House Committee on Rules

Re: Opposition to HB 2692

Dear Chair Bowman, Vice-Chair Drazan, and Members of the Committee

I have been practicing administrative law for over 35 years, mostly in the context of representing industrial clients. I am concerned that the changes proposed in HB 2692 are unwarranted for most rulemakings and will mostly act to the detriment of regulated parties. It should be noted that, in addition to rulemaking, agencies engage in other important activities such as permitting, licensing, assistance, outreach, and enforcement. The allocation of resources among the various functions of an agency necessitates balancing, especially if government efficiency is to be encouraged.

In many instances, businesses will have an interest in having administrative rules adopted expeditiously. For example, a business may need to have regulatory ambiguities resolved in order to avoid unnecessary capital expenditures or employee layoffs. Similarly, businesses suffer when agency resources are diverted from essential activities such as issuing permits. In this regard, imposing cumbersome impediments to the rulemaking process should be avoided.

Advisory committees should not be mandatory.
The mandatory use of advisory committees is problematic because it imposes a burdensome and time-consuming requirement, that in the majority of rulemakings, will result in no appreciable benefit. The use of these committees slows down the rulemaking process, imposes costs in terms of staff time, and contributes no significant value in the typical mundane rulemaking. Rulemakings that result in trivial cost increases or impose minimal requirements do not warrant the formation and management of advisory committees. Keep in mind that affected parties are always able to comment on proposed rules under existing law. Agencies are in the best position to determine when advisory committees are likely to benefit agency decisionmaking and agencies should not be required to employ advisory committees that do not enhance the process.

HB 2692 would make preparing statements of need and fiscal impact unduly burdensome.
The bill would replace the existing requirement that agencies estimate small business compliance costs using available information with a requirement that agencies identify the equipment, supplies, labor, and administrative activities needed to comply with a proposed rule. The bill would further require agencies to analyze the opportunity costs associated with a proposed rule. In many cases, the only way to satisfy these requirements will be for agencies to coercively obtain the mandated information from regulated businesses through the issuance of administrative subpoenas and information requests. Regulated parties are in the best position to assess how a rule will affect them and currently have the discretion to decide whether to voluntarily provide such information. Furthermore, if such information is provided, agencies are required to consider it under current law. Agencies should not be forced to compel small businesses to disclose sensitive business information as a consequence of a rulemaking requirement that generally will not benefit regulated parties.

Mandatory oral hearings can be a waste of time.
Oral hearings are both wasteful and of little benefit when there are no parties interested in providing oral testimony. Pragmatically speaking, comments delivered during oral hearings tend to be conclusory and of less utility to agency staff than written comments. In my experience, state agencies have generally shown good judgment in determining when oral hearings are warranted.

There are some good aspects to HB 2692.
A requirement that a notice of proposed rulemaking describe the problem to be solved and provide a detailed statement of how the rule is intended to solve the problem would help the public to understand the reasons for a proposed rule and enable better comments. Likewise, the requirement that agencies prepare a summary of public comments and agency responses would ensure that agencies consider all the comments submitted during the course of a rulemaking and assure persons who have submitted comments that their views and information were considered by the agency.

Conclusion
Imposing additional inflexible and burdensome rulemaking requirements will not improve rulemaking nor will it reduce the burden of rules on regulated parties. The most commonly encountered problems with state rules are ambiguity, improper scope, and organization. These are the kinds of problems that warrant the most pressing need for public input and are best addressed by written comments than by advisory committees, estimates of compliance burden, and oral hearings.

Thank you for your consideration.

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