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Regulating the Regulators in New York State

Part II : The Office of Business Permits and Regulatory Assistance



Effective October 1, 1984, the statutory responsibilities of the Office of Business Permits were enlarged and what is now called the Office of Business Permits and Regulatory Assistance has emerged as the newest mechanism for regulating the regulators in New York State. Similar in function to President Reagan's expanded Office of Management and Budget¹ and the California Office of Administrative Law,² the Office of Business Permits and Regulatory Assistance was created to coordinate "review of the State's regulatory programs" and to "permit the development of an integrated approach to agency rule-making and coordination with overall regulatory policy."³ Although in a number of states these functions are in part performed by the gubernatorial exercise of authority in approving or vetoing proposed rules,⁴ the creation of a separate executive review agency is still a relatively new and significant experiment.

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¹ Exec. Order No. 12, 291, 46 Fed. Reg. 13, 193 (1981).

² Cal. Admin. Proc. Act art. VI (1985). Also see 71 Pa. Stat. Ann. tit. 71 §745.2 (1983). See R. PIERCE, S. SHAPIRO and P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS, 118-119 (1985).

³ The Governor's Approval Message; Approval #91, August 3, 1984.

⁴ HAWAII REV. STAT. §91-3 (1984), IND. CODE ANN. §4-22-2-34 (Burns, 1985), IOWA CODE ANN. §§7.17, 17A.4(6) (West, 1985), LA. REV. STAT. ANN. §970 (West, 1981), NEB. REV. STAT. §84-901.02 (1984), NEV. REV. STAT. §416.060 (1984), WYO. STAT. §28-9-101 to 108 (Michie 1984). Also see Model State Administrative Procedure Act §3-202 (Uniform Laws Annotated, vol. 14, 1984).

As discussed in Part I (which was printed in the July, 1986 issue of the *Journal*), the New York State Legislature through its numerous committees and commissions, the Executive through his staff and special offices, the Comptroller through his audits, and the Courts through the initiative of individuals and businesses, already oversee, influence and shape the activities of state administrative agencies.⁵ The Office of Business Permits and Regulatory Assistance (hereinafter referred to as the "regulatory assistance office" or "Office") was also created to perform these responsibilities through the systematic review of rules proposed by other state agencies.

Pursuant to specific and detailed statutory procedures,⁶ state administrative agencies must submit a copy of each proposed rule⁷ and two supporting studies—a regulatory impact statement⁸ and a regulatory flexibility analysis,⁹ for review by the regulatory assistance office.¹⁰ The Office must examine each rule and the supporting studies for compliance with specified statutory criteria.¹¹ This executive review is not simply to ensure compliance with administrative rule-making procedures; it is a mandate for broad substantive review of proposed rules.

Broad Substantive Review of Proposed Rules

In performing its judicial review-type function of reviewing proposed rules, the regulatory assistance office must resolve such questions of law as whether the proposed rule "is clearly within the authority delegated by law" and whether it "is consistent with . . . a specific legislative purpose" and "with existing state statutes and rules."¹² In addition, the Office must determine whether the proposed rule is "necessary to achieve a specific legislative purpose" and "does not unnecessarily duplicate existing federal or state statutes or rules."

(emphasis added).¹³ The regulatory assistance office also must determine whether the agency's regulatory impact statement and regulatory flexibility analysis are "adequate to enable interested persons to evaluate the impact of the proposed rule." (emphasis added)¹⁴

The statutory tests of "necessary" and "adequate" give the regulatory assistance office broad authority to review proposed rules. To apply these tests, the Office needs to do more than judge a narrow question of law. The Office also must assess the policy and substantive aspects of a proposed rule in order to judge its necessity and must assess the technical analyses in the supporting studies in order to judge the adequacy of the studies.

Enforcement Through Delay and Public Pressure

The executive review statute sets forth in detail the enforcement mechanism for the Office's review of proposed rules, regulatory impact statements and regulatory flexibility analyses. If an agency fails to change a proposed rule and its supporting studies to conform with the Office's interpretation of the statutory criteria, the regulatory assistance office can delay for a limited period of time the effective date of a proposed rule. During this period of delay, the Office can generate public pressure to force an agency into cooperating with it because at each stage of review, notices of the Office's criticisms of a proposed rule and its supporting studies must be given not only to the public, through publication in the state register, but also to the governor, secretary to the governor, temporary president of the senate, speaker of the assembly and the Administrative Regulations Review Commission (ARRC).¹⁵

To enforce executive review through the power to delay and generate public pressure, the statute sets forth elaborate procedures and a detailed timetable for interactive

review of proposed rules and supporting studies by the Office and the agency. If the agency does not comply with the strict deadlines for cooperating with the Office, the proposed rule will be deemed withdrawn.¹⁶

The power to generate public pressure and to delay the effective date of a proposed rule can be exercised as soon as the regulatory assistance office begins its review of a proposed rule. If the Office concludes that an agency's decision to provide the public the minimum statutory time period for comment does not provide the public sufficient opportunity, the Office can extend the period for comment by fifteen days.¹⁷ Notice of this must be published in the state register and given to the governor, legislative leaders and ARRC.¹⁸

After reviewing a proposed rule and its supporting studies, if the Office concludes that any of the statutory criteria has not been met, the Office must notify the agency proposing the rule.¹⁹ This delays the effective date of the proposed rule until thirty days after the agency responds to the Office's criticisms.

⁵ See generally part one *supra*.

⁶ N.Y. A.P.A. §202-c (McKinney 1984).

⁷ *Id.* at 202-c (1).

⁸ A regulatory impact statement shall contain information on the statutory authority for the rule, the needs and benefits it serves, the cost of complying with the rule, and a statement indicating whether any significant alternatives to the rule were considered. *Id.* at 202-a.

⁹ A regulatory flexibility analysis shall analyze the impact of a proposed rule on small businesses. *Id.* at 202-b.

¹⁰ *Id.* at 202-c(2).

¹¹ *Id.* at §202-c(4).

¹² *Id.* at 202-c(4)(a).

¹³ *Id.*

¹⁴ *Id.* at 202-c(4)(b).

¹⁵ *Id.* at §202-c(5)(6)(7)(8)(10) (McKinney 1984).

¹⁶ *Id.* at 202-c(6)(7).

¹⁷ *Id.* at 202(1), 202-c(8). N.Y. LEGIS. LAW §87(3) (McKinney 1984).

¹⁸ N.Y. A.P.A. §202-c(8) and (10) (McKinney 1984).

¹⁹ *Id.* at 202-c(5).

The Office's notification must be published in the state register, and the notice and the agency's response must be given to the governor, legislative leaders and ARRC.²⁰

After receiving the agency's response, if the regulatory assistance office still concludes that any of the criteria has not been met, the regulatory assistance office again must so notify the agency. The regulatory assistance office has only fifteen days to act, but once it acts, the Office again delays the effective date of the rule. But this time the agency must not only respond to the Office's continuing criticisms. It is also required to hold a public hearing at which the agency must present its response to the regulatory assistance office's second set of criticisms and provide any interested person an opportunity to use this forum to comment on the proposed rule and supporting studies.²¹

After the hearing, the agency must prepare for the governor a "brief report" indicating whether the agency intends to proceed with the rulemaking and setting forth the agency's response to the Office's criticisms. Notice of the Office's continuing criticisms and notice of the agency's scheduling of a public hearing must be published in the state register, and these notices and the "brief report" must be sent to the governor, legislative leaders and ARRC. Finally, the proposed rule may not be adopted until ten days after the report is sent to the governor.²²

The power to delay and generate public pressure could be a powerful enforcement mechanism. The procedures ensure that if an agency does not cooperate fully and quickly the whole dispute will become public with prominent public officials being invited to participate in the dispute. Because agencies usually prefer to settle in-house disputes with sister agencies privately and quietly, this power to delay and generate public pressure should pro-

mote expeditious resolution of any criticisms of a proposed rule by the regulatory assistance office.

Potential Obstacles to the Effective Functioning of the Executive Review Process

The structure of the statute establishing the regulatory assistance office, the omission or ambiguous wording of key provisions, and the limited funding of the Office's operations might seriously hamper the effectiveness of the executive review process.

First the elaborate procedures for enforcement of executive review through the power to delay and generate public pressure could fail, if one critical condition is not met. If support for the regulatory assistance office by the Governor, the Legislature or the public is not strong, an agency could safely ignore the Office's criticisms and thus thwart the statutory enforcement mechanism. If public exposure of a dispute with the Office fails to generate any gubernatorial, legislative or public pressure to change the proposed rule, and the review procedures are exhausted, an agency can adopt the original rule, and the regulatory assistance office can do nothing about it.

Second, the regulatory assistance office has insufficient expertise to perform the technical tasks contemplated by the regulatory review statute. Currently, the executive review staff consists of three generalists: two attorneys and one researcher.²³ In order to apply intelligently the statutory criteria, the staff must possess the specialized expertise necessary to assess the technical aspects of the numerous and diverse proposed rules and supporting studies being prepared by other state agencies.

Third, the regulatory review procedures might shift the policy-making from the specialized agencies created to do this to the regulatory assistance office which

was not formed to make policy but rather to monitor the making of policy by other agencies. This might occur for several reasons.

(1) The regulatory review statute fails to specify a standard of review to be followed by the regulatory assistance office when reviewing proposed rules and their supporting studies for compliance with the statutory criteria. The standard of review defines the degree the Office is authorized to intervene into an agency's development of a rule. Defining a standard of review delineates the institutional relationship between a reviewing body and an administrative agency. For the courts, CPLR Article 78 tries to define the institutional relationship. But, for the regulatory assistance office, its enabling statute is silent on this point.²⁴

If the Office assumes a role similar to a reviewing court, it would defer to the expertise of a regulatory agency by limiting its review of compliance with the statutory criteria to determining whether a proposed rule and its supporting studies are supported by substantial evidence or are not arbitrary and capricious.²⁵ But if the office assumes a more aggressive

²⁰ *Id.* at 202-c(6) and (10)

²¹ *Id.* at 202-c(7).

²² *Id.* at 202-c(7)(b)-(c).

²³ Telephone Conversation with William E. Redmond, Counsel, Office of Business Permits and Regulatory Assistance. (October 4, 1985).

²⁴ In contrast, the Presidential Executive Order states that nothing "shall be construed as displacing the agencies' responsibilities delegated by law." 46 Fed. Reg. 13, 193 §3(f)(3) (1981). The California statute bars the Office from substituting its judgment for that of the rulemaking agency. CAL. ADMIN. ACT ART. VI §11349.1(b) (West 1985).

²⁵ N.Y. CIV. PRAC. LAW §7803(3) and (4) (McKinney 1981). Whether these two standards are in fact different is a matter of continuous debate. See R. PIERCE, S. SHAPIRO, and P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS*, 362-363 (1985). Schwartz, *Administrative Law*, 35 SYRACUSE L. REV. 1, 7-8 (1984). *Id.* at 29 SYRACUSE L. REV. 1, 21 (1978). *Id.* at 26 SYRACUSE L. REV. 1, 7-8 (1975).

review, it might in effect be undertaking a *de novo* review. When determining whether a proposed rule and its supporting studies comply with the statutory criteria, the Office might independently assess the factual basis for a rule and the agency's policy preferences. To do this, the regulatory assistance office might find itself substituting its own judgment for that of the agency.

(2) Even if the statute had specified the scope of review for the Office, the application of the criteria of "necessary" and "adequate" are sufficiently open-ended to still provide the Office the opportunity to substitute its judgment for the judgment of a specialized administrative agency. A study of the California Office of Administrative Law noted that the most frequently cited reason for disapproving proposed regulations was the failure to meet the "necessity" standard.²⁶ An examination of those decisions revealed that when a proposed rule involved factual determinations, centralized review was practicable. But, when a proposed rule called for the exercise of judgment, it was inevitable that the reviewing office would substitute its judgment for that of the agency.²⁷

(3) By statutorily centralizing the review of regulations with the Office and vesting it with broad authority for substantive review, the executive review statute creates an agency for administrative appeals—a new forum before which the Governor, legislative officials and interested individuals and regulated parties may present arguments for revising or eliminating an agency's proposed rule. Professor Kenneth Davis suggests that this type of process for regulatory review undercuts the rulemaking process. In regard to the Presidential Executive Order 12,291, he warned that:

When a good lawyer loses in the agency, should he do what he can to win in OMB [Office of Management and

Budget]? Should he then collaborate with his client's lobbyists? If he is afraid his opponents may effectively answer his best arguments, should he withhold them from the agency and present them for the first time to OMB, where they can be kept secret? . . . The result is to some extent a destruction of a part of what is especially good about rulemaking procedures . . .

At its worst, the system under the Executive Order can become one in which the presentation of written comments to the rulemaking agency is totally nullified and decisions are made totally on the basis of secret presentations to people in the Executive Office.²⁸

Incidentally, any shifting of policy-making responsibility from the specialized agency to a generalist agency also might weaken the morale of the agency staff and reduce their incentive to do a thorough job.

At this point in the development of the regulatory assistance office, however, it is unlikely that any significant shifting of responsibility will occur. The staff is too small and lacks the necessary expertise to undermine the specialized agencies by removing from them significant policy-making responsibility.²⁹ But, as the size and expertise of the Office grows, the risk of this shifting of responsibility also will grow.

Fourth, the regulatory review procedures institutionalize indirect *ex parte* and unrecorded contacts between state agencies and interested persons who contact the regulatory assistance office. Even though such contacts are not barred by the State Administrative Procedure Act,³⁰ this statutory encouragement of indirect *ex parte* contacts might lead the Office to undermine rather than improve the ability of state agencies to fulfill their statutory responsibilities.

Prior to the formation of these review procedures, *ex parte* comments were usually made to the agency officials responsible for promulgating a rule.³¹ Under the review procedures, the regulatory assistance office will undoubtedly be contacted directly by interested

persons. The Office will probably reconvey summaries of the comments to the agency. When interested parties choose strategically to contact only the regulatory assistance office and not to contact the agency, the agency will lose the benefit of hearing their unedited comments, will lose the opportunity to discuss the comments with the interested persons and therefore will lose access to information that might be relevant to promulgating an effective rule.³²

Fifth, the statute does not indicate whether a dissatisfied party may seek judicial review of a decision by the Office that an agency's proposed rule complies with the statutory criteria³³ (i.e. that the rule is "necessary or that the regulatory impact statement and the regulatory flexibility analysis are "adequate"). In contrast to the Presidential Ex-

²⁶ See Cohen, *Regulating Reform: Assessing the California Plan*, 1983 DUKE L.J. 231, 268, (1983).

²⁷ *Id.* at 271-275.

²⁸ Davis, *Presidential Control of Rulemaking*, 56 TUL. L. REV. §849, 855 (1982).

²⁹ See *supra* note 23 and accompanying text.

³⁰ SAPA only restricts *ex-parte* contacts in adjudicatory proceedings. N.Y. A.P.A. §307(2) (McKinney, 1984). See *McSpedon v. Roberts*, 117 Misc. 2d 679, 459 N.Y.S. 2d 233 (1983) where a court held that *ex-parte* contacts in rulemaking proceedings were not prohibited. Whether the *ex-parte* contacts should be barred is a significant and controversial question. See Verkuil, *Symposium on Presidential Control of Rulemaking*, 56 TUL. L. REV. 811 (1982).

³¹ N.Y. A.P.A. §202(1) (McKinney 1984).

³² The federal procedures for executive review try to minimize the problem by requiring all comments submitted to OMB also be sent to the agency and that such comments be disclosed in the record. Furthermore, any facts and information developed by OMB and submitted to an agency also shall be made part of the record. Davis, *Presidential Control of Rulemaking*, 56 TUL. L. REV. 849-875 (1982).

³³ When the requirement to prepare the two supporting studies was created, judicial review was limited to compliance with the procedural requirements for preparing the studies. N.Y. A.P.A. 202 (8) and 1984 N.Y. LAWS Ch. 698. But when the regulatory assistance office was created, its enabling statute did not impose any restrictions on judicial review of decisions by the Office.

executive order and the statutes enacted in Pennsylvania³⁴ and California³⁵ for regulatory review, New York's statute is silent regarding the right to obtain judicial review of decisions by the regulatory assistance office. Aggrieved parties will probably tie up the regulatory assistance office in the courts until this ambiguity is judicially resolved.

Finally, the placement of the regulatory review responsibilities with the Office of Business Permits might compromise the neutrality of the regulatory assistance office. The Office of Business Permits was formed to provide permit assistance to persons undertaking commercial or non-profit business projects. The goal was to "provide a comprehensive permit information, one-stop service for permit applicants, and the coordination of permit processing and review."³⁶ In effect, the Office of Business Permits was established to represent business interests before state agencies responsible for issuing business permits. This is a function similar to one of the functions of the New York State Consumer Protection Board, a governmental agency formed to represent consumer interests before other state administrative agencies.³⁷

In contrast with the responsibilities of the Office of Business Permits and the Consumer Protection Board, the responsibilities of the regulatory assistance office are couched in neutral statutory terms.³⁸ Proposed rules and supporting studies are to be judged against neutral statutory criteria. Proposed rules are not to be tested against a standard of "necessary" for the benefit of consumers or for the benefit of business, but rather against a standard of "necessary to achieve a specific legislative purpose."³⁹ Yet the placement of the regulatory assistance responsibilities with the Office of Business Permits might compromise this requirement of neutrality as the Office pursues its dual and conflicting roles of

representing the interests of business and representing broader interests when evaluating proposed rules.

This statutory conflict of functions might cause the Office to disappoint businesses who might expect the Office to represent their interests,⁴⁰ might influence the judiciary's view of any legal challenges to any decisions by the Office, and might undermine the public's confidence in and the effectiveness of the executive review process.

Conclusion

It is no easy task to design an effective system of checks and balances for holding accountable the regulatory agencies. In New York State, there is in place an elaborate system of legislative, executive, comptroller and judicial regulation of the regulators. The executive review responsibilities of the regulatory assistance office is a significant addition to this system of regulation.

The centralized and systematic review of proposed regulations by the regulatory assistance office should provide the Executive an overview of the regulatory activities of state agencies and a unique opportunity to coordinate the development of state regulatory policies. The authority for broad substantive review gives the regulatory assistance office substantial legal authority to scrutinize proposed rules, and the power to delay and generate public pressure should give the Office clout when negotiating with state agencies over the details of proposed rules. But the implementation of the executive review statute must be monitored for the potential problems identified above and others that might surface as the State gains experience with this experimental program.

The decision to create this executive review agency leaves unanswered a complicated and important threshold question: In view of the proliferation in the number of agencies established to regulate the regulators in New York State (see

Part I), is there a more efficient and effective way to hold accountable the regulatory agencies?

Between now and the regulatory assistance office's sunset date of December 31, 1987,⁴¹ the Governor and the Legislature should study the entire system for regulating the regulators in New York State. It is a complex system that deserves systematic study in order to clearly identify its objectives and to assess its efficiency and effectiveness in meeting those objectives. As part of this study, policymakers should consider the various proposals recommended by the New York State Bar Association's Action Unit No. 5 on New York State Regulatory Reform⁴² and other observers of the administrative process.⁴³ The sunset date should provide a timely opportunity to either affirm or reform New York's system of regulating the regulators.

³⁴ The Presidential Executive Order and the Pennsylvania statute each states that the order or statute does not intend to create any new rights enforceable by law. Section 9 of Exec. Order No. 12, 291, 46 Fed. Reg. 13, 193 (1981) and 71 PA. STAT. ANN. tit. 71 §745.2 (Purdon 1983).

³⁵ The California statute explicitly creates certain rights enforceable at law. CAL. ADMIN. PROC. AC §11350(b), 11350.3 (West 1985).

³⁶ N.Y. EXEC. LAW §875 (McKinney 1984).

³⁷ *Id.* at §553(3)(D), (1982).

³⁸ N.Y. A.P.A. §202-c(4) (McKinney 1984).

³⁹ *Id.* at 202-c(4)(a).

⁴⁰ Letter from Stephen P. Woods, National Federation of Independent Business to the Executive Chamber in Support of S9960-A (July 23, 1983).

⁴¹ 1984 N.Y. LAWS Ch. 698 §21.

⁴² New York State Regulatory Reform: Report of Action Unit No. 5 of the New York State Bar Association, Ch. 3 (N.Y. State Bar Association, Albany, N.Y., 1982).

⁴³ *Alternatives to the Legislative Veto*, 32 AD. L. REV. 667 (1980). R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS*, 43-47, 64-78, 86-96, 118-119 (1985). Byse, *Comments on a Structural Reform Proposal: Presidential Directive to Independent Agencies*, 29 AD. L. REV. 157 (1977). Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979). Cutler and Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975).

