Consumers**—Another important GRRC duty is protecting the general public by monitoring the regulation of critical industries. While statutes provide for a public interest representative on the Council, this position is currently held by a corporate tax attorney. Therefore, the Council still lacks a consumer representative. To resolve this, experts in the process suggest this role could be filled by someone who works solely for a broad-based community action group.

- **Experience in Government**—One expert felt GRRC operated best when its members combined a cross section of knowledge in specific areas with a general understanding of how government works. Therefore, future appointments could include individuals who have experience in state government.

RECOMMENDATION

To promote diversity on the Council, the Governor should consider appointing future members with expertise in areas other than the law.

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SUNSET FACTORS

In accordance with A.R.S. §41-2954, the Legislature should consider the following 12 factors in determining whether to continue or terminate the Governor's Regulatory Review Council:

1. Objective and purpose in establishing the Governor's Regulatory Review Council.

The Governor's Regulatory Review Council was established by executive order in 1981 to oversee how agencies make rules that affect the public. GRRC's goal is to protect the public from the harms of excessive regulation, such as unnecessary paperwork or unreasonable costs to businesses that reduce innovation or expansion.

GRRC is charged with reviewing and approving or returning all rules proposed by state agencies not specifically exempted by statute. When reviewing a proposed rule, the Council considers the following factors:

- Whether the language of the rule is clear and understandable;
- Whether the agency has the authority to make the rule;
- Whether the rule conflicts with existing law;
- Whether the benefits of the rule outweigh its costs; and
- Whether the rule is consistent with legislative intent.

GRRC also reviews existing agency rules. Agencies are required by statute to submit written reports on their existing rules to GRRC every five years, analyzing the effectiveness of each rule, documenting written criticisms of rules from the public, and proposing a course of action to eradicate problem rules. GRRC conducts five-year reviews in cooperation with the agency, but has no authority to ensure that an agency follows through with its proposed course of action.

2. The effectiveness with which the Council has met its objectives and purposes and the efficiency with which the Council has operated.

Significant statutory changes to the rulemaking process occurred in 1995, improving the process overall and allowing GRRC to be more effective in its role of overseeing

agency rulemaking (see pages 5 through 6). These changes included moving GRRC's review of agency rules to the end of the rulemaking process and streamlining procedures for routine rulemaking. Although our review did not find a decrease in the length of time required to complete the overall rulemaking process, repositioning GRRC and adding staff has allowed the Council to focus on more substantive issues when conducting its review. Furthermore, the rulemaking process now grants more opportunities for public participation in agency rulemaking.

3. The extent to which the Council has operated within the public interest.

GRRC operates in the public interest by independently overseeing administrative rules made by state agencies. All proposed and existing regulations are reviewed according to established statutory criteria.

Furthermore, GRRC oversight provides several benefits to the rulemaking process by:

- Forcing agencies to consider rules for their necessity, effectiveness, and impact on the public;
- Giving the public an opportunity to advocate or oppose any rule, to appeal certain agency policies, and to appeal rules that prove to be more economically burdensome than originally anticipated;
- Providing technical assistance and training to agencies, the public, and regulated parties involved in rulemaking.

4. The extent to which rules and regulations promulgated by the Council are consistent with the legislative mandate.

GRRC has promulgated rules regarding its policies and procedures that appear to be within its legislative mandate. GRRC has also initiated rulemaking regarding its ability to hear appeals from individuals concerned about the economic impact of a rule, or whether agency practices or policy statements should become rules. These rules went into effect in April 1996.

5. The extent to which the Council has encouraged input from the public before promulgating its rules and regulations and the extent to which it has informed the public as to its actions and their expected impact on the public.

When promulgating its own rules and regulations, GRRC conducts oral public proceedings and also allows written public comment. In addition to fulfilling the

formal rulemaking notification requirements set out in statute, GRRC provides copies of its proposed rules to each agency, to agency rulewriters, and to the public to obtain additional input. Discussion of GRRC's proposed rules is also held at council meetings, which are noticed and conducted in accordance with Open Meeting Laws.

6. The extent to which the Council has been able to investigate and resolve complaints within its jurisdiction.

GRRC has no statutory authority to investigate complaints. However, it does have the authority to question agencies regarding their responsiveness to the public when developing their rules. GRRC also reviews public comments made about existing agency rules. The Council has heard no complaints to date.

7. The extent to which the Attorney General or any other applicable council of state government has the authority to prosecute actions under enabling legislation.

GRRC's actions are limited to reviewing and approving adopted and existing rules established by state agencies. Therefore, the Attorney General's office has no duty in this regard. However, members of the public can file civil litigation if they believe a rule was not made in substantial conformance to the APA, or if they question the interpretation or application of a rule.

8. The extent to which the Council has addressed deficiencies in the enabling statutes which prevent it from fulfilling its statutory mandate.

Deficiencies in the rule review process were addressed in 1994 with sweeping changes recommended by the Joint Study Committee on Regulatory Reform and Enforcement (see pages 5 through 6). In particular, GRRC's role was elevated and the Council was provided with additional staff. These and other changes were made to ensure agencies adequately consider public comment when promulgating rules and create rules that conform to legislative intent and statutory authority.

9. The extent to which changes are necessary in the laws of the Council to adequately comply with the factors listed in the subsection.

Our review did not identify the need for any further statutory changes, although GRRC intends to propose legislation to correct minor inconsistencies within the statutes that are causing confusion to rulewriters. However, agency rulewriters would like further statutory modifications to streamline and clarify certain portions of the rulemaking process. Specific suggestions include:

- Expanding the expedited rulemaking process to allow agencies to update rules involving uniform standards and codes. Rulewriters indicate that the law often lags behind the science of certain industries, forcing many regulated industries to employ and agencies to enforce outdated standards while waiting for regulations to change.

- Standardizing rules that are exempt from the regular process. Rulemakers say this will ensure that agencies are exempted from certain sections of the APA uniformly and that public participation in the rulemaking process is not jeopardized.

- Eliminating the possibility of undisclosed communication with GRRC members by specifically limiting the occasions for communication between interested parties and the Council to public forums. Rulemakers believe this will ensure that all comments regarding rules appear on the record and are revealed to all affected parties.

The rulewriters also expressed concern over conflicts of interest preventing council action and have suggested possible remedies, but state law currently allows the Council to vote in spite of the conflicts of interest in cases where a quorum cannot be reached (see page 13).

10. The extent to which the termination of the Council would significantly harm the public health, safety or welfare.

Although terminating GRRC would not directly harm public health, safety, or welfare, its independent oversight of agency rulemaking helps ensure that agencies implement sound, legal rules. Without such measures, agencies would not be held accountable for formulating and maintaining rules that meet legal standards and economic cost/benefit analysis. Consequently, agencies could create rules that are burdensome and unnecessary, and would probably not review existing rules for their necessity and effectiveness. Furthermore, the public would be unable to comment on agency rules in an independent forum. The effect of such rules could be higher costs to the consumer and greater potential for lawsuits due to unclear regulations.

11. The extent to which the level of regulation exercised by the Council is appropriate and whether less or more stringent levels of regulation would be appropriate.

The level of regulation exercised by the agency is appropriate and consistent with the activities of other states.

12. The extent to which the Council has used private contractors in the performance of its duties and how effective use of private contractors could be accomplished.

The nature of GRRC's activities generally precludes the use of private contractors.

Agency Response

FIFE SYMINGTON
Governor

RUDY SERINO
Director

ARIZONA DEPARTMENT OF ADMINISTRATION
OFFICE OF THE DIRECTOR
1700 WEST WASHINGTON • ROOM 601
PHOENIX, ARIZONA 85007

(602) 542-1500

May 30, 1996

Mr. Douglas R. Norton
Auditor General
2910 North 44th Street, Suite 410
Phoenix, Arizona 85018

Re: Governor's Regulatory Review Council's Response to Performance Audit Report

Dear Mr. Norton:

Thank you for the opportunity to review the Performance Audit Report on the Governor's Regulatory Review Council. On behalf of our Council members and staff, I commend your office on the preparation of a well researched and thorough report. I also wish to convey how pleased we were with the professionalism, competence and fairness of the audit team members assigned to conduct this performance audit and sunset review.

Enclosed is our Agency response to the Performance Audit Report issued by your office.

Sincerely,

Gail A. Parin
Deputy Director, Department of Administration
& Chair, Governor's Regulatory Review Council

Enclosure

Agency Response

The Governor's Regulatory Review Council (GRRC or Council) has reviewed the Performance Audit Report (Report) prepared by the Office of the Auditor General. The Council agrees with the information contained in the report, including the methodology and findings.

In this Agency response, the Council, addresses each section of the report in the order listed in the Table of Contents.

1. Introduction and Background

A. Overview of Arizona Rulemaking

The Council agrees with the facts contained in this section of the report.

B. GRRC' s Role in Rule Review Has Changed

The Council agrees with the facts contained in this section of the report.

C. Organization and Budget

The Council agrees with the facts contained in this section of the report.

D. Scope and Methodology

The Council agrees with the facts contained in this section of the report.

2. Finding I - Reforms Have Improved Arizona Rulemaking

A. Background

The Council agrees with the facts contained in this section of the report.

B. GRRC Changes Have Significantly Improved Rulemaking Review

The Council agrees with the facts contained in this section of the report.

C. Marginal Improvements in Public Participation, Checking Legislative Intent and Timeliness

The Council agrees with the facts contained in this section of the report.

D. Potential Need for Core Group of Rulewriters

The Council agrees with the facts contained in this section of the report. In addition, the Council staff has conducted a more elaborate survey regarding the use of consultants. This survey determined that in the last three years, 15 of the 49 agencies surveyed used a consultant. Each agency paid an average of $3,506 at the rate of $73 per hour. Fifty-nine agencies (31 for rules and 28 for 5-year-review reports) indicated they would use a ADOA rulewriter in the next two years, if one were available. Those surveyed believed that a fair rate for such work would be $25 to $30 per hour. This would generate approximately $36,000 per year.

Given these results, ADOA believes the demand justifies the need for one full time rulewriter position. ADOA will be submitting the funding for such a position as a budget issue in the next budget cycle.

E. Recommendations

The Council agrees with the facts contained in this section of the report.

3. Finding II - GRRC Could Benefit From More Diversified Representation

A. Council Composition Sometimes Poses Conflicts

The Council agrees with the facts contained in this section of the report.

B. Alternate Perspectives May Benefit GRRC

The Council agrees with the facts contained in this section of the report. GRRC is, in fact, recommending to the Office of the Governor that a non-attorney be appointed to fill the next Council member vacancy.

C. Recommendations

The Council agrees with the facts contained in this section of the report.