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POLICY BRIEF

Regulatory Reform

Strengthening Washington's Regulatory Fairness Act

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Key Findings

1. Small businesses pay 45% higher compliance costs than larger businesses.
2. Washington's regulatory system lacks a necessary "peer review" process.
3. The state's Regulatory Fairness Act lacks adequate enforcement mechanisms in order to protect small businesses.
4. An Office of Regulatory Reform should review existing regulations in order to follow British Columbia's example of cutting 1/3 of their red tape.

Washington's small businesses play a huge role in the state's overall economy. Businesses with fewer than 50 employees account for 96% of the state's registered businesses, while employing 41% of the state's private sector workforce. Small businesses also create most of the net new jobs during recessions, while larger businesses shed jobs.

As the state and the rest of the nation continue to recover from what is being called the Great Recession, it should be incumbent upon policymakers to refrain from subjecting the small business community to more onerous rules and regulations that may only have a negligible beneficial impact, yet cause the loss of time and opportunity to those subjected to them.

Regulations are state agency-created rules that implement or interpret enacted legislation. They are specifications on what can or cannot be done by businesses or even individuals. Regulations have the full force of law and businesses and individuals found violating regulations are subject to fines and other penalties, including imprisonment.

Regulations are designed to achieve some sort of public good. Whether to protect the environment, or to ensure public health and safety, regulations attempt to resolve inconsistencies in law or provide more detailed guidance to businesses and individuals.

However, there are always costs associated with complying with regulations. Often, the cost of compliance is quite high – particularly for the small business community.

For instance, in 2008 the Federal Register contained 79,435 pages, up from 72,090 pages in 2007. Also in 2008, federal agencies issued 3,830 final rules, a 6.5 percent increase from 3,595 rules in 2007.[1]

The U.S. Small Business Administration also recognizes the disproportionate cost that compliance puts on small businesses. In his report, "The Impact of Regulatory Costs on Small Firms," author W. Mark Crain cites that

> "…the annual cost of federal regulations in the United States increase to more than $1.1 trillion in 2004. Had every household received a bill for an equal share, each would have owed $10,172, an amount that exceeds what the average American household spent on health care in 2004."[2]

Crain also publishes an eye-opening statistic that shows just how disproportionate the compliance costs are to small businesses.

[1] Clyde Wayne Crews Jr., "Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State," Competitive Enterprise Institute, 2009, pg. 2.
[2] W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," U.S. Small Business Administration Office of Advocacy, September 2005.

> "Small businesses face an annual regulatory cost of $7,647 per employee, which is 45 percent higher than the regulatory cost facing large firms (defined as firms with 500 or more employees)."[3]

This disproportionate impact on small businesses inspired policymakers three decades ago to look for ways to soften the compliance costs on smaller firms.

In 1980, Congress passed the first Regulatory Flexibility Act (RFA), which affected only federal agencies. However, it was not long before states began passing tailored versions of their own RFAs. Among other things, the federal RFA asserts that (emphasis added):[4]

1. Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

2. Laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations (non-profits), and small governmental jurisdictions **even though the problems that gave rise to government action may not have been caused by those smaller entities**;

3. **Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands** including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

4. The failure to recognize differences in the scale and resources of regulated entities **has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity**;

5. **Unnecessary regulations create entry barriers** in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

6. The practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent **may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation**;

7. **Alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses**, small organizations, and small governmental jurisdictions.

As early as 1980 the federal government recognized the cost regulations have on the small business community, and that enforcing regulations could impose undue costs while failing to achieve intended benefits.

The 1980 Act required federal agencies to go through a number of steps in order to mitigate the regulatory cost imposed on small businesses. Some of these steps include:

[3] Ibid.
[4] Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Fairness Act of 1996. Available at: http://www.sba.gov/advo/laws/regflex.html

1. Agencies must consider the impact of their regulatory proposals on small entities;

2. Agencies must analyze equally effective regulatory alternatives, and;

3. Agencies must make their analyses available for public comment.

In 1993, President Clinton issued Executive Order 12866, which reinforced the RFA in order to ensure that agencies' regulatory programs were consistent with the philosophy of using accurate cost/benefit analyses, in addition to considering suitable regulatory alternatives. The executive order specified more clearly the need for agencies to consider alternative regulations, and clarified what "significant regulatory actions" meant, such as any rules that would cost the business community nation-wide more than $100 million annually.

After years of requests from the small business community, in 1996 Congress reinforced the 1980 statute with passage of the Small Business Regulatory Enforcement Fairness Act (SBREFA). The purpose of SBREFA was to add "teeth" to the RFA in the form of judicial review. Businesses, or private citizens, would now be able to challenge an agency's compliance with the federal RFA and basically double-check the agency's cost assertions.

The reinforcement act also required agencies to request and consider the input of small businesses during the development of regulations.

However, an SBA research paper in 2001 found that many federal agencies still suffered from noncompliance with RFA/SBREFA stipulations. The report said that, "The researchers observed that the most pervasive problem lies in the failure of agencies to identify or focus early on rulemakings with potentially serious impacts on small entities."[5]

Small Business Regulatory Relief in Other States

According to the SBA Office of Advocacy, seventeen states and one territory have active regulatory flexibility statues. Another twenty-seven states have a partial or partially-used regulatory flexibility statute or Executive Order. Washington state falls among this latter group. Only six states have no regulatory flexibility statutes.

Several states have a small business ombudsman, a position designed to help business owners with specific regulatory problems – Washington state does not. Interestingly enough, one report says that more often than not, the states' ombudsman positions were created to answer all business questions, not just small business. The ombudsman positions are mostly aimed at helping businesses deal with the Clean Air Act, and do not actually help reduce regulatory burdens for small businesses.[6]

Current Assessments of Regulatory Burden in Washington State

Businesses in Washington have to comply with many different rules and regulations. The regulations come from a host of state agencies, such as the Department of Revenue, Labor and Industries, Fish and Wildlife, Ecology,

[5] "An Evaluation of Compliance with the Regulatory Flexibility Act by Federal Agencies," Consad Research Corporation, under contract with the SBA, Pittsburgh, Pennsylvania, 2001.
[6] "Analysis of State Efforts to Mitigate Regulatory Burdens on Small Businesses," Management Research and Planning Corporation, under contract with the SBA, June 1, 2002, pg. 8.

Employment Security, Office of the Insurance Commissioner, Financial Institutions, Transportation, Social and Health Services, and many more.

One of the major worries in regards to the state's regulatory environment isn't so much the regulations themselves, but the sheer number of them. According to the Office of the Code Reviser, during 2009, Washington state agencies proposed over 14,000 pages of new or amended administrative rules. The result was 545 new rules, which amounted to 6,102 pages.[7] Not every business or entity is subject to all new or existing rules, but time and resources must be expended to ensure compliance with the regulatory regime.

National rankings vary widely regarding Washington's regulatory environment. On the positive side, *Forbes.com* lists Washington as the 5th best regulatory system in its "Best States for Businesses" ranking.[8] CNBC has a slightly different opinion. The news outlet ranked Washington 34th best overall for "business friendliness," which includes an assessment of our state's regulatory and tort environment.[9] Our worst ranking comes from the Mercatus Center at George Washington University. Its "Freedom in the 50 States: An Index of Personal and Economic Freedom," ranked Washington's "Regulatory Policy Ranking" as 45th, or 6th worst in the nation.[10]

None of these rankings use the same methodology. However, it is clear that no matter which method used, Washington does not rank as the state with the best regulatory system.

Rulemaking Process in Washington State

For the purposes of this paper, we will forgo analyzing emergency or expedited rulemaking in favor of assessing and improving the normal rulemaking process.[11] Normal rulemaking has resulted in the proliferation of arcane or archaic regulations, in addition to regulations that are actually serving their intended purpose.

The first step of rulemaking in Washington involves lawmakers passing legislation that the governor must then approve. The governor, through an Executive Order, can also initiate a rulemaking. The process of making and administrating rules is governed by our state's Administrative Procedures Act, as laid out in RCW 34.05.

After receiving legislative or gubernatorial authority to issue, change or repeal a rule, the appropriate regulating agency files a pre-notice inquiry with the Office of the Code Reviser. The Code Reviser then publishes the notice in the *Washington State Register*, a bi-monthly document containing all agency rule notices, public meeting notices, Executive Orders from the governor and Supreme Court rulings.

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[7] "Agency Rule-Making Activity, 2009," Office of the Code Reviser. Available at: http://www.leg.wa.gov/CodeReviser/Documents/rulactiv.pdf

[8] "The Best States for Business," *Forbes.com*, September 23, 2009. Available at: http://www.forbes.com/2009/09/23/best-states-for-business-beltway-best-states_table.html

[9] "Business Friendliness," America's Top States for Business 2010, CNBC. Available at: http://www.cnbc.com/id/37516038/

[10] Jason Sorens and William Ruger, "Freedom in the 50 States: An Index of Personal and Economic Freedom," Mercatus Center at George Washington University, Table III. Available at: http://mercatus.org/sites/default/files/publication/Freedom_in_the_50_States.pdf

[11] According to the Office of Regulatory Assistance, an expedited rulemaking can take place if the rule applies to internal government operations or if the rule is fixing insignificant errors. An emergency rulemaking process is reserved for rules that are necessary to protect human health, safety or general welfare, etc., and does not require public notice or hearing. Emergency rules are in effect for 120 days initially, before they are repealed or before the agency must re-file the rule under the normal rulemaking process.

During this first stage, agencies may also hold public meetings to gather public comment, both written and oral, as the agency determines how to move forward. At this point there may be a Small Business Economic Impact Statement required, although only a small fraction of proposed rules are actually ever subject to this requirement.

The regulatory agency then prepares an analysis in compliance with RCW 34.05.328 to ensure the proposed language falls under legislative intent. If no citizen, business or other entity objects, and if the Joint Administrative Rules Review Committee (more on JARRC later) does not flag the regulation for review, the proposed language is filed with the Code Reviser's Office and the rule normally takes effect 31 days later. The entire process, without having to work through objections, can take as little as three months from start to finish, but often it takes longer.[12]

Regulatory Relief Legislation in Washington State since 1982

In 1982, on the heels of the federal Regulatory Flexibility Act, Washington policymakers enacted the Regulatory Fairness Act (RFA) to minimize the impact of state regulations on small business. The RFA requires a Small Business Economic Impact Statement (SBEIS) of proposed rules that impose more than a minor cost on twenty percent of the businesses in all industries or ten percent of the industries in any one industry. Small businesses in Washington are defined as any business that has fifty or fewer employees.[13]

As an accompaniment to the state RFA legislation, the legislature created a Small Business Improvement Council (SBIC) in 1984 to identify regulatory, administrative and legislative proposals that will improve the entrepreneurial environment for small businesses and advises state business programs on their policies and practices.

Governor Gary Locke disbanded the SBIC in 2003 and rolled its mission into the Washington Economic Development Commission.[14] Similarly, the Washington Business Assistance Center was dissolved in 1995.

In 1993 Governor Mike Lowry created the Regulatory Reform Task Force, which submitted many recommendations to the legislature, some of which led to 1994's E2SHB 2510. This legislation, among other things:

1. Required agencies to prepare a statement of intent for proposed rulemaking, along with citing specific statutory authority;

2. Introduced "pilot projects" for rulemaking through use of volunteer pilot study groups to try out proposed rules;

3. Implemented a process for an individual to petition the governor to repeal the rule, to which the governor must respond in writing within seven days;

4. Rulings by JARRC now only require a simple majority vote, no longer a two-thirds majority vote, in order to require a state agency to prepare a small business economic impact statement;

[12] See flow chart in Appendix A.
[13] A revenue qualifier has often been used along with the "under 50 employees" stipulation, but it can vary depending on the agency. Some legislation in the past has included "under $7 million in gross annual revenues." Also used has been "under $3 million in gross annual revenues." However, the "under 50" qualification is the most common.
[14] More information on the Washington Economic Development Commission is available at www.wedc.wa.gov.

5. Began a business assistance center to develop guidelines to assist agencies in determining whether a proposed agency rule will impose more than a minor cost on businesses.

Governor Mike Lowry vetoed several parts of the above legislation and issued Executive Order 94-07 to further buttress the parts of E2SHB 2510 that he did like. The 1994 order included several provisions but the ones that stood out were:

1. Rule Adoption Factors – Agencies were now required to prepare written analyses of rules citing the objective of the rule; whether changes to other rules or statutes would achieve the same objective; how the provisions would be coordinated with other agencies; whether the agency chose a reasonable, cost-effective manner to achieve the regulatory goal; and, the consequences of *not* adopting the proposed rule;

2. Agencies shall identify and assess alternative forms of regulation where appropriate;

3. Justifying why agency rulemaking might differ from existing federal rules or standards.

Policymakers and many people in the business community felt that 1994's legislation and the Governor's Executive Order were not enough to complete regulatory reform. Therefore, in 1995 the legislature passed Substitute House Bill 1010, also known as the Regulatory Reform Act of 1995. Its mandates included:

1. Writing administrative rules that conform with legislative intent;

2. Adopting only those rules that actually accomplish something;

3. Finding ways to minimize duplication and conflict with other federal, state and local regulations;

4. Evaluation of the effects of rules and their alternatives;

5. Selection of the least burdensome alternative, and;

6. Requirements that a rule's benefits outweigh its probable costs.

In 2005 the legislature modified the requirements of the Small Business Economic Impact Statement (SBEIS) to include the number of jobs created or lost due to the impact of the proposed rule.[15]

The state's RFA requires a small business economic impact statement (SBEIS) when *it is anticipated* that a proposed rule would impose disproportionate costs on small businesses, or *when requested* by the Joint Administrative Rules Review Committee. Essentially, there is no requirement to conduct an SBEIS outside of the subjective qualifications anticipated by an agency (which has every incentive to *not* anticipate costs) or requested by the JARRC.

However, if a small business brings a concern of cost compliance to the regulating agency, the agency can effectively avoid conducting an SBEIS unless ordered to do so by the JARRC. This does nothing to alleviate the concern of the business that brought forward the objection to the proposed rule and is an area ripe for reform.

[15] See RCW 19.85.040

Even so, an SBEIS is often written in a very complex manner and is not widely distributed. Industries affected by the proposed rules have little opportunity to provide public feedback.

The state legislature passed SSB 5042 in 2009, which provides a waiver of penalties for first-time paperwork violations by small businesses. A paperwork violation, in this instance, is defined as a failure to comply with any statute or regulation requiring an agency to collect data or a business to collect, post or retain data.

In 2010, the legislature passed HB2603, which gives small businesses a "two business day" window to comply with minor violations of agency regulations before fines and/or penalties are assessed against the business. Both of these recent pieces of legislation amended the Administrative Procedures Act, not the state's Regulatory Fairness Act.

Office of Regulatory Assistance

In 2002, just as the economy was rebounding from the dot-com-led recession, the legislature created the Office of Permit Assistance in the Department of Ecology. For years the regulatory discussion centered around the burdensome construction permit system and the lack of agency responsiveness to the business community.[16]

Just a year later the legislature changed the name of the Office of Permit Assistance to the Office of Regulatory Assistance in order to broaden the office's scope beyond ecology permit assistance.

Today, the ORA describes its mission as "help[ing] people navigate Washington's environmental and business regulatory systems while working with our partners to improve those systems so they produce better results and reflect our values."[17]

Missing from the mission statement is any mention of reforming the regulatory system in aiding the business community. Instead, the ORA's mission seems to be more about helping people wade through the regulatory morass, not helping reform the system itself.

Joint Administrative Rules Review Committee (JARRC)

In late 1982, the legislature created the Joint Administrative Rules Review Committee to help keep agency rulemaking within the statutory authority given to it by the legislature.

According to the Committee, its primary charge is to:

- "Selectively" review proposed and existing agency rules to determine whether or not they conform to the intent of the statutes they purport to implement.
- Review any rule to determine whether it complies with the Regulatory Fairness Act, especially with regard to hearing any objections raised about the economic impact statements required for small businesses.

[16] For original legislation, see HB2671 from 2002.
[17] "2009 Office of Regulatory Assistance Strategic Plan," page 3, available at: http://ora.wa.gov/documents/StrategicPlan.pdf

- Related activities include determining whether rules are adopted in conformance with other statutory requirements, and whether policies or guidelines are being used in situations where formal rules should be adopted.

JARRC is made up of eight legislators from the House and Senate and both political caucuses. It does not meet during the legislative session unless an emergency arises.

Unfortunately, JARRC does not have many tools available in the area of enforcement or sanctions. In fact, it only has two options available:

1. If a majority of the Committee determines the regulation being questioned falls outside of legislative intent, it notifies the regulating agency to hold a required public hearing within 30 days. If, after the hearing, the agency has not amended or repealed its proposed regulation, the Committee can then file a formal objection against the rule.

2. By a majority vote, the Committee may also recommend suspension of the rule. The governor must then approve or disapprove of the suspension. If the suspension is approved, the rule is suspended until 90 days after the next legislative session.

The two options for JARRC are helpful but only marginally so. Neither option gives the JARRC much of a role in determining whether the proposed regulation should actually be adopted by the agency. The first option only requires an agency to be more transparent and open up the process to public comment. The best JARRC can do is delay the rule's implementation until after the next regular legislative session, at most slightly over one year (since JARRC typically does not meet during legislative sessions).

In regards to the second option, if the JARRC rules a regulation is outside the scope of legislative intent, neither the governor nor the legislature is required to act and issue an approval or disapproval of this action. Theoretically, the governor could stand by and let the suspension on the rule expire, therefore giving tacit approval to the proposed regulation.

Summary of Management Research and Planning Corporation Study

In 2002, the Management Research and Planning Corporation (MRP) released a landmark study, "Analysis of State Efforts to Mitigate Regulatory Burdens on Small Businesses." The report highlighted several states' efforts to comply with the federal Regulatory Fairness Act and identified which states had their own similar regulatory model.[18]

The report stated that most states unfortunately do not enforce their own regulatory flexibility acts and only a handful of states come close to accomplishing the original goals of the legislation.

In particular, the study points out the state of Arizona for empowering its independent review board with the ability to block regulations that were determined to be burdensome. The report also points to Washington as being the only other state, at the time of the report's release, that also has an entity to review regulations and laws for RFA compliance (JARRC).

[18] "Analysis of State Efforts to Mitigate Regulatory Burdens on Small Businesses," Management Research and Planning Corporation (MRP), June 1, 2002.

One of the study's main conclusions, in particular regarding regulatory review, is that states requiring impact studies (such as Washington's Small Business Economic Impact Study) do not include objective reviews of those studies. In other words, while an agency like Labor & Industries may be required to issue an SBEIS, there is no required action after issuing the impact assessment. The impact statement became the end goal, instead of using the report as a tool to assess whether regulatory action should be continued.

The report summarized many of the concerns of the small business community:

> "When reviewing the states' efforts to reduce regulatory burden on small businesses, it became clear that few states could be candidates for best practices case studies. Few states had systems in place that appeared to genuinely attempt to offer a climate geared towards fostering positive small business opportunities for growth and protection from regulatory burden."

So, unfortunately, there is no adequate case study to imitate when it comes to reforming Washington's regulatory system. But there are several steps that can and should be taken to relieve pressure on small businesses faced with an ever-growing regulatory regime. The point is not to strip away all regulations or impugn the motives of regulators. The goal is to ensure the regulations state agencies use to govern the business community are relevant, achieve measurable goals, and that the benefits outweigh the costs.

A streamlined regulatory structure would help grow and retain businesses in Washington state and would contribute to the state's economic growth.

Case Studies of Specific Regulatory Reform Projects

British Columbia

In the early 2000s, the Canadian Provence of British Columbia implemented an ambitious regulatory reform program. Entitled, "A New Era for Small Business," the provincial government:

1. Introduced 27 tax relief measures that provided $900 million in net tax relief for individuals and $350 million for businesses;

2. Raised the threshold for the small business income tax to $300,000 from $200,000;

3. Eliminated the provincial sales tax on production machinery, saving B.C. businesses $160 million a year;

4. Eliminated more than 70,000 regulations, in pursuit of cutting red tape by one-third within three years;

5. Expanded the OneStop business services program to allow small businesses to complete government forms online, and;

6. Introduced the first-job wage to encourage employers to hire young people with no paid work experience.[19]

In 2004, B.C.'s Ministry of Community, Aboriginal & Women's Services published a regulatory best practices guide. Its introduction states,

[19] "A New Era for Small Business," Government of British Columbia. Available at: http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/367724/smallbusiness.pdf

> "Not all issues are solved solely by government action. Before deciding whether to intervene in relation to a specific problem, it makes good sense to look at the situation from a broad perspective. Best practice in the sphere of government intervention suggests that before any intervention is considered, there should be clear evidence that a problem exists, taking into account the views of those who are affected; an analysis of the likely benefits and costs of action and non-action; and consideration of alternative approaches for addressing the problem. Experience has shown that 'today's problem' may be a result of 'yesterday's intervention'… **Reducing involvement, rather than increasing it, may be a better practice**."[20] [Emphasis added]

During the 2001-2010 timeframe, the Ministry of Small Business, Technology and Economic Development reports that it eliminated more than 152,000 regulations – a red-tape reduction of over 42%, with the goal of no net new regulations through 2012.[21]

Arizona

Arizona has a Governor's Regulatory Reform Review Council, which consists of citizens, agency representatives and elected officials. The Council's main functions are regulatory review and reform. According to the MRP study, Arizona's regulatory review process is effective because the state:

1. Has a legislatively-mandated review process in place for all agency regulations;

2. Has an independent review board, which involves small business advocates in the review process;

3. Has an ombudsman position that monitors small business activity and reports directly to the Governor, and;

4. The Council has the ability to "veto" regulations if they are deemed unfriendly to small businesses.

In the midst of this recent recessionary period, Arizona Governor Jan Brewer issued a management directive to state agencies to temporarily freeze all new state government regulations. All state agency directors and acting directors were asked not to submit any new regulations to the Arizona rulemaking process until the Governor could perform a comprehensive review of all rules and regulations implemented during previous gubernatorial administrations. The freeze remained in place until April 30, 2009.[22]

State of New York

In 1995, New York Governor George Pataki signed Executive Order No. 20, which created the Governor's Office of Regulatory Reform.[23] GORR is tasked with overseeing state agency rulemaking and sets specific criteria for evaluating

[20] "Regulatory Best Practices Guide," Ministry of Community, Aboriginal and Women's Services, 2004. Available at: http://www.cd.gov.bc.ca/lgd/gov_structure/library/regulatory_best_practices_guide.pdf
[21] "B.C. Continues to Cut Red Tape," Press Release, Ministry of Small Business, Technology and Economic Development, May 10, 2010.
[22] Janice K. Brewer, "Regulatory Review Plan," State Management Directive, January 22, 2009.
[23] "Executive Order Number 20," State of New York, November 30, 1995. Available at: http://www.gorr.state.ny.us/RegulatoryReform/Executive%20Order20.htm

all new and existing regulations. The tools for assessing regulations includes cost-benefit analyses, risk assessment and peer review. New York's successive governors have continued to re-up GORR.

In addition to GORR, in 2009 New York Governor David Paterson signed Executive Order No. 25, "to eliminate unnecessary regulatory requirements on businesses and local governments." The EO established a Regulatory Review and Reform Program to "eliminate or revise antiquated and burdensome regulations on businesses, local governments, health care providers and other regulated entities, and focus the State's regulations on those necessary to retain and strengthen critical protections for public health, safety and welfare."

The Review Committee, while consisting mostly of cabinet and sub-cabinet officials and agency personnel, was instructed to work with various state agencies to invite comments from the general public on which regulations should be discarded or reformed. An agency must then report on any action required to reform its specific regulations under review. If the recommended action does not meet the Review Committee's satisfaction, the Committee can seek further stakeholder interaction, until the Committee is satisfied with an agency's plan for reform.[24]

Recommendations

Broader Regulatory Review

One critical component of any Regulatory Flexibility Act is mandatory periodic review of agency rules. In 2007, the state of Hawaii passed Senate Bill 188, which requires agencies every other year to review all existing rules that affect small businesses to ensure they continue to serve their public purpose. Washington state does not have a mandatory periodic review process.

Currently, agencies are directed by the state's RFA to perform an internal analysis of which regulations they believe should be reviewed. This is done once a year, per RCW 19.85.050, and the results are submitted to the Office of Financial Management (OFM). However, the rules that are subject to review are controlled by the regulating agency. In other words, an agency can arbitrarily decide which of its own rules should be subject to review. Washington Policy Center's recommendation is to remove the arbitrary and autonomous nature of the current statute and place the direction of which rules are reviewed into the hands of a designated third party, such as a Small Business Advisory Group, as described below.

Small Business Advisory Groups

Under this proposal, any agency whose rulemaking triggers a Small Business Economic Impact Statement would create a small business advisory group of representatives from the affected industries. The advisory group would consult with the agency on the likely effect of the rule on their business, alternative approaches to the proposed rule, and provide input to the agency for a more comprehensive SBEIS finding.

This idea is not without precedent. On the federal level, the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) are required to convene small business advocacy review panels that

[24] "Establishing a Regulatory Review and Reform Program," Executive Order Number 25, State of New York, August 7, 2009. Available at: http://www.gorr.state.ny.us/AgencyInfo/GOVregulationsPR.htm

consult with small entities on the impact of specific proposals at the pre-proposal stage of a rule's development. The goal is to institutionalize the small business outreach in state agencies to ensure that all effective and cost-saving alternatives are considered before draft rules are issued. This accomplishes a "peer-review" process of an SBEIS – something that is not done in the current state rulemaking process.

Extend JAARC Oversight to Existing Regulations or Create New Entity

Currently, the Joint Administrative Rules Review Committee only intervenes in the rulemaking process. There is no entity in charge of reviewing rules that are already on the books. The state of New York has a Governor's Office of Regulatory Reform, which is charged with monitoring and overseeing all government regulations and questioning their necessity.

In the Executive Order issued by New York Governor David Paterson in 2009, the "regulatory review and reform program" was assigned:

> "…to evaluate, reform or repeal, where necessary, rules and paperwork requirements in order to reduce substantially unnecessary burdens, costs and inefficiencies and to improve the State's economy while maintaining appropriate protections for the public health, safety and welfare and the conduct of business."[25]

As mentioned earlier, periodic review of Washington state agency rules is left up to the agencies themselves. This results in a self-policing system that can be ineffective at rolling back unneeded regulations.

Extending JARRC's oversight to existing rules, or creating an entity based on New York's GORR (perhaps building on our own Governor's Office of Regulatory Assistance), would produce a body whose mission would be to search for archaic and unnecessary regulations, or to serve as a sounding board for the business community, allowing business owners to report on which regulations businesses believe are too onerous, not needed, and are not achieving its original goal.

Conclusion

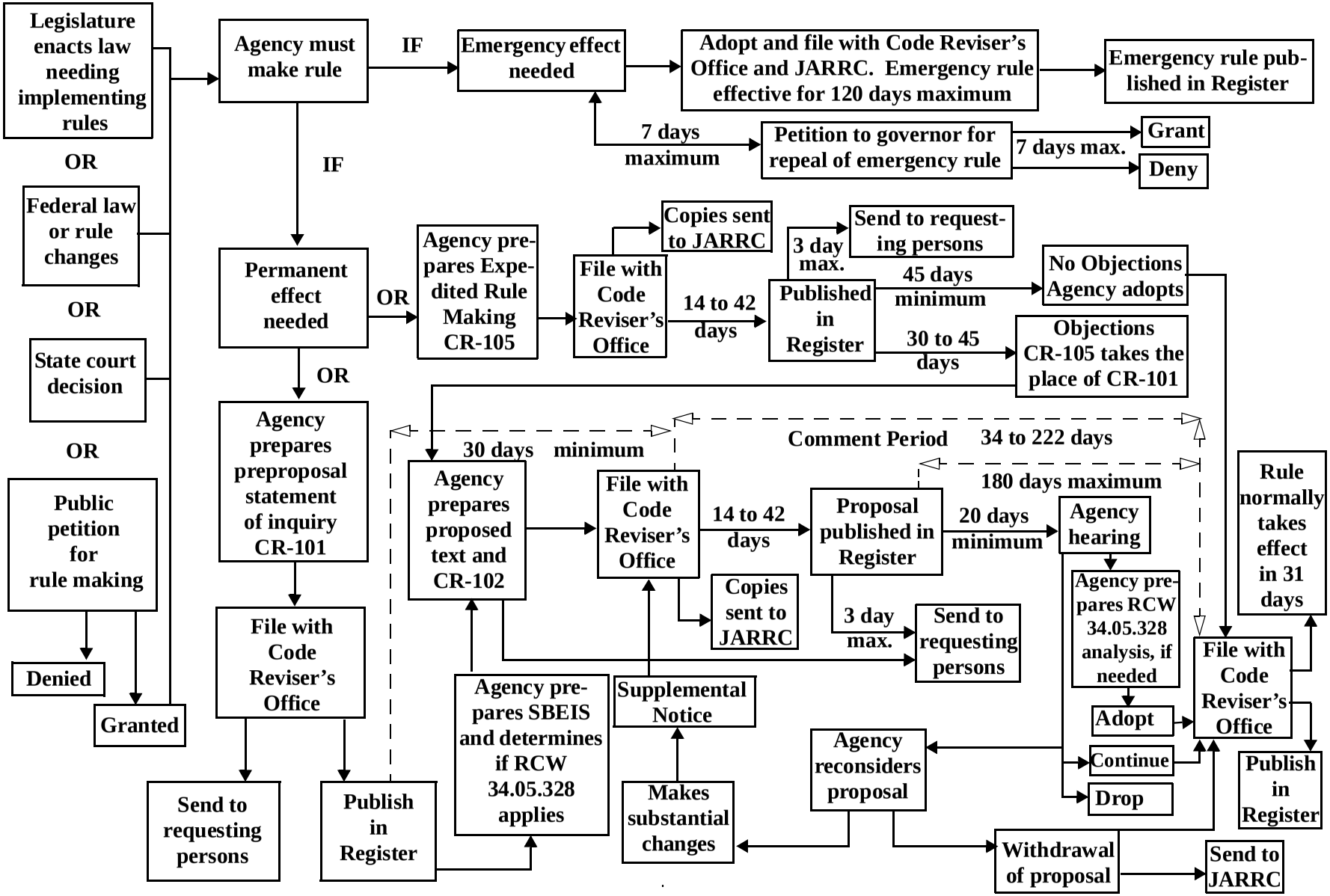
The regulatory process can be very tedious and often the public's view of the process is opaque at best. Policymakers must recognize that regulatory action, whether initiated by the executive or legislative branches of government, have real-world consequences, particularly on smaller businesses and individual citizens.

The federal government and several other states are experimenting with ways to infuse the regulatory process with more transparency. But it is not just about being transparent. As the British Columbia report stated, sometimes government action is not the best way to solve a particular problem. Policymakers and agency personnel should resist the kneejerk regulatory reaction that is common among bureaucracies. Involving stakeholders early in the process will help bring about a better regulatory ecosystem that achieves a public good, without imposing punitive compliance costs, and will help grow Washington's economy.

[25] State of New York Executive Order 2009 – No. 25, available at: http://www.ny.gov/governor/executive_orders/exeorders/eo_25.html

RULE-MAKING PROCESS

(Source: WA State Office of Regulatory Assistance)



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