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REPORT OF THE JOINT STANDING COMMITTEE ON STATE GOVERNMENT ON LEGISLATIVE VETO OF AGENCY RULES

NOVEMBER 1986

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CONTENTS

I. Background

II. Legal Context

III. Procedure

IV. The Maine Administrative Procedure Act

V. Review of Existing Rules

- A. General Procedures
- B. Legislative Review
  - 1. Public Petition
  - 2. Submission of Proposed Rules

VI. Other States Experience with Legislative Review of Agency Rules

- A. Scope of the Review
- B. Composition of the Rules Review Committee
- C. Legislative Rules Review Procedures
- D. Staff Role

VII. Case Studies

- A. Hazardous Chemicals Identification
- B. Student-Teacher Ratios
- C. Underground Storage Tanks
- D. Analysis

VIII. Survey of Agency Rulemaking Experience

IX. Survey of Legislative Review of Agency Rules

X. Conclusions

XI. Recommendations

XII. Legislation

EXECUTIVE SUMMARY

LEGISLATIVE VETO OF AGENCY RULES

During the Second Regular Session of the 112th Legislature, a bill was submitted to the Legislature providing for a Constitutional amendment to authorize the Legislature or a committee of the Legislature to veto agency rules. The State Government Committee report removed authorization for a committee veto; however, the bill became stalled between houses. A Conference Committee was convened but was unable to reach agreement and this study was requested.

The issue of Legislative veto of agency rules raises complicated legal issues. Although the issue has never been decided in Maine, it is generally believed that a statutory provision authorizing the Legislature to veto existing rules by a procedure which did not involve enacting overriding legislation would constitute a violation of the separation of powers provisions of the Maine Constitution.

The study was conducted by a subcommittee of five persons. The subcommittee reviewed the Administrative Procedure Act (APA) and its procedures for agency adoption of rules as well as Legislative review of proposed rules. A statistical review was conducted of agency rules in calendar year 1985 to present a picture of rulemaking activity. Proposed rules submitted by state agencies to the Legislature pursuant to statute were reviewed to determine the extent of agency compliance with the law and the incidence of proposed rules among Legislative committees. Three case studies were developed based upon examples presented to the subcommittee of instances where it was alleged that an agency had exceeded its authority or legislative intent in the rulemaking proceedings. A survey was conducted of the experience of other states with legislative review of agency rules. The subcommittee developed and investigated several draft recommendations and at its final meeting decided on the recommendations contained in this report.

The Maine Administrative Procedure Act was enacted in 1977. It requires state agencies adopting rules to follow a specified procedure intended to promote the maximum amount of public notice and participation. All proposed rules must be sent to the Legislature, specifically to members of the appropriate legislative committee. The Act also provides several procedures for review of existing laws. The Public may petition the agency to reopen a rule or it may petition the Legislature to review a rule.

A review of the laws of other states indicates a variety of approaches to legislative review of agency rules. The scope of the review may be broad or limited to the question of statutory authority. Although the composition of rules review committee varies, the average size is 6-12 member. Rules review

committees are frequently bipartisan, with equal representation from each party and from each house of the legislative branch. An active rules review committee requires an adequate staff; however, there is wide variation in the number of staff available in various states.

Several suggestions were made to the subcommittee of instances where it was alleged that an agency had either exceeded its authority in rulemaking or had proposed or adopted rules which were contrary to legislative intent in the authorizing legislation. The subcommittee chose three of those that it considered to be the best examples presented. The subcommittee analyzed these three case studies and determined that they did not demonstrate a serious threat of agencies exceeding their rulemaking authority or varying from legislative intent. In one instance the rules were vague. In one instance, the law was vague and in one instance, when criticism arose, the legislature was consulted in order to ensure that the rules were agreeable.

In order to develop a picture of current rulemaking, an examination was made of rules proposed in 1985. Slightly more than three fourths of all proposed rules were adopted. Four Departments accounted for almost half of all proposed rules. Within those departments, a significant number were proposed by independent licensing boards or concerned the licensing of facilities or services. Review indicates that the explanatory information that agencies are required to provide about proposed rules is inadequate. A large portion (80%) of proposed rules represent amendments to existing rules. There is no centralized procedure for obtaining information about public comment or complaints about proposed rules. Rules research is hampered by the absence of an indexed compilation of all rules. It would also appear that the review of rules by an assistant attorney general is occasionally only cursory and raises the issue of objectivity.

Since 1985, agencies are required to submit copies of proposed rules to the Legislature. Copies of proposed rules are mailed to members of the appropriate Legislative Committees. To date, no Committee review has resulted from this procedure. A review of proposed rules received by the Legislature indicates a mixed degree of compliance with the law. No one verifies whether the Legislature is receiving all proposed rules. It is clear that many agencies are not supplying the "fact sheet" required by law. Much of the required information, especially estimated fiscal impact of the rule is not being provided.

The subcommittee study of legislative review of agency rules results in the following general findings.

The current APA rulemaking statutory framework is a reasonable one which provides for an acceptable level of legislative involvement and which permits public participation and comments with respect to proposed rules. Although the current system is good on paper, it has some flaws which restrict accessibility to the process.

The subcommittee also believes that the benefits that could be derived from a legislative veto are not sufficient to justify the required amount of legislative and staff resources necessary for an effective veto procedure, although these constraints are of secondary concern.

Experience in Maine and from other states indicates that a legislative veto is not necessary to prevent agency abuse of rulemaking authority. A strong administrative procedures act and regular legislative attention to rulemaking activity is the best way to ensure agency compliance with statutory authority and legislative intent. Increased legislative participation and communication before and during the rulemaking process can be as effective a check on executive agency action as full legislative review and veto provisions.

Therefore, the recommendations of this subcommittee are directed primarily at improving the requirements of the rulemaking process and increasing legislative participation in it.

RECOMMENDATIONS OF THE COMMITTEE

RECOMMENDATION 1. The Legislature should require by joint rule that every bill or resolve which authorizes an agency to adopt rules and which receives a committee recommendation other than unanimous "ought not to pass" or "leave to withdraw" should include a statement that rule-making authority is being authorized.

RECOMMENDATION 2. Agencies should meet with legislative committees at least twice annually to review the agency's regulatory agenda.

RECOMMENDATION 3. The Secretary of State's office should monitor and approve agency compliance with current statutory requirements relating to rulemaking.

RECOMMENDATION 4. Agency statement addressing public comments should be more detailed and should be provided to the Legislature prior to adoption of a rule.

RECOMMENDATION 5. The Secretary of State's office should report on the cost and advisability of codification and indexing of rules, including the potential for contracting with private sources.

RECOMMENDATION 6. Rules of independent boards should be subject to increased scrutiny in order to improve responsiveness to legislative intent.

7146

DRAFT STUDY REPORT

LEGISLATIVE VETO OF AGENCY RULES

I. BACKGROUND

During the Second Regular Session of the 112th Legislature, a bill was submitted to the Legislature providing for a Constitutional amendment to authorize the Legislature or a committee of the Legislature to veto agency rules. LD 2228 would have added a provision to the Maine Constitution which would state

> The Legislature, or a committee of the Legislature, by order, as provided by law, may disapprove any rule adopted by an agency of the Executive Department.

This language was based upon a Connecticut provision which authorized a similar procedure.

LD 2228 proposed to amend the Maine Constitution to allow the Legislature or a committee of the Legislature to veto state agency rules. The purpose of LD 2228 was to allow the Legislature or Legislative Committees to approve and disapprove rules adopted by state agencies without violating the separation of powers principle of the Maine Constitution.

A majority of the Committee (10) approved a committee amendment removing authorization for a committee of the Legislature to disapprove state agency rules. The procedure for disapproval of rules would be established by statute. This procedure as intended by the State Government Committee would authorize a Legislative Committee to suspend a rule but not "disapprove or veto" a rule which could only be accomplished by the Legislature.

There was considerable debate about this issue, particularly in the Senate. The measure was approved in the House but indefinitely postponed in the Senate. A Conference Committee was requested, but it could not resolve the differences. As a compromise the State Government Committee requested and the Legislative Council approved this study.

Proponents of LD 2228 argued that only the Legislature can establish policy which is implemented by the executive branch. The proponents argued that executive agencies, on occasion, develop rules that conflict with Legislative intent. The result is the implementation of a different policy that the Legislature never intended.

Opponents argued that executive agency rules cannot conflict with state law or exceed the provisions established by law. In addition, legislative approval-disapproval of agency rules

exists now because the Legislature may pass a law to nullify the effect of a rule.

II. LEGAL CONTEXT

The issue of Legislative veto of agency rules raises complicated legal issues. Although the issue has never been decided in Maine, it is generally believed that a statutory provision authorizing the Legislature to veto existing rules by a procedure which did not involve enacting overriding legislation would constitute a violation of the separation of powers provisions of the Maine Constitution. See Article III, Sections 1 and 2; Attorney General Opinion #83-5, February 15, 1983.

The United States Supreme Court has ruled that the separation of powers provisions in the federal Constitution prohibit a veto by one house of Congress of an executive branch deportation order. INS v. Chadha, 103 S.Ct. 2764 (1983). The highest courts of several other states have decided likewise. Two rationales are raised for the prohibition. They are really two sides to the same coin. The first rationale maintains that rulemaking is an executive function which the separation of powers principle restricts to the executive branch. The second holds that the Legislature may act only through the procedures specified in the Constitution for the exercise of legislative power -- enactment by both houses and presentment to the executive.

III. PROCEDURE

The study was conducted by a subcommittee of five persons. The subcommittee met four times to discuss the scope of its investigations and to receive information from staff and others. The subcommittee reviewed the Administrative Procedure Act and its procedures for agency adoption of rules as well as Legislative review of proposed rules. A statistical review was conducted of agency rules in calendar year 1985 to present a picture of rulemaking activity. Proposed rules submitted by state agencies to the Legislature pursuant to statute were reviewed to determine the extent of agency compliance with the law and the incidence of proposed rules among Legislative committees. Three case studies were developed based upon examples presented to the subcommittee of instances where it was alleged that an agency had exceeded its authority or legislative intent in the rulemaking proceedings. A survey was conducted of the experience of other states with legislative review of agency rules. The subcommittee developed and investigated several draft recommendations and at its final meeting decided on the recommendations contained in this report.

IV. THE MAINE ADMINISTRATIVE PROCEDURE ACT

The Maine Administrative Procedure Act, Title 5 MRSA, Chapter 375, was enacted in 1977 to provide one uniform system for the adoption of agency rules. The Act requires all state agencies adopting rules to follow a procedure which is intended to promote the maximum amount of public notice and participation. Notice of proposed rulemaking must be published and mailed to interested parties. Public hearings are usually held, though not required unless requested by five persons. An opportunity for public comment is provided, and agencies must address representative comments when adopting a rule. Rules must be written in "plain and clear English, which can be readily understood by the public."

Section 8053-A of Title 5, enacted in 1985, requires all agencies to submit copies of proposed rules to the Legislature. The proposed rules must be accompanied by a fact sheet containing the following information:

1. A citation of statutory authority for the adoption of the rule

2. A concise statement of the principal reasons for the rule

3. An analysis of the rule; and

4. An estimated fiscal impact of the rule.

The proposed rules are submitted through the office of the Executive Director of the Legislative Council. Copies of the proposed rules are forwarded to the standing committee of the Legislature with jurisdiction over the subject matter of the rule.

V. REVIEW OF EXISTING RULES

A. General procedures

Once a rule has been adopted, the APA provides procedures for the public to seek review of that rule. Under 5 MRSA §8055, any person may petition an agency for adoption or modification of a rule. If the petition is submitted by 150 or more registered voters, the agency must initiate rulemaking proceedings within 60 days after receipt of the petition. Otherwise, the agency has the discretion to either initiate rulemaking proceedings or deny the petition. If rulemaking proceedings are initiated, the agency must follow the general statutory requirements for those proceedings. It may adopt or modify a rule or decide not to make any change in the rule.

B. Legislative review

Two procedures exist in Maine law relating to legislative review of agency rules. One permits members of the public to petition for legislative review of an existing rule; the other provides for the submission of proposed rules to the Legislature.

1. Public petition

When the Administrative procedure Act was originally enacted, a procedure was established for the automatic expiration of all agency rules over a five year period, unless extended, based upon a review by the appropriate committee of the Legislature. This procedure was repealed in 1978, before it could ever be actually implemented and was replaced by a procedure which permits a petition to the Legislature to review a rule. The current procedure contains the following provisions:

Application: May be filed by (a)100 registered voters with a substantial interest or (b)any person with a direct, substantial and adverse interest.

Procedure: Petition filed with executive director of the Legislative Council who polls substantive committee. If one-third of committee members approve, the committee must review the rule.

Review: Committee reviews rule for (a)consistency with legislation, (b)reasonableness of the effects of the rule, (c)changed circumstances since adoption of the rule, (d)abuse of discretion and (e)whether fees are reasonably related to the cost of administration.

Result: Majority of committee may request that legislation be drafted as a result of the review process. No minority legislation permitted. Legislation must follow course of any other legislation.

Two reviews of agency rules have been conducted under this procedure. One resulted in the legislative committee conducting the review taking no action as a result of its review. One review was conducted informally and discontinued when the agency changed its rule in response to criticism.

2. Submission of proposed rules

5 MRSA §8053-A was enacted in 1985. It requires state agencies to send copies of proposed rules to the Legislature accompanied by a "fact sheet" intended to provide a summary of information that would be of interest to legislators. The proposed rules are submitted to the appropriate committee and a procedure is provided if the committee wishes to review the

rule. Thus far, no committee has chosen to review a rule as a result of this procedure.

VI. OTHER STATES' EXPERIENCE WITH LEGISLATIVE REVIEW OF AGENCY RULES

The several states have adopted very different approaches to legislative review of executive agency rules. There are only a few common characteristics to legislative review of rules among these states. In all of the states surveyed, legislative review of rules is conducted by one joint committee of the legislature. In the survey no state has adopted the use of substantive committees to review rules.

Rules review, in general, requires considerable time and effort throughout the entire calender year. Rules review committees are required to meet, at a minimum, of two times a month. In many cases, the members of the various Rules Review Committees do not serve on any other committees.

A second common feature to legislative review of rules is the formal review process. Although the legislatures in some states do not have the authority to disapprove rules, the formal review process, according to spokespeople in these states, has been very effective.

In order to describe the implementation of rules review in several selected states, this study examined the following issues:

1. the scope of the review
2. Composition of rules review committee
3. legislative rule review procedures, and
4. the staff role with respect to rules review.

A. Scope of the Review

In some states the scope of the review is comprehensive while in others it is very limited. For example, in Illinois, the legislative rules review committee (Joint Committee on Administrative Rules) examines the policy involved or created by the rule. If the committee objects to the policy or the impact of the rule the committee also objects to the rule.

In Florida, on the other hand, the Joint Administrative Procedures Committee bases its decision solely on statutory authority for the rule. In some cases, a substantive committee has objected to a proposed rule because the adverse effects of the rule will outweigh the benefits. If the "bad" rule had statutory authorization, the review committee did not object to the rule. The Joint Administrative Procedures Committee

informed the substantive committee that the law would have to be changed to nullify the proposed rule which is the responsibility of the substantive committee (not the rules review committee).

For the most part, the various states review rules with respect to statutory authority for the proposed rules and legislative intent as it relates to the policy or program affected by the rule(s). In states such as New York and Illinois, rules review requires analyses of the impact of the proposed rule on other state agencies and programs, the economic impact of the proposed rule, and the effect of the rule on small business.

Unlike Connecticut, most other state legislatures in the survey are not constitutionally or statutorily provided with approval, veto, or disapproval authority over executive agency rules. In order to avoid constitutional problems such as violation of the separation of powers principle and other principles, most state legislatures are authorized to review only proposed executive agency rules. The agencies are prohibited from adopting a proposed rule until they receive comments concerning the rule from the legislative review committee.

There are several variations among the states with respect to their authority to review executive agency rules, but the net result, in most cases, is the effective curbing of rules that fail to meet legislative approval. Some of the techniques used include the sunset of all executive agency rules within a specified period of time (e.g., by June 30 of the following year) which can only be extended by a vote of the Legislature. Another technique is legislative committee action that delays implementation of a rule by 180 days when the rule fails to meet the review committee's approval. In the event that the executive agency, during the initial 180 day period fails to modify or rescind a proposed rule to which the review committee objects, the legislature can enact legislation delaying implementation of the proposed rule indefinitely.

Full-time legislatures with rules review committees do not need approval/disapproval authority of executive agency rules. The advantage of a full-time legislature with respect to rules review lies with the ability of the legislature to immediately pass legislation to nullify a proposed rule that fails to meet the approval of a rules review committee.

In general, executive agencies are reluctant to insist on the adoption of a rule that has been scrutinized and disapproved by a legislative rules review committee. The executive agencies are hesitant to take any action that will generate legislative hostility. In nearly all the states surveyed, whenever an executive agency has insisted on the adoption of a rule disapproved by a rules review committee of the Legislature, the entire legislative body has supported the

committee's decision. Thus, the formal review process, itself, has the effect of moderating over-zealous executive agency rules and bringing about compromise between the Legislature and the executive agencies.

B. Composition of the Rules Review Committees

The composition of the rules review committees in the various states differ with respect to numbers of members and political party representation on the committees. In the survey, the sizes of the rules review committees range from 6 members to 26 members. In general, the average size ranges is from 6-12 members.

In some states, the rules review committees of the legislatures are strictly bipartisan. Each party has equal representation on the rules review committee, regardless of the political party composition of the legislature. In other states, the dominant political party has a majority of the members on the rules review committees.

C. Legislative Rules Review Procedures

The rules review procedures of the various state legislatures surveyed do not differ significantly. In general, the following procedure exemplifies the typical rules review process:

a. The executive agency publishes a proposed rule in the state's Register

b. A public comment period is provided in the state's administrative procedure's act. In most states, a public hearing is required for certain types of rules or upon the request of the general public or an adversely affected person

c. The proposed rule and any public comments on the rule are provided to the legislative rules review committee

d. The staff of the rules review committee reviews each rule and prepares comments for the committee

e. The entire committee deliberates the proposed rule which is accompanied by the public comments and the staff's comments

f. The executive agency presents its case to the committee and responds to the comments of the general public, the committee staff, and committee members

g. The rules review committee certifies each rule by declaring that it has no objections or that it has objections. Statutory provisions usually establish a

maximum period of time in which the rules review committee is required to act,

h. The agency, following a rules review committee's certification of objections, may rewrite the rule to meet the committee's concerns or adopt the proposed rules (except in Connecticut), and

i. In the event that the agency adopts a rule to which a rules review committee has objected, the committee may take what ever action is necessary, as provided by law to the committee, to prevent implementation of the rule.

D. Staff Role

The role of the rules review committees' staffs in the several states are significantly similar in many respects. In general, the staffs to legislative rules review committees:

a. Review each proposed rule according to statutory criteria established in the law governing the rules review process. This criteria may include one or more of the following:

1) statutory authority for the rule

2) legislative intent with respect to the program or policy and the law that the legislature approved setting up the program-policy

b. Prepare analyses of each rule

c. Review existing rules as directed by the legislative committee or as required by law, and

d. Recommend modifications to or rejection of the rule.

The sizes of the staffs to legislative rules review committees vary and depend upon the number and complexity of the rules proposed by the executive agencies, the responsibilities and duties placed upon the rules review committees, and the willingness of the legislatures to provide the necessary staff. In Tennessee and Missouri, for example, the legislative rules review committees have only two staff persons to assist the committees. The degree of committee review of rules is thereby limited to the review primarily of rules of state agencies that have a significant and widespread effect.

On the other hand, Illinois and New York have committee staffs of roughly 20-30 people. In Illinois, the rules proposed by executive agencies each year fill 20,000-30,000 pages in the Illinois Register. Thus, a significant staff is required to review such extensive rules.

CASE STUDIES

Several suggestions were made to the subcommittee of instances where it was alleged that an agency had either exceeded its authority in rulemaking or had proposed or adopted rules which were contrary to legislative intent in the authorizing legislation. The subcommittee chose three of those that it considered to be the best examples presented.

A. Hazardous Chemicals Identification

In 1983, legislation was enacted permitting the Bureau of Labor Standards to require submission by employers of material safety data sheets identifying various categories of hazardous and toxic chemicals specified in the law. In the fall of that year, the Bureau proposed rules to implement that law. A public hearing was held. At that hearing no substantial criticism was raised. The proposed rules consisted mainly of a clarification of procedural reporting requirements and did not contain any reference to the chemicals subject to identification except an incorporation by reference of the definitions contained in the legislation. In January 1984 a letter was sent by the Bureau to all persons possibly possessing chemicals subject to identification. The letter contained only general description of those chemicals and was sent to a very wide variety of employers. It also provided for a rather large fee. Many employers receiving the letter complained that the requirement was overinclusive and sought legislative action to change the requirements. In the spring of 1984 new legislation repealed the old law and replaced it with one containing more detail regarding the identification of substances and the obligations of the Bureau. The new law provided that rules adopted under that chapter would expire unless approved by the legislature in the next Regular Session. New rules were adopted and approved by the Legislature.

B. Student-Teacher ratios

In September 1984, the Legislature enacted an education reform bill requiring the Department of Education and Cultural Services and the State Board of Education to adopt rules relating to a number of different subjects, including student-teacher ratios. In the summer of 1985, rules were adopted without criticism requiring a 25:1 ratio in each classroom. Subsequent to the adoption of the rule, there was criticism of the ratio from school administrators and legislators. In February 1986, legislation was proposed to void prior rules, but the legislation was withdrawn because the Department proposed and adopted less demanding rules.

C. Underground Storage Tanks

In 1985, legislation was enacted relating to installation and removal of underground oil storage tanks. Rules were

proposed by the Department of Environmental Protection. Before adoption, complaints were made that two provisions were inconsistent with legislative intent. The Audit and Program Review Committee was consulted to determine its intent. One provision was dropped and one provision was retained as a result of legislative input.

D. Analysis

The subcommittee analyzed these three case studies and determined that they did not demonstrate a serious threat of agencies exceeding their rulemaking authority or varying from legislative intent. In one instance the rules were vague. In one instance, the law was vague and in one instance, when criticism arose, the legislature was consulted in order to ensure that the rules were agreeable.

VIII. SURVEY OF AGENCY RULEMAKING EXPERIENCE

In order to develop a picture of current rulemaking, an examination was made of rules proposed in 1985. This examination included the following variables:

A. Months in the year (1985) in which rules were proposed

B. Months in the years, 1985 and 1986 in which the rules proposed in 1985 were adopted

C. The departments that proposed the rules

D. Differentials between rules that were not adopted and rules that were adopted.

It is difficult to draw any significant conclusions about state agency rulemaking with data from only one year. A history of data would be very valuable, but this is available only in volumes of books and papers. None of the data is computerized.

Any conclusions that may be drawn from the data can only be applied to calender year 1985. As issues and policies change from one year to the next, the types of rules, numbers of rules, and the agencies issuing the rules may change. For example, the issue of child abuse may account for a significant number of rules one year and relatively few in other years. Nevertheless, there are some conclusions that may be drawn.

1. Of the total number of rules proposed (329) in calendar year 1985, 77.6% were adopted.

A. There were a number of proposed rules that, when adopted, generated more than one rule (32 in total).

B. There were 75 rules that were proposed in 1985 but not adopted.

2. Four departments of state government; Human Services, Inland Fisheries and Wildlife, Business Regulation, and Agriculture; account for 49.1% of all rules proposed in 1985. Twenty other state agencies account for the other 50.9% of the proposed rules.

3. Of the total number of rules proposed in 1985, 77.2% represented amendments to existing rules.

4. With respect to the agencies that were the major sources for rules in 1985, a significant number of the rules were either proposed by professional and occupational licensing boards over which the agency has little authority or were concerned with the licensing of facilities and services.

5. While the number of rules proposed in the first 6 months of 1985 was the same as the number of rules in the last 6 months, roughly 60% of the rules were adopted during the period when the Legislature adjourned. Legislative Committees are not authorized to meet to consider rules and the process by which this authorization can be obtained could be cumbersome.

6. Most of the agencies that proposed rules failed to clearly or adequately describe the rules in the concise summary or in a form that would be understandable to the general public as required by law. Inadequate summaries reduce the ability of the public to participate in the rulemaking process.

7. A significant percentage (70%) of the rules proposed in 1985 that were <u>not</u> adopted were rules for which a public hearing was scheduled. The issue relating to the public hearing as a means by which the rule is more closely examined by persons affected or interested in the rule, however, is not necessarily proved by the 1985 data, since 63.2% of all rules were scheduled for a public hearing in that year.

8. The substantial proportion (nearly 80%) of all the proposed rules in 1985 which represented amendments to existing rules as opposed to new rules, <u>may</u> reflect legislative changes in existing programs, services, and approaches as opposed to legislative enactment of new programs, services, and approaches.

A. This is not a conclusion but may be more of a hypothesis.

9. The current reporting system does <u>not</u> provide any information with respect to complaints filed against proposed or existing rules and the basis for those complaints or requests for changes.

10. There is no centralized or easily accessible record of testimony presented at public hearings or testimony sent to agencies with respect to proposed rules.

11. The absence of an official indexed set of codified rules inhibits research and the ability of interested persons to obtain copies of all rules that may pertain to a given subject.

12. Review of rules by an assistant attorney general is occasionally only cursory and raises the issue of objectivity.

13. Rules promulgated by independent boards and agencies which are not responsible to a Department Commission or which have independent sources of funding do not receive the same scrutiny as other rules.

IX. SURVEY OF LEGISLATIVE REVIEW OF AGENCY RULES

Since 1985, agencies are required to submit copies of proposed rules to the Legislature. Copies of proposed rules are mailed to members of the appropriate Legislative Committees. To date, no Committee review has resulted from this procedure. A review of proposed rules received by the Legislature indicates a mixed degree of compliance with the law. No one verifies whether the Legislature is receiving all proposed rules. It is clear that many agencies are not supplying the "fact sheet" required by law. Much of the required information, especially estimated fiscal impact of the rule is not being provided.

X. CONCLUSIONS

The subcommittee study of legislative review of agency rules results in several general findings.

The current APA rulemaking statutory framework is a reasonable one which provides for an acceptable level of legislative involvement and which permits public participation and comments with respect to proposed rules. Although the current system is good on paper, it has some flaws which restrict accessibility to the process.

Although these are secondary concerns, the subcommittee also believes that the benefits that could be derived from a legislative veto are not sufficient to justify the required amount of legislative and staff resources necessary for an effective veto procedure.

Experience in Maine and from other states indicates that a legislative veto is not necessary to prevent agency abuse of rulemaking authority. A strong administrative procedures act and regular legislative attention to rulemaking activity is the best way to ensure agency compliance with statutory authority

and legislative intent. Increased legislative participation and communication before and during the rulemaking process can be as effective a check on executive agency action as full legislative review and veto provisions.

Therefore, the recommendations of this subcommittee are directed primarily at improving the requirements of the rulemaking process and increasing legislative participation in it.

XI. RECOMMENDATIONS

RECOMMENDATION 1. The Legislature should require by joint rule that every bill or resolve which authorizes an agency to adopt rules and which receives a committee recommendation other than unanimous "ought not to pass" or "leave to withdraw" should include a statement that rule-making authority is being authorized.

Many bills are enacted by the Legislature each year which will require agencies or departments of state government to adopt rules in order to carry out the intent of the law. The Legislature, when it enacts such laws, should carefully consider the extent and limitation of the rulemaking authority which it is conferring. If the Legislature does not wish to provide for broad agency rulemaking authority, it must ensure that the legislation providing for rulemaking contains sufficient limitations to prevent the agency or department from exceeding or conflicting with legislative intent.

A regulatory impact statement will cause legislative committees to consider more carefully the extent of rulemaking authority being granted in a bill and will permit all legislators and others to be aware of which bills provide for rulemaking authority and enable them to more easily identify situations where rulemaking authority is undesirably vague or ambiguous. Its primary purpose is to inform legislators of legislation which will result in agency rulemaking. It should take the form of a simple statement at the end of a bill, similar to a fiscal note, indicating that the bill confers rulemaking authority on a specified agency of state government.

RECOMMENDATION 2. Agencies should meet with legislative committees at least twice annually to review the agencies regulatory agenda.

On May 27, 1986 Governor Brennan issued an executive order requiring all regulatory agencies to follow certain procedures aimed at opening the regulatory process to more effective public participation. One procedure provided by the executive

order requires all agencies to publish a regulatory agenda each year identifying rules which it anticipates proposing during the succeeding year and providing the following information:

- a description of the agency's intent regarding the development of regulations during the upcoming period,
- the statutory or other basis for the adoption of regulations,
- the purpose of the regulation,
- the contemplated schedule for adoption of the regulations, and
- the identification and listing of potentially benefited and regulated parties.

The regulatory agenda is a good idea which, the subcommittee recommends, should be formalized by enactment into law to ensure that it is continued forward into succeeding gubernatorial administrations. An agenda enables the agency as well as those which are interested in its work to know what areas will be the subject for rulemaking in the upcoming year. Copies of the regulatory agenda should be sent to the Executive Director of the Legislative Council for distribution to appropriate committee members in the same manner that Title 5, Section 8053-A now provides for proposed rules.

The subcommittee also recommends that legislative committees meet with agencies at least twice annually to review the regulatory agenda. Although one of these meetings could occur during the legislative session, it seems likely that the most useful time for one meeting may be during the period when the Legislature is not in session. This is true because the Governor's timetable requires the publishing of the agenda on a date which is intended to coincide with the 90 day post session effective period for laws enacted by the Legislature during a given session. As a result, this subcommittee recommends that the Legislative Council authorize at least one interim meeting for each committee to permit the meetings envisioned by this recommendation. Each committee should be free to determine for itself the most useful time to hold the meeting based upon the agenda of the agencies it reviews. This procedure should be formalized by inclusion within the Joint Rules.

The subcommittee believes that increased legislative participation in the rulemaking process and closer communication will result in closer attention to legislative intent and better understanding on the part of legislators of agency needs.

RECOMMENDATION 3. The Secretary of State's office should monitor agency compliance with current statutory requirements relating to rulemaking.

Title 5 currently contains a detailed procedure that agencies must follow when adopting rules. Although many specific actions are required, "substantial compliance" with those procedures will save a rule from invalidity. For example, Title 5, Section 8053-A requires proposed rules to be sent to the Legislature with a fact sheet containing certain information contained in the law. Yet no sanction is provided if an agency fails to comply. No one monitors whether agencies are complying with this requirement. A cursory examination of the proposed rules that have been submitted to the Legislature indicates that in the majority of instances the information required by the law is not being supplied.

Similarly, no one is given authority to review proposed rules for clarity or agency compliance with requirements of a concise summary or analysis of public comments received. The result is that agencies exhibit varying degrees of compliance with legal requirements intended to make the rulemaking process more accessible to the public.

The subcommittee recommends that the Secretary of State's office be required to monitor the rulemaking process and determine whether an agency has adequately completed each step required by the law in adopting rules. A checklist should be developed to indicate compliance, and a copy of the checklist for each rule adopted should be provided to the appropriate Legislative committee. The subcommittee stops short of recommending that the Secretary of State's Office be given authority to require an agency to complete each step of the process before a rule may be ultimately adopted; however the subcommittee recommends that when the Committee on State Government of the 113th Legislature considers the legislation resulting from this report that it give serious consideration to whether this authority should be provided.

It is recommended that an increased outreach effort be undertaken by the Secretary of State's office to make agencies more aware of the legal requirements and provide enhanced assistance to those agencies which need it. Many boards and agencies do not have staff who are adequately trained in the complexities of rule writing. The Secretary of State's Office should provide increased services to those entities in the form of training, advice and consultation. As agencies become more aware of the standards that must be met, there will be a closer attention to all of the requirements of the law.

RECOMMENDATION 4. Agency statement addressing public comments should be more detailed and should be provided to the Legislature prior to adoption of a rule.

The requirement of agency response to public comment should be strengthened. Currently, at the time of adoption of a rule an agency is required to adopt a written statement of the factual and policy basis for the rule. It must "specifically address representative comments and state its rationale for adopting or failing to adopt suggested changes. Although these statements may be obtained from the agency, they are relatively inaccessible to the public or legislators who may be interested in the rule. The subcommittee heard complaints that the statements are usually quite brief and frequently give little detail regarding agency consideration of public comments.

Legislation should be enacted into law which requires agencies to submitted their responses to comments to the appropriate Committee of the Legislature prior to adoption of a rule.

RECOMMENDATION 5. The Secretary of State's office should report on the cost and advisability of codification and indexing of rules, including the potential for contracting with private sources.

The federal government and many states maintains codes of regulations which are indexed by subject matter and are publicly available to assist any person who wished to determine the regulations pertaining to a particular activity.

In Maine, although copies of rules are filed with the Secretary of State's office and may be obtained from the adopting agency, no such code exists. The result is that rules relating to a particular topic are hard to find. A person needs to determine which agency might have rules on a topic and then whether that agency has rules of interest to him. Some subjects may be regulated by three or four different agencies.

In the past year, a private organization has attempted to fill the gap by publishing a compilation of Maine rules, See Weil and Firth, Code of Maine Regulations (1986). However, not all rules are included and the compilation has not been adopted as official.

Easy access to agency rules is a prerequisite to effective public notice and participation in rulemaking proceedings. The Secretary of State's office should investigate the cost and advisability of an official codification and indexing of agency rules. This investigation should include an examination of the potential for contraction with a private group to provide an official codification as is currently done with the Maine Revised Statutes Annotated. The Secretary of State's office

should report the results of its investigation to the State Government Committee of the Legislature by December 1, 1987.

RECOMMENDATION 6. Rules of independent boards should be subject to increased scrutiny in order to improve responsiveness to legislative intent.

Many occupational and professional licensing boards are located within the Department of Business Regulation and Human Services. These boards typically operate on their own funding sources and are not subject to the control of the Commissioner when it comes to rulemaking. The potential for abuse of authority exists with this type of agency.

The subcommittee recommends that legislation be adopted requiring the Commissioners of the appropriate departments to review current and proposed rules of these boards and comment upon their authority and advisability. A one-time review should be made of all existing rules; followed by an annual review which should be completed at the time of legislative review of regulatory agendas. A more open discussion should ensure that independent boards are responsive to legislative intent.

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FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document No.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY SEVEN

AN ACT to Improve Legislative and Public Access to the Agency Rule-Making Process.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 5 MRSA §8002, sub-§9, ¶A is amended as follows:

A. "Rule means the whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency. ~~All rules promulgated after July 1, 1979, shall, to the maximum extent feasible, as determined by the affected agency, use plain and clear English, which can be readily understood by the public.~~

Sec. 2. 5 MRSA §8052, sub-§5 is amended to read:

5. Written statement adopted. At the time of adoption of any rule, the agency shall adopt a written statement explaining the factual and policy basis for the rule. The agency shall

specifically address representative comments and state the rationale for adopting any changes from the proposed rule, or failing to adopt suggested changes. The statement addressing representative comments shall contain a detailed explanation of the agency's response to those comments.

Sec. 3. 5 MRSA §8053-A, as amended or replaced by PL 1985, c. 528, c. 690 and c. 737, is repealed and the following enacted in its place:

§8053-A. Notice to legislative committees

1. Proposed rules. At the time of giving notice of rulemaking under section 8053 or within 10 days following the adoption of an emergency rule, the agency shall provide copies of the proposed rule to the Legislature. The agency shall also provide a fact sheet providing:

A. A citation of the statutory authority for the adoption of the rule;

B. A concise statement of the principal reasons for the rule;

C. An analysis of the rule; and

D. An estimated fiscal impact of the rule.

2. Regulatory agenda. The agency shall provide copies of its agency regulatory agenda to the Legislature at the time that the agenda is issued.

3. Adopted rules. When an agency adopts rules, it shall provide a copy of the adopted rule and the statement required by section 8052, subsection 5, and the checklist required by section 8056-A to the Legislature.

4. Procedure. When an agency is required by this section to provide materials to the Legislature, it shall provide them to the Executive Director of the Legislative Council who shall refer the materials to the appropriate committee or committees of the Legislature for review. The agency shall provide sufficient copies of the materials for each member of the appropriate committee or committees.

Sec. 4. 5 MRSA §8056, sub-§3, ¶A-1 is repealed.

Sec. 5. 5 MRSA §8056-A is enacted to read:

§8056-A. Oversight

1. Monitoring. The Secretary of State shall monitor the compliance of all agencies with this subchapter. He shall establish and implement a checklist which shall be completed for each rule which is proposed after January 1, 1988. The

purpose of the checklist is to provide an indication of the agency's compliance with rulemaking requirements. It shall include the timing of filing and notices as well as other requirements, such as the adequacy and clarity of explanatory and fiscal information.

2. Technical assistance. The Secretary of State shall develop drafting instructions for use by agencies which propose rules under this subchapter. In addition, the Secretary of State shall provide advice and assistance to any agency regarding the drafting of rules and supporting materials and the other requirements of this subchapter.

3. Report. The Secretary of State shall report to the Governor and the Legislature prior to February 1 of each year with respect to agency compliance with the provisions of sections 8052, 8053-A and 8060. The Secretary of State shall specify in the report the areas in which compliance needs improvement and the means by which improvement can be achieved. The Secretary of State shall also specify the agencies that have relatively low compliance rates.

Sec. 6. 5 MRSA §8060 is enacted to read:

§8060. Regulatory agenda

Each agency with the authority to adopt rules shall issue an agency regulatory agenda as provided in this section.

1. Contents of agenda. Each agency regulatory agenda must contain the following information.

A. A list of rules that the agency expects to propose prior to the next regulatory agenda due date;

B. The statutory or other basis for adoption of the rule;

C. The purpose of the rule;

D. The contemplated schedule for adoption of the rule; and

E. An identification and listing of potentially benefited and regulated parties.

2. Due date. A regulatory agenda must be issued prior to 100 days after adjournment of each Regular Session of the Legislature.

3. Legislative copies. The agency shall provide copies of the agency regulatory agenda to the Legislature as provided in section 8053-A.

4. Availability. An agency which issues an agency regulatory agenda shall provide copies to interested persons.

5. Legislative review of agency regulatory agendas. Each regulatory agenda shall be reviewed by the appropriate joint standing committee of the Legislature at a meeting called for that purpose. The committee may review more than one agenda at a meeting.

Sec. 7. 5 MRSA §8061 is enacted to read:

§8061. Licensing and commodity boards

1. Initial review by commisioner. Prior to December 1, 1987, the commissioner of the department in which is located an occupational and professional licensing board or a commodity or product protection and promotion board, as those boards are described in Section 12004, subsections 1 and 9, shall review the existing rules of the board and shall issue a report to the appropriate joint standing committee of the Legislature evaluating those rules according to the following criteria.

A. Whether the board's rules are consist with its rulemaking authority;

B. Whether the board's rules are consistent with Legislative intent; and

C. Whether the board accurately complies with the requirements of this subchapter relating to rulemaking.

2. Subsequent reviews. Each year after 1987, the commissioner shall evaluate rules proposed by the board during that year and submit a report containing the results of the evaluation to the appropriate joint standing committee of the Legislature by the same date that regulatory agendas are due as specified in section 8060.

Sec. 8. 5 MRSA §8062 is enacted to read:

§8062. Style

All rules and any other materials required by this subchapter to be provided to the public or to the Legislature shall, to the maximum extent feasible, use plain and clear English, which can readily be understood by the general public. The use of technical language shall be avoided to the greatest possible extent.

Sec. 9. Codification of rules. The Secretary of State shall investigate the cost and advisability of codification and indexing of agency rules, including the potential for contracting with private resources. The Secretary of State shall report the findings of the investigation to the joint standing committee of the Legislature with jurisdiction over state government by December 1, 1987.

STATEMENT OF FACT

This bill contains the recommendations of the Joint Standing Committee on State Government as a result of its study of the issue of legislative veto of agency rules. These recommendations are intended to strengthen the rulemaking process, primarily by increased public and legislative notice of rulemaking proceedings and through monitoring of agency compliance by the Secretary of State.

Sections 1 and 2 expand the requirement that rulemaking materials be written in plain and clear English understandable to by the public.

Section 2 requires that agency statements addressing public comments on a proposed rule must contain a detailed explanation of the agency's respone to those comments. This provision attempts to remedy the concerns expressed by some members of the public that some agencies currently do not provide sufficient information with regard to public comments on proposed rules.

Section 3 revises Title 5, section 8053-A regarding rulemaking documents that must be provided to the Legislature. It corrects inconsistencies created by several contemporaneous amendments to the section in 1986 and expands its coverage to include the new regulatory agenda and copies of adopted rules with their supporting statements.

Section 4 repeals a provision of law requiring the Secretary of State to compile, index and edit agency rules. This provision was originally enacted in 1979 when it appeared that an independent contractor was interested in publishing the rules. That effort was never completed. The requirement is not currently being met and should be repealed. In its place, this bill recommends in section 7 that the Secretary of State investigate and report to the State Government Committee regarding the cost and advisability of compiling and indexing the rules.

Section 5 provides that the Secretary of State will develop instructions and explanatory information to agencies which develop rules and will provide assistance in drafting to rulemaking agencies. This section also provides that the Secretary of State will monitor agency compliance with rulemaking requirements and adopt a checklist which will be provided to the Legislature when a rule is adopted.

Section 6 requires each agency with the authority to adopt rules to issue a regulatory agenda at the time following a regular session of the Legislature when most laws become effective. The agenda would then be reviewed by the appropriate joint standing committee of the Legislature.

Section 7 provides that existing and proposed rules of certain "independent" boards must be reviewed by the Commissioner of the appropriate department of government by

December 1, 1987 and annually thereafter. The commissioner's report would be available to the Legislative for review at the same time as regulatory agendas.

Section 9 requires the Secretary of State to investigate and report on the cost and advisability of compiling and indexing all state agency rules in order to provide a resource which would be more readily available to the public.