

## General Assembly Regulates the Regulators

**09.30.2011**

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The North Carolina General Assembly's historic 2011 session included sweeping reforms to curtail the regulatory authority of all state agencies, including the Division of Health Service Regulation and its Licensure and Certificate of Need Sections, the Division of Medical Assistance, and other agencies directly affecting the operation of long-term care providers in our state. Among the most important legislative changes impacting agencies' regulatory powers is the new rulemaking framework that takes effect October 1, 2011.

### Focus on Economic Impact

A common thread interwoven throughout the new rulemaking laws is a heightened focus on economic impact. One of the key changes is a requirement that prohibits agencies from adopting a new rule that will have an aggregate financial impact of \$500,000 or more in a 12-month period, unless the rule is required to respond to: (a) a serious and unforeseen threat to public health, safety or welfare; (b) an act of the General Assembly or U.S. Congress that specifically requires the agency to adopt rules; (c) a change in federal or state budgetary policy; (d) a federal regulation; or (e) a court order. Given the relatively low economic impact threshold that will trigger these rule-making constraints, these limitations will likely apply to the majority of new rules of any substance. The new \$500,000 significant economic impact floor is a substantial reduction of the \$3 million level that existed under the prior law.

Additional new fiscal-related requirements for agency rulemaking include:

- A mandate that the agency consider at least two alternatives before adopting a rule with



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an economic impact of \$500,000 or more per year and explain why those alternatives were rejected;

- A requirement that the agency proposing a rule prepare any required fiscal note for approval by the Office of State Budget and Management (OSBM);
- Provisions for increased critical review and analysis of any fiscal note prepared for a proposed rule;
- A requirement that for a proposed rule with an economic impact of \$500,000 or more per year, the agency must, among other things, (a) describe the persons who would be subject to the proposed rule and the types of expenditures those persons would have to make; and (b) estimate additional costs that would result from implementation of the proposed rule, including both economic and opportunity costs; and
- Provisions to facilitate public comment and input on a proposed new rule as well as any related fiscal note.

### Other New Rulemaking Mandates

Along with these changes keyed to economic impact, the General Assembly adopted a new slate of rulemaking principles. These principles applicable to all proposed new rules provide:

- An agency may adopt only those rules that are expressly authorized by federal or state law and that are necessary to serve the public interest;
- An agency must seek to reduce the burden on persons and entities that will have to comply with the rule;
- Rules must be written in a clear manner and must be reasonably necessary to implement or interpret federal or state law;
- An agency must consider the cumulative effect of all its rules related to the specific

purpose for which the new rule is proposed and cannot adopt a rule that is unnecessary or redundant;

- When appropriate, rules must be based on sound and reasonable scientific, technical, economic, and other relevant information; and
- Rules must be designed to achieve the objective in a cost-effective and timely way.

Agencies will now be required to post proposed new rules on their websites, along with an explanation of the proposed rules and the reasons behind them, any fiscal notes or federal certifications for the proposed rules, and instructions on how and where to submit comments on the proposed rules. These general rulemaking guideposts adopted by the General Assembly essentially codify the regulatory principles established by Governor Perdue as part of her regulatory reform initiative under Executive Order No. 70 issued in October 2010.

### **Annual Review of Existing Rules**

In addition to changes governing future rules, the General Assembly adopted a new statute governing the Rules Modification and Improvement Program (RMIP) which will be coordinated and overseen by OSBM. Many of the statutory requirements relating to the RMIP essentially adopt as state law the regulatory changes that were originally established as part of the RMIP under the Governor's Executive Order No. 70. Under the new statute, each agency must conduct a critical review of its existing rules each year to identify any rules that are unnecessary, unduly burdensome, or inconsistent with the new general rulemaking principles. The OSBM will invite public comments on existing rules, assemble and evaluate public comments received, and forward any comments it deems to have merit to the agency at issue for further review. Each agency must review the public comments and report on whether any of the public's recommendations have merit or justify further action. Agencies must repeal any nonconforming rules identified in this review.



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Only time will tell what the actual practical and legal ramifications, costs, benefits, and efficiencies of our state's new rulemaking framework will be. Meanwhile, long term care providers and other regulated businesses in North Carolina have a new playbook to follow, which includes increased opportunities for commenting on existing and proposed rules and their economic impact and for understanding the agencies' reasoning behind both existing and proposed new rules.



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