# RULES REFORM TASK FORCE

**Report to the Governor and the Legislature**
**January 15, 2001**

**DRAFT**

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# INTRODUCTION

## *Why Does This Report Exist?*

Minnesota first enacted procedural rulemaking requirements in 1945 and has grappled with the Administrative Procedure Act's (APA) competing goals ever since. To be sure, the statute serves many purposes, namely: "(1) to provide oversight of powers and duties delegated to administrative agencies; (2) to increase public accountability of administrative agencies; (3) to ensure a uniform minimum procedure; (4) to increase public access to governmental information; (5) to increase public participation in the formulation of administrative rules; (6) to increase the fairness of agencies in their conduct of contested case proceedings; and (7) to simplify the process of judicial review of agency action as well as increase its ease and availability." (Minn. Stat. § 14.001 (2000)). However, as the statute itself points out, while there is an inherent need to address each of these components, there is also the "need for efficient, economical, and effective government administration."

The statute's purposes need not necessarily translate into government inefficiency, expense or ineffectiveness, but far too often Minnesotans may feel frustrated by burdensome compliance requirements, by a lack of input in the rulemaking process, or by simply not being aware of rules affecting them. Staff members in agencies responsible for issuing rules (or promulgating, as it is often called) protest too. The rulemaking process is often too lengthy to be efficient, too costly to be worthwhile, and too complicated to be effective. By one estimate, the cost to taxpayers to adopt such rules in Minnesota each year is around $3.4 million – and this does not include the cost to the regulated community responsible for complying with them.

Governor Jesse Ventura, lawmakers, business leaders, and many others have called for reforming the regulatory system. And, they are not alone. Many other states are also working to reform their versions of the APA. Indeed, no less than 32 states, including Minnesota, in the last few years have been working to address these same issues. Minnesota must take a hard look at its regulatory system to ensure a competitive business environment, protection for citizens and a more effective, accountable government.

## *The Rules Reform Task Force*

In the last legislative session, the Legislature created a Rules Reform Task Force (RRTF) to address specifically how rules and the rulemaking process of state government could be improved. It's charge: "to study and make recommendations to the governor and the legislature on issues relating to review of agency rules." Furthermore, the Task Force's report was asked to include:

1. "a process to be used by agencies, the governor, and the legislature to identify and prioritize rules and related laws and programs that will be subject to legislative review;

2. a process by which the legislature will review rules and related laws and programs identified under clause (1);

3. the estimated agency and legislative time and resources required for review of rules and related laws and programs under the processes recommended under clauses (1) and (2);

4. the effect of possible repeal of agency rules on the state budget and any loss of benefits to citizens of the state resulting from such a repeal;

5. the desirability of changes in the rulemaking requirements of the Administrative Procedure Act, given increased legislative scrutiny of rules; and

6. an analysis of ways to ensure or encourage compliance with state policies and goals using methods other than rulemaking, such as administrative penalty orders, descriptive guidelines, best management practices, compliance incentives, technical assistance, training, and procedural templates."

This report represents a two and a half-month effort to collect information from businesses, citizens, and agency officials on where the Legislature should focus its reform efforts. The Task Force and its staff collected data from stakeholders, and researched federal and other states' administrative rulemaking processes. It posted a notice of meetings in the State Register and received feedback from many interested parties. All task force meeting notices, testimony, and reform proposals were made available on the RRTF website (www.commissions.leg.state.mn.us/rtf/rtf.htm).

In the end, the Task Force heard that there must be balance. A balance between allowing agencies to implement the will of the Legislature, and maintaining legislative oversight of agency authority; between providing the public with substantial access and participation in the rulemaking process, and allowing an agency to implement rules efficiently and cost-effectively; and between achieving industry compliance, and reducing overall regulatory burdens. Common ground must be sought to achieve this balance and realize real regulatory and rulemaking reform.

## *Goals of the RRTF Report*

In addition to the charge given by the Legislature, the Task Force report reflects three key goals. First, the report identifies the principal challenges blocking the path to an improved regulatory environment. Second, the report proposes several strategies and solutions for redressing these problems. And third, the report serves as a constructive starting point by offering suggestions for implementing these strategies as the Governor and Legislature reform the rulemaking process.

In attempting to address each of these goals, the report tackles three substantive policy areas and is divided accordingly. Chapter One focuses on issues of agency accountability and legislative oversight. Chapter Two analyzes questions surrounding public access and input in the rulemaking process. And, Chapter Three addresses concerns about regulatory burdens and industry compliance. Structurally, each chapter outlines some of the main issues at stake and the objectives pursued by the Task Force. Importantly, chapters also include strategies and recommendations for addressing issues and achieving objectives. A proposed course of implementation is provided, including draft legislative language where appropriate. Finally, Chapter Four offers some conclusions and the Appendix provides applicable statutes referenced in the report, minutes from the RRTF meetings, and other relevant information.

## *Rules Reform Task Force Members*

In creating the Task Force, the Legislature directed the Governor to appoint four people, and the Speaker of the House of Representatives and the Senate Committee on Rules and Administration each to appoint a member from their majority and minority caucuses.

| **House Appointees** | **Senate Appointees** | **Governor's Appointees** |
|---|---|---|
| Rep. Gene Pelowski, Chair<br>*(D-Winona)*<br><br>Rep. Marty Seifert<br>*(R-Marshall)* | Sen. Don Betzold<br>*(D-Fridley)*<br><br>Sen. Dan Stevens<br>*(R-Mora)* | Katie DeBoer<br>*Citizen Member*<br><br>John Knapp<br>*Winthrop & Weinstine, P.A.*<br><br>Laura Offerdahl<br>*Governor's Office*<br><br>David Orren<br>*Minnesota Dept. of Health* |

# Chapter 1: Agency Accountability & Legislative Oversight

The last few decades have seen the rise of the regulatory state. More regulations exist than ever before and, in fact, the number of volumes containing Minnesota's rules is roughly equal in size to the number of volumes containing its statutes. This rise represents several factors. Rules need to be adopted to implement programs that the Legislature enacts. Often the Legislature does not have the time nor the expertise to craft legislation with the necessary detail. Frequently, rules in Minnesota need to be amended to meet federal eligibility requirements, and to reflect technological, economic, social, and other changes. The problem, however, is not simply that there may be too many rules, but rather Minnesota may not be managing its rules process in the most effective way possible. Rules may be beyond the scope of what the Legislature intended, outdated, or simply unnecessary.

When the Legislature allows an agency to promulgate a rule, it is essentially delegating its authority to create laws to that agency. While legislators are ultimately responsible to their constituents, agencies are only directly responsible to the Governor and the Legislature. Consequently, the process by which agencies are held accountable must be improved in order to rein in excessive rulemaking, clean the books of outdated rules, and ensure that rules are meeting the needs of citizens.

**Objectives:** to increase agency accountability for administrative rulemaking, ensure that legislative intent is followed, and serve citizens more responsibly and responsively.

## PROPOSAL: PRIORITIZE AND FOCUS LEGISLATIVE REVIEW PROCESS

**Background:** ???

**Recommendation:** The Task Force recommends encouraging legislative committees to focus on one or two rule chapters or topic areas per session.

The Task Force recommends that the "process to be used by agencies, the governor, and the legislature to identify and prioritize rules and related laws and programs that will be subject to legislative review" be as follows:

- This process applies to the rules subject to review under Minnesota Statutes, section 14.3691, which states in pertinent part: "An entity whose rules are scheduled for review under this section must report to the governor and the appropriate committees of the legislature . . . . The speaker of the house of representatives and the senate committee on rules and administration shall designate the appropriate committees to receive these reports. The report must: (1) list any rules that the entity recommends for repeal; (2) list and briefly describe the rationale for rules that the entity believes should remain in effect; and (3) suggest any changes in rules that would improve the agency's ability to meet the regulatory objectives prescribed by the legislature, while reducing any unnecessary burdens on regulated parties."
- Agencies required to report on their rules should report separately on each chapter of their rules. For most rule chapters that should remain in effect, the report would be a paragraph or two on the continuing viability of the rules chapter. Where appropriate, this would list parts that need updating and when this is anticipated. The report might be more in depth for one or two chapters, but this would happen only if the program or issues related to the rule chapters has taken a recent controversial or problematic turn.
- The agency report should comply with Minnesota Statutes, section 3.197, which states: "A report to the legislature must contain, at the beginning of the report, the cost of preparing the report, including any costs incurred by another agency or another level of government."
- Legislative committees would identify and prioritize rules for review after considering:
  - the agency reports;
  - input from the public; and
  - legislators' experience and opinions.
- Legislative committees would then select for review only one main topic area per committee, except in rare circumstances, where more than one topic area merits legislative attention and scrutiny. In many cases, a topic area would fit within one agency's set of rules. In other cases, a topic area could cut across several agencies when necessary to address the regulatory issues of an industry that is affected by many agencies' rules.

**Rationale:** A limited review of existing rules would be more manageable for the Legislature and state agencies and likely to produce more constructive results.

**Implementation Strategy:** ???

## PROPOSAL: AMEND NOTICE REQUIREMENT TO LEGISLATURE

**Background:** Minnesota Statutes, section 14.116, requires agencies to give notice to the Legislature when proposing rules. The notice must be given to committees with jurisdiction over the subject matter of the rules and to legislators who were authors of the rulemaking authority.

**Recommendation:** The task force recommends requiring notice to be given additionally to the ranking minority member on committees with jurisdiction over the subject matter of the rules. It also recommends deleting the statutory requirement that authors must continue to receive rule notices; instead, agencies should be required to provide notice to sitting recent chief bill authors.

**Rationale:** The notice to committees promotes communication about the rules, especially if committee members are concerned about specific provisions. Including both the committee chair and ranking minority party member ensures that notices receive bipartisan consideration. The notice to legislative authors, however, is problematic for many reasons, especially when the rulemaking authority is contained in an old and often-amended statute. In some cases, agencies may spend 10 or more hours researching authors from many years ago. This burden results in little, if any, benefit, since the policy committees already have received notice. Also, the notice to legislative authors accomplishes little when the rulemaking authority is contained in a large composite bill and the authors of record had little to do with the rulemaking authority.

**Implementation Strategy:** The task force proposes the following legislative language:

> **14.116 NOTICE TO LEGISLATURE.**
>
> When an agency mails notice of intent to adopt rules under section 14.14 or 14.22, the agency must ~~make reasonable efforts to~~ send a copy of the same notice and a copy of the statement of need and reasonableness to ~~the following:~~
>
> ~~(1) all people who are still legislators and who were main authors, or supporting authors, of the law granting the agency the statutory authority the agency relies upon as authority to adopt the proposed rule; and~~
>
> ~~(2)~~ the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rules.
>
> In addition, if the mailing of the notice is within two years of the effective date of the law granting the agency authority to adopt the proposed rules, the agency must make reasonable efforts to send a copy of the notice and the statement to all sitting legislators who were chief authors of the law or of the companion bill to the law or who the agency knows to have been involved in drafting the portion of the law or companion bill granting the rulemaking authority.

## PROPOSAL: DEDICATE EXECUTIVE BRANCH POSITION TO OVERSEE INTERNAL RULES REVIEW PROCESS

**Background:** The executive branch is often criticized for its lack of centralized oversight of administrative rules. The Ventura Administration recognizes the importance of agency accountability for rules and that the Governor's Office bears some responsibility for reining in rulemaking and excessive regulation. In 1999, the

Governor's Office initiated rules review procedures to hold commissioners accountable for agency rules and to provide feedback to agencies at key points in the rulemaking process (see appendix for a summary of these review procedures).

**Recommendation:** The task force supports the efforts of the Governor's Office to assign review the rulemaking process to a staff member in the Governor's Office or Minnesota Planning. This person would coordinate the internal rules review procedures, maintain a state rulemaking docket, and collaborate with state agencies to identify and implement improvements to the rulemaking process.

**Rationale:** Centralized, dedicated executive branch oversight is not meant to add another layer of bureaucracy to the administrative rulemaking process. Rather, it is meant to ensure a more efficient and effective internal review process and provide for greater collaboration with agencies on changes to rulemaking procedures.

**Implementation Strategy:** The Governor's Office will identify a staff person to assume this role. It has already implemented a three-week turn-around on approval of agency rules to address agencies' concerns about the length of the review period. If the rules are not reviewed within three weeks, the Governor's Office will contact the agency about the status of the review and explain why more time is needed to complete the review (see appendix for a summary of these review procedures).

The task force proposes codifying part of the Governor's Office Rule Review Procedures:

> **14.11? Notice to the Office of the Governor.**
> When an agency mails notice of intent to adopt rules under section 14.14 or 14.22, the agency must send a copy of the same notice and a copy of the statement of need and reasonableness to the Office of the Governor.

## PROPOSAL: EXTEND THE GOVERNOR'S VETO AUTHORITY

**Background:** The 1999 Legislature passed a law allowing the Governor to veto all or part of a new rule. As a result, the Governor's Office initiated rules review procedures to provide feedback to agencies early in the rulemaking process to avoid the need to exercise this authority (see appendix for a summary of these review procedures). Currently, the Governor must notify chairs of legislative committees with jurisdiction over the agency whose rule was vetoed. The Governor must also publish notice of the veto in the State Register within 14 days of receiving a copy of the rule from the Secretary of State. Often, this does not translate into a 14 day review period since the Governor must publish a notice of veto according to State Register deadlines. This authority sunsets June 30, 2001.

**Recommendation:** The task force recommends extending this provision beyond the sunset date. In addition, the task force recommends changing the veto period to require the Governor's Office to submit a veto notice to the State Register within 14 days of

receiving a copy of the rule from the Secretary of State. This change will give the Governor's Office a full 14 days to review a rule.

**Rationale:** Allowing the Governor veto authority provides a final check on agencies and protects the regulated community from needless, burdensome, or inappropriate rules. Extending the veto review period by allowing the Governor's Office to submit a veto notice to the State Register within 14 days of receipt enables the Governor adequate time to consider the impact of the rule.

**Implementation Strategy:** The task force proposes to eliminate the sunset clause in Minnesota Statutes, section 14.05, subd. 6. It also recommends the following legislative language:

> Subd. 6. **Veto of adopted rules.** The governor may veto all or a severable portion of a rule of an agency as defined in section 14.02, subdivisions 2 and 4, by ~~publishing~~ submitting notice of the veto in the State Register within 14 days of receiving a copy of the rule from the secretary of state under section 14.16, subdivision 3, 14.26, subdivision 3, or 14.386 or the agency under section 14.389, subdivision 3. This authority applies only to the extent that the agency itself would have authority, through rulemaking, to take such action. If the governor vetoes a rule or portion of a rule under this section, the governor shall notify the chairs of the legislative committees having jurisdiction over the agency whose rule was vetoed.

## PROPOSAL: ENCOURAGE LEGISLATIVE POLICY COMMITTEE RULE REPEALS REVIEW

**Background:** Example of unwanted repeals?

**Recommendation:** The task force encourages the Legislature to review rule repeals in policy committees when possible.

**Rationale:** Committees with expertise in a policy area should consider rule repeals in their policy context. This would also help avoid unwanted rule repeals at the close of the session during conference committee negotiations and allow for greater public consideration and feedback during a committee's deliberations.

**Implementation Strategy:** The task force offers this recommendation to the House and Senate Rules & Administration Committees for their consideration as they adopt legislative rules for 2001-02.

## PROPOSAL: REQUIRE FULL TEXT OF RULE TO ACCOMPANY REPEAL LEGISLATION

**Background:** ???

**Recommendation:** The task force recommends requiring the full text of the rule to accompany the bill to repeal the rule.

**Rationale:** Rules have the force and effect of law and the same legislative procedures for repealing statutes should also apply to rules. In addition, providing this information would allow legislators to consider more effectively the rules proposed for repeal.

**Implementation Strategy:** The task force proposes the following legislative language:

**JOINT RULE 2.01.**

A bill that repeals a statute or rule must ~~may~~ include or be accompanied by an appendix containing the full text of the section or subdivision repealed.

## PROPOSAL: RE-REFER RULES BILLS TO GOVERNMENTAL OPERATIONS COMMITTEES

**Background:** ???

**Recommendation:** The task force recommends that the House and Senate adopt procedures requiring bills repealing rules to be re-referred to the governmental operations committees.

**Rationale:** This change would be parallel to the current legislative rule requiring re-referral of bills granting rulemaking authority to the governmental operations committees.

**Implementation Strategy:** ???

## PROPOSAL: USE EXPEDITED RULEMAKING PROCESS TO REPEAL OBSOLETE RULES

**Background:** ???

**Recommendation:** [See Marinac memo: The task force could recommend the use of the expedited rulemaking process in section 14.389 to repeal rules listed in an agency's annual report on obsolete rules. It would be possible to require use of the full rulemaking process if 100 or more people objected to use of the expedited process. Another option would be to allow standing committees of the legislature to trigger a fuller rulemaking process.]

**Rationale:** ???

**Implementation Strategy:** ???

## PROPOSAL: DEVELOP ONE BILL REPEALING OBSOLETE RULES

**Background:** Under current Minnesota Statutes, section 3C.04, subdivision 4, the Revisor of Statutes has authority to prepare bills clarifying and correcting statutes and administrative rules. Current Joint Rule 2.01 refers to the Revisor attaching an informational memorandum to a "Revisor's bill" correcting errors in Minnesota Statutes.

**Recommendation:** The task force recommends that the Revisor [or the Legislature] develop one bill to repeal obsolete rules. [Staff recommendation: The joint rule could be amended to permit an informational memorandum for a parallel bill repealing obsolete rules.] In order to make sure that the rules were prudently selected, ... [insert desired sign-off procedure, per staff recommendation; see Marinac memo].

**Rationale:** ???

**Implementation Strategy:** ???

## PROPOSAL: INCLUDE RULE NOTES ON PROPOSED REPEALS

**Background:** Under current Minnesota Statutes, section 3.985, the chair of a standing committee to which a bill delegating rulemaking authority has been referred may require an agency to prepare a rulemaking note on the proposed delegation of authority. [A similar provision could be created for bills proposing repeal of rules.]

**Recommendation:** The task force recommends creating a similar provision allowing rulemaking notes on the repeal of rules.

**Rationale:** ???

**Implementation Strategy:** ???

## PROPOSAL: DELAY ADOPTION OF RULE

**Background:** ???

**Recommendation:** The task force recommends temporarily delaying the adoption of rules if the standing committee of the House of Representatives or Senate with jurisdiction over the subject matter of the rules recommends that the rules should not be adopted as proposed.

**Rationale:** ???

**Implementation Strategy:** The Task Force proposes the following legislative language:

**14.165 COMMITTEE AUTHORITY.**

(a) A standing committee of the house of representatives or senate with jurisdiction over the subject matter of a proposed rule may vote to advise an agency that a proposed rule should not be adopted as proposed. The speaker of the house of representatives and the senate committee on committees must determine if a standing committee has jurisdiction over a rule before a committee may act under this section.

(b) A committee vote under this section may occur any time after the publication of the rulemaking notice under section 14.14, subdivision 1a and before notice of adoption is published in the State Register under section 14.18. A committee voting under this section must notify the agency, the Revisor of Statutes, and the chief administrative law judge of the vote as soon as possible. The committee must publish notice of the vote in the State Register as soon as possible.

(c) If a standing committee votes to advise an agency that a proposed rule should not be adopted as proposed, the agency may not adopt the rule until the legislature next adjourns an annual legislative session.

**14.265 COMMITTEE AUTHORITY.**

(a) A standing committee of the house of representatives or senate with jurisdiction over the subject matter of a proposed rule may vote to advise an agency that a proposed rule should not be adopted as proposed. The speaker of the house of representatives and the senate committee on committees must determine if a standing committee has jurisdiction over a rule before a committee may act under this section.

(b) A committee vote under this section may occur any time after the publication of the rulemaking notice under section 14.22 and before notice of adoption is published in the State Register under section 14.27. A committee voting under this section must notify the agency, the Revisor of Statutes, and the chief administrative law judge of the vote as soon as possible. The committee must publish notice of the vote in the State Register as soon as possible.

(c) If a standing committee votes to advise an agency that a proposed rule should not be adopted as proposed, the agency may not adopt the rule until the legislature next adjourns an annual legislative session.

[Note Judge Beck's suggestion in his 12/19/00 memo to consider deleting the LCC rule review procedure in light of the above proposal.]

# Chapter 2: Public Access & Input in the Rulemaking Process

As the APA describes, one of its purposes is to "increase public access to governmental information" and "public participation in the formulation of administrative rules[.]" To be sure, every time an agency promulgates a rule, it must follow prescribed procedures for involving the regulated community and the public-at-large. Not only does this create an open and responsive government, but, as administrative law judges have observed, rules that have attracted wide public comment are often the best and most easily enforced.

Increasing access, however, is not inexpensive. The more opportunities competing interests have to participate in the process, the greater the burden agencies face in satisfying everyone's demands. As a result, the length of time to draft the rule necessarily increases – often substantially. By one estimate, rules that receive a hearing take on average just over two years to promulgate, whereas rules that do not receive a hearing take on average between 10 and 17 months, depending whether the agency seeks outside opinions. Currently, there is already active public input in the rulemaking process, and many agencies proactively secure broad-based public participation. However, not all affected parties are aware of an agency's rule efforts or believe they can contribute to the process, particularly individuals outside the Twin Cities metropolitan area.

**Objective:** To increase communications between agencies, the regulated community, and the public-at-large without unnecessarily lengthening the rulemaking process.

## PROPOSAL: IMPROVE AND EXPAND WEB ACCESS TO RULES INFORMATION

**Background:** While many state agencies already provide certain rulemaking information on the Internet, most public rulemaking dockets are not available on-line. Our paper-intensive system makes it difficult for citizens to easily access rulemaking documents, particularly those that live in rural parts of the state.

**Recommendation:** The task force recommends increasing web access to state agencies' public rulemaking dockets, rule notices, agency contact information, and other related documents. The group also recommends linking agency rulemaking dockets to a centralized state rulemaking docket.

**Rationale:** The regulated community and citizens would have easier access to information about agency rules and timelines, and thus greater opportunities for input.

**Implementation Strategy:** The task force supports the Governor's efforts to direct state agencies to publish public rulemaking dockets, rules notices, contact information and other related materials on the Internet.

## PROPOSAL: MAKE NOTICES AND DOCKETS AVAILABLE TO COUNTY NEWSPAPERS OF RECORD

**Background:** ???

**Recommendation:** The task force recommends that rule notices and the statewide rulemaking docket be made available to each county's newspaper of record.

**Rationale:** The regulated community and citizens would have more access to information about agency rules and timelines, and thus greater opportunities for input.

**Implementation Strategy:** The task force supports the Governor's efforts to notify county legal newspapers of the on-line state rulemaking docket and to provide a publishable version that is available to interested parties.

## PROPOSAL: OBTAIN GREATER CITIZEN FEEDBACK

**Background:** While agencies generally do a good job of seeking feedback from the public and the regulated communities, greater solicitation of input from citizens and stakeholders will provide the broadest possible perspective on the need, reasonableness, clarity and enforceability of agency rules and on the administrative rulemaking process itself.

**Recommendation:** The task force supports the efforts of the Governor's Office and the Inter-Agency Rules Committee to assist agencies, boards and commissions with implementing citizen advisory committees, feedback panels, focus groups or other citizen input mechanisms where they are currently not used.

**Rationale:** Additional feedback early in the process generates ideas for reducing compliance burdens and identifies opportunities to improve the rulemaking process.

**Implementation Strategy:** The Governor's Office and the Inter-Agency Rules Committee will provide technical assistance to agencies, boards and commissions who seek to use citizen feedback mechanisms as part of the administrative rulemaking process.

# Chapter 3: Regulatory Burdens & Industry Compliance

Not all regulated parties benefit from a lengthy rulemaking process. In fact, in many instances, parties may actually prefer that an agency enact a rule more quickly so that they know how an agency will implement or enforce a particular law. Predictability fosters planning and planning fosters compliance. Accordingly, agencies may wish to promulgate rules quickly, but are hampered by the complicated and substantial rulemaking process. Currently, any minor change in a rule, even if it is noncontroversial, must be promulgated. Certainly agencies need to consider carefully the broad impacts of their rules or amendments on multiple stakeholders. Yet, agencies need to provide the regulated community information on a more timely basis so that these parties can respond more effectively and agencies can increase compliance.

Many agencies realize that they would be able to increase stakeholder compliance if they could administer rules more flexibly. "Hard and fast" rules are often overly onerous, costly, and impracticable. Likewise, the regulated community has often sought more flexibility in the administering of rules. Regulated parties want agencies to focus on whether they achieved the Legislature's intended results, rather than whether they followed a specified process by which the results are achieved.

**Objective:** to reduce the regulatory burdens on industries while protecting the public and achieving the compliance goals of state agencies.

## PROPOSAL: PROVIDE ADMINISTRATIVE LAW JUDGE PROCEDURE FOR CHALLENGING UNADOPTED RULE

**Background:** ???

**Recommendation:** The task force recommends allowing a party to have an administrative law judge determine whether an agency's pronouncement is in fact an unadopted rule that should be subject to the formal rulemaking procedures of the APA.

**Rationale:** Agencies are required to adopt rules through the APA. Some stakeholders complain that there is no way to challenge enforcement of an unadopted rule short of a declaratory judgment proceeding in District Court or an expensive contested case proceeding and possible appeal to the Court of Appeals. This new law would provide a

quick and inexpensive procedure for obtaining a decision on the question. The Administrative Law Judge (ALJ) would apply Minnesota law that sets out when an agency policy is mere interpretation of a statute and when it is a rule that must be adopted under the APA. A similar provision is in effect in California (Calif. Stat. § 11340.5).

**Implementation Strategy:** The task force proposes the following legislative language:

> **14.381 UNADOPTED RULES.**
>
> Any person may petition the office of administrative hearings seeking an order of an administrative law judge determining that an agency is utilizing, enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard or similar pronouncement as though it was a duly adopted rule. The petition must be supported by affidavit and must be served upon the agency. The agency must respond in writing to the petition within ten working days. The administrative law judge may order oral argument on the petition, but only if necessary to a decision. The order of the administrative law judge may direct the agency to cease enforcement of any unadopted rule. The order must be served upon the parties and the legislative coordinating commission by first class mail and must be published by the agency in the state register. The decision of the administrative law judge may be appealed under §§14.44 to 14.45.
>
> [Note Judge Beck's suggestion in his 12/19/00 memo to define who will pay the costs of this.]

## PROPOSAL: IMPLEMENT GENERAL VARIANCE LAW

**Background:** "Hard and fast" rules are often overly prescriptive and give agencies little flexibility to work with the regulated community to achieve compliance. For example, agencies with rigidly defined rules may be unable to give a party more time comply with a rule or use an alternative way to meet the purpose of the rule. In the end, agencies cannot reach their compliance goals and regulated parties are dissatisfied with agencies' enforcement practices. Current law allows agencies to grant a variance to a rule, however, an agency must create new rules to decide how the rule will be varied. (Minn. Stat. 2000, section 14.05, subd. 4). Consequently, the legislative language offered below provides more concrete variance procedures thereby allowing agencies to use this tool more effectively.

**Recommendation:** The task force recommends a general variance procedure permitting state agencies to vary a rule if the purpose behind it is met and the waiver meets certain criteria.

**Rationale:** Rules cannot be drafted so that they fairly apply in all situations. This procedure would allow the agencies to tailor the application of rules to particular circumstances. Providing more flexibility to agencies will reduce regulatory burdens and increase industry compliance.

**Implementation Strategy:** The Task Force proposes the following legislative language:

Section 1. Rule Waiver

Subdivision 1. Except to the extent prohibited by statute, each agency may order, in response to a completed petition or on it own motion, a waiver of a rule adopted by the agency, in whole or in part, as applied to the circumstances of a specified person if the agency finds that:

a. the application of the rule to the person at issue would result in hardship or injustice to that person; and

b. the waiver of the rule on the basis of the particular circumstances relative to that specified person would be consistent with the public interest; and

c. the waiver of the rule in the specific case would not prejudice the substantial legal rights of any person.

The decision on whether the circumstances justify the granting of a waiver shall be made at the discretion of the agency head, upon consideration of all relevant factors.

Subd. 2. In response to the timely filing of a completed petition requesting a waiver, the agency shall, except to the extent prohibited by statute, grant a waiver of a rule, in whole or in part, as applied to the particular circumstances of a specified person, if the agency finds that the application of all or a portion thereof to the circumstances of that specified person would not, to any extent, advance or serve any of the purposes of the rule.

Subd. 3. The petitioner assumes the burden of persuasion when a petition is filed for a waiver of an agency rule.

Subd. 4. The agency may create a provision identifying other generally applicable contexts, or other general standards, that it will utilize as a basis for granting discretionary or mandatory waivers of its rules for specified persons. All provisions that identify generally applicable contexts or standards must be submitted to the Governor for final approval before they are implemented b the agency.

Subd. 5. This provision does not preclude the agency from granting waivers in other contexts or on the basis of other standards if the statute or other agency rules authorize it to do so, and the agency deems it appropriate to do so.

Sec. 2. Procedures for Granting Rule Waiver

Subdivision 1. Each agency shall designate an individual to receive written petitions for rule waiver.

Subd. 2. A petition for a waiver shall include the following information where applicable and known to the petitioner:

a. The name and address of the person or entity for whom a waiver is being requested.

b. A description and citation of the specific rule to which a waiver is requested.

c. The specific waiver requested, including the precise scope and operative period that the waiver will extend.

d. The relevant facts that the petitioner believes would justify a waiver. This statement shall include a signed statement from the petitioner attesting to the accuracy of the facts provided in the petition, and a statement of reasons that the petitioner believes will justify a waiver.

e. A history of the agency's action relative to the petitioner.

f. Any information regarding the agency's treatment of similar cases, if known.

g. The name, address, and telephone number of any person inside or outside of state government who would be adversely affected by the grant of the petition, or otherwise possesses knowledge of the matter with respect to the waiver request.

Each agency may include other provisions that govern the form, filing, timing, and contents of petitions for the waivers of rules, and the procedural rights of persons in relation to such petitions.

Subd. 3. Agencies shall acknowledge a petition upon receipt. Each agency shall ensure that notice of the pendency of a petition, and a concise summary of its contents, have been provided to all persons to whom notice is required by any provision of law, within 30 days of the receipt of the provision. In addition, the agency may give notice to other persons. To accomplish this notice provision, each agency may require the petitioner to serve the notice on all persons to whom notice is required by any provision of law, and provide a written statement to the agency attesting that notice has been provided.

Subd. 4. Prior to issuing an order granting or denying a waiver petition, the agency may request additional information from the petitioner relative to the application and surrounding circumstances.

Subd. 5. An order granting or denying a waiver shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains, a statement of the relevant facts and reasons upon which that action is based, and a description of the precise scope and operative period of the waiver. The agency shall grant or deny a petition for the waiver of all or a portion of a rule as soon as practicable, but at any event, shall do so within 60 days of its receipt, unless the petitioner agrees to a later date. Failure of the agency to grant or deny a petition within the required time period shall be deemed approval of that petition by the agency.

Subd. 6. Within five (5) days of its issuance, any waiver order issued shall be transmitted to the petitioner or the person to whom the order pertains, and to any other person entitled to such notice by an provision of law.

Subd. 7. Each agency shall maintain a record of all orders granting and denying waivers. The records shall be indexed by rule and available for public inspection.

Subd. 8. After the agency issues an order granting a waiver, the order is a defense within its terms and the specific facts indicated therein for the person to whom the order pertains in any proceeding in which the rule in question is sought to be invoked.

## PROPOSAL: REDUCE INSTANCES WHERE STATE VARIES FROM FEDERAL RULES

**Background:** A frequent complaint of Minnesota rules is that they conflict with requirements of federal law and the regulated community is then subjected to conflicting requirements. Under the 1995 amendments to Chapter 14 of Minnesota Statutes, agencies are required to identify and justify differences between proposed state rules and federal law.

**Recommendation:** The task force recommends a process to allow citizens and stakeholders the opportunity to petition to change a state rule that is in conflict with a federal rule or law.

**Rationale:** This process would subject rules adopted prior to the 1995 APA amendments to the same level of scrutiny as those adopted since that time. It would reduce the number of state rules that conflict with federal rules or laws without placing an undue burden on state agencies to determine which conflicts are problematic.

**Implementation Strategy:** The task force proposes the following legislative language:

Sec. ___ **[Review of Rules Required by Federal Law.]** Subd. 1. By December 1, 2001, each agency must submit to the governor, the legislative coordinating commission, the policy and funding committees and divisions with jurisdiction over the agency, and the revisor of statutes, a list of any rules or portions of rules that were adopted prior to August 1, 1995 to implement federal programs, rules or statutes together with an assessment of the differences, if any, between the rule so identified and current federal law.

Subd. 2. Any 25 persons may petition an agency requesting the adoption, or amendment or repeal of any rule identified by an agency pursuant to subdivision 1. The agency shall then initiate a rulemaking proceeding within 30 days of the receipt of the petition. The chief administrative law judge may prescribe by rule the form for all petitions under this section and procedures for their submission, consideration and disposition.

Subd. 3. In any rulemaking proceeding under this section, the burden shall be on the agency to establish the need and reasonableness of any difference between the rule and federal law.

Subd. 4. Any proceeding under this section shall be completed within 12 months of the initiation of the proceeding unless extended for good cause by the chief administrative law judge.

## PROPOSAL: STUDY WHETHER INTERPRETIVE NOTICES SHOULD BE EXTENDED TO OTHER STATE AGENCIES

**Background:** In 1990, the Legislature allowed the Department of Revenue to issue Revenue Notices, similar to those published by the IRS. (Minn. Stat. section 14.03, subd. 3 (b) (6) (2000)). The Notices allow the Department to inform taxpayers how they will interpret a particular rule or law. Importantly, these Notices are only binding on the agency and have no precedential value. Taxpayers have benefited from this resource as they are able to receive more information and rely on the agency's pronouncements.

**Recommendation:** The task force recommends that the House and Senate Governmental Operations Committees study whether interpretive notices should be extended to other appropriate situations. Further, if the use of interpretive notices is extended to other situations, it should be limited in scope and should include a sunset to prompt further review.

**Rationale:** Both the agency and taxpayers benefit from additional interpretative information. Regulated parties receive timely information and can proceed accordingly, increasing compliance. Identifying how we might expand the use of these notices to other situations could result in a more efficient and effective regulatory process.

**Implementation Strategy:** The task force proposes the following legislative language:

**14.???? INTERPRETIVE NOTICES.**

Subdivision 1. **Authority.** An agency may make, adopt, and publish interpretive notices. An "interpretive notice" is a policy statement that has been published pursuant to subdivision 5 and that provides interpretation, details, or supplementary information concerning the application of law or rules. Interpretive notices are published for the information and guidance of citizens, regulated parties, the agency, and others concerned.

Subd. 2. **Effect.** Interpretive notices do not have the force and effect of law and have no precedential effect, but may be relied on by regulated parties until revoked or modified. A notice may be expressly revoked or modified by the agency, by the issuance of an interpretive notice, but may not be revoked or modified retroactively to the detriment of the regulated parties. A change in the law or an interpretation of the law occurring after the interpretive notice is issued, whether in the form of a statute, court decision, administrative rule, or interpretive notice, results in revocation or modification of the notice to the extent that the change affects the notice.

Subd. 3. **Retroactivity.** Interpretive notices are generally interpretive of existing law and therefore are retroactive to the effective date of the applicable law provision unless otherwise stated in the notice.

Subd. 4. **Issuance.** The issuance of interpretive notices is at the discretion of the agency. Before issuing interpretive notices, the agency shall establish procedures governing the issuance of interpretive notices. At least one week before publication of an interpretive notice in the State Register, the agency shall

provide a copy of the notice to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed notice.

Subd. 5. **Publication.** The agency shall publish the interpretive notice in the State Register and in any other manner that makes it accessible to the general public. The agency may charge a reasonable fee for publications.

[The preceding draft language started with Minnesota Statutes, section 270.0604, governing revenue notices, and was adapted to apply generally. This will also need a reference in Minnesota Statutes, section 14.03, subdivision 3, paragraph (b), to exempt it from the regular rulemaking process. Also, we may want to consider a reference like the one in Minnesota Statutes, section 14.06, paragraph (b), that would require the agency to put its interpretations in rule, upon request or under some conditions, and as soon as feasible.]

## PROPOSAL: IMPLEMENT EXPEDITED RULES PROCESS

**Background:** While Minnesota's rulemaking process contains many requirements and protections, it has also been called one of the most complex of any state in the country. That complexity often translates into significant costs, particularly for state agencies. In many instances involving important, complicated, or controversial issues, the rulemaking process effectively ensures appropriate thought, justification, and public participation. However, there are also many noncontroversial rules where Minnesota's rulemaking process is "too much process" for the particular objective and often acts as a disincentive for agencies to adopt rules or amendments in a timely manner.

**Recommendation:** The task force recommends allowing agencies to use a notice and comment rulemaking process to expedite noncontroversial rulemaking. This process would be subject to agency discretion, but would allow the public to move the rulemaking back into the regular process easily.

**Rationale:** ???

**Implementation Strategy:** The task force proposes the following legislative language:

**14.??? NOTICE AND COMMENT PROCESS.**

Subdivision 1. **Application.** An agency may use this section to adopt, amend, or repeal rules, unless a law specifically requires another process or unless 100 requests are received under subdivision 4. Rules adopted, amended, or repealed using the process in this section have the force and effect of law. Sections 14.19, 14.20, 14.365, and 14.366 apply to rules adopted, amended, or repealed under this section.

Subd. 2. **Notice plan; prior approval.** The agency must draft a notice plan under which the agency will make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule by giving notice

of its intention in newsletters, newspapers, or other publications, or through other means of communication. Before publishing the notice in the state register and implementing the notice plan, the agency must obtain prior approval of the notice plan by the chief administrative law judge.

Subd. 3. **Notice and comment.** The agency must publish notice of the proposed rule in the State Register. The agency must also mail the notice to persons who have registered with the agency to receive mailed notices and to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rule. The agency must also give notice according to the notice plan approved under subdivision 2. The mailed notice must include either a copy of the proposed rule or a description of the nature and effect of the proposed rule and a statement that a free copy is available from the agency upon request. The notice must include a statement that, if 100 or more people submit a written request, the agency will have to meet the requirements of sections 14.131 to 14.20 for rules adopted after a hearing or the requirements of sections 14.22 to 14.28 for rules adopted without a hearing, including the preparation of a statement of need and reasonableness and the opportunity for a hearing. The notice in the State Register must include the proposed rule or the amended rule in the form required by the revisor under section 14.07 and a citation to the most specific statutory authority for the rule. The agency must allow 60 days after publication in the State Register for comment on the rule.

Subd. 4. **Requests.** If 100 or more people submit a written request, the agency may adopt the rule only after complying with sections 14.131 to 14.20 or the requirements of sections 14.22 to 14.28. The requests must be in the manner specified in section 14.25.

Subd. 5. **Adoption.** The agency may modify a proposed rule if the modifications do not result in a substantially different rule, as defined in section 14.05, subdivision 2, paragraphs (b) and (c). If the final rule is identical to the rule originally published in the State Register, the agency must publish a notice of adoption in the State Register. If the final rule is different from the rule originally published in the State Register, the agency must publish a copy of the changes in the State Register. The agency must also file a copy of the rule with the governor. The rule is effective after it has been subjected to all requirements described in sections 14.131 to 14.20 and five working days after the notice of adoption is published in the State Register unless a later date is required by law or specified in the rule.

Subd. 6. **Legal review.** Before publication of the final rule in the State Register, the agency must submit the rule to the chief administrative law judge in the office of administrative hearings. The chief administrative law judge shall within 14 days approve or disapprove the rule as to its legality and its form to the extent the form relates to legality.

**[Possible limitation to repeal of obsolete rules or when specifically authorized.** There was some discussion at the last Rules Reform Task Force meeting and in a comment letter by Administrative Law Judge George Beck that

the Notice and Comment process for rulemaking would be a fundamental change in Minnesota rulemaking. If the Task Force is reluctant to recommend this for all rulemakings, please consider instead allowing this for the repeal of obsolete rules and to situations when it is specifically authorized. To accomplish this, subdivision 1 would be replaced, as follows, and corresponding changes would be made to other subdivisions.]

Subdivision 1. **Application.** An agency may use this section to repeal rules identified in the agency's annual obsolete rules report under section 14.05, subdivision 5, unless a law specifically requires another process or unless 100 requests are received under subdivision 4. An agency may also use this section to adopt, amend, or repeal rules when specifically authorized by law, unless 100 requests are received under subdivision 4. Rules adopted, amended, or repealed using the process in this section have the force and effect of law. Sections 14.19, 14.20, 14.365, and 14.366 apply to rules repealed under this section.

[The proposed statutory language was developed by:

- Starting with the language from the expedited rulemaking process in Minnesota Statutes, section 14.389.
- Greatly beefing up the notice provisions to:
  - require notice designed to reach affected persons; and
  - require prior approval by an Administrative Law Judge of the agency's notice plan.
- Providing a 60-day, instead of 30-day, comment period so the notice is more effective.

Agencies can choose to use this process for any rulemaking. However, as a practical matter, this process will be limited to noncontroversial rules because of the public's ability to easily pull this back into the regular rulemaking process with the SONAR and regulatory analysis.]

## PROPOSAL: IMPLEMENT ONE-STOP-SHOPPING PILOT PROGRAM TO COORDINATE MULTIGOVERNMENTAL RULES

**Background:** ???

**Recommendation:** The task force recommends a one-stop-shopping pilot program to coordinate the laws and rules of a particular regulated community to reduce the regulatory burdens on that industry.

**Rationale:** This one-stop-shopping concept allows businesses to focus on business and less on multiple state and federal rules.

**Implementation Strategy:** The task force supports the efforts of the Governor's Office to target a highly regulated industry with many operators throughout the state as a pilot project (e.g. gas stations, farms, restaurants, etc.). The Governor's Office plans to coordinate with various agencies to reduce duplicative reporting requirements and create an index explaining which agency regulates what.

# CONCLUSIONS