

Legislative Performance Audit

Committee

Committee Members:
Senator John Harms, Chair
Senator Heath Mello, Vice Chair
Speaker Mike Flood
Senator Annette Dubas
Senator Lavon Heidemann
Senator Bob Krist
Senator John Wightman

Legislative Audit Office
P.O. Box 94945, State Capitol
Lincoln, NE 68509-4945
402-471-2221

Office Staff:
Martha Carter, Legislative Auditor
Clarence Mabin, Analyst
Dana McNeil, Analyst
Stephanie Meese, Legal Counsel
Sandy Harman, Committee Clerk

Memorandum

To: Committee Members
From: Stephanie Meese
Date: January 31, 2011
Re: Rules & Regulations Research

You asked the Performance Audit Section (Section) to conduct a preaudit relating to timeliness of regulation promulgation. We found several 2010 performance and financial audits that identified agencies that have not promulgated rules and regulations in a timely fashion. Examples include:

- a legislative performance audit of the Department of Health and Human Services' (DHHS) Community-based Behavioral Health System found that regulations were not in place six years after enactment of LB 1083;
- a legislative performance audit of the Public Service Commission's Office of the Public Advocate and a State Auditor's report found that the PSC had not promulgated required regulations seven years after the passage of the enacting legislation;
- a State Auditor's report found that draft Retirement Board regulations, approved by the board in 2002, had never been finalized; and
- a State Auditor's report covering issues in many agencies found that DHHS had not updated regulations relating to payment rates and 6-month eligibility reviews for certain services, and the Oil and Gas Conservation Commission needed to update its regulations to incorporate statutory changes and fee increases going back as far as 1994.

Timeliness Analysis

We had hoped to analyze the length of time from statutory effective dates to the effective dates of related regulations for a representative sample of bills, but found it was impractical because of the amount of time it would have taken to identify the statutory effective dates for the following reasons. Although the Administrative Procedure Act (Act) requires proposed regulations to cite the relevant statutory authority, in practice that reference sometimes simply cites an entire act, not the specific bill or bills that made the regulations necessary. There may also be more than one effective date if provisions of more than one bill are incorporated into the regulations or if provisions of a single bill became effective at different times. Finally, while the Governor's Policy Research Office (GPRO) and the Secretary of State both maintain regulation tracking systems, neither includes statutory effective dates. (Instead, each system starts with the event that triggers the office's involvement in the regulation process.)

No Timeliness Standard

Although the Act dictates many aspects of the regulation promulgation process, it contains no timeliness standard for promulgation of regulations. Similarly, the legislative history is silent on this point.

The Nebraska Supreme Court has established a minimum standard for timeliness in that the Court has made it clear agencies may not implement a statute that affects an individual right before finalized regulations are in place. In the relevant cases, the Court found that the Department of Motor Vehicle's commencement of license revocation hearings prior to filing finalized regulations with the Secretary of State constituted a denial of the drivers' due process rights.¹

The timing of public hearings on proposed regulations required under the Act is of particular interest to the Legislature. In 2005, the Legislature adopted LB 373 to facilitate legislative involvement in the regulation promulgation process. That process is triggered when an agency files a hearing notice with the Secretary of State and Executive Board. The Board then forwards the notice to relevant parties within the Legislature. Delay in scheduling a hearing also delays the Legislature's involvement in the process.

Timeliness Standards in Other States

At our request, NCSL sent out a survey asking if states have a deadline for completion of administrative rules or regulations following a bill's enactment. Of the 20 states that responded, only two states had formal policies in place, although the majority of states stated that occasionally the legislature will place deadlines for rules and regulations adoption within legislation. Of the two states with formal policies, Indiana requires agencies to begin the rulemaking process within 60 days of the statute that authorized the rule, or the agency has to provide notification to the administrative rules oversight committee stating the reasons for the agency's noncompliance. The other state, North Dakota, has a deadline of nine months following the effective date of the statutory change.²

Additionally, many states also have legislative committees that are responsible for administrative rule reviews. According to NCSL, as of February 2010, 27 states have legislative committees that perform this role and an additional 13 report that either the legislative counsel or the appropriate standing committees fulfill this duty.³

The Nebraska Legislature does not currently have such a committee, although a bill to reestablish one is pending before the Legislature.⁴ A similar Committee was in place from the early 1970s to the mid-1980s. In fact, a 1978 bill to establish the regulation committee as a standing committee was passed over the veto of then-Governor Exon. The Governor's veto memo called the bill "a brazen attempt to violate the separation of powers clause" of the State Constitution, referencing an Attorney General's opinion that the bill raised "very serious questions involving the separation of powers." The Legislature's decision to override the Governor's veto despite these objections suggests it believed strongly in the need for the Committee.

¹ *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 522 N.W.2d 417 (1994); *Dannehl v. Department of Motor Vehicles*, 3 Neb. App. 492, 529 N.W.2d 100 (1995); *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996).

² NCSL, *Deadline by which Administrative Rules/Regulations Must Be Adopted*, August 2010.

³ NCSL, *Administrative Rules Review*, February 2010.

⁴ LB 617, introduced by Senator Heath Mello.

The committee was eliminated in 1986, but the need for legislative involvement in the regulation process was discussed periodically thereafter. No bills were passed, however, until 2005 when the Legislature passed LB 373, which established the existing process for legislative review of proposed regulations.

Conclusion and Recommendations

Although we were unable to conduct an in-depth analysis of the length of time between statutory enactments and completion of the rulemaking process, the examples of problems we identified—in which some rules were not promulgated for years after statutes were adopted—are serious enough to warrant legislative attention. By not adopting rules and regulations in a timely fashion, agencies are not fully implementing the law, which leaves them open for legal challenges as well as thwarting the intent of lawmakers.

While an argument can be made that a single deadline may not fit all circumstances, it is also arguable that regulations, especially when statutorily required, are fundamental to a law's implementation and should be promulgated in a reasonable, timely fashion. When regulations are not promulgated years after a statute's enactment, they fail to meet the standard of reasonableness.

The Committee could consider:

- 1) Setting an outside deadline for completion of the promulgation process, such as North Dakota's nine months after a statutory change. Such a requirement should provide for reasonable exceptions. Such exceptions for good cause could be approved by the Governor, similar to the existing Governor's waiver of the public hearing requirement.
- 2) Setting a deadline for the public hearing date for regulations, since the public hearing triggers the legislative oversight process. Such a requirement should also include an exception process.
- 3) Amending § 84-907.09 to require agencies to identify the specific legislation that authorizes proposed regulations to facilitate future assessments of timeliness. This option was suggested by the GRPO director.

The Legislative Audit Office appreciates the assistance of the Auditor of Public Accounts and his staff in providing information included in this report.