

RED TAPE REVIEW GROUP  
FINDINGS & RECOMMENDATIONS

APRIL 19, 2010



SUBMITTED BY

Honorable Kim Guadagno, Lieutenant Governor, Chair

Honorable Steven V. Oroho, Senator, District 24

Honorable John J. Burzichelli, Deputy Speaker, District 3

Honorable Scott T. Rumana, Assemblyman District 40

Honorable Bob Martin, Commissioner of Environmental Protection

Honorable Lori Grifa, Acting Commissioner of Community Affairs

Honorable Jeffrey S. Chiesa, Chief Counsel to the Governor

April 19, 2010

Dear Governor Christie:

We are pleased to submit the report of the Red Tape Review Group, the delivery of which fulfills a promise that you made to the people of New Jersey to bring about a fundamental change in the manner in which administrative rules and regulations are promulgated.

The Group has conducted its meetings in a transparent and bi-partisan fashion, and has arrived at a series of unanimous recommendations to improve the regulatory process and thereby promote job creation and retention, economic growth and investment in New Jersey.

The Group would like to extend its appreciation to the Department of Environmental Protection, which provided stenographic services for our meetings, as well as the administrations of Rowan University, Brookdale Community College and Montclair State University, which graciously provided their facilities for our public meetings.

We again thank you for the opportunity to serve the people of the State of New Jersey in this important endeavor. The work of the Red Tape Review Group has been completed pursuant to the provisions of Executive Order No. 3 (2010). Accordingly, we believe that there is no further need to continue Executive Order No. 3 as currently drafted, and request that the order be rescinded.

## TABLE OF CONTENTS

I.	Introduction	1
II.	Executive Summary	3
III.	Summary of Recommendations	6
IV.	Synopsis of the Red Tape Review Process	8
	A. The Gubernatorial Transition Period -- November to January 2010	8
	1. Input Sessions	8
	2. Transition Team Review of Other State Efforts at Regulatory Reform	9
	a. Texas	9
	b. Virginia	10
	c. Ohio	11
	d. Pennsylvania	11
	3. Regulatory Review and Freeze	11
	B. Immediate Post-Inauguration Period/Issuance of Executive Orders -- January to February 2010	12
	C. Red Tape Review Public Meeting Period -- March through April 2010	14

	1. Rowan University -- March 2, 2010	15
	2. Brookdale Community College -- March 9, 2010	15
	3. Montclair State University -- March 23, 2010	16
	D. Legislator Meetings	16
V.	Legislative Recommendations	18
	A. Reform the “Administrative Procedure Act”	18
	B. Local Mandates Reform	24
	C. Unnecessary Boards, Task Forces & Commissions	28
	D. Affordable Housing (COAH)	29
	E. Civil Service: Rationalization of Titles and “Opt-out”	30
	F. Binding Interest Arbitration	30
	G. Education Mandates	31
VI.	Regulatory Recommendations	33
	A. “Common Sense Principles” for Rule-making	33
	B. Results of the 90-Day Regulatory Freeze	34
	C. The 180-Day Review of Existing Rules and Regulations	34
	D. Shortcomings of the Regulatory System	34

	1. Archaic and Anachronistic Rules	35
	2. Rules that Offend Common Sense	37
	3. Rules Where State Regulators Overreach their Authority	39
VII.	Policy Recommendations	41
	A. “Culture Change” in State Agencies	41
	B. A “New Model” for Economic Growth	42
	C. Improvements to Information Technology	44
	D. Office of Smart Growth & State Planning Commission	48
	E. Establishment of an Ongoing Red Tape Review Group	50
	F. Executive Orders to be Rescinded	51
VIII.	Background Information	52
	A. Previous Regulatory Reform Efforts in New Jersey	52
	B. The Administrative Rule-Making Process: An Overview	55
IX.	Conclusion	65
	Appendices	
	A. OAL Substantive Change Memorandum	
	B. OAL Statistics on Contested Cases	

C. List of Boards, Task Forces & Commissions

D. Background on Housing Opportunity Task Force

E. Civil Service Background

F. Background on Education Mandates

G. Results of the 90-Regulatory Freeze

H. Review of 180-Day Review of Existing Rules  
and Regulations

I. List of Potential Executive Orders for Elimination

## I. INTRODUCTION

New Jersey possesses an enviable geographic location, a well-developed network of highways, rail lines, airports and port facilities, noteworthy institutions of higher education and a highly-educated workforce. These attributes have long been the essential ingredients of the State's prosperity.

In recent years New Jersey has increasingly been less able to compete with other states when it comes to opening or maintaining a business, and creating or maintaining jobs. The 2009 *Small Business Survival Index* of the Small Business & Entrepreneurship Council ranked New Jersey 50<sup>th</sup>, out of 50 states and the District of Columbia, based on the public policy climate that the State has created for small business and entrepreneurship.<sup>1</sup> A 2009 survey of 543 CEOs conducted by *Chief Executive* Magazine ranked New Jersey 48<sup>th</sup> among the states for job and business growth.<sup>2</sup>

Against this backdrop, there has been an emerging bi-partisan consensus to improve New Jersey's reputation as a place to establish or grow a business, and create and maintain good-paying jobs. The non-partisan Tax Foundation notes that modern market is characterized by "mobile capital and labor" and that companies will locate where they have the greatest competitive advantage.<sup>3</sup>

Employers who seek to bring jobs and economic growth to New Jersey, or maintain or expand business already located in this State, have suggested that the extensive system of administrative rules and regulations promulgated by State agencies needs to be improved. When compared with other states, New Jersey's regulatory system is regarded as being unpredictable, overly-complicated and often contradictory. In order to allow New Jersey to better compete with other states, policymakers in both the Executive and Legislative Branches of State believe that administrative rulemaking by State agencies should be revised and improved. A new approach to administrative rule-making should be implemented to ensure that the substantive and procedural requirements for rules and regulations:

- Rely upon sound science or other technical data or information;

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<sup>1</sup> Raymond J. Keating, *Small Business Survival Index 2009: Ranking the Policy Environment for Entrepreneurship Across the Nation*, Small Business & Entrepreneurship Council, <http://www.sbecouncil.org/uploads/SBSI2009.pdf> (February 9, 2010)

<sup>2</sup> "CEOs Select Best, Worst States for Job Growth and Business," *Chief Executive*, March 25, 2009, <http://www.chiefexecutive.net/media/usbestandworststates/2009> (February 9, 2010)

<sup>3</sup> Kail Padgitt, *Background Paper: 2010 State Business Tax Climate Index*, Tax Foundation, <http://www.taxfoundation.org/files/bp59.pdf>, (February 19, 2010).

- Are consistent with broader State policy goals;
- Are consistent with the intent of the legislation under which they are promulgated where appropriate; and
- Protect and promote the public interest, including the urgent need to promote economic development and encourage private-sector job creation.

The State Government should not view the success of its regulatory framework through the prism of how many pages of complex paperwork it imposes on entrepreneurs and small business owners, or by the dollar amounts of the fines and fees it collects from people who cannot navigate the intricacies of that system. The success of the State's regulatory system should rightly be measured by how well it achieves compliance with State policy goals.

Fortunately, these goals can be accomplished, and the perception of New Jersey can be changed, without triggering a regulatory "race to the bottom" where public health, environmental and safety standards are compromised in the name of economic progress. There is nothing that is inherently safer, healthier or environmentally-friendly about a system of administrative rules that is incomprehensible, confusing and contradictory.

The Red Tape Review Group's limited mandate was to "review pending and proposed rules and regulations, as well as all operative Executive Orders from previous administrations, in order to assess their effects on New Jersey's economy and to determine whether their burdens on business and workers outweigh their intended benefits." While this report focuses primarily on this mandate, it also chronicles a number of other legislative, regulatory and policy issues that the Group encountered during its deliberations that address a number of long-range policy issues relating to reform of the regulatory system.

It was against this background that the following report was prepared.

## II. EXECUTIVE SUMMARY

This report presents the recommendations of the bi-partisan Red Tape Review Group created under Executive Order No. 3 (2010) and chaired by Lieutenant Governor Kim Guadagno. The Group was charged in Executive Order No. 3 to “review all pending and proposed rules and regulations, as well as all operative Executive Orders from previous administrations, in order to assess their effects on New Jersey’s economy and to determine whether their burdens on business and workers outweigh their intended benefits.”

A series of recommendations follows this summary, categorized by type: Legislative, Regulatory and Policy. The central thesis of this report is simple and clear: the state must achieve a better balance between protecting the public and nurturing free enterprise. The recommendations in this report seek to address the most common complaints the Group heard about the State’s regulatory climate from business people, educators, environmentalists, health care professionals and local government officials during its 90 days of operation, and to incorporate positive suggestions from this broad cross-section of stakeholders. The overarching theme of what the Group heard, as reflected in the recommendations, is that there is a great need for the application of common sense in rule-making and rule enforcement and that State Government must learn to operate in a user-friendly manner.

The report begins with the synopsis of the deliberations of the Red Tape Review Group and the process it used to collect its information, beginning with the gubernatorial transition and ending with a series of public meetings. An informal red tape review team began its outreach to constituent groups during the gubernatorial transition and analyzed the regulatory reform efforts of other states. The team also reviewed 800 pages of proposed regulations that would greet the new Administration when it took office and identified the rules that could be frozen without negative impact. On his first day in office, Governor Christie executed the freeze on proposed regulations in Executive Order No. 1 and a 90-day moratorium on new proposals was instituted. As a first step toward applying the “Common Sense Principles for Rulemaking” of Executive Order No. 2, State agencies were directed to review the frozen proposals for consistency with the order and rescind or modify them as necessary.

The bi-partisan Red Tape Review Group was formed with representatives from both the Legislative and Executive Branches of State Government. In March 2010, the Group began a series of three public meetings at colleges and universities in the southern, central and northern regions of New Jersey. From preliminary work done during the transition, the Group was able to determine the three issues, respectively, that each meeting would address: 1) amending the “Administrative Procedure Act” that governs rule-making; 2) seeking new and better ways to eliminate unfunded local mandates; and, 3) hearing testimony on specific regulations for consistency with “Common Sense Principles.” Well over 100 witnesses testified at the Red Tape

Review Group meetings, while other stakeholders submitted written testimony. In addition, legislative members of the Group held public hearings on regulatory reform in their individual districts.

The next section of this report delves into the bi-partisan recommendations of the Group, starting with those that would be achieved through legislation. While the issue of final decision authority by Administrative Law Judges will require further review, the Group recommends other amendments to the “Administrative Procedure Act” that should expedite both the rule-making and the administrative hearing processes. The Group also recommends new strategies to eliminate unfunded mandates by empowering the Council on Local Mandates to seek out mandates for elimination and by expanding the types of entities that are permitted to bring complaints before the Council. Issues such as affordable housing, Civil Service (particularly as it pertains to mergers and shared services) and binding interest arbitration were among the most cited of onerous burdens at the unfunded mandates hearing. Finally, task forces, committees and advisory boards that exist in name only should be eliminated via legislation or executive order where appropriate.

The following section of the report deals with recommendations that are regulatory in nature and a discussion of the “Common Sense Principles” in Executive Order No. 2. Executive Order No. 1 suspended or “froze” 128 proposed and contemplated administrative rules and regulations that were pending when the administration took office, while 70 proposed rules were permitted to proceed to adoption because it was determined that they fell under exceptions for health, safety, federal compliance or essential agency operations. At the conclusion of the 90-day review period, 16 proposed rules were withdrawn in order to be modified or rescinded as a result of the Red Tape Review process. Given the much larger number of rules already in the New Jersey Administrative Code, the agencies were given a six-month window to review existing regulations for compliance with Executive Order No. 2. Finally, the Group cites some examples of more striking regulatory shortcomings that witnesses identified at the Group’s public meetings.

The report then addresses recommendations that are of a policy nature, such as changing the culture of State agencies so that they become more customer-oriented. The better deployment of information technology with regard to on-line permitting and the State business portal, as well as improved coordination among departments, is recommended. The group acknowledged that the Office of Smart Growth has not lived up to expectations and perhaps needs to be reorganized as a key strategic group. Witnesses throughout the Red Tape Review process consistently defined “one-stop shopping” for permits relating to significant economic development projects as a compelling need. This should be a key feature of a new economic development entity.

The Red Tape Review Group was given a limited mandate and a comparatively short time-frame to complete its work. Accordingly, the final recommendation discusses how to

continue to advance regulatory reform through the vehicle of an ongoing Red Tape Review Committee. Lastly, in order to place this report in an historical perspective and to provide background information, past regulatory reform initiatives in New Jersey are detailed, along with a treatise on the “nuts-and-bolts” of the rule-making process as it currently stands.

### III. SUMMARY OF RECOMMENDATIONS

#### I. LEGISLATIVE

- A. Improve the administrative rule-making process under the “Administrative Procedure Act” by permitting rule proposals to be changed based on public comment, adopting reforms to the system of administrative adjudications, and altering the “sunset” requirements for rules.
- B. Provide for new and expanded powers to combat unfunded mandates, including expanding the number of groups who can bring complaints before the Council on Local Mandates, and enlisting the assistance of the State’s law schools to undertake a review of all mandates presently contained in the statutory law and administrative code.
- C. Through legislation or Executive Order, as appropriate, eliminate unnecessary boards, task forces, study commissions and councils. New standards should be adopted to guide the State with respect to the creation of boards that administer regulated professions.
- D. Affordable housing dictates remain a problematic area for State policy-makers. The Red Tape Review Group, given its limited mandate and compressed timeframes, recommends that the Legislative and Executive Branches continue efforts to arrive at a more effective affordable housing policy that is less burdensome for municipalities and taxpayers.
- E. The burdens of the Civil Service system were testified to at length. While this topic exceeds the mandate of the Red Tape Review Group, the Group acknowledges efforts to rationalize titles underway at the Civil Service Commission and provide a means for a municipal “opt-out.”
- F. Binding Interest Arbitration was testified to at length, but this topic exceeds the mandate of the Red Tape Review Group and requires further review.
- G. Unfunded mandates for both K-12 and higher education should be examined.

#### II. REGULATORY

- A. State agencies should adopt the “Common Sense Principles” for rule-making.
- B. State agencies should proceed with rule rescissions and modifications pursuant to the 90-day review of rules.

- C. State agencies should proceed with rule rescissions and modifications pursuant to the 180-day review of rules.
- D. Shortcomings of the Regulatory System should be addressed such as:
  - 1. Archaic and anachronistic rules;
  - 2. Rules that offend common sense; and
  - 3. Rules that over-reach.

### **III. POLICY**

- A. State agencies should adopt a culture change that results in a more customer-service oriented mentality.
- B. Endorse the creation of a new model for job creation/economic development under the supervision of the Lieutenant Governor. A central element of this model will be the creation of “one-stop” shopping for State permits for significant economic development projects.
- C. Adopt improvements to State Information Technology systems that result in convenient and efficient access across State agency organization boundaries to integrated services for businesses.
- D. Recognize that the Office of Smart Growth and the State Planning Commission must become a key strategic player in State Government, so that permitting and capital investment decisions can be coordinated with planning.
- E. Establish an ongoing, transparent and bi-partisan Red Tape Review Group to succeed the 90-day Red Tape Review Group.
- F. Rescind Executive Orders that confuse or impede economic development goals.

## IV. SYNOPSIS OF THE RED TAPE REVIEW PROCESS

### A. The Gubernatorial Transition Period -- November 2009 to January 2010

Following the 2009 general election and prior to the inauguration, the gubernatorial transition conducted a series of meetings on regulatory reform and mandate relief. Members of the Transition Team (the “Team”) conducted fact-finding through a series of roundtable discussions and a review of regulations to organize the formal work of the Red Tape Review Group that was ultimately established on the Administration’s first full day in office.

#### *1. Input Sessions*

The Team first met on November 10, 2009, and held 18 planned input sessions over the following seven weeks. To kick-off its series of meetings, the Team met with local government officials at the New Jersey State League of Municipalities Annual Conference on November 19, 2009 in Atlantic City. Other large group meetings that included a variety of stakeholders were held at the Eagleton Institute, Montclair State University and the South Jersey Chamber of Commerce. In addition, the Team conducted 14 smaller discussion groups with business people from start-ups to major corporations, educators, healthcare professionals, lawyers, local government officials and environmentalists. The goal of these sessions was to gather opinion from as diverse a cross-section of New Jersey as possible (in a short period of time), on the regulatory policies and processes that impede job growth and retention and burden New Jersey’s economy the most. In addition, the Team sought out local officials to further explore the topic of “unfunded mandates” in an effort to gather information on the most burdensome dictates imposed by regulatory agencies.

As the Team delved into its meeting schedule, certain recurring themes became obvious. Generally, stakeholders expressed the frustration that the rule-making process employed by State agencies has too many dysfunctional parts. These broken parts could be categorized by 10 issues:

- The State policy toward affordable housing and the dictates of the Council on Affordable Housing (COAH) were badly broken and in need of substantial reform;
- Civil Service provisions were frustrating efforts of public entities to share services and reduce spending;
- The culture of the bureaucracies at numerous State agencies was not “customer-service” oriented;

- Unfunded mandates on local governments and boards of education were contributing to increasing property tax rates;
- The process by which State agency permits are administered is broken;
- State Government agencies are plagued by poor information technology systems and infrastructure, which in turn compounds delays in the regulatory process;
- Tax regulations are needlessly complex and often do not recognize how businesses operate in the “real world”;
- Business information reporting requirements are redundant, outmoded, unnecessary or are in conflict with federal law or policy;
- While the State Development and Redevelopment Plan espouses important concepts to guide State growth, the document is not the comprehensive document that should guide regulatory decision-making and State agency capital investments. Moreover, State agencies have acted autonomously to adopt individual plans that impact State growth policies that may be unmoored from the larger State Plan.

## *2. Transition Team Review of Other State Efforts at Regulatory Reform*

The Team also studied reform efforts in other states in an attempt to learn from their failures and successes. In fact, many of the reforms recommended by other states were similar to those proposed in earlier regulatory reform groups in New Jersey, if not implemented. Indeed, in some cases reforms proposed in other States were already “on the books,” although not widely practiced in New Jersey. The Team examined efforts to eliminate red tape and create an attractive climate for job creation and investment in Texas, Virginia, Ohio and Pennsylvania.

a. Texas -- Lieutenant Governor William “Bill” Hobby, Jr. led the major reform effort in Texas in the mid to late-1970s. The “Texas Joint Advisory Committee on Government Operations” worked for 13 months and offered 113 recommendations in its final report.<sup>4</sup> Some key recommendations that the Committee also put forth included a mandatory sunset provision

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<sup>4</sup> The Joint Advisory Committee on Government Operations (the Hobby Commission) was established in 1975 (Senate Bill 319, 64th Legislature, Regular Session), to analyze and improve the operations of state government. The Commission, chaired by Lieutenant Governor William Hobby, consisted of 18 legislators and private citizens, including the Secretary of State. The Commission divided itself into seven subcommittees to gather data before it issued its final reports with recommendations to the governor and the legislature in 1977.

for agencies and commissions, an ongoing review process for incorporation into day-to-day operations, and federal supremacy in rules where there is overlap with State jurisdiction. The Committee focused on process, not product, and from a “macro” perspective analyzed agency programs with the following guidelines:

1. What is the need for this program or service?
2. Can the effectiveness or efficiency in the delivery of services be improved?
3. Are similar services being provided in more than one agency to respond to similar needs, problems or target groups?
4. Can the services be provided at lower cost without hampering their effectiveness?
5. Can this service -- or improved service -- be provided at lower cost or more effectively by modifying its delivery or organizational framework?

b. Virginia -- The Commonwealth of Virginia’s efforts on red tape reform are led by Lieutenant Governor William T. Bolling. On June 11, 2009, the “Attorney General’s Government and Regulatory Reform Task Force” issued a report which reviewed over 8,700 pages of regulations impacting Virginians, acted upon four significant legislative proposals which were ultimately approved by the Virginia General Assembly, and made approximately 350 recommendations for change to affected state agencies.<sup>5</sup>

Many of the recommendations from the Virginia report were designed to promote entrepreneurship and the development of small businesses and included a recommendation to implement web-based “One-Stop Small Business Permitting.” As described later in this report, the New Jersey Office of Information Technology (OIT) has developed a similar concept on a smaller scale, and will expand the application to satisfy goals of both the Red Tape Review Group and the New Jersey Partnership for Action. The Virginia report encouraged agencies to implement a “small-business impact statement” in the administrative rule-making process, which is akin to the Regulatory Flexibility Act in New Jersey. The Virginia task force recommended that state agencies be required to assess alternatives before proposing new regulations and must periodically review existing rules and regulations by following the checklist that we have duplicated below. The review must take into consideration:

1. The continued need for the rule;
2. The nature of complaints or comments received concerning the regulation from the public;
3. The complexity of the regulation;

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<sup>5</sup> The Final Report of the Attorney General’s Government and Regulatory Reform Task Force can be accessed at [http://www.vaag.com/PRESS\\_RELEASES/AttorneyGeneral\\_web.pdf](http://www.vaag.com/PRESS_RELEASES/AttorneyGeneral_web.pdf)

4. The extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and
5. The length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

c. Ohio -- Lieutenant Governor Lee Fisher of Ohio led that state's economic development effort and was a huge proponent of the triumvirate of education reform, tort reform and tax reform to foster an attractive climate for employers and employees. Ohio also focused its job creation efforts on the "new economy" space for clean/green energy. Lieutenant Governor Fisher reached beyond the other 49 states and heavily marketed its improved business climate internationally; Virginia also established offices around the world as part of its outreach. In response to demands for a higher level of government accountability, each State agency must meet with the Governor to develop its own goals that would be consistent with the Administration's. Once the agency determined its goals, it identified metrics by which it could measure progress toward those goals. Those metrics are posted on Ohio's website so that taxpayers can track the progress. The Red Tape Review Group suggests that this could be an additional step toward increasing government transparency in New Jersey.

d. Pennsylvania -- Pennsylvania is widely praised for its efforts to eliminate bureaucracy, including the concept of one-stop-shopping. The Commonwealth has used aggressive marketing tactics to lure businesses to that State. As is the case in Ohio, Pennsylvania invests public funds in new business ventures and funds projects that have historically provided its taxpayers with a high return on investment. The state has emphasized education and urban renewal. To optimize its responsiveness to business, Pennsylvania has organized its outreach regionally.

### *3. Regulatory Review and Freeze*

As of the November 16, 2009 publication of the *New Jersey Register*, the Office of Administrative Law tallied 25,746 of administrative rule text pages in the New Jersey Administrative Code, comprising 925 Chapters of rules in 27 Titles. During the final phase of transition-related activities, Team staffers undertook the task of analyzing proposed rules (totaling approximately 800 pages of the New Jersey Administrative Code) that were pending on January 19, 2010 to determine which rules could be frozen. Governor Christie had promised during the 2009 general election campaign that proposed rules and regulations would be frozen and subjected to a review by a bi-partisan Red Tape Review Group. As a result of the staff's review and analysis, it was preliminarily determined that 156 proposed rules could be frozen, while another 67 proposed rules should be permitted to proceed to adoption.<sup>6</sup> This research

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<sup>6</sup> As a result of proposed rule expirations and rule adoptions the conclusion of the Corzine Administration, the number of rule proposals appearing in the *New Jersey Register* that were ultimately set forth in Executive Order No.

provided the information needed for Governor Christie to issue Executive Orders No. 1, 2, and 3 on January 20, 2010, thus laying the groundwork for the formal work of the Red Tape Review Group.

#### B. Immediate Post-Inauguration Period/Issuance of Executive Orders -- January to February 2010

On January 20, 2010, Governor Christie signed a series of Executive Orders designed to cultivate a new approach to administrative rule-making. Executive Order No. 1 (2010) suspended or “froze” 128 proposed administrative rules and regulations and prohibited the promulgation of new rules and regulations by State agencies for 90 days. The order provided that any proposed rule or regulation published in the *New Jersey Register* on January 20, 2010 was suspended for the 90-day period. In addition, any proposed rule that had been transmitted to the OAL but had not been published in the Register would also be suspended. The provisions of the Executive Order did not apply to any proposed or contemplated rule if the failure to adopt the rule would:

- Adversely impact public safety or security;
- Adversely impact the public health;
- Prejudice the State of New Jersey with respect to the receipt of monies from the federal government or impede the ability of the State to obtain certifications from the federal government;
- Prevent the application of powers, functions and duties essential to the operations of the State agency in question; or
- Adversely impact compliance with any judicial deadline.

Executive Order No. 1 also extended the expiration date of any administrative rule or regulation that would have otherwise expired during the 90-day freeze period until April 18, 2010 and until such time as the extended rule was re-adopted pursuant to the provisions of the “Administrative Procedure Act.”

Executive Order No. 1 froze proposed administrative rules and regulations to allow State agencies to comply with the provisions of Executive Order No. 2 (2010). That order established “Common Sense Principles” for State agency rule-making designed to make the regulatory process understandable, consistent and predictable. Among the reforms mandated by the order,

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1 (2010) totaled 198. Of that number, 128 were suspended or “frozen,” while an additional 70 were not. Added to this number were 23 notices of rule proposals and 5 temporary adoptions involving the Casino Control Commission under review for publication at the time E.O. No 1 took effect.

all State agencies are required to implement pre-proposal and stakeholder processes, so that proposed rules and regulations can be examined by knowledgeable persons in the private sector and academia. Although the use of pre-proposals and stakeholder processes are used in certain circumstances by some State agencies, their use is neither uniform nor widespread.

Executive Order No. 2 also mandated that State agencies adopt “time of decision” rules that require that a permit or approval application shall be governed by the administrative rules and regulations that are in effect when the permit application is filed, except in those cases where otherwise specifically provided for in State law. This provision is designed to prevent State agencies from “moving the goal posts” by constantly changing the requirements for permits and applications while the permit or approval application is pending.

The “Common Sense Principles” also call upon State agencies to adopt regulations that permit waivers from strict compliance, provided that the granting of such waivers is not inconsistent with the core mission of the State agency in question. Policies permitting waivers are necessary in order to avoid situations where compliance with one agency permit program results in non-compliance with the requirements of a different permit program. Also, State officials would have greater ability to use their good judgment in those situations, rather than falling back upon the response that while a waiver may be eminently sensible, “the rules don’t allow it.” The order further directs State agencies to publish their policies for granting waivers on their respective agency websites.

The order also directed State agencies to employ the use of cost/benefit analyses when promulgating rules and regulations. In some instances, the “socio-economic statement” required for rule proposals pursuant to the Rules for Agency Rulemaking is not comprehensive, or fails to take into account legitimate information and scientific data developed by federal government or agencies in neighboring jurisdictions.

Executive Order No. 2 also requires State agencies to detail and justify every instance where a proposed rule exceeds the requirements of federal law or regulations. It further directs that when promulgating new rules, State agencies should not exceed federal standards unless required to do so by State statutory law or only in those cases where it is demonstrated that the enhanced requirements are necessary to achieve a New Jersey-specific policy goal.

Executive Order No. 3 (2010) established a bi-partisan “Red Tape Review Group” chaired by Lieutenant Governor Guadagno to begin a focused and short-term process of changing New Jersey’s approach to regulation by reviewing the 800 pages of frozen rules and regulations to determine which ones negatively impact New Jersey’s economy. State agencies were to be guided by the “Common Sense Principles” articulated in Executive Order No. 2 informed the deliberations of the Group and provided a guide to State agencies for reviewing

their pending rules and regulations. In addition to its mandate to review pending rules and regulations frozen by Executive Order No. 1, the Group was tasked by Governor Christie with the review of all operative Executive Orders from prior administrations, so that orders that impeded economic growth and the creation of jobs could be rescinded or modified.

The Group met informally for the first time on February 4, 2010. Lieutenant Governor Guadagno's staff, the staff from the Legislature and the Office of the Governor's Counsel began work in advance of that meeting and have met at least weekly thereafter.

### C. Red Tape Review Public Meeting Period -- March through April 2010

With the cooperation of Executive Branch departments and agencies, consultation with the leadership of both Houses and both caucuses of the Legislature, the Group undertook a series of public meetings and working sessions to hear testimony on the regulations frozen pursuant to Executive Order 1, and other issues relating to regulatory reform. Individual legislative members of the Group also conducted their own hearings on regulations and mandates that impact New Jersey's economy.

To gather ideas from stakeholders and to conduct as transparent a process as possible, the Red Tape Review Group decided to hold three public meetings over the course of the 90-day period culminating on April 19, 2010. The meetings were purposefully held outside of the State Capitol in Trenton and were scheduled for locations in the southern, central and northern portions of the State. The locations were: Rowan University, Glassboro, Gloucester County on Tuesday, March 2, 2010; Brookdale Community College in Middletown Township, Monmouth County on Tuesday, March 9; and at Montclair State University, Montclair Township, Essex County, on Tuesday, March 23. The public meetings were arranged around three major topics, respectively: "Reforming the provisions of the 'Administrative Procedure Act,'" "Eliminating Unfunded Mandates," and testimony on "Rules that violate the 'Common Sense Principles' on Rule-Making" set forth in Executive Order No. 2 (2010).

The first two hearings lasted for approximately three and a half hours and since the last meeting concerned the broadest topic, it was five-hours in duration.<sup>7</sup> At the initial meeting, given the relatively technical nature of the subject matter, invited witnesses testified and responded to questions with a 20-minute time limit. Subsequently, invited witnesses testified with a 10-minute time limit and all other speakers were given 5 minutes to testify, followed by any questions posed by the Group members. Almost all witnesses submitted written testimony and constituents who did not testify also submitted testimony to be part of the public record.

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<sup>7</sup> The complete testimony of the public meetings of the Red Tape Review Group is available on the Department of State web site at <http://www.state.nj.us/state/>

### *1. Rowan University -- March 2, 2010*

At the Rowan University meeting, the Red Tape Review Group first heard testimony that detailed procedures at the Office of Administrative Law. Lawyers and other experts in administrative law commented as to whether or not Administrative Law Judges should be given final decision authority, subject to appeal in the Superior Court Appellate Division, in contested cases under the “Administrative Procedure Act.” It was noted that in most State departments and agencies now, the State agency head may override the decision of the administrative law judge, which witnesses believed added an unnecessary and undesirable level of uncertainty to the process.

The issue of permitting substantive changes to rule proposals based upon public comment during the rule-making process, including alternatives to the present system, was also discussed in detail. State departments and agencies, as well as stakeholders in the rule-making process, have complained that agencies are hesitant to incorporate changes to rule proposals because they would be compelled to restart the process if a change can be construed as “substantive.” Many witnesses argued that the failure of agencies to adopt changes based on comment turned the comment process into a wasted exercise in which rules were promulgated by State agencies despite the knowledge of their practical flaws.

Witnesses also addressed whether or not the five-year “sunset” provision for most regulations set forth in the “Administrative Procedure Act” is optimal. A total of 26 witnesses registered to speak. The Red Tape Review Group and staff also held a meeting after this hearing with senior personnel from the Office of Administrative Law to obtain further information on the topics raised at the Rowan public meeting.

### *2. Brookdale Community College -- March 9, 2010*

At the meeting held at Brookdale Community College, a group comprised mostly of elected county and municipal officials and educators testified on the most burdensome mandates imposed on them. In addition, 58 members of the general public signed up at the meeting, but not all spoke. The Chairman of the Council on Local Mandates explained the power of that body in ruling when an unconstitutional unfunded mandate has been imposed on a local entity. The Red Tape Review Group was surprised by how few representatives from public entities were aware of the Council on Local Mandates as a forum to challenge unfunded mandates. Clearly the Council has been underutilized. The local officials cited COAH, binding interest arbitration, the DEP Stormwater Management Program and compliance with the records request provisions of the “Open Public Records Act,”<sup>8</sup> (OPRA) as their most burdensome local mandates. The most common concern expressed by educators was the need to implement modifications to the NJ Quality Single Accountability Continuum (QSAC) provisions. Both sets of public entities requested relief from what they considered to be the unduly restrictive provisions of Civil

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<sup>8</sup> N.J.S.A. 47:1A-1 et seq.

Service regulations, which they contend present an obstacle to efforts to implement shared service agreements. While outside the scope of regulatory relief on an administrative level, many local officials requested relaxation from the requirements of the prevailing wage, which they contend raises the costs of public projects and even prevents private citizens from donating their services to their communities.

### *3. Montclair State University -- March 23, 2010*

The Montclair State University public meeting was well attended and the witnesses represented a cross-section of individuals, individual businesses, industry groups, unions, environmental groups, educators, elected officials and healthcare professionals. More than 75 individuals attended the hearing. Testimony ranged from individual complaints about work rules or permitting, to suggestions for long-term studies that assess the effectiveness of existing programs, to the elimination of unnecessary task forces commissions, and licensing boards for regulated professions. Whether supportive of regulations or not, most speakers agreed that less paperwork and greater leveraging of information technology could have at least mitigated many of the common regulatory roadblocks.

Speakers at the Montclair meeting also testified that outdated and unevenly applied rules in the telecommunications industry unintentionally discourage cutting-edge hi-tech companies from calling New Jersey home. Among the most striking examples of rules that violate common sense principles informed the lack of flexibility for hiring in special needs schools. As one witness testified, “[W]e have one high school student who spends each day crawling on all fours and roaring like a bear ... [h]e often relates to other children in a menacing manner.” To comply with regulations, this special needs school is forced to spend scarce resources on teachers for biology and world languages rather than on specialists who can deal with basic behavioral and communication problems.

#### D. Legislator Meetings

These larger public meetings were not the only venues for public participation, and were complemented by meetings held by the legislative members of the Red Tape Review Group. The Assembly Regulatory Oversight and Gaming Committee chaired by Assemblyman Burzichelli held a hearing on February 8, 2010, where the committee took testimony from invited speakers concerning the regulatory process in New Jersey and problems that it has presented for businesses in the State.<sup>9</sup> In addition, the Assembly Regulatory Oversight and Gaming Committee held a meeting on March 4, 2010, to hear testimony from the public

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<sup>9</sup> The testimony from the committee meeting can be accessed at: [http://www.njleg.state.nj.us/MEDIA/OLS\\_MEDIA\\_PLAYER.HTM?wma=!{A}http://rmsserver.njleg.state.nj.us/intemet/2010/ARG/0208-0200PM-M0-1.wma!](http://www.njleg.state.nj.us/MEDIA/OLS_MEDIA_PLAYER.HTM?wma=!{A}http://rmsserver.njleg.state.nj.us/intemet/2010/ARG/0208-0200PM-M0-1.wma!)

concerning the feasibility of prohibiting a State agency from filing with the Office of Administrative Law a notice of proposal or notice of adoption for any rule that would exceed federal standards or requirements, unless specifically authorized by State law. Also, the committee considered legislation to require that all State agency rules be published in the *New Jersey Register*, and that the use of regulatory guidance documents be prohibited unless specifically authorized by State law.<sup>10</sup>

Assemblyman Rumana held a public meeting in his 40th District (Bergen/Passaic/Essex Counties) on local mandates. Finally, Senator Oroho held a meeting in Sussex County with a similar open agenda concerning regulations that defied common sense principles.

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<sup>10</sup> The testimony from the committee meeting can be accessed at:  
[http://www.njleg.state.nj.us/MEDIA/OLS\\_MEDIA\\_PLAYER.HTM?wma=!{A}http://rmsserver.njleg.state.nj.us/internet/2010/ARG/0304-0200PM-M0-1.wma!](http://www.njleg.state.nj.us/MEDIA/OLS_MEDIA_PLAYER.HTM?wma=!{A}http://rmsserver.njleg.state.nj.us/internet/2010/ARG/0304-0200PM-M0-1.wma!)

## V. LEGISLATIVE RECOMMENDATIONS

### A. Reform the “Administrative Procedure Act.”

*1. State agencies should be permitted to adopt changes to proposed administrative rules based upon public comment.*

Many witnesses testified before the Red Tape Review Group in order to give the group a critique of the State’s rule-making process. There are a number of causes which lead to the initiation of rule-making in the State, including: implementation of new legislation, policy changes, executive orders, court decisions, rule-making petitions from interested parties, emergent issues and federal requirements. Significantly, any revision, rescission, or replacement of an existing rule is considered a new rule that must be submitted to the entire rule-making process.<sup>11</sup> Moreover, all rules have a lifespan of five years, and must be readopted under the rule-making process at the expiration of that time.<sup>12</sup>

Once a State agency has prepared a proposed rule, the first step in the review process is the Smart Growth Ombudsman.<sup>13</sup> The Smart Growth Ombudsman reviews proposed rules or substantive changes in current rules to determine whether the rules are consistent with the State Development and Redevelopment Plan.

Following that review process, pursuant to the “Administrative Procedure Act,” public notice of the rule proposal must be given via publication in one of the 24 annual volumes of the *New Jersey Register*. To be included in a given volume of the *New Jersey Register*, the proposal typically must be submitted to the Office of Administrative Law approximately one month prior to publication. The Office of Administrative Law reviews the notice of proposal to ensure that it is in compliance with the requirements of the “Administrative Procedure Act.” The Notice of Proposal must be accompanied by ten statements which summarize the proposed rule changes, nine of which are required by statute, and one of which is required pursuant to an Executive Order issued during the administration of Governor McGreevey.<sup>14</sup> The required impact statements are: a social impact statement, an economic impact statement, a federal standard statement, a jobs impact statement, an agricultural industry impact statement, a regulatory flexibility statement, a housing affordability impact statement, a smart growth impact statement, a smart growth development impact statement, a small growth impact statement. Once a rule

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<sup>11</sup> N.J.S.A. 52:14B-4.9

<sup>12</sup> N.J.S.A. 52:14B-5.1

<sup>13</sup> N.J.S.A. 52:27D-10.2, et seq.

<sup>14</sup> See Executive Order No. 4 (2002) (McGreevey) at <http://www.state.nj.us/infobank/circular/eom4.htm>

proposal is published in the *New Jersey Register*, there is a 60-day comment period. An agency must conduct a public hearing on the proposal, if requested to do so by the Legislature or a governmental agency or subdivision, or if sufficient public interest is demonstrated.

Following the comment period, an agency may adopt its proposal by filing a Notice of Adoption with the Office of Administrative Law. The notice of Adoption must summarize and respond to the concerns raised during the comment period. Minor changes to the proposed rules received during the comment period can be adopted. The publication of the Notice of Adoption in the *New Jersey Register* marks the effective date of the new rules.

The testimony received by the Red Tape Review Group identified a number of problematic issues with the State's current rule-making process. One of the most significant concerns emphasized in the testimony is the fact that it is overly difficult for a State agency to alter a rule proposal based upon public comment, even when the agency receives valid comments which raise legitimate concerns, improve the rule proposals, or expose significant flaws. State agencies are often just as frustrated as stakeholders by this state of affairs. The Rules of Agency Rule-making provide that when a State agency determines to make changes to a proposed rule which are so substantial that the changes effectively destroy the value of the original notice, the agency must give a new notice of proposal and provide the public with an opportunity to be heard.<sup>15</sup> In determining whether the changes in the proposed rule are so substantial, consideration is given to the extent that the changes to the proposal:

- “Enlarge or curtail who and what will be affected by the proposed rule;”
- “Change what is being prescribed, proscribed or otherwise mandated by the rule;”
- “Enlarge or curtail the scope of the proposed rule and its burden on those affected by it.”

According to the testimony received by the Red Tape Review Group, over time, the notion of what constitutes a substantial change has been construed by State agencies in the most narrow and conservative fashion. It would appear that State agencies have erred on the side of not making even relatively minor changes to proposed rules, out of fear that the changes may be construed as substantial and potentially lead to the entire rule proposal being challenged for failure to comply with the proper notice procedure. Moreover, given the attendant additional work and delays associated with the process of re-proposing rules, agencies frequently disregard this option as well. As a result, State agencies may ignore valid and legitimate comments altogether in an effort to finalize the current incarnation of a set of proposed rules, regardless of deficiencies that have been identified.

Therefore, the testimony reflected that the public comment process is effectively turned

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<sup>15</sup> N.J.A.C. 1:30-6.3

into an exercise where public opinion is solicited on proposed rules and then cannot be incorporated into the rule-making process. This predicament where form often outweighs substance is in need of reform.

The Red Tape Review Group recognizes that the requirements of the “Administrative Procedure Act” are established in an effort to protect the real and legitimate constitutional due process rights of the citizens of this State. These protections cannot be ignored or disregarded in the name of efficiency. However, finding a middle ground is necessary. The Red Tape Review Group believes that the tension between an efficient rule-making system that places real and substantial weight on the public’s comments and concerns and a diligent rule-making system that protects the constitutional due process rights of the public to speak to legitimate issues upon fair notice, is not irreconcilable. Indeed, the Red Tape Review Group notes that both the federal government and other states have been able to satisfactorily resolve this tension.<sup>16</sup> Accordingly, the Red Tape Review Group recommends that the “Administrative Procedure Act” be revised to permit State agencies to adopt substantive changes to proposed rules without needing to undergo the entire rule-making process anew, provided that an additional public comment period is provided prior to the altered rule taking effect.

*2. Amending current law to mandate that the decisions of Administrative Law Judges be considered “final agency action” in contested cases is not being recommended at this time; however, a series of immediate reforms to the system of administrative adjudications should be implemented.*

The Red Tape Review Group also considered the authority of Administrative Law Judges and their role within the State’s administrative law process. The Office of Administrative Law and Administrative Law Judges were created by the Legislature as a result of an amendment to the “Administrative Procedure Act” in 1978. Administrative Law Judges are the preliminary adjudicator for determining challenges to agency actions. When a challenge to an agency action is brought, the Administrative Law Judge is responsible for conducting hearings, assessing credibility, making factual findings, and making a preliminary decision on that challenge. The preliminary decisions are then submitted to the head of the government agency for a final decision, to approve, reject, or modify the Administrative Law Judge’s preliminary ruling.

Prior to the creation of the Office of Administrative Law, agency adjudications were typically conducted internally by employees of the agency itself. This situation fostered a perception of agency bias, which undermined the legitimacy of those proceedings. The creation of the Office of Administrative law was intended to bring impartiality, objectivity, and a heightened fairness to agency determinations.

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<sup>16</sup> See Appendix C for a memorandum prepared by the Office of Administrative Law that details the manner in which other jurisdictions address the issue of a proposing agency’s ability to substantively revise a proposed rule.

However, the Red Tape Review Group heard testimony from witnesses who argued that the current system does not go far enough. These witnesses advocated that the decisions of Administrative Law Judges should be the final determination on agency adjudications, subject only to appeal to the Appellate Division of the Superior Court. Specifically, issue was raised with the fact that Administrative Law Judge decisions are preliminary findings that are subject to final approval or rejection by the governmental agency. The witnesses maintained that so long as the head of the governmental agency is still the final arbiter on agency adjudications, the same bias and impartiality concerns predominate over the administrative proceedings – the end result is still that an agency is internally making an adjudication as to the correctness of agency actions taken by an employee of the same agency. It was stressed that this multiple-step process also delays the time frame for obtaining final determinations and adds additional work to the agency’s already extensive list of responsibilities. As a potential middle ground, these witnesses suggested that, if the Administrative Law Judge’s decision is not treated as a final determination, then the decision should still be entitled to a heightened deference upon the agency’s final review of that decision.

The Group received statistical information from the Office of Administrative Law which shed light on the question of how often initial decisions from Administrative Law Judges are overturned by State agency heads. According to the Office, a review of 352 Appellate Court decisions on the Rutgers-Camden Law School website from 2005 onward shows that 70% of the time, the initial decision of the Office of Administrative Law was adopted as a final decision by the Department or Agency.<sup>17</sup> The Appellate Division affirmed 215 of these decisions, or 60% of the cases. The Appellate Division rejected 30 decisions, or 10%, concluding that both the OAL and the agency head erred in their interpretation of the law. In 30 of these instances, or 11%, the Appellate Division overturned the agency head’s decision, affirming the initial decision’s legal conclusion.

In areas such as Medicaid the affirmances primarily involve true legal interpretation of difficult statutory language. In others, such as DEP, the Civil Service Commission, or the Division of Alcoholic Beverage Control, generally the cases addressed penalty matters. Under the legal review standards, to overturn a penalty, the Appellate Division cannot simply choose a different result, but must conclude that the agency action was arbitrary, capricious and unreasonable.

The Red Tape Review Group recognizes that these witnesses have raised significant and considerable concerns regarding the administrative adjudication process and the role of Administrative Law Judges. However, the Red Tape Review Group is sensitive to the fact that the suggestion raised by these witnesses to remove final agency determination on the preliminary decisions of Administrative Law Judges proposes a substantial departure from the existing

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<sup>17</sup> See Appendix E for a detailed chart prepared by the Office of Administrative Law containing a department-by-department breakdown of how contested cases have been reviewed by the Superior Court, Appellate Division.

principles of governmental authority. Administrative adjudication is a basic regulatory responsibility of each State agency, and that authority composes a significant integral aspect of each agency's overall regulatory authority. While it ultimately may be in the best interest of the State to move this function out of the regulatory responsibilities of State agencies to the Office of Administrative Law, such a reorganization of authority implicates a substantial shift of regulatory authority away from the Executive Branch. As such, the Red Tape Review Group believes that this issue must be examined further.

Nevertheless, the Group believes that there is a series of changes to the administrative adjudication process that should be implemented immediately regardless of the outcome and further deliberation concerning final agency action in contested cases:

a. *Oral Initial Decision* -- The first of these reforms concerns Administrative Law Judge's authority to issue oral decisions. Currently, Administrative Law Judges are required to provide their preliminary decision to the agency in written format. The Red Tape Review Group recommends that Administrative Law Judges be authorized to issue their initial opinion orally, unless the agency requests a written opinion, and only if the parties agree to order a transcript. This is intended to streamline the administrative adjudication process in appropriate cases by allowing Administrative Law Judges to issue oral decisions in appropriate matters.

b. *Checklist Decisions* -- Similarly, the next of these reforms concerns the authority of Administrative Law Judges to issue checklist decisions. The Red Tape Review Group recommends that Administrative Law Judges be authorized to issue their initial opinion in a checklist format in appropriate cases. The determination as to what cases are appropriate for checklist decisions, and the composition of the checklist decision format, should be reached in consultation between the Chief Administrative Law Judge and the individual state agencies. This "checklist" recommendation is intended to streamline the administrative adjudication process in appropriate cases by allowing Administrative Law Judges to issue opinions faster.

c. *Authorize Agencies to Delegate Final Authority* -- As discussed above, the Red Tape Review Group believes that further consideration is necessary regarding treating the decisions of Administrative Law Judges as final agency determinations. However, the Group believes that government agencies should have the ability to delegate the agency's authority to issue a final determination to the Administrative Law Judge, as the agency believes appropriate. Therefore, the Red Tape Review Group recommends that State agencies be authorized to delegate all or some of the agency's final decision-making authority on administrative adjudications to the individual Administrative Law Judges. This recommendation will streamline the administrative adjudication process and lessen the bureaucratic workload on agencies by allowing them to forego final review of the preliminary decisions of Administrative Law Judges.

d. *Rationalize Decision Deadlines* -- Most decisions are due from the Office of Administrative Law in 45 days, but there are variations depending upon the nature of the case.

The Red Tape Review Group recommends that these deadlines be rationalized.

*e. Agency Settlement Programs* -- State agencies should establish settlement programs to compromise penalties unless prohibited by law.

*f. Pre-hearing Conferences/Telephone and Video Conferencing* -- The Red Tape Review Group believes that pre-hearing conferences and telephone motions should be permitted by law and encouraged by the Office of Administrative Law. Additionally, witnesses should be permitted to testify via telephone or through video conferencing.

*g. Electronic Filing* -- The Red Tape Review Group believes that the Office of Administrative Law should be encouraged to convert to an electronic filing system.

3. *The sunset for rules that are being re-adopted without changes should be lengthened to seven years provided that the State agencies subject rule re-adoption to a “decision matrix.” In addition, a new procedure for the adoption of rules without substantive changes should be implemented.*

Governor Byrne issued Byrne Executive Order No. 6 (1978), which dictated that all agency rules must expire or “sunset” within five years unless readopted under the rule-making procedure. This five-year sunset rule was subsequently codified by the Legislature in 2001.<sup>18</sup> Accordingly, at the expiration of the five-year period, every rule must be resubmitted to the rule-making procedure.

The Red Tape Review Group recommends that this rule be revised. The five-year sunset provision is an unnecessarily burdensome requirement for well-established rules. Under this requirement, agencies must undertake the full rule-making process for established rules, regardless of whether any issues have arisen or been identified with the current regulatory scheme. The time period should be extended for rules that are readopted without substantive change. An extension of the sunset time frame for unchanged rules from five years to seven years strikes the appropriate balance.

There should continue to be some periodic review of these rules, even if they are not being changed as readopted. As such, State agencies should be required to complete a “decision matrix” with regard to pending rules that are not being changed. The Red Tape Review Group anticipates that the completion of this decision matrix for rules that are not anticipated to change should result in an extension of the “sunset” for an additional two-year period. The Red Tape Review Group recommends that the “decision matrix” include the following inquiries:

1. *Does the regulation exceed its statutory authority?*

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<sup>18</sup> See Section 12 of P.L. 2001, 5 (N.J.S.A. 52:14B-5.1)

2. *Does the regulation have a bona fide purpose that makes sense in the 21<sup>st</sup> Century?*
3. *Does the regulation contribute to the health, safety and/or welfare of the State?*
4. *Are the benefits to the overall good of the people outweighed by the cost of the regulation to the public and the State?*
5. *Can the regulation be monitored and enforced in a manner that retains the benefit to the State with a lower burden (e.g.-electronic reporting methods)?*
6. *Does the regulation conflict with another regulation on the books?*

This “decision matrix” should be implemented in a manner that will ensure that unnecessary rules are not continued in perpetuity simply because they are not substantially changed. This should eliminate unnecessary rules and regulations from the books in an effort to simplify and streamline New Jersey’s regulatory code.

In addition to extending the chapter expiration date for two years, the Red Tape Review Group proposes that when a State agency proposes to adopt a rule without changes, or with technical changes as defined by the Office of Administrative Law, the agency should file a notice of publication in the *New Jersey Register* at least 30 days in advance of the expiration date of that rule. Upon receipt of public notice from a State agency announcing the agency’s intent to readopt an expiring rule without changes, or with technical changes only, the Office of Administrative Law would publish that notice in the Register and note the new expiration date for the rule in the New Jersey Administrative Code. The re-adoption of a rule with substantive changes would still be required to follow the procedures set forth in current law.

## **B. Local Mandate Reform.**

*1. The Council on Local Mandates enabling statute should be expanded to give organizations other than local governments and boards of education standing to bring complaints before the Council.*

The Group recommends that the enabling statute for the Council on Local Mandates be amended to allow representatives of organizations such as the New Jersey Conference of Mayors, the New Jersey State League of Municipalities, the New Jersey School Boards Association, the New Jersey Association of Counties, or the Garden State Coalition of Schools to file a complaint with the Council on Local Mandates concerning a potential unfunded mandate. In addition, current law should be amended to permit the Council on Local Mandates to authorize similar organizations representing member counties, municipalities, or school boards to file a complaint with the Council.

The Council on Local Mandates is a unique constitutional entity -- a virtual fourth Branch

of State Government -- that is independent of the Executive, Legislative and Judiciary.<sup>19</sup> It was created pursuant to an amendment the New Jersey Constitution approved by voters in November 1995, and an enabling statute that became effective in May of 1996.<sup>20</sup> Under provisions of current law, the Council may only hear complaints filed by municipalities, school districts and counties. Interested groups or individuals may only apply to the Council to appear in a case as *amicus curiae* or “friends of the court.”

The definition of an “unfunded mandate” and the types of laws, rules and regulations that the Council may not consider to be unfunded mandates are set forth in the Constitutional Amendment and the Council Statute. The Council has exclusive constitutional authority to rule whether a State law, rule, or regulation imposes an institutional “unfunded mandate” on boards of education, counties, or municipalities. Under the Constitution, if the Council so rules, the “unfunded mandate” in the law, rule or regulation, ceases to be mandatory in effect and “expires.” Therefore, drafters of laws, rules and regulations must be particularly conscious of introducing actions which may run afoul of the unfunded mandate law. Rulings by the Council are final and not subject to judicial review.

The Red Tape Review Group heard testimony at the Brookdale public meeting which indicated that the Council on Local Mandates has nullified only five statutes and regulations. In addition, a number of witnesses from local governments and boards of education present at the meeting were unaware of the Council’s activities, and its ability to respond to unfunded mandate complaints.

Underutilization of the Council is troublesome because when its powers are brought to bear on an unfunded mandate, the decisions of the Council can have a significant impact for property taxpayers. For example, the Chairman of the Council noted in his testimony that in May of 2000, the Borough of Highland Park board and municipal governing council successfully brought a complaint that struck down a regulation that changed the formula for the funding of charter schools. The Legislature subsequently passed a law requiring the State to pay for the added funding for charter schools. According to the Department of Education, local school districts saved approximately \$54.5 million over eight fiscal years following that decision.

Senate Bill No. 1716 of the 2008-2009 session accomplished the goal of this recommendation, and enjoyed widespread bi-partisan support when it passed the Senate by a vote of 38-0 on December 10, 2009. Legislation of similar substance would fulfill this recommendation.

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<sup>19</sup> N.J. Constit. Art. VIII, Sec. II, para. 5

<sup>20</sup> N.J.S.A. 52:13H-1 et seq.

*2. The Legislature should give consideration to a proposed constitutional amendment to authorize the Council on Local Mandates to seek out unfunded mandates for elimination.*

The Legislature should give consideration to an amendment to the State Constitution to empower the Council on Local Mandates to become a proactive body, rather than an entity that responds to complaints. If such a change can be wrought in a cost-effective manner, and within the limitations of the budgetary challenges faced by the State, New Jerseyans will have enlisted a partner in eliminating the unfunded mandates that drive increases in property taxes.

An amendment to the basic governing document of the State is a matter that cannot be taken lightly; and this recommendation merely calls for an exploration of this topic by the legislative branch. However, testimony before the Red Tape Review Group at the Brookdale Community College hearing indicated that oftentimes municipal governments and local boards of education are unaware of their ability to bring complaints before the Council on Local Mandates. Given the burden of local property taxes, it is prudent for the Legislature to examine whether it is wise to harness the expertise developed by the members and staff of the Council on Local Mandates to review statutes and regulations, whenever enacted or adopted, in order to recommend the repeal or modification of those laws and regulations that place an excessive burden on local units of government.

*3. The Red Tape Review Group recommends a full review all statutory and regulatory mandates and suggests enlisting the cooperation of the State's law schools to assist in a review of unfunded mandates.*

Executive Order No. 4 (2010) created a process to prevent the imposition of new unfunded mandates on the part of State agencies.<sup>21</sup> The Order requires every State agency to analyze their proposed regulations and assess how their rules would impact the operations and budgets of local governments. The Order further directs that no agency may propose a regulation that includes an unfunded mandate without the express approval of Governor Christie or Lieutenant Governor Guadagno.

In addition, before proposing any mandate on local government, State agencies will be required to prepare detailed written reports analyzing and evaluating the fiscal impact of any mandate. Agencies must also solicit information on any proposed mandate from affected local governments, businesses, residents, and public stakeholders and include it in their report. The report shall be submitted to the Lieutenant Governor and be made available to the public. Within 30 days of receiving the report, the Lieutenant Governor would determine whether the proposed regulation would constitute an unfunded mandate, and, if so, make recommendations for changes that would bring the proposal into compliance with the law.

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<sup>21</sup> Executive Order No. 4 (Christie) (2010) <http://www.state.nj.us/infobank/circular/eoindex.htm>

If proposed regulation is necessary to respond to emergent circumstances that threaten the public health, safety or welfare, the agency may suspend the reporting requirement. However, as soon as practicable after the emergency has been addressed, the Lieutenant Governor must reinstate the reporting requirement and give the agency a specific deadline for compliance.

While these tools, along with a reinvigorated Council on Local Mandates, can act to staunch the flow of new mandates, there currently exists no proposal other than the constitutional amendment cited above that would put in place a mechanism to seek out mandates that have already been imposed for elimination or modification. At the Brookdale public meeting, the Group heard testimony from Marianne Smith, the Administrator of Hardyston Township, Sussex County, who compiled a list of mandates imposed from Trenton that impact her community.<sup>22</sup> The “Hardyston List” is arguably the only comprehensive list of mandates that has been composed, and it raises questions regarding the costs of law enforcement training mandates, purchasing requirements, environmental planning, mandatory attendance of professionals at planning and zoning board of adjustment meetings, and other mandates that are imposed on local governments by the State.

A comprehensive review and analysis of the Hardyston List and all other extant unfunded mandates could prove a major benefit to the State’s local governments and school boards -- and, most importantly -- to property taxpayers. For example, a long-term analysis could be undertaken to examine whether some law enforcement training mandates could be altered without compromising public safety would be a worthy enterprise. However, such a project would require a significant investment of time and must elicit expert testimony in order to be successful.

The proposal to amend the State Constitution to empower the Council on Local Mandates to seek out and repeal unfunded mandates could be a vehicle for such a project; but if that proposal is not timely or cost-effective manner, then the Group recommends that the State engage in discussions with the leadership of the State’s law schools to create an internship program for their students -- under the direction of State official and their faculty -- to undertake a comprehensive and orderly review of unfunded mandates in the statutory law and New Jersey Administrative Code. Under such a plan, students could receive solid experience and credit towards their studies, while the State would receive bright and able assistance to move this formidable project along at little cost to the taxpaying public.

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<sup>22</sup> The “Hardyston List” of mandates can be accessed at the New Jersey State League of Municipalities web site at: <http://www.njslom.org/Hardyston-Twp-Mandates-Analysis.pdf>

**C. The Red Tape Review Group recommends the consolidation of defunct and inactive boards, task forces and commissions, as well as a review of regulated professional boards.**

*1. Consistent with the provisions of Executive Order 15 (2010), the Red Tape Review Group supports the consolidation by Executive Order or legislation, as appropriate, of defunct or otherwise inactive boards, task forces and commissions that no longer fulfill their intended purposes, have completed their work, or have not been convened for a prolonged period of time.*

Executive Order 15 (2010) provides, in part, that the heads of each principal department in the Executive Branch identify State authorities, boards, task forces and commissions established in or allocated to their respective departments, and provide a recommendation to the Governor's Office not later than May 15, 2010, regarding whether any of those bodies should continue to exist or be eliminated.<sup>23</sup> The Group gratefully acknowledges the assistance provided by the Governor's Office of the Appointments Counsel, which has compiled a list set forth in Appendix C of this report of boards, task forces and commissions that should be consolidated consistent with Executive Order No. 15. A number of these commissions still require staff work from State agencies and their continued presence often serves to confuse the public.

Appendix C contains list of defunct or otherwise inactive boards, task forces and commissions that either: (1) have not met for an extended period of time (in some cases more than 10 years); (2) were never filled with appointed members; (3) addressed a problem that is no longer an issue; (4) fulfilled their mandates or functions; (5) were absorbed by other boards or commissions; or (6) never issued a final report to indicate their task was complete; and (7) at their creation, were not given a date of terminus. The appropriate department confirmed that each board, task force or commission was no longer in operation.

The Red Tape Review Group therefore recommends that the list of entities set forth in Appendix C to this report serve as a starting point for a discussion of boards, task forces and commissions that should be consolidated by legislation or Executive Order, as appropriate.

*2. In addition, the Red Tape Review Group recommends that pursuant to Executive Order No. 15 (2010) further analysis of approximately 500 remaining boards, task forces and commissions be undertaken.*

Such an analysis should be guided by a "bright line test" that if a board or commission has not met for a reasonable and defined period of time, the board in question is in all likelihood not needed. Also, when the mission of a committee or commission overlaps with that of another, the prospect of a "merger" should be explored.

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<sup>23</sup> See Section 8 of Executive Order 15 (2010) (Christie) at: <http://www.state.nj.us/infobank/circular/eocc15.pdf>

The Red Tape Review Group further recommends that whether created legislatively or by Executive Order, new task forces, advisory councils, committees and commissions be given a termination date or act that would indicate a “sunset” (i.e., “The commission will expire upon completion of its final report.”)

*3. The Red Tape Review Group recommends that a study be undertaken to review whether any of the 41 boards and committees, regulating more than 80 professions and occupations under the jurisdiction of the Division of Consumer Affairs in the Department of Law and Public Safety should be abolished or consolidated.*

Approximately 600,000 New Jersey residents are licensed by such boards. The Group notes that in 1971, the Professional and Occupational Licensing Study Commission, chaired by the then-Senator Raymond H. Bateman, recommended four criteria for use in determining when New Jersey should license professions and occupations. Commonly referred to as the “Bateman Criteria,” groups should be licensed when:

- The unregulated practice can clearly harm or endanger the health, safety and welfare of the public and when the potential for such harm is easily recognizable and not remote or dependent upon tenuous arguments; and
- The public needs, and will benefit by, an assurance of initial and continuing professional and occupational ability; and
- The public is not effectively protected by other means; and
- It can be demonstrated that licensing would be most appropriate form of regulation.

The “Bateman Criteria” were designed to provide effective regulation of a profession or occupation in as simple a manner as possible in terms of efficiency, adequacy and administrative soundness, and the Group endorses a study to ensure that professional boards comply with this criteria.

**D. Affordable housing dictates remain a problematic area for State policy-makers. The Red Tape Review Group, given its limited mandate and compressed timeframes, recommends that the Legislative and Executive Branches continue efforts to arrive at a more effective affordable housing policy that is less burdensome for municipalities and taxpayers.**

The Red Tape Review Group heard a great deal of testimony on the subject of affordable housing policy. This discussion underscored that need to arrive at a new housing policy for the State. However, a recommendation in this regard clearly exceeds the Mandate of the Red Tape Review Group as set forth in Executive Order No. 3 (2010). In Appendix D to this report, there is a detailed explanation of the report of the Housing Opportunity Task Force, which was tasked

with a review of affordable housing policies in New Jersey.<sup>24</sup>

**E. Civil Service reform: The Red Tape Review Group heard overwhelming testimony concerning the burden of the current system, which suggests options for reform, including rationalization of titles and legislation to permit municipalities to “op-out” should be implemented.**

The mission of the Civil Service Commission is to attract, develop and retain a high quality workforce for State, county and municipal governments. The commission also maintains a partnership with management and labor to develop a fair, efficient human resource delivery system rewarding quality, merit and productivity. Efforts by the new Chair/Chief Executive Officer Robert M. Czech to streamline operations are detailed in an Appendix E at the end of this report.

Particularly at the Brookdale meeting on unfunded mandates, local officials testified one after another that they were handcuffed by the present Civil Service system. They complained that not only does the system create delays in resolving personnel decisions, but when municipalities are under pressure to share services and/or merge to avoid property tax hikes, Civil Service can become an insurmountable obstacle.

The Governor has recommended legislation to provide an “opt-out” from Civil Service for municipalities. The Red Tape Review Group notes with approval that a bill<sup>25</sup> sponsored by Assemblyman Burzichelli would permit counties and municipalities to withdraw from the Civil Service system by passage of an ordinance by their governing body. Also, a draft bill circulated by the New Jersey State League of Municipalities would allow local governments to drop out of Civil Service either by adoption of an ordinance or through passage of a referendum. Whatever the specific outcome, overwhelming testimony as to the burdens of the Civil Service system suggest a compelling need for reform.<sup>26</sup>

**F. Binding Interest Arbitration was testified to at length, however, the Red Tape Review Group notes that this topic exceeds its mandate and requires further review.**

The Red Tape Review Group heard testimony from local government officials regarding the use of binding interest arbitration when it comes to public service contracts for police, fireman, teachers and other unionized employees. Under such a system, once a stalemate in negotiation occurs between what is offered by the municipality and what is requested by the union a third party, or arbitrator, is brought in. That person’s decision to break the stalemate is

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<sup>24</sup> See Appendix C. A copy of the Housing Opportunity Task Force report can be accessed at: [http://www.state.nj.us/governor/news/reports/pdf/2010033\\_COAH.pdf](http://www.state.nj.us/governor/news/reports/pdf/2010033_COAH.pdf)

<sup>25</sup> See Assembly Bill 2580, introduced March 22, 2010 by Assemblymen Paul Moriarty and John Burzichelli.

<sup>26</sup> Background information on the testimony relating to Civil Service reform is detailed in Appendix E to this report.

binding.

The Group heard testimony from local officials who complained that historically, arbitrators have assumed the employees are entitled to raises irrespective of whatever external fiscal or economic forces are at play in the municipality. They argued that the decisions of arbitrators are out of sync with the fiscal realities confronting local property taxpayers. They suggested to the Group that revisions to the arbitration system are needed to require the arbitrator to consider the impact of their decisions on other governmental services, the impact on property taxes, and the ability for all costs to stay under a legislatively-established cap. The Governor has proposed reforms along the lines of this testimony in the Fiscal Year 2011 State Budget Recommendation Document.

**G. The Red Tape Review Group notes that overwhelming testimony supports the need to provide relief from unfunded educational mandates.**

At the Brookdale meeting on unfunded local mandates, educational organizations urgently called for a moratorium on new regulations. Witnesses concurred with municipal government leaders on the difficulties imposed by the Civil Service system, and the need for “op-out” provisions, as well as prevailing wage relief.

The witnesses representing K-12 school districts, specifically expressed the need for “last best offer” as a negotiating tool; for improvement in the overall mediation system, in which the economy is a factor; for uniformity in curriculum standards statewide; and for more flexibility with the Department of Education’s Quality Single Accountability Continuum (QSAC) for the evaluation of public school districts. While QSAC requires evaluations every three years, witnesses from school communities testified that high-performing districts should then be evaluated every seven years. Please see Appendix F and the end of this report for the Department of Education’s review of unfunded mandates pertaining to education.

Witnesses from colleges and universities supported the removal of State management from collective bargaining for unionized employees at State college and universities. The State is not the employer of record; nor does it pay these employees’ salary. If colleges and universities cannot gain the power to conduct negotiations, they argue for the right to accept or reject terms proposed by the State for collectively-negotiated contracts that affect college and university employees.

The institutions of higher education recommend empowering State colleges and universities to manage their own workers’ compensation programs and claims for workplace illness and injury. Compensation payments from State colleges and universities to the State have increased 100% in five years. Similarly, health claims from workplace illness and injury increased 146%, from \$500,000 in fiscal 2000 to \$1.3 million a year in fiscal 2005.

The colleges and universities also recommend legislation authorizing the Department of Community Affairs to either contract with private firms directly or delegate the authority to conduct code-related inspections to State colleges and universities.

The Group acknowledges the need to reform additional education mandates, and notes that the Governor has proposed a number of the reforms mentioned in testimony in the Fiscal Year 2011 State Budget Recommendation Document. A description of those issues and potential reforms are set forth in Appendix F of this report.

## VI. REGULATORY RECOMMENDATIONS

### A. “Common Sense Principles” for State Agency Rule-Making/Decisions

After hearing repeated testimony as to how the rule-making process is broken, the Red Tape Review Group listened to testimony support of the “Common Sense Principles” for rule-making laid out in Executive Order No. 2. The testimony before the Group generally viewed those guidelines as transformative to a more user-friendly regulatory environment: Advance notice of rules; time of decision; waivers of strict compliance; cost/benefit analysis; federal supremacy and performance-based outcomes.

The information that was learned from the series of informal discussions on regulatory reform and mandate relief held during the gubernatorial transition period led directly the adoption of the “Common Sense Principals” enumerated in Executive Order No. 2. Those principles, in turn, have already begun to change the way State agencies do business, how they review the regulatory process, and even the substance of the rules and regulations that are adopted.

The results of the 90-day “freeze” on regulations as well as the actions being committed to in the 180-day action items clearly show that the “Common Sense Principles” have had their intended effect. Further evidence of agency culture change can be found by the DEP’s process of re-opening the comment period of each of its suspended rules and undertaking open stakeholder meetings of each. The DEP has committed to ongoing, transparent stakeholder and outreach processes to effectuate the Principals in Executive Order No. 2. Other State agencies should follow suit.

The “Common Sense Principles” are just that, common sense processes and decision making values that will result in better ways of doing business and getting results in State Government. The Principals include engaging in advance public outreach on rules, time of decision requirements, the ability to waive rules in certain instances, employing a cost/benefit analysis on rules, justifying exceeding federal standards and refraining from doing so unless a New Jersey-specific policy goal is being pursued, looking to results rather than process, eliminating rules that are conflicting or that are contrary to legislative intent, promoting transparency and predictability in rules, working to lessen burdens and compliance costs to businesses, promoting compliance over sanctions, and continually seeking process and other improvements.

The Group believes that it is important not to lose sight of the value these “Common Sense Principles” have and the need to integrate them into State agency decision and rule-making. Moving forward we believe that particular attention should be paid to how well each State agency adheres to these principles.

## **B. Results of the 90-Day Regulatory Freeze**

After reviewing their frozen regulations in light of Executive Order No. 2 (2010) and the Common Sense Principles, the departments of Banking and Insurance, Education, Environmental Protection, Labor and Workforce Development and Law and Public Safety withdrew a number of proposals for further evaluation and review, including more in-depth cost/benefit analysis, to solicit additional advice and opinion, to lessen the regulatory burden, or to otherwise allow the regulations to expire. The proposals that have been withdrawn, and an explanation of the actions taken with regard to Executive Order No. 2 (2010) are included in an Appendix G to this report.<sup>27</sup>

## **C. The 180-Day Review of Existing Rules and Regulations**

Executive Order No. 2 directed agencies to review their existing regulations for compliance with the “Common Sense Principles,” just as they were directed to review the frozen proposed regulations. Since there are many more existing regulations than proposed regulations, the agencies were given 180 days to complete this task. The Department of the Treasury is well along in its 180-day review of existing rules and regulations pursuant to Executive Order No. 2 and has suggested that the following rules are candidates for repeal or revision since they create unnecessary red tape or are obsolete. Similarly, the Department of Environmental Protection has undertaken a partial review of existing rules and regulations pursuant to Executive Order No. 2 (2010) and has suggested a series of rules for repeal or revision. Detailed lists of these regulations are attached as an Appendix H to this report.<sup>28</sup>

## **D. Shortcomings of the Regulatory System**

In the course of its deliberations, the Red Tape Review Group heard and received testimony from individuals and groups concerning specific instances where the regulatory system had failed. The Red Tape Review Group, in general, recognizes that regulation serves a necessary, positive purpose in our society and many of the recommendations of the Red Tape Review Group concern the regulatory process, not the product. The Group also understands that rule-making often involves striking a balance between the need to provide specificity and predictability for persons involved in a regulated industry, while at the same time giving State

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<sup>27</sup> See Appendix G for a listing of rule proposals by State agency.

<sup>28</sup> See Appendix H for a listing of regulations by State agency.

officers and employees the ability to apply common sense and their own discretion when appropriate.

However, in some cases rules live beyond their usefulness or cause unintended and even irrational consequences. In the following paragraphs we discuss three categories of regulatory failures and examples of each that were related to the Red Tape Review Group in oral or written testimony: (1) anachronistic rules that served a useful purpose in their day; (2) rulemaking that has unintended consequences or requirements that appear to be simply arbitrary or without purpose; and (3) government overreach that has resulted in nothing but cost, delay and frustration.

The following examples are not related to the Red Tape Review Group's limited mandate, namely the approximately 800 pages of rules that were frozen pursuant to Executive Order No. 1 (2010). Nonetheless, as each State agency continues its 180-day review of existing regulations, the Red Tape Review Group suggests that the agencies in question pay particular attention to the rules set forth below.

1. Examples of Archaic and Anachronistic Rules

*N.J.A.C. 12:90 - Boiler Techs*

The Department of Labor and Workforce Development rules require that apartment boilers be continuously monitored and logged hourly. These regulations were designed for industrial equipment and, when applied to residential apartments, unnecessarily burden maintenance staff without providing added safety benefits. Education professionals had a similar complaint about the black seal boiler tech rule, which served an important safety purpose when boiler technology was far more rudimentary. They suggest that costs could be mitigated if one maintenance worker were permitted to monitor several schools.

*Delays in Obtaining Riparian Instruments*

The complicated review process for tidelands grants has resulted in staggering periods of delay for even routine applications. In the last decade, the average applicant faced an average wait of at least three years to receive a final grant. Many applicants endured longer delays, with some grants lingering for five and even six years. Frustratingly, an appreciable portion of these delay occurred during the routine and uncomplicated process of signing the final grants. During this time, the applicant was faced with a difficult and costly choice: either forego beneficial use and development of the riparian land while the multi-year review process concluded, or tie up funds sufficient to cover all possible compensation to the State in an escrow account. Not surprisingly, many applicants simply abandoned their petitions during this process, stalling both

desperately needed commercial improvements to infrastructure, as well as simple enjoyment of residential lands by State homeowners.

The Lieutenant Governor has recently implemented a pilot program to expedite the tidelands process under which she has executed final sign-off on more than 90 grants totaling almost \$3 million of revenue to the State of New Jersey. Once fully implemented, the new program changes are projected to decrease grant processing time from the three year average to less than one, with many new applications finalized in less than six months. As a result, real estate transactions involving riparian lands will be concluded without unnecessary delay, fees can be collected and deposited into the Fund for the Support of the Free Public Schools more readily, and escrow deposits will be returned in a timely manner freeing private capital for development.

#### *N.J.A.C. 2:48-4.1 - Milk Coupons*

New Jersey is one of a handful of states that continue to regulate minimum retail prices for milk and one of 11 that restrict the use of coupons in retail promotional and marketing campaigns. This regulatory scheme originated during the Great Depression, when the demand for milk fell precipitously and farmers suffered tremendous economic distress. Price support schemes were adopted across the United States to guarantee a supply of this important commodity. New Jersey rightly values its remaining dairy farmers, but this regulation does not seem to be an effective way to protect those farmers and contributes to higher consumer prices. In fact, allowing retailers to offer coupons could co-exist with a price support structure at the wholesale level. Furthermore, coupons may now be used by the National Dairy Promotion Board and by restaurant promotions (see N.J.A.C. 2:48-4.2 and N.J.A.C. 2:48-4.3, respectively)

#### *Sub-Metering of Utilities*

New Jersey is the only remaining state that does not permit the sub-metering of utilities in rental housing units. Sub-metering is a means to monitor and account for utility usage in each unit in a multi-family building that was designed with a single master meter to serve the entire building. Fuel, water, and sewer costs are the top uncontrollable expenses for most professional rental housing providers and sub-metering would promote consumer education, advance conservation efforts and reduce waste. Studies have found water savings upward of 15% after sub-meters were installed to measure individual unit consumption.

#### *Business Registration Certificate (“BRC”)*

This is a regulation administered by the Division of Revenue and applies to all contractors and subcontractors who seek to do business with the State and other public agencies in the State. Proof of registration is also required for licensure with the Casino Control Commission. The present \$3,150 threshold is too low for any business transaction in these

times. In addition, municipalities have the ability to purchase goods and services in amounts not to exceed \$18,000 without public bidding. It would seem logical for the BRC requirement to at least be consistent with the \$18,000 limit.

#### N.J.A.C. 13:2-27.1 - *E141 Forms*

Although the Prohibition era is history, certain rules for establishments serving liquor still seem rooted in that philosophy. Establishments with liquor licenses are required to fill out E141 Forms that list all employees working on the premises on a given day. Technically, even contract workers like a musical band performing at the establishment should be listed on this form. The regulated community contends that payroll forms combined with employee applications include all the information relevant to assessing qualifications -- including of course, age, as well as criminal background. Due to the high turnover in the restaurant and hospitality industry, failure to have an updated E141 form is among the most common violations and this administrative oversight can result in penalties that include the costly suspension of a liquor license.

#### 2. Examples of Rules that Appear to Offend Common Sense

##### N.J.A.C. 7:7 and N.J.A.C. 7:7E, respectively - "*Public Access Rules*"

The Group heard testimony at the Montclair State University meeting regarding the implementation of the Department of Environmental Protection (DEP) Public Access Rules. The regulations were adopted in December 2007 as amendments to the rules governing the administration of the Coastal Permit Program and Coastal Zone Management regulations, addressing the public's right to the access and use of tidal waterways and their shores -- including the ocean, bays and tidal rivers in the State. Specifically, the regulations require that as a condition of receiving a permit, on-site, permanent, unobstructed public access to the tidal waterways and shores need be provided on a 24-hour, seven-day-a-week basis. If the access is not practicable, then DEP regulations require that a payment be made to DEP to provide off-site access somewhere else. The Group heard testimony from marina operators, the business community and port operators that the regulations will impact security at military installations, sensitive industrial facilities, commercial ports and harbors and energy facilities.

The Group recognizes that the Public Trust Doctrine establishes the right of the public to use tidal waterways and their shores, including the ocean, bays, and tidal rivers. The doctrine upholds that public rights to tidal waterways and their shores are held by the State in trust for the benefit of all of the people. Further, the Group understands the critical importance of tourism to the economy of New Jersey and the need to protect natural resources and encourage recreational uses of the waterways of this State for swimming, sunbathing, fishing, boating and walking along tidal waterways and their shores. However, it became equally clear that the DEP regulations requiring unfettered access to recreational marinas would impose immense legal

liability, security and safety-related costs on an industry that is essential to the State's tourism economy.

It should be noted that the DEP presently operates six recreational boat marinas through lease or direct State ownership. The Group heard testimony that the DEP staff in charge of those marinas had told the gubernatorial transition team that due to a lack of resources and personnel, DEP-operated marinas could not provide 24-hour access to the public. In other words, the DEP could not afford to comply with the provisions of an administrative rule that it was willing to impose on the private sector.

N.J.A.C. 7:25-4.1 et seq. - *"Exotic Species" Regulations for Bison Raised as Livestock*

Pursuant to regulations adopted pursuant to the "The "Endangered and Nongame Species Conservation Act," N.J.S.A. 23:2A-1 et seq., bison (or American buffalo) is considered an "exotic species," and their possession by farmers is regulated by the Division of Fish and Wildlife in the Department of Environmental Protection. Farmers raising more than 10 bison are subjected to an annual fee for the possession of such animals, even if they are being used as agricultural livestock and raised for the purpose of being turned into steaks and burgers, rather than for any scientific or exhibition purposes.

N.J.A.C. 18:6-3.4 - *Cigarette "Sales" Tax Misnomer*

One might assume that a sales tax is paid on the total price for an actual transaction, but not necessarily for cigarettes. New Jersey prohibits the sale of cigarettes below the minimum price set by the State. This does not take manufacturers' discounts into consideration, which lower the price that retailers can charge consumers. The Department of the Treasury adopted a rule on December 7, 2009 that requires retailers to pay sales tax on the arbitrary minimum sales tax set by the State, rather than on the actual price paid by the consumer. If the price paid by the consumer, due perhaps to manufacturers' discounts, is lower than the State minimum price, then the retailer must remit the extra sales tax required and, in effect, subsidize the consumer for purchasing cigarettes. This provision has apparently played havoc with the calibration of cash registers at convenience stores throughout New Jersey, and imposes a burden on retailers that they do not encounter in other states.

N.J.A.C. 13:2-13.13 and N.J.A.C. 13:2-19.1, respectively - *Wine Tasting in Restaurants*

The Group heard testimony regarding Division of Alcoholic Beverage Control (ABC) regulations on wine tastings. The Group heard testimony that restaurants which currently hold on-premise consumption licenses and are, therefore, able to responsibly serve wine as part of wine tasting dinners, are being subjected to regulation in the same manner as wine tastings that occur in liquor stores.

N.J.A.C. 13:28-1.1. et seq. - *"Sweet & Sassy"*

At the Montclair State University meeting, Red Tape Review Group heard from a franchisee that employs 34 people and is ready to close her business in New Jersey because the regulatory environment will render it uneconomical. “Sweet & Sassy” is a salon, store and party place for young girls. Licensed stylists work in the salon area. In the party area, typically, high school girls act as party coordinators for younger girls. The older girls lead the group in singing, dancing, arts and crafts, opening up cards and presents and eating birthday cake. They also pin the party-goers’ hair into “updos” at the start of the party and pat light glitter make-up on their faces, which takes approximately five minutes for each partygoer. According to testimony received by the Group, no brush, implements or equipment that must be sanitized is involved in these activities. The main responsibility of the party coordinators is to lead the group in activities. The Board of Cosmetology in the Department of Law and Public Safety warned the proprietor that licensed stylists must apply the make-up and perform the up-dos. The Board also fined Sweet & Sassy \$300 for each high school girl engaged in these activities, which, of course, becomes part of the public record. The Board strongly suggested that the use of high school students working as program coordinators be discontinued and replaced with cosmetology and hairstyling students with student permits (senior work permit), that have completed a minimum of 600 hours of training in a vocational school or proprietary school licensed by the Board. The Group recognizes the legitimate need to ensure that regulatory requirements for decontamination, sterilization, sanitation and awareness of communicable, contagious and infectious diseases are maintained. It should be noted, however, that this franchise business operates in 17 other states, and that these regulatory issues have only been encountered by the franchisee that operates in New Jersey.

### 3. Examples of Rules Where State Regulators Overreach their Authority

N.J.A.C. 13:34-11.2b, N.J.A.C. 13:34-13.1a 2, b and c - *Counselor Licensing*

The Board of Marriage and Family Therapy adopted rules regarding the licensing of professional counselors. The regulations were apparently not adopted to address an existing problem and the extant counseling programs at New Jersey’s institutions of higher education are well-respected and have produced graduates who have gained licensure in professional counseling. Unlike those of any other state professional counseling licensing board, the new regulations mandate a CACREP-accredited degree as the sole criterion for licensure. (CACREP accreditation takes three to ten years). In fact, only one-third of counseling programs are accredited by CACREP nationally and just 11% of those are 60-credit Mental Health Counseling programs. With one exception, no other boards in New Jersey require an applicant to have graduated from a discipline-specific accredited program. Existing programs at New Jersey institutions would be decimated and the number of applicants for licensure from New Jersey, other states without CACREP accreditation, and re-entry professionals would be curtailed. As a

consequence, consumers would have less choice (particularly consumers in underserved communities) at probably greater cost.

N.J.A.C. 7:7E-8.14 - *Wildwood Parking/ CAFRA*

In concert with DEP, the City of Wildwood, Cape May County, updated its Municipal Master Plan and Land Use Ordinances to lay the foundation for urban redevelopment and year-round tourism. To permit construction of the necessary hotel accommodations for the State-sponsored Wildwood Convention Center, the city amended its Land Development Ordinance to permit high rise structures in July 2005. Wildwood required 0.8 parking spaces for each one-bedroom residential unit, 1.3 spaces for each 2-bedroom unit and 1.9 spaces for each 3-bedroom residential unit. DEP required 2 parking spaces per residential unit, however. Furthermore, DEP defined a lock out unit as an additional residential unit requiring another 2 spaces. Therefore, a base hotel unit with a lock out option required 4 parking spaces. The cost of construction and these unnecessary parking spaces could not be supported by projected revenues. After negotiations, DEP agreed to revise the parking requirement to 1 parking space for units up to 650 square feet in size and the proposed Coastal Zone Management Rule Amendment – Traffic Rule was published in the *New Jersey Register* on January 20, 2009. However, the Traffic Rule amendment was never approved.

## VII. POLICY RECOMMENDATIONS

**A. The Red Tape Review Group endorses the adoption of measures to ensure a “Culture Change” in State Agencies to fundamentally change how they view and treat the public with whom they interact, how they measure “success,” and the transparency in how they operate.**

The Red Tape Review Group heard extensive testimony that the culture of State agencies is not customer-service oriented, that the agencies are more concerned with the process and the paper than on the actual results attained, and that they often make decisions out of the public eye and without sufficient public input. The Group believes that we need to change the culture in which State agencies function and how State employees treat the citizens they serve.

In too many instances, individuals and businesses that apply for a permit, especially from regulatory agencies such as the Department of Environmental Protection, are treated as if they are trying to do something wrong rather than trying to do something that the law allows. A permitted activity is essentially that, an activity that the law permits to occur, not something that should be discouraged or automatically rejected. Permit applicants represent interests that are seeking to enjoy the benefits that life in the State offers or are trying to achieve economic gain, both of which should be encouraged within the confines of the law.

The Group recommends that Cabinet Officers instill in their departments a conviction that New Jersey must become a “yes we can” place to do business and State employees must become customer-service oriented. To do this a “change management” process must be put into place following standard organizational development theories, practices and processes. The strategy must be clearly defined, the workforce properly prepared and the process managed at all levels.

State agencies must also measure success in a totally different manner. Success is not based on the number of permit applications processed, fines imposed, or pages of regulations adopted. It is measured by our ability to improve the quality of life for the citizens of New Jersey and by meeting the overall policy goals which support that quality of life.

The Group recommends that an Executive Order be issued to ensure that Cabinet Officers develop a set of metrics for each of their Departments that establish quantifiable results-oriented goals and that reports be issued each year to show progress toward those goals.

The Group recommends that Cabinet Officers require their Departments to be as open as possible in their decision-making processes and that, when major decisions are being considered,

extensive outreach, including stakeholder and workgroups, be established to gain as much information as possible. This is also consistent with many of the “Common Sense Principles” enumerated in Executive Order No. 2.

**B. “The Red Tape Review Group endorses the creation of a new model for job creation and retention, economic growth and investment in this State, and the consolidation of existing economic development programs to a central source under the supervision of the Lieutenant Governor.**

Regulation in New Jersey has made the cost of doing business in the State higher than in other states in many ways. The inefficiencies and excessive cost of regulation have impeded the overall development of the economy and the growth and expansion of the State’s individual businesses, and has discouraged the location of new business in New Jersey. Neighboring states, on the other hand, have been successful in retaining and attracting new private-sector investment and jobs.

The current economic climate in our State simply is not tolerable and requires a new course, one where all hands are “on deck” working together to jump-start the economy and create optimum conditions for future growth and prosperity. The work of the Red Tape Review Commission clearly signals the State’s recognition that it must change how it does business if it is to bring New Jersey aggressively back into the marketplace for jobs and investment, both domestically and worldwide. Critical to the long-term success of the overall effort will be the involvement of New Jersey’s business community. To this end, the Group is supportive of a new model for the State’s economic development, investment and job creation programs. Key participants in this new approach will be the Lieutenant Governor, existing programs within State Government and New Jersey’s business leaders.

State Government must take the lead in transforming New Jersey’s business climate into one that is supportive and open to business. There currently is a need in New Jersey for a proactive, integrated business retention and expansion strategy focused on providing professional, coordinated services to both new and existing businesses. There also is a dire need for a single point of operations to exclusively coordinate an efficient and timely process for submission, evaluation and resolution of applications for business permits, licenses, certificates and other approvals. The most potent way to send a signal, both within and outside the State Government, that things are going to be different is to place the primary responsibility for assisting businesses to deal efficiently and effectively with State regulations with the Lieutenant Governor. Under this new model, the Lieutenant Governor would be responsible for “breaking down silos” -- resolving internal differences and compelling departments and agencies to work together on an integrated and outcomes-based approach.

To further facilitate a “one-stop-shopping” experience for businesses, the Lieutenant Governor would maintain and oversee staff to provide guidance to persons who inquire about

permits, licenses, certificates and other business-related approvals. As the State's driver of economic growth, the Lieutenant Governor would work with the various State departments, agencies and divisions to facilitate and expedite permitting processes. To support the Lieutenant Governor in carrying out these new responsibilities, we recommend that each State department designate a liaison at the deputy or assistant commissioner level to work directly with the Lieutenant Governor and her staff, similar to the recommendation of the Subcommittee on Economic Development & Job Growth. Also, it should be made clear, both internally and externally, as to whom within State Government is responsible for these functions and oversight. These functions are best led by the Lieutenant Governor.

The most successful states have created specially empowered not-for-profit organizations to plan and execute business development and corporate outreach strategies, typically relying on a mix of public funding and corporate financial support. The Commission also endorses this approach and supports the creation of such an entity to participate with State Government in the new model. Given New Jersey's current budgetary constraints, it simply cannot afford to effectively market its vast assets to attract and retain businesses. However, neither can the State afford to continue to lose business and jobs to neighboring and other states. New Jersey would be well served by an organization whose primary mission is to aggressively market and promote the State as a place in which to invest and do business, highlighting the State's core strengths, including its strategic access to local and global finance markets, highly trained workforce, creative project funding, world class seaports and airport, extensive energy and communications infrastructure and elite research universities.

This not-for-profit organization would be privately managed and led. Its governing board would be comprised of a small, diverse cross-section of chief executive officers from some of the State's leading industries. In order to be most effective, this newly formed organization should be funded with private funds. The organization would be managed by a chief executive officer and skilled professional staff recruited from within industry and the ranks of professional economic development organizations nationally. This organization would develop targeted "contact" strategies focused on the industries and projects the State most wants and can realistically attract; participate in industry conferences and trade shows; and, conduct targeted advertising to reach potential "customers." Key to the development of this outreach would be an ongoing dialogue with input from the State.

The EDA is a well established authority, which has among the broadest range of powers of any public and/or private economic development entity, serving as an economic development, real estate development and incentives manager. Given the fact that it is the central point of contact for the majority of the State's incentive programs, EDA could serve as the financial arm of this new approach. In keeping with EDA's mission to attract and retain businesses through financial assistance, once prospects are identified, the EDA would continue to provide the required financial solutions, as well as analysis of the competitive gap to be addressed on a project-by-project basis. This could include tax-exempt and taxable bond financing, loans, loan

guarantees, venture capital and business and tax incentives, along with other incentives and variables as may be necessary in order to close the competitive gap.

Both government and the private sector are deeply committed to the economic welfare of New Jersey and together can change the trajectory of the State's economy. This new economic development model, the Lieutenant Governor, EDA and the planned not-for-profit organization - each would have clearly defined, yet highly complementary, role that could provide the State with a comprehensive and competitive approach to retaining and attracting businesses. The Group is confident that such a partnership would deliver the highest level of industry-leading marketing and "total customer experience" that New Jersey needs to win and retain more jobs and investment.

**C. The Red Tape Review Group endorses improvements to the State Government's approach to information technology which recognize that "Technology is the Enemy of Bureaucracy."**

The Group heard testimony throughout its deliberations that New Jerseyans regard their government as being a vast bureaucracy with too many insular agencies, many drifting away from a focus on the needs of citizens and businesses toward the needs of Trenton. The Group believes that there is no better place to confront this challenge than in the relationship between State Government and the business community. Facing a severe economic climate and historic fiscal challenges, the government must work to make New Jersey competitive again.

The Group recognizes that the effort made and the outcome realized in attracting, retaining, and supporting businesses will go a long way toward defining New Jersey's future. Information Technology (IT) can play a key role in this transformation. This is a key resource at our disposal to rapidly and cost-effectively change the way government operates while reorienting the relationship between the State Government and the business community.

The current structure of State Government has grown over time, often as a result of decisions that were based on specific needs or in an effort to react to specific problems. While much attention is correctly focused on improving the delivery of services to constituents by eliminating organizational inefficiencies, the Group believes it is not necessary to wait for departmental reorganization to occur in order to deliver on the goal of improved and integrated services to the business community.

Over the years, private sector companies have worked hard to offer on-line services through a consolidated view of their customers. Regardless of the number of computer systems residing in the back office, they've taken the steps to link them in order to provide seamless service to their customers. State Government should work just as hard in this regard.

The Office of Information Technology (OIT) has proposed a series of ideas to improve the State's approach to IT issues using existing fiscal resources. The central elements of this plan respond to issues raised by persons appearing before the Group, and are outlined below:

*What Taxpayers and Persons Creating Jobs and Investment Should Expect*

- **Convenient and Efficient Access to Integrated Services providing businesses with easy access to efficient and integrated services, and simple methods to fulfill reporting obligations, saves businesses time and money, and promotes a more efficient state government.**

Access to integrated services, and methods to fulfill reporting obligations, will be provided through online channels that businesses find convenient. They will be organized by function and not by agency to insulate businesses from organizational boundaries within State Government. A single online "Customer Account" will be developed for each business operating in or moving to New Jersey. The account will be used by authorized representatives of a business to conduct online transactions, fulfill reporting requirements, seek automated and online help, interact with call centers, and apply for services and financial subsidies, across all agency boundaries. Through the "Customer Account," authorized representatives will have a comprehensive view of a business's interactions and its relationship with State Government. Agencies will accept a single set of credentials from businesses and where permissible, use the same information provided by them, so as to minimize the business's need to provide the same information over and over again.

Today, a business paying taxes, applying for a Department of Environmental Protection permit, and competing for a State contract, must maintain multiple accounts with the State Government. This requires the business to register multiple times and to manage multiple versions of the same information across the bureaucracy. Businesses fiercely compete to survive and prosper in the marketplace, and every dollar spent navigating the bureaucracy is a dollar no longer available for capital investment or new hires. The State must rapidly move to provide more convenient access to integrated services for the business community.

New Jersey should enhance and expand its Premier Business Services (PBS), currently managed by the Divisions of Revenue and Taxation. PBS currently allows one-stop access to all electronic tax filing and payment services applicable to a business, as well as access to the business's filing/payment history. While presently lacking a cross-agency perspective, and in need of a more user-friendly interface, its online process for vetting a business's credentials is notable. PBS should be enhanced to be even more user-friendly and expanded, cross-agency, to become the single "Customer Account" for each business.

- **World Class Customer Service Employees and Processes Businesses interacting with knowledgeable State Government employees, who have a comprehensive view of a business's interactions with State Government, saves time and money and provides the State Government with opportunities for improving and enhancing service delivery.**

To efficiently coordinate and provide services to businesses, State Government employees and agents who serve the business community will have available, appropriate views of "Customer Account" information that span organizational boundaries. Protocols and workflows that coordinate, improve responsiveness, and enhance and speed the delivery of integrated services will be automated, and used across agencies.

Today, there is no easy way to identify the services a business is receiving from various State agencies. This hinders New Jersey's ability to coordinate service delivery and to proactively promote new opportunities. Each agency maintains its own set of business information and typically lacks the protocols and technologies for inter-agency sharing of that information.

For example, development subsidies, environmental permits, training grants, and highway right-of-ways are provided by different agencies. A New Jersey business, seeking to expand, is left on its own to determine which of these services are available or required for its expansion. It is then left on its own to coordinate the delivery of these services. Without a coordinated response, this process may be prolonged unnecessarily costing the business time and money.

From a policy perspective, in order to make informed decisions, the State needs reliable analytics to gauge the impact of programs on specific businesses or business groups. Today, each request for a composite, cross-agency view of the services provided to a business becomes an onerous task likely to involve multiple staff resources from multiple agencies. Unfortunately, businesses are often more knowledgeable about the services they are receiving from the State than is the State Government itself.

New Jersey should expand and enhance its Customer Relationship Management (CRM) system, championed by the New Jersey Economic Development Authority (EDA), and used primarily to manage a business's interactions with the EDA. The CRM system should be used to organize and synchronize business processes across agency boundaries. While presently lacking a cross-agency perspective, and in need of a unique business identifier to link disparate agency systems, the CRM system could be used to rapidly improve the coordination of services.

- **Transparency -- An open government that provides businesses with a clear view of its activities encourages honesty, integrity, and efficiency.**

All public information, including financial, regulatory, and operational information should be readily available to any business. It should be provided online, organized to be easily accessible and searchable, and consistently branded. While the State has developed a one-stop business portal, the inability to link together agency systems in order to provide a composite view of activities across State agency silos inhibits the desire for transparency.

- **Opportunities for Active Participation -- An ongoing, two-way conversation between businesses and State Government encourages government responsiveness and innovation.**

State Government should increase its presence and participation in business-oriented social networking sites, and will use automated help and survey forums, to better understand the needs, questions, and ideas of businesses.

Today, New Jersey provides few opportunities for small businesses to be heard. The State relies heavily on standard call centers to resolve problems, collects ideas and issues from businesses through the submission of forms, and uses simple ‘frequently asked questions’ as automated help. Modern day companies use more sophisticated methods to gather customer feedback and provide world-class customer service.

In March 2010, Facebook surpassed Google as the most visited site in the United States. Facebook is increasingly being used as a home for small business websites and business networking. Most State agencies block access to Facebook. Starbucks uses Salesforce.com’s “IdeaExchange” to accomplish online polling and voting for product development -- always maintaining a critical touch point with its customers. No State agencies currently maintain this sort of relationship with the State’s customers. Dell Computer uses online chat to allow its technicians to maintain multiple help sessions with customers seeking assistance. None of the major State agencies serving the business community have implemented similar technology. While progress has been made within a few agencies, a statewide approach needs to be developed that takes advantage of the power of social networking media.

#### *How Should the State IT System Operate?*

- **Use Technology to Present a Unified View of New Jersey State Government**

Government will always consist of organizational silos that treat the management of information as discreet agency responsibilities. Unfortunately, government’s inherent organizational boundaries are counterintuitive to businesses. In order to provide businesses with

a clear and easily navigable view of its activities, government can use current technologies to create a transparency (i.e., information) layer above the organizational silos.

The State should commit to building an architectural blueprint that guides the structure of the transparency layer and that blueprint should be a required design element in every IT project. All business-related IT projects will be required to integrate with the transparency layer.

- **Drive Efficiencies into Government Operations**

Interagency protocols, workflows, and IT activities will be vetted against a blueprint of the administration's business goals. Proposed protocols, processes and IT activities that are not aligned with a clearly articulated business driver, will not be undertaken.

- **Embrace New IT Delivery Models**

Historically, government IT practitioners relied heavily upon the construction and management of physical infrastructure (e.g., networks, servers, software) to deliver services. However, today's IT industry is transforming into a virtual, Internet-based service delivery engine. IT companies now provide an array of models from simple data center hosting to fully operational software as a service (SaaS). IT management should fully assess alternatives for delivering electronic services. The old paradigm in which government must build everything will shift to a model where the most appropriate delivery model is used.

**D. The Red Tape Review Group recognizes that the Office of Smart Growth and the State Planning Commission need to be strengthened. A transfer of their functions to the Department of State could serve to reinvigorate the planning functions of State Government, and ensure that planning activities complement job creation and retention, economic growth and investment.**

The Office of Smart Growth (OSG) in the Department of Community Affairs (DCA) provides staffing to the New Jersey State Planning Commission (SPC) and the New Jersey Brownfields Redevelopment Task Force. Through the State Development and Redevelopment Plan, the OSG works to improve the efficiency and reduce the costs of land development and infrastructure in New Jersey by expanding areas of coordination and cooperation among State and local agencies.

The OSG was initially constituted as the Office of State Planning in 1986 to staff the SPC in developing and implementing the State Development and Redevelopment Plan and to pursue other activities to improve intergovernmental coordination and cooperation as defined by the

“State Planning Act.”<sup>29</sup> As originally envisioned, the OSG and SPC would streamline the planning and development process in the State and serve as the focal point at which various State agencies would coordinate to advance State planning strategies. These planning strategies would then engender economic growth opportunities in a streamlined and predictable manner.

Members of the planning community as well as members of the Governor’s Transition Subcommittee for the Department of Community Affairs, note that the OSG and SPC have not achieved their intended purposes for several reasons. First, the planning functions and controls over vast areas of land in the state are governed by other planning entities and regulatory schemes (Highlands, Pinelands, Meadowlands, Fort Monmouth, CAFRA, etc.). Second, cooperation with the OSG is voluntary and there is no reason or incentive for municipalities to work within its guidelines or planning strategies. Third, OSG and SPC have no enforcement powers. Fourth, in light of the foregoing, OSG has become a mere advisory office. Fifth, OSG and SPC’s interaction with other State agencies that have enforcement powers, most notably the DEP, further frustrates their purposes, since the functions of OSG and SPC are almost always duplicated by other State agencies.

Accordingly, the planners and the DCA Transition Subcommittee recommended one of two options: the OSG and SPC be abolished; or both entities be repositioned in the Department of State as a “one-stop” shop wherein the private and public sectors can utilize them for purposes of carrying out future development of the State. The focus of such an office would be to serve as a liaison with all State agencies involved in the oversight or regulation of development projects Statewide.

Testimony before the Red Tape Review Group did not support the abolition of either the OSG or the SPC. In fact, there was considerable support for the idea that a new State Plan for the 21<sup>st</sup> century must be developed that sets up key principles, and State agency rules and master plans must be coordinated with this overall State Plan. Witnesses propped that state planning should be used as a tool to align all levels of government behind a shared vision for future growth and preservation, as well as a means to streamline and coordinate regulations and focus capital spending.

Additionally, witnesses noted that there exists a multitude of plans established by numerous State agencies that may or may not be coordinated with the State Development and Redevelopment Plan. These plans include documents such as the DEP Statewide Water Supply Plan, the DOT and New Jersey Transit 2030 New Jersey Long Range Transportation Plan, the DOT 2007 Comprehensive Statewide Freight Plan, the Pinelands Comprehensive Management Plan, the Highlands Regional Master Plan, the Coastal Zone Management rules, the New Jersey

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<sup>29</sup> N.J.S.A. 52:18A-196 et seq.

Meadowlands Commission Master Plan, the Global Warming Response Act Recommendations Report, and the New Jersey Energy Master Plan, to name but a few.

The Red Tape Review Group concurs with the sentiments expressed by witnesses that New Jersey's planning and regulatory environment sends conflicting signals about where growth will be supported by State permits and policy. While these conflicts are not necessarily a result of bad or unnecessary regulations, they are the result of the fact that State regulations are not coordinated with each other, and are devised by individual agencies acting in an autonomous manner.

**E. The Red Tape Review Group created pursuant to Executive Order No. 3 (2010) recommends the creation of an ongoing Red Tape Review Group.**

The members of the Red Tape Review Group believe that the establishment of an ongoing, transparent and bi-partisan entity to continue the work started by the Group established pursuant to Executive Order No. 3 (2010) is warranted. Such a recommendation is in keeping with the commitment made by the Governor in the 2009 general election campaign to make red tape review a "permanent feature" of his administration.

First, the sheer number and volume of submissions presented to the 90-day Group constitutes a strong argument in favor of the establishment of a permanent body that can be convened after consultation with the bi-partisan leadership of the Legislature. Individuals can appear before this body on a periodic basis to bring complaints about, or suggestions to improve, the regulatory process. Second, a long-term approach to regulatory reform is in keeping with activities in other states. For example, the Virginia Government and Regulatory Reform Task Force took three years to accomplish its review of 8,700 pages of regulations in that state.<sup>30</sup> In Massachusetts, a joint effort to review regulations by the Governor and Attorney General began in October of 2007 and remains ongoing as of the date of this report.

The creation of an ongoing review body could help ensure that State agencies complete their review of existing rules and regulations required under the provisions of Executive Order No 2 (2010). Finally, a permanent group could serve a useful role in advising the Lieutenant Governor on an ongoing basis with respect to administrative rules and regulations that unnecessarily impede job creation, economic growth and investment in this State.

The Red Tape Review Group believes that in order for such a group to enjoy the confidence of the general public, it should contain members from as broad a cross-section of New Jersey as possible, including former State and local officials, leaders from large and small business, environmentalists, consumer advocates, in addition to private citizens. The Group believes that specific criteria should be established to ensure that the deliberations of such a

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<sup>30</sup> [http://www.vaag.com/PRESS\\_RELEASES/AttorneyGeneral\\_web.pdf](http://www.vaag.com/PRESS_RELEASES/AttorneyGeneral_web.pdf)

group are open and fair to all parties, and that input is solicited from individuals who support, as well as oppose regulations under review. The ongoing Group should consider establishing subcommittees that correlate to policy areas and/or State agencies.

The Group believes that legislation currently pending in the 2010-2011 legislative session contains a number of elements that could guide deliberations on the creation of a body to review regulatory policy in this State. Senate Bill No. 339 (Oroho/Sweeney) establishes the “New Jersey Commission on Government Efficiency and Cost Control” to recommend measures for efficiency and cost reduction in State Government operations. Although S-339 creates a commission to deal with government efficiency generally, its provisions contain proposals that would prove useful in the creation of a body to review rules and regulations. For example, S-339 contains suggests that the State Government solicit input, ideas, and recommendations from current and retired State Government workers through a website and through the county-based 211 telephone system. The legislation also provides for the appointment of active or retired employees of private-sector companies who, through their performance in the private sector, have demonstrated an exceptional ability to conduct business operations in an efficient and cost-effective manner.

Accordingly, the Governor should replace Executive Order No. 3 (2010) with a new ongoing Red Tape Review Group.

**F. The Red Tape Review Group recommends the elimination of Executive Orders that confuse or impede economic growth activities should be rescinded.**

The Red Tape Review Group recommends that Executive Orders that confuse or impede New Jersey’s economic growth strategies be rescinded. A list of these potential Executive Orders for elimination are included in the Appendix I to this report.

## IX. BACKGROUND INFORMATION

### A. HISTORY OF PREVIOUS REGULATORY REFORM EFFORTS IN NEW JERSEY

Bringing “common sense” into the regulatory process has been attempted by prior administrations with varying degrees of success. While each of the previous endeavors sought to unshackle the State’s economic growth potential from unreasonable and unproductive regulations, the current unprecedented economic crisis in New Jersey elevated the profile and the importance of this reform effort. Governor Christie also recognized that a successful attempt at statewide reform to rekindle job creation would required no less than the expertise, energy and coordinated efforts of the bi-partisan Red Tape Review Group and a commitment to make such an effort an ongoing part of his administration.

#### *Reform by Executive Order*

While perhaps not as immediate in breadth or scope, executive orders have been issued by prior governors with a similarity of spirit. For example, stating that “[t]he number of boards, commissions, committees and councils are proliferating needlessly,” Governor Byrne signed Executive Order No. 54 in 1977 to order an annual review by each department to justify the existence of it boards, commissions, committees and councils, to be approved by the Office of the Governor’s Counsel. As evidence that permitting problems are not a modern day phenomenon, that same year Governor Byrne established the Cabinet Committee on Permit Coordination (the “Committee”) by Executive Order No. 57. The Committee included the Commissioners of Community Affairs, Environmental Protection, Transportation and the Office of Business Advocacy, among others, to analyze the permitting process and make suggestions for improvement. Any person who proposed a construction project with costs of \$500,000 or more was given access to the Committee to discuss the project and assigned a state employee as “expediter” to coordinate the review of the project, advise the applicant and keep the Committee abreast of developments. Governor Byrne also created the Citizen Committee on Permit Coordination to advise the Committee. Moreover, the executive order directed that all departments “shall approve, condition or disapprove an application for a construction permit within 90 days following the date that application is complete.”

Through Executive Order No. 100 in 1985, Governor Kean resurrected the Committee with additional Commissioner members, the Citizens' Committee on Permit Coordination and ordered that a Permit Coordinator from the Office of Business Advocacy expedite permit reviews for all projects. The executive order also urged the construction industry to utilize the newly-developed "One Stop" Permit Identification System.

In April 1994, by Executive Order No. 15, Governor Whitman subsumed the Committee and the Office of Business Advocacy into the newly created Office of Business Ombudsman within the Department of State. (By Executive Order No. 1 in 1994, Governor Whitman created the New Jersey Economic Master Plan Commission that was charged with developing a plan for economic growth and sustainable prosperity. The Commission identified permitting and undue regulatory enforcement as hindrances to economic growth.) The Office of Business Ombudsman was to direct "a comprehensive effort to assist businesses in dealing effectively with State Regulations." In 1977, Executive Order No. 71 moved the Office of the Ombudsman to the Department of Commerce and Economic Development where an Account Management System was established to formulate and execute strategies to attract and retain businesses in New Jersey. Alongside marketing efforts, endeavors to reform the system increasingly became focused on how best to negotiate the regulatory maze.

In April 2006, Governor Corzine signed Executive Order No. 6, creating the New Jersey Commission on Government Efficiency and Reform ("GEAR"). The purpose of GEAR was to "evaluate the budget, structure and organization of government in New Jersey...and advise the Governor on governmental restructuring, effectiveness, best practices, efficiencies, cost-saving measures, and how best to achieve economies of scale in the delivery of services and programs, at the lowest possible cost, consistent with mission and quality." GEAR developed task forces to help execute its mission: the Higher Education Task Force, the Budget Controls and Personnel Reform Task Force, the Task Force on Sentencing and Corrections, and the Health Care Task Force. Subsequent reports by these Task Forces offered an array of recommended changes on a host of State activities, not all of which were implemented.

### *Past Reports with Recommendations*

One of the more comprehensive treatments of regulatory reform in recent history was a product of the 1988 Study Commission on Regulatory Efficiency ("SCORE"), created through legislative enactment in 1987. In fact, the true genesis of SCORE was an initiative begun in 1985 through the Coalition for Regulatory Efficiency, developed in part "to serve as a vehicle to create heightened public awareness of the developing [regulatory] crisis." SCORE sought to identify rules and regulations that were duplicative, unnecessary and that unfairly increased the cost of doing business in New Jersey. In its 25-page report, the SCORE team advanced 24 recommendations covering four categories: (1) legislative, (2) agency, (3) Administrative

Procedures Act, and (4) implementation. As recently as December 2009, not all of the SCORE recommendations had been implemented, and the status of other recommendations was inconclusive.

Whitman efforts resulted in the larger initiative, Strategy to Advance Regulatory Reform (STARR). In July 1995, the STARR report was issued; it was followed by a detailed “A Progress Report on Regulatory Reform” a year later. It was developed “to harness the energies of business and government to provide the highest quality of life.” Based on information collected in hearings held in the fall of 1994, the report sought to identify specific priorities for action; present guiding principles for each agency to follow; detail the initiatives, priorities and accomplishments of the various Cabinet Departments; and benchmark those needs with recommendations from past reports.

In March of 1994, a report developed by the New Jersey Institute of Technology (NJIT) for the Senate Budget and Appropriations Committee also focused on regulatory reform. That NJIT report (“A Review of the Economic Impact of Environmental Statutes, Rules and Regulations on New Jersey Industry”) identified categories of critical issues impacting the State’s business climate such as: 1. excessive fees and fines; 2. overly adversarial relationships between regulators and businesses; 3. high compliance costs; 4. burdensome paperwork; 5. state-of-the-art technology requirements; 6. obstacles to research and development activities; 7. right-to-Know labeling and reporting requirements; and 8. compliance assistance for small business manufacturers. It made 24 recommendations for legislative and regulatory changes. Not all of these recommendations were implemented.

While many good ideas for government reform were never executed, the current economy almost demands action. Under the leadership of Lieutenant Governor Guadagno and with consensus agreement by the Executive and Legislative members on the recommendations to eliminate unnecessary red tape and foster job creation, there is reason to be optimistic that the Red Tape Review Group will be able to succeed where past efforts have fallen short.

## B. THE ADMINISTRATIVE RULE-MAKING PROCESS IN NEW JERSEY: AN OVERVIEW

The “Administrative Procedure Act,” (APA)<sup>31</sup> establishes the procedures that executive branch agencies must follow when exercising their authority to adopt rules and regulations.

### OFFICE OF ADMINISTRATIVE LAW

The New Jersey Office of Administrative Law (OAL) is an Executive Branch agency located in, but not of, the Department of Treasury. The OAL advises Executive Branch agencies on making rules and regulations, and requires the agencies to follow statutorily prescribed steps in rulemaking. Further, it ensures that the promulgation of rules and regulations includes adequate opportunity for input by anyone interested and affected. The Division of Administrative Rules in the OAL reviews all Executive Branch agency rulemaking notices for compliance with the APA and the *Rules for Agency Rulemaking*.<sup>32</sup> The division also serves as a resource for State agencies for the proper adoption of rules and regulations.

Executive Branch agency rulemaking notices are processed by the OAL for publication in the *New Jersey Register* (the “Register”), which is published twice a month. The Register is the official publication for duly proposed and adopted rules and regulations. The Register also contains Executive Branch agency public notices, Executive Orders and Reorganization Plans. Following publication of adopted rules and regulations in the Register, rules and regulations are incorporated into the New Jersey Administrative Code (N.J.A.C.), which is the official OAL publication containing all effective rules and regulations adopted by executive branch agencies. Each agency’s body of rules and regulations is codified in a title of the NJAC.

The OAL Division of Rules, though its Manager and staff, oversees publication of the *New Jersey Register* and the New Jersey Administrative Code by LexisNexis Matthew Bender. The current publishing contract runs from February 2005 through February 2012. Under the terms of the contact, the OAL receives an annual licensing fee in the amount of the staff salaries of the Division of Administrative rules, plus royalties of 21% of gross sales, together totaling almost \$1 million per year.

### *ADMINISTRATIVE LAW JUDGES*

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<sup>31</sup> N.J.S.A. 52:14B-1 et seq.

<sup>32</sup> N.J.A.C. 1:30 et seq.

As stated above, the OAL is independent of supervision or control by the Department of Treasury. The OAL is headed by a Director who reports directly to the Governor and who serves as the chief judge to a group of administrative law judges. An administrative law judge (ALJ) is a full time officer of the OAL, and is not permitted to hold other employment. An ALJ is appointed by the Governor and confirmed by the Senate for a one-year term. After this initial term, the Governor may re-appoint the ALJ to a four-year term. Any subsequent reappointment is to a five-year term and requires Senate confirmation.

The ALJs are responsible for the administrative hearing functions of all but certain specifically exempted types of cases,<sup>33</sup> and cases where a State agency head decides to conduct a hearing rather than transmit the matter to the OAL.<sup>34</sup> Upon determining a matter to be a “contested case,” a State agency transmits the contested case to the OAL. Litigants do not apply directly to the OAL for a hearing. As a general rule, hearings are public, except special education and certain human services cases, where confidentiality is required by federal regulations. An ALJ presides over a contested case, which is conducted according to hearing rules established by statute and by the OAL. The ALJ provides a neutral forum where the evidence of all parties, often including the agency with subject matter jurisdiction over the case, is presented.

The ALJ prepares an initial decision that is sent to the State agency head within the time frame set by statute for the particular substantive area of the case, usually 45 days. The ALJ’s initial decision may be affirmed, modified, or rejected by the agency head empowered to make a final decision in the matter. Any order or final decision rejecting or modifying the initial decision must specify in clear and sufficient detail the nature of the rejection or modification, the reasons for it, and the changes in result or disposition caused by the rejection or modification. If a State agency head does not adopt, reject, or modify the initial decision within 45 days, and unless the period is extended as provided by statute, the initial decision becomes the final decision.

#### THE “ADMINISTRATIVE PROCEDURE ACT”

The APA defines an “administrative rule” as an agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intra-agency and interagency statements; and (3) agency decisions and findings in contested cases. The OAL *Rules for Agency Rulemaking* provide that, for

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<sup>33</sup> Exempted cases include those arising from the Parole Board, the Public Employment Relations Commission, the Division of Workers' Compensation and the Division of Tax Appeals.

<sup>34</sup> N.J.S.A. 52:14F-8.

purposes of determining effective dates, there are five types of rules and regulations: new rules, amendments, repeals, re-adoptions, and emergency rules.<sup>35</sup>

The APA requires an agency to give notice of its intention to adopt, amend or repeal a rule or regulation, and to publish that notice in the *New Jersey Register*. The notice must include a summary of the proposed rule or regulation and various analyses of its potential impact. The agency must give members of the public reasonable opportunity to comment on the proposal, and must publish a report of those comments, along with the agency's response

### *PRE-PROPOSALS*

The OAL has adopted rules and regulations for the use of "pre-proposals" by Executive Branch agencies. A "pre-proposal" refers to a preliminary proceeding for the purpose of eliciting ideas, views and comments of interested persons on a contemplated rulemaking proceeding. It may include a notice of the subject matter of the intended rulemaking without proposing the text of a rule or regulation and request the public's viewpoint on the particular area sought to be regulated and the particular provisions which should be included in the proposed rule, or if specific rule changes are contemplated, an agency may publish a pre-proposal notice with the proposed text of a rule and elicit the public's comments.

This preliminary proceeding precedes the filing of a formal rule proposal, and is not required by the APA. An agency may use any reasonable informal procedures and means of notice to solicit participation from the regulated or interested public. However, the *Rules for Agency Rulemaking* provide that when a State agency determines to conduct a deliberative proceeding with respect to a contemplated rulemaking, the agency shall submit a "notice of pre-proposal" to the OAL for publication in the Register and provide at least a 30-day public comment period prior to submission of any formal notice of proposal on the same subject.

### *RULE PROPOSALS*

The APA provides that prior to the adoption, amendment or repeal of any rule or regulation, an agency must provide notice of the "terms of substance" of its intended action. The APA requires an agency to prepare for publication in the Register a statement setting forth a summary of the proposed rule or regulation, an explanation of the purpose and effect of the rule or regulation, the specific legal authority under which its adoption is authorized, a description of the expected socio-economic impact of the rule or regulation, a regulatory flexibility analysis, or the statement of finding that a regulatory flexibility analysis is not required, a jobs impact statement, and an agriculture industry impact statement. A rule proposal is also required to include a federal standards statement and a smart growth impact statement; and according to the

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<sup>35</sup> See N.J.A.C. 1:30-1.2

*Rules for Agency Rulemaking*, the “socio-economic statement” is divided into a social impact statement and an economic impact statement. A rule proposal is also required to contain a housing affordability impact statement and a smart growth development impact statement.<sup>36</sup>

### *IMPACT STATEMENTS*

The social impact statement describes the expected social impact of the proposed rulemaking on the public. It includes a description of who is affected, the nature of the social impact, the projected reaction to the rule or regulation, an explanation of the positive or negative consequences to the various parties affected, and any social conditions which may have precipitated the rule or regulation.

The economic impact statement includes an explanation of who the proposal will affect economically and describes the expected costs, revenues, and other economic impact upon governmental bodies of the State and any segments of the public proposed to be regulated. State agencies which adopt, re-adopt or amend State regulations that exceed any federal standards or requirements are required to include in the rulemaking document a “Federal Standards Analysis.” The analysis is to include “a statement as to whether the rule or regulation in question contains any standards or requirements which exceed the standards or requirements imposed by federal law.” This requirement applies to any rule or regulation that is adopted, re-adopted or amended under the authority of or in order to implement, comply with or participate in any program established under federal law or under a State statute that incorporates or refers to federal law, federal standards or federal requirements.<sup>37</sup>

The jobs impact statement is required to include an assessment of the number of jobs to be generated or lost if the proposed rule takes effect. In addition, an agriculture industry impact statement provides information on the impact of the proposed rule or regulation on the agricultural industry, and requires the State Agriculture Development Committee to review the rule proposal to determine its impact on the agriculture industry of the State. If the committee determines that the proposed rule or regulation adversely impacts the agricultural industry in a significant manner and notifies the State agency of that determination, the agency must consult with the SADC prior to the adoption of the regulation.<sup>38</sup>

Under the provisions of the “New Jersey Regulatory Flexibility Act,” a regulatory flexibility analysis is required if a rule imposes any reporting, recordkeeping or compliance requirements on small businesses.<sup>39</sup> The law defines a “small business” as any business which is

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<sup>36</sup> N.J.S.A. 52:14B-4.1b

<sup>37</sup> Exec. Order No. 27 (Whitman) (1994), (<http://www.state.nj.us/infobank/circular/eow27.htm>) & N.J.S.A. 52:14B-22.

<sup>38</sup> N.J.S.A. 4:1C-10.3

<sup>39</sup> N.J.S.A. 52:14B-16 et seq.

resident in this State, independently owned and operated and not dominant in its field, and which employs fewer than 100 full-time employees. A rule proposal must include either a regulatory flexibility analysis or a statement of finding that a regulatory flexibility analysis is not required.

State law also requires the filing of a housing affordability impact statement, which requires State agencies to provide: (1) an estimate of the number of housing units impacted by the proposed rule; and (2) an estimate on the increase or decrease in the average cost of housing which will be affected by the rule. The housing affordability impact statement is not required if the State agency determines that the rule would impose an insignificant impact on housing, either because the scope of the rule is minimal or it is unlikely that the regulation would result in a change in housing costs.<sup>40</sup>

Current law further requires the filing of a smart growth development impact statement, which describes the types and an estimate of the number of housing units which a proposed rule would apply to, an estimate of the increase or decrease in the availability of affordable housing which will be affected by the regulation, and a description of whether the proposed rule would affect new construction within Planning Area 1 or 2, or within designated centers under the State Development and Redevelopment Plan. Like the housing affordability impact statement, this statement is not required if a State agency determines that the proposed rule would have an insignificant impact, or if there is an extreme unlikelihood that the rule would change housing production within Planning Area 1 or 2 or within designated centers.

Finally, an Executive Order issued in 2002 requires State agencies which adopt, amend or repeal any rule or regulation adopted pursuant to the APA to include a “smart growth impact statement” describing the impact of a proposed rule or regulation on the New Jersey State Development and Redevelopment Plan.<sup>41</sup>

#### QUARTERLY RULEMAKING CALENDARS

The APA requires agencies to develop and publish in the *New Jersey Register* a quarterly rulemaking calendar setting forth the agency's anticipated rulemaking activities for the upcoming six months. Each item listed on the calendar is required to include a citation to the legal authority authorizing the rulemaking action, a synopsis of the rulemaking and its objective or purpose, and the month and year in which publication of the notice of proposal is anticipated. The APA also states that a State agency notify OAL when it wishes to amend its calendar of rulemaking activities. Further, the APA requires that any change in rulemaking calendar shall provide that the agency take no action on that matter until at least 45 days following the first

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<sup>40</sup> N.J.S.A. 52:27D-329.1 et al.

<sup>41</sup> Exec. Order No. 4 (McGreevey) (2002) (<http://www.state.nj.us/infobank/circular/eom4.htm>)

publication of the amended calendar in which the announcement of that proposed rulemaking activity first appears.

The AP allows the following exceptions to the rulemaking calendar: (1) cases where failure to adopt the rule would prejudice the State under federal law; (2) cases where a specific statutory authorization requires the adoption of the rule in a shorter time period; (3) cases involving an imminent peril; (4) cases where the State agency has published a notice of pre-proposal for the rule; or (5) rules under which a 60-day comment period is provided.

### PUBLIC COMMENT PERIODS AND PUBLIC HEARINGS

The APA requires that all interested persons be afforded a reasonable opportunity to submit data, views, or arguments, orally or in writing, and that the executive branch agency consider all written and oral submissions respecting the proposed rule or regulation. If within 30 days of the publication of the proposed rule or regulation sufficient public interest is demonstrated in an extension of the time for submissions, the agency is required to provide an additional 30 day period for the receipt of submissions by interested parties and the agency may not adopt the proposed rule or regulation until after the end of that 30 day extension.

The APA requires an Executive Branch agency to conduct a public hearing on the proposed rule or regulation at the request of a committee of the Legislature, or a governmental agency or subdivision, or if sufficient public interest is shown, provided such request is made to the agency within 30 days following publication of the proposed rule in the Register. However, many agencies elect to conduct public hearings without such a request and publish notice of the public hearing as part of the proposal notice. The APA sets forth requirements for a public hearing, including the requirement for at least 15 days notice of the hearing, and that a verbatim record of each hearing must be maintained, and copies of the record be available to the public at no more than the actual cost. The hearing officer is also required to make recommendations to the agency regarding the adoption, amendment or repeal of a rule or regulation, i.e., the “Summary of Hearing Officer’s Recommendations and Agency Response” required to be included in the notice of adoption.

### RULE ADOPTIONS

When an agency adopts a proposed rule or regulation, the agency is required to prepare a “notice of adoption” and submit the notice to the OAL for publication in the New Jersey Register. The APA specifies a number of components that must be included in a notice of adoption, including, if appropriate: a “Summary of Hearing Officer’s Recommendations and Agency Responses”; a “Summary of Public Comments and Agency Responses”; a “Summary of

Changes Upon Adoption”; a “Summary of Agency Initiated Changes”; a Federal Standards Statement; and the text of any changes between the rules and regulations as proposed and as adopted, specifically indicating additions and deletions.

It should be noted that an agency may chose to partially adopt a proposal, i.e., adopt some pieces of a proposal and leave part of the proposal pending, or adopt some pieces of a proposal and re-propose other parts with changes. The time frame for an agency to go from publication of a proposal in the Register to adoption varies, depending on the length of the public comment period and the amount of public comment received; however, in no case can it take more than one year. If a proposal has not been adopted and filed with the OAL within one year from the date the notice of proposal was published in the Register, the proposal expires. Before the proposed rule amendment, repeal or re-adoption can be adopted; the agency must resubmit the notice of proposal for publication in the Register and must comply again with the notice and opportunity to be heard requirements of the APA.

#### DIFFERENCE BETWEEN PROPOSED & ADOPTED RULES

Where, following the notice of proposal, an executive branch agency determines to make changes in the proposed rule or regulation which are “so substantial that the changes effectively destroy the value of the original notice,” the agency is required to give a new notice of proposal and public opportunity to be heard. In determining whether the changes in the proposed rule or regulation are so substantial, OAL considers the extent that the changes: (1) enlarge or curtail who and what will be affected by the proposed rule or regulation; (2) change what is being prescribed, proscribed or otherwise mandated by the rule or regulation; or (3) enlarge or curtail the scope of the proposed rule or regulation and its burden on those affected by it. Where the changes between the rule or regulation as proposed and as adopted are not substantial, the changes do not prevent the adopted rule or regulation from being accepted for filing.

#### EXPIRATION DATES FOR ADOPTED RULES

Since 1978, all rules and regulations include an expiration date, or “sunset” date, of no later than five years from the effective date of the rule. This provision, which was implemented by Executive Order and later codified in the statutory law, was intended to discourage excessive agency rulemaking by requiring a reflective rulemaking review to eliminate unnecessary, redundant, confusing or unreasonable rules and regulations.<sup>42</sup> Each chapter of the administrative code has an expiration date of five years after the chapter’s effective date, unless a shorter expiration has been established for the rule or regulation. Expiration dates do not apply to rules that repeal other rules, rules and regulations that are mandated by federal law, and rules and

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<sup>42</sup> See Exec. Order No. 66 (1978) (Byrne) & N.J.S.A. 52:14B-5.1.

regulations where the expiration of the rules and regulations would violate any other federal or State law.

In order to maintain the effectiveness of a chapter of rules and regulations, the rules and regulations must be duly proposed for re-adoption, adopted and filed prior to the chapter expiration date. According to the OAL, approximately 35% of rule-making are re-adoptions. Upon the filing of a notice of proposed re-adoption, the expiration date of the subject chapter may be extended for 180 days, if such notice is filed with the OAL on or before the chapter expiration date. Re-adopted rules and regulations are effective upon filing with the OAL and any amendments to re-adopted rules and regulations are effective upon publication of the notice of adoption. Amendments enacted to the APA in 2001 also permit the Governor, upon the request of a State agency head, to continue in effect an expiring rule or regulation for a period to be specified by the Governor.

### EMERGENCY RULES

In the event that a State agency “finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 30 days’ notice and states in writing its reasons for that finding, and the Governor concurs in writing that an imminent peril exists, it may proceed without prior notice or hearing, or upon any abbreviated notice and hearing that it finds practicable, to adopt the rule.”<sup>43</sup> Such a rule can only be effective for a period of not more than 60 days unless each House of the Legislature passes a resolution concurring in its extension for an additional 60 days. The rule cannot be effective for more than 120 days unless re-adopted in accordance with normal APA rule-making procedures.

To continue the provisions of an emergency rule beyond the statutory 60-day period of emergency, the agency may propose the provisions of the emergency rule in a notice of proposal which is filed with the OAL at the same time that the emergency adoption is filed. The notice of emergency adoption must state that the rule is being proposed concurrently. The concurrent proposal must comply with the APA procedures for rulemaking and may be adopted after the comment period. The adoption of the concurrent proposal is be effective upon timely filing (i.e., on or before the expiration date of the emergency rule.) of the notice of adoption with the OAL. Any changes to the re-adopted rule are effective upon publication of the notice of adoption. An adoption of a concurrent proposal filed after the expiration of the emergency rule is effective upon publication in the Register.

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<sup>43</sup> N.J.S.A. 52:14B-4(c) & N.J.A.C. 1:30-6.5

## THE SMART GROWTH OMBUDSMAN

Pursuant to legislation enacted in 2004, the office of Smart Growth Ombudsman was created in the Department of Community Affairs (DCA).<sup>44</sup> The Ombudsman is appointed by and serves at the pleasure of the Governor. Among the functions delegated to the ombudsman is the authority to review any new rules or regulations proposed by any State agency and determine whether the proposed rules or regulations, as they pertain to the smart growth areas, are consistent with the State Plan.

The term “smart growth area” is defined in the “State Planning Act” as Planning Area 1 (Metropolitan), Planning Area 2 (Suburban), a designated center, or a designated growth center in an endorsed plan; a smart growth area and planning area designated in a master plan adopted by the New Jersey Meadowlands Commission; a growth area designated in the comprehensive management plan prepared and adopted by the Pinelands Commission; an urban enterprise zone; an area determined to be in need of redevelopment under State law as approved by the DCA; or similar areas designated by the Department of Environmental Protection. The law also provides that in the event that the Smart Growth Ombudsman determines that the proposed rules or regulations in the smart growth areas are inconsistent with the State Plan, the ombudsman would return the proposed rules or regulations to the State agency with recommended amendments necessary to make the proposed rules or regulations consistent with the plan.

The 2004 legislation also provides that a State agency cannot file proposed new rules or regulations for publication in the Register unless and until the Smart Growth Ombudsman determines the proposed rules or regulations in the smart growth areas are consistent with the State Plan. These requirements may be waived upon a written determination by the Governor’s Counsel that the proposed rules or regulations are required to implement a federal or State mandate.

## RULE-MAKING DATA

### I. New Jersey Administrative Code

Number of rule pages:	25,824	(through 2009)
Volumes:	38	(37 of which are rule text)
Titles:	26	
Chapters:	925	

### II. *New Jersey Register*

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<sup>44</sup> N.J.S.A. 52:27D-10.2 et al.

	<u>2009</u>	<u>2008</u>	<u>2007</u>
Pages	4,846	7,020	5,392
Proposals	389	418	380
Adoptions	496	396	393
Other Notices	443	522	469
(Public Notices	307	404	318
Pre-Proposals	1	3	1
Petition Receipt	38	32	34
Petition Action	44	25	36
Rule Calendars	1	4	10
Executive Orders	42	31	44
Reorganization Plans	3	1	1
Expiration Date			
Extensions	5	15	17
Rule Hearings	2	7	8)
Notice Totals	1,228	1,336	1,242

(Source: Office of Administrative Law)

## IX. CONCLUSION

The Red Tape Review Group has made a series of legislative, regulatory and policy recommendations that would transform the process by which rules are promulgated. In addition, the Group has proposed measures to relieve counties, municipalities and local boards of education of the burdens of unfunded mandates, and begin the process of eliminating unnecessary boards, task forces and commissions.

Rule-making is a necessary component of the orderly administration of our State Government. Regulations protect the public health and safeguard our natural environment. Regulations often deal with complex issues that the statutory law cannot possibly envision. Laws cannot address every real world situation that may arise as a result of legislative enactments, and State agencies need guidelines to govern their administrative actions. Despite the recognized need for regulations, the process by which rules are created can and should be improved, and instances of duplication, inconsistency and uncertainty be minimized or eliminated. While the Red Tape Review Group's mandate dealt with a specific short-term freeze on regulations, many recommendations take a longer view of what is required to resolve the outstanding challenges with New Jersey's regulatory system.

The Group believes that policymakers in both the Executive and Legislative branches must work together to create a new paradigm for rule-making, under which common sense is used when drafting rules and the process employed in their promulgation and adjudications arising from the administrative law are transparent and respectful of the legitimate views of impacted parties. If such a process is successful, it can result in the creation of a regulatory system in which stakeholders may disagree with the decisions made by State agencies, but recognize that the process used to arrive at those decisions was both appropriate and fair.

The foregoing report provides a practicable and effective guide to just such a process.

Appendix A



**STATE OF NEW JERSEY**  
**OFFICE OF ADMINISTRATIVE LAW**

**TO:** John Hutchison  
Executive Director  
Red Tape Review Group

**FROM:** Mark J. Stanton, Esq.  
Manager, Division of  
Administrative Rules

**RE:** Survey of Other States' "Substantive  
Change upon Adoption" Standards **DATE:** January 29, 2010

Per our discussion on January 26, 2010, I reviewed the statutes and rules of other states governing the administrative rulemaking process in order to ascertain how they address the issue of a proposing agency's ability to substantively revise proposed rule text upon adoption (essentially, their counterparts to N.J.A.C. 1:30-6.3). This memorandum sets forth the results of that research, by state, in state name alphabetical order; if information regarding a state does not appear below, that state's statutes and rules did not address "substantive change upon adoption" in the rulemaking process.

Please do not hesitate to contact me ((609) 588-6614) should you have any questions.

**ALASKA**

Alaska Stat. §44.62.200(b) provides, "A regulation that is adopted, amended, or repealed may vary in content from the summary specified in (a)(3) of this section if the subject matter of the regulation remains the same and the original notice was written so as to assure that members of the public are reasonably notified of the proposed subject of agency action in order for them to determine whether their interests could be affected by agency action on that subject." The referenced paragraph (a)(3) requires that a notice of proposal include "an informative summary of the proposed subject of agency action."

## Appendix A

### ARIZONA

A.R.S. §41-1025 states:

"A. An agency may not submit a rule to the council that is substantially different from the proposed rule contained in the notice of proposed rule making or a supplemental notice filed with the secretary of state pursuant to section 41-1022. However, an agency may terminate a rule making proceeding and commence a new rule making proceeding for the purpose of making a substantially different rule.

B. In determining whether a rule is substantially different from the published proposed rule on which it is required to be based, all of the following must be considered:

1. The extent to which all persons affected by the rule should have understood that the published proposed rule would affect their interests.

2. The extent to which the subject matter of the rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule.

3. The extent to which the effects of the rule differ from the effects of the published proposed rule if it had been made instead."

The "supplemental notice" referenced in subsection A is a requirement of A.R.S. §41-4022.E, "If, as a result of public comments or internal review, an agency determines that a proposed rule requires substantial change pursuant to section 41-1025, the agency shall issue a supplemental notice containing the changes in the proposed rule. The agency shall provide for additional public comment pursuant to section 41-1023." The Secretary of State's rulemaking rules, at A.A.C. §R1-1-507, sets forth the supplemental notice requirements:

"A. If an agency determines that a proposed rule requires substantial change due to either internal review or public comments, the agency shall prepare a supplemental notice for publication in the Register. A supplemental notice shall contain every Section undergoing change from the current text in the Code, as if the supplemental notice were the agency's first version of the proposed rule.

B. The supplemental notice shall contain the heading **NOTICE OF SUPPLEMENTAL PROPOSED RULEMAKING** in all capital letters, located one inch from the top of the page; followed by the Title, its number, and heading below the notice heading; followed by the Chapter, its number, and heading below the Title; followed by the Subchapter, its label, and

## Appendix A

heading below the Chapter, if applicable; followed by the word PREAMBLE in all capital letters, below the Chapter or Subchapter, all of which shall be centered on their respective lines, followed by the items listed below in the same numbered order:

1. The Register citations and dates for the Notice of Rulemaking Docket Opening, the Notice of Proposed Rulemaking, and any Notices of Supplemental Proposed Rulemaking, if applicable;

2. The Sections Affected and the Rulemaking Action in two columns as specified in R1-1-502(B)(1);

3. The specific statutory authority for the rulemaking including both the authorizing statute (general) and the implementing statute (specific);

4. The name and address of agency personnel with whom persons may communicate regarding the rulemaking;

5. An explanation of the rule, including the agency's reasons for initiating the rulemaking;

6. An explanation of the substantial change that resulted in the supplemental notice;

7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision;

8. The preliminary summary of the economic, small business, and consumer impact;

9. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business, and consumer impact statement;

10. The time, place, and nature of the oral proceedings for the making, amendment, or repeal of the rule;

11. Any other matters prescribed by statute and applicable to the specific agency or to any specific rule or class of rules; and

12. Any material incorporated by reference and its location in the text.

13. The phrase 'The full text of the rules follows:'. The full text of the changes shall begin on the page after the last page of the Preamble."

### **CALIFORNIA**

Cal. Gov. Code §11346.8(c) provides, "No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public

## Appendix A

pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation. Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9." The referenced Cal. Gov. Code §11346.5 sets forth the requirements for a notice of proposal, and the referenced Cal. Gov. Code §11346.9 sets forth the information that must accompany the submission of a rule adoption. The California Office of Administrative Law, at 1 CCR 40, defines "nonsubstantial changes" as used in Cal. Gov. Code §11346.8(c) as changes that "clarify without materially altering the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text."

### **COLORADO**

C.R.S. §24-4-103(4)(c) requires that adopted rules shall be "consistent with the subject matter" as set forth in the notice of proposal.

### **CONNECTICUT**

While Connecticut does not have a standard for substantive change upon adoption, Conn. Gen. Stat. §4-168(d) requires an agency that wants to adopt rule text altered from that proposed to provide all commenters on the proposal with a notice setting forth the rule's final text, the principal reasons in support of the agency's intended action, and the principal considerations in opposition to the intended action and the reasons for rejecting such considerations. This notice must be provided at least 20 days before the agency submits the final rule to the standing legislative regulation review committee.

### **DELAWARE**

29 Del. C. §10118(c) provides, "In the event an agency makes substantive changes in the proposal as a result of the public comments, evidence and information, the agency shall consider the revised proposal as a new proposal subject to the notice requirements of § 10115 of this title

## Appendix A

and all other requirements of this subchapter. If the changes are not substantive, the agency shall not be required to repropose the regulation change. Whether a change constitutes substantive or nonsubstantive matter shall be determined by the agency head." 29 Del. C. §10102(9) defines "substantive" as "those regulations allowing, requiring or forbidding conduct in which private persons are otherwise free or prohibited to engage, or regulations which state requirements, other than procedural, for obtaining, retaining or renewing a license or any kind of benefit or recompense."

### **DISTRICT OF COLUMBIA**

The rules of the District of Columbia Office of Documents and Administrative Issuances (ODAI), at CDCR 1-310.5, provide, "If the text of a rulemaking document is substantially altered from the text published with the notice of proposed rulemaking, the promulgating agency must re-submit the text as a proposed rule, pursuant to § 309. An agency does not have to wait the full notice period before re-filing an altered proposed rule. A new notice period begins upon re-publication." CDCR 1-310.5 sets forth that "substantial alteration" does not include:

"(a) Re-arrangement or renumbering of portions of the text;

(b) Re-wording to correct errors in format or style;

(c) Re-wording of the document, including the addition or deletion of material, that serves to clarify the intent, meaning, or application of the rule(s) and that does not substantially change the intent, meaning, or application of the proposed rule(s) or exceed the scope of the rule(s) as published with the notice of proposed rulemaking, as determined by ODAI."

### **FLORIDA**

Fla. Stat. §120.54(3)(d) governs modification or withdrawal of proposed rules:

"1. After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, if the rule has not been changed from the rule as previously filed with the committee [Administrative Procedures Committee of the Legislature], or contains only technical changes, the adopting agency shall file a notice to that effect with the committee at least 7 days prior to filing the rule for adoption. Any change, other than a technical change that does not affect the substance of the rule, must be supported by the record of public hearings held on the rule, must be in response to written material submitted to the agency within 21 days after the

## Appendix A

date of publication of the notice of intended agency action or submitted to the agency between the date of publication of the notice and the end of the final public hearing, or must be in response to a proposed objection by the committee. In addition, when any change is made in a proposed rule, other than a technical change, the adopting agency shall provide a copy of a notice of change by certified mail or actual delivery to any person who requests it in writing no later than 21 days after the notice required in paragraph (a). The agency shall file the notice of change with the committee, along with the reasons for the change, and provide the notice of change to persons requesting it, at least 21 days prior to filing the rule for adoption. The notice of change shall be published in the Florida Administrative Weekly at least 21 days prior to filing the rule for adoption. This subparagraph does not apply to emergency rules adopted pursuant to subsection (4).

2. After the notice required by paragraph (a) and prior to adoption, the agency may withdraw the rule in whole or in part.

3. After adoption and before the effective date, a rule may be modified or withdrawn only in response to an objection by the committee or may be modified to extend the effective date by not more than 60 days when the committee has notified the agency that an objection to the rule is being considered.

4. The agency shall give notice of its decision to withdraw or modify a rule in the first available issue of the publication in which the original notice of rulemaking was published, shall notify those persons described in subparagraph (a)3. in accordance with the requirements of that subparagraph, and shall notify the Department of State if the rule is required to be filed with the Department of State.

5. After a rule has become effective, it may be repealed or amended only through the rulemaking procedures specified in this chapter."

### **IDAHO**

Idaho Code §67-5227 provides, "An agency may adopt a pending rule that varies in content from that which was originally proposed if the subject matter of the rule remains the same, the pending rule is a logical outgrowth of the proposed rule, and the original notice was written so as to assure that members of the public were reasonably notified of the subject of

## Appendix A

agency action and were reasonably able from that notification to determine whether their interests could be affected by agency action on that subject."

### INDIANA

Burns Ind. Code Ann. §4-22-2-29(b) provides, "An agency may not adopt a rule that substantially differs from the version or versions of the proposed rule or rules published in the Indiana Register under section 24 of this chapter, unless it is a logical outgrowth of any proposed rule as supported by any written comments submitted:

- (1) during the public comment period; or
- (2) by the Indiana economic development corporation under IC 4-22-2.1-6(a), if applicable."

Indiana statutes contain a different standard for change upon adoption applicable to rulemakings of boards within the Department of Environmental Management and Boards, at Burns Ind. Code Ann §13-14-9-10:

"(a) A board may amend a proposed rule at a board meeting held under section 5(a)(3) [IC 13-14-9-5(a)(3)] of this chapter and adopt the amended rule under section 9(2) [IC 13-14-9-9(2)] of this chapter if the amendments are a logical outgrowth of:

- (1) the proposed rule as published under section 5(a)(2) [IC 13-14-9-5(a)(2)] of this chapter; and
- (2) any comments provided to the board at the meeting held under section 5(a)(3) of this chapter.

(b) In determining, for the purposes of this section, whether an amendment is a logical outgrowth of the proposed rule and any comments, the board shall consider:

- (1) whether the language of:
  - (A) the proposed rule as published under section 5(a)(2) of this chapter; and
  - (B) any comments provided to the board at the meeting held under section 5(a)(3) of this chapter;

fairly apprised interested persons of the specific subjects and issues contained in the amendment; and

- (2) whether the interested parties were allowed an adequate opportunity to be heard by the board."

## Appendix A

### IOWA

Change upon adoption is addressed in the Iowa Administrative Code through Uniform Rules on Agency Procedure promulgated by the Iowa Attorney General, specifically 000 IAC 0.X.9(17A):

"X.9(1) The agency shall not adopt a rule that differs from the rule proposed in the Notice of Intended Action on which the rule is based unless:

a. The differences are within the scope of the subject matter announced in the Notice of Intended Action and are in character with the issues raised in that notice; and

b. The differences are a logical outgrowth of the contents of that Notice of Intended Action and the comments submitted in response thereto; and

c. The Notice of Intended Action provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

X.9(2) In determining whether the Notice of Intended Action provided fair warning that the outcome of that rulemaking proceeding could be the rule in question, the agency shall consider the following factors:

a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;

b. The extent to which the subject matter of the rule or the issues determined by the rule are different from the subject matter or issues contained in the Notice of Intended Action; and

c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the Notice of Intended Action.

X.9(3) The agency shall commence a rule-making proceeding within 60 days of its receipt of a petition for rule making seeking the amendment or repeal of a rule that differs from the proposed rule contained in the Notice of Intended Action upon which the rule is based, unless the agency finds that the differences between the adopted rule and the proposed rule are so insubstantial as to make such a rule-making proceeding wholly unnecessary. A copy of any such finding and the petition to which it responds shall be sent to petitioner, the administrative rules coordinator, and the administrative rules review committee, within three days of its issuance.

## Appendix A

X.9(4) Concurrent rule-making proceedings. Nothing in this rule disturbs the discretion of the agency to initiate, concurrently, several different rule-making proceedings on the same subject with several different published Notices of Intended Action."

### **MAINE**

5 M.R.S. §8052.5.B provides, "A rule may not be adopted unless the adopted rule is consistent with the terms of the proposed rule, except to the extent that the agency determines that it is necessary to address concerns raised in comments about the proposed rule, or specific findings are made supporting changes to the proposed rule. The agency shall maintain a file for each rule adopted that must include, in addition to other documents required by this Act, testimony, comments, the names of persons who commented and the organizations they represent and information relevant to the rule and considered by the agency in connection with the formulation, proposal or adoption of a rule. If an agency determines that a rule that the agency intends to adopt is substantially different from the proposed rule, the agency shall request comments from the public concerning the changes from the proposed rule. The agency may not adopt the rule for a period of 30 days from the date comments are requested pursuant to this paragraph. Notice of the request for comments must be published by the Secretary of State in the same manner as notice for proposed or adopted rules."

### **MARYLAND**

Md. STATE GOVERNMENT Code Ann. §10-113 governs changes in proposed regulations:

"(a) In general. -- If a unit wishes to change the text of a proposed regulation so that any part of the text differs substantively from the text previously published in the Register, the unit may not adopt the proposed regulation unless it is proposed anew and adopted in accordance with the requirements of §§ 10-111 and 10-112 of this subtitle.

(b) Symbology. -- If the regulation is proposed anew, the changes in the text shall be shown with the symbols that the Administrator requires.

(c) Certification of Attorney General. --

(1) The Administrator shall refuse to publish the notice of adoption of a regulation that differs from the text previously published unless the notice is accompanied by a certification

## Appendix A

from the Attorney General that the provisions of subsections (a) and (b) of this section are not applicable.

(2) The certification shall:

(i) be prepared in the form and according to guidelines specified by the Administrator;

(ii) contain a description of the nature of each change and the basis for the conclusion;

and

(iii) be published in the Register as part of the notice of adoption."

As defined in Md. STATE GOVERNMENT Code Ann. §10-101(h), "substantively" means "in a manner substantially affecting the rights, duties, or obligations of:

(1) a member of a regulated group or profession; or

(2) a member of the public."

### **MINNESOTA**

Minn. Stat. §14.24 provides, "The proposed rule may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantially different rule, as determined under section 14.05, subdivision 2, from the rule as originally proposed. An agency may adopt a substantially different rule after satisfying the rule requirements for the adoption of a substantially different rule."

The referenced Minn. Stat. §14.05, subdivision 2, Authority to modify proposed rule, provides:

"An agency may modify a proposed rule in accordance with the procedures of the Administrative Procedure Act. However, an agency may not modify a proposed rule so that it is substantially different from the proposed rule in the notice of intent to adopt rules or notice of hearing.

(b) A modification does not make a proposed rule substantially different if:

(1) the differences are within the scope of the matter announced in the notice of intent to adopt or notice of hearing and are in character with the issues raised in that notice;

(2) the differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing and the comments submitted in response to the notice; and

(3) the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.

## Appendix A

(c) In determining whether the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question the following factors must be considered:

(1) the extent to which persons who will be affected by the rule should have understood that the rulemaking proceeding on which it is based could affect their interests;

(2) the extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of intent to adopt or notice of hearing; and

(3) the extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of intent to adopt or notice of hearing."

The Minnesota Office of Administrative Hearings promulgated a rule at Minn. R. 1400.2110 on the procedure to adopt substantially different rules:

"Subpart 1. An agency may adopt a substantially different rule if it has complied with the procedures in this part.

Subp. 2. The agency must mail or deliver to each person or group that made a written or oral comment during the comment period or registered at the rule hearing, if the person's address is known to the agency:

A. a copy of the substantially different rule; and

B. a statement that tells the recipient that the chief judge found the rule to be substantially different, explains the agency's reasons for modifying the rule, tells the recipient that the agency must accept written comments for 15 days, and gives the date the comment period ends.

Subp. 3. After considering any comments received, the agency must submit the documents listed in subpart 2 and any written responses to the chief judge.

Subp. 4. The chief judge must review the agency's filing to decide whether:

A. the agency has met the requirements of this part;

B. the substantially different modifications to the rule are based on comments or evidence in the record;

C. the substantially different rule complies with part 1400.2100; and

D. in light of the nature of the substantially different modification and the course of the rule proceeding, it would not be fair to affected persons to allow the agency to adopt the modification without initiating a new rule proceeding. The chief judge must either approve or

## Appendix A

disapprove the substantially different rule within ten days after the office receives it, unless it is withdrawn by a person authorized to withdraw the rule."

The referenced Minn. R. 1400.2100 sets forth the standards of review of rules by the chief judge or other judge of the Office of Administrative Hearings:

"A rule must be disapproved by the judge or chief judge if the rule:

A. was not adopted in compliance with procedural requirements of this chapter, Minnesota Statutes, chapter 14, or other law or rule, unless the judge decides that the error must be disregarded under Minnesota Statutes, section 14.15, subdivision 5, or 14.26, subdivision 3, paragraph (d);

B. is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;

C. is substantially different than the proposed rule, and the agency did not follow the procedures of part 1400.2110;

D. exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law;

E. is unconstitutional or illegal;

F. improperly delegates the agency's powers to another agency, person, or group;

G. is not a "rule" as defined in Minnesota Statutes, section 14.02, subdivision 4, or by its own terms cannot have the force and effect of law; or

H. is subject to Minnesota Statutes, section 14.25, subdivision 2, and the notice that hearing requests have been withdrawn and written responses to it show that the withdrawal is not consistent with Minnesota Statutes, section 14.001, clauses (2), (4), and (5)."

### **MISSISSIPPI**

Miss. Code Ann. §25-43-3.107 governs variance between a proposed and adopted rule:

"(1) An agency shall not adopt a rule that differs from the rule proposed in the notice of proposed rule adoption on which the rule is based unless all of the following apply:

(a) The differences are within the scope of the matter announced in the notice of proposed rule adoption and are in character with the issues raised in that notice;

(b) The differences are a logical outgrowth of the contents of that notice of proposed rule adoption and the comments submitted in response thereto; and

## Appendix A

(c) The notice of proposed rule adoption provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

(2) In determining whether the notice of proposed rule adoption provided fair warning that the outcome of that rule-making proceeding could be the rule in question, an agency shall consider all of the following factors:

(a) The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests;

(b) The extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of proposed rule adoption; and

(c) The extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of proposed rule adoption."

### **NEBRASKA**

R.R.S. Neb. §84-907.05 governs substantive difference from a proposed rule:

"(1) An agency may not adopt a rule or regulation that is substantially different from the proposed rule or regulation contained or referenced in the published notice. An agency may terminate a rulemaking or regulationmaking proceeding and commence a new rulemaking or regulationmaking proceeding for the purpose of adopting a substantially different rule or regulation.

(2) In determining whether a rule or regulation is substantially different from the proposed rule or regulation contained or referenced in the published notice, the following shall be considered:

(a) The extent to which all persons affected by the adopted rule or regulation should have had adequate notice from the published notice and the proposed rule or regulation contained or referenced in the published notice that their interests would be affected;

(b) The extent to which the subject matter of the adopted rule or regulation or the issues determined by the rule or regulation are different from the subject matter or issues involved in the proposed rule or regulation contained or referenced in the published notice; and

(c) The extent to which the effects of the adopted rule or regulation differ from the effects of the proposed rule or regulation contained or referenced in the published notice had it been adopted instead."

## Appendix A

### **NEW YORK**

Under NY CLS St Admin P Act §202.4-a, an agency must publish a notice of revised rulemaking for any proposed rule that contains a substantive revision:

"(a) Except with respect to any rule defined in subparagraph (ii) of paragraph (a) of subdivision two of section one hundred two of this chapter, prior to the adoption of a rule, an agency shall submit a notice of revised rule making to the secretary of state for publication in the state register for any proposed rule which contains a substantial revision. The public shall be afforded an opportunity to submit comments on the revised text of a proposed rule. Unless a different time is specified in statute, the notice of revised rule making must appear in the state register at least thirty days prior to the adoption of the rule. The notice of revised rule making shall indicate the last date for submission of comments on the revised text of the proposed rule, which, unless a different time is specified in statute, shall be not less than thirty days after the date of publication of such notice.

(b) Each agency shall publish and make available to the public an assessment of public comment for a rule revised pursuant to this subdivision. Such assessment shall be based upon any written comments submitted to the agency and any comments presented at any public hearing held on the proposed rule by the agency. The assessment shall contain: (i) a summary and an analysis of the issues raised and significant alternatives suggested by any such comments; (ii) a statement of the reasons why any significant alternatives were not incorporated into the rule; and (iii) a description of any changes made in the rule as a result of such comments. If no comments have been received, the notice of revised rule making shall state that no comments were received by the agency. Any subsequent assessment published pursuant to this paragraph or paragraph (b) of subdivision five of this section need only include comments not addressed in any previously published assessment of public comment for the rule; provided, however, that the notice of revised rule making or adoption shall contain the date any previous notice of revised rule making containing an assessment of public comment was published in the state register.

(c) The notice of revised rule making shall:

(i) cite the statutory authority, including particular sections and subdivisions, under which the rule is proposed for adoption;

## Appendix A

(ii) contain the complete revised text of the proposed rule, provided, however, if such text exceeds two thousand words, the notice may contain only a description of the subject, purpose and substance of such rule in less than two thousand words;

(iii) identify the substantial revisions to the text of the rule;

(iv) give the date, time and place of any public hearing or hearings on the rule which are to be held subsequent to the publication of the notice;

(v) include a revised regulatory impact statement, when required by the provisions of subparagraph (ii) of paragraph (a) of subdivision six of section two hundred two-a of this chapter, provided, however, if such statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;

(vi) include a revised regulatory flexibility analysis and a rural area flexibility analysis, when required by the provisions of subparagraph (ii) of paragraph (a) of subdivision seven of section two hundred two-b and paragraph (b) of subdivision eight of section two hundred two-bb of this chapter, provided, however, if such statement exceeds two thousand words, the notice shall include only a summary of such statement in less than two thousand words;

(vii) give the name, address and telephone number of an agency representative knowledgeable on the rule, from whom the complete revised text of such rule, any revised regulatory impact statement[,] any revised regulatory flexibility analysis and any revised rural area flexibility analysis may be obtained; from whom information about any additional public hearing may be obtained; and to whom written data, views and arguments may be submitted;

(viii) state whether the notice shall also extend the rule making period for an additional ninety days as provided in subdivision three of this section;

(ix) include the assessment of public comment, prepared pursuant to paragraph (b) of this subdivision provided, however, that, if such assessment exceeds two thousand words, the notice shall include only a summary of such assessment in less than two thousand words; and

(x) include any additional matter required by statute.

(c) *[sic]* An agency may not submit a notice of revised rule making for a rule which has been proposed as a consensus rule."

Paragraph 9 of NY CLS St Admin P Act §102 defines "substantial revision" as "any addition, deletion or other change in the text of a rule proposed for adoption, which materially alters its purpose, meaning or effect, but shall not include any change which merely defines or

## Appendix A

clarifies such text and does not materially alter its purpose, meaning or effect. To determine if the revised text of a proposed rule contains a substantial revision, the revised text shall be compared to the text of the rule for which a notice of proposed rule making was published in the state register; provided, however, if a notice of revised rule making was previously published in the state register, the revised text shall be compared to the revised text for which the most recent notice of revised rule making was published."

### **NORTH CAROLINA**

N.C. Gen. Stat. §150B-21.2(g) governs adoption of a substantially different rule from that proposed:

"(g) Adoption. -- An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

(1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.

(2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.

(3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule."

The referenced N.C. Gen. Stat. §150B-21.2(f) requires at least a 60-day comment period on proposed rules.

## Appendix A

### **OHIO**

Under ORC Ann. §119.031, determination of the existence of a substantive revision between a proposed and final rule is made by the Chairperson of the Legislature's Joint Committee on Agency Rule Review, and the action to be taken in such case is determined by that Joint Committee:

"(A) The chairperson of the joint committee on agency rule review shall compare each rule, amendment, or rescission as filed in final form with the latest version of the same rule, amendment, or rescission as filed in proposed form.

(B) If, upon making the comparison required by division (A) of this section, the chairperson of the joint committee on agency rule review finds that the rule-making agency has made a substantive revision in the rule, amendment, or rescission between the time it filed the latest version of the rule, amendment, or rescission in proposed form and the time it filed the rule, amendment, or rescission in final form, the chairperson shall promptly notify the rule-making agency, the secretary of state, and the director of the legislative service commission in electronic form of that finding.

(C) The joint committee on agency rule review shall review any rule, amendment, or rescission as filed in final form if, under division (B) of this section, it is found to contain a substantive revision. The joint committee may do either or both of the following:

(1) If the joint committee makes any of the findings stated in division (I)(1)(a), (b), or (c) of section 119.03 of the Revised Code, it may suspend the rule, amendment, rescission, or any part thereof. The suspension shall remain in effect until the time for legislative review and invalidation has expired under division (D) of this section, or until the general assembly adopts a concurrent resolution invalidating the rule, amendment, rescission, or any part thereof, whichever occurs first. The chairperson of the joint committee shall promptly notify the rule-making agency, the secretary of state, and the director of the legislative service commission in electronic form of the suspension.

(2) The joint committee may recommend the adoption of a concurrent resolution invalidating the rule, amendment, rescission, or any part thereof if it makes any of the findings stated in division (I)(1)(a), (b), or (c) of section 119.03 of the Revised Code.

## Appendix A

(D) A rule, amendment, or rescission that, under division (B) of this section, is found to contain a substantive revision shall nevertheless become effective pursuant to division (B)(1) of section 111.15, division (A)(1) of section 119.04, division (B)(1) of section 4141.14, or division (A) of section 5703.14 of the Revised Code and remain in effect as filed in final form unless:

(1) Under division (C)(1) of this section, the joint committee suspends the rule, amendment, rescission, or any part thereof; or

(2) Prior to the sixtieth day after the rule, amendment, or rescission was filed in final form, the house of representatives and senate adopt a concurrent resolution invalidating the rule, amendment, rescission, or any part thereof. If, after the joint committee on agency rule review recommends the adoption of a concurrent resolution invalidating the rule, amendment, rescission, or part thereof, the house of representatives or senate does not, within the time remaining for adoption of the concurrent resolution, hold five floor sessions at which its journal records a roll call vote disclosing a sufficient number of members in attendance to pass a bill, the time within which that house may adopt the concurrent resolution is extended until it has held five such floor sessions.

Upon the adoption of such a concurrent resolution, the clerk of the senate shall, within five days thereafter, send the rule-making agency, the secretary of state, and the director of the legislative service commission, in electronic form, a certified copy of the resolution together with a certification stating the date on which the resolution takes effect. The secretary of state and the director shall each note the invalidity of the rule, amendment, rescission, or part thereof, and shall remove the invalid rule, amendment, rescission, or part thereof from the file of current rules. The director shall also indicate in the Ohio administrative code that the rule, amendment, rescission, or part thereof is invalid and the date of invalidation. The rule-making agency shall make appropriate adjustments to reflect the invalidity of the rule, amendment, rescission, or part thereof.

(E) Invalidation of a rule, amendment, rescission, or part thereof under this section shall prevent the rule-making agency from instituting proceedings to readopt any version of the same rule, amendment, rescission, or part thereof for the duration of the general assembly that invalidated the rule, amendment, rescission, or part thereof unless the same general assembly adopts a concurrent resolution permitting the rule-making agency to institute such proceedings.

## Appendix A

(F) The failure of the general assembly to invalidate a rule, amendment, rescission, or part thereof under this section shall not be construed as a ratification of the lawfulness or reasonableness of the rule, amendment, rescission, or any part thereof or of the validity of the procedure by which the rule, amendment, rescission, or any part thereof was adopted.

(G) As used in this section, a rule, amendment, or rescission is filed:

(1) "In proposed form" when it is filed in such form with the joint committee under division (D) of section 111.15 or division (H) of section 119.03 of the Revised Code;

(2) "In final form" when it is filed in such form with the joint committee under division (B)(1)(b) of section 111.15, division (A)(1)(b) of section 119.04, division (B)(1)(b) of section 4141.14, or division (A)(2) of section 5703.14 of the Revised Code."

ORC Ann. §119.01(J) defines "substantive revision" to mean "any addition to, elimination from, or other change in a rule, an amendment of a rule, or a rescission of a rule, whether of a substantive or procedural nature, that changes any of the following:

(1) That which the rule, amendment, or rescission permits, authorizes, regulates, requires, prohibits, penalizes, rewards, or otherwise affects;

(2) The scope or application of the rule, amendment, or rescission."

### **PENNSYLVANIA**

45 P.S. §1202 provides, in pertinent part: "The agency text of any administrative regulation or change therein as finally adopted may contain such modifications to the proposed text as published pursuant to section 201 as do not enlarge its original purpose, but modifications which enlarge the original purpose of a proposal as published under section 201 shall be republished thereunder prior to final adoption by the agency."

### **SOUTH CAROLINA**

S.C. Code Ann. §1-23-110(C)(2) provides, "Following the public hearing and consideration of all submissions, an agency must not submit a regulation to the General Assembly for review if the regulation contains a substantive change in the content of regulation as proposed pursuant to subsection (A)(3) and the substantive change was not raised, considered, or discussed by public comment received pursuant to this section. The agency shall refile such a

## Appendix A

regulation for publication in the State Register as a proposed regulation pursuant to subsection (A)(3)."

### **SOUTH DAKOTA**

Under S.D. Codified Laws §1-26-4.7, the Legislature's Interim Rules Review Committee may require an agency to revert to any step in the rule adoption procedure under S.D. Codified Laws §1-26-4, and may require an agency to hold public hearings in addition to those provided for under S.D. Codified Laws §1-26-4 if, in the Committee's judgment, "(1) The substance of the proposed rule has been significantly rewritten from the originally proposed rule which was not the result of testimony received from the public hearing; (2) . . ."

### **UTAH**

Utah Code Ann. §63G-3-303(1) and (2) govern changes to proposed rules:

"(1) (a) To change a proposed rule already published in the bulletin, an agency shall file with the division:

(i) the text of the changed rule; and

(ii) a rule analysis containing a description of the change and the information required by Section 63G-3-301.

(b) A change to a proposed rule may not be filed more than 120 days after publication of the rule being changed.

(c) The division shall publish the rule analysis for the changed rule in the bulletin.

(d) The changed proposed rule and its associated proposed rule will become effective on a date specified by the agency, not less than 30 days or more than 120 days after publication of the last change in proposed rule.

(e) A changed proposed rule and its associated proposed rule lapse if a notice of effective date or another change to a proposed rule is not filed with the division within 120 days of publication of the last change in proposed rule.

(2) If the rule change is nonsubstantive:

(a) the agency need not comply with the requirements of Subsection (1); and

(b) the agency shall notify the division of the change in writing."

The referenced Utah Code Ann. §63G-3-301 sets forth the contents of a proposed rulemaking.

## Appendix A

Under Utah Code Ann. §63G-3-102(19), "substantive change" means "a change in a rule that affects the application or results of agency actions." The rules of the Utah Division of Administrative Rules at U.A.C. R15-4-6 and 15-4-7 establish, respectively, the requirements for making nonsubstantive and substantive changes to proposed rules:

### " R15-4-6. Nonsubstantive Changes in Rules.

(1) Pursuant to Subsections 63G-3-201(4)(d) and 63G-3-303(2), for the purpose of making rule changes that are grammatical or do not materially affect the application or outcome of agency procedures and standards, agencies shall comply with the procedures of this section.

(2) The agency proposing a change shall determine if the change is substantive or nonsubstantive according to the criteria cited in Subsection R15-4-6(1).

(a) The agency may seek the advice of the Attorney General or the division, but the agency is responsible for compliance with the cited criteria.

(3) Without complying with regular rulemaking procedures, an agency may make nonsubstantive changes in:

(a) proposed rules already published in the bulletin and digest but not made effective, or

(b) rules already effective.

(4) To make a nonsubstantive change in a rule, the agency shall:

(a) notify the division by filing with the division the form designated for nonsubstantive changes;

(b) include with the notice the rule text to be changed, with changes marked as required by Section R15-4-9; and

(c) include with the notice the name of the agency head or designee authorizing the change.

(5) A nonsubstantive change becomes effective on the date the division makes the change in the Utah Administrative Code.

(6) The division shall record the nonsubstantive change and its effective date in the administrative rules register.

### R15-4-7. Substantive Changes in Proposed Rules.

(1) Pursuant to Section 63G-3-303, agencies shall comply with the procedures of this section when making a substantive change in a proposed rule.

(a) The procedures of this section apply if:

## Appendix A

(i) the agency determines a change in the rule is necessary;

(ii) the change is substantive under the criteria of Subsection 63G-3-102(19);

(iii) the rule was published as a proposal in the bulletin and digest; and

(iv) the rule has not been made effective under the procedures of Subsection 63G-3-303(1)(d) and Section R15-4-5.

(b) If the rule is already effective, the agency shall comply with regular rulemaking procedures.

(2) To make a substantive change in a proposed rule, the agency shall file with the division:

(a) a rule analysis, marked to indicate the agency intends to change a rule already published, and describing the change and reasons for it; and

(b) a copy of the proposed rule previously published in the bulletin marked to show only those changes made since the proposed rule was previously published as described in Section R15-4-9.

(3) The division shall publish the rule analysis in the next issue of the bulletin, subject to the publication deadlines of Section R15-4-3. The division may also publish the changed text of the rule.

(4) The agency may make a change in proposed rule effective by following the requirements of Section R15-4-5, or may further amend the rule by following the procedures of Sections R15-4-6 or R15-4-7."

The referenced U.A.C. R15-4-5, specifically at U.A.C. R15-4-5b, sets forth the requirements for providing the Division with notice of the effective date for a change in a proposed rule.

### **VERMONT**

3 V.S.A. §843(b) provides, "The text of the adopted rule shall be the same as the text of the final proposed rule submitted under section 841, except that any germane change may be made by the agency in response to an objection or expressed concern of the legislative committee on administrative rules."

### **VIRGINIA**

## Appendix A

Regarding changes between proposed and final regulations, Va. Code Ann. §2.2-4007.06 provides, "If one or more changes with substantial impact are made to a proposed regulation from the time that it is published as a proposed regulation to the time it is published as a final regulation, any person may petition the agency within 30 days from the publication of the final regulation to request an opportunity for oral and written submittals on the changes to the regulation. If the agency receives requests from at least 25 persons for an opportunity to submit oral and written comments on the changes to the regulation, the agency shall (i) suspend the regulatory process for 30 days to solicit additional public comment and (ii) file notice of the additional 30-day public comment period with the Registrar of Regulations, unless the agency determines that the changes made are minor or inconsequential in their impact. The comment period, if any, shall begin on the date of publication of the notice in the Register. Agency denial of petitions for a comment period on changes to the regulation shall be subject to judicial review."

### **WASHINGTON**

Rev. Code Wash. §34.05.340 provides:

"(1) Unless it complies with subsection (3) of this section, an agency may not adopt a rule that is substantially different from the rule proposed in the published notice of proposed rule adoption or a supplemental notice in the proceeding. If an agency contemplates making a substantial variance from a proposed rule described in a published notice, it may file a supplemental notice with the code reviser meeting the requirements of RCW 34.05.320 and reopen the proceedings for public comment on the proposed variance, or the agency may withdraw the proposed rule and commence a new rule-making proceeding to adopt a substantially different rule. If a new rule-making proceeding is commenced, relevant public comment received regarding the initial proposed rule shall be considered in the new proceeding.

(2) The following factors shall be considered in determining whether an adopted rule is substantially different from the proposed rule on which it is based:

(a) The extent to which a reasonable person affected by the adopted rule would have understood that the published proposed rule would affect his or her interests;

(b) The extent to which the subject of the adopted rule or the issues determined in it are substantially different from the subject or issues involved in the published proposed rule; and

## Appendix A

(c) The extent to which the effects of the adopted rule differ from the effects of the published proposed rule.

(3) If the agency, without filing a supplemental notice under subsection (1) of this section, adopts a rule that varies in content from the proposed rule, the general subject matter of the adopted rule must remain the same as the proposed rule. The agency shall briefly describe any changes, other than editing changes, and the principal reasons for adopting the changes. The brief description shall be filed with the code reviser together with the order of adoption for publication in the state register. Within sixty days of publication of the adopted rule in the state register, any interested person may petition the agency to amend any portion of the adopted rule that is substantially different from the proposed rule. The petition shall briefly demonstrate how the adopted rule is substantially different from the proposed rule and shall contain the text of the petitioner's proposed amendment. For purposes of the petition, an adopted rule is substantially different if the issues determined in the adopted rule differ from the issues determined in the proposed rule or the anticipated effects of the adopted rule differ from those of the proposed rule. If the petition meets the requirements of this subsection and RCW 34.05.330, the agency shall initiate rule-making proceedings upon the proposed amendments within the time provided in RCW 34.05.330."

The referenced Rev. Code Wash §34.05.320 sets forth the requirements for a notice of proposed rule, and the referenced Rev. Code Wash §34.05.330 sets forth the requirements for a petition for adoption, amendment or repeal of a rule.

### **WEST VIRGINIA**

W. Va. Code §29A-3-8 provides, in pertinent part, "A procedural or interpretive rule may be amended by the agency prior to final adoption without further hearing or public comment. No such amendment may change the main purpose of the rule. If the fiscal implications have changed since the rule was proposed, a new fiscal note shall be attached to the notice of filing. Upon adoption of the rule (including any such amendment) the agency shall file the text of the adopted procedural or interpretive rule with its notice of adoption in the State Register and the same shall be effective on the date specified in the rule or thirty days after such filing, whichever is later."

## Appendix A

W. Va. Code §29A-3-14(b) provides, "At any time before a proposed legislative rule has been submitted by the Legislative Rule-Making Review Committee to the legislature pursuant to the provisions of section twelve [§ 29A-3-12] of this article, the agency may modify the proposed rule to meet the objections of the committee. The agency shall file in the State Register a notice of its modifying action including a copy of the modified rule, but shall not be required to comply with any provisions of this article requiring opportunity for public comment or taking of evidence with respect to such modification. If a legislative rule has been withdrawn, modified and then resubmitted to such committee, the rule shall be considered to have been submitted to such committee on the date of such resubmission."

W. Va. Code §29A-1-2(g) defines "procedural rule" as "every rule, as defined in [W. Va. Code §29A-1-2(i)], which fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency, including forms prescribed by the agency."

W. Va. Code §29A-1-2(c) defines "interpretive rule" as "every rule, as defined in [W. Va. Code §29A-1-2(i)], adopted by an agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced or administered by it and which is not intended by the agency to be determinative of any issue affecting private rights, privileges or interests. An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the exercise of private rights or privileges nor to confer any right or privilege provided by law and is not admissible in any administrative or judicial proceeding for such purpose, except where the interpretive rule established the conditions for the exercise of discretionary power as herein provided. However, an interpretive rule is admissible for the purpose of showing that the prior conduct of a person was based on good faith reliance on such rule. The admission of such rule in no way affects any legislative or judicial determination regarding the prospective effect of such rule. Where any provision of this code lawfully commits any decision or determination of fact or judgment to the sole discretion of any agency or any executive officer or employee, the conditions for the exercise of that discretion, to the extent that such conditions are not prescribed by statute or by legislative rule, may be established by an interpretive rule and such rule is admissible in any administrative or judicial proceeding to prove such conditions."

## Appendix A

W. Va. Code §29A-1-2(d) defines "legislative rule" as "every rule, as defined in [W. Va. Code §29A-1-2(i)], proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the Legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting private rights, privileges or interests is a legislative rule. Unless lawfully promulgated as an emergency rule, a legislative rule is only a proposal by the agency and has no legal force or effect until promulgated by specific authorization of the Legislature. Except where otherwise specifically provided in this code, legislative rule does not include (A) findings or determinations of fact made or reported by an agency, including any such findings and determinations as are required to be made by any agency as a condition precedent to proposal of a rule to the Legislature; (B) declaratory rulings issued by an agency pursuant to the provisions of section one [§ 29A-4-1], article four of this chapter; (C) orders, as defined in subdivision (e) of this section; or (D) executive orders or proclamations by the Governor issued solely in the exercise of executive power, including executive orders issued in the event of a public disaster or emergency."

### **WISCONSIN**

Wis. Stat. §227.19(4)(a)3 provides that, during the course of mandatory review of a proposed rule by a standing committee of the legislature, an agency "may, on its own initiative, submit a germane modification to a proposed rule to a committee during its review period. If a germane modification is submitted within the final 10 days of a committee review period, the review period for both committees is extended for 10 working days. If a germane modification is submitted to a committee after the committee in the other house has concluded its jurisdiction over the proposed rule, the jurisdiction of the committee of the other house is revived for 10 working days. In this subdivision, an agency[']s proposal to delete part of a proposed rule under committee review shall be treated as a germane modification of the proposed rule."

Wis. Stat. §227.19(4)(a)4 provides, " An agency may modify a proposed rule following the committee review period if the modification is germane to the subject matter of the proposed rule. If a germane modification is made, the agency shall recall the proposed rule from the chief clerk of each house of the legislature. The proposed rule, with the germane modification, shall be

## Appendix A

resubmitted to the presiding officer in each house of the legislature as provided in sub. (2) and the committee review period shall begin again. Following the committee review period, an agency may not make any modification that is not germane to the subject matter of the proposed rule. In this subdivision, an agency[']s proposal to delete part of a proposed rule under committee review shall be treated as a germane modification of the proposed rule."

### **2009 DRAFT REVISED MODEL ADMINISTRATIVE PROCEDURE ACT**

As drafted by the National Conference of Commissioners on Uniform State Laws, Section 308, Variance between Proposed and Final Action, including comments, is as follows. It should be noted that the three numbered factors used in applying the "logical outgrowth test" mentioned in the first paragraph of the Comments were included as rule text in Section 308 in the 2008 Draft Revised Model Administrative Procedure Act.

**"SECTION 308. VARIANCE BETWEEN PROPOSED AND FINAL ACTION.** An agency may not take action on a rule proposed to be adopted, amended, or repealed that differs from the action proposed in the notice of proposed rulemaking on which the rule is based unless the action is the logical outgrowth of the action proposed in the notice.

#### **Comment**

This section draws upon provisions from several states. See Mississippi Administrative Procedure Act, Miss. Code Ann. Section 25-43-3.107 and the Minn. Administrative Procedure Act, M.S.A. Section 14.05. The variance test adopted by state and federal courts is the logical outgrowth test. If the adopted rule is the logical outgrowth of the proposed rule, no further comment period is required. If it is not the logical outgrowth, then a further comment period is required. Courts utilize several factors to apply the logical out growth test including: (1) any person affected by the adopted rule should have reasonably expected that the published proposed rule would affect the person's interest; (2) the subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published rule proposed to be adopted; and (3) the effect of the adopted rule differs from the effect of the rule proposed to be adopted or amended.

The following cases discuss and analyze the logical outgrowth test and these factors. These judicial opinions also convey the wide acceptance and use of the logical outgrowth test in the states. *First Am. Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008,

## Appendix A

1015 (D.C.Cir.2000); *Arizona [publisher]. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C.Cir.2000); *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994); *Trustees for Alaska v. Dept. Nat. Resources*, \_\_\_AK\_\_\_, 795 P.2d 805 (1990); *Sullivan v. Evergreen Health Care*, 678 N.E.2d 129 (Ind. App. 1997); *Iowa Citizen Energy Coalition v. Iowa St. Commerce Comm.* \_\_\_IA\_\_\_, 335 N.W.2d 178 (1983); *Motor Veh. Mfrs. Ass'n v. Jorling*, 152 Misc.2d 405, 577 N.Y.S.2d 346 (N.Y.Sup.,1991); *Tennessee Envir. Coun. v. Solid Waste Control Bd.*, 852 S.W.2d 893 (Tenn. App. 1992); *Workers' Comp. Comm. v. Patients Advocate*, 47 Tex. 607, 136 S.W.3d 643 (2004); *Dept. Of [publisher]. Svc. re Small Power Projects*, 161 Vt. 97, 632 A.2d 13 73 (1993); *Amer. Bankers Life Ins. Co. v. Div. of Consumer Counsel*, 220 Va. 773, 263 S.E.2d 867 (1980)."

## Appendix B

### APPELLATE DIVISION DECISIONS -- OFFICE OF ADMINISTRATIVE LAW AND AGENCY HEADS

AGENCY	# of Decisions Reviewed	Agency-OAL Results Identical & Affirmed	Agency-OAL Results Identical & Rejected or Remanded Entirely	Agency Result Affirmed	OAL Result Affirmed
Alcoholic Beverage Commission	10	6	0	3	1
Children & Families	12	4	1	1	6
Civil Rights	5	4	0	1	0
Civil Service Commission	111	73.5	3.5	26	8
Community Affairs	17	10	3	2	2
Education	51	38	1	8.5	3.5
Environmental Protection	16	10	2	4	0
Health	9	6	1	0.5	1.5
Lemon Law	1	1	0	0	0
Medicaid	22	7	2	7	6
Motor Vehicle Commission	3	3	0	0	0
Pensions	88	49	15	14	10
Professional Boards	5	4	1	0	0
Public Welfare	12	6	1	2	3
	352	215.5	30.5	66	40
		61%	9%	19%	11%

*Notes:*  
 Decisions include both published and unpublished, as available on the Rutgers-Camden website from 2005 on.  
 Some decisions split between the agency on some issues and OAL on others; these are reflected by the .5 notations.  
 The 3.5 CSC rejections are more accurately 2.5 because the Supreme Court overturned the App. Div. in I/M/O Carter  
 The 15 pension remands resulted from a major change in law; it is probably more accurate in terms of the overall picture, to remove them.  
 2 of the 4 environment cases involved fees, which were increased by DEP, and all 3 ABC cases involved increased penalties  
 18 of the 26 Civil Service affirmances involved the CSC increasing penalties for corrections or police following I/M/O Carter. prior to that, the CSC decreased 3 of them.

For ALL of the penalty cases, the Appellate Standard of review is VERY deferential to the Agency Head: “When a reviewing court is considering a challenge to an administratively imposed sanction, it considers only ‘whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one’s sense of fairness. “Div. of Alcoholic Beverage Control v. Maynards, 192 NJ 158 184 (2007) (quoting in re Polk, 90 N.J. at 578)

## Appendix C

### Task Forces, Boards, Councils and Commissions For Consolidation

Entities that were created pursuant to Executive Order are denoted by an asterisk (\*):

Advisory Committee on the Preservation and Use of Ellis Island\*  
Advisory Council on Community Affairs  
Advisory Council on Juvenile Justice\*  
Advisory Council to Promote the Profession of Nursing in New Jersey\*  
Advisory Council to the Ambassador Arnold Raphel Center for International Business Education\*  
Advisory Panel on Higher Education Restructuring\*  
Advisory Panel on School Vouchers\*  
Agent Orange Commission  
Animal Welfare Task Force\*  
Apprenticeship Committee  
Benefits Review Task Force\*  
Billboard Policy and Procedure Review Task Force\*  
Blue Ribbon Panel on Development of Wind Turbine Facilities in Coastal Waters\*  
Blue Ribbon Transportation Commission\*  
Budget Efficiency Savings Team Commission\*  
Cable Television Advisory Council  
Camden Financial Review Board  
Christopher Columbus Quincentennial Observance Commission  
Citizens' Committee on Permit Coordination  
Citizens' Consumer Advisory Committee  
Commission on Early Childhood Education  
Commission on Health Science, Education and Training\*  
Commission on Jobs, Growth and Economic Development\*  
Commission on Missing Persons  
Commission on Racism, Racial Violence and Religious Violence  
Commission to Study Sex Discrimination in the Statutes  
Committee to Review the State Commission of Investigation  
Consolidated Police and Firemen's Pension Fund Commission  
Construction Trade Training Council\*  
Corporation Business Tax Study Commission  
Council on Community Restoration  
Crime Prevention Advisory Committee  
Defense Conversion and Community Assistance Commission\*  
Deferred Balances Task Force - Board of Directors\*

## Appendix C

Delaware and Raritan Canal Transportation Safety Study Commission  
Drug Utilization Review Council\*  
Economic Development Council  
Education Advisory Committee Chapter 2 Block Grants  
Education Mandate Review Study Commission\*  
Environment Advisory Task Force  
Ergonomics in Education Study Commission  
Fisheries Information and Development Center Coordinating Board  
Fix DMV Commission\*  
Governor's Air and Space Medal Nominating Committee  
Governor's Cabinet for Children\*  
Governor's Commission on Eastern European History\*  
Governor's Committee on Children's Services Planning\*  
Governor's Committee on Welfare Reform\*  
Governor's Council on New Jersey Outdoors\*  
Governor's New Jersey 2000 Advisory Committee\*  
Governor's Study Commission on Discrimination in State Employment and Contracting\*  
Governor's Study Group on the Bicentennial of the Polish Constitution\*  
Governor's Task Force on Public Health Emergency Planning\*  
Governor's Task Force on Steroid Use and Prevention\*  
Governor's Teachers Advisory Committee\*  
Hazardous Waste Facilities Siting Commission  
Hoboken School for Vocational Education Board of Trustees  
Homework Regulation Review Commission  
Hospital Care Payment Commission  
Hudson River Waterfront Development Committee\*  
Jewish Heritage Trail Study Commission  
Lake Restoration and Management Advisory Task Force\*  
Landlord-Tenant Task Force\*  
Legalized Gaming Policy Study Commission\*  
Liberty State Park Public Advisory Commission\*  
Low-Level Radioactive Waste Disposal Facility Siting Board  
Managed Care Task Force  
New Jersey Advanced Technology Vehicle Task Force\*  
New Jersey Advisory Commission on Privatization\*  
New Jersey Birthplace of Football Monument Commission  
New Jersey Citizens' Clean Elections Commission  
New Jersey Commemorative Coin Design Commission  
New Jersey Commission to Deter Criminal Activity  
New Jersey Council on Environmental Quality

## Appendix C

New Jersey Council on Job Opportunities\*  
New Jersey Fisheries Development Commission\*  
New Jersey Geographic Information Council\*  
New Jersey Health Data Commission  
New Jersey Obesity Prevention Task Force  
New Jersey Railroad and Transportation Museum Commission  
New Jersey Uniform Securities Law Study Commission  
Parents' Education Program Advisory Committee  
Police Paperwork Reduction Task Force  
Pollution Prevention Advisory Board  
Ports of Philadelphia and Camden - Board of Directors  
Prepaid Higher Education Expense Board  
Prison Officers' Pension Commission  
Property Tax Convention Tax Force  
Racing Industry Commission\*  
Radioactive Waste Advisory Committee  
Real Property Recording Study Commission  
Recreational Sports and Leisure Activities Liability Study Commission  
Regional Impact Council for Camden  
Regional Intergovernmental Transportation Coordinating Study Commission  
Regional Marine Research Boards  
Renewable Energy Task Force\*  
Review, Planning and Implementation Steering Committee\*  
Right to Know Advisory Council\*  
Rural Advisory Council  
School Construction Review Commission  
South Jersey Food Distribution  
State Advisory Committee on Driver Education  
State Board of Public Movers and Warehousemen  
State Commission on County and Municipal Government  
State Commission on Drunk Driving  
State of New Jersey Technology Governing Board\*  
State Revenue Forecasting Advisory Commission  
Storm Water Detention Facility Advisory Council  
Study Commission on Parole\*  
Task Force for the Review of the Farmland Assessment Program\*  
Task Force for the Review of the Treatment of the Criminally Insane\*  
Task Force on New Jersey History  
Task Force on the Affordability and Accessibility of Health Care in New Jersey\*  
Task Force on Workplace Violence

## Appendix C

Task Force to Study Attendance in Public Schools  
The Trustees of the New Jersey School of the Arts  
Travel Demand Management Advisory Council  
Ventnor City Redevelopment Agency  
Video Lottery Study Commission\*  
Women's Business Advisory Council  
World Language Instruction Commission  
Youth Transitions to Work Partnership Advisory Council

## Appendix D

### Background information on the report of the Housing Opportunity Task Force

The Housing Opportunity Task Force's final report documents the history and evolution of the Supreme Court's decisions in the *Mt. Laurel* cases, the "Fair Housing Act," and the Council on Affordable Housing (COAH).<sup>1</sup> It also reflects the changed economic, demographic, and social circumstances in this State, which explain why the current system is broken and unworkable. The report provides a list of proposals providing common-sense solutions to the State's Affordable Housing issues, including:

- Implementation of a system that makes affordable housing a natural by-product of normal development and eliminates the endless conflicts, expenditures and complexities that have been attendant to all prior approaches;
- Recommendation that the Council on Affordable Housing should be abolished and replaced with a system that is sustainable, fair, simple, and predictable;
- Oversight of affordable housing outside of the current COAH system by incorporating an affordable housing element into municipal master plans, which would be overseen by County Planning Boards, in an effort to allow municipalities the necessary flexibility to customize affordable housing obligations to reflect the unique circumstances of each area;
- Focus on rehabilitation as a means of providing affordable housing solutions to those low and moderate income households that are currently occupying deficient housing units;
- Reevaluation of municipal capacity for affordable housing based on a common sense analysis of the available developable space that is actually supported by the necessary infrastructure for residential development;
- Reevaluation of the municipal obligation to provide affordable housing based on realistic growth projections that take into account the density and character of a municipality;
- Reconsideration of the necessary set-aside of development that should be reserved for affordable housing, at a proposed rate of 10%, in order to strike an economic balance that provides for the creation of affordable housing without forcing projects into the realm of economic infeasibility;
- Incentives for housing for certain portions of the population, including special needs housing;

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<sup>1</sup> N.J.S.A. 52:27D-301 et seq.

## Appendix D

- Removal of job growth as a consideration from the affordable housing analysis; and
- Reconsideration of the development fee structure currently utilized to subsidize affordable housing.

The Commissioner of Community Affairs is performing an independent analysis of the Karrow Report and will make recommendations to the Governor that will ensure that the constitutional obligation to provide Affordable Housing is implemented in a fair and reasonable manner.

## Appendix E

### Civil Service Reform Testimony

Chair/Chief Executive Officer Robert M. Czech has taken action to reduce bureaucracy, generate efficiency, and improve management of public employees throughout State and local Civil Service jurisdictions in New Jersey.

The commission recently launched a project to consolidate job titles. This long overdue step is aimed at reducing the number of job titles and making duties less restrictive. The Commission's effort has paid almost immediate dividends. Almost 275 State job titles have already been eliminated, ranging across the spectrum of duties and departments. This reduction is part of a systematic review of titles by the Civil Service Commission to determine which titles remain necessary and which are obsolete or redundant.

The Commission's effort is in keeping with Governor Christie's call for government to be more efficient. Moving forward in this process, the Civil Service Commission will look to redefine the testing process and conduct testing at milestone points where major job responsibilities change instead of for each individual title. This reform would streamline the promotion process.

With respect to the issue of Civil Service generally, the Group heard testimony that placed the present system in its historical perspective. In November 1938, residents of the Township of Millburn went to the polls and voted to join the state Civil Service system. The youngest voters who participated in that election would now be aged 92, and it can be safely assumed that most have passed to their final reward. Nonetheless, their decision remains binding on today's residents of Millburn and their elected officials. While several studies in the 1970's suggested ways to reform Civil Service, no major reforms have been enacted.<sup>1</sup>

Title 11A of the New Jersey Statutes, which allows municipalities to join Civil Service through a referendum, provides no way for later generations of voters to undo that decision.

*We the people' can amend our Constitution -- our basic framework of civil rights and self-government -- but we cannot rescind a personnel policy decision made over 70 years ago and opt out of the Civil Service system, -- Millburn Administrator Timothy Gordon in written testimony presented to the Red Tape Review Group.*

In the 102 years since New Jersey established a Civil Service system, residents of 194 of

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<sup>1</sup> These studies included a gubernatorial task force, a Legislative Office of Fiscal Affairs Study and a federally-funded study by the consultant Carl Lutz.

## Appendix E

the State's 566 municipalities and every county except Somerset have voted to join it.<sup>2</sup> They undoubtedly did so because they saw considerable advantages in joining a system that promised hiring and promotions would be based on merit. Most joined during the first six decades of the program's existence. Only 14 municipalities have joined Civil Service since 1969, and only three<sup>3</sup> have done so in the last 30 years. The last two counties to join Civil Service -- Gloucester and Salem -- did so in 1955. Voters in Somerset County rejected a proposal to join Civil Service in 1972.

During its hearing, the Red Tape Review Committee heard many of the same complaints about the Civil Service system that have been voiced for decades. Middletown Township Administrator Anthony Mercantante testified that Civil Service creates long delays in resolving important personnel decisions. Getting a list of applicants qualified for a position can take one to two years, he said, while an appeal of one employee's title classification took four years to resolve. He also testified that at a time when municipalities are under intense pressure to reduce property taxes by sharing services, Civil Service stands as an obstacle, particularly when one of the towns belongs to the system and the other does not.

Mr. Gordon, testifying on behalf of the Township of Millburn and the New Jersey State League of Municipalities, said municipalities that opt out of Civil Service "will realize a reduction in red tape and at the same time realize cost savings." He argued that only by opting out can municipalities gain the flexibility they need to cut costs, as previous efforts to provide that flexibility through reform of the Civil Service system have proved unsuccessful. "The time for reformation of the Civil Service system has come and gone," Mr. Gordon said. The Township of Millburn passed a resolution last fall urging that municipalities be given the power to opt-out of the Civil Service system and the League of Municipalities unanimously endorsed it at its annual conference in November 2009.

For many local governments -- probably most -- a decision on whether or not to "opt-out" of Civil Service would hinge on whether or not it will produce savings that will in turn reduce or hold down property taxes. Some towns may save money by remaining in Civil Service and avoiding the costs of creating their own personnel systems; others have already concluded they can cut red tape and save money by opting out. The Governor has recommended legislation in this regard, and proposes additional reforms to eliminate obstacles to cost-saving local shared service and consolidation initiatives.

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<sup>2</sup> Another 203 local government entities such as fire districts, libraries, utility and housing authorities and boards of social services also belong to the Civil Service system. Ten municipal school districts also belong to the system.

<sup>3</sup> They are Winslow Township (1986), Pleasantville City (2004) and Runnemede Borough (2008).

## Appendix F

### Department of Education Review of Mandates

#### N.J.S.A. 18A:11-11 – *Administrative Contracts.*

This law requires administrative contracts to be reopened if modifies in any way, even for cost-saving measures. The DOE proposes that contracts should be opened for wage freezes and other cost-savings measures without going to the public.

#### N.J.S.A.18A:35-5, 7, 8 – Health & Physical Education.

This law requires health and physical education classes for grades 1-12, 2.5 hours per week. The DOE suggests that this statute be amended to permit flexibility for grades 1-6 and, in general, greater flexibility with time requirements.

#### N.J.S.A.18A: 40-1 – School Nurses

The DOE suggests that schools in close proximity to each other should be permitted to share nurses.

In addition, legislation is pending to extend the life of school buses, which the educators who testified at our hearing support, as does the DOE. The DOE also suggests relaxing the requirement for an architect when a project is minor in nature; to change requirements so that special education students can be placed in the district and kept on the rolls for ASSA purposes; and to permit circumstances where district superintendents could retire after August 1 to allow time for the District Board of Education to select a replacement.

The Department of Education has identified the following regulations to be in contravention of Executive Order No. 2 and makes suggestions regarding these unfunded educational mandates in light of a difficult fiscal environment.

#### N.J.A.C. 6A:8-5.1(a)1v – *Financial Literacy Mandate for High School Seniors*

As it begins its 180-day comprehensive review of existing regulations, the Department of Education is concerned about cost issues related to the financial literacy mandate for high school graduates. The requirement was scheduled to become effective with the 2010-2011 ninth-grade class, but the DOE has proposed a new effective date of 2013 for consideration by the State Board of Education.

#### N.J.A.C. 6A:8-1.1(a) – *Standards and Assessment.*

This broad rule outlines curriculum requirements, including those for world languages (K-8). DOE recommends waiver or flexibility for implementation of the program (scope of program, grades, etc.)

## Appendix F

### N.J.A.C. 6A:9-14.1 – *Acting Administrators.*

This rule limits the terms of acting administrators to three months, with three-month renewals as necessary. DOE recommends that retired administrators be given a waiver to serve for two years or more.

### N.J.A.C. 6A:13 – *Programs and Practices to Support Student Achievement.*

This rule outlines the requirements for high poverty school districts with regard to class size, full-day kindergarten, language arts literacy, mathematics literacy and the time-line for implementation of programs. DOE recommends a waiver or relaxation of the implementation mandates.

### N.J.A.C. 6A:14 – *Special Education.*

The legal authority for these regulations is the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §§1400 et seq. DOE recommends a waiver for requirements that exceed the federal statute.

### N.J.A.C. 6A:16-9.1 – *Programs to Support Student Development.*

This regulation details the requirements to establish an alternative education program. DOE recommends waiver or equivalency to support districts in their need to make budget cuts without sacrificing the integrity of their educational programs.

### N.J.A.C. 6A:16-10.1 – *Programs to Support Student Development.*

This regulation outlines the requirements for home or out of school instruction due to a temporary or chronic health condition. DOE recommends waiver or equivalency to support districts in their need to make budget cuts without sacrificing the integrity of their educational programs.

### N.J.A.C. 6A:23A-3.1 – *Fiscal Accountability, Efficiency and Budgeting Procedures.*

This subchapter addresses the review and approval of employment contracts for superintendents, assistant superintendents and business administrators by Executive County Superintendents, including additional standards. DOE recommends waiver or relaxation of the code.

## Appendix G

### Results of the 90-Day Review of Frozen Regulations

#### Department of Law and Public Safety

41 N.J.R. 1651; N.J.A.C. 13:33-8.8, 9. *Ophthalmic Dispensers and Ophthalmic Technicians Board – Registration for Contract Lens Sellers.*

The rule requires out-of-state sellers of replacement contact lenses to register with the Board before selling contact lenses to consumers in New Jersey. Since the rule intersects with federal Standards, it is being sent back to the Board for additional review.

41 N.J. R. 1387(a); N.J.A.C. 13:33-5.1, 5.9. *Ophthalmic Dispensers and Ophthalmic Technicians Board – Taking Measurements.*

The proposal re-codifies the existing provisions for ophthalmic dispensers taking measurements before dispensing eyeglasses to consumers. The Board will review to see if the rule would cause substantive changes to prevailing practice standards and, therefore, whether the rule is necessary at this time.

41 N.J.R. 3021(a); N.J.A.C. 13:37-1.2. *Nursing Board – Education Programs.*

The existing rules create a process for Board accreditation of new nursing education programs; the proposed amendments tighten the limits. The Board will review to see if the new regulations are unduly burdensome.

41 N.J.R. 2081(a); N.J.A.C. 13:44-4.13. *Veterinary Medical Examiners Board – Complementary Medicine.*

The rule would limit the practice of complementary medicine (animal acupuncture, chiropractic, physical therapy and rehabilitative therapy) to licensed veterinarians and their employees. The Division of Consumer Affairs (“Division”) is sending this back to the Board for re-proposal with less burdensome requirements.

41 N.J.R. 4183(a); N.J.A.C. 13:44D-4.1. *Public Movers and Warehousemen – Moves Based on Weight.*

The new rule would require a mover who charged fees on the basis of shipment weight to weigh his or her truck before and after loading the shipment on a State-certified scale. Weight tickets from the scale would be provided to consumers at the completion of the move. The Division has a concern that this may be overly burdensome and will further study the cost of compliance.

40 N.J.R. 6758(a); N.J.A.C. 13:45A-26D.4. *Sale of Tires.*

## Appendix G

This was a pre-proposal to elicit input on possible regulations for consumer notification as to the age of tires. Tires in storage degrade in quality over time, even if they are “new” to a consumer. The Division has received information from many interested parties and is now determining if regulation is necessary.

40 N.J.R. 6926; N.J.A.C. 13:45F-1.1-1.3, 3.3, 5.2. *Identity Theft.*

This was a pre-proposal to elicit input on new identity theft regulations concerning unauthorized access to personal information stored in computer files. Many parties voiced concern that an earlier proposal would have been difficult and costly to comply with. The Division continues to refine this proposal.

### Department of Labor and Workforce Development

41 N.J.R. 2768(a); N.J.A.C. 12:235-4. *Workers’ Compensation – Informal Process.*

The proposed amendments would establish a new informal process for resolving disputes over medical fees between medical providers and insurers. The Division of Workers’ Compensation will solicit additional views to determine whether to go forward with these amendments and repeals.

### Department of Banking and Insurance

41 N.J.R. 2426; N.J.A.C. 11:24C-4. *Managed Care Plans and Provider Networks.*

This proposal places new standards on health carriers with regard to network negotiations and agreements with providers. DOBI will review further and engage the managed care industry and providers should it decide to pursue the amendments.

41 N.J.R. 3363; N.J.A.C. 11:1-2A.1, 3-18.1, 45.1. *Personal Lines – Rate Filing Review Procedures.*

This new rule would require personal automobile insurance carriers that would raise rates by 7% or more within a 12-month period to notify the Public Advocate. DOBI is engaging in further “advance notice of rulemaking” with the industry and determine whether to go forward.

41 N.J.R. 2612; N.J.A.C. 11:3-8.4-8.6. *Nonrenewal and Cancellation of Private Passenger Auto Insurance.*

This proposal revises the nonrenewal process for automobile insurers in light of the phase out of all-comers on January 1, 2009. This rule will be re-proposed with substantial revisions.

## Appendix G

### Department of Education

41 N.J.R. 4004(a); N.J.A.C. 6A:30 – *Evaluation of the Performance of School Districts.*

This proposal contains regulations for the Quality Single Accountability Continuum Code (QSAC). The Department of Education will complete the current cycle of evaluations and follow-up measures, but the next cycle that is scheduled to begin in September 2010 will be suspended until September 2011 so that DOE can conduct a comprehensive review of the code.

### Civil Service Commission

41 N.J.R. 2500(a), 41 N.J.R. 2726(a); N.J.A.C. 4A:6-1.23 – *Voluntary Furloughs.*

No rule has been proposed, but petitions have been filed to expand the voluntary furlough program. The agency recommends that the rule petitions be denied due to potential negative effects on staff management and workflow issues.

41 N.J.R. 3850(b); N.J.A.C. 4A:8-1.2-1.4 – *Layoffs.*

This petition would enhance the role of affected negotiation units by requiring a meeting rather than consultation in the review of layoff plans. Adding steps to the layoff process would reduce efficiency and there is recourse through the existing administrative appeals process. The agency recommends that the rule petition be denied.

### Department of Environmental Protection

41 N.J.R. 1128(a); N.J.A.C. 7:18-5.6, 9.4 – *Safe Drinking Water Act Rules.*

This rule would add a maximum contaminant level for perchlorate (5 ml) and require testing of water from private wells under the Private Well Testing Act. DEP will delay adoption pending the issuance of federal standards from the EPA this summer and a more rigorous cost/benefit analysis with stakeholder input.

41 N.J.R. 1314(a); N.J.A.C. 7:7A-1.7, 3.6, 3.7, 10.1, 10.3, 11.1 – *Freshwater Wetlands.*

This proposed rule codifies the process to review substantial reliance claims on a letter of interpretation. DEP recommends letting this rule expire because the issue of substantial reliance will be addressed in the Department's broader review of rules for waivers of strict compliance (also as per Executive Order No. 2).

## Appendix G

### Department of Community Affairs

41 N.J.R. 3140(a); N.J.A.C. 5:23-2.20, 3.6, 3.14, 3.15, 3.17, 3.18, 3.20, 3.21, 3.22, 12.2 and 12.12 – *Uniform Construction Code*.

This rule proposes to adopt certain subcodes of the Uniform Construction Code. These proposed amendments reflect the modifications the Department is proposing to adopt and which have been reviewed by the Uniform Construction Code Advisory Board and its subcode committees. One of two new proposed provisions to the UCC is the requirement to install fire sprinklers in newly-constructed one- and two-family dwellings. The Department is strongly encouraged to ensure, consistent with the Notice of Adoption for this provision of the rule proposal, that this provision be revisited in the event that the State's economy has not recovered by the January, 2012, the effective date of this requirement.

## Appendix H

### 180-Day Review of Existing Rules and Regulations

#### Treasury – General

##### N.J.A.C. 17:12-2.12(a) – *Registration Form Requirement.*

Businesses submitting bid proposals to the State must include proof that they are registered with the Division of Revenue. Treasury seeks to modify to eliminate red tape so that bidders who are properly registered but forget to submit the business registration form can legally be considered.

##### N.J.A.C. 17:12-2.2(a) – *MacBride Principles Requirement.*

To be considered for a State contract, a vendor must “Comply with the MacBride Principles of nondiscrimination in employment as set forth at ... N.J.S.A. 52:34-12.2.” To eliminate red tape, Treasury seeks to modify the statute so that the RFP requirement for the form’s completion and inclusion as part of a bidder’s proposal can be simplified or dropped.

##### N.J.A.C. 17:15 – *Central Motor Pool.*

These rules date back to the 1960’s and address the State vehicle pool. Since state vehicle matters are communicated via Circular Letters, there is no need to maintain motor pool rules.

#### Treasury – Taxation

##### N.J.A.C. 18:7-2.14 – *Allocation of Payments Received with the CAR-100.*

This regulation deals with the allocation of payments between the corporate tax and the “Annual Report” registration fee filed using the CAR-100. Treasury recommends repeal of the regulation since the CAR-100 was eliminated and annual reports are filed online through the Division of Revenue.

##### N.J.A.C. 18:7-2.4 – *Proof of Federal Accounting Period.*

This rule requires every corporation that acquires taxable status in New Jersey to submit proof of its accounting period for federal income tax purposes to the Division of Taxation. Corporations that acquire taxable status provide their accounting year information on forms used to register with the Division of Revenue, so this regulation can be repealed.

##### N.J.A.C. 18:7-2.5 – *Proof of Accounting Other than Federal Basis.*

## Appendix H

This regulation requires a corporation which is not required to file a Federal income tax return to submit proof to the Division of Taxation of its accounting period for reporting purposes. Again, this information is provided to the Division of Revenue upon registration, so this rule can be repealed.

### N.J.A.C. 18:32-1.2. - *Written Protest.*

Protests must be in writing and include taxpayer identification items and the specific amount of taxes, interest and/or penalties under protest, any uncontested amounts, and the grounds for the protest with supporting facts. Subsection (b) of the regulation states that a protest that lacks the stated amount of the taxes under protest (or uncontested), the grounds for the protest and the facts supporting the protest will not be considered a valid protest. This subsection has been interpreted as exceeding the statute, however, and the Division proposes its repeal.

## Department of Environmental Protection

The Department of Environmental Protection has undertaken a partial review of existing rules and regulations pursuant to Executive Order No. 2 (2010) and has suggested that the following rules are candidates for repeal or revision.

### N.J.A.C. 7:15 - *Water Quality Management Planning Rules*

These rules set forth where sewers may be placed throughout the state and the density of developments in other areas. We are already actively engaged in a series of stakeholder meetings to review and address the issues raised by the regulated and environmental communities.

### N.J.A.C. 7:7E - *Public Access*

While the DEP has historically imposed public access requirements pursuant to development applications on lands adjacent to tidal waters, a '08 rule adoption significantly extended the DEP's regulatory reach by requiring municipalities and others to provide 24/7 access and other amenities and by imposing substantial monetary obligations to provide off-site access when on-site access was not feasible. The DEP is about to undertake a stakeholder meeting on these issues to better define the public's need and right for access to tidal waters under the public trust doctrine and to seek a balance with the interests of those who are developing along those waters or seeking to enhance economic opportunities.

### N.J.A.C. 7:38 - *Highlands*

In 2004 the Legislature enacted the "Highlands Water Protection and Planning Act." Major provisions of this law included designation of Preservation and Planning areas,

## Appendix H

creation of the Highlands Water Protection and Planning Council, directing the DEP to prepare rules for enhanced protection of the Preservation Area, providing 17 types of projects that were exempt for the rules, and specifically providing that agriculture was exempt from the rules.

The act has been highly controversial because it essentially took away nearly all of the land values in the Preservation Area and did not provide a mechanism for adequate compensation, was based on water supply and quality assumptions that have been questioned, did not provide mechanisms for targeting growth anywhere in the Planning Area, further restricts any significant development in the Planning Area, and has been implemented in such a way by the Department and the Council so as to prevent or not easily allow even redevelopment projects. There are also several administrative issues between the DEP and the Council that need to be resolved.

The DEP is fully aware of the issues and controversies and is about to begin a series of stakeholder meetings, involving the legislative leaders and a number of interest groups. The stakeholder process will look to see where greater flexibility in the law exists and if that flexibility should be exercised as well as mechanisms to help facilitate certain development projects. The DEP recognizes that a number of regulatory provisions have been enacted since the adoption of this act and that there may be other ways to protect the water and forest resources of this area. We also plan to fully analyze the underlying scientific and non-legislative policy decisions that were made concerning the law's implementation.

### *N.J.A.C. 7:26C, 26B, 26D, 26E and N.J.A.C. 7:14B - Licensed Site Remediation Professional Program*

Last legislative term the Legislature enacted the Site Remediation Reform Act. This law required the DEP to license site remediation professionals to be able to clean up contaminated sites without extensive oversight by the DEP. DEP is committed to ensuring that this program works as the Legislature intended so that the 20,000 known contaminated sites can be remediated as quickly as possible and hopefully returned to productive economic use.

### *N.J.A.C. 7:26E – Re-adoption of the Technical Requirements for Site Remediation*

The Technical Requirements for Site Remediation (“Tech Regs”) is the regulation that describes the process for remediating contaminated sites. The regulated community has expressed their concern that this regulation is overly prescriptive which hinders the rate at which sites can be remediated.

## Appendix H

In conjunction with the newly implemented Licensed Site Remediation Professional (LSRP) program, the DEP is redrafting the Tech Regs to make them less prescriptive and more goal and performance based. A steering committee of site remediation stakeholders (regulated community, industry trade associations and LSRPs) has been established to provide input to the DEP as part of this process. This group meets on a regular basis with DEP staff to provide input on appropriate changes to both the Tech Regs and the guidance documents. The DEP believes that this active outreach and involvement of stakeholders will result in a streamlined rule that is focused on achievable outcomes with the guidance documents serving as the “how to” manual for conducting site remediation activities.

### *N.J.A.C. 7:26C - The Site Remediation Reform Act (SRRA)*

Signed into law in May of last year, the SRRA authorized the DEP to adopt special rules to implement the provisions of the act. The rules, known as the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS rule), became effective upon filing on November 4, 2009. The emergent nature of this special adoption of the ARRCS rule did not provide, under the law, an opportunity for the public to comment on the rulemaking.

At this time, the DEP is working on proposing minor changes to the ARRCS rule to clarify and simplify certain provisions in the rule. This rulemaking effort thus provides an opportunity for the public, including stakeholder groups, to provide input where the previous rulemaking effort did not provide that opportunity.

The DEP is actively soliciting comments from stakeholders via a listserv and internet outreach process similar to an interested party review, as well as from various stakeholder meetings that are taking place on a regular basis. In addition, the proposal will be subject to formal public comment under the “Administrative Procedure Act.” The DEP is planning to propose the rule in late September of this year.

The DEP plans to propose further more substantive changes to meet its obligations for when the program becomes fully effective in May of 2012. The DEP will continue to actively seek involvement from stakeholders early in the rulemaking process. SRRA and the ARRCS regulations will expedite the clean-up of 20,000 contaminated sites, thereby providing greater protection of human health and the environment and freeing up sites for redevelopment.

### *N.J.A.C. 7:27-19 - High Energy Demand Day compliance date extension*

The existing regulatory requirement will be modified to provide an additional 20 months for certain electricity generating units (those with at least 30% control of NO<sub>x</sub>) to comply

## Appendix H

with tighter NO<sub>x</sub> emission limits (currently required by May 1, 2015). Extension of the compliance date was discussed in response to comments on the rule when adopted in 2009.

### *N.J.A.C. 7:31 - Toxic Catastrophe Prevention Act*

This law was passed after the catastrophe in Bhopal, India where an explosion at a chemical plant killed thousands of persons living near the plant. The Act is intended to prevent similar incidents in New Jersey by proper planning to prevent an incident and to properly respond to it. Recent regulatory changes to this act changed the types of plans certain facilities had to supply, thus costing them significantly more money. Food processing plants were particularly impacted. DEP is looking at the impacts of these regulatory changes, that have gone beyond federal standards, to determine their impacts on the regulated community and if they are necessary for public health and safety.

### *Waivers*

Executive Order No. 2 requires that each DEP adopt regulations that allow it to waive compliance from its rules in certain circumstances. Perhaps in no department is this authority more needed than in the DEP where we have thousands of pages of proscriptive regulations, many often in conflict with each other, many which are near impossible to meeting, many which do not allow for flexibility where a project would actually further the goals of the Department, and many which prevent decisions that could lead to enhanced environmental protection and a net increase in ecological values.

The DEP is working on crafting necessary regulatory changes to allow for the waiver of substantial compliance with its regulations where that waiver would lead to a better environmental result and where that waiver would further the overall policy goals and objectives of the DEP and the State.

### *Flexibility*

Similar to the need for a waiver is the need for greater flexibility in how we protect our natural resources of the State. By focusing on results and state and regional planning goals, rather than site-by-site decision making, we can significantly enhance our environment, ecological resources, and promote sensible economic growth at the same time. We are exploring avenues to incorporate these concepts into our rule and decision making.

### *Time of Decision*

Executive Order No. 2 requires that the DEP adopt a time of decision rule governing the rules that will apply when an application for a permit is made to the Department. Given the number of statutory programs in place at the DEP and the number of state and federal

## Appendix H

laws we are implementing, adoption of a time of decision rule is complicated. We fully intend to abide by the terms of EO 2 and will shortly begin a rule writing process.

### N.J.A.C. 7:7 and N.J.A.C. 7:7E - *Coastal Rules*

DEP is currently drafting a rule proposal to combine the Coastal Permit Program Rules, N.J.A.C. 7:7-1 with the Coastal Zone Management Act rules at N.J.A.C. 7:7E-1 to form one comprehensive coastal rule. This will reduce confusion and provide clarity for people interacting with these rules. These rules expire in March 21, 2011 and July 7, 2011 respectively. In the re-adoption, DEP will remove the traffic and parking requirements, reduce the permitting process (general permits to permit by rules) for activities in manmade lagoons, remove other prohibitions such as restaurants on piers which have no environmental basis, clarify dock requirements, reduce the scope of dune regulation, and clarify the filled water's edge rule, streamline the Tidelands grant signature process, among other streamlining and efficiency changes, some recommended by the Permit Efficiency Task Force.

### N.J.A.C. 7:13 - *Flood Hazard Area Control Act*

The DEP will be proposing amendments to the above rule to streamline and clarify application of these rules, adopted in 2007 which include but are not limited to: 1) Adding more General Permits, these help applicant to obtain permits faster. New GP's: trails and board walks, site remediation, forestry; 2) Adding more Permit by Rules which reduces staff work load. 3) Examining the Riparian Zone rules, looking into relaxing regulations for areas with previously disturbed riparian zone. 4) Adding buffer averaging and/or mitigation type of language for disturbance in riparian zone. 5) Comparing Coastal Rules to Flood Hazard rules to provide uniform requirements based on a particular activity. 6) Re-evaluate acid producing soils criteria; and 7) Unified application procedure for all Land Use permits.

### N.J.A.C. 7:27 - *Title V program streamlining*

The DEP is considering revising existing generic air permit conditions to allow for use of some temporary equipment at major operating facilities. This approach, if approved by EPA, is intended to address industrial facilities' concerns regarding the need for a mechanism to allow facilities to periodically employ temporary equipment for short periods of time and on short notice.

### N.J.A.C. 7:14A - *Stormwater Management Permitting*

Currently, the requirements of the New Jersey Stormwater Management Act are conducted at the local and state level resulting in redundant efforts. The DEP has developed a pilot program (including 27 towns) to determine if the stormwater reviews currently performed by the state can be eliminated allowing the function to be performed

## Appendix H

solely by the municipalities as part of their development project reviews. It is important to note that this is not a new responsibility for municipalities, but rather a strengthening of the existing relationship between the DEP and the municipalities.

### *Delegation of Permitting Authority*

As with the stormwater permitting program outlined above, the DEP will explore other permits that we issue that can more easily be administered on the local level. These will likely encompass minor projects involving individual homeowners where the impacts to the environment are negligible. The DEP is also committed to reviewing its regulatory relationship to other regulatory and planning entities, in particular the Highlands Commission and the Pinelands Commission to ensure a consistency of approach to protecting natural resources while promoting economic growth and also to eliminate redundant and conflicting processes.

### *N.J.A.C. 7:8 - Municipal Stormwater Program*

The DEP has adopted regulations requiring municipalities to adopt certain stormwater ordinances and implement certain practices. The DEP has taken this action in accordance with federal mandates by the US Environmental Protection Agency. In certain instances municipalities have claimed that our rules are too proscriptive and costly. The Department is looking at the flexibility the federal law may allow us to implement our municipal stormwater program and ways that we can make it easier and less costly for local governments to comply. We are also committed to a continuing educational and outreach program to assist municipalities in their compliance efforts.

Appendix I

Executive Order Number	Governor	Topic	Defunct Council?	Statutory?
9	Corzine	NJ commission on government Efficiency and Reform		
30	Corzine	NJ Economic Growth Council		
39	Corzine	Commission on Rationalizing NJ's Health Care Resources		
42	Corzine	State of NJ Technology Governing Board		
52	Corzine	Each Department reports to Appointments Office every December which boards should be eliminated, consolidated, etc.		No
133	Corzine	Governor's Commission on the Horse Racing Industry		
161	Corzine	Study Commission on New Jersey's Non-Public Schools -- exp. June 1, 2010		
2	McGreevey	Establishes BEST Commission (Budget Efficiency Savings Team)		
4	McGreevey	Smart Growth Policy Council in the Office of the Governor to assure State agencies incorporate smart growth principles and the State Plan into their plans and regs		
7	McGreevey	Establishes Governor's Education Cabinet		
13	McGreevey	Governor's Teacher Advisory Committee		
17	McGreevey	Commission on Health Science, Education, and Training (see also EO #42)		
38	McGreevey	Directs "Smart Development" initiatives for DCA (in Office of Smart Growth), DEP, DOT, EDA and Commerce		
42	McGreevey	Creates a Review, Planning and Implementation Steering Committee within the Commission on Health Science, Education and Training		
53	McGreevey	Governor's Fire Service and Safety Task Force		
56	McGreevey	Establishes Commission on Jobs, Growth and Economic Development		
71	McGreevey	Set-Aside Act for Small Businesses (NJSA52:32-17 et seq) requires contracting agencies to set-aside 15% of State contracting dollars; EO increases to minimum of 25%		
129	McGreevey	Vendors with the State must disclose contracted (subcontracted) services that will be performed outside the US; when off-shoring by a vendor is acceptable		
132	McGreevey	Orders a permanent position of CFO in the Commerce and Economic Growth Commission and expands the duties of the Audit Committee		
134	McGreevey	Restrictions on State agencies and authorities with respect to the awarding of contracts and political contributions		No
15	Whitman	Creates Office of the Business Ombudsman at DOS to assist with regulatory environment		
17	Whitman	Creates NJ Advisory Commission on Privatization		
22	Whitman	Ordered DOE to thoroughly review administrative regs by Dec 31, 1995 (EO 8/5/94) to find overly prescriptive, inefficient, unnecessary rules. Extended sunset provisions for review period.		No
27	Whitman	When adopting regs, Administrative agencies to include statement whether federal standards are exceeded	Yes	
38	Whitman	Establishes Prosperity New Jersey		No

Appendix I

40	Whitman	Governor's Council on New Jersey Outdoors		
50	Whitman	Health Care Fraud Task Force to function as policy development body for the Executive Branch to develop a comprehensive health care fraud enforcement plan	Yes	
71	Whitman	Rescinds EO# 15 and transfers Office of the Ombudsman to Department of Commerce and establishes an Account Management System		
82	Whitman	Advisory Committee on the Preservation and Use of Ellis Island		
88	Whitman	Directs State agencies to review regs for impact on interlocal shared service programs		No
94	Whitman	Creates NJ Advanced Technology Vehicle Task Force		
103	Whitman	Orders creation of the Advisory Committee on the Sales and Use Tax		
122	Whitman	Establishes within OIT the NJ Geographic Information Council		
123	Whitman	Establishes Construction Trade Training Counsel and Emerging Small Business Pilot Program in Commerce	Yes	
7	Florio	Establishes Governor's Management Review Commission		Yes
10	Florio	Establishes NJ Transportation Executive Council		
11	Florio	Rescinds 35 EOs of Governor Kean		
13	Florio	Establishes the NJ-Atlantic City Coordinating Council		
19	Florio	Directs that the SES System be implemented Statewide		
27	Florio	Creates Governor's Cabinet Action Group on Juvenile Justice		No
28	Florio	Establishes State Council on Vocational Education		
47	Florio	Develops NJ Quality Achievement Award		
54	Florio	NJ Council on Job Opportunities		
62	Florio	NJ Business-Higher Education Forum		
63	Florio	State Agency Coordinating Council on Local Partnerships		
66	Florio	Establishes Chief of Economic Recovery position		
87	Florio	Defense Conversion and Community Assistance Commission		
102	Florio	Governor's Committee on Children's Services Planning to make recommendations to Cabinet Task Force on Children and Families (precursor to Department of Children and Families?)		
34	Whitman	Continues Governor's Advisory Council on Volunteerism and Community Service; establishes Governor's Youth Advisory Council		
38	Whitman	Establishes Prosperity New Jersey	Yes	
40	Whitman	Governor's Council on New Jersey Outdoors		
50	Whitman	Health Care Fraud Task Force to function as policy development body for the Executive Branch to develop a comprehensive health care fraud enforcement plan		
59	Whitman	"Work First New Jersey" Interdepartmental Coordinating Committee to implement welfare reform		
68	Whitman	Creates Office of Sustainability in Department of Commerce and Economic Development		
71	Whitman	Rescinds EO# 15 and transfers Office of the Ombudsman to Department of Commerce and establishes an Account Management System		No
82	Whitman	Advisory Committee on the Preservation and Use of Ellis Island		

Appendix I

Executive Order Number	Governor	Topic	Defunct Council?	Statutory?
88	Whitman	Directs State agencies to review regs for impact on interlocal shared service programs		
89	Whitman	NJ Advisory Council on Elder Care in DHSS		
94	Whitman	Creates NJ Advanced Technology Vehicle Task Force		
96	Whitman	Directs agencies to adopt policies that comport with 11 sustainability goals of NJ Future's "Living With the Future in Mind"		No
99	Whitman	Office of Volunteerism from Human Services to DOS	No	
103	Whitman	Orders creation of the Advisory Committee on the Sales and Use Tax		
114	Whitman	Creates within DHSS "Task Force on Cancer Prevention, Early Detection and Treatment in NJ"		
122	Whitman	Establishes within OIT the NJ Geographic Information Council	Yes	
123	Whitman	Establishes Construction Trade Training Counsel and Emerging Small Business Pilot Program in Commerce		
4	Florio	Gives Treasury control of State cars; expanded in EO #33		
6	Florio	Consolidates attorneys in Department of Law and Public Safety		Yes
7	Florio	Establishes Governor's Management Review Commission		
10	Florio	Establishes NJ Transportation Executive Council		
11	Florio	Rescinds 35 EOs of Governor Kean		
13	Florio	Establishes the NJ-Atlantic City Coordinating Council		
19	Florio	Directs that the SES System be implemented Statewide		No
28	Florio	Establishes State Council on Vocational Education		
42	Florio	Continues Governor's School Board of Overseers (Kean EO #129)		
47	Florio	Develops NJ Quality Achievement Award		
54	Florio	NJ Council on Job Opportunities		
56	Florio	Continues Ethnic Advisory Council started during Kean Administration (EOs #99 and #206)		
62	Florio	NJ Business-Higher Education Forum		
63	Florio	State Agency Coordinating Council on Local Partnerships		
66	Florio	Establishes Chief of Economic Recovery position		
87	Florio	Defense Conversion and Community Assistance Commission		
102	Florio	Governor's Committee on Children's Services Planning to make recommendations to Cabinet Task Force on Children and Families (precursor to Department of Children and Families?)		
111	Florio	Reconvenes the New Jersey Commission on Environmental Education		