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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); (See Appendix B)

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); (See Appendix B)

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; (See Appendix B)

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 regulated entities, 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 *(D-Winona)*	Sen. Don Betzold *(D-Fridley)*	Katie DeBoer *Citizen Member*
Rep. Marty Seifert *(R-Marshall)*	Sen. Dan Stevens *(R-Mora)*	John Knapp *Winthrop & Weinstine, P.A.*
		Laura Offerdahl *Governor's Office*
		David Orren *Minnesota Dept. of Health*

CHAPTER 1: AGENCY ACCOUNTABILITY & LEGISLATIVE OVERSIGHT

"We no longer have that ability [to question an unpromulgated rule] short of spending funds to file lawsuits. It would be helpful to establish a venue for questioning the authority and/or boundaries of state agency policy without requiring individual businesses to expend funds on attorneys."

~ Patti Cullen, Care Providers of Minnesota

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 obsolete rules, update 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.

Strategy: Prioritize and Focus Legislative Review Process

Background: Minnesota Statutes 14.3691 requires a review of cabinet-level agency rules over the next four years. The legislature left it to the Rules Reform Task Force to recommend the details for how the review should be accomplished.

Recommendation: The task force recommends encouraging legislative committees to focus on one or two rule chapters or topic areas per session. It 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 better focus resources on the rules that most need attention. It would also be more manageable for the Legislature and state agencies and likely to produce more constructive results.

Implementation Strategy: The task force will submit this recommended procedure to legislative leadership and the committee chairs with jurisdiction over the rulemaking process.

Strategy: 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 was contained in a large composite bills that passed many years ago 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.

Strategy: 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 C).

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 C).

The task force proposes codifying the notification requirements in the Governor's Office Rule Review Procedures as follows:

> **NOTICE TO THE OFFICE OF THE GOVERNOR.**
> When a draft of the proposed rules is available and before an agency mails notice of intent to adopt rules under section 14.14 or 14.22, the agency must send the proposed rules and the statement of need and reasonableness, or nearly final copies of these documents, to the Office of the Governor.

Strategy: 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 for Minnesota Statutes, section 14.05, subdivision 6 contained in Minnesota Laws 1999, Chapter 129, section 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~~ to 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.

Strategy: Encourage Legislative Policy Committee Rule Repeals Review

Background: Members of the task force expressed concern that in some cases agencies have brought proposals late in the legislative session for repealers of large numbers of rules. In these cases, there is little opportunity for scrutiny by legislators, legislative staff, or the affected public. Changes to legislative rules or procedures will help ensure adequate consideration of proposed rule repeals.

Recommendation: The task force recommends that each policy committee hold one or more hearings early in each legislative session on obsolete rules identified in agency reports. It also recommends that, when possible, rule repeals that surface late in a

legislative session be considered first in a policy committee. Agencies should be encouraged to submit proposals for repeal of rules at the time of introduction of agency omnibus or housekeeping bills.

Rationale: Committees with expertise in a policy area should consider rule repeals in their policy context. This process would also help avoid unwanted rule repeals and allow for greater public consideration and feedback on obsolete rules.

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

Strategy: Allow Full Text of Rule to Accompany Repeal Legislation

Background: Members of the task force expressed concern that in some cases agencies have brought proposals late in the legislative session for repealers of large numbers of rules. In these cases, there is little opportunity for scrutiny by legislators, legislative staff, or the affected public. Changes to legislative rules or procedures will help ensure adequate consideration of proposed rule repeals.

Recommendation: The task force recommends allowing 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 may include or be accompanied by an appendix containing the full text of the section or subdivision repealed.

Strategy: Implement Notice and Comment Process for Obsolete Rules

Background: Members of the task force expressed concern that in some cases state agencies have brought proposals forward late in the legislative session to repeal large numbers of rules. In these instances, there is often little opportunity for scrutiny by legislators, legislative staff, or the affected public. Legislative repeal of agency rules has become more commonplace in recent years as agencies have found the rulemaking process to be too cumbersome, lengthy and expensive of a way to deal with obsolete rules. Allowing an agency to use a notice and comment process to repeal rules contained in its obsolete rules report will help ensure adequate consideration of proposed rule repeals.

Recommendation: The task force recommends allowing agencies to use a notice and comment rulemaking process to repeal rules listed in an agency's annual report on obsolete rules. It recommends requiring use of the full rulemaking process if 25 or more people object to the use of the notice and comment process.

Rationale: A notice and comment rulemaking process will give agencies the ability to repeal obsolete rules in a timely fashion, while protecting the public with beefed-up notice requirements, a longer comment period and a trigger mechanism to move a rule back into the traditional rulemaking process.

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

NOTICE AND COMMENT PROCESS.

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 25 requests are received under subdivision 4. Sections 14.19, 14.20, 14.365. amd 14.366 apply to rules repealed under this statute.

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 25 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 25 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 this section 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.

Strategy: Delay Adoption of Problematic Rules

***Background*:** Colorado model for legislative oversight of proposed rules.

***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*:** Gives the legislature the ability to temporarily hold-up a rule that may be contrary to legislative intent until the legislature is able to act during the next legislative session.

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

14.165 COMMITTEE AUTHORITY.

(a) A majority vote from standing committees of the house of representatives and senate with jurisdiction over the subject matter of a proposed rule may 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 majority vote from standing committees of the house of representatives and senate with jurisdiction over the subject matter of a proposed rule may 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.

CHAPTER 2: PUBLIC ACCESS & INPUT IN THE RULEMAKING PROCESS

"When a rule or regulation potentially impacts a citizen's quality of life, affected citizens want a chance for their perspectives to be considered at the beginning of the rulemaking process."

~ Wallace Rogers, Jefferson Center

"We advocate encouraging agencies to advertise their notices of planned rulemaking on a broad basis."

~ Kathleen Davis, Legal Aid Society of Minneapolis

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.

Strategy: 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 citizens who 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.

Strategy: Make Notices and Dockets Available to Local Newspapers

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

Recommendation: The task force recommends that rule notices, agency contact information and the statewide rulemaking docket be made available to local newspapers.

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 local newspapers of the on-line state rulemaking docket and to provide a publishable version that is available to interested parties.

Strategy: 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

"For proposed regulations, quicker implementation of rule changes is necessary because the current timeframes are too lengthy, resulting in many state agencies bypassing the administrative process entirely and going to interpretive bulletins or statutory changes. The challenge is to balance a shortened regulatory timeframe with the need for interested stakeholders to participate in the development of final regulations."

~ Patti Cullen, Care Providers of Minnesota

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 most rules, even if it is noncontroversial, must be promulgated using the full rulemaking process. 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.

One note of caution, there are some areas of state regulation that protect vulnerable populations. There are other areas of state regulation where state statutes and federal laws and regulations rigidly circumscribe an agency's flexibility. Agencies would not likely be flexible in administering these areas.

<u>Objective:</u> to reduce the burdens on regulated entities while protecting the public and achieving the compliance goals of state agencies.

Strategy: 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 variance 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 Variance

Subdivision 1. Except to the extent prohibited by statute, each agency may order, in response to a completed petition or on its own motion, a variance 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 variance 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 variance 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 variance shall be made at the discretion of the agency head, upon consideration of all relevant factors.

In granting a variance, the commissioner may attach conditions that the commissioner determines are needed to protect public health, safety, or the environment. Alternative measures or conditions attached to a variance have the

force and effect of the applicable rule. If the party violates the alternative measures or conditions attached to the variance, the party is subject to the enforcement actions and penalties provided in the applicable law or rule. A variance shall have only future effect.

Subd. 2. In response to the timely filing of a completed petition requesting a variance, the agency shall, except to the extent prohibited by statute, grant a variance 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 variance 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 variances 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 by the agency.

Subd. 5. This provision does not preclude the agency from granting variances 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 Variance

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

Subd. 2. A petition for a variance 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 variance is being requested.

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

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

d. The relevant facts that the petitioner believes would justify a variance. 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 variance.

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 variance request.

Each agency may include other provisions that govern the form, filing, timing, and contents of petitions for the variance 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 variance 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 variance 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 variance. The agency shall grant or deny a petition for the variance 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 variance 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 variances. The records shall be indexed by rule and available for public inspection.

Subd. 8. After the agency issues an order granting a variance, 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.

Strategy: Reduce Instances Where the State Rule Differ from Federal Requirements

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 that the Legislature consider an amendment to the Minnesota Administrative Procedures Act which would allow for reconsideration of rules adopted before 1995 that are inconsistent with federal law of other state rules.

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 that the legislature considers an amendment to the Minnesota Administrative Procedure Act which would allow for reconsideration of rules adopted before 1995 that are inconsistent with federal law or other state rules.

Strategy: 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)). These notices allow the department to inform taxpayers in a timely manner how it 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 (Minn. Stat., section 270.0604).

Recommendation: The task force recommends that the House and Senate Government 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 by the legislature as to the effectiveness of this provision and whether there are any unintended consequences.

Rationale: Both the agency and citizens 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 for purposes of studying the possible extension of interpretive notices:

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.

Strategy: Provide ALJ Procedure for Challenging Unadopted Rules

Background: Agencies are required to adopt rules through the APA. Because this process is often too lengthy, expensive and inefficient, some state agencies have bypassed the process and substituted interpretive bulletins, policy guidelines, etc. for rulemaking. 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.

Recommendation: The task force recommends allowing a party to have an administrative law judge (ALJ) 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: This new law would provide a quick and inexpensive procedure for obtaining a decision on whether a rule is, indeed, an unadopted rule. The administrative law judge would apply Minnesota law that sets out when an agency policy is merely the application of a statute to specific facts 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. The petitioner shall pay for the costs of the office of administrative hearings unless it is determined that the agency must cease enforcement of an unadopted rule, in which case the agency must pay.

Strategy: Implement One-Stop-Shopping Pilot Program to Coordinate Multigovernmental Rules

***Background*:** Multiple units of government are often regulating businesses for essentially the same purpose. In some cases, this division of regulation is necessary but in other cases these rules are unnecessarily burdensome in accomplishing their purpose. Opportunities exist to coordinate these rules and regulations to achieve the intended benefits to society while minimizing the burdens on regulated parties.

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

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

***Implementation Strategy*:** The task force supports the efforts of the Governor's Office to target a highly regulated party as a pilot project. The Governor's Office will seek input from the legislature, state agencies and the regulated community to identify an affected party that will benefit from better regulatory coordination. The Governor's Office will work with various agencies to reduce duplicative reporting requirements, create an index explaining which agency regulates what, and address conflicts in state rules.

CONCLUSIONS

Reform Must Strike a Balance

As Administrative Law Judges have observed, rules subject to wide public participation are frequently better written and achieve higher rates of compliance. Similarly, the Rules Reform Task Force set out to receive broad participation from a variety of regulated sectors, including industries, local governments, and state agencies and therefore it is the task force's intention for the recommendations in this report to have the greatest possible impact on reforming rulemaking in Minnesota.

Reforming the regulatory environment in Minnesota means many things to many people. For the regulated community, it has often meant relieving them of unnecessary or outdated rules that interfere with how these parties conduct their affairs. For citizens and the public-at-large, it has often meant opening up the rulemaking process to increase opportunities for input. For the Governor and Legislature, it has often meant providing greater oversight of agencies' rulemaking activities. And for state agencies, it has often meant allowing them to implement the will of the Legislature more efficiently while still protecting the health, safety and welfare of the public. Addressing these fundamental issues is essential to improving the rulemaking process.

These issues coalesced around broad themes: legislative oversight, agency accountability, public input, regulatory burdens and industry compliance. Oftentimes, pursuing one goal may cause tensions in other areas. For example, allowing an agency to provide information more quickly to the regulated community may address regulated parties' need to receive information on a more timely basis. However, this same process may diminish the public's opportunity to provide input in the rulemaking forum. Consequently, reform must take into account both interests and thus a balance must be struck.

Reform Must Be Comprehensive

The task force concluded that there are many ways to achieve reform. Many of these strategies are overlapping and address multiple objectives. For example, allowing for a procedure to challenge unadopted rules creates greater oversight of agency activity, while also improving the overall rulemaking process. These strategies can be implemented by legislation or through the internal efforts of agencies, the Legislature, and the Governor's office. However, true reform should comprehensively address all the issues discussed in this report. Repealing obsolete rules efficiently should not happen without also providing a process that is responsible, fair, and open. Gathering greater public input should not be at the expense of unnecessarily lengthening the rulemaking process. Getting the regulated community information more quickly should not be at the expense of considering the broad impacts of rules on many stakeholders.

Providing agencies more flexibility to implement and enforce rules should not jeopardize the health and safety of Minnesotans.

Comprehensive rulemaking reform that strikes a balance between the various competing interests will improve the regulatory environment in Minnesota for all affected parties. The strategies recommended in this report will help build a more accountable, open and less burdensome process if implemented by the Legislature and Executive Branch.

APPENDICES